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Zasloff, Jonathan

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LAW AND THE SHAPING OF AMERICAN FOREIGN POLICY: FROM THE GILDED AGE TO THE NEW ERA

JONATHAN ZASLOFF*

What is the proper relationship between law and American foreign policy? Can or should law and legal institutions shape international relations? Although Americans vigorously debate these questions today, there was a time when they assumed a tight connection between law and foreign affairs. Lawyers dominated American foreign policy at the turn of the twentieth century; every Secretary of State from 1889 to 1945 was a lawyer, and the Republican Party's chief foreign policy thinker, Elihu Root, was also its foremost lawyer. In this Article, Professor Jonathan Zasloff argues that this relationship between law and foreign policy had real consequences for the shape of American diplomacy during that period. Professor Zasloff contends that classical legal ideology—the prevailing ideological framework among elite lawyers in the late nineteenth and early twentieth centuries—profoundly influenced the direction of American foreign policy. Classical legal ideology taught that law does not derive its effectiveness from the coercive state but rather from popular custom and social norms. Moreover, it held that law could be effective without state coercion because it stood as a neutral, apolitical source of order that satisfied widely varying social groups. These two beliefs implied that international law could form a basis for a legally regulated world order and that traditional balance-of-power methods were either unnecessary or harmful. As policymakers debated the shape of the post–World War I world order, classical legal ideology told lawyer-statesmen like Root that they did not need to make strategic commitments to ensure global stability. Lawyers imbued with classical legal ideology concentrated on international law and institutions and neglected realpolitik foreign policy. In doing so, they unwittingly contributed to global catastrophe.

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* Acting Professor of Law, University of California at Los Angeles School of Law. B.A., 1987, Yale University; J.D., 1993, Yale University; Ph.D., 2002, Harvard University. For comments and suggestions, I would like to thank Rick Abel, Ann Carlson, Willy Forbath, Laura Gómez, Joel Handler, Laura Kalman, Jerry Kang, Bill Klein, Gillian Lester, Sandy Levinson, Tim Malloy, Grant Nelson, Randy Peerenboom, Kal Raustiala, Bill Rubenstein, Larry Sager, Gary Schwartz, David Sklansky, Clyde Spillenger, Kirk Stark, Richard Steinberg, and of course Katherine Trisolini. The staff of the Hugh and Hazel Darling Law Library at UCLA, especially the incomparable and indefatigable Laura Cadra, provided superb research assistance. The tireless editors of the *New York University Law Review*—especially Harlan Cohen—saved me from many errors and improved the piece. I also thank the UCLA School of Law Dean's Fund and the UCLA Academic Senate for research funding.

In order to publish a piece drawing largely from primary historical documents, the *New York University Law Review* has departed from its standard procedures for citation and substance checking. Due to the limitations of a student-produced journal, editors were unable to access many of the nonduplicable primary sources located exclusively in special collections of various libraries and historical societies. When possible, editors relied on typewritten quotations transcribed by the author.

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I
INTRODUCTION: LEGAL CONSCIOUSNESS AND AMERICAN FOREIGN POLICY

Does being a lawyer make any difference when approaching political or moral questions? This question carries interest for the sociology of professions, but it has particular salience for historians as well. Scholars as diverse as Robert Gordon,[1] Michael Les Benedict,[2] Duncan Kennedy,[3] Thomas Grey,[4] Grant Gilmore,[5] William Wiecek,[6] Howard Gillman,[7] and Morton Horwitz[8] have argued that "classical legal consciousness" or "classical orthodoxy" dominated the work of lawyers, scholars, and judges from the Gilded Age through the 1920s. Legal realism, so the story goes, challenged and eventually vanquished orthodox thought during the '20s and '30s, culminating most spectacularly in the famous "switch in time" of *West Coast Hotel Co. v. Parrish*[9] and the transformation of private law doctrine in tort, contract, and property. But for several decades, orthodoxy served as the crucial paradigm underlying legal thought and decisions.

Our knowledge of how orthodoxy actually worked in practice, however, remains primitive. Kennedy and Wiecek have identified classical premises and reasoning in certain U.S. Supreme Court opinions,[10] Daniel Ernst has found orthodox thinking in the work of lawyers who represented small businesses and fought union boycotts,[11] and Barry Cushman recently has reinterpreted Commerce Clause and due process jurisprudence to argue for a new account of the New Deal

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[1] See Robert W. Gordon, "The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910 [hereinafter Gordon, Ideal and Actual], in The New High Priests: Lawyers in Post–Civil War America 51 (Gerard W. Gawalt ed., 1984); Robert W. Gordon, Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920 [hereinafter Gordon, Legal Thought], in Professions and Professional Ideologies in America 70 (Gerald L. Geison ed., 1983).

[2] See Michael Les Benedict, Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 L. & Hist. Rev. 293 (1985).

[3] See Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940, 3 Res. L. & Soc. 3 (1980).

[4] See Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1 (1983).

[5] See Grant Gilmore, The Ages of American Law 41-98 (1977).

[6] See William M. Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937 (1998).

[7] See Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993).

[8] See Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992).

[9] 300 U.S. 379 (1937).

[10] See generally Kennedy, supra note 3; Wiecek, supra note 6.

[11] See Daniel R. Ernst, Lawyers Against Labor: From Individual Rights to Corporate Liberalism (1995).

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constitutional revolution.[12] In general, though, while we know something about what classical legal culture *was*, we know comparatively little about what it *did*. How did classical legal culture affect lawyers' perceptions? Did classical legal culture influence how lawyers viewed legal problems or even how they decided that something was a legal problem in the first place? Did it alter lawyers' views of public issues or change their priorities?

I believe that I have discovered a partial answer to these questions in a fairly unlikely place: American foreign policy during the period of the classical orthodox ascendancy. Lawyers dominated U.S. foreign policy during this period and beyond—for example, from 1889 to 1945, every Secretary of State was a lawyer.[13] I argue that the beliefs, biases, and perceptions underlying classical legal ideology carried implications for foreign affairs, and these implications powerfully influenced the conduct and outlook of American foreign relations during the first three decades of the twentieth century.[14]

Tracing these intellectual links yields more than antiquarianism, for the foreign policy of the period embodies the greatest disaster in American diplomatic history. During the 1920s, or the "New Era," American leaders claimed that they rejected isolationism and favored extensive engagement with Europe and the rest of the world. They did so, however, in idiosyncratic and seemingly contradictory ways, advocating involvement in European affairs while insisting on remaining aloof from European "politics," placing enormous faith in international legal institutions, rejecting realpolitik, and contending that deep and abiding conflicts of interests and values could be ameliorated.

The U.S. prescription fundamentally misdiagnosed the problem. After the First World War, international order required active American political and strategic involvement: The rest of the great powers

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[12] See generally Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998).

[13] An interesting contrast is that during the same period only one British Foreign Secretary had a legal background. Cf. David Butler & Gareth Butler, Twentieth-Century British Political Facts, 1900–2000, at 55-56, 77-83 (8th ed. 2000). I refer in this case to Sir John Simon, Foreign Secretary from 1931 to 1935. I do not count Lord Reading, who served as Foreign Secretary for only three months in a caretaker government in 1931.

[14] Readers interested in the connection between law and foreign policy also can examine Francis Anthony Boyle, Foundations of World Order: The Legalist Approach to International Relations, 1898–1922 (1999). Although Boyle's work deals with some of the same issues explored in this Article, his approach is quite different. Generally speaking, he does not put his discussion of early-twentieth-century foreign policy legalism in the context of the history of American foreign policy or the history of American legal thought. Instead, he focuses on various international legal agreements and regimes rather than examining foreign policy's ideological roots. Although I consulted Boyle's book while preparing this Article, our works address very different questions.

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looked to the United States for constructive leadership to stabilize Europe. That leadership, however, never materialized, leaving a weak and divided continent unable to grapple with financial crisis and the ensuing rise of fascism.[15]

What caused such a dramatic policy failure? Although historians have carefully analyzed the *patterns* of U.S. involvement in the outside world during the period,[16] our understanding of the intellectual *origins* of American policy remains incomplete. Where did these idiosyncrasies come from? How did they develop prior to the New Era? Why did they make sense to American leaders?[17] I seek to help answer these questions by pointing to one major intellectual source of U.S. policy: the assumptions, beliefs, and biases generated by classical legal thought. Classical legal ideology taught that law does not derive

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[15] See, e.g., Norman A. Graebner, America as a World Power: A Realist Appraisal from Wilson to Reagan 30 (1984) (arguing that American isolationism resulted in system of European collective security that "offered no defense against aggression, nor . . . present[ed] any solution for the problem of peaceful change"); George F. Kennan, American Diplomacy 1900–1950, at 77-79 (1951) (arguing that America potentially could have avoided World War II by giving greater support to moderate forces within Weimar Republic and by taking stiffer attitude towards Hitler's earlier encroachments); Randall L. Schweller, Deadly Imbalances: Tripolarity and Hitler's Strategy of World Conquest 7 (1998) ("If the United States had not disengaged from Europe and demobilized its armed forces, Hitler would have been denied his 'window of opportunity' to grab the Continent."). See generally Robert Endicott Osgood, Ideals and Self-Interest in America's Foreign Relations: The Great Transformation of the Twentieth Century 364-80 (1953) (describing American isolationism in 1920s and arguing it resulted from mistaken belief that America's interests were not at stake).

[16] See, e.g., Warren I. Cohen, Empire Without Tears: America's Foreign Relations 1921–1933 (1987); Melvyn P. Leffler, The Elusive Quest: America's Pursuit of European Stability and French Security, 1919–1933 (1979); William Appleman Williams, The Legend of Isolationism in the 1920's, 18 Sci. & Soc'y 1 (1954).

[17] Historians have pointed to "assumptions" behind U.S. policy but have not explored them in detail. See, e.g., Frank Costigliola, Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919–1933, at 59-60 (1984); Leffler, supra note 16, at 39, 81. Importantly, scholars have noted that American policymakers were obsessed with having a "legal" global order, but they have seemed mystified by the assertion and have not sought to explain it. See, e.g., Betty Glad, Charles Evans Hughes and the Illusions of Innocence: A Study in American Diplomacy 185-211, 321-27 (1966) (describing Hughes's efforts to promote U.S. membership in World Court and other measures for development of international conciliation and arbitration, and codification of international law); Graebner, supra note 15, at 8-24 (arguing that nature of American internationalism in 1920s was such that "[t]he United States would support world peace, not through specific commitments to the defense of the Versailles settlement but through the encouragement of any organization or procedure that promised to limit change in international life to peaceful processes"); Robert Freeman Smith, American Foreign Relations, 1920–1942, in Towards a New Past: Dissenting Essays in American History 232, 240 (Barton J. Bernstein ed., 1968) ("[B]etween 1921 and 1931, [American policymakers] tried to build a world order through treaties and other arrangements. The goal was a 'law-bound' world . . . ."). Robert H. Wiebe, The Search for Order: 1877–1920, at 260-62 (1967), notes the same pattern for the prewar period.

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its effectiveness from the coercive state but rather from popular custom, social norms, and the gradual development of consensual arbitration mechanisms. Moreover, it held that law could be effective without state coercion because it stood as a neutral, apolitical source of order that could find solutions satisfying widely varying social groups (whose conflicts were more apparent than real). These two beliefs implied that international law could form a basis for a legally regulated world order and that traditional balance-of-power methods were either unnecessary or harmful. Thus lawyers imbued with classical legal ideology concentrated on international law and institutions and neglected realpolitik foreign policy.[18] In doing so, they unwittingly contributed to global catastrophe.

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[18] This Article also implicates another crucial theoretical concern, because American actions during the 1920s and before directly contradict structural realist theories of foreign policy. The literature setting forth the theories of structural realism is vast. The seminal account is Kenneth N. Waltz, Theory of International Politics (1979) [hereinafter Waltz, Theory of International Politics]. For debates over Waltz's theory, see generally, for example, Barry Buzan et al., The Logic of Anarchy: Neorealism to Structural Realism (1993); Neorealism and Its Critics (Robert O. Keohane ed., 1986). For a succinct account of the theory, see Fareed Zakaria, Is Realism Finished?, Nat'l Int., Winter 1992–1993, at 21, 22-23.

Realism implies not only an account of how the international system operates (a theory of international politics), but also a forecast of how states will actually behave in light of systemic incentives (a theory of foreign policy). Waltz sharply distinguishes theories of international politics from those of foreign policy. Waltz, Theory of International Politics, supra, at 71-72; Kenneth N. Waltz, International Politics Is Not Foreign Policy, 6 Security Stud. 54, 54-55 (1996). For persuasive demonstrations that the realist theory of international politics implies a theory of foreign policy, see Fareed Zakaria, From Wealth to Power: The Unusual Origins of America's World Role 13-43 (1998); Gideon Rose, Neoclassical Realism and Theories of Foreign Policy, 51 World Pol. 144, 144-72 (1998). Realist theories of foreign policy predict that in response to the anarchic and conflict-ridden world system, nations will seek to expand national power and balance against other threatening powers. This means that nations will broaden their political interests abroad when their relative power increases. Robert Gilpin explains:

> [A]s the power of a group or state increases, that group or state will be tempted to try to increase its control over its environment. In order to increase its own security, it will try to expand its political, economic, and territorial control; it will try to change the international system in accordance with its particular set of interests.

Robert Gilpin, War and Change in World Politics 94-95 (1981). Nazli Choucri and Robert C. North add:

> Despite proclamations of nonintervention or even genuinely peaceful intentions, a growing state tends to expand its activities and interests outward—colliding with the spheres of influence of other states—and find itself embroiled in international conflicts, crises, and wars . . . . The more a state grows, and thus the greater its capabilities, the more likely it is to follow such a tendency.

Nazli Choucri & Robert C. North, Nations in Conflict: National Growth and International Violence 1 (1975).

The United States's failure to expand its interests both before and after the First World War thus provides a powerful counterexample to realist predictions. Presented with

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How, in manageable form, can we explain legal ideology by reference to foreign policy and vice-versa? Policy stems from numerous causes; to fit legal ideology into this vast panoply, over three critical decades, would require volumes. Instead, I focus on a specific and crucial example to demonstrate complex intellectual connections. I closely examine one representative yet seminal figure: Elihu Root, by all accounts the most prominent American lawyer from 1890 to 1920 and the leading foreign policy thinker in the Republican Party.[19] Root was the Zelig of American politics from the Gilded Age to the New Era.[20] A leading figure in New York State Republican politics through the 1890s, Root was appointed as Secretary of War by President William McKinley in 1899, a position from which he directed the development of American imperial power and the modernization of the U.S. Army. After a brief hiatus in private life, he became Theodore Roosevelt's Secretary of State in 1905 and helped reorient American Latin American and Far Eastern policy. Just as importantly, he effectively served as Roosevelt's prime minister.[21] When confronted with a political crisis, the President repeatedly turned to Root and called him "the most able man I have ever seen in American politics"[22]—a striking compliment, even for one as prone to hyperbole as the Rough Rider.

When Roosevelt left office in 1909, Root became a U.S. Senator, but played a similar consigliere role to the new President, William Howard Taft.[23] After leaving the Senate in 1915, Root's enormous prestige led the GOP to consider him seriously—at the age of seventy-

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the opportunity to dominate the European continent politically, the United States refused to do so. Given realism's dominance of theoretical international relations theory this refusal must be explained.

19 The two leading (and only complete) accounts of Root's life are Philip C. Jessup, Elihu Root (1938), and Richard W. Leopold, Elihu Root and the Conservative Tradition (1954).

20 See Zelig (United Artists 1983), in which writer-director Woody Allen portrays a mysterious figure who plays a crucial (yet subsequently forgotten) role in most of the major historical events of the early twentieth century.

21 See John Milton Cooper, Jr., The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt 75 (1983) (noting that Roosevelt consulted Root on important matters).

22 Letter from Theodore Roosevelt to Andrew Carnegie (Dec. 14, 1909), in 7 The Letters of Theodore Roosevelt 42 (Elting E. Morison ed., 1954). According to Roosevelt, Root "was *the* man of my cabinet, the man on whom I most relied, to whom I owed most, the greatest Secretary of State we have ever had, as great a cabinet officer as we have ever had, save Alexander Hamilton alone." Letter from Theodore Roosevelt to Andrew Carnegie (Feb. 18, 1910), in 7 The Letters of Theodore Roosevelt, supra, at 47, 48.

23 See 2 Jessup, supra note 19, at 156-57 (noting that Taft adopted Roosevelt's "presidential habit of reliance on Root"); Leopold, supra note 19, at 77-78 (revealing that Root was intimate with Taft administration and "Taft leaned heavily on Root").

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one—for their presidential nomination.[24] After the Republicans regained political dominance in 1920, Root, now well into his seventies, maintained his political salience, becoming America's principal advocate for participation in international institutions such as the World Court, and founding both the Council on Foreign Relations and the American Law Institute (ALI).[25] Little wonder that he is aptly described as the "father of the foreign policy establishment"[26] and was recently named as one of the twentieth century's thirty most influential lawyers.[27]

Reducing the broad sweep of history down to one individual may seem an unconventional methodology, and certainly American legal and diplomatic history of the period does not boil down to Elihu Root. But as the foregoing suggests, Root was highly influential in his own right. He played a significant role in creating, organizing, and running the peak legal institutions that set the course for elite legal development of the period and played a similar role in driving American foreign policy. Had Root embraced a different ideology, with different implications, the course of American legal and diplomatic history could have changed.

Root was, moreover, deeply representative of elite lawyers of the late nineteenth and early twentieth centuries. To his contemporaries, he exemplified the pinnacle of the profession and symbolized lawyerly judgment.[28] Other lawyer-diplomats repeatedly called on him for counsel and direction, and diplomatic precedents established by him served as the basis of U.S. diplomacy even in his retirement.[29] If, then, we can understand the mind of Elihu Root, we can go a long way in understanding the minds of the lawyers who established GOP foreign policy during the first three decades of the century.

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[24] Arthur S. Link, Woodrow Wilson and the Progressive Era, 1910–1917, at 231 (1954); 1 Jessup, supra note 19, at 427, 444; 2 id. at 332-52.

[25] See infra notes 152-56 and accompanying text.

[26] Cohen, supra note 16, at 58.

[27] See Morton Keller, The First Wise Man, Am. Law., Dec. 1999, at 109.

[28] See, e.g., Godfrey Hodgson, The Colonel: The Life and Wars of Henry Stimson 1867–1950, at 49-50 (1990) (describing Root as "the acknowledged leader of the New York bar" and "an exemplar of what the good and useful life might be and of what might be achieved by worldly wisdom, self-control and hard work"). Historians agree. See Gordon, Legal Thought, supra note 1, at 99, 137 n.84 (offering Root as "striking example" of "extremely conscientious attorney[ ]"); James Willard Hurst, The Growth of American Law: The Law Makers 368-70 (1950) (calling Root "master technician" who "represented much of the best that lawmen contributed to society in the United States").

[29] See L. Ethan Ellis, Frank B. Kellogg and American Foreign Relations, 1925–1929, at 229-31, 233 (1961) (explaining how Root and others developed "Root Formula" to help facilitate settlements in disputes between individual nations).

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In this Article, I explore the critical assumptions and beliefs underlying classical legal ideology and attempt to show how they influenced Root's conduct of external policy. I discuss (among other things) his role in American imperialism, his priorities as Secretary of State, and his more theoretical writings on international and domestic politics. These developments prelude the most seminal event in U.S. diplomatic history before World War II: the 1919 battle over the ratification of the Treaty of Versailles (Versailles Treaty). Centered around the question whether the United States would join the League of Nations, this struggle also determined much of the nature and scope of American involvement in world affairs for the next two decades. Root played a pivotal role in this clash: He was the intellectual leader of the Republican opposition to Wilsonian diplomacy and drove much of the GOP's strategy during the treaty fight.[30]

Root's opposition, however, did not assume the form of either major alternative to Wilsonianism, namely, traditional American isolationism or traditional European realism. Instead, following the pattern implied by classical legal ideology, Root advocated a conception of international politics relying heavily on international law and legal institutions to preserve peace. He advocated a vision for world politics committed to American engagement with the outside world, but downplayed power concerns, insisting that proper institutional structures could prevent most international conflicts.

The Republicans and Root successfully blocked ratification of the Versailles Treaty, mostly due to Wilson's intransigence. But the conception of international politics Root outlined in 1919—a conception shared by other influential GOP lawyers—served as a major pillar of U.S. foreign policy under the Republican administrations that came to power the next year and governed for the entire decade.[31] Root's career, then, concretely manifests the theoretical intellectual links described earlier: Imbued with the worldview of classical legal ideology, Root—along with other lawyer-diplomats of the period—developed and practiced a foreign policy based upon the implications of that ideology. The diplomacy that he helped to develop continued during the 1920s, contributing to the collapse of global order in the inter-war years.

This Article proceeds in eight parts. Part II sets forth the main presuppositions, beliefs, and biases of classical legal ideology. Part III transitions from this exegesis and briefly contrasts classical legal for-

[30] See infra notes 422-541 and accompanying text.

[31] See Costigliola, supra note 17, at 31 (calling Root "the most respected statesman of the Republican Party" and observing that he "commanded the esteem of Hughes, Stimson, Kellogg, and other Republicans who came to power after 1921").

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eign policy ideas with its main competitors: traditional isolationism, realism, and Wilsonianism. Parts IV, V, VI, and VII show how classical legal ideology affected Root's thinking on critical issues of American external relations: Part IV examines his actions as Secretary of War; Part V sets forth his policy choices as Secretary of State; Part VI considers his attempts to arrive at a coherent theory of world politics and his changing views on domestic issues, showing how the outbreak of World War I undermined Root's theory; and Part VII presents the *denouement*—Root's crucial role in the debate over the Versailles Treaty at the close of the First World War. I conclude by assessing the general influence of classical legal ideology on Root's foreign policy and suggesting how legalist ideas shaped American foreign relations in the 1920s.

II
CLASSICAL LEGAL IDEOLOGY

In order to recognize how classical legal ideology shaped American foreign policy, one must understand what it was. After discussing the concept of ideology and placing classical legal ideology in its historical and class context, I attempt to identify its four key facets. These facets, I argue, carried implications for foreign affairs: Statesmen advocated certain policies because classical legal ideology imbued them with a worldview suggesting that such policies would succeed in establishing a stable international order.

A. What Is Ideology?

"Ideology" is a notoriously treacherous concept. I understand the notion as David Brion Davis does: "an integrated system of beliefs, assumptions, and values, not necessarily true or false, which reflects the needs and interests of a group or class at a particular time in history."[32] As Davis suggests, an ideology's impact is reciprocal: It reflects the political needs and interests of its adherents and conditions, influences, and constrains conscious belief. Davis notes that "ideologies are modes of consciousness, containing the criteria for interpreting social reality," and thus "they help to define as well as to legitimate collective needs and interests."[33] Ideology, then, reflects an epistemology. It serves as a prism through which to view the world, a

[32] David Brion Davis, The Problem of Slavery in the Age of Revolution, 1770–1823, at 14 (1975).

[33] Id.

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mentalité.[34] It therefore legitimizes the interests of a class, party, or section by justifying, either explicitly or implicitly, actions and policies that enhance such interests.[35]

Ideology's legitimating function does not imply that it serves as a cynical cover for the naked pursuit of self-interest.[36] Rather, ideologies carry power precisely because they allow people to believe that they are acting properly while at the same time serving their own interests. Legitimation, then, is directed more at the producer of ideology than at the consumer.[37] Put another way, an effective ideology enables action because it helps avoid the cognitive dissonance that arises when a person advocates something she knows to be unjust or destructive simply to further her own interest.

Used in this sense, the concept of ideology potentially has important implications for studying foreign-policy making. Because ideology provides the background assumptions necessary for a coherent understanding of the world, it assumes larger significance when deci-

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[34] I thus use the concept in a similar fashion to the classic work of Bernard Bailyn. See generally Bernard Bailyn, Ideological Origins of the American Revolution (1965). For Bailyn, the American Revolution's origins are "ideological" because the revolutionaries maintained a set of integrated assumptions, beliefs, and biases concerning the fragility of republican governments and their tendency to decay through patronage and "corruption." They thus viewed actions by the British government and its agents in the colonies—such as increased taxes and patronage politics—as evidence of encroaching tyranny and despotism. See id. at 22-54. The irony was that the British and colonial political figures who took such actions would not have interpreted them in this manner, a theme that Bailyn explored in later work. See generally Bernard Bailyn, The Ordeal of Thomas Hutchinson (1974) (noting that British officials attributed Revolution to movement led by demagogues and could not appreciate ideological passion behind it); see also generally Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 4 (1970) (referring to ideology as "system of beliefs, values, fears, prejudices, reflexes, and commitments—in sum, the social consciousness—of a social group, be it a class, a party, or a section").

[35] Karl Mannheim notes that the conception of ideology—either "total" or "particular"—understands

> what is said by the indirect method of analysing the social conditions of the individual or his group. . . . [O]pinions, statements, propositions, and systems of ideas are not taken at their face value but are interpreted in the light of the life-situation of the one who expresses them. It signifies further that the specific character and life-situation of the subject influence his opinions, perceptions, and interpretations.

Karl Mannheim, Ideology and Utopia: An Introduction to the Sociology of Knowledge 56 (1936).

[36] Quentin Skinner offers a particularly elegant example of this self-legitimating function of ideology, while also showing how legitimation functions to constrain actors' behavior and justify them externally. See 1 Quentin Skinner, The Foundations of Modern Political Thought, at xi-xiii (1978).

[37] See Mannheim, supra note 35, at 55-108 (detailing "total" conception of ideology and setting forth sociology of knowledge, which interprets actions in light of class interests but without reference to motivations).

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sionmakers confront a lack of critical information.[38] Whereas domestic politics presents policymakers with a *dearth* of adequate information, world politics offers them a *void*: Unlike the domestic front, actors cannot use state power to coerce information out of parties, and the gaps in distance, culture, and understanding exacerbate the problem. In this absence of information, decisionmakers are forced to rely upon ideological assumptions to guide their action.[39]

Scholars have long recognized that comprehending policymakers' decisions requires understanding these background worldviews. That task is difficult, however, because unspoken assumptions have the annoying tendency of being unspoken.[40] We thus cannot *prove* whether or to what extent such assumptions influenced policymakers' actual decisions. These background assumptions, however, can *explain* various aspects of key decisions that have long seemed inexplicable.

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[38] Clifford Geertz notes that ideologies "come most crucially into play in situations where the particular kind of information they contain is lacking, where institutionalized guides for behavior, thought, or feeling are weak or absent. It is in country unfamiliar emotionally or topographically that one needs poems and road maps." Clifford Geertz, Ideology as a Cultural System, in The Interpretation of Cultures 193, 218 (1973).

[39] Like all ideologies, classical orthodoxy did not form a rigorous or precisely logical system. Instead, it provided lawyers, judges, and jurisprudes with a way of interpreting social phenomena and developing programs for action and reform. In this way, it resembles Thomas S. Kuhn's famous account of how research "paradigms" structure which questions scientists ask and influence which information they see as relevant. See generally Thomas S. Kuhn, The Structure of Scientific Revolutions (3d ed. 1996). In so doing, a paradigm also tells researchers (or in this case, decisionmakers) which questions not to ask: It tells them that certain developments are more likely, steering them away from other possibilities. See id. at 75-76 (noting that alternate theoretical constructions are not made in absence of crises). Classical orthodoxy had an important impact, then, not simply in what it illumined, but more significantly in what it obscured.

Stephen Krasner succinctly explains such a process. Belief systems, Krasner observes, "have both a denotation and a connotation." The "denotation" is a system's "explicit logic," its literal implications for analysis. But a system's "connotation," he notes, carries with it even more force, for it "suggests which questions are most important, what kind of evidence should be gathered, and, often tacitly, which issues should be ignored." Stephen D. Krasner, Global Communications and National Power: Life on the Pareto Frontier, 43 World Pol. 336, 361 (1991).

[40] See James Joll, 1914: The Unspoken Assumptions 6 (1968) (

> When political leaders are faced with the necessity of taking decisions the outcome of which they cannot foresee, in crises which they do not wholly understand, they fall back on their own instinctive reactions, traditions and modes of behaviour. Each of them has certain beliefs, rules or objectives which are taken for granted; and one of the limitations of documentary evidence is that few people bother to write down, especially in moments of crisis, things which they take for granted. Yet if we are to understand their motives, we must somehow try to find out what, as we say, "goes without saying.")

Joll explicitly saw his project as an exercise in understanding ideology. See id. at 17 (noting that his essay called for reconstructing "ideological furniture" of decisionmakers who led their nations into the First World War).

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The ideological model makes great sense for the period of American history from the Gilded Age to the New Era (i.e., the 1920s), a time when foreign policy decisionmakers most needed ideology to structure their choices.[41] During the first three decades of the twentieth century, America emerged as a world power after more than eight decades of "free security," in which the Royal Navy essentially protected the United States from European rivalries and allowed America to develop without having to worry about global power politics.[42] The United States had little experience in world politics and no foreign policy "infrastructure"—experts, think tanks, or a professional foreign service—of any kind.[43] Yet it was forced to make critical decisions affecting the future of the international system. It could no longer simply rely on its past experience.

The country's leaders, then, most of whom were lawyers, turned to a highly familiar legal ideology that explained the nature of social order and source of political stability. As I hope to show, they did so despite the availability of other powerful paradigms, such as European realpolitik, traditional American isolationism, or Wilsonian diplomacy.[44] Virtually no elite lawyer-politician adopted any of the other three frameworks; instead, for them, classical orthodoxy remained dominant.[45]

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[41] Geertz suggests:

> [P]recisely at the point at which a political system begins to free itself from the immediate governance of received tradition . . . formal ideologies tend first to emerge and take hold. . . . It is when neither a society's most general cultural orientations nor its most down-to-earth, "pragmatic" ones suffice any longer to provide an adequate image of political process that ideologies begin to become crucial as sources of sociopolitical meanings and attitudes.

Geertz, supra note 38, at 219.

[42] See generally Walter Lippmann, U.S. Foreign Policy: Shield of the Republic (1943); Nicholas J. Spykman, America's Strategy in World Politics: The United States and the Balance of Power (1942).

[43] The United States did not establish a professional diplomatic corps until the passage of the Rogers Act in April 1924. Pub. L. No. 135, 43 Stat. 140 (1924). The bill passed both houses with virtually no debate and was signed by President Calvin Coolidge on May 24, 1924. 65 Cong. Rec. 8622-25 (1924) (recording passage in Senate after minimal debate); id. at 7633-35 (recording passage in House after minimal debate). The Brookings Institution, the first modern Washington, D.C. think tank, was founded in 1927. Donald T. Critchlow, The Brookings Institution, 1916–1952: Expertise and the Public Interest in a Democratic Society 4 (1985).

[44] See infra notes 190-91 and accompanying text.

[45] While this Article focuses on Root, it also will consider the views of other prominent lawyer-statesmen such as William Howard Taft, Philander Knox, Joseph H. Choate, LeBaron Colt, Nicholas Murray Butler, Henry L. Stimson, Charles Evans Hughes, and Frank B. Kellogg. I will provide evidence that all these figures adopted the classical legal-foreign policy paradigm in some form. In subsequent work concentrating on the 1920s, I will focus more deeply on the last three men on the list (each of whom held the position of Secretary of State between 1921 and 1933) as well as two other key lawyer-policymakers

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B. Who Was Influenced by Classical Legal Thought?

1. The Divided American Bar at the Turn of the Century

Although classical legal thought "erect[ed] a vast discursive structure that came to dominate legal education and to greatly influence the practical work of lawyers and judges,"[46] it carried special force for a key segment of the elite bench and bar. This segment wielded its greatest influence in New York City but held sway among lawyers in most eastern cities and several Midwestern ones.[47]

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during the period, Dwight Morrow and Owen Young. In this subsequent work, I will attempt to show that all of them adopted the framework set forth in this Article.

Moreover, this Article provides evidence that nonlawyers were less inclined to adopt the classical legal framework. For example, Part IV shows the sharp split between lawyers and generals in the formation of colonial policy. See infra notes 209-46 and accompanying text. I also draw a sharp contrast between Root's and Theodore Roosevelt's foreign policy outlooks, divergent even though the two men worked closely together. In contrast to Root, Roosevelt, the nonlawyer, maintained deep skepticism about any international legal arrangements, ridiculed arbitration treaties, and focused on realpolitik as the basis of American foreign relations. See infra Part V; infra notes 260-327 and accompanying text. I further point to such thinkers as Alfred Thayer Mahan and Lewis Einstein as examples of nonlawyers taking quite different positions from lawyers as to the proper nature of American foreign policy. See infra notes 288-93, 535-39 and accompanying text.

One could advocate a causal analysis systematically comparing (say) ten lawyers and ten nonlawyers and demonstrate the divergent foreign policy positions between the former and latter groups. With the evidence discussed above, I have endeavored here to approximate tentatively such an analysis. Practical and methodological reasons demand leaving it at this stage, though. Practically speaking, the investigation of someone's ideology—their unspoken background assumptions—requires extensive textual and biographical analysis; thus, a serious attempt to replicate the ideal would take volumes. Methodologically, this comparative analysis runs into complications. First, the lack of a general pattern does not imply the lack of causality. For example, many scholars believe that Woodrow Wilson's Protestant background powerfully influenced his foreign policy views; this argument certainly is not belied by the fact that thousands of Protestants sharply opposed that outlook. It is thus wise not to adopt a too strongly positivistic outlook on causation. Moreover, the mere fact that nonlawyers would adopt a certain ideology does not mean that it is no longer a "legal" ideology. For example, historians of American foreign policy in the 1920s refer to it as "business internationalism," as it placed large emphasis on economic interests. But neither Warren Harding nor Coolidge, both of whom warmly endorsed it, were businessmen: They were career politicians with no real commercial experience. Hughes and Kellogg also advocated it—but were lawyers. So were Morrow and Young, both cited by historians as examples of "businessmen" influencing policy (mainly because they were purely businessmen by the early 1920s). See Costigliola, supra note 17, at 56-57, 121-22; Cohen, supra note 16, at 21, 68; Leffler, supra note 16, at 90, 97. The point is that a successful ideology can be adopted by other segments of society than that from which it originated; it thus should be unsurprising if nonlawyers talked in the language of classical legal ideology as well. See infra Part VII (noting Coolidge's use of classical legal thought).

[46] Grey, supra note 4, at 5.

[47] Robert Gordon observes that these classical-ideology lawyers did more than talk about law. They also

> played a major role in building the organizational forms that were intended to house their conceptions of the Ideal: schools of law and political science, bar associations, law reform committees; merit selection of judges; commissions to

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To these men, classical legal thought represented far more than an esoteric hobby; it implied instead a practical program of concrete reform to which they devoted countless hours in constructing real institutions. To be sure, these lawyers hardly comprised the majority of American attorneys, but

> since this minority was large in absolute numbers, included many of the lawyers of the highest professional standing . . . and dominated all the bar organizations, its members were effectively able to take on the role of articulating the aspirations of the profession's elite, to occupy by default its symbolic high ground.[48]

They thus carried influence out of proportion to their raw numbers.

2. *Root's Place at the Elite Bar*

Root exemplified this pattern. Even after the culmination of his public career, he insisted that he was "just a lawyer, from the ground up, and everything that I have done in my life has been as an incident to a lawyer's career, responding to the calls made upon a lawyer under the responsibilities of his oath and his conception of a lawyer's duty."[49] During his career in private practice, he immersed himself in legal classicism and studied from its apostles. Root's mentor at New York University School of Law in the 1860s was John Norton Pomeroy, one of the leading orthodox treatise writers and lawyers of the era, who developed the case method of law teaching before Christopher Columbus Langdell both introduced it and created the orthodox law-school curriculum.[50] James Coolidge Carter, the elite

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> investigate legislative corruption or Tammany finances; reform political clubs; actual reform administrations (city and state); commissions regulating railroads, public utilities, securities, and insurance; professionalization of civil service appointments at the city, state, and federal levels; and even some international organizations.

Gordon, Ideal and Actual, supra note 1, at 52-53.

[48] Id. at 52.

[49] Elihu Root, Individual Liberty and the Responsibility of the Bar, Address at the Annual Dinner of the New York State Bar Association (Jan. 15, 1916) [hereinafter Root, Individual Liberty], in Addresses on Government and Citizenship 511, 511 (Robert Bacon & James Brown Scott eds., 1916).

[50] See John Norton Pomeroy, Jr., John Norton Pomeroy, in 8 Great American Lawyers 91, 99 (William Draper Lewis ed., 1909) ("Professor Pomeroy anticipated, by several years, most of the essentials of the method introduced into the Harvard Law School by Professor Langdell, which in late years has revolutionized the study of law in most of our larger schools."). Pomeroy's son quotes an address from Root to the NYU School of Law alumni, which captured the relationship between Root and Pomeroy:

> For the two years [I was at NYU], the greater part of my time was passed in that library, with that professor. . . . The students were few in number; each one knew the professor personally, intimately, and was with him day by day, hour after hour, sometimes from the early morning until late in the evening; the whole day being occupied in the library with the professor there, the stud-

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New York lawyer whose work "represents in a clear and unsubtle manner the intellectual paradigm for virtually all orthodox late-nineteenth-century legal theory,"[51] became one of Root's principal professional mentors and consulted Root during the writing of his most important book.[52] Upon achieving professional success, Root took care to maintain contact with Harvard orthodoxy, recruiting from there his top associates (such as Henry Stimson) and sending his son there for law school.[53] After visiting Harvard, he noted the institution's role "in making up the personal influences and environment in which I have been living for many years," specifically referring to mentors such as Carter and Joseph H. Choate and remarking that he felt "quite like a duly naturalized citizen."[54] Shortly after Yale Law School began to adopt the orthodox curriculum and the case method of teaching, it invited Root to deliver an endowed lecture series.[55]

Root achieved high public office for the first time at the comparatively advanced age of fifty-four, after a legal career that spanned more than three decades; before then, as a practitioner he played a

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> ies interspersed with occasional questions and answers, and discussions; and impromptu moot-courts coming up without any premeditation; so that we had the opportunity not only to receive systematic instruction, but to know the man.

Id. at 98-99; see also Letter from Elihu Root to John Norton Pomeroy, Jr. (Jan. 15, 1906) (on file with Elihu Root Papers, box 185, Library of Congress) (setting forth similar description of his relationship with Pomeroy). Root highly praised the Great American Lawyers collection—and, one assumes, the description of Pomeroy. See Letter from Elihu Root to William Draper Lewis (June 17, 1907) (on file with Elihu Root Papers, box 188, Library of Congress).

[51] Horwitz, supra note 8, at 122.

[52] See Letter from Elihu Root to Lewis C. Ledyard (Nov. 25, 1907) (on file with Elihu Root Papers, box 188, Library of Congress) ("I thank you ever so much for sending me the book containing Carter's lectures. It goes without saying that I shall read them with the greatest interest. I talked with him many times while he was engaged in their preparation."). Ledyard was Carter's law partner; Carter's book, Law: Its Origin, Function, and Growth, was published posthumously in 1907.

[53] Cf. Letter from Elihu Root to Elihu Root, Jr. (Feb. 10, 1906) (on file with Elihu Root Papers, box 185, Library of Congress) (providing career advice in preparation of latter's graduation from Harvard and recommending Stimson's law firm as place for employment).

[54] Letter from Elihu Root to Henry Cabot Lodge (July 2, 1907) (on file with Henry Cabot Lodge Papers, box 25, reel 24, Massachusetts Historical Society).

[55] Root's Dodge Lectures were eventually published as The Citizen's Part in Government (1907). Robert Stevens notes that Yale began to move toward the Harvard curriculum in the 1890s and began use of Langdell's case method in 1903–1904 when Arthur Corbin joined the faculty. Other Harvard graduates soon followed, and Yale "crossed the Rubicon" by 1912, eventually appointing Harvard graduate Thomas Swan as Dean in 1916. See Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 61-62 (1983). Root relied heavily on the work of John F. Dillon, the prominent laissez-faire constitutional scholar and a personal friend, in the preparation of his Yale lectures. See Letter from Elihu Root to John F. Dillon (July 2, 1906) (on file with Elihu Root Papers, box 185, Library of Congress).

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major role in virtually all the institution-building and law-reform efforts Gordon describes. While the paucity of documents on the subject constrains us to know relatively little about his actual private law practice, his activities during these years makes him the epitome of Gordon's elite lawyer model.[56]

When not holding public office, Root's principal public pursuit was the promotion of "legal science," the hallmark of the elite lawyers' ideal and a fundamental value in classical legal thought. Most prominently, Root led the drive for requiring law-school education before admission to the bar. At the turn of the century, only a small minority of American lawyers attended professional law schools; indeed, elite lawyers' formal law-school education divided them from the rest of the American bar.[57] But this very division undermined classical ideals and principles: Law could not be a "science" if it was practiced by untrained and uneducated attorneys. Langdell, the central figure in the promotion of classical orthodoxy, recognized this from the outset. "If law be not a science," he proclaimed, "a university will consult its own dignity in declining to teach it."[58] So the converse was also true: If law was a science, a university should teach it—and lawyers should go to the university to learn it.[59]

Root (along with all elite lawyers) believed that the bar was a learned profession and he used his influence to ensure that states would adopt that belief. The American Bar Association's (ABA's) Council on Legal Education, which Root chaired, became the specific

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[56] He was one of the principal leaders, along with Choate, of the so-called "Swallowtail Republican" faction in New York City politics that fought for civil-service reform and against Tammany Hall. See David C. Hammack, Power and Society: Greater New York at the Turn of the Century 140, 144, 146 (1982) (noting Root's leadership among Swallowtail Republicans). During the 1890s, again along with Choate, Root led the "Committee of One Hundred for Public School Reform" that centralized public school administration throughout the city. See id. at 285, 290, 293, 297. He also served as a delegate to the 1894 and 1915 New York State Constitutional Conventions (and was overwhelmingly voted as chair of the latter proceeding), see Leopold, supra note 19, at 93, and as President of the Bar Association of the City of New York, see 2 Jessup, supra note 19, at 474-75, and the American Bar Association (ABA), see id. at 468; Leopold, supra note 19, at 99.

[57] See generally Gordon, Ideal and Actual, supra note 1 (discussing role of law schools in development of "legal science"); Gordon, Legal Thought, supra note 1, at 72-77 (same).

[58] C.C. Langdell, Teaching Law as a Science, 21 Am. L. Rev. 123, 123 (1887).

[59] Root posed the contrast clearly. Referring to the Indiana Constitution's provision that any man of "good moral character" could practice law, Root wrote:

> If the bar is to be a learned profession, then somebody should see to it that its members become reasonably learned before they are admitted to practice, otherwise they will be practicing under false pretenses and deceiving the public. The theory of the Indiana constitution, of course, is that the bar is not to be a learned profession.

2 Jessup, supra note 19, at 469 (quoting Root's letter to President of State Bar Association of Indiana).

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institution to put this belief into practice. The Council produced a report bearing Root's name, which asserted that "only in law school could an adequate legal education be obtained" and that two years of college should be required before admission to law school. The Root Report essentially declared that the problems of the American bar could be solved by making all American lawyers emulate the elite.[60]

Throughout his legal career, then, Root worked to entrench legal science and fulfill the elite bar's classical ideals. But such a record begs important questions: What were those ideals? What substantive content filled the institutions that Root had worked long and hard to make concrete?

C. Classical Legal Premises

As noted above, other historians have detailed the nature of classical legal ideology.[61] The next four Sections aim to make explicit what is implicit in this historiography, viz. those central aspects of classical legal ideology that carry powerful implications for foreign-policy making.[62] These aspects were:

Legal peripheralism. Nineteenth-century legal thinkers denied that the state constituted the dominant source of legal rules and enforcement efforts. They acknowledged that state enforcement was often important but they strongly emphasized that custom and informal social controls could establish a modicum of social order in the absence of the coercive state. Some jurisprudes denied that state-enforced rules without customary origins constituted "law" at all and posited a sharp distinction between "law" and "force." In sum, they firmly believed that large gains in social and legal stability could be achieved by nonstate methods of social control and voluntary institutions.

Interest unitarianism. Informal norms and controls and voluntary dispute resolution could succeed because social actors and groups were not divided by fundamental or irresolvable conflicts of interests

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60 "In spite of the diversity of human relations with respect to which the work of lawyers is done," it noted, "the intellectual requisites are in all cases substantially the same. . . . All require high moral character and substantially the same intellectual preparation." Preble Stolz, Training for the Public Profession of the Law (1921): A Contemporary Review, reprinted in Herbert L. Packer & Thomas Ehrlich, New Directions in Legal Education app. 2, at 227, 247-48 (1972).

61 See, e.g., supra notes 1-8.

62 While other historians focus on classical legal thought in order to assess its implications for jurisprudence, public policy, the role of the state, the nature of legal discourse, etc., I draw out implications concerning the relationship of law to power and the relationship of the coercive state to legal efficacy. These relationships are necessary to understanding classical legal ideology's implications for foreign relations.

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and values. Although conflicts did occur, they were not as important as the fundamental consensus linking social groups.

Conflict resolution through neutral expertise: law versus politics. Nineteenth-century thinkers obviously did not deny the existence of conflict. But they believed that it resulted either from failure to provide proper institutional mechanisms, or because immediate problems obscured the more basic lack of conflict. Law and legal institutions served as neutral, apolitical institutions that could resolve conflicts while giving groups and individuals complete liberty within their respective spheres of action, if their principles were properly applied.

Evolutionary thought. Law evolved according to secular causes and grew through time in both strength and effectiveness. This evolution, however, did not occur through the exercise of state power; instead, it developed through a voluntary process of arbitration and informal mechanisms.

Such premises were clearly *ideological* in the sense presented earlier:[63] They represented beliefs, fears, prejudices, reflexes, and commitments of a social class, and served the interests of that class. Classical legal thought represented a congenial worldview for elite lawyers: It suggested that law created order without coercion and maintained order without true conflict. It thus assured elite lawyers—all of whom were wealthy and many of whom exercised political power—of the essential justness of their social position and the worthiness of their profession. But as with all ideologies, such service hardly meant that its adherents used it for obfuscation. As one prominent commentator has noted of Root and his political allies (many of whom were elite lawyers), "it is difficult to read [their] correspondence . . . without feeling they believed what they espoused."[64] Classical legal principles formed a coherent and workable ideology because they legitimated lawyers' work to lawyers themselves.

What, though, did any of this have to do with foreign policy? Classical legal ideology, if applied to world politics, carried significant implications.

Most importantly, it strongly suggested that international law and legal institutions could effectively regulate international relations and achieve major gains in global stability. Critics of international law asserted that because it was not enforced by the centralized, coercive power of the state, it was condemned to ineffectiveness. Late-nine-

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63 See supra Part II.A.

64 Richard L. McCormick, From Realignment to Reform: Political Change in New York State, 1893–1910, at 112 (1981). A leading analyst of Hughes's career also observes how closely his private letters and notes match his public statements and actions. See Glad, supra note 17, at 3.

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teenth-century legal peripheralism, by contrast, emphasized those areas of social action where (it contended) law successfully maintained social stability in the absence of centralized state coercion.[65]

Second, it caused lawyer-diplomats to shy away from realism. Realist thought holds that the anarchical international system creates fundamental conflicts of interest between nations, requiring states to maintain a balance of power for them to survive. Moreover, traditional realism also focuses on basic conflicts of values between nations as a source of international instability.[66] Classical legal thought, however, rejected both of these premises: It argued that most conflicts were false ones and contended that they could be mediated and resolved through the application of neutral legal rules, which demonstrated how individuals could pursue their aims without conflict. It followed that the pessimistic realist prescriptions of continuous conflict were simply wrong as a matter of empirical fact.

Third, the evolutionary character of classical legal thought lent powerful support to the belief that the weaknesses of international institutions were not fundamental problems, but rather temporary difficulties on the way to more robust institutions. Legal evolutionary thought had no unified theory of the evolutionary mechanism. Such a gap, however, was a strength rather than a weakness: It allowed classical legal thinkers to believe that institutions would become stronger without having to pay too much attention to potential obstacles to such strengthening.

In order to show that the above description is not merely a straw man and that classical legal ideology in fact had these implications, we must look at it more closely. Did it truly have these beliefs, perceptions, presuppositions, and biases? Subsections D through G demonstrate that the answer is yes.

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[65] Legal thinkers shied away from saying absolutely that the state played no role in establishing social order or that law never represented coercion. Coercion and state power existed but usually somewhere else, with different actors, under different circumstances. As Kuhn notes, paradigms consistently operate in this fashion. The mere existence of anomalies and troubling facts hardly serves to shake a paradigm, for every paradigm contains anomalies. Those committed to the existing paradigm, then, will simply "devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict." Kuhn, supra note 39, at 78.

[66] See generally Jonathan Haslam, No Virtue Like Necessity: Realist Thought in International Relations Since Machiavelli (2002); Michael Joseph Smith, Realist Thought from Weber to Kissinger (1983).

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D. Legal Peripheralism

1. The Tradition of Legal Centralism

Oliver Williamson has famously used the phrase "legal centralism" to describe the belief that the state is the chief source of rules and enforcement efforts.[67] Robert Ellickson contrasts this view with "legal peripheralism," which holds that state power is relatively ineffectual as a source of order; instead, norms and markets are far more powerful influences on human behavior.[68]

The quintessential legal centralist was Thomas Hobbes, who argued that a society without a sovereign would result in permanent chaos, the war of "every man against every man."[69] But for precisely this reason, most late-nineteenth-century thinkers rejected Hobbes's theory (although maintaining respect for his acumen as a thinker). To the late-nineteenth-century legal mind, the absence of state power did not imply violent chaos. For example, Sir Henry Maine, the preeminent English legal theorist of the late nineteenth century,[70] rejected both the theories of Hobbes and Locke. Dismissing social theory, Maine contended that "nothing can be more worthless . . . than Hobbes's conjectural account of the origin of society and government. . . . The theory is open to every sort of objection. There is no evidence of any stage of the supposed history, and the little we know of primitive man contradicts it."[71] Locke's theory was "open to pre-

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[67] Oliver E. Williamson, Credible Commitments: Using Hostages to Support Exchange, 73 Am. Econ. Rev. 519, 520, 537 (1983).

[68] See Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 147 (1991). As the title of his book suggests, Ellickson's work is an effort to develop a robust legal-peripheralist theory that can explain how order can exist in the absence of a coercive state. See id. at 137-66. As I suggest, some elements of Ellickson's theory were prefigured by classical legal theorists, although without some important qualifications and complexities that characterize Ellickson's work.

[69] Thomas Hobbes, Leviathan 84 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1588); see also id. at 111-15 (arguing that only state can force parties to abide by their agreements).

[70] For Maine's influence, see George Feaver, From Status to Contract: A Biography of Sir Henry Maine, 1822–1888 (1969); Frederick Pollock, Sir Henry Maine and His Work, in Oxford Lectures and Other Discourses, 147 (London, MacMillan & Co. 1890); Peter Stein, Legal Evolution: The Story of an Idea 86-115 (1980); Robert Redfield, Maine's *Ancient Law* in the Light of Primitive Societies, 3 W. Pol. Q. 574 (1950); Stephen G. Utz, Maine's Ancient Law and Legal Theory, 16 Conn. L. Rev. 821 (1984).

[71] Henry Sumner Maine, Lectures on the Early History of Institutions 356 (London, John Murray 1875). Similarly, Thomas Cooley argued that "such a state of nature is mere fancy; . . . it never did and never can exist, for the individual is never found outside of society and of the reach of human law." William Blackstone, Commentaries on the Laws of England 122 n.4 (Thomas M. Cooley ed., 3d ed. rev., Chicago, Callaghan & Co. 1884), quoted in Stephen A. Siegel, Historism in Late Nineteenth Century Constitutional Thought, 1990 Wis. L. Rev. 1431, 1489 n.327. Christopher Tiedeman, too, castigated the "groundless doctrine of the social contract" and called it an "absurdity." Christopher G.

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cisely the same objection."[72] Maine rebuffed the notion that the social fabric was "some shifting sandebank in which the grains are Individual men, that according to the theory of Hobbes is hardened into the social rock by the wholesome discipline of force."[73]

Virtually no one adheres to extreme legal peripheralism, and the late-nineteenth-century legal paradigm was no exception. But classical legal thought focused intensively on nongovernmental modes of maintaining order and generally rejected the state as a determinant of social change. Put another way, classical legal thinkers saw enormous potential gains in nonstate methods of legal development.

2. *Rejecting the State*

If law did not come from the state, then where did it come from? Classical legal thought believed that laws percolated up from the customs and practices of the people. Carter, summing up the jurisprudence of the time, completely rejected the positivism of John Austin and Jeremy Bentham, and averred that law

> is not a command at all; . . . it is not the dictate of Force but an emanation from Order; . . . it is that form of conduct which social action necessarily exhibits, something which men can neither enact nor repeal, and which advances and becomes perfect *pari passu* with the advance and improvement of society.[74]

In the face of this powerful, custom-driven law, the state had a much circumscribed role. "[J]urisprudence," Pomeroy argued, "must be the product of the ideas and life of the people over which it dominates; it must spring from the soil."[75] Pomeroy asserted that force could not achieve social order in the absence of popular custom. Unless the state resorted to genocide, it could not impose law on a sullen and unwilling people. State coercive power was merely a temporary—and ineffectual—expedient.[76]

Tiedeman, The Unwritten Constitution of the United States (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1974) (1890).

[72] Maine, supra note 71, at 357.

[73] Henry Sumner Maine, Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas 250 (Ashley Montagu ed., Univ. of Ariz. Press 1986) (1861).

[74] James Coolidge Carter, Law: Its Origin, Growth, and Function 344-45 (1907). Professor Horwitz argues that Carter's jurisprudence "represents in a clear and unsubtle manner the intellectual paradigm for virtually all orthodox late-nineteenth-century legal theory." Horwitz, supra note 8, at 122. While I believe this to be an overstatement—for instance, many orthodox legal thinkers did not share Carter's extreme antipathy to legislation—Carter can be seen as a representative figure.

[75] John Norton Pomeroy, An Introduction to Municipal Law § 349, at 209 (New York, D. Appleton & Co. 1865).

[76] See id. § 349, at 210.

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Legal theorist Thomas M. Cooley, whose *Constitutional Limitations* served as a principal treatise of classicism,[77] epitomized both the reluctance to accept the efficacy or permanency of violence and the eagerness to see the potential gains of extragovernmental lawmaking. A nation's laws are determined not by the will of the sovereign but by "the common reason of the people."[78] Law drawn from this source, he contended, will be obeyed "spontaneously"[79] and "cheerfully."[80] And law drawn from any other source—whether it be the arbitrary command of a despotic ruler or the theoretical speculations of the most well-intentioned ethicist—"will be disobeyed whenever it seems safe to do so."[81]

Cooley's reference to spontaneity hardly meant that people obeyed erratically. The key concept, rather, was that of "habit." Cooley conceded that even though "[m]uch of legal right [is] conventional in its origin,"

> legal rules long observed create a reason for themselves, and the citizen conforms to them without question as he does to the laws of nature whose operations he perceives about him. He yields by a sort of instinct to what the law, expressing the common opinion, has settled upon as right, and the law is a master which he follows without seeing, and obeys without waiting for a command.[82]

Habit, Cooley said, breeds "respect and obedience" and "deprives the numerous restraints of the law of all seeming hardship that might have been felt originally."[83] Through habit, the law's "restraints come to be

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77 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislatures of the Several States (Boston, Little, Brown & Co. 1868). Cooley also served as a justice on the Michigan Supreme Court. For excellent discussions of Cooley's career and ideology, see generally Alan Jones, Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration, 53 J. Am. Hist. 751 (1967); Alan Jones, Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights, 81 Pol. Sci. Q. 602 (1966).

78 Thomas M. Cooley, The Administration of Justice in the United States of America in Civil Cases, 2 Mich. L.J. 341, 342 (1893) [hereinafter Cooley, Administration]; see also id. at 341 (defining law as "outgrowth of the habits, desires and needs of the people"); Thomas M. Cooley, Labor and Capital Before the Law, 139 N. Am. Rev. 503, 503 (1884) [hereinafter Cooley, Labor] (arguing that law is "settled conviction of the people as to what the rule of right and conduct should be"); Thomas M. Cooley, Sources of Inspiration in Legal Pursuits, Address to the Iowa State Bar Association (May 1875), in 9 W. Jurist 515, 519 (1875) (observing that law closely tracks "public sentiment").

79 Cooley, Labor, supra note 78, at 503.

80 Cooley, Administration, supra note 78, at 342; see also Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 10 (photo. reprint 1993) (1880) (noting that impartial laws will be "cheerfully acquiesced in").

81 Cooley, Labor, supra note 78, at 507.

82 Thomas M. Cooley, The Uncertainty of the Law, 22 Am. L. Rev. 347, 368 (1888).

83 See Cooley, supra note 80, at 10. Maine saw habit as a key determinant of legal creation and legal change. See Maine, supra note 73, at 7 ("It is certain that, in the infancy

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understood and appreciated in their true character as being severally the representatives of rights secured and protected, and the feeling they give is one of security rather than of restiveness and oppression."[84] He argued that law that "lacks the popular approval[ ] can seldom in the full and proper sense be a law at all."[85]

> Similarly, an ongoing theme in Maine's discussion in *Ancient Law* is the irrelevance of sovereign power, whether exercised by kings or by the civil state through a duly constituted legislature, to the growth and amelioration of the law. Maine sometimes wr[ote] as if legal doctrines have a life of their own, stimulated by major economic and demographic changes without conscious intervention by any central power.[86]

Custom played a central role in late-nineteenth-century legal thought because its presence demonstrated that fundamental conflicts of interests and values did not exist.[87] Customs, Carter wrote,

> being common modes of action, are the unerring evidence of common thought and belief, and as they are the joint product of the thoughts of all, each one has his own share in forming them. In the enforcement of a rule thus formed no one can complain, for it is the only rule which can be framed which gives equal expression to the voice of each. It restrains only so far as all agree that restraint is necessary.[88]

Pomeroy was moved to deny the state-society distinction entirely. The state, he asserted, is "the permanent agent[ ] which [the nation] has established to make efficient its organic will." A government "may have any organization, from the purest democracy, to the most

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of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit.").

[84] Cooley, supra note 80, at 10; see also id. at 15 ("[The] value of any law consists in the habitual reception and the spontaneous obedience which the people are expected to give to it."); Cooley, supra note 82, at 366 (stating that popular laws will be obeyed spontaneously).

[85] Cooley, Labor, supra note 78, at 507. For this reason, Cooley refers to "the people" as our "law-makers." Id. at 516. This insistence on "the people" as the lawmakers served as a typical theme in classical thought and a bulwark in the classical attack on the legal positivism of Austin and Bentham. See, e.g., Maine, supra note 73, at 380-81 (describing communal origin of law in certain societies).

[86] Utz, supra note 70, at 832. See also Lawrence Rosen, Foreword to Maine, supra note 73, at xiv (noting that Maine was "bent on showing that sovereign power is not the key determinant of progress at all stages. Custom, morality, and innate human inertia play equally important roles . . . even if Maine never specifies the precise forces at work in legal and political change").

[87] Carter, for example, asserted that "[c]ustom, however conventional, does in nearly every case dictate what is just, according to the common sense of justice." Carter, supra note 74, at 141.

[88] Id. at 143.

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absolute monarchy[,]"[89] but "[t]he idea that the rulers, whether one or many, compose the state, is a thing of the past, a notion which has been swept away in the resistless march of social development."[90]

3. *Root as a Legal Peripheralist*

Root explicitly endorsed the legal-peripheralist view. In a 1904 address to the Yale Law School graduating class, he argued forcefully that popular customs, not state power, constituted the principal means of legal enforcement. "The real force of law as a continuing rule of action," he asserted, "is derived from the assent of the people for whom the rule of action is prescribed. Without real assent on their part to the justice and expediency of the law it soon becomes powerless and ineffective."[91] While some of Root's examples of this argument seemed relatively innocuous—he cited the "blue laws" in New England, for instance—his contention applied to far more than mere matters of etiquette. He also referenced "the treatment of the crime of horse-stealing upon our western frontiers"[92]—where theft was treated with capital punishment.

Root saw the peripheralist vision as applying to the very core of social order. Referring to the relative powerlessness of the state in making law, he contended,

> No doubt is thrown upon this principle by the fact that very bad and oppressive laws have been for long periods enforced by superior power among peoples who had not yet conceived the idea that they themselves were the true source of the authority. The assent of such people to the right of superior authority to impose laws upon them is in effect an assent to the law which is imposed by that authority, however much it may differ from their judgment and wish.[93]

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[89] John Norton Pomeroy, An Introduction to Constitutional Law of the United States § 41, at 30 (New York, Hurd & Houghton 1868); see also id. § 7, at 4-5, § 9, at 5-6, § 37, at 28.

[90] Id. § 39, at 29. Even Tiedeman, by far the most modernist (next to Holmes) of the late-nineteenth-century legal thinkers, believed that instead of the state controlling the people, the people controlled the state. "The great majority of a people," he averred, "are a law unto themselves." As a result, the "morality commonly and uniformly practiced by the masses" is the "standard after which rules of law are modelled." Tiedeman, supra note 71, at 5. When judges and legislatures make law, they are "bound down by [the] prevalent sense of right to a fixed line of conduct, from which [they] cannot successfully swerve. . . . I do assert emphatically that the legislature cannot completely enslave the popular will by an enactment not endorsed by the prevalent sense of right." Id. at 7.

[91] Elihu Root, Some Duties of American Lawyers to American Law, Commencement Address Before the Yale Law School New Haven (June 27, 1904), in Addresses on Government and Citizenship, supra note 49, at 413, 416.

[92] Id. at 417.

[93] Id.

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If a law was obeyed, it was *a fortiori* assented to. This application of the "principle," of course, defined away the problem. But it demonstrated how far Root and other classicists were willing to go in order to buttress the argument that the enforcement of law came from the people, not the state.

Root contended that the evolutionary development of law demonstrated the truth of the peripheralist vision, for the growth of democracy and technology weakened the power of the state even further. Government simply could not create order by imposing its will; instead, order developed through spontaneous embrace of social norms. "One thing we have learned during the experience of popular government," he stated in his lectures at Yale Law School,

> is that the progress of the world has carried people to a point where . . . society . . . cannot possibly go back to the old method of keeping peace by force or the threat of force. The complication and interdependence of life puts the power of doing incalculable harm in the hands of so many men and combinations of men in different occupations that a realization of common interest is absolutely essential to the working of the vast machine. The mere forcible enforcement of law is quite inadequate. *It is not fear of the policeman or the sheriff that keeps the peace in our many cities; it is the self-control of the millions of inhabitants enabling them to conform their lives to the rules of conduct necessary to the common interest; it is only against the exceptional lawbreaker, and criminals who are comparatively few in number, that the policeman and sheriff are effective.*[94]

Law was "enforced" through the voluntary adoption of norms. Root did not deny the importance of formal, state-driven law enforcement, but, unlike legal centralists, he saw it as distinctly secondary to self-imposed community norms in maintaining the legal order.[95] State imposition of social control was simply impractical.

Root's belief in peripheralism, forged in the late nineteenth century, stayed with him until the end of his life. A few months before his

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[94] Elihu Root, The Citizen's Part in Government 17-18 (1907) (emphasis added).

[95] Root followed this conviction in his own law practice. His most notorious client, the promoter Thomas Fortune Ryan, recalled,

> Root was always keeping me out of trouble and prevented me from doing many things that I wanted to do. . . . In those days we generally issued bonds for the property but in the case of common stock and even preferred stock it was not considered necessary to have anything but water behind it—good will. Root always wanted to have value put in and to have the stock represent property.

Henry L. Stimson, Diary (May 21, 1924) (on file with Sterling Memorial Library, Yale University). The lawyer, not the state, prevailed upon the client to adhere to community norms.

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death he argued (echoing Cooley) that "habit rules the world." This, not the state, enforced order. "It is because of habit that people can walk safely around the streets without having a knife in their ribs."[96]

E. The Factionless Republic: Interest Unitarianism

Late-nineteenth- and early-twentieth-century thought concerning the legal order could believe in its voluntary nature because of a key bedrock faith: the idea of a unified public interest that transcended and replaced the interests of different social groups.

That such an ideology could emerge during the late nineteenth century seems ironic, to say the least. The Gilded Age represented a period of protracted social conflict. Violent struggles between capital and labor characterized the era. Waves of immigrants, crowded into often-diseased tenements, fundamentally disrupted the nation's sense of cultural coherence. Intense political competition by corrupt parties, driven by boss rule, led many to question the vitality of the nation's democracy.[97]

How did an ideology arise that promised harmony in such a climate? Classical legal thinkers argued that by establishing neutral and objective rules, they would demonstrate how society *could* achieve unity despite appearances of being severely divided. They were not blind to the upheavals around them; rather, they firmly believed that such upheavals could be avoided through noncoercive means. As Robert Gordon notes, the classical legal project was

> an attempt to deal with the problem of the perceived illegitimacy of forms of domination by making them seem to *disappear*, i.e., by making all coercion seem to be the result of either consent or natural necessity (e.g., of human biology or economic laws). Late nineteenth-century legal thought held out the theoretical possibility of seeing everything in the social order as either naturally determined or as the spontaneous creation of individual wills that were incapable of oppression because, as far as admittedly imperfect institutions could achieve this, they were bounded in their zones of free autonomous action by neutral rules of the game.[98]

Social conflict did not have to exist. Neutral rules, based upon custom and precedent, could be fashioned that allowed everyone freedom, autonomy, and a reasonable chance to pursue their interests

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[96] Conversation of Philip C. Jessup with Mr. Root at 998 Fifth Ave. (Jan. 26, 1936) (on file with Philip C. Jessup Papers, box 245, Library of Congress). Root made these comments while discussing the New Deal; Roosevelt, he said, "seems to have the idea that you can in a minute change the habits of many generations." Id.

[97] See Wiebe, supra note 17, at 44-110 (describing class, labor, and social conflicts of that era).

[98] Gordon, Legal Thought, supra note 1, at 93.

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within the limits of the possible. Conflict was an epiphenomenon, not an indication of fundamental social contradictions.

1. The Factionless Republic

This position did not imply (at least to its adherents) a fatalistic belief that despite the social cleavages, the government should simply stand by impassively.[99] Instead, it rested on the firm conviction that social cleavages were irrelevant in the long run due to social mobility. This outlook derived from the "free labor" ideology of the Republican Party during the Civil War and Reconstruction and retained remarkable durability well into the twentieth century.[100] Eric Foner, describing the free-labor worldview, notes its faith in "the harmony of interests" and explains that it believed "the interests of labor and capital were identical, because equality of opportunity in American society generated a social mobility which assured that today's laborer would be tomorrow's capitalist."[101]

This notion of a unified people animated the police powers jurisprudence of the late nineteenth and early twentieth centuries.[102] As several historians have demonstrated, state and federal courts throughout the period consistently upheld extensive government regulation.[103] In order to uphold such economic and social regulations, however, courts repeatedly required a showing that the challenged regulations were intended to protect the health, safety, morals, or the "general welfare," i.e., benefit the *public as a whole*. Conversely, any legislation that seemed designed to favor one group over another was "class legislation" or "special legislation" and would not withstand judicial scrutiny.[104]

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[99] Fatalism more accurately describes the position of Justice Holmes, who believed in inevitable social conflict and saw the government as reflecting the dominant forces in society that imposed their will on the weak. See generally Yosal Rogat, The Judge as Spectator, 31 U. Chi. L. Rev. 213, 256 (1964) (describing Holmes as "[f]atalistic, mistrustful of reason, [and] obsessed with the ubiquity of force").

[100] For the classic description of this ideology, see Foner, supra note 34, at 11-39. Foner has demonstrated that free-labor ideas lasted past the Civil War. See Eric Foner, Reconstruction: America's Unfinished Revolution 512 (1989). Wiecek, supra note 6, at 86, 106, 125, 140, 155, also sees free-labor ideology as heavily influencing classicist judges.

[101] Foner, supra note 34, at 20.

[102] My discussion of these issues rests heavily on those in Benedict, supra note 2, and Gillman, supra note 7, although it clearly does not do justice to the complexities and subtleties of these accounts.

[103] See generally Benedict, supra note 2; William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America 1 (1996) (detailing "plethora of bylaws, ordinances, statutes, and common law restrictions regulating nearly every aspect of early American economy and society").

[104] From a modern perspective, such an ideology seems outdated not only in terms of public policy but also conceptually. While the contemporary mind might view certain

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The overall point was clear. The state could and should be neutral in all respects among different social groups. Indeed, state power constituted a key *cause* of social strife. Once the state started awarding benefits and protections to certain groups, the argument went, all groups would compete more fiercely for such favors, leading to the very social disintegration that legal centralists claimed the state was designed to ameliorate.[105] Choate suggested that special legislation had caused the Civil War: The war taught that "the national welfare and common good of all sections is the only object of the National Government" and thus that "there shall be no legislation for the benefit of any section or any class or any interest except so far as it shall be required to promote the general good."[106] The best solution was to reject special legislation, refuse to recognize groups, and restrict government regulation to that advancing public welfare as a whole.

2. *Ambivalence About Coercion: Assumed Risks and Yellow Dogs*

The classical legal mind's robust distinction between the interests of the public as a whole and the combined interests of different groups within the public carried deeper implications for its underlying social theory. Classical police powers jurisprudence posited that liberty could be protected if and only if the state remained neutral and did not disrupt "natural" relations between groups. This belief, however, clearly implied that these relations themselves did not impair liberty. Indeed, as we have seen, classical theorists posited that social conflict was not repressed by the state but rather caused by it. Such a view

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kinds of public health regulations as benefiting a common interest, the public philosophy of the late twentieth century harbors deep skepticism toward the idea of a "public interest" divorced from distributional concerns between groups. Consider the example of safety regulation, which late-nineteenth-century courts routinely upheld: Few agencies have weathered fiercer intergroup politics than the Occupational Safety and Health Administration (OSHA). See, e.g., Terry M. Moe, The Politics of Bureaucratic Structure, in Can the Government Govern? 267, 297-306 (John E. Chubb & Paul E. Peterson eds., 1989) (describing OSHA as victim of American democratic process). "Safety" on the modern conception is not a general public concern, but a deeply contested policy choice that implicates fundamental value and interest conflicts.

[105] Thus, in response to labor reformers' claims that labor unions were simply trying to defend themselves against corporate monopoly power, laissez-faire analysts responded,

> If capital has gained an advantage by special legislation, this is to be counterbalanced, not by special legislation to favor the other side . . . but by earnest united protests against all special legislation." By doing otherwise, workers "play into the very hands of monopoly, by following its example . . . . The era of social justice will not be ushered in by those who have nothing better to urge them than the old strife of classes for supremacy.

Benedict, supra note 2, at 308 (quoting Francis Wayland, The Elements of Political Economy 110-11 (1878)).

[106] Joseph H. Choate, Notes for Washington's Birthday Address to Confederate War Veterans ([1895?]) (on file with Joseph H. Choate Papers, box 24, Library of Congress).

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gave rise to an important feature of classical legal ideology: a tendency to downplay aspects of social relations that, to the late-twentieth-century mind, would signal coercion.

"Coercion" is a problematic concept, to say the least. Philosophers continue to debate the proper meaning of the term, and several have even questioned whether it has any independent meaning at all.[107] The mere fact that classical legal thinkers would tend not to see coercion does not imply that they were necessarily blind. Rather, it suggests that in the absence of information (or with conflicting information), they believed that perceived conflicts were false ones, and that establishing appropriate legal rules and institutions would reveal fundamental interest identities.

The tort doctrine of "assumption of risk," which originated in the nineteenth century, provides a useful example.[108] Assumption of risk provides a complete defense to a tort action: A defendant's negligence does not lead to liability because the plaintiff has knowingly[109] and voluntarily[110] accepted the danger of the situation. The question was, what constitutes a "knowing" and "voluntary" acceptance? Courts in the late nineteenth century did not routinely use the doctrine to deny recovery to plaintiffs,[111] but assumption of risk was a robust defense in certain scenarios that carried ideological meaning.

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[107] The most sustained recent treatment is Alan Wertheimer, Coercion (1987), which concludes that "coercion" has no independent meaning, but rather can be understood only as moral judgments about social arrangements. See id. at 7-8.

[108] In order to make my claims concerning assumption of risk in the late nineteenth century, I surveyed all New York cases between 1865 and 1900 that mentioned the doctrine or contained a reference to it in the head notes. I chose New York for the obvious reason that the elite lawyers whom I study centered their practices there. To some extent, this sampling method will overestimate the influence of the doctrine, because it will miss those cases where assumption of risk could have been used but was not. I believe that this difficulty is not fatal, however, because defense counsel would often raise the doctrine only to have it rejected by courts; moreover, the head notes will often cite to the doctrine even if the case does not, thus enabling it to appear in database searches.

[109] See W. Page Keeton et al., Prosser & Keeton on Torts § 68, at 486-90 (5th ed. 1984) (explaining that plaintiff must know that risk is present, and must understand its nature). For a contemporary acknowledgement of this principle, see, e.g., Cincinnati, New Orleans & Tex. Pac. Ry. v. Thompson, 236 F. 1, 9 (1916) ("Knowledge of the risk is the watchword of . . . assumption of risk.").

[110] See Keeton et al., supra note 109, § 68, at 490-92 (explaining that plaintiff must clearly manifest assent to relieve defendant of obligation of reasonable care).

[111] My late colleague Gary Schwartz has demonstrated that assumption of risk in California and New Hampshire was an exceptional defense most frequently invoked in employment cases. See Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717, 1767-72 (1981) (arguing that assumption of risk was exceptional defense most frequently invoked in employment cases). My sample of New York cases tells the same story. The vast majority of assumption-of-risk cases come in the employer-liability context; other contexts where the doctrine seemed to maintain

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In particular, employer liability for workplace injuries served as the central locus for assumption of risk. "The ordinary hazards and risks of the employment," explained one court, were "voluntarily assumed . . . that when a man engages in a dangerous enterprise, he accepts its ordinary risks."[112] This general rule often led to rulings denying recovery to injured workers even where the employer clearly acted negligently. If the record indicated that the worker knew or had reason to know of dangerous conditions, assumption of risk frequently served as a complete defense.

Other scenarios containing contractual elements also lent themselves to successful assumption-of-risk defenses. For instance, defendants used it successfully in the landlord-tenant context,[113] and courts often held that even when landlords failed to comply with minimum safety statutes and this failure led to unsafe conditions that caused plaintiff's injuries, they could not be held liable for negligence if the tenant was aware of the unsafe conditions and continued to live in the building.[114] Although courts made moves in the direction of making the landlord's duty to keep safe premises nondelegable,[115] defendants effectively used assumption of risk in landlord-tenant cases well into the twentieth century.[116]

The problem was that reliance on the assumption-of-risk defense carried a high probability of coercion, a prospect recognized by con-

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vitality are situations in which the plaintiff and defendant had some sort of contractual relationship, which goes to the coercion developed in this section.

112 Curran v. Warren Chem. & Mfr. Co., 36 N.Y. 153, 154-55 (1867).

113 The leading case is Doupe v. Genin, 45 N.Y. 119, 125 (1871) (holding that landlord has no liability for tenant property damage if tenant could have vacated).

114 See, e.g., Brown v. Wittner, 59 N.Y.S. 385, 386 (App. Div. 1899) (concluding that plaintiff assumed risk of missing banister by using stairs repeatedly without complaint); see also Johnson v. Oppenheim, 55 N.Y. 280, 287-88 (1873) (ruling that tenant assumed risk by not allowing landlord to comply with remedial statute). But see Sembler v. Cowperthwait, 103 N.Y.S. 979, 982 (Sup. Ct. 1907) (explaining that assumption-of-risk defense is not available for building code violations); Horn v. Breakstone, 133 N.Y.S. 285, 287 (N.Y. City Ct. 1911) (cutting back rule in wake of legislative housing code). The rule appears never to have held in a situation where the danger to the tenant was what would now be referred to as an "ultrahazardous" or "abnormally dangerous" activity. See Prussak v. Hutton, 51 N.Y.S. 761, 763 (App. Div. 1898) (upholding liability of explosives factory).

115 See Dollard v. Roberts, 29 N.E. 104, 105 (N.Y. 1891) (finding nondelegable landlord duty of care in maintaining common spaces).

116 See Baumler v. Wilm, 122 N.Y.S. 98, 99 (App. Div. 1910) (concluding assumption of risk applies in failure to bring candle down poorly lit hallway); Mitcheltree v. Stair, 120 N.Y.S. 540, 542 (App. Div. 1909) (holding that repeated use of stairs justified implied assumption of risk); Anderson v. Steinreich, 65 N.Y.S. 799, 800 (N.Y. City Ct.), rev'd on other grounds, 66 N.Y.S. 498 (App. Term 1900) (finding assumption of risk in agreement to reduce rent due to property damage).

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temporaneous English courts[117] as well as by Progressive critics.[118] Courts persisted, however, in applying the doctrine through the 1920s.[119]

It is by no means self-evident why assumption of risk existed mainly in the employment and landlord-tenant cases.[120] But seeing the doctrine in light of the effort to reconcile competing interests might make the underlying intuition clearer. The employment and landlord-tenant cases plainly implicated a struggle between contending social groups. Labor and capital were obviously at odds in the former instance, and the housing cases involved living conditions for the masses of immigrant poor who were transforming urban politics and whose existence raised troubling questions about the coherence of the American polity.[121] Assumption of risk represented part of the legal profession's attempt to reconcile groups by using individualistic means, i.e., freedom of contract. Collective battles between social groups on this scheme would be less necessary because of the "neutral" ability of rules to allow individuals to determine their fate.

Assumption of risk, then, stood as the embodiment of this effort. It also stood as the private law equivalent of the Supreme Court's

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[117] See, e.g., Smith v. Baker & Sons, [1891] A.C. 325, 355 (H.L. 1891) (ruling that employees cannot assume risk merely by continuing to work); Thrusell v. Handyside & Co., 20 Q.B.D. 359, 364 (1888) (declaring that assumption of risk is not voluntary where worker is subject to termination); Yarmouth v. France, 19 Q.B.D. 647, 657 (1887) (holding that circumstances surrounding assent could factor in jury determination of assumption of risk).

[118] Typical was the dissent of Charles Labatt, who objected to the rule in the employment context because

> upon the average man it is certain that the fear of the disagreeable, and, it may be, frightful, consequences which will almost certainly ensue from the failure to obtain work or from the loss of a position, must always operate as a very strong coercive influence, indeed. To speak of one whom that fear drives into or detains in a dangerous employment as being a voluntary agent is a mere trifling with words.

3 C.B. Labatt, Commentaries on the Law of Master and Servant § 963, at 2590-91 (2d ed. 1913).

[119] See, e.g., Dougherty v. Pratt Inst., 155 N.E. 67, 68 (1926) (Cardozo, J.) (finding risk assumed by continuing work under dangerous conditions). At times, New York courts applied the doctrine in nonemployment cases as well. See, e.g., Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929) (Cardozo, C.J.) ("One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . . . The timorous may stay at home.").

[120] Schwartz acknowledges this and points out that governmental entities also retained similarly anomalous immunity from liability. See Schwartz, supra note 111, at 1771-72.

[121] See Hammack, supra note 56, at 7-9, 141-42 (describing late-nineteenth- and early-twentieth-century concerns over political power of tenement dwellers and their allegedly pernicious influence on American society); see also Paul Boyer, Urban Masses and Moral Order in America, 1820–1920, at 179-80, 234-35 (1978) (arguing that many housing reform initiatives arose from genteel perception of moral decline in immigrant communities). See generally Roy Lubove, The Progressives and the Slums: Tenement House Reform in New York City, 1900–1917 (1962) (describing history and politics of housing reform laws).

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most significant police powers cases during the period. *Coppage v. Kansas*[122] considered a statute that forbid firms from conditioning employment on workers promising not to join a labor union, a condition known as a "yellow-dog contract." The Kansas legislature adopted the legislation based upon what it perceived as an element of coercion between capital and labor. The Supreme Court, however, rejected the very premises upon which the Kansas legislature had operated: "[S]o far as [the statute] expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case."[123] What was at stake was not coercion but liberty of contract. The Court quoted approvingly from another of its key cases and stated that

> it is not within the functions of government . . . to compel any person . . . against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another . . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.[124]

The *Coppage* Court's reference to "equality of right" was more than a mere formal distinction; indeed, it was adamant that the right to contract freely benefited all groups of citizens, for "the vast majority of persons have no other honest way to begin to acquire property, save by working for money."[125] Thus, the Court's opinion did not derive from a simple refusal to see the obvious. Rather, it stemmed from a deep-seated conviction that over the long run, rules guaranteeing formal "equality of right" would benefit labor as well as capital.[126]

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122 236 U.S. 1 (1915).

123 Id. at 14; see also id. at 15 (noting that employer's conduct was "entirely devoid of any element of coercion, compulsion, duress, or undue influence"); id. at 16 (stating that employer's offer was made "under circumstances devoid of coercion, duress, or undue influence" and castigating Kansas for "designating as 'coercion' conduct which is not such in truth").

124 Id. at 10-11 (quoting Adair v. United States, 208 U.S. 161, 174-75 (1908)).

125 *Coppage*, 236 U.S. at 14.

126 Those such as William Graham Sumner, who defended liberty of contract as inevitable and "progressive," while denying that it eventually would redound to the benefit of labor, became iconoclasts within professional American social science. It is coherent to argue that liberty of contract is the best of a series of dismal options presented by the "iron laws" of economics, but such coherence was not well received by mainstream social science academics, who did not accept this pessimistic version of Social Darwinism. See Dorothy Ross, The Origins of American Social Science 85-88, 139-40, 220-21 (1991). And as noted in the discussion of Social Darwinism, infra notes 162-64 and accompanying text, Social Darwinism was never embraced by the legal profession or the academy.

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3. *Interpreting the Evidence*

It was the unified concept of the "people" and the "public interest" separate and distinct from social groups and factions that made the notion of the "Night Watchman" state possible in the first place. The entire idea of the Night Watchman state implied that the watchman did not have much to do. Police officers catch criminals; they do not mediate conflict between social groups, broker among contending factions, or ameliorate fundamental value conflicts. Police, of course, function to "maintain order," but this represents order-maintenance of a distinctly secondary nature.

Thus, if we require only a Night Watchman state, we assume that other kinds of conflicts do not exist. If necessary, they could be assumed away. During his time as American Ambassador to Great Britain, Joseph H. Choate, Root's legal mentor and leader of the New York bar, often was called on to deliver addresses to English audiences on American topics. Choate particularly enjoyed discussing the Founders' constitutional framework, which not surprisingly happened to coincide perfectly with classical legal ideology. During a discussion of James Wilson, Choate asserted that in

> our dual system of Government . . . over every inch of the national soil and over every citizen in all the States there [are] two equal and independent sovereignties, each supreme in its own sphere, each working freely and adequately in its own orbit . . . . and yet *never coming into armed conflict or trespassing forcibly upon each other in the exercise of their respective powers*.[127]

This was a stunning declaration from a man who had lived through the Civil War. Choate argued that the Supreme Court of the United States "secures perpetual harmon[y] between the two parts of this dual system, as the final arbiter in all threatened conflicts between the State power and the Federal power"[128]—again overlooking the *Dred*

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[127] Joseph H. Choate, Address, James Wilson (n.d.) (notes available on file with Joseph H. Choate Papers, box 24, Library of Congress) (emphasis added).

[128] Id. Choate repeated the same ideas in several speeches as ambassador. See, e.g., Joseph H. Choate, Alexander Hamilton, Inaugural Address as President of the Associated Societies of the University of Edinburgh 35-36 (Mar. 19, 1904) (on file with Joseph H. Choate Papers, box 27, Library of Congress) (noting that "Hamilton had declared that two sovereignties could not possibly co-exist within the same limits; but the combined wisdom of the whole body proved greater than that of any one member"). This sometimes required continuing amnesia. See id. at 35 ("The Constitution as it was adopted by the Convention has safely stood the test of a century."); see also Joseph H. Choate, Address to the Bench and Bar 14 (Apr. 14, 1905) (on file with Joseph H. Choate Papers, box 26, Library of Congress) (positing that relation between federal and state authorities was that of "two distinct and independent governments . . . working in absolute harmony because of the healing function of our great tribunal").

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Scott decision.[129]

If the tendency not to see conflicts and coercion derived from the early nineteenth century and reached its heights during the late nineteenth century, it persisted among orthodox members of the elite bar well into the twentieth. A good example is found in the movement during the 1930s for the proposed "Child Labor Amendment" to the United States Constitution. Shortly after the First World War, the orthodox Supreme Court had struck down federal child labor legislation as exceeding Congress's Commerce Clause power.[130] This decision led to the proposal to overrule the Court via a constitutional amendment, an idea that the elite bar furiously resisted. In 1934, at the height of the Great Depression, elite lawyers decided to invest their energies in creating the "New York State Committee Opposing ratification of the proposed Child Labor Amendment to the Constitution of the United States."[131] Root quickly accepted the Honorary Chairmanship of the organization,[132] and the committee included the most prominent members of the New York bar.[133] The legal argument was straightforward and reflected the standard theories of orthodoxy: It

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[129] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). This was not simply an aside from Choate; it represented the very basis of Supreme Court due process jurisprudence in regards to personal jurisdiction. See Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (

> The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.).

[130] Hammer v. Dagenhart, 247 U.S. 251, 273 (1918) (holding that statute regulated state police power rather than interstate commerce and was therefore unconstitutional). When Congress attempted to use its taxation powers to suppress child labor, the Court again invalidated the statute, on the same grounds. See Bailey v. Drexel Furniture, 259 U.S. 20, 39 (1922) (equating scope of commerce power and tax power).

[131] Information about this committee, plus a list of its board of directors, can be found in the William R. Guthrie Correspondence File, Nicholas Murray Butler Papers, Columbia University.

[132] Root told the committee's vice-president,

> I shall be glad to do whatever I can to help along with the proposed committee against the ratification of the Child Labor Amendment as member or Honorary Chairman. . . . It seems incredible to me that our Legislature should be willing to abandon their own authority in such a vastly important field of local regulation and transfer that authority to men living thousands of miles away.

Letter from Elihu Root to William R. Guthrie (Apr. 4, 1934) (on file with Nicholas Murray Butler Papers, Columbia University).

[133] The committee's letterhead, which prominently featured Root, listed as committee members: William R. Guthrie, Thomas Chadbourne, Frederic Coudert, Robert T. Swaine, George Wickersham, Henry Taft, William Nelson Cromwell, among others. See William R. Guthrie Correspondence File (on file with Nicholas Murray Butler Papers, Columbia

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was simply inappropriate, committee members argued, for the federal government to intervene in matters that the Constitution had reserved for the states.[134] This was especially true in cases of child labor, where it was believed the amendment could lead to federal regulation of family relationships.

The supposed constitutional problem might have caused some psychic tension among committee members, because their constitutional scruples seemed to conflict with the moral necessity of preventing child labor. But Nicholas Murray Butler, the President of Columbia University, assured the committee that there was no need to worry because child labor did not exist: "There are simply no such conditions," he asserted. "I have myself visited during the past ten or twelve years those parts of the country from which the greatest complaints of child labor came, and found these complaints to be almost entirely baseless." Those supporting the amendment, then, "have been gravely misled by some propagandist."[135] Similarly, "the stories now in circulation are purely fictitious and are based upon conditions which, if they were existing, have long since been discontinued."[136]

For his part, Root had a hard time believing that even revolutionary upheavals signified conflicts between social groups; instead, he contended, they "are ordinarily dictated by purely personal motives [and] involve no question of principle."[137] The unified polity remained intact.

University). These are several of the most notable names listed by Gordon in his ongoing study of New York elite lawyers. See Gordon, Ideal and Actual, supra note 1, at 67 n.6.

[134] Much correspondence of the committee centered on the comparison of the Child Labor Amendment with the Eighteenth Amendment, which was regarded as a disaster for over-centralizing governmental regulatory functions. See, e.g., Letter from William R. Guthrie to Nicholas Murray Butler (Dec. 28, 1933) (on file with Nicholas Murray Butler Papers, Columbia University) (

> Your letter in this morning's 'Times' on 'The Child Labor Amendment' is excellent, and all opposing its adoption, as I do, must be thankful to you. You are entirely right in asserting that this proposed amendment is just as objectionable and dangerous as the Eighteenth Amendment. If adopted, regulation of school and home by Congress will inevitably follow . . . .);

see also Letter from William R. Guthrie to Nicholas Murray Butler (May 24, 1934) (on file with Nicholas Murray Butler Papers, Columbia University) (comparing Child Labor Committee's tactics to those of Anti-Saloon League); Letter from William R. Guthrie to Nicholas Murray Butler (Apr. 21, 1934) (on file with Nicholas Murray Butler Papers, Columbia University) (same).

[135] Letter from Nicholas Murray Butler to William R. Guthrie (May 14, 1934) (on file with Nicholas Murray Butler Papers, Columbia University).

[136] Letter from Nicholas Murray Butler to William R. Guthrie (May 17, 1934) (on file with Nicholas Murray Butler Papers, Columbia University).

[137] Letter from Elihu Root to Henry L. Stimson (May 28, 1908) (on file with Henry L. Stimson Papers, Sterling Memorial Library, Yale University).

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F. Neutrality as Conflict Resolution: Law Versus Politics

Lawyers and jurisprudes who adhered to the late-nineteenth-century worldview faced formidable obstacles to maintaining their belief in a legally regulated world free of conflict and coercion: As noted above, the Gilded Age saw a sharp increase in social conflict. Instead of relying on the coercive state, however, classical legal culture sought refuge in neutrality, expertise, and the distinction between law and politics in order to present a public philosophy that held out the promise not of brokering and managing such conflict, but of avoiding it entirely.

1. Law Versus Politics

Such a belief characterized Langdellian legal science, even though classical orthodoxy—while not opposed to state regulation—had little interest in it. Legal science's key task lay in the discovery of legal *principles*, which could apply uncontroversially to every case presented.[138]

Where did these principles come from? Certainly not from the exercise of state power, in keeping with the Gilded Age's anathema to positivism. Instead, they merely *existed*. Legal scientists saw individual appellate cases as akin to scientific experiments: Compiling and classifying the results of those experiments would reveal the natural order of things. In the same way, compiling and classifying the results of cases would reveal the general principles that the law comprised. Once these principles were derived, they then could be used to determine future cases. In this way, legal science combined both inductive and deductive reasoning. The law, Joseph H. Beale stated confidently, "is not a mere collection of arbitrary rules, but a body of scientific principle."[139]

These principles were thus *neutral*: Appellate cases were expressions of reason, not markings of will. The application of legal science would reveal the general principles underlying the cases. These general principles could then be used to determine the "right" answer to subsequent cases. Politics and power simply never entered the equation. As Robert Gordon has noted, "On this model, the progressive discovery of the underlying principles of the social order would provide the means for its neutral, disinterested management in everyone's interest so that conflict (between, for example, capital and

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138 See Grey, supra note 4, at 15.

139 1 Joseph H. Beale, A Treatise on the Conflict of Laws 24-25 (1935).

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labor) would seem pointless and illicit domination would become impossible."[140]

2. *Consensual Regulation*

The history of early efforts at economic regulation, exemplified by Cooley at the Interstate Commerce Commission (ICC) and Charles Francis Adams, Jr. at the Massachusetts Board of Railroad Commissioners, demonstrate this intellectual mood. In 1887, Cooley became the ICC's first chair and faced what appeared to be a formidable barrier to success. The infant agency's swaddling clothes resembled a straitjacket: The ICC could set aside particular instances of unjust rates, but not establish those rates to begin with, and the judiciary reviewed its orders de novo.[141] Similarly, Adams's Massachusetts Board had no power to enforce any of its recommendations and even lacked a procedural mechanism to hold hearings. Adams noted some years after the agency's formation that "[t]he Commissioners have no power except to recommend and report. Their only appeal is to publicity. The Board is at once prosecuting officer, judge, and jury, but with no sheriff to enforce its process."[142]

But such apparent impotence fazed neither man. Cooley wrote to his wife, "The less coercive power we have the greater, I think, will be our moral influence."[143] Cooley objected to the view that the ICC was a "police court" focused on coercion; instead, he believed it should focus on the "gradual education of the public in the matter of railway transportation, the quiet work we can perform in the improvement of the law [and] the unification of a railway system."[144] Similarly, Adams's philosophy focused on mobilizing public opinion to obtain *voluntary* compliance from railroads, and his methods centered upon producing detailed reports concerning such matters as rates, railway safety issues, and labor relations.[145] Historians refer to this concept as the "Sunshine Commission," a regulatory agency that would

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[140] Gordon, Legal Thought, supra note 1, at 93.

[141] On the Interstate Commerce Commission's early powerlessness, see Owen M. Fiss, Troubled Beginnings of the Modern State, 1888–1910, at 195-96, 196 n.43 (1993).

[142] Thomas K. McCraw, Prophets of Regulation 20 (1984) (quoting Charles Francis Adams, Jr.).

[143] Letter from Thomas M. Cooley to Mary H. Cooley (Oct. 21, 1888) (on file with Thomas M. Cooley Papers, Bentley Historical Library, University of Michigan).

[144] Thomas M. Cooley, Diary (Sept. 19, 1889) (on file with Thomas M. Cooley Papers, Bentley Historical Library, University of Michigan).

[145] See McCraw, supra note 142, at 23-25.

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reform industry practices through the salutary medium of public scrutiny and exposure.[146]

The Sunshine Commission philosophy rested principally upon its conception of social interests. Both Adams and Cooley understood that compliance was not wholly voluntary and automatic; Adams, for example, understood that exhortations to the railroads to change their practices came with rising popular pressure for stringent coercive regulation. But both firmly believed that such coercive instruments were generally unnecessary because of the identity of interests between the public and the corporations. Cooley argued that under properly designed regulation, "the true interests of the owners of railroad property may be made to harmonize perfectly with the true interests of the public, and that it will be as wise for the state to encourage and protect whatever in corporate arrangement is of beneficial tendency as it will be to suppress whatever is mischievous."[147] In his first annual report, Cooley went so far as to contend that the Interstate Commerce Act "was not passed to injure any interests, but to conserve and protect";[148] under these conditions, coercive enforcement was not needed.

If interests, however, were essentially harmonious, why did conflict exist in the first place? The answer lay in the parties' misunderstanding of their own interests. Adams contended that labor unions arose because the railroads themselves refused to acknowledge the new conditions brought about by industrialization, which required a new system of labor relations. He thus argued for a set of policies that rail corporations should adopt voluntarily to achieve industrial peace.[149] Thomas McCraw observes that "Adams was reasoning from a premise of attainable harmony. Under proper institutional arrangements, industrial peace would reign automatically. Conflict, more apparent than real in any case, would simply disappear, as the interests of the corporations, their employees, and the public converged."[150] These outdated institutional arrangements caused conflict that new, noncoercive regulatory forms, discovered through the application of intelligence, could eliminate.

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146 See Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1216-19 (1986).

147 T.M. Cooley, Popular and Legal Views of Traffic Pooling, 24 Railway Rev. 211, 213 (1884).

148 1887 Interstate Commerce Comm'n Ann. Rep. 19-20.

149 These policies, which now go by the name of "welfare capitalism," centered on a plan for step raises, the protection of workers' seniority, and the establishment of private disability and life-insurance benefits for workers. McCraw, supra note 142, at 42-43.

150 Id. at 43.

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3. Developing Apolitical Law: Root and the Restatement Movement

Root maintained a deep connection with Langdellian ideals throughout his life. As noted above, he learned law through the case method at NYU in the 1860s—four years before it was introduced at Harvard.[151] In his 1916 presidential address to the American Bar Association, he concisely expressed the Langdellian ideal of legal science. "The living principle of the case system of instruction in our law schools," he observed, "is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history."[152]

The clearest evidence of Root's classical orthodoxy lies in the leading role he took in founding the American Law Institute and promoting its "Restatements" of the common law. Root played a central role in ensuring that the ALI and Restatement project came to fruition. In his ABA presidential address, he called for a systematic classification of the law along lines that the Restatement project eventually adopted. Most prominently, Root arranged for the ALI's financing: As chairman of the board of trustees of the Carnegie Corporation, he pushed through millions of dollars in grant money to underwrite the ALI's start-up expenses. Indeed, "[h]is handiwork can be discerned in every detail of [its] arrangements."[153] The ALI concept originated in the Association of American Law Schools, but Root directed that a Permanent Organizing Committee, which would include practitioners and jurists, take the lead in developing and finalizing the proposal. Not surprisingly, at the committee's first meeting, it unanimously elected Root as its chairman. The committee's work culminated in 1923 with the founding of the ALI; Root, by now nearly eighty years old, became its honorary president.[154]

The Restatement project "betrayed an obviously Langdellian world-view."[155] The report of the ALI's first meeting announced that its principal objective was "to help make certain much that is now

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[151] See 1 Jessup, supra note 19, at 61 (describing teaching method of Root's teacher, Professor John Norton Pomeroy, as "not unlike the case system later perfected by Langdell"). Langdell became Dean at Harvard and began the case system there in 1870. Grey, supra note 4, at 1; see also Stevens, supra note 55, at 51-56.

[152] Elihu Root, Public Service by the Bar, Address as President of the American Bar Association at the Annual Meeting in Chicago (Aug. 30, 1916) [hereinafter Root, Public Service by the Bar], in Addresses on Government and Citizenship, supra note 49, at 519, 532.

[153] N.E.H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 Law & Hist. Rev. 55, 75-76 (1990).

[154] Id. at 77.

[155] Neil Duxbury, Patterns of American Jurisprudence 24 (1995).

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uncertain and to simplify unnecessary complexities."[156] In case anyone had any doubt as to the Langdellian origins of the project, the ALI chose four Harvard professors with impeccable classical orthodox credentials.[157] Root, then, bore a large responsibility for the institutionalization and growth of classical legal science outside the academy.

G. Evolution and the Lure of History

Legal culture between the end of the Civil War and the beginning of World War I marked the "heyday of legal evolution."[158] The term "evolution" evokes visions of Darwinism (both social and otherwise), but it is a mistake to assume that all or even most evolutionary thought was Darwinian. Instead, evolutionary legal thought in the late nineteenth century resembled a mish-mash of different theories, none commanding dominant assent: Legal thinkers could not agree on the precise *mechanism* of historical change. Evolution, however, did suggest that historical change had purpose and moral meaning.

1. The Historist Moment

The nineteenth century marked a transformation in the historical consciousness of American thinkers. While eighteenth-century American intellectuals conceived of history as a pattern of repeating cycles,[159] their nineteenth-century counterparts saw history evolving through different stages of growth. Stephen Siegel has identified a pattern of thought, which he dubs "historism," that reflected the intellectual currents of the age.[160] Historism reflected modern social thought because it saw social change as a constant process, often

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156 Report of the Comm. on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute, 1 A.L.I. Proc. 1, 14 (1923).

157 Thus, notes Neil Duxbury, "the [American Law Institute] had bestowed professional credibility on the Langdellian idea that the basic principles of law are simply there to be discovered by logical analysis and thereafter reported in a fashion which reflects their 'real'—meaning unambiguous—nature." Duxbury, supra note 155, at 24.

158 See Stein, supra note 70, at 69-98.

159 This brief discussion is derived primarily from Dorothy Ross, Historical Consciousness in Nineteenth-Century America, 89 Am. Hist. Rev. 909 (1984). Ross emphasizes the nineteenth-century growth in "historicism," which she defines as "the doctrine that all historical phenomena can be understood historically, that all events in historical time can be explained by prior events in historical time." Id. at 910. She contrasts historicism with the work of such representative figures as George Bancroft, who saw God acting directly and constantly in time. To Bancroft, history reflected the constant unfolding of God's will. Id. at 915-17. Thus, "historism" as it is discussed in this Section's notes and accompanying text reflects historicist tendencies but is not fully historicist because of the emphasis it places on the meaning of historical events and the role of God in bringing about those events.

160 See Siegel, supra note 71, at 1435.

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brought about by mundane and (importantly) secular causes. Yet historism followed earlier modes of social thought by maintaining that this ongoing process of social change carried meaning: History was not simply one damn thing after another.[161]

This belief in historical meaning sharply distinguished it from Darwinian theory, which held that evolutionary change occurred as a result of random and accidental variations.[162] Instead, as Cooley asserted, "[t]here have been revolutions in many things, but the onflow of the law has been as steady as it has been majestic; as peaceful as it has been resistless."[163] Similarly, Beale wrote that "the common law changes. . . . The law of today must of course be better than that of seven centuries ago, more in accordance with the general principles of justice, more in accordance with the needs of the present age, more humane, more flexible and more complex."[164]

Nineteenth-century legal thinkers disagreed or simply remained vague on the particular mechanism that caused the change. It could be natural law, custom, ethnic culture, or even law professors.[165] But

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161 Thus, Pomeroy stated that ancient legal systems were typified by "arbitrariness" and "rude forms" and diverged sharply from the "innate principles of natural justice." But "as a nation advances in civilization," he argued, "we uniformly find" that "equity displaces force; right supplants might; [and] fewer instances of hardship and injustice occur in the actual working of the [legal] system." Pomeroy, supra note 75, § 12, at 8.

162 Historians have rejected Darwinism as a major influence on Gilded Age legal theory. See William E. Nelson, The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 561 n.336 (1974). Hovenkamp also concludes that "Social Darwinism is the most overrated of Gilded Age ideologies," that "the influence of Social Darwinism was much less than we have been led to believe," and that "in both economics and law, 'Social Darwinism' was much more an epithet than an analytic tool." Herbert Hovenkamp, Enterprise and American Law, 1836–1937, at 99-100 (1991).

163 Cooley, supra note 82, at 366; see also Cooley, supra note 80, at 13 (stating that common law principles "grow and expand, and . . . actually become more comprehensive, though so steadily and insensibly . . . that for the time the expansion passes unobserved"); id. at 15 (describing common law development as "moderate," involving "steady and almost imperceptible change").

164 Joseph H. Beale, A Treatise on the Conflict of Laws or Private International Law 149 (1916). Beale argued that "[t]his must be true, or the science of law, differing from all other sciences, would be unprogressive." Id. Langdell also believed strongly in the gradual and progressive (and thus non-Darwinian) nature of legal evolution. Each basic legal doctrine, he averred, "has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries." Langdell, supra note 58, at vi.

165 See James Barr Ames, The Vocation of the Law Professor, in Lectures on Legal History 354, 366-67 (1913) (explaining that professors "are destined to exercise a great influence in the further development of the law"). Beale argued that "[t]he teachers of law today have an increasing influence, and one which is comparable in degree with the part played by the judges, in the development of the law; and their power to mould professional opinion is likely to increase in the future more rapidly than that of the judges." Beale, supra note 164, at 150. Thomas Grey observes that on the Langdellian model, "[p]rogress occurred when the scholar (or the great judge or lawyer) discovered a previously unrecog-

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they all agreed that it was not the state. The late-nineteenth-century belief in legal evolution carried important normative meaning because of its anti-positivist implications: If culture, custom, or human nature inexorably pushed law in certain directions, then sovereign commands must be far less powerful.[166] This buttressed the legal-peripheralist agenda and allowed late-nineteenth-century legal culture to downplay the role of the coercive state.

Even when social norms and voluntary institutions could not establish complete order, they played a crucial role in the evolution of a legal system and the development of social peace. Thus, focused attention on such norms and institutions was vital in classical legal ideology. This becomes clear in an examination of late-nineteenth-century legal thinkers' account of a fundamental issue: the development of judicial authority to settle disputes. These thinkers used this concrete example to show that (1) law gradually "improved" over time; (2) that it was gradually adopted as a custom by the populace; and (3) that this adoption did not involve the exercise of coercive force.

2. *The Origins of Courts*

Legal thinkers of the late nineteenth century frequently grappled with a fundamental historical question: How did judicial settlement of disputes arise? They framed this question not as how the judiciary obtained authority from executives, but rather how judicial settlement of disputes arose out of anarchy.

The preeminent legal evolutionist was Sir Henry Maine, and he proceeded by parsing Roman law. Without a coercive state to command obedience, courts only could be established through voluntary submission, and according to Maine, that was precisely what occurred.[167] He noted that Roman law "assume[d] that the quarrel is at once referred to a present arbitrator."[168] The prospective punishment of the coercive state faded quickly into the background.

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nized principle, one that provided a simple and satisfying explanation for existing decisions, and that at the same time reflected the slowly changing needs and conditions of society." Grey, supra note 4, at 31.

166 See E. Donald Elliott, The Evolutionary Tradition in Jurisprudence, 85 Colum. L. Rev. 38, 92-93 (1985) (writing that use of evolutionary theories as source of ultimate meaning in law carried normative power). Nineteenth-century legal evolutionary theorists explicitly argued this point. See, e.g., Freidrich von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence 30 (A. Hayward trans., Arno Press 1975) (1831) (contending that "all law . . . is at first developed by custom and [conventional morality], next by jurisprudence,—everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver").

167 Maine, supra note 71, at 253-56.

168 Id. at 260; see also Maine, supra note 73, at 365.

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Maine acknowledged that voluntary arbitration could not account completely for the origins of judicial dispute resolution,[169] but he found the answer in the action for distress, or distraint, through which an aggrieved party may take forcible possession of movable property or land and hold it until the adverse party agrees to arbitration. A modern court, he observed, could take "the whole dispute into its own hands" because it has "the full command of the public force" and is thus "sure of being able to compel the submission of the defendant to its jurisdiction and of coercing him in the end till he does justice . . . . But at the era to which the procedure in distress originally belonged, *the Court had no such assurance of power* . . . ."[170] Instead, Maine suggested, the idea was to recalibrate parties' incentives. "The person assumed to have a grievance," he commented, "is allowed to proceed according to the primitive method, which has the advantage[s] of giving the other side the strongest inducements to call in the judicial authority of the State and submit to its decision."[171]

Maine's account raises a key question—at least to the modern reader—concerning the relative power of the adverse parties. The two parties under this scenario wind up in front of a judge only if the distrainor is more powerful than the distrainee—if the opposite were true, the property could never be possessed or seized in the first place. But if that is the case, then why should the distrainor now accept the court's jurisdiction once he has seized the property? He has got what he wanted and then some.

Maine noted obliquely that the weak state's power "consisted, neither in wholly forbidding [the dispute] nor in assuming active jurisdiction over the quarrel which provoked it, but in limiting it, prescribing forms for it, or turning it to new purposes. . . . Distress now becomes a semi-orderly contrivance for extorting satisfaction."[172] This hardly answered the question directly, but it did imply that the notion of voluntary submission unsanctioned by the state was both a crucial notion and what actually occurred. The existence of the procedure, even if noncompulsory, created a social norm: If the distrainor appealed to judicial norms, even if nonsanctioned, and the distrainee finally agreed to the court's jurisdiction, the former could not then turn around and change his mind. Appealing to the court initially

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169 See Maine, supra note 71, at 259 ("[S]uppose there is no arbitrator at hand, . . . [w]hat expedient for averting bloodshed remains, and is any such expedient reflected in that ancient procedure which, by the fact of its existence, implies that the shedding of blood has somehow been prevented?").

170 Id. at 268 (emphasis added).

171 Id. at 268-69.

172 Id. at 266.

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meant that he would have to submit to it subsequently: Refusing to submit would change the inherent social meaning of his action. Why should he care about this shift? Maine remained silent.

But he insisted that distress became effective even without the state. He posed the critical questions squarely: "What were these Courts? To what extent did they command the public force of the sovereign State?"[173] Here, his answer was straightforward: Court systems might "be highly developed and yet their jurisdiction might be only voluntary."[174] He noted that

> in the earliest times and before the full development of that kingly authority which has lent so much vigour to the arm of the law . . ., Courts of Justice existed less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong.[175]

The implication, then, was that parties had sufficient interests and desire to mediate their conflicts, but lacked the proper mechanisms to do so. In other words, large gains in order and stability could be achieved in the absence of state coercion by providing proper dispute resolution institutions.

Maine wisely avoided suggesting that such an institutions gap was universally the case. "[T]here is no . . . inconsistency," he argued, "between the prevalence of disorder and the frequency of litigation as would make them exclude each other."[176] The point was that society shifted over time from violence to litigation. "[C]ontention in court," he concluded, "takes the place of contention in arms, but only gradually takes its place."[177] Such a transition, he suggested, explains much of ancient civil procedure: "[I]t is a tenable theory that many of the strange peculiarities of ancient law, the technical snares, traps, and pitfalls with which it abounds, really represent and carry on the feints, strategems, and ambuscades of actual armed strife between man and man, between tribe and tribe."[178]

Carter cited Maine's account of the origins of arbitration approvingly and commented that the judge in this scheme "was the successor of a private citizen to whom two disputants had voluntarily submitted their difference."[179] Why, though, would people engage in such voluntary submission? Surely the stronger party would not submit if he

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173 Id. at 286.
174 Id. at 288.
175 Id.
176 Id.
177 Id. at 289.
178 Id.
179 Carter, supra note 74, at 50.

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thought he could get what he wanted by force. Not true, said Carter: "[T]he first step in repressing the private redress of wrongs among Western European peoples was in bringing about an arbitration of quarrels."[180] Arbitration, though, derived from consenting to the legal expertise of arbitrators: "This employment of arbitrators must have been voluntary, for there was, at the time, no organised society capable of enacting laws or contriving other social arrangements."[181] Carter noted that there was a class of people skilled at arbitration and since

> [t]hey could have no authority except such as was derived from the assent of disputants . . . such assent must have been habitually given; for otherwise there would not have arisen the demand for such a class. The custom, therefore, was brought about of displacing the bloodshed and violence of self-help with the peaceful method of arbitration.[182]

In their account of the origins of judicial dispute settlement, Maine and Carter demonstrated an application of the historist evolutionary "mechanism." First, history moved in a particular direction in accordance with transcendent moral principles. Second, experts and scholars drove legal development through their ability to discover broader legal principles. Third, this process was enforced not through the coercive power of the state but rather through the development of custom and habit to follow the decrees of judges.

3. *Root and Legal Evolution*

Root strongly adhered to historist and evolutionary beliefs. His speeches, writings, and personal letters are filled with constant references to evolutionary processes and an insistence on waiting patiently for conditions to develop, grow, and change. A typical statement is found in an address to students at his alma mater, Hamilton College.[183] "Civilization," he told the undergraduates, "is the product of inter-dependent, associated effort of man, and the working of this aggregate of power and achievement is a biological study."[184] But this biology was not a product of Darwinian mutations; instead, civilization "can go higher and farther because mankind by infinite struggling has built up step by step, century by century, a platform from which

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180 Id. at 50-51.

181 Id. at 51-52.

182 Id. at 52.

183 Elihu Root, Address to the Undergraduates of Hamilton College in the Chapel (Sept. 25, 1926) (on file with Philip C. Jessup Papers, box 138, Library of Congress).

184 Id.

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we can go on."[185] Mediating the "wisdom of the past" with the "possibilities of the future"[186] was the task of education, which accomplished its goals in a typically historist process: "Always human progress and betterment starts necessarily from the achievements of the past and goes on preserving those achievements in better things."[187] But this did not occur through coercion:

> All uplift of mankind, all the improvement od [sic] civilization, is the result of a spiritual process, never of an external application of force. Mankind makes progress in morals, in human relations, always by the gradual elevation of standards of conduct, always by the gradual improvement in the conception of what is desirable to do and be, and that is a long slow process, painfully slow . . . because it is a process which goes on in human heart and soul.[188]

In the same way that Carter declared that law is an emanation from order and not a command from the sovereign, Root averred that progress could not come from sovereign command but only as an emanation from human hearts.

III
FINDING CLASSICAL LEGAL THOUGHT IN AMERICAN FOREIGN POLICY

Part II sought to outline classical legal ideology and suggest how it carried important implications for American foreign relations. In particular, as noted above,[189] the stress on legal peripheralism, the separation of law and politics, the denial of fundamental interest conflicts, and the emphasis on evolutionary thinking implied that (1) international legal institutions could serve as sturdy bulwarks of global order; (2) realism was an inappropriate model for foreign policy; and (3) setbacks to international legal order were merely temporary bumps in the road, not indications of fundamental conceptual errors.

The parts that follow attempt to connect classical legal ideology and American foreign policy by showing that much of the reasoning and language used to support international law closely resembled the reasoning used by classical legal thought in the domestic sphere. Such reasoning and language does not correspond perfectly, but it provides important evidence of a similar intellectual basis.

Just as importantly, these parts seek to demonstrate that lawyer-diplomats had other conceptual options—options that were frequently

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185 Id.
186 Id.
187 Id.
188 Id.
189 See supra notes 61-66 and accompanying text.

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taken up by nonlawyers. The most prominent of these other options were:

Traditional American isolationism. The clearest option was to refrain from active U.S. involvement in global politics, a tack supported by most Americans before the First World War and which commanded significant support in Congress (although not among those officials who had elite legal backgrounds). Generally speaking, isolationism held that, protected by two vast oceans, the United States easily could afford not to involve itself in world politics.[190] Root and other lawyers, however, sharply rejected this option. They strongly opposed isolationist sentiment and advocated active engagement in international affairs and institutions.

Realpolitik/Classical realism. This path received its strongest endorsement from Theodore Roosevelt, whom Root served as Secretary of State and with whom he remained close until 1912. Roosevelt, a nonlawyer, had little interest in international law and institutions and based his foreign policy on the balance of power. During the First World War, backed by influential thinkers such as the naval theorist Alfred Thayer Mahan and the diplomat Lewis Einstein, Roosevelt advocated a balance-of-power alliance with Great Britain. This tradition received its strongest expression in the proposed tripartite security treaty with England and France after the War. Root and other lawyers, however, put such considerations at the periphery of their foreign policy thought, if anywhere at all.

Wilsonianism. While often dubbed a "legalist," Woodrow Wilson's brand of progressive internationalism diverged sharply from the vision that Root and other legalists promoted. Wilson, a nonlawyer,[191] believed that war stemmed from the internal characteristics of

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[190] This means that "isolationism" is somewhat of a misnomer because the term implies a sort of quarantine for the United States. Isolationists did not mean this and often advocated engagement with Latin America (and at times, East Asia). But they rejected any attempts at American expansionism, either political, financial, or commercial, and strongly resisted any engagement with Europe. See generally Selig Adler, The Isolationist Impulse (1957) (arguing that "isolationism" has unique meaning in American context); Robert David Johnson, The Peace Progressives and American Foreign Relations (1995) (asserting that congressional "peace progressives" espoused more complex foreign policy than isolationist label they have acquired would indicate).

[191] In fairness, it must be conceded that as a young man Wilson graduated from the University of Virginia Law School. See Cooper, supra note 21, at 44-47 (describing Wilson's dissatisfaction with law school and legal practice). But Wilson explicitly turned his back on the profession after practicing only a year, seeing it as without promise for leadership, and instead went to graduate school, where he found his true intellectual and philosophical home. He never practiced again and wrote exclusively in political science.

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states and social injustice; his Fourteen Points[192] and the League of Nations Covenant (League Covenant or Covenant) derived from his desire to transform world politics fundamentally. While his program bore superficial similarities to the legalists, it had very different origins and aims. Elite lawyers frowned on his program and gave Wilson little support during the fight over the Versailles Treaty, although Root attempted to provide constructive opposition.

As will be seen, one can explain Root's (and other elite lawyers') external policy preferences by viewing them in light of classical legal thought. Moreover, these preferences did not arise out of general social drift. Lawyers had other options; unlike nonlawyers, they chose not to exercise them.

IV
ROOT AT THE WAR DEPARTMENT

A. Into the Cabinet

Despite his extensive political involvement and financial largesse to the Republican Party, Root hardly expected to receive a Cabinet appointment from President William McKinley, whom he had met once but did not know well. There is no evidence that Root lobbied or pushed for a post. Instead, the story appears to be consistent with the one that Root told later in his life:

> I was called to the telephone and told by one speaking for President McKinley, "The President directs me to say to you that he wishes you to take the position of Secretary of War." I answered, "Thank the President for me, but say that it is quite absurd, I know nothing about war; I know nothing about the army." I was told to hold the wire, and in a moment there came back the reply,
>
> > President McKinley directs me to say that he is not looking for any one who knows anything about war or for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants.
>
> Of course I had then, on the instant, to determine what kind of a lawyer I wished to be, and there was but one answer to make, and so I went to perform a lawyer's duty upon the call of the greatest of all our clients, the Government of our country.[193]

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192 Woodrow Wilson, Fourteen Conditions of Peace, Address to Congress (Jan. 8, 1918), in Selected Addresses and Public Papers of Woodrow Wilson 244 (Albert B. Hart ed., 1918).

193 Elihu Root, The Lawyer of Today, Address Before the New York County Lawyers' Association, New York City (Mar. 13, 1915) [hereinafter Root, The Lawyer of Today], in Addresses on Government and Citizenship, supra note 49, at 503, 503-04; see also Interview by Philip C. Jessup with Elihu Root (May 4, 1930) (on file with Philip C. Jessup

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Thus, legalism figured heavily in the appointment from the beginning. He noted to Attorney General John W. Griggs that "I think the main feature of the change I am making is the formation of a new law firm of 'Griggs and Root, legal advisers to the President, colonial business a specialty.' I only regret that I can't play golf better."[194] Whether the Attorney General appreciated the new Secretary of War muscling in on the job of presidential legal advisor is not recorded, although the Cabinet was apparently unanimous in favoring Root's selection.[195]

Ironically, Root (along with most elite lawyers) had expressed reticence about America's new imperial venture. Although he favored Cuban independence, he was quite tepid about American military involvement in Cuba[196] and seemed more concerned that McKinley's inaction might benefit the Democratic Party in the upcoming midterm elections. But when Root focused on the crisis's international implications, he stayed away from questions of power. Instead, in a letter to Interior Secretary Cornelius Bliss, he contended that if the President were to back off from demands for Spain to abandon Cuba it would

> appear[ ] to the Civilized World in the attitude of admitting that our demands were unjustified; that Spain was right and that we were wrong. Either we have been impertinent meddlers in affairs which did not concern us, or, on Spain's refusal to do what we require we are entitled to intervene. To deny the one is to assert the other. The moral support that would be given to Spain abroad by such a position on the part of the President would be incalculable and the consequences of it in this country would be frightful.[197]

Root's foreign policy argument resembled appellate advocacy. After making demands upon Spain, the important task was to assemble a coherent argument. Otherwise, something called "moral support" would be given to Spain, which could cause "incalculable" damage. Root hardly made clear what would be the precise effect of such incalculable moral support.[198]

Papers, box 233, Library of Congress) (noting that Root refused post until McKinley told him he wanted lawyer for it).

194 1 Jessup, supra note 19, at 219 (quoting Root).

195 See George B. Cortelyou, Diary (July 22, 1899) (on file with George B. Cortelyou Papers, box 1, Library of Congress).

196 See Letter from Elihu Root to [Interior Secretary Cornelius N.] Bliss (Apr. 2, 1898) (on file with Elihu Root Papers, box 1, Library of Congress) (saying about possibility of war, "I prefer that we should not do it; I don't think we are bound to do it; I would prevent it if I could").

197 Id.

198 It seems highly unlikely that Root contemplated the formation of an anti-American league among the great powers. Some international leaders, particularly Kaiser Wilhelm II

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But he clearly believed in an international community of nations, where "moral support" had important effects. "Moral support" was not merely rhetoric; it was, instead, the authentic expression of a community that generated powerful social norms. Pomeroy, Carter, and historical jurisprudence explained that a domestic community could enforce certain customary morals and behaviors on individuals; the international community, perhaps, could do the same.[199] When confronted with the concrete problems of American imperialism, Root began to clarify his position: Nations could gain this moral support by putting their policies on a firm legal footing. Adhering to international law could develop the international social norms necessary to maintain global stability.

B. Cuba

The future of Cuba served as the *casus belli* between Spain and the United States, but the McKinley administration quickly rejected the possibility of holding onto Cuba; instead, the questions focused on the methods and timing of independence. Root's contribution lay primarily in creating what later became known as the Platt Amendment (named after its Senate sponsor). The Platt Amendment served as the official legal authority for granting Cuban independence and contained a famous clause allowing the United States to intervene milita-

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of Germany, made noises about constructing a unified European front against the United States. But such a front quickly collapsed of its own weight: The Powers simply did not consider the Cuban crisis to be of such importance that it required standing up for a decaying power (Spain) against a rising one (the United States). See Ernest R. May, Imperial Democracy: The Emergence of America as a Great Power 196-219 (1961) (arguing that self-interests of each European power interfered with and ultimately doomed formation of alliance against United States). In any event, such an anti-American league hardly would have been formed as a response to American ambivalence; rather, it was mooted as a response to U.S. self-assurance and aggressiveness. "Moral support," whatever Root meant by it, surely did not mean a conventional international alliance.

[199] Root's early beliefs scarcely represented a robust theory of international politics. One need only read his summation to Bliss to grasp his ambivalence: "I deplore war," he told his friend.

> I prefer that we should not do it; I don't think we are bound to do it; I would prevent it if I could; I think the President has been right in trying to prevent it, but if it is to be done, then every American ought to be for the war heart and soul, and first and foremost and without the slightest uncertainty or question should be the President of the United States.

Letter from Elihu Root to [Interior Secretary Cornelius N.] Bliss, supra note 196. For all its murkiness, however, Root's missive captured the feelings of the American elite: Bliss reported that not only did the letter "express[ ] my own sentiments," but it was approved by the President, the Vice-President, "and several Senators." Letter from [Interior Secretary Cornelius N.] Bliss to Elihu Root (Apr. 6, 1898) (on file with Elihu Root Papers, box 1, Library of Congress).

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rily "for the preservation of Cuban independence."[200] Washington's insistence on including this clause in the Cuban constitution delayed independence for several months and damaged relations with Latin America.

Root, however, insisted on its inclusion for reasons that in retrospect seem bizarre. He later explained, "You cannot understand the Platt Amendment unless you know something about the character of Kaiser Wilhelm the Second."[201] As early as the turn of the century, Root distrusted German diplomacy and suspected that the Kaiser wished to expand his sphere of influence in the Americas. There was a widespread fear among American officials of German aggression,[202] and policymakers looked for a method of deterrence.

But how could the Amendment accomplish that? Root had a ready answer. "In international affairs," he told Cuban Governor-General Leonard Wood, "the existence of a right recognized by international law is of the utmost importance."[203] Root explained to Wood that by virtue of its peace treaty with Spain, the United States had the recognized right to intervene in Cuban affairs. But

> [i]f we should simply turn the government over to the Cuban administration, retire from the island, and then turn round to make a treaty with the new government . . . no foreign State would recognize any longer a right on our part to interfere in any quarrel which she might have with Cuba, unless that interference were based upon an assertion of the Monroe Doctrine.[204]

The Monroe Doctrine, however,

> is not a part of international law and has never been recognized by European nations. How soon some one of these nations may feel inclined to test the willingness of the United States to make war in support of her assertion of that doctrine, no one can tell. It would be quite unfortunate for Cuba if it should be tested there.[205]

This reasoning seems remarkably circular. On the one hand, Root and American officials firmly believed that Berlin would attempt to encroach in the Western Hemisphere and felt that a mere

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200 For the text and discussion of the Platt Amendment, see 1 Jessup, supra note 19, at 310-24.

201 Id. at 314 (quoting Letter from Elihu Root to Philip C. Jessup (Dec. 20, 1934) (on file with Philip C. Jessup Papers, box 138, Library of Congress)).

202 See Stuart Creighton Miller, "Benevolent Assimilation": The American Conquest of the Philippines, 1899–1903, at 19 (1982) (noting deep suspicion among American policymakers of Germany's international intentions).

203 Letter from Elihu Root to Leonard Wood (Jan. 9, 1901) (on file with Elihu Root Papers, box 168, Library of Congress).

204 Id.

205 Id.

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statement by the United States forbidding such encroachment—the Monroe Doctrine—was inadequate to forestall German aggression. But why, then, would a simple legal device like a provision of the Cuban constitution do anything to change the situation?

Root's answer was vague. "Because of . . . [the Amendment]," he argued, "European nations will not dispute the intervention of the United States in defense of the independence of Cuba."[206] This of course assumed that having a sound footing in international law would prevent European nations from objecting to U.S. intervention. "Good diplomacy," Root asserted, "consists in getting in such a position that upon a conflict's flaming up between two nations the adversary will be the one which has violated the law."[207] This assertion, however, was far from obvious: Traditional diplomacy emphasized not whether a nation had international law on its side, but whether it could persuade other countries that supporting its side would foster those other nations' important strategic or political interests.

Root explained his thinking further to Secretary of State John Hay. Referencing Great Britain's possession of Egypt, he told Hay that

> there was at one time a great deal of discussion over the effect which the vesting in England of a right of intervention in Egypt would have, and my impression is that some good authorities were of the opinion that it would enable England to retire and still maintain her moral control, and prevent the backsliding of the Egyptian Government.[208]

Root's insistence on the Platt Amendment, then, exemplified the beliefs of late-nineteenth-century legal culture. Like Thomas Cooley at the ICC, Root placed great emphasis on the influence of "moral control." His reliance on traditional international law principles, his emphasis on adhering to the customs and norms of international society, and his conviction that such reliance and adherence constituted effective foreign policy firmly planted him in the discourse of legal peripheralism. The mere invocation of the Monroe Doctrine, he suggested, would fail to energize the informal social controls that maintained international social order. Maintaining a commitment to norms and customs, however, would. How exactly would this work? Would the Kaiser be dissuaded from aggression because he, too, ad-

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206 1 Jessup, supra note 19, at 319 (quoting Root). These statements were made in a confidential conversation with a group of Cuban convention delegates who had come to Washington to object to the Platt Amendment.

207 Id. (quoting Root).

208 Letter from Elihu Root to John Hay (Jan. 11, 1901) (on file with Elihu Root Papers, box 168, Library of Congress).

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hered to these norms and would not risk breaking them? Or would his breach of those norms bring pressure from other members of the international community? Root did not say. But he was confident that maintaining international legal precedent could also maintain the fabric of international order.

C. "Lawyer's Work": Root, Taft, and the Imperialism of Suasion

If Cuba represented America's principal short-term cause of the conflict with Spain, the Philippines represented its greatest long-term administrative and political problem. Cuba was less than one hundred miles off the coast of Florida; the Philippines lay literally on the other side of the globe. Americans had a deep familiarity and experience with Cuba but knew virtually nothing about the Philippines. Most importantly, Cuban independence was the *sine qua non* of the war itself and forged an obvious mutual interest between the U.S. Army and Cuban revolutionaries; in the Philippines, however, President McKinley rejected independence, insisting instead that the archipelago remain an American possession, even if the United States's prime mission would be one of "beneficent assimilation."[209]

McKinley's policy led to political confrontations at home,[210] but as War Secretary, Root had a much sharper conflict to handle: a Philippine nationalist insurrection led by General Emilio Aguinaldo, the President of the nascent Philippine Republic. When Root entered office in April 1899, the Philippine-American War was already two months old; it would last for more than three years. More than four thousand Americans and approximately twenty thousand Filipinos eventually died in the conflict.[211]

Such circumstances clearly placed intense pressure on the classical legal worldview. It is difficult (to say the least) to insist that legal order derives consensually without the use of coercive state power while attempting to suppress a full-scale armed revolt. Root understood the need for overwhelming military force and ably directed the creaking U.S. Army bureaucracy into field efficiency.

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[209] The phrase "beneficent assimilation" is taken from President McKinley's instructions to the American Military Governor of the Philippines setting forth his decision to maintain American political and military control of the Philippines. Proclamation by the Military Governor of the Philippine Islands (Jan. 4, 1899), in 2 W. Cameron Forbes, The Philippine Islands app. VI, at 438 (1928) (quoting McKinley's instructions).

[210] Democrat William Jennings Bryan engaged in a "half-hearted" effort to make imperialism a central issue of the 1900 presidential election, Wiebe, supra note 17, at 241, and anti-imperialist forces challenged the administration's colonial policy both in the press and in Congress. See Miller, supra note 202, at 104-28 (1982).

[211] Richard E. Welch, Jr., Response to Imperialism: The United States and the Philippine-American War, 1899–1902, at 42 (1979).

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But in formulating colonial policy, Root refused to rest solely or even principally upon the military arm. Instead, he became the architect of what has been aptly called the "imperialism of suasion."[212] Root firmly dismissed the notion that Filipinos could govern themselves, but he also rejected the traditional European models of colonial rule—the American public would not stand for any imperialism that violated the Bill of Rights.[213] What emerged was a distinct form of imperialism comprising an amalgam of native traditions and American ones. In composing President McKinley's instructions to the Second Philippine Commission, which was given legislative power in the Islands and was to form the basis for the Philippines' future civil government, Root wrote:

> In all the forms of government and administrative provisions which they are authorized to prescribe, the Commission should bear in mind that the government which they are establishing is designed, not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.[214]

Carter and Pomeroy would have been proud: American rule in the Philippines was to be based on the custom and habit of Filipinos. For Root, this ruling mode was more than sheer moralism. Custom served a compelling practical purpose: It ensured that government would operate for the benefit of the governed and thus would yield stable colonial rule.[215]

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[212] The phrase is Peter Stanley's. See Peter W. Stanley, A Nation in the Making: The Philippines and the United States, 1899–1921, at 265-78 (1974) (characterizing America's presence in Philippines, generally marked by accommodation of Filipinos, as "imperialism of suasion").

[213] See Conversation of Philip C. Jessup with Mr. Root (Sept. 20, 1930) (on file with Philip C. Jessup Papers, Library of Congress) (recounting Root's conclusion that American Bill of Rights must circumscribe colonial policy).

[214] President McKinley's Instructions to the Philippine Commission (Apr. 7, 1900), in Forbes, supra note 209, app. VII, at 442.

[215] One objection to linking Root's reliance on custom with classical legal thought might be British colonialism's similar reliance on native customs. Lord Lugard, for example, espoused a strategy of "indirect rule," whereby the British Empire ruled its colonies through local hereditary dynasties and chiefs. See generally Lord Lugard, The Dual Mandate in British Tropical Africa 193-229 (5th ed. 1965) (setting forth principles of indirect rule). There is some evidence for British influence on Root's thinking: He acknowledged consulting works on British colonialism before writing the instructions. See Conversation of Philip C. Jessup with Mr. Root, supra note 213 (recounting that Root read books on British colonial experience to prepare himself for his task). While true, this hardly undermines the influence of classical legal thought. First, the British reliance on custom and native traditions was pioneered by Maine and his student (and sometime rival) Sir James F. Stephen in

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Root took care, however, to mediate customary with principle-based law. After the admonition concerning custom and habit, Root insisted that custom had to yield to "certain great principles of government which have been made the basis of our governmental system" such as the Bill of Rights. "These principles," he insisted, "must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the[ir] customs . . . [and] laws of procedure."[216]

On one level, it was hardly surprising that the U.S. Secretary of War should insist upon the primacy of American law. But first, this insistence served as a side constraint on the basic principle of yielding to indigenous custom.[217] Moreover, Root never argued for the supremacy of American law as such; indeed, at the time he wrote the instructions it was unclear whether the Constitution required any civil liberties to be maintained in American colonial possessions.[218]

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their capacity as the Legal Member for the Viceroy's Council of India. See Feaver, supra note 70, at 90-107 (detailing how Maine and Stephen successfully turned back previous Benthamite policies regarding British colonial legal policy in India); Michael H. Fisher, Indirect Rule in India: Residents and the Residency System 1764–1858, at 446-47 (1991) (noting that Maine developed key concept of sovereignty for English "indirect rule" philosophy); Eric Stokes, The English Utilitarians and India 312-13 (1959). Thus, American and British colonial policy derived from the same source. It is hard chronologically to argue that Root's policy aped the British. The apex of reliance upon customary law and indirect rule postdated Root's instructions. For example, Lugard did not become Governor of Nigeria until 1913. In Kenya and Uganda, the original imperial directive establishing a legal framework for those colonies did not require adherence to customary law. See H.F. Morris & James S. Read, Indirect Rule and the Search for Justice: Essays in East African Legal History 167-212 (1972). Only five years later (two years after Root's instructions) did Britain order the resident commissioner "to respect existing native laws and customs." East Africa Order in Council, 1902, Stat. R. & O. No. 2. Indeed, in East Africa, when the British needed to develop statutes for colonial governance, they did not create them based upon East African custom, but rather imported them wholesale from India—an experiment ultimately rejected. See Morris & Read, supra, at 109-30 (describing rationale for adoption and eventual abandonment of Indian Codes in East Africa). In addition, American rule in the Philippines cannot be called indirect rule: That term refers to, among other things, continuity of preexisting "native authority." See Fisher, supra, at 4-7.

216 President McKinley's Instructions to the Philippine Commission, supra note 214, at 443.

217 This caveat provides some evidence that Root paid less than careful attention to British colonial precedent: He made much of the fact that he rejected British precedents because of the Bill of Rights. See supra note 213. However, this caveat was not much different from Britain's, which always qualified fidelity to custom, stating that "native laws and customs . . . so far as the same may be opposed to justice or morality" would not be enforced. E.g., East Africa Order in Council, 1902, Stat. R. & O. No. 2; see also Morris & Read, supra note 215, at 175 (noting common application of such clauses). This basic misreading of British practice suggests that it was not foremost in Root's mind when he composed the Philippine Commission's instructions.

218 The Supreme Court considered these questions in the Insular Cases. In De Lima v. Bidwell, 182 U.S. 1, 2-3 (1901), the Court used the term "Insular Cases" to refer to that case and the four others argued with it: Downes v. Bidwell, 182 U.S. 244 (1901);

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Instead, American law constituted a series of *principles* maintained for the sake of Filipinos' "liberty and happiness." Such an analysis reflected Root's and the legal culture's notion that genuine authority—and political stability—rested on some notion of consent. Root's conception of basing government on indigenous custom and principles of civil liberty may seem generous, and in comparison to other colonial experiences, certainly was. But it also reflected his hard-headed assessment of what would make American colonial authority possible in the first place. At some level, as Pomeroy and Cooley had demonstrated in another context,[219] Filipinos themselves had to consent to American rule.[220]

Root was content with setting the broad outlines of American policy because he knew that the Philippines could not be governed directly from the War Department in Washington, D.C. He thus developed the idea of the Philippine Commission as the source of the Philippine government's legislative branch and as the core for any future civil government. President McKinley quickly settled on a fellow Ohioan to head the Commission: Judge William Howard Taft of the Sixth Circuit, the youngest man ever appointed to the federal appel-

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Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); and Dooley v. United States, 183 U.S. 151 (1901). These decisions muddied more than they clarified, although they did hold that at least many constitutional provisions and much of the Bill of Rights extended to the Philippines and other American colonial possessions. See Fiss, supra note 141, at 225-56 (discussing Insular Cases). Root offered a pithy—and in retrospect quite accurate—assessment of the impact of the decisions. When pressed by reporters for a reaction to the Insular Cases, he responded: "[A]s near as I can make out the Constitution follows the flag—but doesn't quite catch up with it." 1 Jessup, supra note 19, at 348 (quoting Root).

219 See supra Section II.D.2.

220 In my view, Root's position on this issue has been misconstrued by subsequent historians, who have cited a campaign speech made a few days before the 1900 election. In the speech, Root denied that the McKinley administration betrayed the Jeffersonian principle that government derives its just powers from the consent of the governed, because "[g]overnment does not depend upon consent. The immutable laws of justice and humanity require that people shall have government, that the weak shall be protected, that cruelty and lust shall be restrained, whether there be consent or not." He noted that Jefferson himself had refused to allow the newly formed Louisiana Territory self-governance, as it was not ready for it at the time. Elihu Root, The United States and the Philippines in 1900, Address at Canton, Ohio (Oct. 24, 1900), in The Military and Colonial Policy of the United States 27, 42-43 (Robert Bacon & James Brown Scott eds., 1916). Almost immediately, Root realized that he had vastly overstated his own views. In a personal note to a friend, he conceded six days later that he had spoken too broadly and was merely "making a concession for the purposes of the present argument." Letter from Elihu Root to Samuel B. Clarke (Oct. 30, 1900) (on file with Elihu Root Papers, box 178, notebook 2, Library of Congress). As with his initial assessment of imperialism, Root let his hatred of the "Silver Democracy" get the better of him. "It is humiliating to have so many people follow such a man as Bryan," he complained. "He is thoroughly dishonest, and he ought to be selling patent medicines." Id.

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late bench and a principal exponent of classical legal views.[221] When Taft initially balked, Root called him to Washington and persuaded him to take the job,[222] although Taft did extract from Root the presidency of the Commission.[223] Thus was born a friendship and political alliance that would last until Taft's death three decades later.

Taft's conception of the nature of American rule paralleled Root's. Repeatedly, he told the Secretary of War that the task of the Commission was "lawyer's work,"[224] and both he and the rest of the Commissioners quickly threw themselves into the task of legislating. Taft arrived in the summer of 1900, a period of often fierce fighting between the U.S. Army and Aguinaldo's rebels; indeed, General Elwell Otis, the military commander in the Philippines since the rebellion's inception, had just been dismissed for his failure to make headway against the revolt.[225] From the beginning, there was little doubt

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221 See, for example, Moores & Co. v. Bricklayers Union, 10 Ohio Dec. Reprint 665, 668-75 (Super. Ct. 1890) (Taft, J.) (relying on lack of formal privity of contract to hold union liable in tort for boycotting products of supplier which dealt with nonunion building contractor), and the discussion in Ernst, supra note 11, at 82-83, 200-03 (charting Taft's expression of classical legal views in *Moores*). Taft maintained his skepticism of unorthodox thought throughout his life. See, e.g., Letter from William Howard Taft to Elihu Root (May 1, 1913) (on file with William Howard Taft Papers, ser. 10, vol. 42, reel 607, Library of Congress) (noting that

> the disquisitions of modern sociological jurists, or jural sociologists and economists . . . excite my indignation, and with their assumption of omniscience shake the foundations of law as I have been trained to know them, in such a way that it would seem as if we would have to begin the education of the American people in first principles of fundamental law all over again.).

In fairness to Taft, his opinions from the bench often recognized the tensions and difficulties in orthodox thought, as Ernst points out. And while Taft was undoubtedly very conservative, at times he displayed a deep sympathy with low-income claimants, leading him to write opinions undermining orthodox doctrine. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525, 562-67 (Taft, C.J., dissenting) ("I do not feel . . . that either on the basis of reason, experience or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage."). It is fair to say that *Adkins* was not a typical Taft opinion, however. Cushman puts it well when he notes that while in some opinions, Taft was "squinting" in the direction of New Deal jurisprudence, this "squinting was done through a set of conceptual lenses that limited the reach of his vision. In Taft's jurisprudential *Weltanschauung*, the distinction between public and private enterprises was not nice and technical, but true and immutable . . . the essential categories of substantive due process jurisprudence remained intact." Cushman, supra note 12, at 149.

222 See 1 Henry F. Pringle, The Life and Times of William Howard Taft 159-62 (1939) (describing invitation by President McKinley, discussions between McKinley, Taft, Root, and Long, and Taft's eventual acceptance of position as head of Philippine Commission).

223 Letter from William Howard Taft to Elihu Root (Feb. 3, 1900) (on file with Elihu Root Papers, box 164, Library of Congress).

224 Id. In this letter, Taft describes the commissioner's role as "lawyer's work" no less than three times.

225 See Miller, supra note 202, at 98-103 (noting that by late spring of 1900, "euphoric mood" produced by early victories had "soured into one of despair and bitter doubts that the war would ever end").

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that U.S. forces could achieve a purely military victory.[226] Even before arriving in Manila, however, Taft determined that forcible occupation and protracted military government over the Islands would be unnecessary because most Filipinos desired American rule.

Root told Taft before his departure from the United States to keep him updated on an informal basis,[227] and Taft took him at his word, sending a stream of lengthy dispatches detailing his perceptions of conditions in the Philippines. These dispatches consistently linked several themes, forming the basis of the justification for retaining the Islands. First, Filipinos were completely incapable of self-government;[228] second, the rebellion was on its last legs, waiting only for McKinley's reelection to collapse completely;[229] third, the rebellion itself was little more than a criminal conspiracy;[230] fourth, the vast ma-

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226 See Stanley, supra note 212, at 51 ("There was never any doubt that the American army could prevail by force.").

227 Letter from Elihu Root to William Howard Taft (Apr. 16, 1900) (on file with William Howard Taft Papers, ser. 3, reel 30, Library of Congress) ("I hope you will not hesitate to write me personally and unofficially on any matters which you think require that kind of treatment.").

228 See, e.g., Letter from William Howard Taft to Elihu Root (July 14, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress) ("The population of the islands is made up of a vast mass of ignorant, superstitious people, well intentioned, light-hearted, temperate, somewhat cruel, domestic and fond of their families, and deeply wedded to the Catholic Church."). On August 18, 1900, Taft wrote:

> [It is on] the indubitable fact, which no one who has ever been in these Islands has ever attempted to controvert, that the Filipinos are at present so constituted as to be utterly unfit for self government. The six or eight millions of people are made up of from 6 to 10 thousand socalled [sic] well educated men and a mass of quiet, lazy, polite, ordinarily inoffensive, rather light hearted people, of an atticic [sic] temperament in an imitative sense; easily subject to immoral influences; quite superstitious, and if aroused at all exceedingly cruel to animals and each other.

Letter from William Howard Taft to Elihu Root (Aug. 18, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress).

229 See, e.g., Letter from William Howard Taft to Elihu Root (Aug. 23, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress) ("The fact that the whole insurrection hangs on Bryan's election is confirmed by so many circumstances that it goes here without saying."); Letter from William Howard Taft to Elihu Root (Aug. 11, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress) ("The policy of . . . taking steps . . . to improve this country . . ., taken with the re-election of President McKinley, will bring about pacification without difficulty."); Letter from William Howard Taft to Elihu Root (July 14, 1900), supra note 228 ("Nothing has occurred . . . to change my idea that the solution, so far as the military situation is concerned, is a very easy one—the re-election of President McKinley.").

230 See, e.g., Letter from William Howard Taft to Elihu Root (Aug. 23, 1900), supra note 229; Letter from William Howard Taft to Elihu Root (Aug. 18, 1900), supra note 228 ("[B]ut for the terrorism of the insurgent in arms, and the ladrones, [the natives] would be entirely willing to welcome American civil government. . . . The rebellion is kept up by the

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jority of Filipinos were eager to support American sovereignty and a colonial government;[231] and fifth, the foregoing facts demanded the speedy and imminent establishment of a civil government, despite the military authority's ignorant denials.[232] Even in the context of a war of independence against a colonial power, Taft saw the creation of civil government as essentially a consensual process, which would succeed if American authorities governed wisely.

For Taft, wise governance comprised what he called the "policy of attraction": In his view, Filipino loyalty to American sovereignty would be cemented if the colonial government (1) made a real effort to improve the education system, which was virtually nonexistent under Spanish rule; (2) undertook economic development projects, particularly roads, rail lines, and harbor improvements; and (3) included several Filipinos in the colonial administration, especially in the provincial and municipal governments organized by the Commission. Taft, however, clearly intended that final authority would remain in the hands of Americans; "attraction" was not simply an independence policy under another name.[233]

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insurgent leaders and a few predatory bands."); Letter from William Howard Taft to Elihu Root (July 26, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress) (

> We get reports from many districts that the people are just awaiting the establishment of municipal governments, and need some power to resist the attacks of the ladrones and others who would disturb the peace. . . . The city of Manila is not, it seems to me, as full of plots and conspiracies as General Otis was wont to think. Most of the unruly spirits who were accustomed to circulate rumors of uprisings have been captured and are in the Anda Street prison.).

231 See, e.g., Letter from William Howard Taft to Elihu Root (Aug. 11, 1900), supra note 229 ("The policy of indicating that we are taking steps practically to improve this country would aid us much, and that taken with the re-election of President McKinley, will bring about pacification without difficulty."); Letter from William Howard Taft to Elihu Root (July 14, 1900), supra note 228 (

> The pacification of the Islands seems to depend largely on the character of the military officer in charge of the particular district. Where a great effort is made by the commanding officer to cultivate the good will of the people and to convince them of the purposes of the United States to give them a good government, it seems entirely possible to make them tractable and glad to welcome the assistance of the officer in the formation of municipal governments, but where the officer resorts to cruel methods and treats them as inferiors and as "Niggers", the insurgents are able to find recruits.).

232 See, e.g., Letter from William Howard Taft to Elihu Root (Aug. 23, 1900), supra note 229; Letter from William Howard Taft to Elihu Root (Aug. 18, 1900), supra note 228 ("It would be difficult . . . to exaggerate the impatience and the feeling of enmity that exists on the part of the people here who are civilians whether Americans, English, German, or Filipinos, against military rule."); Letter from William Howard Taft to Elihu Root (July 26, 1900), supra note 230 ("The good effect of a change from a provost marshal government to that of a popular civil government can not I believe be exaggerated.").

233 The Municipal Code promulgated by the Commission stipulated that all actions by either provincial or municipal governments would be subject to review by the Executive

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Instead, Taft cultivated a group of better-educated Filipinos known as *ilustrados* and encouraged them to form a political party wholly loyal to American sovereignty. The Federal Party, as it came to be known, proposed that the Islands become a state of the union. Its chief function, however, was not expressing Filipino political aspirations but instead serving as a locus of patronage.[234] By co-opting the elite, educating the young, and developing the infrastructure, Taft hoped to (in McKinley's words) "substitute the mild sway of justice and right for arbitrary rule."[235]

Ironically, Taft did not combine his insistence upon an American monopoly of legal authority with a demand for a U.S. monopoly of armed force. A key issue dividing civil and military authorities was the recruitment and arming of a native Filipino militia and police force. Taft was willing early on to entrust the lion's share of the Islands' security to these native forces, a prospect looked on with horror by the local U.S. military commanders.[236] But the logic, in Taft's eyes, was irrefutable: Most Filipinos wanted the United States to rule the Islands, and the insurrection's success was attributable entirely to rebel intimidation; the best response was to create a native militia.

Root was not ready to grant Taft all the authority he wanted, mostly due to domestic political considerations, but in substance the Secretary backed Taft completely. "I have received your several letters, [and t]hey have given me great satisfaction," Root told him. "The disagreeable characteristics of military life in the Islands, without any enemy to fight and the constant danger of assassination, are, I think, giving the army people a rather pessimistic view of the situation. I am glad to see that you do not share it."[237] Root consistently endorsed Taft's outlook and policies. "Your letters are most interesting and satisfactory," he told the Governor. "I do not see where you

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Secretary of the Insular Government, an American, who was appointed by the Civil Governor, also an American. Moreover, control over finances and contracts was lodged in appointed, not elected, offices. In addition, the franchise was tightly restricted to about three percent of the wealthiest and best-educated Filipinos. See Stanley, supra note 212, at 73-75.

234 See id. at 52, 270.

235 Proclamation by the Military Governor of the Philippine Islands, supra note 209, at 438.

236 See, e.g., Letter from William Howard Taft to Elihu Root (Sept. 13, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress); Letter from William Howard Taft to Elihu Root (Aug. 31, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress); Letter from William Howard Taft to Elihu Root (July 30, 1900) (on file with William Howard Taft Papers, ser. 8, Philippine Comm'n, vol. 1, reel 463, Library of Congress).

237 Letter from Elihu Root to William Howard Taft (Aug. 8, 1900) (on file with Elihu Root Papers, box 164, Library of Congress).

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have made a slip in any respect. The favorable judgment on this course of the commission seems to be practically universal."[238]

Taft's sanguine version of events hardly constituted the unanimous verdict among American observers. General A.V. MacArthur, the military commander from 1900 to 1901, clashed repeatedly with Taft and Root over the fundamental question of Filipino support for American rule. MacArthur told newspaper interviewers, Senators, and just about anyone else who would listen that "the Filipino masses are loyal to Aguinaldo and the government which he heads."[239]

MacArthur's successors quickly backed his findings. Taft soon found that he had similar difficulties with Adna Chaffee, who succeeded MacArthur in July 1901. The central question remained that of military versus civil government: At what point could the Commission assume complete governance of the Islands? Chaffee simply rejected Root and Taft's notion of consensual conquest. For a time, they papered over their differences. In mid-October 1901, after a terse cable from President Roosevelt demanding that they come to an accommodation,[240] Taft wrote to Root and reported, "I was pleasantly disappointed to find that we can probably reach an agreement."[241] The problem, he explained, was that Chaffee "hasn't changed his views at all. He thinks every Filipino hates us" and "that we ought to pin these islands down with bayonets for ten years until they submit."[242] For Taft, such a view undermined the entire American imperial mission and, indeed, the entire principle of governance: "I told him if I thought so I would go home."[243] Although Chaffee "thought the army knew better the feeling than anyone[,] I said that I did not think so because the people felt very different toward American civil government."[244] Since civil government could not exist without as-

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238 Letter from Elihu Root to William Howard Taft (Sept. 5, 1901) (on file with William Howard Taft Papers, ser. 3, reel 33, Library of Congress).

239 Topics of the Day: The Samoan Settlement, 19 Literary Dig. 31, 32 (1899) (quoting H. Irving Hancock). General MacArthur repeated this sentiment years later before the Lodge Committee. See Affairs in the Philippine Islands: Hearing Before the Senate Comm. on Philippines, S. Doc. No. 57-331, pt. 2, at 1926 (1902) (statement of Maj. Gen. Arthur MacArthur); see also Annual Report of Maj. Gen. Arthur MacArthur, U.S.V., Commanding Division of the Philippines, Military Governor in the Philippine Islands, H.R. Doc. No. 56-2, vol. 1, pt. 5, at 61-62 (1900).

240 See Letter from President Theodore Roosevelt to Adna R. Chaffee (Oct. 8, 1901), in 2 Correspondence Relating to the War with Spain 1297 (photo. reprint 1993) (1902).

241 Letter from William Howard Taft to Elihu Root (Oct. 14, 1901) (on file with Elihu Root Papers, box 164, Library of Congress).

242 Id.

243 Id.

244 Id.

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sent, the fact of its continued existence demonstrated such assent was forthcoming.

On one level, the subsequent history of American rule over the Philippines seemed to confirm Taft and Root's view and thus confirm the possibility of conquest by consent. After all, the United States maintained control over the Philippines until 1946 without any sustained revolutionary activity from Filipinos. But an examination of the Islands' political history shows otherwise. Within a few years, Root and Taft's colonial policy almost had eroded completely. In 1907, elections were held for the lower house of the Philippine parliament, and Taft's Federalistas were swamped by pro-independence parties. The Federalistas ceased to be a political force in the country.[245] Meanwhile, popular and elite agitation for independence continued: The surface stability masked a constant threat of renewed open revolt.[246] Finally, in 1916, Congress passed the Jones Bill, which formalized the American commitment to Filipino independence, made both the Filipino Assembly and Senate elected bodies, and gave vast new powers to Filipinos in the colonial administration.[247] The Jones Bill passed with bipartisan support—despite vehement opposition from Taft and Root. Thus, scarcely three years after Taft left the White House, the imperialism of suasion was dead: The Filipinos, it seemed, simply had refused to be swayed. Imperial rule would only come from the barrel of a gun.

V

ROOT AT THE STATE DEPARTMENT

Secretary of State John Hay died on July 1, 1905, and from the start the only doubt about his successor stemmed from the reticence of the prime candidate for the job. "If you could only get Root the problem would be solved at once," Henry Cabot Lodge, Senator from Massachusetts and Republican leader, told President Roosevelt. "He has been the ablest Cabinet Officer of our time. But after what he has

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245 See Stanley, supra note 212, at 132-33.

246 For an insightful and suggestive demonstration of this point, see Reynaldo C. Ileto, Orators and the Crowd: Philippine Independence Politics, 1910–1914, in Reappraising an Empire: New Perspectives in Philippine-American History 85, 85-113 (Peter W. Stanley ed., 1984) (noting existence of popular pro-independence radicalism requiring constant concessions from Filipino and American elites); see also Stanley, supra note 212, at 156-57 (stating that Assembly Speaker Sergio Osmena, who cooperated with U.S. rule, "openly avowed, to great applause from participants at a banquet in Manila, that should the Filipino people wish to revert to their former means of pursuing the [pro-independence] ideal he would abide by their decision").

247 See Autonomy Act, ch. 416, 39 Stat. 545 (1916).

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said this I fear is only a hope with slight foundations."[248] Root's wife detested the Washington social circle, and Root himself no doubt enjoyed his massive law practice income.[249] But a request from President Roosevelt was difficult to resist, and Root accepted immediately. "He will be a tower of strength to us all," Roosevelt told Lodge.[250] "You and I felt exactly the same way about Root."[251]

Root's move to the State Department confronted him with several key diplomatic issues, but two stood out: the Algeciras Conference of 1905–1906 and preparations for the Second Hague Conference, scheduled for 1907. While both were styled as "conferences," they represented opposing poles of diplomatic action. Whereas Algeciras was a typical instance of classical European balance-of-power negotiation, the Hague was promoted as a step in the gradual transformation of world politics into a system based upon the rule of law. Examining Root's response to both events thus reveals not only his emerging foreign policy ideas but also their connection to the prevailing legal culture of the late nineteenth century.

A. Adventures in European Realpolitik: The Algeciras Conference

The Moroccan Crisis of 1905–1906 was in many ways a rehearsal for the First World War. A small, seemingly insignificant country—in 1905, Morocco; in 1914, Serbia—served as the flash point for international rivalries and an increasingly unstable European order. By 1905, France nearly had completed a multiyear effort to achieve a sphere of dominance in the North African sultanate, a move typical of the diplomacy of imperialism. Germany saw the move as an opportunity to challenge France diplomatically. In the spring and early summer, Germany very publicly demanded that France liquidate her nascent sphere of influence and submit to an international conference on Morocco's future. By mid-June, Berlin had resorted to veiled threats of military conflict.[252]

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248 Letter from Henry Cabot Lodge to President Theodore Roosevelt (July 2, 1905), in 2 Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge 1884–1918, at 160, 161 (1925) [hereinafter Roosevelt-Lodge Correspondence].

249 See 2 Jessup, supra note 19, at 141, 309; see also Leopold, supra note 19, at 71 (noting Mrs. Root's dislike for Washington). Root was generally unanxious about returning to public life. See, e.g., Letter from Elihu Root to Henry Cabot Lodge (Aug. 18, 1904) (on file with Henry Cabot Lodge Papers, box 22, reel 21, Massachusetts Historical Society) (rejecting overtures to run for Governor of New York).

250 Letter from President Theodore Roosevelt to Henry Cabot Lodge (July 11, 1905), in 2 Roosevelt-Lodge Correspondence, supra note 248, at 165, 165.

251 Letter from President Theodore Roosevelt to Henry Cabot Lodge (July 18, 1905), in 2 Roosevelt-Lodge Correspondence, supra note 248, at 168, 168.

252 For discussions of the First Moroccan Crisis, see Christopher M. Andrew, Theophile Delcasse and the Making of the Entente Cordiale: A Reappraisal of French Foreign Pol-

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While German policy was far from coherent, there is little doubt that it seized on the Moroccan issue to humiliate Paris and break apart the Anglo-French "Entente Cordiale." Always jealous of British power, the Kaiser and his advisors gambled that threatening war would put strains on the Entente too great for it to withstand. Notably, Japan recently had crushed Russia in a Far Eastern war, and thus Russia, France's traditional ally, was unavailable as a counterweight. Even after the dismissal of France's anti-German foreign minister, Theophile Delcasse, Berlin seemed intent on pressing the issue, forcing France into an international conference, and breaking the Entente. For several weeks, Europe appeared headed inexorably toward war.[253]

All of this would describe a "typical" European diplomatic crisis of the period, and indeed it does—except for the wholly new and unprecedented involvement of the United States. As the crisis gathered steam during the spring, both France and Germany appealed for the intervention of President Roosevelt, who recently had negotiated the treaty ending the Russo-Japanese War and whose international prestige had reached euphoric heights. Carefully negotiating with Berlin, Paris, and London, Roosevelt reached a tacit agreement with Germany by the end of June: The United States would support an international conference if Berlin would agree to Roosevelt's proposals in the event of a deadlock. Britain and France also consented to these terms.[254]

Root assumed office just as Roosevelt had completed this arrangement. The President briefed his new Secretary of State fully on the events, and the two worked closely together in preparing for the conference to be held at Algeciras. Root understood the stakes of the conference. In a personal letter to Henry White, the head U.S. delegate, Root referred to the "broader and really important part that the

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icy, 1898–1905, at 268-301 (1968); James Joll, The Origins of the First World War 53-54, 56, 154, 156 (2d ed. 1992); Richard Langhorne, The Collapse of the Concert of Europe: International Politics, 1870–1914, at 87, 92 (1981). An excellent account from the British perspective is Zara S. Steiner, The Foreign Office and Foreign Policy, 1898–1914, at 48, 55, 66 (1969). An intriguing and provocative dissent is found in Keith M. Wilson, The Policy of the Entente: Essays on the Determinants of British Foreign Policy, 1904–1914, at 73-75 (1985).

253 See Andrew, supra note 252, at 302-08; Joll, supra note 252, at 53-56; Langhorne, supra note 252, at 88-95; Steiner, supra note 252, at 87-89; Wilson, supra note 252, at 101-05.

254 The standard accounts of Roosevelt's diplomacy during the Moroccan Crisis are found in Howard K. Beale, Theodore Roosevelt and the Rise of America to World Power 335-447 (1956); Frederick W. Marks III, Velvet on Iron: The Diplomacy of Theodore Roosevelt 66-70 (1979); George E. Mowry, The Era of Theodore Roosevelt and the Birth of Modern America, 1900–1912, at 192-96 (1958).

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conference is to play in the politics of Europe."[255] He warned White that the United States must not be thrown "into even apparent antagonism to the Anglo-French entente, or to make us a means of breaking that up. It is useful to us as well as agreeable."[256]

But in the context of his other work at the State Department, Root's approach to the crisis stands out for his downplaying of the conference's significance. The conference deadlocked in February 1906, as every French concession was met by heightened demands from the Germans. Once again, Europe seemed ready for war. And once again, Roosevelt's intercession—strong diplomatic support of the Anglo-French position and threats to the Kaiser to publish confidential correspondence recording German promises to follow Roosevelt's lead—helped break the logjam and end the crisis. But while Root handled much of the day-to-day negotiating, the conference's significance seemed lost on him. Algeciras represented the first European diplomatic conference in which the United States played a key part and served to avert war. Root, however, told U.S. Ambassador to England Whitelaw Reid,

> Between White and the German Ambassador here, we are following the Algeciras Conference pretty closely, but our interests are not sufficient to justify us in taking a leading part; and while, of course, we should be very glad to contribute towards keeping the peace, we do not wish to get into a position where we will be justly charged with intermeddling or to become a party to a controversy, and we have not yet considered that there was a situation in which any move by us would be practically useful.[257]

While Root was telling Reid that the United States had not found a way to be "practically useful," Roosevelt was playing a central part in the conference's success.

Root no doubt played down the conference's significance *publicly* because of the political trouble it created at home.[258] But this

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255 Letter from Elihu Root to Henry White (Nov. 28, 1905) (on file with Elihu Root Papers, box 164, Library of Congress). Root repeated his admonition about the stakes of the conference in his official instructions, which were drafted by him and the President: "[W]e regard as a favorable condition for the peace of the world, and, therefore, the best interests of the United States, the continued entente cordiale between France and England, and we do not wish to contribute towards any estrangement between these two countries." Id.

256 Id.

257 Letter from Elihu Root to Whitelaw Reid (Feb. 27, 1906) (on file with Elihu Root Papers, box 185, Library of Congress).

258 Democratic senators introduced a resolution in January 1906 condemning the administration's actions as violating the Monroe Doctrine. Press reaction was also generally negative and at times hostile, although Roosevelt received strong support from two of New York City's leading newspapers, the *Times* and the *Sun*. See Moroccan Plan Roosevelt's,

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hardly serves to explain his private reticence, especially since he often wrote very candidly to close associates like Reid. Even in confidential letters, he seemed focused elsewhere. He told General James H. Wilson after the conference ended: "Undoubtedly, the fact that we had no specific interest in the controversy and did not pretend to have any enabled us to exercise a very calming influence in that affair. I fully agree with you, however, that our great interests are this side of the Atlantic."[259]

In sum, while Root understood the situation at Algeciras on one level, the conference hardly affected or colored his view of the United States's international role. In April 1905, when the crisis began, even Roosevelt's attitude was that U.S. interests in Morocco were negligible and that the United States should stay out. Upon realizing the dispute's European political context, however, Roosevelt, the nonlawyer, played an active role in the conference and remained deeply engaged in European politics for the rest of his term and afterwards. For Root, on the other hand, the conference was simply an isolated episode—important in its time but scarcely indicative of anything in the future. Six years later, another Moroccan Crisis erupted under similar circumstances; Root (by now in the Senate) did not advocate U.S. involvement (unlike Roosevelt). Root virtually never referred to the Algeciras Conference in later life, and when pressed by his biographer as to its significance, downplayed it yet again. If Root forgot little about Algeciras, he seemed to learn little as well.

B. Attempts at Remaking World Politics: The Hague Conference

1. Background: The First Hague Conference and the International Peace Movement

If Algeciras held little continuing interest for Root, the same could not be said for the impending 1907 international peace conference at the Hague. The upcoming conference would continue the work of its 1899 predecessor, convened on the initiative of Czar Nicholas II. The conference deliberated and considered proposals concerning arms limitation, the international law of war, the establishment of a world court, and the development of a system of international arbitration.[260]

N.Y. Sun, Mar. 23, 1906, at A1; Mr. Roosevelt's Plan in Favor at Algeciras, N.Y. Times, Mar. 23, 1906, at A1; Roosevelt to End the Morocco Dispute, N.Y. Times, Feb. 14, 1906, at A1.

259 Letter from Elihu Root to James H. Wilson (Apr. 3, 1907) (on file with Elihu Root Papers, box 188, Library of Congress).

260 On the 1899 Hague Conference and America's role in it, see generally Calvin DeArmond Davis, The United States and the First Hague Peace Conference (1962).

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But if the 1899 conference was hailed by peace advocates as the beginning of a new system of international relations, it had little to show for its efforts. Delegates could not agree on any more than very limited and practically unimportant schemes for limiting weapons. Unsurprisingly, politics was the chief cause: The Americans and British refused to consider naval limitations, and the Germans vetoed any treatment of land armaments. The conference reached similar results concerning the laws of war. Nations with diverging political interests hardly could agree on rules that would have disparate impacts on their national security: The British, for instance, could not accept continental proposals restricting the use of blockades, a key instrument of British external policy for centuries.[261] Even international arbitration failed to move forward.[262]

Such a paltry result did not stop the international peace movement, for its leaders managed to find wealthy patrons to sponsor a succession of impressive international conferences. Andrew Carnegie, although not a pacifist, agreed to fund the building of an international peace palace at the Hague to house future meetings.[263] Most spectacularly, in the autumn of 1904, activists sponsored a meeting of the "Interparliamentary Union," which brought delegates from legislatures throughout the world to discuss the promotion of international peace.[264] The meeting's lavishness, high ideals, and distinguished guest list invariably brought press attention, giving the peace movement domestic political saliency.[265]

Roosevelt paid careful attention to the peace movement during 1904, a presidential election year. The President made all the right noises, proclaiming sympathy with the movement's aims, declaring arbitration a promising method of transforming the international system, and expressing his desire for arms-control agreements. But after the election, realizing that European nations never would agree to disarmament for strategic reasons, the President lost interest in the mat-

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261 See id. at 110, 133-35 ("[T]hey conducted themselves as though nothing were sacred save the sovereignty of their governments."); 1 James Brown Scott, The Hague Peace Conferences of 1899 and 1907, at 64-66 (1909) (describing 1899 conference's lack of accomplishments).

262 See Davis, supra note 260, at 149-61. The 1899 conference wound up establishing something called the "Permanent Court of Arbitration," but it really amounted to little more than a large panel of jurists available if and when nations decided to summon them. See id. at 209.

263 See Calvin DeArmond Davis, The United States and the Second Hague Peace Conference: American Diplomacy and International Organization, 1899–1914, at 92-97 (1976).

264 See id. at 107-10.

265 See Davis, supra note 260, at 103-10.

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ter and concentrated on what he saw as more critical geopolitical issues.

2. *Driving American Policy at the Hague*

The same could not be said for Roosevelt's new Secretary of State. During 1905 and 1906, Root helped form the American Society of International Law (ASIL), and agreed to serve as its president—a post he would occupy for the better part of two decades.[266] Root's colleagues in forming ASIL included Columbia law professor James Brown Scott, whom Root appointed as one of his closest advisors at the State Department[267] and who later wrote a laudatory account of the 1907 meeting[268] notable for what even sympathetic historians have called an overoptimistic attitude toward the Hague system.[269]

On one level, Root's involvement in ASIL should have come as no surprise. As seen, his commitment to the Platt Amendment rested almost exclusively on international legal considerations. And if he saw his role at the War Department as one of counselor, his diplomatic role was even more suited to the task. But Root had strong reason to avoid entanglements with ASIL. Its strongest supporters were also members of the international peace movement, for which Root had little use. The peace movement's greatest luminaries advanced schemes that seemed utopian even by the sanguine standards of the day. The movement often displayed a sharp pacifist streak, a tendency that former Secretary of War Root, who had served as the principal defender of Republican policy in the Philippines and who pioneered the U.S. Army's general staff, contemptuously dismissed.[270]

Nevertheless Root wholeheartedly endorsed several aspects of the peace movement's program. Over the next several years, Root developed his philosophy of international relations, and his speeches invariably were published in journals such as International Conciliation, the movement's publication of record. On the eve of the Hague Conference, the Secretary of State—who routinely declined hundreds

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266 2 Jessup, supra note 19, at 473.

267 Id. at 260, 319-20, 419, 454 (reporting examples of situations in which Root relied on Scott's counsel); see also Charles DeBenedetti, Origins of the Modern American Peace Movement, 1915–1929, at 48, 53-54 (1978) (discussing relationship between Root and Scott and Scott's role).

268 See Warren F. Kuehl, Seeking World Order: The United States and International Organization to 1920, at 105-06 (1969).

269 See, e.g., C. Roland Marchand, The American Peace Movement and Social Reform, 1898–1918 (1972).

270 For a general background on the American peace movement during this period, see id. at 57-122.

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of speaking requests—agreed to address the International Arbitration and Peace Congress in New York City.[271]

Root's assessment of the Hague Conference's potential derived from categories central to legal ideology. He identified "two distinct and apparently inconsistent motives or principles of national conduct" that operate in international affairs: the "competitive attitude fashioned upon the habits of self-preservation and self-assertion enjoined by the necessities of the struggle for existence"; and the "ethical, altruistic, humane impulse that presses forward constantly toward ideals" and whose "possessors . . . assert principles and set up standards of action."[272] Root argued that these conflicting desires occurred not only "[i]n every man's nature," but also manifested themselves politically: "[I]n every nation there are many citizens in whom one, and many in whom the other, impulse strongly predominates. As circumstances bring one class of motives or another into control of national conduct in different fields of national action, strangely variant and inconsistent national action results."[273]

Casting international discord as a product of warring impulses allowed Root to make an important ideological move: Global conflict resulted not from the logical workings of an anarchical system structure but instead from human nature. Modern international theorists draw a distinction between the international "system," i.e., the practical rules by which international society is governed, and the "units" of that system. According to modern, "neorealist" thought, because the global system is governed by anarchy, each state is or should be primarily concerned with its own survival and its relation to other units in the system. Since no government can maintain order, states must rely on self-help or coalition building with other states in order to protect their existence. On this account, the evilness or the goodness of human nature does not enter the equation; rational, amoral self-preservation takes primacy. Even the best human beings will engage in self-help and coalition building in order to survive under conditions of anarchy.[274]

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271 See Letter from Elihu Root to Robert Erskine Ely, Esq. (Mar. 2, 1907) (on file with Elihu Root Papers, box 188, Library of Congress) (accepting invitation).

272 Elihu Root, The Hague Peace Conferences, Address in Opening the National Arbitration and Peace Congress, in the City of New York (Apr. 15, 1907) [hereinafter Root, Hague Peace Conferences], in Addresses on International Subjects 129, 130 (Robert Bacon & James Brown Scott eds., 1916).

273 Id. at 130-31.

274 See generally Waltz, Theory of International Politics, supra note 18. In an earlier work, Waltz contrasted "third image" theories emphasizing the structure of the international system with "first image" theories that placed the blame for war on human nature. See generally Kenneth N. Waltz, Man, The State, and War: A Theoretical Analysis (1954).

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Ascribing world conflict to human evil, however, carried different implications. War did not derive from cool, calculated rational self-interest, but rather "selfishness and greed."[275] It was not an accurate reflection of international realities but rather the manifestation of internal neurosis. Root's diagnosis, then, amply allowed for hope because such human frailties existed in the domestic sphere as well: Men did not suddenly become neurotic by virtue of attending a diplomatic conference. While human evil caused global strife, it could be ameliorated just as it had in national life.

No wonder, then, that global conflict was the exception, not the rule. "It is a common saying," Root observed, "that the world is ruled by force—that the ultimate sanction for the rules of right conduct between nations is the possibility of war. That is less than a half truth."[276] The Secretary of State suggested that diplomatic practices evolved in much the same way that legal institutions did. In the past, "diplomacy consisted chiefly of bargaining and largely cheating in the bargain."[277] But echoing his argument in favor of the Platt Amendment, he stated that "[d]iplomacy now consists chiefly in making national conduct to conform or appear to conform to the rules which codify, embody, and apply certain moral standards evolved and accepted in the slow development of civilization."[278]

Nowhere would this evolutionary process take greater hold, Root predicted, than with arbitration, where "we are surely justified in hoping for a substantial advance both as to scope and effectiveness."[279] As we have seen, the prevailing legal culture revealed a tendency not to interpret events as interest and value conflict—and Root's view of arbitration fit the pattern perfectly. As the Secretary saw it, nations so far had refused to adopt universal arbitration not because it undermined any important national interests, but rather because institutions did not exist to select truly impartial arbitrators. This institutional problem, in turn, derived from the failure of states to recognize the distinction between law and politics. "[A]rbitrators," Root complained, "too often act diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence . . . . Instead of the sense of responsibility for impartial judgment which weighs upon the judicial officers of every civilized country, . . . an international arbitration is often regarded as an occa-

275 Root, Hague Peace Conferences, supra note 272, at 130.

276 Id. at 135.

277 Id.

278 Id.

279 Id. at 140.

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sion for diplomatic adjustment."[280] If international legal institutions could attain the same neutral, apolitical status as their domestic counterparts, they could stabilize international life in the same way that their counterparts had in the domestic sphere. The world needed arbitrators who were not "public men concerned in all the international questions of the day, but judges who will be interested only in the record before them."[281] If the Hague Conference could achieve this, it would be an "agency of peace; not the peace of conquest, but the peace of agreement; not enforced agreement, but willing and cheerful agreement."[282]

Root cautioned that the delegates should not "expect too much" from the Hague; echoing Cooley's sentiments about the Interstate Commerce Commission and Adams's regulatory theories, he argued that "the moment an attempt is made to give such a conference any coercive effect . . . the conference fails."[283] Instead, the point was Langdellian: The conference should instead "work out methods of applying *general principles* in such a way as to prevent future differences."[284]

Root did not intend his words as mere rhetoric; unlike the President, he maintained keen interest in the Hague system. Shortly after the Arbitration and Peace Congress, the Secretary sat down with the U.S. delegation and prepared American policy.[285] At this meeting, the delegation concentrated less on establishing universal arbitration and more on specific provisions of international law.

A rough consensus had emerged among the various international delegations that the conference should discuss the laws of war, and the U.S. delegation focused on developing its position. In particular, it considered the question of legal immunity for private property at sea from capture during war. The issue should have caused little discussion: America had long maintained a position in favor of such immunity because it saw itself as a neutral power whose vessels would be subject to seizure during wartime.[286] At the First Hague Conference,

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280 Id. at 141.

281 Id. at 142.

282 Id. at 143.

283 Id.

284 Id. (emphasis added).

285 This meeting is the only record of collective deliberations by the United States delegation. See Minutes of the Meeting of the American Commission to the Second Hague Conference, Held April 20, 1907, in the Diplomatic Room of the Department of State (on file with Joseph H. Choate Papers, box 20, Library of Congress) [hereinafter Minutes of the Meeting].

286 See Davis, supra note 263, at 138.

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the U.S. delegation had vigorously (although unsuccessfully) advocated the immunity principle.[287]

Times, however, had changed radically by 1907, as one American delegate, U.S. Navy Captain Alfred Thayer Mahan, had pointed out previously to Roosevelt. Mahan was no mere naval officer: His book, *The Influence of Sea Power on History*, emerged in the late nineteenth century as something of a Bible for naval policymakers,[288] and the President himself considered it a seminal work.[289] Mahan warned Roosevelt about the damaging geopolitical consequences of traditional American policy:

> Maritime transportation, and commercial movement which is what so-called "private property" really amounts to, is now one of [Germany's] great interests, and is steadily growing. Great Britain, and the British Navy, lie right across Germany's carrying trade with the whole world. Exempt it, and you remove the strongest hook in the jaw of Germany that the English speaking people have. . . .[290]

Mahan's reference to the "English speaking people" did not reflect Anglophilia; instead, it was based on his hard-headed appraisal of U.S. interests. He told Roosevelt that "circumstances almost irresistible are forcing us & Great Britain, not into alliance, but into a silent cooperation, dependent upon conditions probably irreversible in the next two generations."[291]

Roosevelt already had arrived at similar conclusions as to the Anglo-American relationship and for similar geopolitical reasons. The logic was straightforward. The United States could remain secure as long as the European great powers were unable to threaten the Western Hemisphere; they could not so threaten as long as Great Britain retained mastery of the seas;[292] thus it was in the U.S. interest to assist Britain and buttress its naval power. This logic had formed the basis of the Anglo-American rapprochement between 1898 and 1903 and was fostered by the democratic nature of the British regime.[293]

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287 See id. at 21, 28.

288 See Paul M. Kennedy, Mahan Versus MacKinder: Two Interpretations of British Sea Power, in Strategy and Diplomacy 41, 43-44 (1983).

289 See, e.g., Beale, supra note 254, at 177, 191, 255-56, 259, 392 (detailing Mahan's influence on Roosevelt).

290 Letter from Alfred Thayer Mahan to Theodore Roosevelt ([1906 or 1907?]) (on file with Alfred Thayer Mahan Papers, Library of Congress), quoted in Davis, supra note 263, at 139.

291 Id.

292 Great Britain had an interest in keeping the military strength of the other European powers confined to the European continent.

293 See generally Bradford Perkins, The Great Rapprochement; England and the United States, 189–1914 (1968).

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Strong support for the British position on private-property immunity seemed an easy choice.[294] Root's deliberations, however, were anything but. Some evidence suggests that initially, the Secretary of State accepted Mahan's arguments.[295] But by the time of the delegation meeting, he had come to a different viewpoint. He told the delegation that although he was personally unclear on the proper policy, "the question was really precluded" by the U.S. position at the First Hague Conference.[296] In the end, "although he had great doubt on the question, he felt it his duty to instruct the delegation in favor of the immunity."[297] And on the eve of the conference, Root cabled instructions to Choate to that effect.[298]

Why would Root feel it was his duty to adhere to this position? By his own admission, stare decisis seemed to take precedence over U.S. interests. Root never explained his own reasons, but the actions of his legal mentor—Choate—might provide us with clues. During the immunity discussions, Choate asserted that

> we should not reduce the discussion to the level of national needs and interests; that the doctrine of immunity made for civilization, for the protection of property, and that this Government should examine the question from the humanitarian and international standpoint rather than weigh the doctrine solely in the scale of self-interest.[299]

Root never explicitly argued for such a view; throughout the meeting, he consistently discussed issues in light of the "interests of the United States."[300] But from the standpoint of legal orthodoxy, Choate's view had force: Civilization advanced as nations learned to separate legal questions from political ones and develop the rule of law by seeing their own long-term self-interest in a legally regulated order. No state coercion was necessary. But if nations changed their

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294 Indeed, Root was sympathetic to following the British generally. See Letter from Elihu Root to Whitelaw Reid (Oct. 3, 1906) (on file with Whitelaw Reid Papers, Library of Congress) (asking Reid to sound out British delegation on subject of British positions at conference and offering to exchange confidential information with London).

295 See Davis, supra note 263, at 139-40 (recounting that Root "came to the conclusion that Mahan was right").

296 Root actually had thought of another reason to abandon traditional U.S. policy: The business community, he contended, traditionally tended to advocate for a peaceful foreign policy for fear of losing its cargo, but establishing immunity for private property would remove this antiwar pressure. See Letter from Elihu Root to Whitelaw Reid (Oct. 24, 1906) (on file with Whitelaw Reid Papers, Library of Congress).

297 Minutes of the Meeting, supra note 285, at 13-14.

298 Letter from Elihu Root to Joseph H. Choate (June 6, 1907) (on file with State Department, Numerical File 40/297, National Archives), quoted in Davis, supra note 263, at 179.

299 Minutes of the Meeting, supra note 285, at 12.

300 Id. at 22.

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positions on international legal issues based upon their short-term self-interest, they would confuse legal questions with political ones. Endorsing such a process—or worse, following it—would unravel the slowly evolving international legal order. For Root, this development would be catastrophic; he thus felt constrained to abandon what appeared to be U.S. interests. At the conference, Choate hectored British Foreign Secretary Sir Edward Grey on the question and later attacked the British in his conference speech on the subject. Root stood idly by.[301]

3. *Selling the Conference*

In the end, the Second Hague Conference seemed more of a distraction from than a replacement for traditional diplomacy. The delegations failed to reach agreement on any significant issue. Contrary to Root's expectations, nations did not agree on the principle of compulsory arbitration.[302] Questions of armaments limitations—both land and naval—were simply swept aside. The delegates were even unable to settle on a formula for appointing judges to the World Court.[303]

What remained were a series of conventions and declarations that could at best be called symbolic. For instance, the delegations agreed "in principle" that a world court would be important and acknowledged the "principle" of obligatory arbitration—but they failed to reach accord on any institutions or rules implementing these ideals. All parties agreed to a call for a third conference, to be scheduled for 1915, but no one had an answer for the obvious question[304] of why any future conference would come to consensus where the current one had failed.[305] Eyre Crowe, Britain's technical delegate, whose analysis of Imperial German diplomatic intentions would become a historical

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301 In any event, the conference failed to agree on the matter. Great Britain stood fast in its anti-immunity position, backed by France and Russia—her two Entente partners. Once again, geopolitics triumphed over international legalism.

302 The Germans paid lip service to the principle, but undercut it at every opportunity; Berlin simply refused to give up its sovereignty and freedom of action. See Davis, supra note 263, at 277-86.

303 See id. at 260-76.

304 See id. at 275-79, 287-89.

305 Finley Peter Dunne's Mr. Dooley, who had a uncanny ability to deflate pretense, crisply summarized the problem:

> All th' Powers sint dillygates an' a g-reat manny iv th' weaknesses did so too.... [T]hey have been devotin' all their time since to makin' war impossible in th' future. Th' meetin' was opened with an acrimonyous debate over a resolution offered be a dillygate fr'm Paryguay callin' f'r immeejit disarmamint.... This was carrid be a very heavy majority. Among those that voted in favor iv it were: Paryguay, Uryguay, Switzerland, Chiny, Bilgium, an' San Marino. Opposed were England, France, Rooshya, Germany, Italy, Austhree, Japan, an' the United States.

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classic,[306] acidly commented, "Nothing really important depends on what goes on here." Instead, Crowe noted that Germany and her allies "completely succeeded in wrecking everything in the most open manner."[307] The British press echoed Crowe's assessment as to the conference's significance.

Root, however, refused to be discouraged. He told journalists that "all was accomplished that I expected to see accomplished."[308] This was not cynicism. "You can't properly say," he asserted,

> what progress has been made by examining the work of one of these conferences. One has to study it in relation to what was done at the first Hague meeting. I think a distinct advance has been made. When we attempt to say what progress has been made toward the ideal of permanent peace, we do not take the records of the year, but go back fifty or a hundred years, or even twenty-five years, and see what betterment has been made in international relations. It is noticeable that all nations in the civilized world are more solicitous of international public opinion than they have ever been. Nations hesitate to do anything which they suspect or feel the conscience or moral feeling of other civilized nations will not approve.[309]

Root backed up his sentiments and launched a campaign for Senate support in ratifying the Hague conventions. He lobbied key members of the Senate and prepared reservations to any provision of the conventions that could be objectionable. The Senate insisted on giving its advice and consent to every arbitration award. Roosevelt believed this undercut the entire concept, but Root persuaded the President to move ahead.[310]

In the Secretary's view, the principle of arbitration was more important than any specific substance. Transmitting the conventions to the Senate for ratification, he contended that the work of the Second

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> This was regarded be all present as a happy auggry. Th' convintion thin discussed a risolution offered be th' Turkish dillygate abolishin' war altogether. This also was carrid, on'y England, France, Rooshya, Germany, Italy, Austhree, Japan, an' th' United States votin' no.

Finley Peter Dunne, Mr. Dooley at His Best 142 (Elmer Ellis ed., Charles Scribner's Sons 1938) (1911).

306 In 1907, Crowe wrote a comprehensive analysis of German foreign policy that guided much of Foreign Office policy until the outbreak of the First World War and moved British policy to a much more strongly anti-German orientation. See Zara S. Steiner, Britain and the Origins of the First World War 44-45 (1977); Steiner, supra note 252, at 111-16. See generally R.T.B. Langhorne, Great Britain and Germany, 1911–1914, in British Foreign Policy Under Sir Edward Grey (F.H. Hinsley ed., 1977).

307 Letter from Eyre Crowe to William Tyrrell (Oct. 11, 1907) (on file with Sir Edward Grey Papers, Public Records Office, London), quoted in Davis, supra note 263, at 290.

308 Davis, supra note 263, at 295 (quoting Root).

309 Id. (quoting Root).

310 See id. at 295-302.

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Hague Conference "presents the greatest advance ever made at any single time toward the reasonable and peaceful regulation of international conduct, unless it be the advance made at The Hague Conference of 1899."[311] Thanks to his carefully prepared reservations and equally careful advocacy, the Senate ratified the Hague accords. "To many of his contemporaries ratification of the conventions of 1907 was one of Elihu Root's most important achievements as secretary of state."[312] Some observers knew better: Whitelaw Reid opined to Roosevelt, "In fact, I feel about it a good deal as you will remember the New England farmer did about the pig he had taken to market. 'That hog didn't weigh as much as I expected he would, and I always knew he wouldn't.'"[313]

C. *Playing the Great Power Game: The Question of Manchuria*

These subtly competing perspectives rarely manifested themselves during Roosevelt's administration: If the President and the Secretary of State differed as to the causes of wars, they agreed fully on particular policies. Moreover, Root's loyalty to Roosevelt as a Cabinet member and personal friend—as well as a keen recognition of who was boss—prevented any initiation of tension on his part. When Root was given authority over a key policy area, however, the differences between him and Roosevelt became clearer.

1. *Defending the Open Door*

Such a situation emerged concerning U.S. policy toward Manchuria, the rich northern province of China that served as the principal battleground between Russia and Japan during their war and later was split by those powers into two spheres of influence. The United States cared about such a faraway place because its businessmen did: The myth of the vast "China market" had lured them for decades, and American policy cast its gaze on China most prominently with the issuance of John Hay's famous "Open Door Notes" in 1899.[314] Hay's

311 Id. at 300.

312 Id. at 301.

313 Letter from Whitelaw Reid to Theodore Roosevelt (Oct. 21, 1907) (on file with Roosevelt Papers, Library of Congress), quoted in Davis, supra note 263, at 296.

314 The literature on the Open Door is vast. I rely heavily upon Raymond A. Esthus, The Changing Concept of the Open Door, 1899–1910, 46 Miss. Valley Hist. Rev. 435, 445-51 (1959) in this account. George Kennan criticized the entire notion of the Open Door as unrealistic moralism. See Kennan, supra note 15, at 21-54. The leading historian of the Open Door, however, is Michael Hunt. See generally Michael H. Hunt, Frontier Defense and the Open Door: Manchuria in Chinese-American Relations, 1895–1911 (1973) [hereinafter Hunt, Frontier]; Michael H. Hunt, The Making of a Special Relationship: The United States and China to 1914 (1980).

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Notes asked the great powers, who were at the time busily carving up China into spheres of influence, to ensure American commerce equal rights to commerce of any other nation in their spheres of influence.[315] Manchuria stood out as particularly important because it was one of the most economically developed sections of the country. In July 1900, during the Boxer Rebellion, Hay issued another circular declaring that American policy was to seek the preservation of Chinese territorial and administrative integrity—a policy that suggested American opposition to the entire notion of spheres of influence.[316]

As President, Roosevelt paid lip service to the first policy and quickly scrapped the second. Russia had used the Boxer troubles to send fifty thousand troops into Manchuria, but the President quickly recognized the power correlations: "In this Manchurian matter," he told a sympathetic journalist, "we are not striving for any political control or to help any nation acquire any political control or to prevent Russia from acquiring any political control of the territory in question."[317] The United States, the President reasoned, simply could not fight fifty thousand Russian soldiers half a world away for negligible interests. For Roosevelt, this calculation did not change at all with the triumph of Japan in 1905. He explained in a letter to (by-then President) Taft in 1910 that "as regards Manchuria, if the Japanese choose to follow a course of conduct to which we are adverse, we cannot stop it unless we are prepared to go to war." But "a successful war about Manchuria would require a fleet as good as that of England, plus an army as good as that of Germany"—neither of which the United States had.[318]

This recognition of power realities led Roosevelt to give Japan a free hand in Manchuria. As for the Open Door, he told Taft that it

> was an excellent thing, and will I hope be a good thing in the future, so far as it can be maintained by general diplomatic agreement; but as has been proved by the whole history of Manchuria, alike under Russia and under Japan, the "open-door" policy, as a matter of fact, completely disappears as soon as a powerful nation determines to disregard it . . . .

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315 See Letter from John Hay to Joseph H. Choate (Sept. 6, 1899), in U.S. Dep't of State, Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1899, at 131, 131-33 (photo. reprint 1968) (1901).

316 See generally sources cited in supra notes 314-15.

317 Letter from Theodore Roosevelt to Lyman Abbott (June 22, 1903), in 3 The Letters of Theodore Roosevelt 500, 500-01 (Elting E. Morison ed., 1951).

318 Letter from Theodore Roosevelt to William Howard Taft (Dec. 22, 1910), in 7 The Letters of Theodore Roosevelt, supra note 22, at 189, 190.

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> . . . [O]ur interests in Manchuria are really unimportant, and not such that the American people would be content to run the slightest risk of collision about them.[319]

For Roosevelt, it really did not matter even if the Japanese ran roughshod over treaty rights: If he could achieve a balance of power in the Far East, then he would consider his policy a success.

For Root, however, treaty rights were very crucial things indeed, and in Manchuria—a sphere where he was the principal American policymaker—Root sought to entrench this view in American policy. His efforts in this regard are seen most clearly in his intervention concerning the city of Harbin, Manchuria's major city. Early in 1908, Russia began to enforce its claim to an exclusive right of administration in the city. This was more than just a sphere of influence granting commercial and financial dominance, which the United States had recognized in several treaties, including the one that had ended the Russo-Japanese War. Instead, it was a direct attempt to extend Russian political sovereignty over most of the northern area of the province. Root saw as much and began a "long and determined struggle" to stop it.[320] After interviewing the Russian ambassador on the subject, Root drew two lines across a piece of paper and noted: "[I]f there is to be a broad belt of sovereignty drawn down through the center of Manchuria, Russian at the one end and Japanese at the other, like our Canal Zone across the Isthmus of Panama, it may be very serious."[321]

But why was it so serious? As Roosevelt had noted, U.S. interests in Manchuria were negligible; indeed, the putative Russo-Japanese division of Manchuria appeared to reflect a stable balance between the two nations that the President had long pursued. For Root, however, U.S. foreign policy had to advance principle—in this case, the international legal principle of maintaining Chinese territorial integrity. Upon discovering the Russian initiative, Root privately

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319 Id.

320 Esthus, supra note 314, at 445-46.

321 Memorandum from Elihu Root (Mar. 26, 1908) (on file with State Department Records, File 4002, Numerical File 5315/559, National Archives). Russia perceived the State Department's attitude and began protesting immediately. See Memorandum and Protest from Imperial Russian Government (Feb. 4, 1908) (on file with Whitelaw Reid Papers, Library of Congress). Root responded two months later, sternly reminding St. Petersburg that it was expressly limited by international treaty provisions in what it could do in Manchuria and that the area was under the political sovereignty of the Chinese Government. See Letter from Elihu Root to Baron Rosen, Russian Ambassador to the United States (Apr. 9, 1908) (on file with Whitelaw Reid Papers, Library of Congress).

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commented that "we cannot recognize this attempt to exclude Chinese sovereignty."[322]

During the rest of his tenure at the State Department, Root worked to rally diplomatic support for blocking the Russian claim. Root's effort was marked by the use of international legal principles of the type he earlier had hoped to enshrine through the Platt Amendment; an established legal agreement, Root believed, could give the United States diplomatic leverage that it would not have in its absence. He used precisely such an argument to put pressure on British Foreign Secretary Sir Edward Grey. "We do not wish to have any controversy on the subject," the Secretary wrote to Reid in London,

> but all the treaty powers would seem to be equally interested in having the municipal government to be established at Harbin and at other points along the line of the railroad, both in Russian and Japanese control, based upon an extraterritorial right under the treaties rather than upon an erroneous construction of the railroad grant.[323]

The Secretary also did not hesitate to press the issue with the principal great powers involved, even at some risk to ongoing negotiations. In the spring and summer of 1908, during delicate talks with the Japanese concerning a Japanese-American rapprochement, Root took several opportunities to try to dissuade Tokyo from backing the Russian position or, even worse, attempting to establish its own network of Japanese-administered cities wholly free from Chinese sovereignty.[324] In December 1908, he reiterated that the United States would oppose any Russian attempt to undercut the Open Door or violate Chinese integrity.[325] Root's tactics bore fruit: He obtained the support of the German government in the matter,[326] and Reid reported that Grey had urged Japan (Britain's ally) to be very cautious about committing itself to St. Petersburg's plan of action. In May

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322 Note from Elihu Root (Mar. 10, 1908) (on file with State Department Records, File 4002, Numerical File 5315/559, National Archives).

323 Letter from Elihu Root to Whitelaw Reid (Apr. 11, 1908) (on file with Whitelaw Reid Papers, Library of Congress).

324 See Letter from Elihu Root to Whitelaw Reid (May 22, 1908) (on file with Whitelaw Reid Papers, Library of Congress). Root persisted in his gambit even after Great Britain made it clear that it would not pressure either Japan (its ally) or Russia (with which it had just completed an entente) to back down in favor of the Open Door. See Letter from Elihu Root to Whitelaw Reid (June 24, 1908) (on file with Whitelaw Reid Papers, Library of Congress); Letter from Elihu Root to Whitelaw Reid (June 15, 1908) (on file with Whitelaw Reid Papers, Library of Congress); Letter from Elihu Root to Whitelaw Reid (June 12, 1908) (on file with Whitelaw Reid Papers, Library of Congress).

325 See Letter from Elihu Root to Baron Rosen (Dec. 29, 1908), in U.S. Dep't of State, Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 6, 1910, at 207, 209 (1915).

326 See Correspondence from Elihu Root to Whitelaw Reid (May 30, 1908) (on file with Whitelaw Reid Papers, Library of Congress) (cipher telegram).

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1909, three months after he left office, the Russians and the Chinese agreed to a railroad administration plan that recognized the sovereignty of China in the railway zone as a fundamental principle.

Unlike Roosevelt, Root refused to abandon legal principle in the face of realpolitik concerns. The Secretary knew full well that the United States could not directly bring force to bear on the situation, but declined to concede whatever the dominant regional powers wanted.[327]

2. *Classicism Ascendant: Manchurian Policy Under Root's Successors*

The lawyers who succeeded Root at the helm of U.S. foreign policy adopted his adherence to legal principle without any of his sound judgment as to practical realities. Root attempted to enforce international law in Manchuria and diverged somewhat from Roosevelt's views, but he was not blind to the overwhelming reality of Japanese dominance in the region. In 1909, however, Roosevelt gave way to his chosen successor, William Howard Taft. Taft wanted to retain Root at the State Department, but Root, at the request of his wife, declined and instead opted for the U.S. Senate seat from New York.[328] Taft then turned to Senator Philander Knox of Pennsylvania, who, like Root, was a corporate lawyer. James Bryce, the British Ambassador in Washington, noted that the new Secretary was "first, last, and all the time a lawyer, with the characteristic habits of mind which belong to that profession, and disposed to look at the questions primarily from the legal side."[329]

These habits of mind led to a new attempt to solve the Manchurian "problem." Knox and his right-hand man, Huntington Wilson (who was also a lawyer), thoroughly distrusted Japan and saw international law as a way to advance "dollar diplomacy"—i.e., focusing foreign policy on expanding American trade and investment opportunities. In 1910, Knox proposed internationalization and neu-

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[327] U.S. Minister to China William Phillips "accurately summed up Root's attitude." "I do not think," he said,

> that the Department intends to have trouble in Manchuria, either with Russia or Japan. The Secretary is especially anxious not to become embroiled in little incidents with either of those two powers; but when Russia makes a demand that we relinquish our extraterritorial rights in Harbin and on all railway property . . . we can not very well agree to her proposal without hitting China pretty hard.

Esthus, supra note 314, at 447-48.

[328] See 2 Jessup, supra note 19, at 138; Leopold, supra note 19, at 71.

[329] Letter from James Bryce to British Foreign Secretary Sir Edward Grey (Jan. 5, 1909) (on file with Records of the British Foreign Office, 371/786, Public Records Office, London), quoted in Hunt, Frontier, supra note 314, at 181 & n.2.

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tralization of all Manchurian railways in order to remedy what he believed to be Japanese violations of the "Open Door" principle, namely, that great powers with Chinese spheres of influence should not discriminate against commerce from other powers in their spheres. The reasoning was straightforward: The powers had agreed to the "Open Door" in Manchuria; Japan, by dominating the Manchurian railways had violated this principle; therefore, Japan should be stopped by the other powers. The point, then, was to bring all the Manchurian railways "under an economic, scientific, and impartial administration."[330]

The legalistic argument was more than a cover for American interests. Legal ideology operated to integrate perceived American self-interest with broader and supposedly neutral principles. Thus, American policy was justified

> by a bewildering array of arguments: to prevent a breach of faith; to safeguard treaty rights; to preserve American commercial interests; to guarantee the United States a voice in the councils of the powers in future questions concerning China's finances; and to fulfill the self-imposed role of protector of China.[331]

What was good for America was good for the world.[332]

Knox's proposal was simple, direct, and stunningly unrealistic.[333] No other great power could challenge Japan's military supremacy in Manchuria, giving Tokyo little reason to relinquish its sphere of influence. Pressure from England, its ally, might have given Japan pause. But why should London risk its alliance on the altar of American commercial expansion? In the end, Knox's demarche only served to drive Russia and Japan together and to come close to simply partitioning Manchuria; for its part, England stuck with its ally; the other great powers were unwilling to chance anything for Washington; China it-

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330 Telegram from Philander Knox to Whitelaw Reid (Nov. 6, 1909) (on file with State Department, Numerical File 5315/559, National Archives).

331 Hunt, Frontier, supra note 314, at 224-25.

332 Hunt suggests that "by late 1910 Knox had confused his goals with his justification . . . , so that . . . he defended his policy not as one of commercial and financial necessity but as one of protections of the principle of the open door." Id. at 225. I do not quarrel with Hunt's penetrating account and analysis of American policy, but I do believe that it makes more sense to interpret goals and justifications as unified through an ideological framework rather than insisting that a goal emerged and that subsequently a justification was concocted to support it.

333 Even on its own terms, Knox's proposal rested on incorrect assumptions. Japanese control of railways did not violate what traditionally had been considered the "Open Door" principle because it did not discriminate against American commercial trade at all: It simply refused to give equal treatment to American investment. See generally Esthus, supra note 314.

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self, far too weak to challenge the powers, could only lick its wounds. The railways, meanwhile, remained firmly under Japanese control.

The whole development infuriated Roosevelt, who had left the White House only to see his carefully crafted foreign policy collapse. As we have seen, Roosevelt saw Manchuria as peripheral to U.S. interests. He reminded Taft that questions of immigration policy recently had caused a rupture between Japan and the United States due to anti-immigrant agitation on the West Coast and the ensuing Japanese belligerence in response to American racism. In such a political climate, the Manchurian scheme needlessly risked conflict with Tokyo.[334]

None of this, however, really appeared to matter to Knox, for reasons that seemed Langdellian in nature. He denied "'any essential connection' between the immigration and Manchurian issues."[335] Such an assertion made perfect sense for the classical legal mind: Immigrants in San Francisco had no conceptual linkage with railways in Manchuria, so it was improper to consider the two together. Huntington Wilson dismissed Roosevelt's views as "queer" and "absurd."[336] Even more importantly, Knox rejected the notion of success as a benchmark in foreign policy. "[I]t would be much better," he told Taft, "for us to stand consistently by our principles even though we fail in getting them generally adopted."[337] Adhering to principle was more important than actually accomplishing anything.

British diplomats grasped the legalism of Knox's policies. The problem with Knox, said one, was that "[t]o him a treaty is a contract, diplomacy is litigation, and the countries interested parties to a

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[334] Roosevelt wrote:

> Our vital interest is to keep the Japanese out of our country, and at the same time to preserve the good will of Japan. The vital interest of the Japanese, on the other hand, is in Manchuria and Korea. It is therefor peculiarly our interest not to take any steps as regards Manchuria which will give the Japanese cause to feel, with or without reason, that we are hostile to them, or a menace—in however slight a degree—to their interests.

Letter from Theodore Roosevelt to William Howard Taft, supra note 318, at 189-90; see also Letter from Theodore Roosevelt to William Howard Taft (Dec. 8, 1910), in 7 The Letters of Theodore Roosevelt, supra note 22, at 180, 180-81 (remarking that provoking Japanese over Manchuria could be problematic).

[335] Letter from Philander Knox to William Howard Taft (Jan. 7, 1911) (on file with Philander H. Knox Papers, Library of Congress).

[336] Letter from Huntington Wilson to Philander Knox (Dec. 23, 1910) (on file with Wilson Papers, Myrin Library, Ursinus College), quoted in Hunt, Frontier, supra note 314, at 221 & n.21.

[337] Letter from Philander Knox to William Howard Taft, supra note 335. To be sure, Knox most likely did not mean that effects were irrelevant, but rather that in the long run, principles would win out—even though he was hardly clear as to the source of beliefs.

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suit."[338] This legalism permeated Knox's State Department: Staff work usually involved interpretations of treaties rather than assessments of political power.[339]

For his part, Root, by then in the Senate, became disgusted with Knox and blamed Huntington Wilson for the whole fiasco.[340] There is little doubt that had Root remained at the State Department, the United States would have avoided the disaster. But such a result would require cabining the legal cast of mind. Root could do so, which speaks well of his intelligence and judgment; other lawyers, however, could not. And at a broader level, Root did not seem inclined to question legalist assumptions.

VI
ROOT'S INTERNATIONAL THEORY: ADVANCE AND RETREAT

A. Developing an International Theory

As his tenure at the State Department came to an end and upon entering the United States Senate, Root began to develop a more comprehensive view of world politics. In so doing, he demonstrated a marked ability to synthesize legal culture with the felt realities of international relations. To be sure, Root would not have explained his theory of international relations as a function of preexisting ideology. He saw his view as confirmed by the events and historical trends not only in the United States but throughout the globe. Just as importantly, he interpreted events in East Asia and at the Hague—the practical facts of contemporary politics—as demonstrative of the fundamental realism of his approach. Concrete facts of world politics could be explained by preexisting ideology and synthesized into a relatively coherent web of ideas. This set of ideas, in turn, established Root's priorities for American foreign policy: Instead of examining international power balances, he argued that American policymakers should concentrate on establishing and strengthening international legal and quasi-legal institutions. World politics was about law, not force.

Root understood that to argue for a legally regulated global order in the absence of a supranational state required some explaining. He

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338 Letter from Mitchell Innes to Sir Edward Grey (Nov. 11, 1910) (on file with Records of the British Foreign Office, 371/875, Public Records Office, London), quoted in Hunt, Frontier, supra note 314, at 224 & n.32.

339 Hunt, Frontier, supra note 314, at 224.

340 See 2 Jessup, supra note 19, at 250-51 (noting that Root attributed many of Knox's mistakes to leaving matters to Wilson).

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met the issue head on. The problem for legal skeptics, he contended, lay in their flawed ideas regarding why people obey the law in the first place. Although some denied that international law could properly be called "law" at all due to the absence of state coercion, "in countless cases nations are yielding to [legal] arguments and shaping their conduct against their own apparent interests . . . in obedience to the rules which are shown to be applicable."[341] This demonstrated, in turn, that "the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and that there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law."[342]

Social norms, not state coercion, served as the bases of obedience. As Root argued:

> It is a mistake to assume that the sanction which secures obedience to the laws of the state consists exclusively or chiefly of the pains and penalties imposed by the law itself for its violation. It is only in exceptional cases that men refrain from crime through fear of fine or imprisonment. In the vast majority of cases men refrain from criminal conduct because they are unwilling to incur in the community in which they live the public condemnation and obloquy which would follow a repudiation of the standard of conduct prescribed by that community for its members. As a rule, when the law is broken the disgrace which follows conviction and punishment is more terrible than the actual physical effect of imprisonment or deprivation of property.[343]

If the law and public opinion "point different ways," Root stated, "the latter is invariably the stronger."[344] Cooley had asserted that the ICC could wield more influence if it had less coercive power, and Adams had acknowledged frankly that his Sunshine Commission had no sheriff to enforce its edicts; but both were firmly convinced that such direct coercive force was unnecessary because public opinion and moral influence would in fact have greater power than the state. Twenty years later, Root applied this conviction to the international sphere: "[T]he effectiveness of the punishments denounced by law against crime derive[s] chiefly from the public opinion which accompanies them."[345]

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341 Elihu Root, The Sanction of International Law, Presidential Address at the Second Annual Meeting of the American Society of International Law, Washington (Apr. 24, 1908), in Addresses on International Subjects, supra note 272, at 25, 26.

342 Id.

343 Id. at 27.

344 Id.

345 Id.

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Indeed, relying on state power alone was folly: "Laws are capable of enforcement," he argued, "only so far as they are in agreement with the opinions of the community in which they are to be enforced."[346] And Root never doubted that international politics constituted such a "community" because the ongoing intercourse between nations strongly pushed for adherence to international law as an act of national self-interest. Hard-headed practicalities dictated it. "Conformity to the standard of business integrity which obtains in the community," he contended,

> is necessary to business success. It is this consideration far more frequently than the thought of the sheriff with a writ of execution that leads men to pay their debts and to keep their contracts. . . . It is only for the occasional nonconformist that the sheriff and policeman are kept in reserve; and it is only because the nonconformists are occasional and comparatively few in number that the sheriff and the policeman can have any effect at all. For the great mass of mankind laws established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.[347]

This conception of law's efficacy powerfully influenced Root's view of the actual relations between great powers. During 1912, a serious dispute arose between the United States and Great Britain concerning America's authority to charge differential tolls for American and British shipping in the Panama Canal. The Hay-Pauncefote Treaty of 1901 arguably forbade unilateral imposition of such tolls, but in the summer of 1912 Congress passed legislation exempting U.S. shipping from these tolls.[348] For Root, what appears in retrospect to be a commercial dispute assumed first importance as a foreign policy issue. He fought tirelessly to repeal the provision, delivering a series of speeches on the Senate floor, including the issue in his Princeton lectures, and addressing audiences throughout the country on the topic.

Throughout the controversy, Root's position was straightforward: Any disagreement about its meaning, in the absence of repeal, should be resolved through arbitration. "We have a treaty with Great Britain," he observed,

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346 Id.

347 Id. at 28; cf. Stuart Macauley, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963) (positing that reliance on contracts by businesses depends on type of transaction and relation of parties involved).

348 Panama Canal Act of 1912, Pub. L. No. 337, 37 Stat. 560 (codified as amended at 15 U.S.C. § 31 (2000)).

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> under which we have agreed that all questions arising upon the interpretation of treaties shall be submitted to arbitration; and, while it seems hardly conceivable, yet there are men who say that we will never arbitrate the question of the construction of the treaty; but I say to you that if we refuse to arbitrate it, we shall be in the position of the merchant who is known to all the world to be false to his promises.[349]

The analogy with domestic law was clear: If the United States refused either to arbitrate or to repeal the law, it would make "ourselves in the mind of the world like unto the man who in his own community is marked as astute and cunning to get out of his obligations [and] . . . is known to be false to his agreements."[350]

Root saw the domestic analogy as confirmed by actual American experience. In keeping with the theory of the federal government and the states as "sovereigns" absolute in their spheres, Root maintained that diversity jurisdiction in the United States stood as the historical precedent for arbitrating national disputes. "Federal tribunals," he argued, are "selected and empowered by the representatives of both states and of all the states—true arbitral tribunals in the method of their creation and the office they perform."[351] Federal jurisdiction did not derive from the strength of the national government, but rather from an interstate compact setting up arbitral courts. The same process could transform international politics. "The whole world owes too much to the Constitution of the United States to think little of its example,"[352] he contended. He noted that the "proud independent sovereign commonwealths" such as Virginia, Pennsylvania, New York, and Massachusetts, which all had well-developed systems of state

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[349] Elihu Root, The Spirit of Self-Government, Address at the One Hundred and Forty-Fourth Anniversary Banquet of the Chamber of Commerce of the State of New York (Nov. 21, 1912), in Addresses on Government and Citizenship, supra note 49, at 379, 385.

The sentiment also influenced Root's position at the Hague Conference. He told Whitelaw Reid that he doubted a naval arms-limitation treaty could be secured at the Hague because Russia's navy had been destroyed in its war with Japan and would want to replace its fleet to the prewar level, and other nations might not be content with simple maintenance and replacement. But "in my judgment, it would be a distinct gain to civilization and the world, to fix definitely the responsibility for the refusal. Any Power which is put in that position would necessarily be compelled by its future conduct to rebut the presumption that it means to disturb the peace . . . ." Letter from Elihu Root to Whitelaw Reid, supra note 296.

[350] Elihu Root, The Obligations of the United States as to Panama Canal Tolls, Address in the Senate of the United States (Jan. 21, 1913) [hereinafter Root, Obligations as to Panama Canal Tolls], in Addresses on International Subjects, supra note 272, at 207, 239.

[351] Elihu Root, The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts, Presidential Address at the Third Annual Meeting of the American Society of International Law, Washington (Apr. 23, 1909), in Addresses on International Subjects, supra note 272, at 33, 39.

[352] Id.

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courts at the founding, nevertheless understood how "small local jealousies" could subvert "peace and concord and friendship and brotherhood between the states and their citizens."[353] They gave up exclusive jurisdiction, and nations could do the same.

Why, though, would nations behave like the early American states? Root responded that they would do so because it was in their self-interest. He did not maintain that everything could be arbitrated—only a particular group of disputes. But this group of disputes was in fact more important than nonarbitral questions.

Root made it clear he was no pacifist. But he also rejected the notion that the international system made conflict and contention inevitable. "So long as selfishness and greed and the willingness and the brutality to do injustice continue in this world, we must have the policeman," he argued. "[A]nd the international policeman whose presence makes the use of his club unnecessary, is the army and the navy."[354] Such a notion, of course, did not see war as inherently unnecessary or archaic. But it also assumed that international conflict was somehow irrational, a product of human frailty and failure, not the inevitable response to objective conditions. "War comes today as the result of one of three causes," Root contended:

> [E]ither actual or threatened wrong by one country to another; or suspicion by one country that another intends to do it wrong, and upon that suspicion, instinct leads the country that suspects the attack, to attack first; or, from bitterness of feeling, dependent in no degree whatever upon substantial questions of difference; and that bitterness of feeling leads to suspicion, and suspicion in the minds of those who suspect and who entertain the bitter feeling, is justification for war. . . . The least of these three causes of war is actual injustice. . . . By far the greatest cause of war is that suspicion of injustice, threatened and intended, which comes from exasperated feeling.[355]

This was not a matter of high theory for Root; it derived directly from his experience with Japanese-American relations, and he pointedly told his listeners that "in this country of ours, we are not free from guilt of all those great causes of war," specifically using anti-Japanese sentiment as his central example. But the overall lesson was clear: "Insult, contemptuous treatment, bad manners, arrogant and provincial assertion of superiority are the chief causes of war to-

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353 Id. at 40.

354 Elihu Root, The Causes of War, Address at a Dinner of the New York Peace Society in Recognition of the Services of the Secretary of State to International Peace (Feb. 26, 1909) [hereinafter Root, Causes of War], in Miscellaneous Addresses 275, 275 (Robert Bacon & James B. Scott eds., 1917).

355 Id. at 277.

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day."[356] The question was one of "injustice," "suspicion," "instinct," and "feeling," not of realpolitik and the balance of power.[357]

Such a view rejected the fundamental underpinning of realism, namely, that the international system led nations to behave belligerently. Indeed, it turned realism on its head by suggesting that international conflict was in fact irrational. The "rational actor," under Root's framework, had little need for conflict with other nations. Hard-headed rationality yielded an antirealist result.

It was a fitting finale to Root's State Department career. Accepting a draft from Republican leaders in the New York legislature, Root became a United States Senator in 1909, his first and only elected office.[358] In this new position, he was forced to confront new issues and develop his public philosophy more deeply.

B. New Conditions: Changing Views on Domestic Policy

Root did not enjoy his time in the Senate. His prodigious administrative skills went to waste in the legislature, and while he diligently attended to his constituents' needs, Senate issues hardly engrossed him in the way that international diplomacy did. After 1910, the Republican Party division between Progressive and Old Guard factions consigned it to minority status, leaving Root without even the consolation of legislative influence.[359] More to the point, the GOP divide reflected the country's broader domestic turmoil, as new public philosophies challenged the late-nineteenth-century framework that animated Root's thought.

Root engaged the new ideas. Perhaps as a way of coming to terms with new realities, he began to examine domestic controversies more closely through speeches and lectures. Root's writings do not present brilliant or particularly original insights as to the nature of American political and social reality; they do, however, reveal a formidable nineteenth-century intelligence attempting to synthesize received knowledge with new conditions. Root grasped these new

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356 Id.

357 Root reserved his greatest contempt for domestic pressure groups that stirred up opposition to conciliatory gestures; these groups were whom he referred to by "insult," "bad manners," etc. See, e.g., Letter from Elihu Root to Whitelaw Reid (July 31, 1908) (on file with Whitelaw Reid Papers, Library of Congress) (criticizing protests by domestic pressure groups like Clan na Gael that stand for idea "that your country ought to fight with everybody whom you do not like").

358 Taft asked Root to stay on at the State Department, but he declined because he did not want to live full-time in Washington. Letter from Elihu Root to Whitelaw Reid (Nov. 23, 1908) (on file with Whitelaw Reid Papers, Library of Congress).

359 Excellent descriptions of the causes and consequences of the Republican split in 1910 can be found in Link, supra note 24, at 3-6, and Mowry, supra note 254, at 250-73.

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conditions and he understood that they demanded novel ways of grappling with policy. But he firmly rejected the notion that they required any reconceptualization of politics or law; while engaging the new public philosophies, he remained firmly anchored to the old.

1. Engaging the New Paradigm

Unlike the Republican Old Guard, Root recognized that the technological advances of the late nineteenth and early twentieth centuries had undermined traditional American individualist assumptions. "[T]here has been a general social and industrial rearrangement," he told his listeners. While in the eighteenth century individuals could support themselves upon their own initiative without governmental intervention,

> [t]o-day almost all Americans are dependent upon the action of a great number of other persons mostly unknown. . . . Their food, clothes, fuel, light, water—all come from distant sources . . . through a vast, complicated machinery of production and distribution with which they have little direct relation. If anything occurs to interfere with the working of the machinery, the consumer is individually helpless. . . . [H]e [thus] must seek the power of combination with others, and in the end he inevitably calls upon that great combination of all citizens which we call government.[360]

Root saw that this meant more than an augmentation of state power; instead, it changed the relation of individuals to the state because now they acted collectively. "Under comparatively simple industrial conditions," he argued,

> [t]he relation between employer and employee was mainly a relation of individual to individual, with individual freedom of contract and freedom of opportunity essential to equality in the commerce of life. Now . . . instead of the free give and take of individual contract there is substituted a vast system of collective bargaining between great masses of men organized and acting through their representatives, or the individual on the one side accepts what he can get from superior power on the other. In the movement of these mighty forces of organization the individual laborer, the individual stockholder, the individual consumer, is helpless.[361]

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[360] Elihu Root, Experiments in Government and the Essentials of the Constitution 4-5 (1913) [hereinafter Root, Experiments in Government]. This book comprises Root's Stafford Little Lectures at Princeton University in 1913.

[361] Id. at 6. Root often repeated these themes. See, e.g., Elihu Root, The Citizen's Part in Government 6-9 (1907) (asserting that individuals must cooperate with others to ensure collective safety and welfare). This book reprinted Root's William Earl Dodge Lectures at Yale University, delivered in 1907.

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These changes, Root contended, required new organizational forms. In his presidential address to the American Bar Association, Root challenged his listeners, stating that "the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority."[362] Observing that recent years had seen the flowering of administrative agencies at both the federal and state levels, Root predicted that their growth would continue because new social industrial conditions demanded them. The task, Root told the bar, was to fashion a "system of administrative law" that would fix and determine the powers of the new agencies.[363]

Put together, Root's arguments formed a cogent and succinct critique of the prevailing legal culture and its deepest assumptions—a particularly impressive performance for a man who grew up in the decades prior to the Civil War. And had Root left it at that, he would have firmly placed himself among the prewar progressive legal thinkers.

2. *Giving with One Hand*

But Root did not leave it at that. Although he acknowledged and accepted much of the Progressive critique of legal orthodoxy, he did not believe that such acceptance required any reconsideration of the fundamental premises of late-nineteenth-century legal ideology. The old structure, he contended, needed some updating, but it did not require any basic rethinking.

For instance, Root maintained that the Supreme Court's traditional police powers jurisprudence was fully adequate to meet the new industrial age because

> [t]he liberty of contract and the right of private property which are protected by the limitations of the constitution are held subject to the police power of government to pass and enforce laws for the protection of the public health, public morals, and public safety. . . . It is only when laws are passed under color of the police power and having no real or substantial relation to the purposes for which the power exists, that the courts can refuse to give them effect.[364]

Root thus maintained the late-nineteenth-century distinction between "public interest" legislation and mere "class" or "special" legislation. He disagreed with *Lochner*,[365] but on classical orthodox

362 Root, Public Service by the Bar, supra note 152, at 535.
363 Id.
364 Root, Experiments in Government, supra note 360, at 77-78.
365 Lochner v. New York, 198 U.S. 45 (1905).

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grounds: The bakers' hours law, he contended, was a public health regulation that the Court had misunderstood.[366] The unified public interest remained intact; there was no need to balance contending interests.

The difficulty arose when government began to assert an active role in brokering and determining the different interests of different groups, because that would imply the state as the fount of social order.[367] If group interests could subordinate the individual freedom to contract, then American democracy would devolve into a crude majoritarianism, in which power, not right, determined policy outcomes. "We find here and there and everywhere doubt," he complained, "which means, if it means anything, a question whether there is any standard of right, whether there is any basis of ethics apart from the will of a majority."[368] Such a result would be anathema because of its straightforward reliance on power, not law.[369]

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366 See Letter from Elihu Root to William Howard Taft (Oct. 14, 1910) (on file with Elihu Root Papers, box 162, Library of Congress) (

> I don't care so much about [Roosevelt's] grumbling at the decisions of the Court. We all do that. Personally, I have never thought that either the Knight case or the bakers' case was rightly decided. In both cases very narrow views as to the significance of the facts in the records prevailed. I have never doubted that ultimately different views would prevail on records which perhaps made the true facts a little plainer.).

The Knight case refers, of course, to United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895), which invalidated federal antitrust prosecution of the Sugar Trust on the grounds that the federal government had the power to regulate "commerce" but not manufacturing. The sharp distinction between manufacturing and commerce was typical of classical adjudication. See Wiecek, supra note 6, at 145, 158. As the letter to Taft reveals, Root did not challenge the ability to make the distinction but rather its application, putting him well within the classical paradigm. Indeed, in his lectures at Yale Law School, Root described maximum-hours legislation as antidemocratic and as a species of "limitations upon individual opportunity," suggesting that those who favored them were those "wage-workers who believe in putting a limit upon the amount of work . . . in [their] day's labor, so that the most industrious, skillful, and ambitious workman shall be permitted to do no more and to earn no more than the most dull, idle, and indifferent workman." Elihu Root, The Task Inherited or Assumed by Members of the Governing Body in a Democracy, in Addresses on Government and Citizenship, supra note 49, at 3, 10.

367 See Root, The Lawyer of Today, supra note 193, at 506, in which he said scornfully,

> We are told that liberty of contract is to be regarded as limited by the incapacity of the citizen to make a contract which will be injurious to him. We are told that the liberty of the individual must be subordinated to the obligation to conform his conduct to the conduct of a class, with the natural corollary and further step that the state, the greatest of all classes, is everything and the individual is nothing.

368 Id.

369 See Root, Individual Liberty, supra note 49, at 511, 515 (arguing that use of bureaucratic power is tempting but runs counter to legal principles of liberty). This address was given at the annual dinner of the New York State Bar Association in 1916.

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Root often set forth these warnings in speeches to lawyers, whom he saw as having special responsibility to divert the public from such a "dangerous road."[370] But in order to do this, lawyers needed a succinct and clear statement of the legal fundamentals. Root used the occasion of his 1916 ABA presidential address, the same address in which he told the elite bar to prepare for further experimentation in government and policymaking, to "state the case in its simplest terms":

> The central principle of our system of government is in the proposition that every man has a right to full and complete individual liberty, limited only by the equal liberty of every other man. . . . Our whole system of law is in its essence only the enforcement of the reciprocal limitations of individual liberty. It is a compulsion upon me to limit my liberty by yours and upon you to limit your liberty by mine. The justification of all laws and customs which constrain human conduct is that they are necessary and appropriate for the preservation of the liberty of others.[371]

Going any farther, Root argued, "is not the just exercise of governmental power, but is essential tyranny."[372]

The problem was that "liberty" hardly defined itself: That judgment had to be made politically in some sense. The formulation suggested that state power was only about something called "liberty"—but many disagreed. Root acknowledged that "the test is difficult of application" and depends "upon a multitude of conditions imperfectly known and subject to controversy."[373] But the overall structure of his "restatement" of American jurisprudence derived from the classical legal paradigm—a paradigm of individuals, with equal liberty, completely free in their own spheres and coming into conflict rarely, if at all.

Root's perspective resembled his view of the Hague and Algeciras Conferences in important ways. In both domestic and external policy, Root recognized—ahead of most of his contemporaries—the radically changing conditions of the early twentieth century. Internationally, he seemed to understand the importance and fragility of the Anglo-French-German relationship and he grasped, at least in a general way, that the United States had an interest in maintaining European stability. Within the United States, he comprehended that the

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370 The bar, he averred, must be prepared to defend the true principles of American liberty "against all indifference and false doctrine, against all willingness to submit individual independence to the control of practical tyranny, whether it be of a monarch or a majority." Id.

371 Root, Public Service by the Bar, supra note 152, at 540.

372 Id.

373 Id.

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factual assumptions behind some police powers jurisprudence had become obsolete and that the formal liberty of contract had new limits. Yet in both contexts, Root's insights did not enable him to rethink the basic foundations of the late-nineteenth-century legal paradigm. In the absence of an imminent great power crisis, Root framed and defined international problems as primarily legal and institutional in character. He devoted his intellectual and political energies to solving these problems and interpreted international events as confirming their saliency. Thus, international disputes reflected misunderstandings exacerbated by institutional weakness, not power conflicts. Similarly, he saw the task of the bar and of the Republican Party as defending traditional legal and philosophical principles against excessive encroachment and of raising political consciousness to enhance this defense. Even as he supported certain policy initiatives such as worker's compensation, he spent his time fighting the initiative and referendum as well as the movement for the popular override of judicial decisions. Advancing policies and programs that reflected his new understanding simply did not rank highly on his agenda.

If, as F. Scott Fitzgerald asserted, the test of a first-class mind is the extent to which it can hold diametrically opposing views at the same time,[374] then Root's mind functioned as one of the best in the country. But when push came to shove, the late-nineteenth-century legal view—and its deepest assumptions—prevailed. The question remained what would occur when the First World War obliterated most of the world that had spawned the assumptions in the first place.

C. Theory Decays: Root and U.S. Entry into the First World War

The outbreak of the First World War caught Root, like most Americans, completely by surprise, and, like most Americans, he did not even entertain the notion that the United States should enter the war. But unlike most Americans, his sympathies clearly lay with the Allies. This difference derived partially from personal connections, but as revealed with the Platt Amendment, Root had harbored suspicions of the Kaiser's diplomacy for more than a decade—a feeling encouraged by Berlin's thinly veiled contempt for international legal institutions and meetings like the Second Hague Conference.[375] By

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[374] See F. Scott Fitzgerald, The Crack-Up 69 (Edmund Wilson ed. 1945).

[375] On Cuba and the Platt Amendment, see supra notes 200-08 and accompanying text. Regarding the German position at the Hague, Root told Carnegie shortly after leaving the State Department "that Germany, under her present government, is the great disturber of peace in the world," and "the obstacle to the establishment of arbitration agreements, to the prevention of war, to disarmament, to the limitation of armament, to all attempts to lessen the suspicion and alarm of nations toward each other." Letter from Elihu Root to

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early August 1914, Root placed the blame for the war squarely on the Kaiser's shoulders. Root maintained his belief in neutrality for a much shorter time than the American public: The sinking of the Lusitania on May 7, 1915, convinced him that it was time for the United States to enter the conflict.

But Root's position on the war during 1914 and 1915 stands out most for its tepidness. After the outbreak of the war in late July, and after he already had announced his retirement from the Senate, New York Republican leaders offered Root the opportunity to run for another term. Despite the onset of a global crisis, the GOP's leading spokesman on foreign affairs declined and apparently never regretted it.[376] Throughout 1914 and 1915, Root made no public comment on the war, ostensibly in deference to President Wilson's call for neutrality. But during the entire period, he never attempted to communicate with the administration on the conflict. Moreover, it hardly followed that explaining his views on the war implied any sort of disloyalty; in the Senate, Root often stood as a figure of principled dissent on many foreign policy issues. Several Republican leaders spoke out on the war, with remarks ranging from the judicious (Taft) to the hysterical (Roosevelt). Many of these leaders specifically asked Root to make his views known; he consistently refused.[377]

It makes more sense, then, to see Root's silence less as a gesture of bipartisan goodwill and more as a symptom of intellectual confusion. During the period of American neutrality, Root sought to assimilate the experience of war into his long-held views concerning the international system. But the same disconnect that appeared in his thoughts on domestic issues manifested itself in his foreign policy positions. Looking inside the United States, Root saw that industrial and social conditions had changed dramatically and called traditional premises into question while simultaneously insisting that these premises had lost none of their fundamental vitality. Looking at the global stage, Root saw that international law posed no obstacle whatsoever to a great power desirous of achieving European primacy by force

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Andrew Carnegie (Apr. 3, 1909) (on file with Elihu Root Papers, box 171, Library of Congress):

376 The best discussion of Root's decision not to seek reelection is found in Leopold, supra note 19, at 94-95. Root made his official announcement on June 29, 1914, about a month before the war began. There is no evidence that he ever regretted leaving the Senate. Since New York's primary was held in the autumn, given Root's enormous prestige in the party, it is reasonable to conclude that had he desired renomination in light of the war, it would have been his for the asking.

377 See, e.g., Letter from Robert Bacon to Elihu Root (Oct. 29, 1914) (on file with Elihu Root Papers, box 171, Library of Congress) (asking Root to make public statement on war).

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while simultaneously looking to legal structures and international institutions as the hallmark of U.S. foreign policy and global stability.

Thus, in his 1915 presidential address to the American Society of International Law, Root acknowledged that "laws to be obeyed must have sanctions behind them; that is to say, violations of them must be followed by punishment," and this punishment "must be caused by power superior to the law-breaker."[378] He also noted the difficulty in making an analogy between municipal and international law "in view of the differences between the individual who is subject to sovereignty and the nation which is itself sovereign."[379] But international legal institutions remained "the only method to which human experience points to avoid repeating the present experience of these years of war consistently with the independence of nations and the liberty of individuals."[380] He rejected realpolitik because "concerts of Europe and alliances and ententes and skillful balances of power all lead ultimately to war."[381]

Root's thought showed the ability of the orthodox legal paradigm to absorb events seemingly at odds with it and turn it to its advantage. Before the outbreak of the First World War, Root argued that evidence of the previous decades such as the Hague Conferences represented the advancement toward a legally regulated international system. Now he asserted that the destruction of the old order would strengthen international legal institutions because "the world will have received a dreadful lesson of the evils of war. . . . [This] will naturally produce a strong desire to do something that will prevent the same thing [from] happening again."[382]

The problem, as always, was institutional: The sanction, more powerful than the law-breaker,[383] necessary for legal compliance was not an alliance to maintain the balance of power. In that case, "there would be no law as between the strong and the weak."[384] Instead, the power must derive from "collective civilization outside of the offending state" and thus "must be based upon public opinion . . . from general, concurrent judgment and condemnation."[385] The method and

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[378] Elihu Root, The Outlook for International Law, Presidential Address at the Ninth Annual Meeting of the American Society of International Law, Washington (Dec. 28, 1915) [hereinafter Root, Outlook for International Law], in Addresses on International Subjects, supra note 272, at 391, 395.

[379] Id.

[380] Id.

[381] Id.

[382] Id. at 394.

[383] Id. at 395.

[384] Id. at 396.

[385] Id.

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precise mechanism of the punishment was less important. It "may be inflicted either by the direct action of governments, forcible or otherwise, or by the terrible consequences which come upon a nation that finds itself without respect or honor in the world and deprived of the confidence and good-will necessary to the maintenance of intercourse."[386]

How, then, could public opinion focus on the law-breaking nation? For Root, the answer lay in the simplification of legal rules: "For the formation of such a general opinion . . . questions of national conduct must be reduced to simple and definite form."[387] Such simplification and clarification reflected the hallmark of classical thought, from Langdell's assertion that the number of legal doctrines was less than is commonly supposed to the ALI's attempt half a century later to simplify the rules of the common law.[388] And this could only be done "by bringing [controversies] to the decision of a competent court which will strip away the irrelevant, reject the false, and declare what the law requires or prohibits in a particular case."[389] Like the arbiter in Maine and Carter's account, international legal institutions would make it clear to the whole community what needed to be done: Postjudgment enforcement was an afterthought.[390]

Thus, while Root seemingly acknowledged the need for coercive enforcement, he cabined the principle so thoroughly that his conclusions about U.S. foreign policy remained virtually unchanged from his prewar position. This attempt to recognize changing conditions while maintaining the old paradigm helps explain the bizarre nature of Root's major foreign policy address in February 1916 when he publicly broke with Wilson's wartime diplomacy. He castigated the Wilson administration on three counts: (1) for failing to prepare American military and naval forces for war; (2) for telling the German government that Berlin would be held "strictly accountable" for the sinking of neutral American ships but then taking no action when German U-boats sank such vessels; and (3) for not protesting the invasion of Belgium, which Root condemned as a clear violation of international law.[391]

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386 Id.

387 Id.

388 See supra notes 151-57 and accompanying text.

389 Root, Outlook for International Law, supra note 378, at 396.

390 See supra notes 167-82 and accompanying text.

391 See Elihu Root, Foreign Affairs, 1913–1916, Address as Temporary Chairman of the New York Republican Convention, New York (Feb. 15, 1916), in Addresses on International Subjects, supra note 272, at 427, 434-47.

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Much of this attack was unfair. Silent, Root had done nothing over the previous twenty months to ensure American preparedness. And the criticism concerning Belgium was not only second-guessing—Root himself had not condemned the invasion either publicly or privately at the time—but incoherent.[392] Root specifically refused to say that the United States should have gone to war over the invasion of Belgium, yet said rather lamely that official denunciation of it "would have given to the people of America that leadership to which they were entitled . . . . It would have brought to American diplomacy the respect and strength of loyalty to a great cause."[393] Thus, the United States should have responded to a violation of international law by denouncing it—and apparently doing nothing else.[394]

In reality, Root's second argument in the address formed the core of his attack on Wilson. Essentially, he believed that the Kaiser already had begun to wage war on the United States and that America needed to respond.[395] During the rest of 1916 and early 1917, he emphasized this criticism of Wilson more than any other and repeated it as the principal justification for intervention. Root also started to draw sharp distinction between German autocratic values, which he often referred to as "Prussianism," and the democratic values held by the Allies.[396]

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392 See id. at 445.

393 Id. at 445. In fact, there is evidence that Root actually had not made up his mind about the issue several months after the invasion. See Chandler P. Anderson, Diary (Feb. 18, 1915) (on file with Chandler P. Anderson Papers, Library of Congress) (noting that Root "did not commit himself to either view").

394 See also Elihu Root, The Enslavement of the Belgians, Address at a Mass Meeting in New York City (Dec. 15, 1916), in The United States and the War; The Mission to Russia; Political Addresses 3, 3-9 (Robert Bacon & James Brown Scott eds., 1918) [hereinafter The United States and the War] (castigating Germans for violating international law in alleged deportation of Belgians from their home country, but refusing to say that German legal violations would constitute reason for American involvement).

395 This was especially true after Germany announced unrestricted submarine warfare in January 1917. See, e.g., Elihu Root, America on Trial, Address Before the Union League Club, New York (Mar. 20, 1917), in The United States and the War, supra note 394, at 27, 27 ("Germany is making war upon us, and we are all waiting to see whether we are to take it 'lying down.' It is either war or it is submission to oppression."); Elihu Root, The United States and the World Crisis, Address as Chairman of a Patriotic Mass Meeting, Madison Square Garden, New York (Mar. 22, 1917) [hereinafter Root, The United States and the World Crisis], in The United States and the War, supra note 394, at 33, 33-34 (arguing that "burden of freedom" demands response to German hostilities).

396 The best example of this is found in the speech that Root made to the New York Republican Club on April 9, 1917, three days after the American declaration of war against Germany. No verbatim transcript exists of the speech, but it is recreated on the basis of newspaper accounts in Elihu Root, The Duty of the Republican Party in the War, Speech Before the New York Republican Club (Apr. 9, 1917) [hereinafter Root, The Duty of the Republican Party], in The United States and the War, supra note 394, at 39, 39. See also Letter from Elihu Root to Richard A. Biggs (May 22, 1918) (on file with Elihu Root Pa-

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But this view seemed to undermine his fundamental beliefs, as Root himself acknowledged.[397] What did international legal institutions accomplish if a country like Germany could simply violate them when it perceived its national interest to require it? And if the war was a struggle over fundamental values, how could the law hope to mediate these conflicts in the absence of the state? Root chose to shy away from confronting these questions.[398]

It was easier just to endorse American involvement once it came. Unlike Roosevelt, Root harbored few romantic notions about war. But when the United States declared war in April 1917, he could turn his attentions to supporting the war effort, a transition that he greeted with a large measure of relief. For the next year and a half, Root energetically threw himself into raising money for war bonds, keeping the Republican Party committed to the war, and heading a mission to Russia.[399] Once it began to appear, however, that the Allies would in fact triumph and that preparations for the postwar world would have to be made, the same troubling questions returned to vex him again.

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pers, box 172, Library of Congress) (suggesting suspension of German language instruction during war on grounds that Prussianism had demoralized German people); Letter from Elihu Root to Joseph Buffington (Sept. 7, 1918) (on file with Elihu Root Papers, box 172, Library of Congress) (denouncing "Prussianism" in Germany because "its organized and incessant appeal to the lower motives for more than a generation has debased the standards of life, of morals, of art, of literature . . . [and] only a spiritual revolution induced by a tremendous shock can restore the old Germany").

397 See Root, The United States and the World Crisis, supra note 395, at 35 (conceding that "[w]e did think a few years ago that the reign of law had come into the world; . . . we did think that the faith of treaties was a protection; but we have had a sad awakening").

398 Root's private correspondence reveals that any anomalies in his arguments did not come from political considerations. Indeed, to the extent that his convictions made him less popular politically, Root seemed to take that as a distinct advantage. See Letter from Elihu Root to Henry Cabot Lodge (Feb. 11, 1916) (on file with Henry Cabot Lodge Papers, box 45, reel 44, Massachusetts Historical Society) (

> I have been much puzzled as to what would be most useful to say from a political point of view, but I finally concluded that there were some things that ought to be said and that I should die happier for saying them and accordingly I am going to say them with such self-restraint as I have been able to command. I feel confident about only one result of what I shall say, and that is, that it will relieve me from any embarrassment about being called upon to run for the presidency.);

Henry L. Stimson, Diary (Feb. 21, 1916) (on file with Sterling Memorial Library, Yale University) (revealing that Root's speech came from his own views and was not influenced by political considerations); Henry L. Stimson, Diary (Feb. 18, 1916) (on file with Sterling Memorial Library, Yale University). In any event, the speech was extremely well received and hardly stopped the Root-for-President boomlet. See, e.g., Letter from Henry Cabot Lodge to Elihu Root (Feb. 16, 1916) (on file with Henry Cabot Lodge Papers, box 45, reel 44, Massachusetts Historical Society) ("It was a very great speech. I have read it with the profoundest satisfaction and delight.").

399 See generally 2 Jessup, supra note 19, at 323-31, 353-71; Leopold, supra note 19, at 116-22.

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VII
DENOUEMENT, 1919: THE QUESTION OF POSTWAR ORDER AND THE BATTLE OVER THE TREATY OF VERSAILLES

A. Planning the Postwar Order

By the spring of 1918, Wilson was deeply engaged in the formation of his postwar program and hoped to use it to maintain control of domestic and international politics. As part of this effort, he endeavored to co-opt key Republican leaders and asked his close advisor Colonel Edward M. House to arrange an informal meeting with Root, Taft, Harvard President A. Lawrence Lowell, and British figures active in preparing an international league concept.[400] But at the meeting, the Republicans were unwilling to defer and give the President control over postwar planning.[401] Root took on the task of drafting a Republican plan for international organization in the postwar world.

Four months later, Root presented House with the memorandum, the first comprehensive statement of a viewpoint Root would maintain with remarkable consistency over the next two years.[402] The memorandum is remarkable for its frank use of legal analogies, categories, and terminology in interpreting international affairs. The war, as Root saw it, did not derive from an imbalance of power; instead (sounding rather Langdellian), the world required "a fundamental change in the *principle* to be applied to international breaches of the

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[400] Root's suspicions toward Wilson advanced daily; along with most of the Republican leadership, he had convinced himself of the President's complete mendacity and incompetence. See, e.g., Chandler P. Anderson, Diary 1-2 (Nov. 18, 1918) (on file with Chandler P. Anderson Papers, Library of Congress) (noting, for example, that Root thought following the President's lead was dangerous because Wilson was only influenced by selfish considerations). But he respected House and justifiably prided himself on being able to work with Democrats on critical issues, so he readily accepted the invitation. Cf. Leopold, supra note 19, at 131 (finding Root, while personally critical of Wilson, was outwardly less partisan than other Republican leaders).

[401] Edward M. House, Diary (Apr. 11, 1918) (on file with Edward M. House Papers, Sterling Memorial Library, Yale University).

[402] Lloyd Ambrosius believes that a large part of the letter reflected the consensus view of the April 11 meeting. See Lloyd E. Ambrosius, Wilson, the Republicans, and French Security After World War I, 59 J. Am. Hist. 341, 345 (1972). Root's subsequent letter, however, strongly suggests that the views expressed there are his alone. He opens with, "I promised to give you in writing the substance of some thing I said during the luncheon at your apartment some time ago" and closes with "I think this covers what I said." Letter from Elihu Root to Colonel E.M. House (Aug. 16, 1918) (on file with Elihu Root Papers, box 136, Library of Congress). In my view, then, it is better to interpret the letter as stating Root's own views, although as this Article suggests, such views did represent a consensus at least in Republican thought.

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peace."[403] Under the previous, incorrect "principle," when one nation used force against another,

> if any other nation claims a right to be heard on the subject it must show some specific interest of its own in the controversy. That burden of proof rests upon any other nation which seeks to take part if it will relieve itself of the charge of impertinent interference . . . in the affairs of an independent sovereign state.[404]

In other words, because of incorrect international legal principles, nations could not form effective barriers to aggression.

Root illustrated this view with the most crucial example possible: "Germany in July 1914 . . . insisted that the invasion of Serbia by Austria-Hungary was a matter which solely concerned those two States, and upon substantially that ground refused to agree to the conference proposed by [British Foreign Secretary] Sir Edward Grey. The requisite change is an abandonment of this view."[405]

Such a perspective reflected classical legal ideology's ability to transform the meaning of events. Germany's objection to Grey's proposal had nothing to do with "principle." The Wilhelmstrasse's policy derived instead from its perception of German national interest. Berlin believed the preservation of Austria-Hungary was critical to German security, and the continued existence of Serbia threatened the dual monarchy. Thus, Austria-Hungary should receive a free hand to punish Serbia as strongly as it could. If such punishment resulted in war with Russia and France, then this was not too high a price to pay because Germany could triumph in such a war.[406]

For Root, however, the issue was a matter of dividing responsibilities into separate legal spheres. Grey's request and Germany's rejection of it, he observed,

> correspond to the two kinds of responsibility in municipal law which we call civil responsibility and criminal responsibility. If I make a contract with you and break it, it is no business of our neighbor. You can sue me or submit, and he has nothing to say about it. On the other hand, if I assault and batter you, every neighbor has an interest in having me arrested and punished, because his own safety requires that violence shall be restrained.[407]

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403 Letter from Elihu Root to Colonel E.M. House, supra note 402 (emphasis added).

404 Id.

405 Id.

406 For a persuasive demonstration of this point, see, e.g., Norman Stone, Moltke and Conrad: Relations Between the Austro-Hungarian and German General Staffs, 1909–1914, in The War Plans of the Great Powers, 1880–1914, at 222, 233-35 (Paul M. Kennedy ed., 1979) (describing Austrian strategic speculation regarding likelihood that German support would deter Russian involvement).

407 Letter from Elihu Root to Colonel E.M. House, supra note 402.

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In best classical orthodox style, Root saw European power struggles as an intellectual problem regarding legal classification: "[T]he old doctrine [international relations as civil law] is asserted and the broader doctrine [international relations as criminal law] is denied by approximately half the military power of the world, and the question between the two is one of the things about which this war is being fought."[408]

Little wonder, then, that he also saw the question of contract enforcement as "no business" of the general public, a sharp public-private distinction characteristic of classical reasoning. Such a view further demonstrated the legal culture's tendency to downplay interest and value conflicts; if workers and businessmen battled over adhesion, unconscionable, yellow-dog, or fraudulent contracts, then this reflected individual disputes between private litigants, not symptoms of broader conflicts between classes and groups. Essential interest identity remained intact.

If Langdellian orthodoxy, however, provided the analytic framework, then historical jurisprudence supplied the solution. "At the basis of every community," Root argued,

> lies the idea of organization to preserve the peace. Without that idea really active and controlling there can be no community of individuals or of nations. It is the gradual growth and substitution of this idea of community interest in preventing and punishing breaches of the peace which has done away with private wars among civilized peoples.[409]

As Carter, Maine, Pomeroy, James Barr Ames, and other historical jurisprudes had maintained, the development of civic peace reflected a slow process of consensual value formation and community social control. It did not reflect the actions of a coercive state. Private wars disappeared because parties eventually realized that submitting to arbitration was in everyone's interest—not because the state threatened to punish those who continued engaging in them.

Root's discussion of the change in "doctrine" ignored state power completely.

> The change involves a limitation of sovereignty, making every sovereign state subject to the superior right of a community of sovereign states to have the peace preserved, just as individual liberty is limited by being made subject to the superior right of the civil community to have the peace preserved.[410]

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408 Id.

409 Id.

410 Id.

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The difference, of course, was that the "civil community" could enforce its will through coercion, a distinction that Root elided. But he did so because of his assumptions about how law triumphed. "When you have got this principle accepted openly, expressly, distinctly, unequivocally by the whole civilized world, you will for the first time have a Community of Nations," he contended. "[T]he practical results . . . will naturally develop . . . ."[411]

"Natural development," of course, hardly meant that legal institutions were unimportant; indeed, they were crucial. But their importance derived from their ability to make agreements easy—they would, in modern parlance, reduce the transaction costs to achieving diplomatic goals.[412] "No lesson from history is clearer than this," Root argued.[413] In the Langdellian framework, scholarly work rationalized legal architecture and allowed the law to demonstrate how apparently opposing interests actually operated in harmony; similarly, in Carter's historical jurisprudence, judges and arbitrators established their authority by proving their usefulness in easily resolving disputes. Root noted, "Provision has been made by the Hague Convention for machinery making it very easy to submit questions of international rights to a tribunal for decision. It has also been made easy to determine the truth when there is a dispute about facts through a Commission of Enquiry."[414] Furthermore, Root also observed that machinery established under the Concert of Europe "made it a natural and customary thing for the powers to meet in a conference when any serious exigency arises for the purpose of discussing the way to avoid general injury."[415]

In the wake of the war, Root contended, new steps were necessary to continue this historical process. "All of these inchoate institutions . . . depend entirely upon individual national initiative. No-one has any authority to invoke them in the name or interest of the Community of Nations."[416] The key, then, was to develop an institution for the application of legal principle. "The first and natural step in the development of these institutions after the adoption of the new principle of community interest in the preservation of peace will be an agreement upon someone or some group whose duty it will be to

411 Id.

412 For a similar view in a more contemporary context, see Robert O. Keohane, The Demand for International Regimes, in International Institutions and State Power: Essays in International Relations Theory 101, 101-31 (1989). Keohane's theory, of course, is more complex and subtle than Root's; Keohane claims to subsume realism, not abandon it.

413 Letter from Elihu Root to Colonel E.M. House, supra note 402.

414 Id.

415 Id.

416 Id.

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speak for the whole community"[417] and call for judicial consideration of disputes, inquiry commissions, or diplomatic conferences. Root conceded that individual nations could refuse such a demand, "but it would be much more difficult than it is now, and much more improbable";[418] refusal would put the offending nation "clearly . . . in the wrong in the eyes of the entire world."[419] The assertion of an "entire world" "clearly" seeing wrong was unproblematic. Indeed, the late-nineteenth- and early-twentieth-century legal culture assumed a unified "public interest" as a central tenet.

Colonel House quickly replied to Root's letter and seemed positive. "[The President] and I read it together and discussed it in detail. . . . I do not believe there will be much difficulty in bringing our minds in harmony upon some plan."[420] But such words were excessively hopeful; House admitted to himself that Wilson seemed more interested in co-opting Root than working with him.[421] By the autumn of 1918 and the winter of 1919, Root directed his energies at criticizing Wilson, not advising him.

B. Wilson's League of Nations: Formulating the Republican Response

The fall 1918 elections brought Republican majorities in both the House and Senate for the first time in eight years.[422] As Wilson left for the Versailles Peace Conference in December, he faced a Senate skeptical of his plans for a League of Nations. The new Senate majority leader and chairman of the Foreign Relations Committee was none other than Wilson's archenemy, Henry Cabot Lodge.[423]

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417 Id.

418 Id.

419 Id.

420 Letter from Colonel E.M. House to Elihu Root (Aug. 23, 1918) (on file with Edward M. House Papers, Sterling Memorial Library, Yale University).

421 Edward M. House, Diary (Aug. 18, 1918) (on file with Edward M. House Papers, Sterling Memorial Library, Yale University).

422 For excellent surveys of the 1918 midterm elections, see generally Thomas J. Knock, To End All Wars: Woodrow Wilson and the Quest for a New World Order 184-89 (1992); Seward W. Livermore, Politics Is Adjourned: Woodrow Wilson and the War Congress, 1916–1918, at 138-247 (1966); Selig Adler, The Congressional Election of 1918, 36 S. Atlantic Q. 447 (1937); Seward W. Livermore, The Sectional Issue in the 1918 Congressional Elections, 35 Miss. Valley Hist. Rev. 29 (1948).

423 By the end of 1918, Lodge's deep distrust of Wilson had morphed into implacable hatred, an attitude shared by most of the Republican leadership. See John Milton Cooper, Jr., Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations 7 (2001) ("Nearly every leading Republican cordially despised Wilson, while the president regarded most of them with anger and contempt."); William C. Widenor, Henry Cabot Lodge and the Search for an American Foreign Policy 206-09 (1980) (describing

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The Republicans, however, had their own political problems. They controlled the Senate, which needed to ratify any peace treaty, but only had a razor-thin forty-nine to forty-seven majority. Moreover, the Republican caucus seemed unable to agree on any postwar program.[424] Finally, although the Democrats lost the election, their standard-bearer's popularity appeared to skyrocket with the end of the war: Europeans hailed Wilson as the savior of the old world, and the publication of the League of Nations Covenant in February 1919 seemed to generate an unstoppable tide of opinion in favor of Wilsonian peacemaking.[425]

GOP leaders were deeply suspicious of Wilson's motives, and hostile to a new institution—the League—that could threaten what they saw as American sovereignty and the constitutional balance between the Senate and the White House. But wracked by divisions, they appeared adrift.[426]

1. Constructive Legalism

Lodge and GOP Chairman Will Hays turned to Root to formulate a constructive Republican position, with Lodge urging him to "show the public what ought to be done to accomplish as much as can practically be accomplished by a union of the nations to promote general peace and disarmament."[427] Root responded two weeks later, us-

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sentiment of Lodge). For other good descriptions of Republican antipathy toward Wilson, see Henry L. Stimson, Diary (Mar. 18, 1919) and Henry L. Stimson, Diary (Mar. 5, 1919).

[424] Irreconcilable isolationists such as William Borah of Idaho rejected virtually any connection with Europe, while those such as Porter McCumber of North Dakota seemed ready to accept all of the Wilsonian program. For a description of Borah, see generally Robert James Maddox, William E. Borah and American Foreign Policy (1969). A brilliant contemporary analysis of Borah is Walter Lippmann, Concerning Senator Borah, 4 Foreign Aff. 211 (1926). For analysis of McCumber's position, see Herbert F. Margulies, The Mild Reservationists and the League of Nations Controversy in the Senate 14-17, 177-78, passim (1989).

[425] See Knock, supra note 422, at 194-95 (detailing enormously favorable European popular reaction to Wilson and initial popularity of League in United States).

[426] See Henry L. Stimson, Diary (Mar. 18, 1919) (on file with Sterling Memorial Library, Yale University) (commenting on Wilson's "inability to recognize the limitations of constitutional Government" and quoting Hays's remark that "fifty or sixty millions of Republicans are in a fluid condition on this subject").

[427] Letter from Henry Cabot Lodge to Elihu Root (Mar. 14, 1919) (on file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society). Hays's request was communicated in a more formal letter dated ten days after Lodge's. Letter from Will H. Hays to Elihu Root (Mar. 24, 1919) (on file with Elihu Root Papers, box 137, Library of Congress). There is little doubt that the two men coordinated their efforts. Stimson recorded the groundswell in the Republican Party for a statement from Root as to proper GOP policy on the League. See, e.g., Henry L. Stimson, Diary (Mar. 18, 1919) (on file with Sterling Memorial Library, Yale University); Henry L. Stimson, Diary (Mar. 19, 1919) (on file with Sterling Memorial Library, Yale University) (recounting consensus of prominent Republicans that Root should give party direction concerning League).

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ing the language and categories of classical legal ideology, in a letter that set forth a comprehensive alternative to Wilsonian peacemaking and heralded the Republican response to Versailles.[428]

For Root, the law-politics distinction played a crucial role in understanding world affairs. "All causes of war," he argued, "fall into two distinct classes": the legal and the political. Legal causes, which Root referred to as "justiciable or judicial questions,"[429] concerned controversies about treaties and violations of international law.[430] Root analogized them to private law disputes, "which courts are all the time deciding."[431] But most importantly, "[t]hey cover by far the greater number of questions upon which controversies between nations arise."[432] Root thus made clear that the most important question facing designers of a postwar security involved dealing with legal disputes.[433]

Root identified the Hague Conferences as the most advanced stage of the development of an arbitral system, but noted that the Hague system had a fatal weakness: "[A]rbitration of these justiciable questions was not made obligatory, so that no nation could bring another before the court unless the defendant was willing to come, and there was no way to enforce the judgment." But "public opinion of the world grew," and several nations signed treaties establishing binding arbitration of justiciable questions. "It became evident," he noted,

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428 Letter from Elihu Root to Will H. Hays (Mar. 29, 1919) (on file with Elihu Root Papers, box 137, Library of Congress). In the letter, Root was careful to give Wilson ample credit for what the Versailles Conference had already achieved. His letter stands out, in a political environment thoroughly poisoned by partisanship, for its judicious and constructive attitude toward the President. This was not easy for him; he was furious that Wilson had refused to call the Senate into session while in Paris and suspected that the President was simply trying to run roughshod over the constitutional balance of power. "The offensively arrogant way" in which Wilson presented his "practical denial of [the Senate's] right to discuss the subject at all," he told A. Lawrence Lowell, "produced a very disagreeable effect upon me, and it took considerable time for me to get into the right frame of mind for a dispassionate consideration of the document." Letter from Elihu Root to A. Lawrence Lowell (Apr. 29, 1919) (on file with Elihu Root Papers, box 137, Library of Congress). For similar sentiments, see Letter from Elihu Root to Henry Cabot Lodge (Mar. 13, 1919) (on file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society).

429 Letter from Elihu Root to Will H. Hays, supra note 428.

430 The origins of the justiciability question is found in John P. Campbell, Taft, Roosevelt, and the Arbitration Treaties of 1911, 53 J. Am. Hist. 279 (1966).

431 Letter from Elihu Root to Will H. Hays, supra note 428.

432 Id.

433 See id.; see also Henry L. Stimson, Diary (Feb. 15, 1919) (on file with Sterling Memorial Library, Yale University) ("His main objection [to the League of Nations] seemed to be that the instrument rested upon the strength of covenants rather than upon an establishment of international law.").

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"that the world was ready for obligatory arbitration of justiciable questions."[434]

In pointing to resolutions of the League to Enforce Peace and similar groups in Great Britain calling for such obligatory arbitration, Root did not ignore enforcement. He observed that "these groups proposed to provide for enforcing the judgments of the court by economic pressure or by force."[435] Obviously, such pressure and force would come from the nations of the world. But why would such nations risk warfare, both military and economic, in such circumstances? Root's unstated answer was that they would because an authoritative decision by a court would "command" it. The legal assumptions of the nineteenth and early twentieth centuries taught that judicial power arose from its ability to attract the acceptance of the populace. For Langdell and the scientists, this acceptance came from law's principled nature; for Carter and the historical school, it came from adherence to custom; for Pomeroy and Cooley, it came from following the values of the race. But regardless, the act of judicial statement seemed to cause the actions of the people. As Root told House, it would be "much more difficult" and "much more improbable" that a nation would flout such a judgment, knowing that the "natural step" would be the unified and clear reaction of the world community.[436]

Thus, Root castigated the League Covenant for abandoning "all effort to promote or maintain anything like a system of international law, or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war."[437] By not making arbitration mandatory, "it throws [the Hague] Conventions upon the scrap-heap."[438] Root emphasized that provisions for the League Council to have conferences was inadequate, because the Council was a "political body." His summation of this complaint reflects the fundamental substructure of late-nineteenth-century legal thought: "All questions of right are relegated to the investigation and the recommendation of the political body, to be determined as matters of expediency."[439] In the best Langdellian mode, he argued that "it is necessary . . . to insist upon rules of international conduct to be founded upon principles."[440]

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434 Letter from Elihu Root to Will H. Hays, supra note 428.

435 Id.

436 Letter from Elihu Root to Colonel E.M. House, supra note 402.

437 Letter from Elihu Root to Will H. Hays, supra note 428.

438 Id.

439 Id.

440 Id.

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The law-politics distinction served as the animating principle behind Root's suggested amendments regarding "legal" questions. He proposed making arbitration of such question "obligatory" before (preferably) a permanent ongoing international court. As for determining what would be justiciable, this was not a difficult intellectual problem: "The term 'Justiciable Questions' should be carefully defined, so as to exclude all questions of policy, and to describe the same kind of questions the Supreme Court of the United States has been deciding for more than a century."[441] If to modern ears the notion that the Supreme Court never decides policy questions sounds a touch quaint, it served as bedrock for the nineteenth-century worldview. In addition, Root suggested a series of regular conferences to "discuss, agree upon, and state in authentic form the rules of international law"[442] to assist tribunals—essentially, a proposal for a restatement of international law that foreshadowed Root's founding of the classicist American Law Institute.[443]

If Root maintained confidence that legal disputes caused "by far" the greater number of wars, he hardly ignored "political" questions. Such questions, he observed with unintended irony, are "continually arising in Europe and the Near East."[444] Yet instead of highlighting the conflicting interests of nations in an anarchical environment, Root argued that nations usually could deal with these conflicts through a diplomatic conference, which would "find some way of reconciling the differences or of convincing the parties to the dispute that it would not be safe for them to break the peace."[445] He recalled that

> in the last week of July, 1914, Sir Edward Grey tried to bring about another conference for the purpose of averting . . . war . . .; but Germany refused to attend the conference . . . because she meant to bring on the war, and knew that if she attended a conference it would become practically impossible for her to do so.[446]

Root offered this explanation of the war's origins for the rest of his life.[447] Before the war "nobody had a right to call a conference,

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441 Id.

442 Id.

443 For a discussion connecting the Restatement movement to the philosophy of classical orthodoxy, see supra notes 153-57 and accompanying text; see also Grant Gilmore, The Death of Contract 58-65 (1974) (showing classical orthodox premises underlying Restatement project); Duxbury, supra note 155, at 24-25, 78, 147-49 (same).

444 Letter from Elihu Root to Will H. Hays, supra note 428.

445 Id.

446 Id.

447 See, e.g., Letter from Elihu Root to Colonel E.M. House, supra note 402; Elihu Root, The Conditions and Possibilities Remaining for International Law After the War, Annual Address as President of the American Society of International Law, Washington (Apr. 27, 1921), in Men and Policies 427, 439 (Robert Bacon & James Brown Scott eds.,

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and nobody was bound to attend one";[448] the League Constitution, however, "makes international conferences . . . compulsory in times of danger . . . and makes it practically impossible for any nation to keep out of it."[449] Root strongly endorsed these provisions. The effect, he asserted, "will be to make the sort of conference which Sir Edward Grey tried in vain to get for the purpose of averting this Great War obligatory, inevitable, automatic."[450]

But what exactly was mandatory about these "mandatory" conferences? If Germany in fact wished to precipitate the war, then why would the mere appellation of a conference as "mandatory" make it "practically impossible" for her to start the conflict?[451] Root never provided an answer but instead assumed the efficacy of custom, reputation, and other informal mechanisms as means of social control apart from any force: Holding the conference would create enough pressure to forestall violence. Moreover, it posited the power of institutional fixes to reconcile competing interests and values.

To be sure, Root qualified his institutional vision with enforcement: He noted that a central purpose of the conference "system" was "convincing the parties to the dispute that it would not be safe for them to break the peace."[452] This suggested that those nations that

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1925) (concluding that "[i]t is a general belief that if Sir Edward Grey had secured the conference he sought . . ., the war would have been averted").

448 Letter from Elihu Root to Will H. Hays, supra note 428.

449 Id.

450 Id. In private, Root was even stronger than he had been in public. See Henry L. Stimson, Diary (Mar. 19, 1919) (on file with Sterling Memorial Library, Yale University) (quoting Root as having said that "[i]f there had been machinery by which Sir Edward Gray [sic] in 1914 could have gotten Germany into a conference, I think he could have prevented the war").

451 Historians still debate the precise content of the German war aims. Even with its weaknesses, the most persuasive account is still that of Fritz Fischer, who believed that Germany made the decision to start a war "to defeat the enemy powers before they became too strong" and thus bring about "German hegemony over Europe." Fritz Fischer, War of Illusions: German Policies from 1911 to 1914, at 470 (1975). Even if one does not accept the extremist Fischerian interpretation—i.e., Berlin's deliberate provocation of preventative war—Jonathan Steinberg's more moderate interpretation also shows how the proposal for "mandatory" conferences simply misses the point. Speaking of the Kaiser's role in the context of German foreign policy and culture, Steinberg observes:

> The Kaiser was not unrepresentative of the state he led. His vision of Germany was widely held. Ultimately, both the Kaiser and the German bourgeoisie wanted Weltgeltung and Weltmacht and were prepared to risk Weltkrieg to get it. These are hard sayings but they seem to leap from the record.

Jonathan Steinberg, The Kaiser and the British: The State Visit to Windsor, November 1907, in Kaiser Wilhelm II: New Interpretations 121, 139 (John C.G. Rohl & Nicolaus Sombart eds., 1982). For an incisive survey of interpretations emphasizing ignorance and indecisiveness but persuasively rejecting the "accident" and "war by timetable" theories of the war, see Marc Trachtenberg, History and Strategy 47-99 (1991).

452 Letter from Elihu Root to Will H. Hays, supra note 428.

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maintained hostile or recalcitrant positions at the conference would face the wrath of the other participants. But Root never explained why nations attending such a conference would risk war for a cause that did not threaten what they perceived to be their own national interests. It was, again, simply a matter of "habit," "custom," or informal norms.

Indeed, it had to be, as Root himself tacitly acknowledged in his analysis of Article X of the League Covenant. Adherents to Article X undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[453] For Wilson, Article X was the "key to the whole Covenant"[454] because it provided the teeth behind the League promise: Aggressor nations would face the combined power of the entire League. Wilson's conception contained the same fundamental problem as Root's interpretation of conference effectiveness: Why should all the nations of the League risk war? But at the very least, Wilson's scheme made the commitment and its mechanism explicit.

Root, however, was deeply skeptical of Article X. He saw it as a perpetual alliance attempting "to preserve for all time unchanged the distribution of power and territory made in accordance with the views and exigencies of the Allies in this present juncture of affairs."[455] Such an effort, he argued, was both "futile" and "mischievous." Sounding like the true historist, he asserted, "Change and growth are the law of life, and no generation can impose its will in regard to the growth of nations and the distribution of power upon succeeding generations."[456] Although Root referred to the distribution of power, he seemed little concerned with it. He emphatically rejected, as examples of freezing present arrangements in place, the Congress of Vienna in 1814 and the Congress of Berlin in 1878—two of the most effective examples of European balance-of-power politics.

But Root was willing to accept Article X for a brief period of time—no more than five years—in order to stabilize Europe. Eastern European disorder in the wake of the war and the Bolshevik triumph in Russia meant that "Great Britain, France, Italy and Belgium, with a population of less than 130,000,000, are confronted with the disorganized but vigorous and warlike population of Germany, German Austria, Hungary, Bulgaria, Turkey and Russia, amounting approximately to 280,000,000."[457] This imbalance of power was not a chronic prob-

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453 League of Nations Covenant art. 10.
454 Knock, supra note 422, at 219.
455 Letter from Elihu Root to Will H. Hays, supra note 428.
456 Id.
457 Id.

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lem. Root suggested instead that it threatened the peace for reasons the legal culture usually ascribed: The stronger mass was "fast returning to barbarism and the lawless violence of barbarous races."[458] As we have seen, the historist approach to civilization and a vague reference to race effectively cabined the place of violence in the late-nineteenth-century legal worldview; in this case, it cabined the need for the United States to make commitments to European security. The chaos in Europe, though real, was only short-term; the commitment could be as well.

Finally, Root emphasized his support for the Covenant's existing provisions regarding arms limitation. He noted that the key to any limitation package is the exchange of "full information," deeming it "essential." "Otherwise, one nation will suspect another of secret preparation, and will prepare to protect itself in the same way, so that the whole scheme of limitation will be destroyed."[459] He thus proposed that the Permanent Commission advising the League on disarmament questions function very much like Adams's Sunshine Commission and Cooley's concept of the ICC: as a provider of unbiased and objective information.

Root's criticism was extensive, but constructive; he proffered specific amendments to the Covenant to implement his suggested changes. Thus, his revisions provided for mandatory arbitration, the codification of international law, the protection of the Monroe Doctrine, the time limitation of Article X, and full inspection powers for disarmament purposes. Root believed that if these amendments were made, "it will be the clear duty of the United States to enter the agreement."[460]

Root's legalism, however, diverged sharply from Wilsonian diplomacy, a point obscured by frequent references to Wilson's "legalism."[461] As Root noted, neither the Versailles Treaty nor the Fourteen Points called for international legal institutions (such as a

458 Id.

459 Id.

460 Id.

461 See, e.g., Kennan, supra note 15, at 101 (linking "legalistic" approach to world affairs with "total war" and then arguing that both made their first appearance in Western civilization during World War I); George F. Kennan, Memoirs, 1950–1963, at 71 (1972) (offering interpretation that America's "rationale and rhetoric" of foreign policy, inherited from statesmen of period from Civil War through World War II eras, is "legalistic in its concept of methodology"). E.H. Carr made a similar critique with similar phrasing. See Edward H. Carr, The Twenty Years' Crisis, 1919–1939, at 22-40 (1946) (characterizing Wilson and other proponents of League of Nations as abstract rationalists). While I believe that Kennan and Carr misconstrued the important differences between Wilsonianism and GOP legalism, it should be clear that I believe the overall thrust of the realist critique of both ideologies is essentially correct.

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world court) or compulsory arbitration of legal disputes; indeed, Wilson rejected the legal-political distinction that served as the essential framework of Root's thinking. Most importantly, Wilsonian peacemaking represented an attempt to revolutionize the very nature of the international system; the guarantee enshrined by Article X could be effective only upon the undertaking of massive social and economic reforms, a position dubbed "progressive internationalism" by Thomas Knock.[462] Progressive internationalists believed that Article X guarantees could be effective only after several other major steps. For example, disarmament was necessary because it would undermine "militarism"[463] and dismantle the arms-manufacturing industry that (they believed) had played a major role in causing the war.[464] International free trade was critical to establish a community of nations.[465] Since imperialism had also caused the war, self-determination of peoples was vital to the new international system, as was the democratic control of foreign policy.[466] In progressive internationalist

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462 See Knock, supra note 422, at 48-69 (distinguishing between "progressive" and "conservative" internationalism).

463 Id. at 62-64 (detailing progressive internationalist critique of preparedness policies).

464 There is no historical evidence supporting this position. Even those historians sympathetic to the "peace progressive" critique of American foreign relations regard this episode as among the least creditable in the history of U.S. foreign policy. See, e.g., Wayne S. Cole, Senator Gerald P. Nye and American Foreign Relations 60-96 (1962) (detailing Senator Nye's investigation of armament industry but noting his failure to pass legislation aimed at discouraging war profiteering); Johnson, supra note 190, at 290-93 (calling claim that reduction in arms would restore stability of economic life relatively minor element of 1920s peace progressive critique). See generally John E. Wiltz, In Search of Peace: The Senate Munitions Inquiry, 1934–1936 (1963).

465 The third of the Fourteen Points called for the "removal of all economic trade barriers and the establishment of the equality of trade conditions." Wilson, supra note 192, at 248. The British Union of Democratic Control, a leading progressive internationalist group, termed high tariffs an example of "economic warfare" and called for their elimination. See Knock, supra note 422, at 37; Marvin Swartz, The Union of Democratic Control in British Politics in the First World War 78 (1971). Mayer and other New Left scholars consider the economic planks of the New Diplomacy as absolutely crucial; they argue that the central thrust of Wilsonianism was the expansion of a liberal capitalist order as an antidote to Bolshevism and traditional imperialism. See generally, e.g., Lloyd C. Gardner, Safe for Democracy: The Anglo-American Response to Revolution, 1913–1923 (1984); N. Gordon Levin, Jr., Woodrow Wilson and World Politics: America's Response to War and Revolution (1968); Arno J. Mayer, Political Origins of the New Diplomacy, 1917–1918 (1959). Knock, by contrast, sees Wilsonianism through the lens of progressive internationalism and emphasizes its affinity with left-liberal and moderate socialist ideologies. See generally Knock, supra note 422. Through either interpretive prism, it is clear that Wilsonianism diverged sharply from the Republican legalism developed and espoused by Root.

466 In his classic study of the levels of analysis in international relations theory, Kenneth Waltz uses Wilson as an outstanding example of theorists who argue that the essential preconditions of peace lie in the internal characteristics of states. In Wilson's case, the "good" state was a democracy. See Waltz, supra note 274, at 83-84, 117-19 (explaining one

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thinking, notes Knock, "a just peace was dependent on the synchronous proliferation of political democracy and social and economic justice around the world";[467] thus, while conservative legalists such as Root had some superficial affinities with progressive internationalists on the need of international institutions to preserve peace, "the differences between them were substantial; in most respects, fundamental."[468] Little wonder, then, that virtually no elite lawyers—most of whom were conservative Republicans—supported Wilsonian diplomacy.

Indeed, the sharp differences between Root's framework and Wilson's galvanized the Republican Party; until Root issued his letter, the GOP had no constructive alternative to Wilsonianism. Now it did. "It is really having just the effect we hoped," Hays exulted.[469] Republicans were still not completely together; "irreconcilables" such as William Borah and Hiram Johnson still rejected the League in any form. But Root's ideas allowed Republicans throughout the country to coalesce around a positive program.

2. *The Reservations Policy*

Wilson responded by negotiating some minor amendments to the treaty but hardly enough to satisfy Senate Republicans. Confident that public opinion backed him, Wilson refused to compromise. Once again, the party turned to Root. In late June, he wrote another public letter to Lodge advocating the proper Republican response. Root did not act on his own; he consulted with Lodge before issuing the letter, and there is no doubt that it had the latter's approval. He also worked through the letter's provisions with Knox, by this time a leading GOP irreconcilable. Since Root's internationalist convictions were beyond question, his ability to hammer out details with Knox demonstrated the growing consolidation of the mainstream Republican position. Root's June missive, however, bore his own personal stamp: To the

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theory that war is provoked by internal strife and desire to achieve unity against common enemy and describing Wilson's belief that international community of democratic nations could dispense with war altogether in favor of dispute resolution via "the force of public opinion"). This contrasted sharply with Root's view. While Root acknowledged certain pacific tendencies in democratic countries, he also believed that democracy created as much international danger as it avoided and greatly feared the effects of democratic control on international stability. See Root, Causes of War, supra note 354, at 275-80.

467 See Knock, supra note 422, at 57.

468 Id.

469 Letter from Will Hays to Elihu Root (Apr. 4, 1919) (on file with Elihu Root Papers, box 137, Library of Congress).

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extent that a "consensus" Republican position emerged, it originated in Root's mind.[470]

In the June note, Root again began by emphasizing the law-politics distinction. He castigated the Versailles Conference most prominently because "[n]othing has been done to provide for the reestablishment and strengthening of a system of arbitration or judicial decision upon questions of legal right. Nothing has been done towards providing for the revision or development of international law."[471]

But Root also appeared simultaneously to think that political disputes would begin to have the force of law; after all, the League Covenant was a binding contract that would leave recalcitrant nations exposed. He thus rejected the new treaty provision allowing for League withdrawal because it "leaves a doubt whether a mere charge that we had not performed some international obligation would not put it in the power of the [League] Council to take jurisdiction of the charge as a disputed question and keep us in the League indefinitely against our will."[472] This cryptic passage is hardly self-explanatory: How could the League Council keep the United States in against its will? Root seemed to assume that the international community could somehow keep America in the League once it joined even if it did not want to remain there.

The passage reflected Root's legal cast of mind. International law's sanction, he had declared, consisted in other nations knowing that one nation was the same as "the man who is known to be false to his agreements; false to his pledged word."[473] The League Council could wield the sanction of international law by declaring the United States in default. Such a scenario constituted Root's constant nightmare. He told Lodge that the "worst possible position" for a nation to be in is that of "having made an agreement and not keeping it."[474] Such a position would throw the United States outside the in-

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[470] See Henry L. Stimson, Diary (Feb. 22, 1920) (on file with Sterling Memorial Library, Yale University) (

> [Root] told me that he had written this letter at Lodge's instance, that they were all scared to death down there for fear the treaty would go through without any reservations, and had appealed to him for help. Out of abundant caution, after he had drafted the letter he went down with it to Washington, and went over it with Lodge, with Knox, with Brandegee, and possibly with some others, and made some minor changes in it at their suggestion; that they were delighted with it, and the letter was published with their full concurrence.).

[471] Letter from Elihu Root to Henry Cabot Lodge (June 19, 1919) (on file with Elihu Root Papers, box 161, Library of Congress).

[472] Id.

[473] See Root, Obligations as to Panama Canal Tolls, supra note 350, at 239.

[474] Letter from Elihu Root to Henry Cabot Lodge, supra note 471.

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ternational community because it would prevent it from entering into the voluntary, consensual agreements that comprised the fabric of law in the first place.

Given these problems, Root asked, "[W]hat ought to be done"?[475] Root explicitly dismissed the solution of the irreconcilables—i.e., rejecting the treaty outright—because "it still remains that there is in the covenant a great deal of very high value which the world ought not to lose."[476] But amendments were impossible because the powers already had signed the treaty. Instead, Root reached again to legal principles: ratification of the treaty with *reservations*. The United States would agree only partially to the compact.[477]

Root's reservations formed the basis of Republican policy for the next year. They specifically disclaimed Article X,[478] refused to recognize League authority in those areas traditionally protected by the Monroe Doctrine, and expressly stated that once the two years notice was given, "no claim, charge or finding that . . . obligations under the covenant have not been fulfilled . . . will be deemed to render the two years notice ineffectual."[479] Bemoaning the inability to improve international arbitration and legal institutions, Root also strongly recommended a Senate resolution asking the President to open new negotiations to establish them.[480]

With his June letter, Republican legalist foreign policy was complete. Once again, Root had pulled the GOP together. From June on, "Root formulated Republican policy."[481]

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475 Id.

476 Id.

477 Root developed the reservations policy on his own, after reading the final treaty for himself. See Henry L. Stimson, Diary (June 3, 1919) (on file with Sterling Memorial Library, Yale University) (describing conversation with Root about treaty and noting Root's suggestions that United States ratify treaty, "reserving the covenant for the League of Nations and the labor covenant for further discussion").

478 Root did not see this as backtracking on his original, time-limited support for Article X. Always skeptical about the provision, he decided to reject it entirely when the Paris Conference refused to amend it. See Letter from Elihu Root to Frank B. Kellogg (Mar. 13, 1920) (on file with Elihu Root Papers, box 138, Library of Congress). Hughes shared Root's view on the matter, pointing to a general consensus among elite lawyers. See Memorandum of Interview with the French Ambassador Held in the Office of the Secretary of State (Mar. 30, 1921) (on file with Charles Evans Hughes Papers, box 157, Library of Congress) ("Secretary Hughes [said] that the [Versailles] Peace Conference had departed from the original idea of the League of Nations by making it not only an instrument for conference and conciliation . . . charging it with certain definite duties in connection with the enforcement of the terms of the Treaty . . . .").

479 Letter from Elihu Root to Henry Cabot Lodge, supra note 471.

480 See id.

481 Widenor, supra note 423, at 328. Prominent Republicans quickly coalesced around Root's position. See, e.g., Letter from Henry Cabot Lodge to Elihu Root (July 7, 1919) (on

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3. Law and Morals

Wilson's desire for total victory made Lodge's goal of Republican unity easier: The President's refusal to make concessions meant that Lodge did not have to either and thus reduced the chance of the irreconcilables bolting from the GOP over such concessions. Still, Lodge realized that he could not rest his political strategy simply on White House stubbornness. Several Republican senators, whom historians have dubbed the "mild reservationists," essentially accepted the Wilsonian League but recognized on practical political terms the need for some reservations. It would not take much from the administration to peel off these wavering Republicans. But such comparatively minor reservations would alienate the majority of Republican senators as well as the irreconcilables.

Again, the Republican Party turned to Root to bridge the gap, and again he did not disappoint. Lodge asked Root to communicate with mild reservationists and point out to them the logical flaws in Article X.[482] As noted above, most Republicans worried that the provisions of Article X would subject the United States to virtually limitless obligations abroad, in effect turning the United States into the world's policeman. Upon his return to the United States in July 1919, Wilson downplayed Article X's force. The Article, he argued, constituted "a very grave and solemn obligation," leaving Congress "absolutely free to put its own interpretation upon it in all cases." Wilson argued Article X is "binding in conscience only, not in law."[483]

If this rationale seemed hopelessly vague, it was. Did Article X impose a binding obligation on its signatories or did it not? If it did, then the United States would not enjoy the freedom of action that Wilson claimed for it; if it did not, then how could the League actually provide an effective deterrent? Wilson obfuscated. "When I speak of a legal obligation," he contended,

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file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society) (noting that all forty-nine Republican Senators agreed to two of three reservations, and forty-seven would vote for all three reservations); Letter from Elihu Root to Henry Cabot Lodge (July 3, 1919) (on file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society) ("I met Hughes the other day, who said he had read my letter to you, and that he agreed fully with it in every respect.").

[482] See Letter from Henry Cabot Lodge to Elihu Root (Aug. 15, 1919) (on file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society). In this letter, Lodge asked Root only to write to LeBaron Colt and Frank Kellogg; further requests followed, however. See, e.g., Letter from Henry Cabot Lodge to Elihu Root (Sept. 3, 1919) (on file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society).

[483] Knock, supra note 422, at 259 (quoting Woodrow Wilson).

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> I mean one that specifically binds you to do a particular thing under certain sanctions. . . . Now a moral obligation is of course superior to a legal obligation, and, if I may say so, has a greater binding force; only there always remains in the moral obligation the right to exercise one's judgment as to whether it is indeed incumbent upon one in those circumstances to do that thing.[484]

In the President's formulation, a person incurring a moral obligation still maintained the right to judge whether to fulfill it.

This response outraged Root and he strongly urged his view on Senator LeBaron Colt of Rhode Island, a leading mild reservationist. A lifelong Republican, Colt had served as a federal judge for three decades before being elected to the Senate and was known both for his nonpartisanship and his judicial temperament even as a legislator.[485] Root's argument, then, had to have legal force.

It did. "I can imagine no proposition more demoralizing and destructive than this," he told Colt.[486] Explicitly linking international relations and legal theory, he contended that "there is nothing more fatal to the maintenance of peace and the rule of international right than the adoption . . . of any such view regarding the obligation of a contract."[487] As Root saw it, Wilson's moral-legal dichotomy would destroy the entire idea of international law: "All contracts between nations are merely moral obligations,"[488] he conceded, but these obligations actually constituted international law. The absence of enforcement power did not detract from its status as *law*: "The idea that the existence or non-existence of a sanction—that is to say, a superior power capable of compelling performance—makes any difference in the certainty of the obligation to do the thing agreed upon is wholly destructive of the system of international good faith."[489] Following the social theory of classicism, Root insisted that law could exist—and play a meaningful role in maintaining social order—in the absence of state sanction. Instead, the key enforcement mechanism was the "system of international good faith."

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484 Lloyd E. Ambrosius, Woodrow Wilson and the American Diplomatic Tradition: The Treaty Fight in Perspective 165 (1987) (quoting Wilson); see also Cooper, supra note 423, at 140-47 (describing in detail meeting between Wilson and member of Foreign Relations Committee).

485 For a good background description of Colt, see Margulies, supra note 424, at 51-52.

486 Letter from Elihu Root to Senator LeBaron Colt (Aug. 28, 1919) (on file with Elihu Root Papers, box 137, Library of Congress).

487 Id.

488 Id.

489 Id.

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Colt wholeheartedly agreed with Root's critique: "As to the binding effect of a contract," he replied, "there is no distinction between a moral and a legal obligation." Colt also concurred

> that the existence of a sanction (in the sense of Municipal Law) makes no difference in the certainty of the obligation to do the thing agreed upon. To my mind the only difference between a contract under Municipal Law and a contract between nations resides in the different form of sanction, or the different means of enforcement. The former is enforced by a sense of compulsion, or through the Courts, and the latter by a different kind of sanction which we deem conscience.

The enforcement distinction between domestic and international law was not dispositive; indeed, it was not even central. Although Colt conceded that "International Law may be a weaker kind of law by reason of its sanction," that sanction was still present in the form of conscience.[490]

It may seem somewhat bizarre in retrospect to label "conscience" as a "sanction" establishing international "law," but from Colt's and Root's perspective it made sense. Root rejected Wilson's assertion that Article X permitted nations to exercise their judgment because "there are two well-recognized kinds of international agreement—the Entente and the Alliance."[491] Ententes only obligated nations to consult with each other in crises and then use their judgment as to action. Alliances, on the other hand, required nations to act in agreed-upon ways: "The specific purpose of the alliance is to foreclose judgment," Root noted. Since "[t]he terms of Article X constitute clearly and unmistakably an alliance,"[492] it was sheer casuistry to argue that it only obliged nations to consult.

Alliances, then, played a crucial role in international law. It was undeniable, moreover, that nations had followed their alliance commitments; indeed, the fulfillment of such commitments within Europe had helped start the war in the first place. International law, however, comprised a series of moral obligations unsanctioned by state power. How could this be explained? Through "conscience," the moral binding force of community norms and custom. Classical legal peripheralism held that law could and did bind social actors and groups in the absence of state power. The success of alliances demonstrated the truth of the classical paradigm.

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490 Letter from Senator LeBaron Colt to Elihu Root (Sept. 2, 1919) (on file with Elihu Root Papers, box 137, Library of Congress).

491 Letter from Elihu Root to Senator LeBaron Colt, supra note 486.

492 Id.

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Root's and Colt's convictions concerning the strength of international law might seem jarring to the contemporary mind. Modern international relations theory (much of which is based on classical realist theory) sees alliances held together not by conscience or norms but rather by national interest.[493] But such a disjunction demonstrates yet another facet of legal classicism at work: When confronted with one interpretive strategy that sees coercion and conflicts of interest, and another that does not, orthodox lawyers generally chose the latter.

In the end, Wilson did much of Root's work for him: By refusing to compromise on the treaty and accept reservations in any form, the President doomed the prospect of American entry into the League. In March 1920, a simple majority of the Senate approved the treaty with reservations very similar to those Root had proposed, but because Wilson ordered Democratic Senators to vote against the treaty in that form, it failed to garner the necessary two-thirds majority.[494]

C. The Road Not Taken: Root and the French Security Treaty

1. Background

Root developed and presented a relatively coherent alternative to Wilsonian internationalism, and with the Republican triumph in the 1920 general election, Root's vision, not Wilson's, achieved political primacy. But the account so far omits potentially the most crucial impact of Republican foreign policy thinking in 1919: the proposed security treaty with France, the importance of which scholars have uncovered over the past two decades.[495] Investigating the role of this proposed treaty reveals even more sharply the debilitating influence that the legal cast of mind had on U.S. policymakers.

The stability of postwar Europe turned on the issue of French security, and the defeat of Germany hardly solved the problem. Although victorious in war, France in 1919 was arguably less secure than it had been in 1914. Even after the war, Germany's population dwarfed that of its smaller neighbor to the west and still threatened continental hegemony. Wartime events accelerated the imbalance of

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493 See, e.g., Stephen M. Walt, The Origins of Alliances 21-26 (1987) (arguing persuasively that states usually form alliances on basis of threats).

494 See Cooper, supra note 423, at 234-375; Knock, supra note 422, at 264.

495 The leading figure in this effort has been Lloyd Ambrosius, whose account of the treaty fight is the definitive one. See generally Ambrosius, supra note 484. Cooper, supra note 423, is also an excellent account. Louis A.R. Yates, United States and French Security, 1917–1921: A Study in American Diplomatic History (1957), provides an excellent chronology and history of the French security treaty not only in the United States, but also in Great Britain and France.

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power between the two nations. Germany's manufacturing and resource base was undamaged by the war, but fighting had destroyed France's industrial and metallurgic heartland. Before the war, France could count on its firm alliance with the Tsar, but by 1919 the Bolshevik Revolution had taken Russia completely out of the European states system, leaving the Germans facing weak states in Poland, Czechoslovakia, and Austria; if anything, Moscow directed its energies toward destabilizing bourgeois regimes like the Third Republic.[496] And while Great Britain recognized the imperative of preventing German domination of the European continent, it was also preoccupied with resuscitating German prosperity and the European economy and was rapidly demobilizing its relatively small army.[497]

Not surprisingly, the French advocated German dismemberment at Versailles. But Wilson and British Prime Minister David Lloyd George refused. Wilson's Fourteen Points rested upon the principle of national self-determination, and Britain argued, with some degree of force, that cutting Germany apart would place an overwhelming barrier to European reconstruction. French Premier Georges Clemenceau contemptuously rejected Wilson's argument that the vague promises of the League would suffice to protect French security: Only detaching the Rhineland from Germany, the French maintained, would protect them from another German invasion.[498]

With the Versailles Conference deadlocked, Lloyd George suggested a way to square the circle: The United States and Britain would guarantee France's eastern border and commit to defending France against German aggression. Clemenceau, at considerable domestic political cost, accepted this solution if Britain and America would consent to the demilitarization of the Rhineland and a right of French occupation if Germany did not live up to its treaty commitments. Secretary of State Robert Lansing, a lawyer, opposed the entire arrangement, arguing that it smacked of realpolitik, but Wilson acquiesced in order to maintain the conference. The signing of the

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[496] A.J.P. Taylor's description is chilling and apt:

> Though Germany's bid for the mastery of Europe was defeated, the European Balance could not be restored. Defeat could not destroy German predominance of the Continent. Only her dismemberment could have done it; and, in the age of national states, this was impossible. France was exhausted by the First World War; Great Britain, though less exhausted, was reduced no less decisively in the long run. Their victory was achieved only with American backing and could not be lasting without it. On the other side, old Russia was gone for good.

A.J.P. Taylor, The Struggle for Mastery in Europe, 1848–1918, at 567 (1957).

[497] See generally Stephen A. Schuker, The End of French Predominance in Europe: The Financial Crisis of 1924 and the Adoption of the Dawes Plan 3-8 (1976).

[498] See Ambrosius, supra note 484, at 107-08.

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Versailles Treaty on June 28 carried the Anglo-American-French accord with it.[499] For Wilson, the agreement meant little; he insisted that the treaty only served as a particular example of Article X's broader commitments.[500]

In this, Wilson was either mistaken or dissembling. The French security treaty was about the old diplomacy, not the new; it represented a classic instance of traditional power balancing. Instead of assuming the broad Article X obligation on behalf of any League member, the Anglo-American guarantee acknowledged the vital U.S. interest in maintaining west European stability. Little wonder, then, that Wilson maintained a studied reluctance to push the accord; after returning from France in July, he refused to submit it to the Senate for nearly one month while strenuously pushing the League Covenant.[501]

2. *The Republican Response*

The French security treaty, however, had some important potential supporters in the GOP. Republicans—particularly Roosevelt and Lodge—long had castigated Wilson for what they saw as his insufficient appreciation of the righteousness of the Allied cause and feared up until the armistice declaration that the President would abandon the Allied effort to accept a "peace without victory."

Root shared these views. Before the Versailles negotiations started, he demonstrated some understanding of the difficulties facing the French.[502] So when he wrote his June letter to Lodge, Root made sure to leave open the possibility of Republican support for the French security treaty. He made sure to explain that his opposition to Article X did not derive from opposition to all overseas commitments. "If it is necessary for the security of western Europe that we should go to the support say of France if attacked," he explained, "let us agree to do that particular thing plainly, so that every man and woman in the country will understand the honorable obligation we are assuming. I am in favor of that."[503] He contrasted this obligation to Wilson's bland assurance that Article X would make League guarantees so powerful that they would never have to be redeemed in practice: "But let us not wrap up such a purpose in a vague universal obliga-

499 See Cooper, supra note 423, at 87-88.

500 See Ambrosius, supra note 484, at 140.

501 See id. at 159.

502 Root noted after the armistice that Germany "is now planning a great campaign to recover her trade," and "she will have the advantage of Belgium and France and industrial Poland because she has destroyed their manufactories and stolen their machinery." Letter from Elihu Root to Archibald Hopkins (Nov. 30, 1918) (on file with Elihu Root Papers, box 137, Library of Congress).

503 Letter from Elihu Root to Henry Cabot Lodge, supra note 471.

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tion, under the impression that it really does not mean anything likely to happen."[504]

Root's support for the treaty was significant, but perhaps even more so was the fact that the letter was drafted with the approval of a leading irreconcilable, Philander Knox, who had returned to the Senate after his disastrous term as Secretary of State. This was no oversight. In December 1918, Knox argued on the Senate floor that the United States should reaffirm its commitment to "guarantees against the German menace."[505] Knox contended that the United States should henceforth adhere to what he called the "new American doctrine": If any power or coalition threatened "Europe's peace and freedom, the United States would again join the Allies to remove this menace and defend civilization."[506]

Knox was not the only irreconcilable to recognize French security requirements. The most radical isolationists opposed American involvement in Europe in any form, but the tripartite treaty held significant support among irreconcilables[507] and represented a clear alternate route for U.S. foreign policy that would engage the world without assuming the obligations of Article X. It also provided an important point of agreement between the GOP's increasingly fractious wings. Even the most internationalist Senate Republicans backed the idea.[508] And even some Wilsonians were willing to back the pact, albeit tepidly. A leading Democrat on the Judiciary Committee, for example, endorsed the conclusion that it was constitutional.[509]

In sum, the French security treaty represented a real opportunity for the United States to reject isolationism while avoiding the burdens of Article X. It attracted substantial support from both wings of the Republican Party, and since it had been negotiated by a Democratic

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504 Id. Root expressed this view as well while dictating his initial public letter to Lodge in March. See Henry L. Stimson, Diary (Mar. 19, 1919) (on file with Sterling Memorial Library, Yale University) (expressing support for explicit alliance between victorious powers to preserve peace).

505 Ambrosius, supra note 484, at 85 (quoting Knox's resolution).

506 Id. at 145.

507 For example, Frank B. Brandegee of Connecticut backed Knox's ideas about intervening if any power threatened European peace. "France will be satisfied with that," he argued. "All they want to know is that they will be secure. I think we ought to do something for France." 66 Cong. Rec., 8777 (1919). Brandegee also forced Wilson to submit the French treaty to the Senate when the President delayed in doing so. For more details on irreconcilable support, see Ambrosius, supra note 402, 345-47.

508 Porter McCumber of North Dakota, who backed Article X, told the Senate that he supported Knox's new American doctrine: "I would be satisfied," he informed his colleagues, "if [it], without elimination or addition, should be the only compact between the great nations of the world." Ambrosius, supra note 484, at 85 (quoting Porter McCumber).

509 Id. at 211-12.

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president, it could not be assailed by Wilsonians as undermining the drive for peace.

3. *The Strange Death of the French Security Treaty*

Why, then, did the French security treaty seemingly disappear from view? Historians of the treaty fight usually place the blame on Wilson. They point out, accurately, that the President agreed to it as part of a diplomatic compromise, never saw its potential benefits, delayed in presenting it to the Senate, completely neglected mentioning it during his celebrated speaking tour on behalf of the League, and refused to advocate its passage to Senate Democrats. With Wilson, the choice was either his entire program or none of it; his refusal to consider the French security treaty in light of Republican objections has been referred aptly to as the President's "isolationist reaction."[510]

This story helps to account for the French security treaty's demise, but it hardly suffices. First, it does not explain why the treaty died in the Senate Foreign Relations Committee at the end of 1919 on the decision of Lodge, France's staunchest supporter in the Senate. Second, it does not address why the treaty failed to appear at any time during 1920 or after the Republican landslide that November. Thus, any complete explanation for the death of the French security treaty must examine the shallowness of its support. And any examination of the shallowness of this support must return to Elihu Root, the principal Republican strategist and foreign policy thinker.

The secondary literature on the treaty fight has seen Root as a backer of the French security treaty, and there is evidence for this interpretation. Root did not end his advocacy of a French security treaty with his June letter. He raised it again during the autumn of 1919. "I hope to the Lord," he told Lodge privately on November 1, "you are going to consent to the French Treaty, striking out of course the provision for submission to the League Council." Returning to this previous theme, Root emphasized its superiority to Article X. "[I]t seems to me," he noted, "that it is desirable to accompany the opposition which you are making to the vague and indefinite commitments of the League Covenant with an exhibition of willingness to do the definite certain specific things which are a proper part of a true American policy."[511] Clearly, then, Root's sympathies on one level lay with the French security treaty.[512]

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[510] See id. at 211.

[511] Letter from Elihu Root to Henry Cabot Lodge (Nov. 1, 1919) (on file with Henry Cabot Lodge Papers, box 59, reel 58, Massachusetts Historical Society).

[512] In March, Root had privately advocated some sort of tripartite pact. He told Stimson and Hats that "if we make a political alliance of the nations that have won the war

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But these quotes represent the sum total of Root's actions regarding the French security treaty. At no other time during 1919 did Root utter anything concerning its significance. And after the treaty's demise in December, Root never again spoke in public about either the treaty itself or the importance of the Anglo-American-French relationship.[513] Root certainly had both the opportunity to express his views and a collection of powerful ears ready to listen. His influence on the Republican Party was vast. Manuscript sources reveal that senators regularly consulted him, and no doubt telephone conversations filled in the gaps.

Instead, Root spent his time advocating his own vision of international legalism. Classical legal ideology powerfully influenced what he saw as the real or important dilemma facing world politics: the weakness of international law. Thus, he focused his political energies on ameliorating this problem. The structural imbalance of power on the European continent simply faded away.

The most striking evidence of this trend can be seen in Root's extensive correspondence with Senator Frank B. Kellogg of Minnesota, who would later serve as President Coolidge's Secretary of State. At the State Department, Kellogg would demonstrate an almost constant dependence upon Root's counsel,[514] and this pattern showed clearly during the treaty fight.[515] Kellogg cabled, wrote, and tele-

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to be continued for the purpose of preserving the victory, I . . . am in favor of what they are doing. . . . I would make an alliance with England and France for that purpose." Henry L. Stimson, Diary (Mar. 18, 1919) (on file with Sterling Memorial Library, Yale University).

513 Henry Stimson recorded a conversation with Root during the Washington Arms Limitation Conference:

> He would be in favor of entering into a modified agreement with Great Britain to reassure France—an agreement that "in case of wanton aggression against France the contracting parties would confer as to the steps to be taken"—the form of agreement which is now usual when people are unwilling to make a hard and fast defensive alliance. We talked over the Franco-German situation at some length. He said that he personally believed that France should have been allowed to take the left bank of the Rhine. She had been wantonly invaded twice in 50 years; that was enough to demand that she should have her defensive frontier. She had been deprived of this by "self-determination", and here he blew off a little at what characterized as a half truth misused as a whole truth.

Henry L. Stimson, Diary (Oct. 18, 1921) (on file with Sterling Memorial Library, Yale University). Nothing in Root's own papers or in any of his correspondence with any of his associates and friends from 1919 shows any indication of his backing either French occupation of the Rhineland or a tripartite consultation pact. As always, Root's realpolitik insights remained tepid, halting, and for the most part unspoken.

514 See Ellis, supra note 29, at 233 (1961) (describing how Kellogg "practically abdicated the policy-making function").

515 Kellogg long had been an admirer of Root; four years beforehand, he had urged Root to seek the Republican presidential nomination. See Henry L. Stimson, Diary,

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phoned Root, often on a daily basis, for guidance and advice, especially as controversies heated up. But Root never took the opportunity to advocate the French security treaty; instead, he focused almost entirely on promoting the reservations policy.

Kellogg reached out. On June 17, Knox argued on the Senate floor that the League was unconstitutional, although he was hardly clear about why.[516] This disturbed Kellogg, as he told Root: "Nations have always made treaties of alliance, offensive and defensive. This country had such a treaty when the Constitution was adopted."[517] But on this, as with just about everything, Kellogg was unsure. "It seems to me," he told Root, "there can be no doubt about the Constitutional power. However, I rely a great deal on your judgment in this matter, and it is my excuse for calling [Knox's] speech to your attention."[518] If ever there had been an opportunity for Root, this was it: Kellogg was practically begging for counsel, and it concerned the propriety of alliances.[519] But Root held back, blandly assuring Kellogg that alliances were constitutional and saying nothing about the French pact even though he had mentioned it just a few days earlier in his letter to Lodge.[520]

The pattern remained the same for the duration of the treaty fight. Root was not coy about offering advice; in mid-August, he wrote Kellogg a lengthy letter suggesting the proper strategy for getting reservations (which Root himself had originated) adopted by the Senate.[521] As autumn progressed, Root and Kellogg corresponded extensively on other issues relating to the precise content of certain reservations and whether the Allies needed to explicitly consent to those proposed by the United States. Kellogg consistently refused to move without explicit consent from Root. Just as consistently, the French security treaty was completely absent. Root's relationship

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"Memorandum of Events in the Autumn of 1915" (on file with Sterling Memorial Library, Yale University).

516 See 58 Cong. Rec., 1216-22 (1919).

517 Letter from Frank B. Kellogg to Elihu Root (June 18, 1919) (on file with Elihu Root Papers, box 137, Library of Congress).

518 Id.

519 Kellogg even provided the citations for Root to examine and comment on. Letter from Frank B. Kellogg to Elihu Root (June 13, 1919) (on file with Elihu Root Papers, box 137, Library of Congress) (mentioning "Dowe v. Braden, 16 Howard 635. New York Indians v. U.S., 170 U.S. 1").

520 This is confirmed by an examination of the Frank B. Kellogg Papers on file with the Minnesota Historical Society. No reference to the French security treaty appears in the collection.

521 See Letter from Frank B. Kellogg to Elihu Root (Aug. 19, 1919) (on file with Elihu Root Papers, box 137, Library of Congress) (encouraging Kellogg to focus on obtaining key reservations for which consensus existed).

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with Brandegee took a different pattern, but the basic outcome was the same. Brandegee was a staunch irreconcilable but he had spoken favorably of supporting France.[522] Root, nonetheless, never approached Brandegee on the issue.

As noted above, Root played a key role in keeping the "mild reservationists" in the Republican fold. But Root made no mention of the French security pact to them as well. Root also kept his distance from Democrats who might have supported the French treaty. As mentioned earlier, Thomas Walsh of Montana, a Democrat on the Judiciary Committee, had expressed his opinion that the treaty was constitutional.[523] Root, however, remained silent.[524]

In fact, after his November 1 note to Lodge, Root made no reference to the French security treaty or indeed the entire problem of French security. Instead, he simply disengaged. This passivity could not have come at a worse time. Root's efforts during 1919 had enabled the congressional GOP to coalesce around a series of anti-Wilson policy proposals, but the general election of 1920 reopened the issue. Party leaders made the key decisions as to the party's standard-bearer for November; while their calculations obviously focused on electability, they had enormous influence over the GOP's eventual foreign policy direction. And in these councils, Root had more influence than most, at least concerning foreign relations.[525]

During the key months of the spring of 1920, when the Republican Party was attempting to form a consensus for its platform in the upcoming presidential election, Root did not participate. Instead, he traveled to Europe at the request of the League of Nations to help write the organic statute for the World Court. When he returned, although he desired that the Republicans nominate Roosevelt's protégé (and preconvention favorite) General Leonard Wood for the presidency, he did not advocate forcefully for the nomination and refused to attend the convention. The GOP wound up with Warren Harding,

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522 See Ambrosius, supra note 484, at 159, 212-13.

523 See id. at 211-12.

524 The desk diary of Secretary of State Robert Lansing, located in the Robert Lansing Papers on file with the Library of Congress, also reveals no communications with Root concerning the issue even though Root and Lansing were friends, and Lansing had served under Root at the State Department. Root wrote Lansing a congratulatory note upon Wilson's war address. See Letter from Elihu Root to Robert Lansing (Apr. 6, 1917) (on file with Elihu Root Papers, Library of Congress) ("That was a bully speech the President gave."). But during the treaty fight Root failed to communicate.

525 See Ambrosius, supra note 484, at 258-64 (describing Root's role in 1920 Republican campaign).

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whose reluctance to commit to any foreign policy made him an acceptable compromise Rohrshach for the party.[526]

Root loyally backed Harding and even provided important political cover for the nominee. In October, he organized and drafted a statement of thirty-one prominent pro-League Republicans—most of whom were elite lawyers—announcing that despite Harding's refusal to endorse the League with reservations and his growing pro-irreconcilable sentiments, a Republican victory would bring about America's accession to an "association of nations."[527] The statement persuaded many pro-League Americans that a Harding administration would embrace the League in some form.[528] In return for his services, Root received no commitments from Harding as to future policy, and the new President eventually rejected the League even with reservations. At no time did Root ever communicate any sentiments concerning the French security treaty to other GOP policymakers.[529]

Root most likely had decided that the time was simply inopportune to push for concessions; the overriding goal was to defeat Wilsonianism and the Democratic Party. But in so doing, he proceeded to undermine the case for the French security treaty in the event of a GOP triumph. In a major speech at a National Republican Club meeting on the eve of the general election, Root condemned Wilson's League of Nations because (ironically enough) it relied too much on realpolitik. In its original conception, he told his audience, the League "was not an organization for the exercise of physical force, but by the universal agreement of the civilized world it was to be an organization to make effectual the exercise and dominance of moral force in the conduct of nations."[530] Root was certainly consistent; twenty years earlier, he had insisted on the inclusion of the Platt Amendment as a means of using "moral force" to prevent German aggression against Cuba. And such a reliance had an impeccable classical orthodox pedigree; in the same way that Beale and classical legal thinkers sharply contrasted "law" and "force," he contrasted "moral" and "physical" force.[531]

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526 See generally Wesley M. Bagby, The Road to Normalcy: The Presidential Campaign and Election of 1920 (1962).

527 See Ambrosius, supra note 484, at 283-84 (quoting Harding).

528 See 2 Jessup, supra note 19, at 413.

529 See Ambrosius, supra note 484, at 283.

530 Elihu Root, Speech at a Meeting Under the Direction of the National Republican Club, in the Presidential Election of 1920 (Oct. 19, 1920) [hereinafter Root, National Republican Club Speech], in Men and Policies, supra note 447, at 277, 291.

531 See supra Part II.C; see also Jonathan Zasloff, Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920's, 102 Yale L.J. 1689, 1698 (1993) ("There are only two possible methods of reconciliation: force, and law. Either the will of the

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These "moral force" norms trumped physical force as a means of making international law effective. Indeed, they demonstrated not that physical force was an ineffective mechanism for achieving international stability but that it undercut that stability. Root noted that

> the world was tired of alliances to prevent war by force. We had learned through centuries of experience that such alliances do not prevent war, but merely vary the combination of the warring elements . . .[;] that the world cannot be made good, moral, peaceable, by compulsion; that the mere opposition of force to force involves no progress toward better things; that the only line of progress is through the growth of the moral qualities that make for peace; and that an organization must be created which shall afford alternatives to war in the opportunity to secure justice by peaceable means, which shall educate moral forces through the exercise of moral forces, which shall promote respect for law . . . . Everybody knew that this would be a slow process, as all processes of advancing civilization have been slow; but it was well understood that real progress toward peace and justice could be made only through such a process, and we all believed that the terrible lessons of the Great War would have greatly accelerated the process throughout the world.[532]

Root thus denied the validity of balance-of-power policies altogether. The use of power to deter aggression became the "mere opposition of force to force involv[ing] no progress toward better things."[533] The formation of alliances to maintain stability became "a [mere variation in] the combination of the warring elements."[534]

In general, then, Root's attitude toward the French security treaty—and the entire notion of the European balance of power—ranged from indifference to hostility. In this, it resembles his evolving views of domestic issues: initial forays into new thinking overshadowed by reliance on the older verities of freedom of contract and "moral force." During a critical time in the evolution of GOP foreign policy, Root disengaged from the major struggle and focused instead on implanting the heaven of legal concepts into a new world court.

D. The Conceptual Possibilities

Is it reasonable to expect that Root would have adopted a balance-of-power perspective on America's European policy? After all,

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physically strongest, or of the mentally alertest, must prevail—the way of the beast; or conflicting wills must be restrained by law—the way of organized human society." (quoting 1 Beale, supra note 139, at 44-45)).

532 Root, National Republican Club Speech, supra note 530, at 291-92.

533 Id.

534 Id.

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opinion leaders—most importantly, Wilson himself—had framed the issue in terms of whether or not to adopt the League. Isolationism remained entrenched in large segments of the American public. One could argue, then, that expecting a realpolitik viewpoint from Root is guilty of anachronism.

Such an argument, however, is belied by the actual discourse in 1918 and 1919. The very existence of the French security treaty, and France's very loud statements concerning its necessity, demonstrate that the balance-of-power viewpoint had achieved saliency in policymaking discussions. Moreover, by the end of the war, such a perspective had appeared prominently within the policy establishment and the Republican Party itself.

The original protagonist was a career American diplomat named Lewis Einstein, familiar to legal scholars for his celebrated correspondence with Justice Holmes.[535] In 1913, Einstein published an article setting forth the implications of the Anglo-German rivalry for U.S. diplomacy. He warned that a German victory against Great Britain in a future war would endanger American security. "Unperceived by many Americans," he noted,

> the European balance of power is a political necessity which can alone sanction on the Western Hemisphere the continuance of an economic development unhandicapped by the burden of extensive armaments. At no time, even unknown to the United States, were European politics a matter of indifference to its vital interests. But if hitherto it was impotent to alter their march, a fortunate destiny preserved the existing balance.[536]

For Einstein, the need for a new American policy was clear. The United States benefited from a stable European balance. Germany threatened that balance, and thus the United States should intervene constructively in European politics to restore and maintain it. In the event of imbalance and conflict,

> [i]f the United States then neglects to observe that the interests of the nations crushed are likewise its own, America shall be guilty of political blindness which it will later rue. To guard against this danger the diplomatic role of the United States in Europe should be far more active than in the past.[537]

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535 See generally The Holmes-Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein 1903–1935 (James Bishop Peabody ed., 1964).

536 The United States and Anglo-German Rivalry, 60 Nat'l Rev. 736, 749 (1913), reprinted in Lewis Einstein, America and Anglo-German Rivalry, 13 Annals of America 378, 382 (1968).

537 Id.

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Root knew Einstein, was familiar with his diplomatic career, and thought highly of him.[538] Root even made sure that Einstein was placed on the U.S. delegation at the Hague. While no direct evidence exists that Root read Einstein's article in 1913, it certainly seems plausible.

In any event, the war itself rescued Einstein's thoughts from obscurity. During the summer of 1918, Columbia University Press published the original article and a subsequent piece, "The War and American Policy" in a single volume entitled *A Prophecy of the War, 1913–1914*. To ensure broader circulation, the Press arranged for Theodore Roosevelt to write the book's Foreword. Roosevelt used most of his space to attack Wilson's policy as cowardly and naïve, but he clearly understood the gravamen of Einstein's argument, noting that "the need that our association with the British Empire shall be one of the closest friendship because it would be an unspeakable calamity for us if the British Empire succumbed to Germany . . . . England is now what a century ago she was not, our natural ally . . . ."[539]

On the eve of his death, Roosevelt used the same rationale in advancing his own vision of proper American postwar policy. He told British Foreign Secretary Arthur Balfour that the Republican Party advocated close cooperation with Allied leaders rather than Wilson's posture of aloofness. "Above all," he said, "we feel that at the Peace Conference, America should act, not as an umpire between our allies and our enemies, but as one of the allies bound to come to an agreement with them, and then to impose this common agreement upon our vanquished enemies."[540]

Four weeks later, Roosevelt was dead; as intellectual leadership of Republican foreign policy passed to Root, the GOP's policy took on the aspect of classical legal thought. Where Roosevelt spoke of the "natural" alliance with Great Britain, Root promoted the "obligatory" calling of conferences; where Roosevelt sought to balance nascent German power with tight contact with France, Root focused on removing the legal causes of war; where Roosevelt strove to maintain the wartime alliance with Great Britain and France to preserve peace, Root condemned such an arrangement as "a throw-back to the old

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538 See, e.g., Letter from Elihu Root to Mrs. Lewis Einstein (Mar. 16, 1906) (on file with Elihu Root Papers, box 185, Library of Congress) (expressing personal interest in Einstein's career); Letter from Elihu Root to John P. Munn (Oct. 29, 1906) (on file with Elihu Root Papers, box 187, Library of Congress) (same).

539 Theodore Roosevelt, Foreword to Lewis Einstein, A Prophecy of the War, 1913–1914 (1918).

540 Letter from Theodore Roosevelt to Arthur James Balfour (Dec. 10, 1918), in 8 The Letters of Theodore Roosevelt, supra note 22, at 1415.

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discredited alliances of the past. It speaks a language of power, and not the spirit of progress."[541] In sum, Root had the opportunity and the intellectual resources to continue in Roosevelt's path—he simply chose not to do so because he had a different view of how world politics worked.

At one level, then, Root "understood" the crucial security issues facing Europe—both in 1906 at Algeciras and 1919 concerning the French security treaty. But this is where classical legal ideology had its important, and most subtle, effect. In times of uncertainty, the ideological superstructure told Root and other policymakers that the "real" issues surrounding U.S. participation in international affairs were those concerning international legal and quasi-legal institutions. Questions of power balances were not regarded as fundamental structural issues, but as temporary expedients that could be left for another day and another place. When the United States confronted similar questions during the 1920s, it responded in the same way.

Conclusion and Epilogue: The Legalist Era in American Foreign Policy

To pose the question suggested at the beginning of this paper: What did classical legal thought "do" in relation to American foreign policy? Answering this question is neither simple nor direct. Classical legal thought did not "make" Root and other lawyers adopt certain policies or oppose others; it did not "prevent" them from taking certain actions or "force" them to take others.

Rather, classical orthodoxy operated more subtly. It told Root and other legalists which developments were more significant and which were more ephemeral and provided a "research program" on which they could direct their energies. Thus, the Moroccan Crisis was a temporary flame-up, not an indication of fundamental instability in the international system; U.S. Manchurian policy should focus on establishing and maintaining international legal agreements, not on giving Japan a free hand in her sphere of influence; the Hague Conference represented a real attempt at a legally regulated international system; the outbreak of the World War suggested that international legal institutions had real promise for fostering stability; and postwar diplomacy should concentrate on strengthening these institutions, not on achieving a stable European balance of power.

Root knew that it was not as simple as this. He clearly understood many of the flaws in the classical orthodox paradigm. He was hardly dogmatic in his emphasis on international law. He supported

[541] Root, National Republican Club Speech, supra note 530, at 293.

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the French security treaty, he comprehended the importance of the Algeciras Conference, and he recognized (where his successors did not) the limits of international law as a means to achieving U.S. goals in Manchuria. But he saw these as exceptions in an otherwise integrated worldview. Little wonder, then, that he did not advocate strongly for realpolitik, or attempt to create a new paradigm for understanding the world.

Instead, he perfected and polished legalist foreign policy, which profoundly influenced subsequent U.S. policymakers. This development had lasting consequences. During the 1920s, the United States found itself as the world's leading power. The international system was still firmly multipolar, but America clearly stood as the first among equals, possessing the world's largest navy, industrial strength dwarfing every other nation, and economic power dominating international commerce.

How, then, would the United States use its newfound strength? In the autumn of 1925, newly elected President Calvin Coolidge presented a suggestive answer in a major policy address on "Government and Business." After discussing his administration's actions to assist in business development, Coolidge turned to U.S. measures to stabilize the international sphere and expounded the philosophy underlying his central policies. "All of these efforts," he declared, "represent the processes of reducing our domestic and foreign relations to *a system of law*. They consist of a determination of clear and definite rules of action. It is a civilizing and humanizing method adopted by means of conference, discussion, deliberation, and determination."[542] These efforts would succeed, Coolidge asserted, because "it has not been brought about by one will compelling another by force, but had resulted from men reasoning together. It has sought to remove compulsion from the business life of the country and from our relationship with other nations."[543]

This was not mere posturing, Coolidge said; American policy sought the creation of concrete institutions to implement its goals. Echoing Root's earlier analogies, Coolidge noted that the United States early on established a court system to administer justice, and

> [w]hat we have been able to do in this respect in relation to the different States of our Union, we ought to encourage and support in its proper application in relation to the different nations of the world. With our already enormous and constantly increasing interests abroad, there are constantly accumulating reasons why we

[542] Calvin Coolidge, Government and Business, in Foundations of the Republic 317, 330-31 (1926) (emphasis added).

[543] Id. at 331.

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> should signify our adherence to the Permanent Court of International Justice.[544]

Coolidge emphasized that such adherence would not involve the United States in the "political affairs" of other nations, "which do not concern us."[545] But "I can think of no more reassuring action than the declaration of America that it will wholeheartedly join with other nations in support of the tribunal for the administration of international justice which they have created." In fact, "I can conceive of nothing that we could do, which involves assuming so few obligations on our part, that would be likely to prove of so much value to the world."[546]

In characteristically succinct fashion, Coolidge illustrated the impact of legal ideology on American foreign relations. Coolidge was not a lawyer, making his statement all the more striking. Legalism had assumed enough importance that all foreign policymakers spoke its language and it cast a shadow over American foreign relations during the period of Republican ascendancy in the 1920s. When President Harding looked for a Secretary of State in 1920, he chose Charles Evans Hughes, the former (and future) Supreme Court Justice who, like Root, was a prominent New York corporate lawyer who came of professional age during the heyday of legal classicism. When Hughes retired in 1925, Coolidge appointed Frank Kellogg, another lawyer who (as we have seen) depended on Root for nearly constant guidance (when he was not consulting Hughes). In 1929, newly elected President Herbert Hoover appointed Henry Stimson, Root's protégé.

These choices helped define the important priorities and questions for policymakers during the decade. As Coolidge observed, the United States could focus its foreign policies on creating a "system of law." It could adhere to international legal institutions without involving itself in international "politics." It could establish international tribunals as a natural outgrowth of the federal government mediating relations between the states. And most importantly, it could avoid facing the hard fact that international stability required strategic commitments from the United States on the European continent. This was a reassuring worldview. It was also inaccurate.

If one possible criticism of this account is that it is simply implausible—an argument that I hope the evidence presented has answered—the other (ironically enough) is that it is simply obvious. Such an argument would contend that the late nineteenth and early

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544 Id.
545 Id.
546 Id.

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twentieth centuries were times of optimism and a belief in progress; American lawyers were imbued with this spirit of the times and thus they had an optimistic foreign policy based upon a belief in progress.

In the end, I find such an argument not very meaningful. To say that American foreign policymakers had an optimistic foreign policy because they were optimistic lands us on the ramparts of tautology. More importantly, it does not tell us why a belief in progress captivated them as it did. Root and the others I study were highly sophisticated, intelligent, and experienced political operators; they may have been optimistic but they were not unthinking. The question, then, is: Why did men of such intelligence and sophistication develop and adhere to this theory? Certainly they must have insisted on (at least to themselves) some evidence, some intellectual superstructure that met their demands for a worldview that seemed "realistic" and justified by concrete, practical experience. To say that they were optimistic, merely because everyone else was, belittles their intelligence and capacity for independent thought.

Moreover, the argument borders on the ahistorical because they maintained this optimistic faith in light of the catastrophe of the First World War. The outbreak of that war, notes James Joll, "can be seen as a defeat for those in all belligerent countries who believed in the application of reason to the settlement of disputes, who believed that all problems have solutions, and that international goodwill and cooperation would suffice to prevent war."[547] Yet Root and other foreign-policy-minded lawyers steadfastly maintained this belief even in the wake of the catastrophe. Pointing to a general belief in "progress" simply does not explain this phenomenon.

The other central objection to my thesis holds that, in the end, legalism did not matter. On this argument, U.S. public opinion would not have supported undertaking strategic commitments to the European continent. Ascribing to legalism the failure to make such commitments, then, misplaces the blame: Policymakers did the best that they could under the circumstances to remain engaged but were prevented from taking necessary measures due to domestic politics.

Such an assertion, I believe, ignores how ideology can change political history. Classical legal ideology assured policymakers that they could maintain their commitment to American engagement abroad while avoiding the difficult political choices at home. It enabled them to avoid cognitive dissonance and tell themselves that they were serving the broad national interest and their narrow political interests simultaneously. Had classical legal ideology not been available to these

[547] Joll, supra note 40, at 22.

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men, political discourse—and political outcomes—might have differed: Some policymakers no doubt would have taken the easy way out, but others might not have. Connecting classical legal ideology with American foreign policy, then, cannot demonstrate why the United States failed to undertake necessary strategic commitments; it can, however, shed light on why a constituency for such commitments did not develop.[548]

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[548] After World War II, the foreign policy establishment founded by Root served as a crucial bulwark of realist foreign policy thought. Lawyers played a key role in this development. See generally Hodgson, supra note 28 (detailing life of Henry Stimson, former Secretary of State and War and former law partner of Elihu Root); Walter Isaacson & Evan Thomas, The Wise Men: Six Friends and the World They Made (1985). The prevailing legal culture of the postwar era, however, was not classical orthodoxy, but rather "legal realism," which emphasized how power and coercion determined legal rules and concrete institutions. Not surprisingly, then, lawyers who practiced in the legal realist age had very different views of international politics as well.

The obvious riposte to this line of thinking is that between the 1920s and the 1940s a more important development than a shift in legal theory occurred to impact American foreign policy: the Second World War itself. This argument, however, is overly deterministic; in the same way that Americans drew several disparate conclusions for U.S. foreign policy after World War I, they could have drawn several disparate conclusions after World War II. In other words, the war did not make containment inevitable. The Truman administration hotly debated the proper response to the Soviet Union from 1945 to 1947 and reached a conclusion—the "Truman Doctrine"—only after crystallization of the containment doctrine by George Kennan, Dean Acheson, and others. See generally John Lewis Gaddis, The United States and the Origins of the Cold War, 1941–1947, at 198-352 (1972) (analyzing evolution of U.S. policy toward Soviet Union from end of World War II to proclamation of Truman Doctrine). Deborah Welch Larson argues forcefully that containment policy derived from the psychologies of the principal U.S. policymakers, and that the Cold War belief system was a retrospective justification for containment, not a cause of it. See generally Deborah Welch Larson, Origins of Containment: A Psychological Explanation (1985). Large segments of both the left and right sharply contested this policy outcome. Thus, containment in the wake of World War II was hardly automatic or unproblematic. Larson writes:

> Once the United States and the Soviet Union faced each other across the corpse of Europe, some form of rivalry or conflict was almost inevitable. But the emerging bipolar structure did not in itself preclude alternative forms that Soviet-American competition could have assumed—a romantic triangle for the favors of a united Germany, U.S. isolation from European political affairs, a limited adversary relationship, a gentleman's agreement dividing Europe into spheres of influence, or war.

Larson, supra, at 58.

In any event, the leading work on the period acknowledges that the containment strategy itself had deep intellectual roots preceding World War II; its origins lay in the rise of the study of geopolitics in American universities during the Great Depression. See Melvyn P. Leffler, A Preponderance of Power: National Security, the Truman Administration, and the Cold War 10, 525 n.30 (1992). Because Leffler's book concerns the postwar period, he does not devote significant attention to this development, and our knowledge of it remains quite sketchy. In future work, I hope to examine closely the thought and activities of the lawyers involved in this development (such as Dean Acheson and Adolf Berle, Jr.) and determine the extent to which legal realism—which also focused heavily on power considerations—played a role in the development of foreign policy realism.

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And this lack of development attests to legalism's tragic consequences. Even though one might be tempted to call him overly idealistic, Root was anything but an innocent man; he was a sophisticated political player keenly aware of the play of social interests. That he of all policymakers could keep the faith while recognizing its severe shortcomings speaks eloquently about the ability of unconscious and often destructive beliefs and ways of thinking to maintain their hold on all of us. The tragedy of Root's career is not that he was naïve, but rather that he was so very sophisticated; no other American policymaker approached his capacity for understanding, synthesizing, and applying the classical legal paradigm.[549] His flaw lay in his acceptance of that paradigm to begin with; once he made his commitment to classicism, he could not break away.

This failure should give contemporary readers pause. We tell ourselves that we have learned the lessons of the past and comfortably assert that we live in a more sophisticated age. But are we simply unable to see the flaws in our worldviews, both domestically and internationally? In what ways are we trapped in contemporary conceptual paradigms? And what consequences await our failure to break out of them?

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549 Even one of Root's harshest critics acknowledged that "[t]here can surely be little doubt in any quarter that Mr. Root is, in intellectual endowment and equipment at least, one of the greatest, if he is not *the* greatest, of living American statesmen." James H. Blount, The American Occupation of the Philippines, 1898–1912, at 224 (1913).

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