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Author
Zasloff, Jonathan

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LAW AND THE SHAPING OF AMERICAN FOREIGN POLICY: THE TWENTY YEARS' CRISIS

JONATHAN ZASLOFF*

I. INTRODUCTION

International law is back. Once derided as pretentious and obscure,[1] the field has blossomed over the last decade into a cutting-edge academic discipline. Yet the explosion of international law is of far more than academic interest. Major national and international policymakers are busily creating and using international institutions in an attempt to remake the world: the international criminal court, a World Trade Organization

* Professor of Law, University of California, Los Angeles School of Law; J.D. 1993, Yale Law School; Ph.D. 2000, Harvard University. For comments and suggestions, I would like to thank Rick Abel, Ann Carlson, Scott Cummings, Willie Forbath, Jody Freeman, Robert Goldstein, Akira Iriye, James Kloppenberg, Sandy Levinson, Daniel Lowenstein, Tim Naftali, Kal Raustiala, Gideon Rose, Gary Rowe, Bill Rubenstein, Larry Sager, Anne-Marie Slaughter, Clyde Spillenger, Kirk Stark, Richard Steinberg, Adam Winkler, and, of course, Katherine Trisolini. Particularly careful and helpful reads at critical stages were provided by Stuart Banner, Carole Goldberg, Laura Gomez, David Sklansky, and Stephen Yeazell. The UCLA Junior Faculty Group and the University of Texas Law School Faculty Colloquium generated stimulating and helpful exchanges. Financial support was provided by the UCLA Academic Senate and the UCLA Law School Dean's Fund. Kamyar Ghaneabisseri contributed very helpful research assistance, as did the extraordinary staff of the UCLA Hugh & Hazel Darling Law Library (especially the indefatigable Laura Cadra).

In order to publish an article drawing largely from primary historical documents, the *Southern California Law Review* has departed from its standard procedures for substance and citation checking.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.

1. Consider, for example, the New Haven School of "policy science" developed by Harold Lasswell and Myres McDougal, perhaps the leading mid-20th-century school of international law. Neil Duxbury's assessment is harsh but accurate:

> At best, it is groundwork; interpreted less charitably, it is the use of theory to encourage procrastination over matters practical. . . . [It] met with rejection . . . [and] was deemed to be too idiosyncratic, élitist, jargon-laden and utopian . . . . [P]ost-realist American legal theorists seemed generally disinclined to make much use of policy science.

NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 202–03 (1995).

appellate court with real teeth, war crimes tribunals, weapons inspectors under international legal mandates, and the list goes on. Advocates in violent conflicts appeal to "international legality" as a way of gaining strength.[2] In the wake of September 11th, several observers have suggested that these kinds of institutions could play a critical role in the war on terrorism and represent a better way than military means to forestall chaos and avoid a clash of civilizations.[3]

There is nothing new under the sun, and these developments are no exception. The frenzy of international legal activity recalls a time early in the 20th century when statesmen and jurisprudes hailed the creation of a new international legal order that could break out of what they believed was the discredited balance-of-power system.

This Article is the story of that time. Specifically, it is the story of twelve years of American foreign policy—from 1921 to 1933—when lawyers directed much of America's relations with the outside world. Of course, lawyers have often played key roles in American foreign policy throughout its history; but this group is unique because it brought with it a powerful, coherent set of ideas about how the world works, a set of ideas that historians have dubbed "classical legal ideology."[4] Classical legal ideology created "a vast discursive structure that came to dominate legal education and to greatly influence the practical work of lawyers and judges"[5]—especially the work of the East Coast legal elite that played a central role in American foreign policy.

This Article argues that this particular form of legal consciousness guided these "lawyer-diplomats" in their formation and execution of

2. For example, Ghassan Khatib, the current minister of labor for the Palestinian Authority, has long claimed that the Palestinian position represents that of "international legality," and that Palestinians believe that adherence to international law is the best way to achieve their goals. *See, e.g.*, Ghassan Khatib, *A Palestinian View: Like Every Other Nation in the World* (May 6, 2002), *at* http://www.bitterlemons.org.

3. *See* Anne-Marie Slaughter, *Terrorism and Justice*, FIN. TIMES, Oct. 12, 2001, at 23, *available at* 2001 WL 28471354; Anne-Marie Slaughter, *Tougher than Terror*, AM. PROSPECT, Jan. 28, 2002, at 22.

4. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937, at 3 (1998); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 3 (1980). Some scholars prefer the term "classical orthodoxy"; although they generally discuss the same trend, they distinguish more precisely between modes and schools of classical legal thought. *See, e.g.*, Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 2 n.6 (1983).

5. Grey, *supra* note 4, at 5.

American foreign policy during the period from the 1920s through the beginning of the Great Depression. This argument is not new. In previous work, I traced the influence of classicism on U.S. foreign relations during the first two decades of the 20th century.[6] Focusing on the 1920s and early 1930s is particularly important, however, because classical legal foreign policy represents the greatest disaster in American diplomatic history: Washington claimed to reject isolationism and favored extensive engagement with Europe and the rest of the outside world. It did so, however, in idiosyncratic and seemingly contradictory ways: advocating involvement in world affairs while insisting on remaining aloof from "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 World War I, international order required active American political and strategic involvement. The rest of the great powers looked to the United States for constructive leadership to help achieve global stability. That leadership, however, failed to materialize, leaving a weak and divided world unable to grapple with financial crisis and the rise of fascism.[7] This "Twenty Years' Crisis" eventually led to the catastrophe of World War II.[8]

The interwar period has received sustained attention from historians, who have written superb accounts of American diplomacy during the period.[9] These accounts stress the domestic roots of the nation's external

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6. *See* Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003).

7. *See, e.g.*, NORMAN A. GRAEBNER, AMERICA AS A WORLD POWER: A REALIST APPRAISAL FROM WILSON TO REAGAN (1984); GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900–1950 (1951); ROBERT E. OSGOOD, IDEALS AND SELF-INTEREST IN AMERICA'S FOREIGN RELATIONS (1953); 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.").

8. The phrase is, of course, E.H. Carr's. *See* EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS 1919–1939 (2d ed., reprint Harper & Row 1964) (1939).

9. Among the best of these works are WARREN I. COHEN, EMPIRE WITHOUT TEARS: AMERICA'S FOREIGN RELATIONS 1921–1933 (1987); FRANK COSTIGLIOLA, AWKWARD DOMINION: AMERICAN POLITICAL, ECONOMIC, AND CULTURAL RELATIONS WITH EUROPE, 1919–1933 (1984); ROBERT H. FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION: HOOVER-STIMSON FOREIGN POLICY, 1929–1933 (1957) [hereinafter FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION]; ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT (1952) [hereinafter FERRELL, PEACE IN THEIR TIME]; MICHAEL J. HOGAN, INFORMAL ENTENTE: THE PRIVATE STRUCTURE OF COOPERATION IN ANGLO-AMERICAN ECONOMIC DIPLOMACY, 1918–1928 (1977); AKIRA IRIYE, AFTER IMPERIALISM: THE SEARCH FOR A NEW ORDER IN THE FAR EAST 1921–1931 (Imprint Publ'ns 1990) (1965); MELVYN P. LEFFLER, THE ELUSIVE QUEST: AMERICA'S PURSUIT OF EUROPEAN STABILITY AND FRENCH SECURITY, 1919–1933 (1979); JOAN HOFF WILSON, AMERICAN

outlook, particularly emphasizing the constraints that policymakers faced. They also highlight the role that businessmen and business groups played in structuring the U.S. external role, noting the ideological salience of business-oriented progressivism and the important policy goal of advancing American commercial and financial interests.[10]

But these accounts have overlooked the profound influence that lawyers and the law had on U.S. foreign relations during the period. The three secretaries of state from 1921 to 1933 were attorneys whose predominant experiences came not from diplomatic posts but from law offices and judicial chambers.[11] They, in turn, brought their law partners and professional colleagues with them to Washington, relied on the advice of prominent elite lawyers when making policy, and sought out the best legal help to serve as ambassadors.[12] The law/diplomacy connection worked its way to the White House as well: Even though the presidents of the period were not attorneys, they spoke the language of the law in foreign affairs, using the images, institutions, and assumptions of legal thinking in structuring their thinking about the U.S. role in world politics.

Some historians have noticed the legal aspect of American foreign policy, but have failed to integrate it into their narratives.[13] They note accurately that policymakers insisted that the world be "law bound" and emphasized legal methods to preserve peace; but they do not consider the origins of these beliefs or seek to explain how policymakers believed that an anarchic world could nevertheless be regulated by law. Because diplomatic historians rarely have any training in legal history, they cannot decode the assumptions behind the thoughts of lawyer-diplomats. Thus, an important part of the story remains missing. I hope that my account, by integrating the history of American foreign policy with the history of

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BUSINESS AND FOREIGN POLICY 1920–1933 (1971). Three excellent essays summarizing much of the historical literature are John Braeman, *Power and Diplomacy: The 1920's Reappraised*, 44 REV. POL. 342 (1982); John Braeman, *The New Left and American Foreign Policy During the Age of Normalcy: A Re-Examination*, 57 BUS. HIST. REV. 73 (1983); Jon Jacobson, *Is There a New International History of the 1920s?*, 88 AM. HIST. REV. 617 (1983).

10. In addition to the sources cited above, *supra* note 9, see also EMILY S. ROSENBERG, SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC AND CULTURAL EXPANSION, 1890–1945 (1982).

11. *See infra* Part III.A.

12. *See infra* Part III.B.

13. *See, e.g.*, LLOYD E. AMBROSIUS, WOODROW WILSON AND THE AMERICAN DIPLOMATIC TRADITION: THE TREATY FIGHT IN PERSPECTIVE 103 (1987); 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).

American legal thought, will fill an important gap in explaining "what went wrong."[14]

This Article takes my original story into the 1920s and through the beginnings of the Great Depression. I discuss the effect of classicism on issues such as the European balance of power, naval arms limitations, and relations with Mexico, as well as the event that helped precipitate the collapse of the interwar system: Japan's invasion of Manchuria in the autumn of 1931.

This story is more than antiquarianism, given the new emphasis on international legalism as a way of promoting peace. Much of the new international law scholarship contributes to policy debates precisely because it relies on classical assumptions. Toward the end of this Article, I analyze some of the best of this new scholarship and attempt to show how classicism has made its way back into international legal theory several decades after it supposedly vanished. Such "neoclassicism," I suggest, exposes the new scholarship to the weaknesses of its forebears, and should warn us to proceed with extreme caution in adopting these proposals or rethinking world politics in light of the new framework. It is far too tempting, in the effort to create a new world order, simply to wind up with the worst results of the old.

II. THE THEORETICAL FRAMEWORK

In Part II, I briefly recapitulate the findings of my previous work to provide background for readers. These findings form the necessary background for considering classicism's influence on American foreign policy during the 1920s. The remainder of Part II considers how classical legal thought updated itself during the first two decades of the 20th century by adapting to changes in American politics and ideology during the Progressive Era. As I hope to show, classical legal thought integrated aspects of progressivism without straying from its core values.

A. CLASSICAL LEGAL IDEOLOGY AND INTERNATIONAL RELATIONS: A REPRISE

Classical legal ideology is complex, but it has four principal tenets that interact to promote a coherent world view.[15]

14. *See* BERNARD LEWIS, WHAT WENT WRONG?: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE (2002).

15. For a more detailed discussion of these points, see Zasloff, *supra* note 6, at 247–85.

Legal peripheralism. Classical legal thinkers denied that the state constituted the dominant source of legal rules and enforcement efforts. They placed strong emphasis on the notion that custom and informal social controls could establish a modicum of social order in the absence of the coercive state. Positing a sharp distinction between "law" and "force," they firmly believed that large gains in social force 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 and values. While conflicts did occur, they were not as important as the fundamental consensus linking social groups.

Conflict resolution through neutral expertise: law versus politics. Classical legal thinkers believed that social conflict resulted either from failure to provide proper institutional mechanisms, or because problems were misconceived to obscure the more basic commonalities. Legal institutions and law served as neutral, apolitical institutions and principles that, if properly applied, could resolve conflicts while giving groups and individuals complete liberty within their respective spheres of action.

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 evolved through informal mechanisms and a voluntary process of arbitration.

This ideology contained profound implications for international relations during the first two decades of the 20th century, because lawyers dominated the foreign policymaking elite.

First, and 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 maintained that international law is condemned to impotence because it is not enforced by the centralized, coercive power of the state. Legal peripheralism, by contrast, emphasized those areas of social action where (it believed) law effectively maintained social stability in the absence of centralized state coercion.

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. Traditional Realism also

focuses on basic conflicts of values between nations as a source of international instability. Classical legal thought 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 could demonstrate how individuals could pursue their aims without conflicting with each other.

Third, the evolutionary character of classical legal thought lent powerful support for the belief that the weaknesses of international institutions were not fundamental problems, but temporary difficulties on the way to more robust institutions.

My previous work focused on how these implications became entrenched in American foreign policy from the Gilded Age to the dawn of the new era of the 1920s. Such a treatment, however, left the story incomplete and diminished its significance, for classicism's greatest impact occurred during the interwar period. In the following two sections, I attempt to show how classicism was updated during the Progressive Era. Ideologies change, and classicism was no exception.

B. DESTRUCTIVE COMPETITION: DEVELOPING THE CLASSICAL PARADIGM

The skeptical reader will immediately offer an objection to my account of classicism: Didn't the first two decades of the 20th century subvert the entire classical structure, particularly in the law? Wasn't the whole political argument of the Progressive Era about breaking apart concentrations of market power (through such devices as antitrust), and maintaining an adequate balance of power between, for instance, labor and capital? And therefore, wouldn't that discourse serve as the appropriate template for even a moderately well-informed lawyer thrust into representing his country in world politics?

Not surprisingly, my answer to all these questions is no. I do not claim, however, that elite lawyers were oblivious to the currents whirling about them—far from it. Rather, these lawyers developed a powerful retort to the antimonopolistic trend of the Progressive Era. This retort recovered and reenergized the classical paradigm, establishing it with greater force during the new era.

The notion of "destructive" or "ruinous" competition lay at the heart of this rejoinder. To some, the words "destructive competition" imply that the concept derived from nonclassical principles. After all, since the popular conception of the Gilded Age sees it as a libertarian era, and the idea of destructive or ruinous competition implies that free markets often

fail, the idea seems to have origins elsewhere. But, in fact, the notion of destructive competition was a hallmark of classical thought.[16]

In the 1880s, economists began to argue that supply and demand did not automatically reach equilibrium, and that industrial capitalism thus yielded "overproduction." By the 1890s, they had developed a theory explaining the phenomenon: Individual firms would incur high fixed costs as they invested in capital without knowing how much other firms had invested. Then, they would stay in business as long as their marginal profit exceeded their marginal cost. The result was a glut of overproducing firms. Competition would continually drive prices to variable costs, without enough remaining to cover payment for capital investment, thereby ruining efficient firms. Merger and cooperative marketing arrangements were the best solutions.[17]

The ruinous competition concept found a receptive audience among elite lawyers because they had made such arguments for decades. The common law accepted the notion more than a half a century before the economic theory appeared. As Herbert Hovenkamp observed, "The notion that economists teach lawyers but do not learn very much from them is built on a rather formal view of the science of economics."[18] Instead, "throughout the nineteenth century lawyers and economists subscribed to a common 'theory of the firm' [and] even developed a common vocabulary to describe what they saw."[19] The *Charles River Bridge* case was predicated on a ruinous competition theory, and the plaintiff's lawyer, Daniel Webster, traced the phrase "ruinous competition" to Chancellor James Kent, whose *Commentaries on American Law* were published in the 1820s.[20] But ruinous competition became prevalent in the 1870s, when classical legal thought was coming into its own. During that decade, lawyers began to regularly win cases based on the doctrine. Ruinous competition's success continued through the rest of the century. Only in 1897, when the U.S. Supreme Court held that the Sherman Act forbade it, did it fall into disfavor in federal courts. State courts, however, continued

16. *See generally* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 308–30 (1991) (providing material for the following discussion of destructive competition in both economics and law).

17. *See, e.g.*, ARTHUR TWINING HADLEY, ECONOMICS: AN ACCOUNT OF THE RELATIONS BETWEEN PRIVATE PROPERTY AND PUBLIC WELFARE 158, 295 (reprint 1906) (New York, G.P. Putnam's Sons 1896); John B. Clark, *The Limits of Competition*, 2 POL. SCI. Q. 45, 55 (1887).

18. HOVENKAMP, *supra* note 16, at 308.

19. *Id.*

20. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 436, 461 (1837).

to follow it, and it reappeared in federal tribunals shortly thereafter, when the U.S. Supreme Court instituted the "rule of reason."[21]

Classicism's embrace of ruinous competition theory held important implications for elite lawyers' view of world politics. Ruinous competition theory rested on the belief that if firms cooperate, then they will all achieve absolute gains, each gaining higher profits. All firms could thereby reach market "security." The analogy to world politics seemed obvious: In a similar fashion, endless battling for position between nations was obsolete because all could prosper from a cooperative order.[22]

Yale Law School's Edwin Borchard served as a primary exponent of the new framework.[23] Borchard was a staunch isolationist, fearing that any U.S. involvement in Europe constituted a prelude to "entanglement." Not surprisingly, Borchard never held an administration position; instead, he remained an important advisor to Senator William Borah, the iconoclastic and often incoherent Idaho Republican who became America's leading foreign policy dissenter during the new era.[24] But Borchard's overall framework for understanding world politics mirrored Republican legalism in critical ways.

Borchard explicitly argued that effective foreign policy demanded the conversion of political questions into legal ones, which could be done through the regulation of destructive competition. Continuing international conflict, he contended,

> is promoted . . . by the *unregulated competition* which prevails among the nations and by the fact that in the most important sphere of

21. Standard Oil Co. v. United States, 221 U.S. 1, 66 (1910).

22. Robert Freeman Smith, *Republican Policy and the Pax Americana 1921–1932*, *in* FROM COLONY TO EMPIRE 253 (William Appleman Williams ed., 1972), first drew my attention to the connections between economic theory and the 1920s' view of world politics. I believe that I am building on this work in four ways: (1) by explicitly connecting it with the fixed cost controversy and theories of ruinous competition, (2) by identifying the intellectual sources of this theory in classical legal thought, (3) by showing how its assumptions and implications differ sharply from realist and balance-of-power theory, and (4) by demonstrating how ruinous competition theory actually is indeterminate and relies on further background assumptions to be useful in developing a theory of world politics.

23. Although Borchard taught at Yale during the heyday of legal realism, he never joined the realist movement, and, in fact, stood out as one of the most conservative members of the faculty. *See* WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 166 (1974) (describing Borchard as one of the "stalwarts" on the Yale faculty).

24. Upon Lodge's death in 1924, Borah became chair of the Senate Foreign Relations Committee, a position he held until the Democrats took over the Senate in 1931. *See generally* Walter Lippmann, *Concerning Senator Borah*, FOREIGN AFF., Jan. 1926, at 211 (providing a brilliant contemporary account). The standard work is ROBERT JAMES MADDOX, WILLIAM E. BORAH AND AMERICAN FOREIGN POLICY (1969).

> international activity, the commercial field, few if any rules of law have yet entered. Here international life is carried on under a sort of jungle law until the conflict of economical interest, which is continually generated, develops into an important national issue which is then called a conflict of political interest and a political question. It is not believed that such unregulated commercial competition for raw materials and markets, for transportation and communication facilities . . . is essential to the exchange of the world's goods, but the failure to realize how important a source of war is embodied in this economic activity accounts for the apparent indifference to its more sensible regulation. It is therefore of considerable importance that the domain of law be extended to new fields which, as a matter of self-interest, might persuade the nations thus to convert political issues into legal issues.[25]

Borchard repeatedly argued that economic competition lay at the heart of global conflict, but in a straightforward rejection of Marxism, argued that such conflict could be ameliorated through proper cooperative pooling arrangements.[26] An international superstate was (by implication) unnecessary because cooperation was in everyone's interest.[27]

Borchard's viewpoint included the core tenets of classical legal ideology as well as references to ruinous competition. His reference to

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25. EDWIN M. BORCHARD, THE DISTINCTION BETWEEN LEGAL AND POLITICAL QUESTIONS, S. DOC. NO. 68-118, at 5 (1st Sess. 1924) (emphasis added). *See also* Edwin M. Borchard, *The Problem of Backward Areas and of Colonies*, *in* THE LEAGUE OF NATIONS: THE PRINCIPLE AND THE PRACTICE 201, 211 (Stephen Pierce Duggan ed., 1919) [hereinafter Borchard, *Problem of Backward Areas*] ("It is out of the competition of national policies for the control of economic spheres of influence that the international relations of the immediate future will shape their new setting and alignments. It is upon the intelligent regulation of this competition that the peace of the future depends.").

26. *See, e.g.*, Borchard, *Problem of Backward Areas*, *supra* note 25, at 216–17. In a letter, Borchard wrote,

> Did you see Hoover's article in yesterday's New York Times on raw materials? This is a subject that I have deemed more important than many others. It has seemed to me that if the League of Nations could once organize itself as an economic conference to adjust these economic conflicts, they would do good [sic] than devoting themselves to political matters.

Letter from Edwin M. Borchard to John Bassett Moore (Jan. 11, 1926) (on file with the Sterling Memorial Library, Yale University, Edwin M. Borchard Papers).

27. Coolidge adopted a similar approach. He viewed economic competition as a central cause of international conflict and suggested that it served as a prime example of ruinous competition theory. *See* CALVIN COOLIDGE, *Ways to Peace*, *in* FOUNDATIONS OF THE REPUBLIC 429, 432–33 (1926). *See also* Calvin Coolidge, Press Briefing (Jan. 9, 1925), *in* THE TALKATIVE PRESIDENT: THE OFF-THE-RECORD PRESS CONFERENCES OF CALVIN COOLIDGE 157–58 (Howard H. Quint & Robert H. Ferrell eds., 1964) (opposing the raising of guns on battleships because doing so would bring back "the old policy of competition"); Calvin Coolidge, Press Briefing (Feb. 23, 1926), *in* THE TALKATIVE PRESIDENT: THE OFF-THE-RECORD PRESS CONFERENCES OF CALVIN COOLIDGE, *supra*, at 162–63 (rejecting the need for a separate air force given "the theory of competitive defense. . . . [I]f we arm ourselves with a great air fleet, the necessary reaction will be that other countries think they must do the same and then we are off again competing in armaments").

changes in international law recalled James Barr Ames's belief in the role of legal scholars in transforming the legal system. He frequently argued that international legal scholars should focus their efforts on establishing new rules of international law to handle destructive international competition.[28]

It may appear that Borchard's emphasis on transforming political questions into legal questions would blur the two categories, violating a cardinal tenet of classical legal thought. But, in fact, Borchard's discussion of the law/politics relationship represented a purer form of the distinction than that advocated by the chief proponents of orthodoxy. Traditionally, as we have seen, proponents of international legalism, such as Elihu Root, drew a sharp distinction between legal and political causes of war.[29] Borchard, however, rejected the distinction because he believed that *all* causes of war were potentially justiciable. "By extending the domain of law, through international conference, to the many fields, notably economic, from which law is now practically excluded," he argued

> even the orthodox criterion of decision by existing rules could be used to extend the list of legal questions. By emphasizing the fact that minor political issues have often been and can usually be settled peaceably, the thought can be impressed that there is no question which is inherently incapable of arbitral or mediatory, and therefore civil, as distinguished from military, settlement.[30]

Most importantly, Borchard's framework depended deeply on the absence of state coercion. The best answer lay in finding a scientific solution to the problem: "Commercial statistics are sufficiently accurate," he contended, "to enable international industrial commissions appointed by the Powers to allocate the raw materials of the world to the manufacturing countries in proportion to their capacity to utilize them."[31] Instead of states ruinously competing to invest in raw materials, thereby causing (Borchard believed) the inevitable clash of military force in the wake of overinvestment, the matter would be adjudicated: The quasi-judicial commission would determine the *right* answer.[32] Moreover, in best

28. *See* Zasloff, *supra* note 6, at 274–75 (noting a sharp distinction in classical thought between law and politics).

29. *See, e.g.*, Letter from Elihu Root to Henry Cabot Lodge (Mar. 29, 1919) (on file with the Library of Congress, Elihu Root Papers). *See also* Zasloff, *supra* note 6, at 343–50.

30. S. DOC. NO. 68-118, at 6.

31. Borchard, *Problem of Backward Areas*, *supra* note 25, at 216.

32. As noted above, some scholars have drawn a sharp distinction (at least theoretically) between classical orthodoxy, which they say eschewed factual inquiry, and progressivism, which paid close attention to facts. On this interpretation, Borchard's reference to an international industrial commission

Langdellian fashion, this answer was based on a simple, objective principle—"capacity to utilize"—that could be applied uncontroversially.

Under this framework, states' role in the equation was severely limited: Nations would appoint members and leave the rest up to science. Such severe limitations were necessary, for otherwise, states would inject *political* considerations, "nurtured in certain historic obsessions or traditions," into the adjudicative process.[33] Private ordering, then, could promote international peace in the same way that it had established domestic stability. This helps to explain why Borchard and other American foreign policymakers could accept ruinous competition/oligopoly theory, but reject spheres of influence—its most direct analog to diplomacy. Because spheres of influence were negotiated by states on the basis of politics, they violated scientific principles and *accurate* pooling arrangements based on objective considerations. The point was to adjudicate the right answer, not cut a backroom deal.

While to the contemporary mind it may seem contradictory that fiercely competitive states would submit to the rulings of an international commission with no coercive power, this posed no problem for Borchard once he was armed with ruinous competition theory. Nations (and politicized cartels) competed essentially because they had no better alternative: They overinvested in securing raw materials, trying to get more then they actually needed. With an international commission to set allocations, no such competition would be necessary. The international commission's allocations would be enforced in the same way that Charles Francis Adams's Sunshine Commissions were.[34]

Thus, classical legal ideology made its way into the 1920s. First, international conflict was taken out of the realm of politics and put into a completely different sphere—that of law, where politics did not enter. Second, this law was to be facilitated through a scientific research program

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would represent nonclassical progressive thought. I believe this distinction, however, to be substantially overdrawn. The key issue was the existence of state power and coercion, which some forms of progressivism accepted and others did not. Legal orthodoxy adopted new individualist progressivism, which sharply rejected coercion, precisely because this form of progressivism conformed so closely with classical assumptions.

33. S. DOC. NO. 68-118, at 6. *See also* Borchard, *Problem of Backward Areas*, *supra* note 25, at 216–17 ("Should governments themselves undertake the exploitation of backward areas, some form of international control of the raw materials obtained must likewise be devised; for the mere aggrandizement of the home industries of the exploiting powers perpetuates the constant menace of war under which the world now labors.").

34. Zasloff, *supra* note 6, at 275–76 (discussing the Sunshine Commission form of regulation, in which regulatory commissions lacking enforcement power regulate industries through public scrutiny and exposure).

driven by legal experts. Third, international relations were not inherently conflictual, but lacking in the proper institutions that could maintain the cooperative oligopoly between nations, and avoid ruinous competition.

C. RUINOUS COMPETITION AND WORLD POLITICS

Little wonder, then, that foreign policy thinkers so sharply rejected balance-of-power theory, which proceeds from quite different assumptions. In the realpolitik world view, self-help under international anarchy makes survival—not prosperity—the touchstone of any state's foreign policy. The key notion is that of a gain *relative* to the other states in the system. As Kenneth Waltz explains,

> When faced with possibility of cooperating for mutual gain, states that feel insecure must ask how the gain will be divided. They are compelled to ask not "Will both of us gain?" but "Who will gain more?" . . . Even the prospect of large absolute gains for both parties does not elicit their cooperation so long as each fears how the other will use its increased capabilities. . . . [T]he condition of insecurity—at the least, the uncertainty of each about the other's future intentions and actions—works against their cooperation.[35]

Not surprisingly, then, while contemporary "neorealist" theorists rely explicitly on analogies to market systems to describe world politics, their accounts of these systems diverge sharply from those of ruinous competition theory. Waltz explicitly compares the international system to an oligopolistic market, which would seem to indicate his acceptance of ruinous competition theory. He argues, however, that oligopoly qualifies but hardly contradicts the notion that relative gains trump absolute ones. "To maximize profits tomorrow as well as today," he contends, "firms first have to survive." But

> [t]he relative strength of firms changes over time in ways that cannot be foreseen. Firms are constrained to strike a compromise between maximizing their profits and minimizing the danger of their own demise. Each of two firms may be better off if one of them accepts compensation from the other in return for withdrawing from some part of the market. But a firm that accepts smaller markets in exchange for larger profits will be gravely disadvantaged if, for example, a price war should break out as part of a renewed struggle for markets.[36]

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35. KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 105 (1979).
36. *Id.* at 105–06.

Thus, he contends, it is "not advisable to disarm in relation to one's rivals" because "the potentiality of renewed warfare always exists."[37]

The question, then, is which view is correct: Realism's skeptical view or ruinous competition theory's benign interpretation? Is cooperation difficult because of the primacy of relative gains, or easy due to the primacy of absolute ones? Contemporary oligopoly theory provides no consensus on conclusions.[38] Indeed, reviews of the literature find that the outcome is indeterminate: Oligopoly actually provides a classic case of a multiple equilibrium where either fierce competition or smooth cooperation is possible and feasible.[39]

As a result, ideology plays a central role toward resolving the question, as it did during the 1920s. Ruinous competition theory interacted symbiotically with other classicist assumptions, most importantly the absence of fundamental interest and value conflicts, the ability of noncoercive institutions to reconcile disputes without recourse to "political" considerations, and the slow non-Darwinian evolution toward scientific and noncoercive solutions. As Borchard noted in dismissing both the League of Nations and a realpolitik system of alliances, "An international economic conference in constant session, and a gradual change from the present system of merciless national competition to one of international co-operation hold out . . . more promise for the rational solution of international conflicts of interest than any political organization of the nations yet suggested."[40]

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37. *Id.* at 106 (quoting WILLIAM FELLNER, COMPETITION AMONG THE FEW 177, 199 (Augustus M. Kelley 1965) (1949)).

38. *See* Robert G. Harris & Lawrence A. Sullivan, *Horizontal Merger Policy: Promoting Competition and American Competitiveness*, 31 ANTITRUST BULL. 871, 907–23 (1986) (reviewing the literature). Importantly, since explicit cooperative agreements are illegal, any empirical survey will not yield an effective answer to the question of whether oligopolistic firms favor relative or absolute gains. Realists will argue that the dearth of agreements means that cooperation is difficult, and their detractors will retort that antitrust law makes the data set too badly distorted for comparison.

39. *See* HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee & Robert Willig eds., 1989). It should be noted, however, that contemporary oligopoly theory is skeptical of ruinous competition as a justification for price fixing: It "may mean only that the speaker prefers high profits and the quiet life to the rigors of competition." PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS § 201(d), at 168 (5th ed. 1997). The authors acknowledge that in those industries with high fixed costs, "[r]ailroads [being] the classic example," there may be a problem with ruinous competition. *Id.* They argue, however, that such examples (1) are quite rare, and (2) may be indicative of the industry's overinvestment in equipment, which means that too many firms exist in the market. The bankruptcy of several firms and the social reallocation of resources would then constitute an efficient result. In any event, the proper solution for chronic overinvestment, the authors suggest, would be a regulated market, which the conservative ruinous competition theorists of the Progressive Era rejected as too coercive.

40. Edwin M. Borchard, *Our Foreign Policy*, 10 YALE REV. 511, 530 (1921).

Elite lawyer-diplomats immersed in classical legal ideology were drawn to the ruinous competition analogy because it appeared to confirm what they already believed, thereby providing important *evidence* for their views of world politics. Such an interpretation was hardly necessary. They could have used ruinous competition theory to justify tighter regulation, but they did not. Given its indeterminacy, they could have rejected its application to world politics, but they did not. Significantly, they could have used it to justify slicing the world into explicit spheres of influence, which represents a clear analogy to the cartelization implied by ruinous competition; but they did not. Instead, they relied on it to buttress the world view bequeathed to them by classical legal ideology: Ruinous competition demonstrated that cooperation could replace violence, that international institutions could solve any apparent conflict, and that world politics was gradually moving in the rigbt direction. Other implications were repressed.

D. PROGRESSIVISM'S IMPACT ON CLASSICAL LEGAL THOUGHT

The discussion of ruinous competition clarifies the interaction between classical legal thought and the broader ideological currents that go by the name of progressivism. The skeptic might argue that many of the ideas I ascribe to classicism are better characterized as progressive thought. For example, arguing that certain policies are more scientific, expert, or objective might be seen as exemplifying early 20th-century progressivism, with legal thought being a superfluous variable.[41] However, while

41. Thomas Grey, for example, draws a sharp distinction between Langdellian orthodoxy and what he calls "progressive" legal thought. *See* Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495–500 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)). In particular, Grey distinguishes between the two modes of thought by pointing to progressivism's insistence on intensive factual inquiry. *See id.* at 499.

As I suggest below, however, classicism's "abhorrence of facts" has been greatly overdrawn. *See supra* Part II.B. Williston, for example, protested bitterly that orthodox legal scholarship cared deeply about factual inquiry. *See* SAMUEL WILLISTON, LIFE AND LAW (1940).

Moreover, progressivism was such a broad-based movement, even within the law, that it is hard to use it as a variable to explain outcomes. *See, e.g.*, ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA 1910–1917, at 54–55 (Henry Steele Commager & Richard B. Morris eds., 1954) (distinguishing sharply between "advanced progressives" who favored, among other things, "stringent regulation of industry, woman suffrage, federal child labor legislation, and advanced governmental aid to labor, farmers, tenant farmers, and the unemployed," and other progressives). Thus, we need to know why *certain types* of progressivism triumphed within particular professional and political communities. As I suggest below, new individualist progressivism not only arose out of, but strongly appealed to, East Coast elite lawyers due to its adherence to classical legal tenets outlined above; but not all progressivism did, which is why it was rejected by elite lawyers, and why classical legal thought remains an important variable.

progressivism modernized classicism in important ways, it left classicism's overall structure intact.

The notion of progressivism has provided historians with an ongoing source of frustration for more than three decades. At the dawn of the 1970s, Peter Filene famously declared that the entire concept was useless as an explanatory framework.[42] Twelve years later, Daniel Rodgers conceded that searching for the *essence* of progressivism was futile.[43] David Kennedy confessed that inquiring into the meaning of progressivism would yield nothing but a "babble of disagreement."[44] Legal historians have fared no better, sometimes simply assigning the label "progressive" to a generalized desire for left-leaning social reform.[45]

Following Robert Wiebe and Ellis Hawley,[46] however, we can help to clarify the notion by thinking about various *types* of progressivism with some overlapping similarities, but also profound differences. The most familiar, of course, are Theodore Roosevelt's "New Nationalism" and Woodrow Wilson's "New Freedom."[47] But both these versions carried too much social radicalism. For East Coast conservatives, what Hawley refers to as the "New Individualism" seemed particularly apposite.

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42. *See* Peter G. Filene, *An Obituary for "The Progressive Movement,"* 22 AM. Q. 20 (1970).

43. *See* Daniel T. Rodgers, *In Search of Progressivism*, 10 REVIEWS AM. HIST. 113, 127 (1982).

44. David M. Kennedy, *Overview: The Progressive Era*, 37 HISTORIAN 453, 453 (1975).

45. *See* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 85–86 (1995) (equating the language and emphasis of legal progressives with other progressive reformers); HORWITZ, *supra* note 4, at 33–35.

46. *See* ELLIS W. HAWLEY, THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER: A HISTORY OF THE AMERICAN PEOPLE AND THEIR INSTITUTIONS, 1917–1933, at 10–11 (1979). *See also generally* ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (reprint Quadrangle Paperback 1968) (1962).

47. The literature on both philosophies is vast. It still makes sense to revisit the classics. *See* LINK, *supra* note 41; GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900–1912 (1958). Briefly stated, the New Nationalism was a much more well-thought-out program. Influenced by Herbert Croly's *The Promise of American Life*, it acknowledged the consolidation of capital in industrial society and advocated a powerful central government to regulate it. Roosevelt also advocated for workers' compensation, old age disability, health insurance, and health and safety laws as a comprehensive package. Wilson, forced to confront the Rooseveltian program, quickly came up with the New Freedom as a response. Influenced by Louis Brandeis, it stressed antitrust and the breaking up of large corporations as a way of recovering the Jeffersonian past. In key areas, the two philosophies merged, but the distinctions led Wilson to attack Roosevelt as a monopolist, and in turn, caused Roosevelt to dismiss the New Freedom as a "kind of rural Toryism." When Wilson triumphed in the election of 1912, his reform package morphed into new nationalist tendencies. For this Article's purposes, the key point to remember is that both the New Nationalism and the New Freedom took as their starting point the imbalance of power between social forces, a conception rejected by the New Individualism.

Rodgers identifies three "distinct social languages" forming a cluster of progressive ideas: first, the "rhetoric of antimonopolism"; second, "an emphasis on social bonds" and "a newly intense sympathy with what now seemed the innocent casualties of industrialism"; and third, the "language of social efficiency," "rationalization, and social engineering."[48] The New Individualism rejected the first language and showed only tepid and halting interest in the second, but maintained laser-like focus on the third.

Adherents of the third model rejected the notion that 19th-century individualism was relegated to history's dustbin; instead, they argued that it needed to be updated by modern and (crucially) *noncoercive* private institutions. The best example was the trade association, a private organization that could police its own members without the need for a coercive state, and whose members acted in concert with each other. As Hawley notes, the New Individualism believed that the answers to social problems lay

> not in strong government but rather in the consignment of social duties to properly enlightened private orders, in the creation of machinery through which these orders could act together for the common good, and in the generation of knowledge upon which enlightened decision makers could draw. The role of the truly progressive state was to serve as the agent or "midwife" for bringing such arrangements into being . . . .[49]

These cooperative social institutions did not broker disputes, balance competing factions, or coercively enforce decisions. Instead, they produced and gathered knowledge that yielded scientifically correct decisions. And there *was* a correct decision: The "solution" to a problem could be found that would harmonize various interests. Indeed, this was why private ordering could maintain social order. What was needed was appropriate technical expertise.

The New Individualism dovetailed closely with classical legal thought; not surprisingly, elite lawyers often spoke in new individualist language. The legal elite comprised precisely that element of the bar that created, nurtured, and joined the noncoercive, cooperative institutions that it favored. Indeed, as Robert Gordon notes, the elites were to some extent defined by the fact that they joined and built such institutions.[50] When the

48. *See* Rodgers, *supra* note 43, at 123–26.

49. HAWLEY, *supra* note 46, at 11.

50. *See* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 52 (Gerard W. Gawalt ed., 1984).

New Individualism discussed cooperative bodies, then, it looked to bodies such as the American Bar Association as models for self policing.

Thus, when New Individualists such as Herbert Hoover developed their theory of the "associative state," which relied heavily on ruinous competition theory to set forth a role for government action, they were in fact reclaiming a legal tradition that predated them by nearly a century. As Hawley and scholars such as Joan Hoff Wilson have noted, Hoover prided himself on developing an alternative to Gilded Age thinking.[51] What he actually accomplished, though, was the production of an alternative to what he *thought* was Gilded Age thinking. Late 19th-century thought, both economic and legal, did not in fact resemble a laissez-faire caricature. Ruinous competition theory strongly implied at least some sort of informal coordination between producers. Belying the image of a libertarian Gilded Age, the late 19th century saw a dramatic increase in health and safety regulation, measures that courts routinely approved.[52]

Moreover, the New Individualism's emphasis on *scientific* solutions to social problems echoed the efforts of legal science. True, some new individualist notions of scientific management relied on massive amounts of factual data, whereas Langdell argued that a lawyer's laboratory was the library, and all that a lawyer needed could be found in printed books.[53] This difference, however, was more apparent than real. Hoover, the avatar of new individualist progressivism as secretary of commerce, commissioned dozens of studies on dozens of industries, yet he always seemed to conclude that sound policy demanded application of the original individual capitalist principles he grew up with. In any event, one can question just how *new* the New Individualism was: Hoover's detailed studies of industries closely resembled similar efforts by Charles Francis

51. *See* HAWLEY, *supra* note 46, at 100–01; JOAN HOFF WILSON, HERBERT HOOVER: FORGOTTEN PROGRESSIVE 79–121 (Oscar Handlin ed., 1975); Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State," 1921–1928*, 61 J. AM. HIST. 116, 117 (1974). Hoover often claimed that his ideology diverged just as sharply from laissez-faire as it did from socialism. *See* HERBERT HOOVER, AMERICAN INDIVIDUALISM: THE CHALLENGE TO LIBERTY 8–13 (1989). His actions as commerce secretary and president, however, considerably weaken this contention.

52. *See* OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH—A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861 (rev. ed. 1969); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860 (reprint Quadrangle Books 1968) (1948); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (Thomas A. Green & Hendrik Hartog eds., 1996).

53. *See* CHARLES W. ELIOT, A LATE HARVEST: MISCELLANEOUS PAPERS WRITTEN BETWEEN EIGHTY AND NINETY 54 (1924) ("Professor Langdell's method resembled the laboratory method of teaching physical science, although he believed that the only laboratory the Law School needed was a library of printed books.").

Adams, the principal exponent of the late 19th-century Sunshine Commission. Put another way, classical legal ideology's supposed hatred of facts is overdrawn, belied not only by Adams's but also by Langdell's acolytes; James Barr Ames, for example, saw himself primarily as a legal historian dedicated to discovering the patterns of legal development through detailed historical studies. The entire historist school of legal thought also relied heavily on fact investigation, and Henry Maine's work did as well.

In understanding the connections between classical legal ideology and new individualist progressivism, then, it makes more sense to emphasize their similarities, particularly their supreme faith in ameliorating social conflict through the application of scientific expertise. For legal scientists, the expertise lay in the discovery of abstract yet precise rules capable of achieving correct results in concrete cases, even if (somewhat contradictorily) these rules might be applied differently depending on changing conditions. For New Individualists, the expertise lay in the application of neutral principles of social engineering capable of meeting the particular needs of specific industries.

To make scientific problem solving work, New Individualism had to rely on another tenet of classical legal ideology: the denial of fundamental interest and value conflicts. Little wonder, then, that both classical legal ideology and New Individualism were animated by the desire to remove politics from their calculations. Lawyers wanted to separate law from politics, and engineers wished to remove science from politics. The overall point, however, was to get rid of politics, which both groups saw as being quite possible indeed. They saw the battle between social forces and ideologies as wasteful bickering and ruinous competition that could be eliminated by enlightened leadership.

Workers' compensation serves as a good example of how classical legal ideology linked with new individualist ideas about efficiency to produce elite lawyers' perspectives on critical issues. For the most part, elite lawyers supported the movement toward workers' compensation laws. But they did not interpret such laws in the way that contemporary observers do, as either a political compromise representing a balance of power between capital and labor, or as a method of attempting to distribute fairly the costs of accidents. Instead, compensation laws were described as a way of eliminating destructive competition between capital and labor—an analogy that referenced a common law doctrine that gained increasing

popularity during the late 19th century.[54] Alternatively, elite lawyers understood compensation as the most scientific policy: It was simply "part of the cost of doing business." Thus, compensation was cast not as demonstrating conflict between labor and capital, but as showing its opposite: Workers and managers could cooperate toward establishing an objectively neutral, scientific policy meeting all parties' needs.

Classical legal ideology and the New Individualism thus had a synergistic, mutually reinforcing character. Elite lawyers' passions for organizing private, self-policing professional associations; their commitment to legal science; and their faith in neutral, apolitical solutions to social problems provided one (although not the only) bulwark for the formation of new individualist progressivism in the early 20th century. In turn, this progressivism, nurtured by legal thought, as well as by newly formed professional engineering associations and corporate leadership, developed new paradigms of scientific management and apolitical governance deeply resonant with elite lawyers. Updated and reenergized, but fundamentally similar to its Gilded Age predecessor, classical legal thought engaged the chaotic global order at the beginning of the 1920s.

III. CLASSICAL LEGAL MINDS: CHARLES EVANS HUGHES, FRANK B. KELLOGG, AND HENRY L. STIMSON

Classical legal ideology was well ensconced in the Republican foreign policymaking apparatus, as classically influenced lawyers occupied the secretary of state's post for the entire period. These diplomats, in turn, received backing from presidents who themselves had accepted the classical legal paradigm.

This part discusses the backgrounds of the men who sat at the pinnacle of the U.S. diplomatic establishment from 1921 to 1933, and considers their general foreign policy philosophies. I hope to demonstrate not only that classicism influenced their professional backgrounds, but also that they approached diplomacy generally with classical assumptions. This will provide the context for Parts IV through VII, which attempt to show classical assumptions operating in the policy areas of reparations, Pacific security, and relations with Mexico. Armed with classical legal backgrounds and staffs of lawyer-diplomats, America's principal foreign policymakers developed general conceptions of world politics based on the legal culture of the times. These general conceptions did not dictate

54. On ruinous competition theory and its links to the common law, see *supra* Part II.C.

specific policies, but raised (and foreclosed) important questions and helped to determine which information was relevant and which irrelevant.

A. CHARLES EVANS HUGHES

Charles Evans Hughes stood as the period's most formidable foreign policy figure. A former (and future) Supreme Court justice, Hughes had stepped down from the Court in 1916 to accept the Republican presidential nomination, and lost one of the closest elections in U.S. history to Woodrow Wilson.[55] While his internationalist convictions made him suspect to the "irreconcilable" wing of the Republican Party, his powerful intellect and integrity, together with the undivided support of the East Coast Republican establishment, gave him important authority.[56] His bosses in the White House, Warren Harding and Calvin Coolidge, were far more than passive recipients of his counsel and set political parameters for him, but Hughes stood as the central figure in U.S. foreign affairs.[57]

All of which was rather strange, given that upon taking office, Hughes completely lacked diplomatic experience.[58] Instead, he was the very model of the classical lawyer. He entered Columbia Law School in 1882, becoming a disciple of classicist Theodore Dwight.[59] Columbia had not yet converted to the Langdellian system,[60] but Dwight was a devotee of much classicist philosophy. For example, he wrote the introduction to the

55. An excellent summary of the campaign of 1916 is found in LINK, *supra* note 41, at 223–51.

56. *See, e.g.*, COHEN, *supra* note 9, at 15–16 ("Harding's most valuable contribution was his sensible deference to Hughes . . . . Hughes was the most prestigious member of the Harding cabinet, overshadowing even the president.").

57. His authority over the conduct and direction of foreign affairs was significant enough that some historians have been moved to compare his role to that of a prime minister. *See* ALEXANDER DECONDE, THE AMERICAN SECRETARY OF STATE: AN INTERPRETATION 83 (1962).

58. Although it tends to the hagiographic, the best overall survey of Hughes's life and career is MERLO J. PUSEY, CHARLES EVANS HUGHES (Columbia Univ. Press 1963) (1951). For an incisive critique of Hughes's foreign policies, which also provides some thorough background information on his life and career, see BETTY GLAD, CHARLES EVANS HUGHES AND THE ILLUSIONS OF INNOCENCE (1966).

59. For a good summary of Dwight's educational philosophy, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 22–24 (1983). Dwight led the drive in post-Civil-War America for the formalization and institutionalization of legal education, a hallmark of East Coast elite lawyers. *See* Zasloff, *supra* note 6, at 251–53.

60. *See* STEVENS, *supra* note 59, at 45 n.19. Stevens notes that Dwight protested against the Langdellian case method of instruction. This does not, however, undermine the contention that he was a classicist. Orthodox legal principles did not imply a particular instructional method, aside from the insistence on the formalization and institutionalization of legal education. Grey, for example, elegantly outlines Langdellian orthodoxy without once mentioning pedagogy. *See generally* Grey, *supra* note 41.

American edition of Maine's *Ancient Law* and used it in his courses.[61] Upon graduation, Hughes secured employment in James Coolidge Carter's law firm and stayed there for seven years, leaving to become a law professor at Cornell.

In Ithaca, Hughes quickly adopted the Langdellian teaching system. While he used textbooks, he insisted on the study of cases, with analysis and discussion of leading cases in the classroom. What's more, he later recalled,

> I determined to make up the deficiencies in my legal training by taking by myself a course in the Harvard casebooks. In that way I went through the casebooks of Langdell, Ames and Thayer. Whether or not the students were benefitted by my teaching, I got the advantage of a self-conducted but thorough post-graduate course which in my later practice proved to be invaluable.[62]

Cornell also prevailed upon him to teach international law, which required him to master the subject from scratch: "Little did I dream that many years later I should find that year of special and exacting study a highly important, if not indispensable, preparation for my service in connection with our foreign relations."[63]

After two years in Ithaca, the lure of lucrative corporate practice returned Hughes to a New York City law firm, where he might have stayed but for his chance appointment in 1906 as counsel to a state commission investigating a life insurance scandal. Hughes's work on this board brought him so much public attention that the state Republican Party, desperate for an uncorrupt candidate, nominated him for governor. He triumphed in the November election and quickly gained a reputation as a progressive in the new individualist mode.[64] Less than three years later, President William Howard Taft appointed him as an associate justice of the

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61. *See* Theodore W. Dwight, *Introduction* to HENRY SUMNER MAINE, ANCIENT LAW, at xxi–lxxxi (Ashley Montagu ed., Univ. of Arizona Press 1986) (1864).

62. Charles Evans Hughes, Notes, *in* THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 95 (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter AUTOBIOGRAPHICAL NOTES].

63. *Id.* at 96.

64. The standard overview of this phase of Hughes's career is found in ROBERT F. WESSER, CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK 1905–1910 (1967). An excellent treatment of the overall context of New York politics in this era, and Hughes's place in it, is RICHARD L. MCCORMICK, FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893–1910, at 193–272 (1981).

U.S. Supreme Court, where he developed a reputation as a cautious progressive.[65]

For Hughes, reentering politics also meant moving rightward. In his campaign, he sharply criticized much of Wilson's social legislation, including the Adamson Act, which established the eight-hour day and overtime pay for railroad workers. Thomas Knock commented on the ideological importance of the legislation, noting that "[t]he Adamson Act, perhaps more than any other domestic issue, separated the progressives from the conservatives among internationalists."[66] After his defeat, Hughes remained a progressive, but always within the context of Republican Party politics—in other words, in the new individualist paradigm. Indeed, by the time President Hoover renominated him to the Supreme Court in 1930, his major Senate opposition came from progressives who portrayed him as a corporate tool. This was unfair; Hughes was anything but an "old guard" Republican. Instead, he was a conservative progressive, intelligent enough to see that new methods needed to be tried, but hardly willing to embark on major campaigns for social reform.[67] This may have seemed somewhat contradictory, but it had important benefits, a fact not lost on contemporary observers. Roscoe Pound wryly noted that in politics, Hughes was "all things to all men."[68]

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65. A good survey of Hughes's judicial record as associate justice is found in ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–1921, at 400–07 (Paul A. Freund & Stanley N. Katz eds., 1984).

66. THOMAS J. KNOCK, TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER 92 (1992). In any event, his campaign style did not impress observers: One journalist observed that Hughes was "little more than a legalistic hyphen between Mr. Roosevelt and Mr. Wilson" and likened him to William Howard Taft, "an able legalistic critic of the issues created by other men." Leslie Brooks Hill, Charles Evans Hughes and United States Adherence to an International Court: A Rhetorical Analysis 126 (1968) (unpublished Ph.D. dissertation, University of Illinois) (on file with the University of Illinois, Urbana-Champaign).

67. A 1916 assessment by Felix Frankfurter, who had his doubts about presidential candidate Hughes, seems just. Frankfurter told Morris Cohen that Hughes

> *is* subject to the impact of facts. . . . Of course Hughes carries a general stock of economic and social views with which he was inculcated at Brown thirty-odd years ago, except insofar as such views have been adjusted by specific problems of government and of life that he has had to face, but he has not a rigid, or a dull, or a commonplace mind; very much to the contrary. . . . Holmes . . . says of Hughes that while he is not prepared to say that he is a great man, he "is a very considerable man, who has vistas." I confess he has not allowed us to see his vistas on the stump, and what Holmes doubtless means is that he is capable of deep conceptions when his mind actually gets busy on a problem.

Letter from Felix Frankfurter to Morris R. Cohen (Oct. 3, 1916), *in* LEONORA COHEN ROSENFIELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 248 (reprint Harcourt, Brace & World, Inc. 1962) (1948).

68. Beerits Memorandum, The European Trip of 1924 [hereinafter The European Trip] (on file with the Library of Congress, Charles Evans Hughes Papers) (quoting Dean Roscoe Pound).

Hughes as a lawyer, then, was firmly grounded in the conservative elite, while leavening his world view with individualist progressivism. His famous opinion as chief justice, upholding the constitutionality of the Wagner Act, serves as a good example of this approach.[69] The federal government sought a broad change in federal power under the Commerce Clause, arguing that, since a business put goods in the "current of commerce," its labor relations were susceptible to federal regulation. But Hughes rejected this modern approach. Instead, writing for the Court, he engaged

> in an eminently Langdellian enterprise. Like Williston and his colleagues with the American Law Institute, Hughes took the opportunity occasioned by the Wagner Act cases to set forth a grand restatement of the law. Of the same age and intellectual generation as Williston (born 1861), Hughes (born 1862) in *Jones & Laughlin* applied the Restatement method to commerce clause jurisprudence. Drawing together all of the various exceptions to the local/national distinction that had accrued over the past three decades, Hughes sought to reformulate them into a single, synthetic principle.[70]

Hughes sought to maintain the traditional "dual federalism" distinction that sharply circumscribed federal power, but grounded it on fact investigation rather than rigid categories. In one sense, reliance on facts represented a departure from orthodoxy, but as Barry Cushman rightly suggests, this departure is overdrawn.[71] Rather, the key point was that by synthesizing cases, the judge (or law professor) could arrive at the *right* principle that yielded the *right* answer. G. Edward White notes tellingly that Hughes

> believed that a judge should "[do] his work in an objective spirit," and, further, that a methodical analysis of the facts and issues in a case would result in an "objective" solution. When he had arrived at that solution, he regarded it not as a compromise or an exercise in political discretion, but as the correct result. He did not, in short, think of himself as being moderate, but as being right. Rightness and moderation were linked only because he perceived the Constitution's framers as having been moderates.[72]

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69. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

70. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 169 (1998).

71. This is also my conclusion. See the discussion concerning classicism and fact investigation at *supra* text accompanying note 53.

72. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 209 (1976) (alteration in original) (footnote omitted).

B. HUGHES AT THE STATE DEPARTMENT

Hughes recalled that the international situation appeared bleak when he became secretary. In a pamphlet prepared for the Coolidge campaign in 1924, he argued,

> It would be difficult to imagine a worse tangle in our foreign relations than that with which the Republican Administration was required to deal when it came into power on March 4, 1921. Two years and nearly four months had elapsed since the Armistice, but we were still in a technical state of war. The peace negotiations had evoked a bitter and undying controversy. In the Far East our relations were embarrassed by suspicion and distrust, giving rise to serious apprehensions. In this hemisphere old sores were still festering. For years our relations with Mexico had been unsatisfactory. The situation was a most difficult one as opportunities for disputes lay on every hand while the chances of finding adequate means of accommodation were extremely meager.[73]

By 1924, however, he stated that "[t]hese difficulties have largely been resolved."[74]

In resolving them, Hughes took pains to avoid traditional diplomacy. He cautioned against returning "to the old instinctive process of self-protection through [the] balance of power";[75] instead, he developed a general conception of world politics that relied heavily on classical legal concepts and recalled the formulations earlier set forth by Elihu Root. Other key lawyer-diplomats of the period also helped formulate this general conception, and it influenced the conduct of American diplomacy long after Hughes left the State Department.

Lawyers did not always apply this general conception to concrete policy issues. In this, they were like any other policymaker, past or present. Rather, the influence of classical legal ideology on American foreign policy emerged more subtly. It helped to set priorities for diplomacy and to foreclose options. When policymakers were confronted with the lack of concrete information, it filled knowledge gaps with default assumptions. It allowed policymakers to interpret for themselves what they were doing. It did not dictate results, but it nudged the course of policy in some directions and steered it away from others.

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73. CHARLES EVANS HUGHES, FOREIGN RELATIONS (1924) (pamphlet on file with the Library of Congress, Charles Evans Hughes Papers), *reprinted in* AUTOBIOGRAPHICAL NOTES, *supra* note 62, at 209. The European Trip, *supra* note 68, also reflects this belief.

74. AUTOBIOGRAPHICAL NOTES, *supra* note 62, at 209.

75. Charles E. Hughes, *The Development of International Law*, 19 AM. SOC'Y INT'L L. PROC., Apr. 23, 1925, at 1, 5.

Nowhere was this more the case than with Hughes himself. The secretary relied heavily on classical legal concepts (and thus international law) during his tenure as America's top diplomat, even telling the world on his appointment that he saw himself as "counsel for the people of this country."[76] He argued that lawyers made the best American diplomatic representatives.[77] To be sure, Hughes did not see international law as the solution to all diplomatic problems.[78] He would often begin his addresses with pessimistic warnings concerning the human tendency toward violence and the fragility of international institutions.[79] But he would then reverse field and set forth a framework for developing a legally regulated international system.

The framework rested on the sharp law/force distinction that served as classical legal thought's hallmark. "The notion of law as imposed and maintained by force," he argued, "may have its advantage in dealing with a small minority of infringers, but in the long run this notion derogates from its authority and counts for much of the natural revolt against legalistic conceptions."[80] In the domestic sphere, obedience to law "finds its motive not in yielding to force, but in the recognition of the law as the expression

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76. GLAD, *supra* note 58, at 121 (quoting Charles Evans Hughes).

77. *See* Letter from Frank B. Kellogg to Cordenio A. Severance (Sept. 19, 1924), *microfilmed on* Frank B. Kellogg Papers, r.14/fr.61 (Minnesota Historical Society). Kellogg concurred with this assessment:

> Hughes evidently has the idea that lawyers make the best Ambassadors. Since I have been here [as ambassador to Great Britain] I have been particularly impressed with the advantage of a wide legal experience in the Diplomatic Service. As you know many of the questions which come up involve international law, and many times domestic laws of the countries, especially of one's own country, and it would seem to me exceedingly difficult for an Ambassador to handle them unless he had a legal education . . . .

Id. See also Letter from Frank B. Kellogg to Herbert Hoover (Sept. 11, 1925), *microfilmed on* Frank B. Kellogg Papers, r.17/fr.1 (Minnesota Historical Society) (noting that someone was appointed to a sensitive diplomatic post primarily because "he is an able lawyer").

78. But it often appeared that he did. Hughes contended in 1918 that the United States had entered the war in large part "because America cannot live in peace and security, unless there is firmly established among the nations the Reign of Law." Charles Evans Hughes, New Phases of National Development, *in* 41 N.Y. B. ASS'N PROC. 188, 188 (address delivered at New York City, Jan. 11, 1918). He also referred to World War I as the "battle of the law," and any international organization's primary job would be to "keep the peace" and "establish the supremacy of international law." *Id.* at 211. While in office, Hughes backtracked on stating these views too strongly in public. *See* Charles Evans Hughes, *Some Aspects of the Work of the Department of State*, 16 AM. J. INT'L L. 355, 356 (1922) ("[T]he most serious international controversies, and this is especially true at this time, are not of a legalistic nature and must be settled, if they are settled at all, by negotiations and agreements."). Suffice it to say that Hughes spent a tremendous amount of time on such "legalistic" matters. More importantly, the point for the legal mind was that the controversies were not to be settled by the application of power and coercion.

79. *See, e.g.*, CHARLES EVANS HUGHES, *The Pathway of Peace*, *in* THE PATHWAY OF PEACE 3, 5–8 (1925) (address delivered before the Canadian Bar Association at Montreal, Sept. 4, 1923).

80. Hughes, *supra* note 75, at 3.

of the democratic will through representative institutions."[81] International law would develop in the same way: "Taking the long view, it may not be regarded as a defect or a misfortune that we escape the notion of the impositions of force in the field of international law."[82]

Why would states give their consent? Because law, unlike politics, was unbiased. It represented a set of neutral principles that, by virtue of their abstraction of formal realizability, were fair to all parties. Just as important, these rules were administered by an impartial judiciary. Hughes considered the character of the adjudicators to be critical, a major heritage of classical legal ideology. Robert Gordon has observed that for late 19th-century elite lawyers, the notion of integrity served as a crucial element in their concept of the rule of law.[83] Hughes saw international application of the integrity notion as a key to judicial efficacy.

After his usual warning against overoptimism, he asked,

> What is the remedy? The alternative to war, where agreement has been found impossible, is in some sort of arbitral settlement. But . . . no arbitral arrangement can escape the imperfections which inhere in human nature. Obviously the best thing that can be done is to select the judges before the controversy arises; to choose them for their preeminence in learning, their approved characters, their impartiality; to set them aside with a secure tenure; to immunize them so far as possible by the dignity and continuity of their office from the prejudices and preoccupations of politicians; gradually to promote confidence in their decisions by the observation of their judicial practice; in short, to establish under the best practicable safeguards a permanent court.[84]

Hughes told his listeners that the World Court, set up in 1920, "holds the promise of the security of rights."[85] His treatment of the court rested firmly on classicism's sharp law/politics distinction. In 1924, Lewis Einstein proposed that the court's authority be expanded to receive and comment on all diplomatic correspondence between "two nations whose relations are strained . . . ."[86] This option, Einstein contended, would

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81. *Id.*

82. *Id.*

83. *See* Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870–1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 98 (Gerald L. Geison ed., 1983).

84. Charles E. Hughes, *Some Observations on Recent Events*, *in* AM. SOC'Y INT'L L. PROC., Apr. 22, 1926, at 1, 7.

85. *Id.*

86. Letter from Lewis Einstein to Charles E. Hughes (May 27, 1924) (on file with the Library of Congress, Charles Evans Hughes Papers). At this time, Einstein was the U.S. minister in Prague.

generate publicity and crystallize international public opinion. Moreover, it "allows a competent judicial opinion" to accompany diplomatic notes and "provides for what may be either an alternative or a preliminary process to arbitration."[87] For Einstein, international institutions essentially served as facilitators of agreements, a notion that later theorists formalized and advocated.[88]

Hughes rejected the idea because it would involve the court "in the consideration of diplomatic questions or questions of policy." A court could determine only "justiciable controversies," he argued, and while he did not rule out other institutions to facilitate peace, the court should restrict itself to "questions of law." Again, the domestic analogy played an important role: "We have steadily refused in this country to permit the Supreme Court to become a political agency," he told Einstein, "and I feel that we must take a similar attitude" with the World Court.[89]

Hughes explicitly analogized between domestic and international legal institutions: For both, impartial neutrality served as the touchstone of their authority and efficacy. The Supreme Court's power, he contended, derived not from the enforceability of its decisions by the executive, but from the universal consent that its judgments brought. Even the most impartial judges, of course, could not play the depoliticizing function had law not been distinguished from politics. The distinction, however, was axiomatic:

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87. *Id.*

88. Such a view of conflict—and conflict avoidance—bears a remarkable resemblance to the contemporary school of international relations theory known as "neoliberal institutionalism." Neoliberal institutionalists emphasize the importance of international "regimes" in preventing conflict and enhancing cooperation. These regimes perform the critical functions of iterating Prisoner's Dilemmas and lowering transactions costs to make more international agreements possible. These theorists do not limit their view to legal institutions, but their analysis of the function of international institutions reflects important aspects of classicism's analysis of domestic legal institutions. Hughes rejected Einstein's proposal in this instance due to the law/politics distinction; yet, in other instances, he appeared to endorse this framework. *See* Jonathan Zasloff, *Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920's*, 102 YALE L.J. 1689, 1698–1700 (1993).

Two things should be emphasized in this context. First, neoliberal institutionalism is a more complex and sophisticated theory than classical legal thought. Neoliberal institutionalists argue that they explicitly consider relative gains and sometimes agree with realist predictions: Their theory claims to subsume Realism, not replace it. *See* ROBERT O. KEOHANE, *Neoliberal Institutionalism: A Perspective on World Politics*, *in* INTERNATIONAL INSTITUTIONS AND STATE POWER 1, 3 (1989). Second, recent years have seen a split between the "liberal" and "institutionalist" aspects of the theory: Many international relations theorists now claim to be either liberal or institutionalist, but not both. Liberal theorists place far greater emphasis on domestic institutions and see international institutions as having less explanatory power. *See, e.g.*, Andrew Moravcsik, *Taking Preferences Seriously: Liberalism and International Relations Theory*, 51 INT'L ORG. 513 (1997).

89. Letter from Charles E. Hughes to Lewis Einstein (July 11, 1924) (on file with the Library of Congress, Charles Evans Hughes Papers).

"The problem in the improvement of the judicial process in international relations," he argued, "is to secure immunity, so far as is humanly possible, from considerations of political interest and policy and to have the rights and obligations of nations determined upon their merits."[90]

C. FRANK B. KELLOGG

Hughes's successor, Frank B. Kellogg, matched neither his predecessor's accomplishments nor his intellect, but he did possess a remarkable Horatio-Alger-like story: Neither born nor bred to the elite bar, he managed to get there anyway. Kellogg grew up in Minnesota and worked his way into the profession without any formal legal education. Not content with playing the country lawyer, he became one of the leading attorneys in Minneapolis and threw himself into the kinds of activities associated with the elite bar: government delegate to the Universal Congress of Lawyers and Jurists in 1904 (part of the peace movement that spawned the second Hague Conference), member of the Republican National Committee from 1904 to 1912, and president of the American Bar Association in 1912 and 1913. Although he had something of a trust-busting reputation, Kellogg's real prowess as a lawyer was doing deals, primarily complex transactions that brought him into close contact with the elite bar of the East Coast. These connections also helped elect him in 1916 to the U.S. Senate, where he loyally supported Elihu Root's arguments for ratifying the Versailles Treaty with reservations. Kellogg's electoral career was short-lived: He was defeated for reelection in 1922 by Hendrik Shipstead, a leading "peace progressive." Coolidge, however, made him ambassador to Great Britain the following year, where he performed so competently that Hughes could reasonably claim that Kellogg would bring to the State Department "a much more intimate knowledge of its immediate problems than most of [his] predecessors in their time."[91]

Kellogg's basic insecurity reflected itself in his cautious administration of the State Department. He essentially remained content with keeping Hughes's staff in the short run. He did insist, though, on bringing in one top-level adviser: Robert Olds, one of his law partners. Kellogg sent the appointment to the Senate less than a week after taking office. While Olds was officially an assistant secretary, within a few months, he was effectively under secretary in political matters. Kellogg

90. Charles Evans Hughes, Address by the Secretary of State of the United States Before the American Society of International Law (Apr. 27, 1923) (on file with author).

91. Letter from Charles E. Hughes to Frank B. Kellogg (Jan. 23, 1925) (on file with the Library of Congress, Charles Evans Hughes Papers).

trusted Olds and relied on him for advice. This led to an increasingly legal cast at the department, as Olds gave special attention to international legal matters. It was not merely Olds that gave the department the appearance of a law firm; in addition, the secretary engaged in a ceaseless hunt for lawyers to fill top department posts,[92] much to the consternation of other department personnel.[93] Olds left the State Department in 1928 to accept a partnership at Sullivan & Cromwell, but continued to work on special assignments for Kellogg. In the meantime, the secretary replaced Olds with J. Reuben Clark, yet another Wall Street lawyer, who served until the end of the Coolidge administration.

Kellogg adopted the classical legalist framework as well. This should hardly come as a surprise: His biographer alluded to his "almost abject dependence" on Hughes and Root for counsel when crises and problems arose.[94] But Kellogg had adopted classicism before he came to the State Department. He told Hughes that "balance of power arrangements . . . have been disastrous in the past."[95] Indeed, realpolitik prevented the United States from exerting its moral influence, which was far more important. He told Coolidge that his earlier support in the Senate for the Versailles Treaty with reservations had been in error: "I realize more than ever how much more influence we will have if we maintain our freedom of action . . . ."[96] War was not the result of the international system's operation, but "a relic of barbarism only perpetuated by the instincts of primeval man."[97]

Law served as the substitute for realpolitik's barbarism. "Western civilization never faced a graver crisis than it faces to-day," he argued in 1924. And thus, "No question is of more importance to-day than the extension of arbitral and judicial settlement of disputes to all questions

92. *See* Letter from Frank B. Kellogg to Calvin Coolidge (July 11, 1927), *microfilmed on* Frank B. Kellogg Papers, r.27 (Minnesota Historical Society) (stating, with respect to the search for an assistant secretary of state, "I should like to get a prominent lawyer but this is rather difficult, as you know. Olds is the only man we have been able to get since I came").

93. *See, e.g.*, William Castle, Diary (Aug. 11, 1928) (transcribed by the author from materials on file with the Library of Congress) (noting Kellogg's "struggle for a lawyer—any lawyer").

94. L. ETHAN ELLIS, FRANK B. KELLOGG AND AMERICAN FOREIGN RELATIONS, 1925–1929, at 233 (1961).

95. Letter from Frank B. Kellogg to Charles Evans Hughes (Mar. 5, 1924), *microfilmed on* Frank B. Kellogg Papers, r.11/fr.283 (Minnesota Historical Society). *See also* Letter from Frank B. Kellogg to Calvin Coolidge (May 12, 1932), *microfilmed on* Frank B. Kellogg Papers, r.45 (Minnesota Historical Society) (noting "the impossibility of maintaining peace in the world by military alliances. They never have and never will create permanent peace").

96. Letter from Frank B. Kellogg to Calvin Coolidge (Oct. 7, 1924), *microfilmed on* Frank B. Kellogg Papers, r.14/fr.155 (Minnesota Historical Society).

97. Frank B. Kellogg, Flag Day Speech (June 14, 1929), *microfilmed on* Frank B. Kellogg Papers, r.38/fr.550 (Minnesota Historical Society).

arising under treaties and well settled principles of international law."[98] These disputes could be taken out of politics. "A justiciable issue under treaties or international law," he argued, "is so well understood and is so clearly defined that it could not possibly involve any political or a sovereign question."[99]

Kellogg also relied heavily, in approaching foreign policy questions, on the public/private distinction, a central notion in classical legal ideology. For example, when dealing with Latin America, he rejected charges of American imperialism, arguing that while other nations carried large debts to America, "the United States government, unlike those of other nations, has not in any way been a party to the extension of a single dollar of these immense credits. They have been strictly private affairs . . . ."[100]

Kellogg agreed with Root and Hughes that the international legal order rested not on sanctions but on the effects that such a system would produce: The observation of judicial functions, Hughes noted, would gradually inspire confidence.[101] In the same vein, Kellogg generally rejected sanctions for treaty violations; instead, "we must rely on the good faith of nations in carrying out their treaties."[102] And he maintained confidence throughout his term that such good faith was developing: "I think the World Court is functioning very well and is doing a great deal of good," he told a senator in a typical expression.[103]

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98. Frank B. Kellogg, Society of Pilgrims Speech (Feb. 2, 1924), *microfilmed on* Frank B. Kellogg Papers, r.11/fr.208 (Minnesota Historical Society).

99. Letter from Frank B. Kellogg to Charles Evans Hughes (May 15, 1924), *microfilmed on* Frank B. Kellogg Papers, r.11/fr.612 (Minnesota Historical Society).

100. Frank B. Kellogg, Conversation Notes, *microfilmed on* Frank B. Kellogg Papers, r.31/fr.409 (Minnesota Historical Society).

101. *See* Hughes, *supra* note 84, at 7.

102. Letter from Frank B. Kellogg to U.S. Ambassador to Great Britain (Dec. 18, 1925), *microfilmed on* Frank B. Kellogg Papers, r.17/fr.462 (Minnesota Historical Society). *See also* Letter from Frank B. Kellogg to Reed Smoot (Sept. 26, 1928), *microfilmed on* Frank B. Kellogg Papers, r.35/fr.6 (Minnesota Historical Society) (noting that enforcement of the Kellogg-Briand Pact "must depend upon the good faith of the nations signing the treaty").

103. Letter from Frank B. Kellogg to Joseph E. Ransdell (Oct. 24, 1928), *microfilmed on* Frank B. Kellogg Papers, r.35/fr.420 (Minnesota Historical Society). *See also* Frank B. Kellogg, Speech at the Tenth Anniversary of the Founding of the Foreign Service School of Georgetown University (Feb. 18, 1929), *microfilmed on* Frank B. Kellogg Papers, r.37 (Minnesota Historical Society). In a noteworthy speech, Kellogg stated,

> This treaty certainly will make it more difficult to declare war. It is a rallying point for the mobilization of world opinion. Some say that no means are provided in the treaty to enforce it. My answer is that the only enforcement behind any treaty is the public opinion of the people. I do not believe war will become outlawed and universal peace come to the nations by maintenance of armies and navies to punish an aggressor.

Id.

Kellogg could advance these ideas in part because of the support they received from President Coolidge. Although not a lawyer, Coolidge embraced the classical legal paradigm and frequently referred to it. The president argued that the United States must "put [its] trust not on force but on a reign of law and the administration of justice,"[104] and was just as reluctant as his secretary of state to enter into realpolitik. Coolidge stated, "[W]e wish to see all the world relieved from strife and conflict and brought under the humanizing influence of a reign of law. . . . We wish to discard the element of force and compulsion in international agreements and conduct and rely on reason and law."[105] While Coolidge acknowledged that this vision will not be "immediately realized," he insisted that small practical steps—such as the Pact of Paris—could be helpful.[106] In all, the president explained, all of his administration's activities "represent the processes of reducing our domestic and foreign relations to a system of law."[107] Adhering to classical orthodoxy's view of law, Coolidge noted that his policies "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."[108]

D. HENRY L. STIMSON

The final secretary of state of the new era, Henry Stimson, occupies a central place in American diplomatic history, having served in high office under no fewer than seven presidents. As secretary of war under Taft and Franklin Roosevelt, and secretary of state under Hoover, Stimson was the only American policymaker with pivotal roles before World War I, during the interwar period, and after World War II.

Stimson's impact emerges in diplomatic historiography as well. In the flush of post-World-War-II triumphalism, Stimson was the quintessential "wise man," the diplomatic prophet who foresaw the dangers of allowing aggression to go unpunished and the perils of American isolation. In the wake of Vietnam era "dissenting" historiography, he became the symbol of a racist American establishment, whose arrogance regarding nonwhites (and particularly Asians) foreshadowed American disaster in Indochina and

104. COOLIDGE, *supra* note 27, at 432 (Memorial Day address delivered May 31, 1926).

105. *Coolidge Declares Observance of Law Is Basis of Peace*, N.Y. TIMES, May 31, 1927, at 1.

106. *Id.*

107. CALVIN COOLIDGE, *Government and Business*, *in* FOUNDATIONS OF THE REPUBLIC, *supra* note 27, at 330 (speech delivered Nov. 19, 1925).

108. *Id.* at 330–31.

hatred in the Third World. Recently, as America has recovered from its "Vietnam syndrome," historians have returned to sympathy (and occasionally hagiography), albeit in more measured tones cognizant of the earlier criticisms.

Surprisingly, though, the accounts of Stimsonian diplomacy have for the most part failed to put him in legal context. Instead, these accounts generally see him as an advocate of American power and military expansion—a recent biography is even titled *The Colonel*.[109] While such a focus well captures an undeniable aspect of Stimson, reliance on it fails to capture fully his thoughts on world politics and U.S. external relations. All nations face the crucial question of how to relate military power to foreign affairs, and the mere love of the army hardly implies a certain general outlook, not to mention specific policies. For example, few would argue that Colin Powell has anything but the closest affinity for the American military, but for the better part of two decades, he has consistently advocated nonmilitary solutions to important issues of world politics.

Instead, it makes sense to recall that Stimson spent the vast majority of his professional working hours in a law office—even if, at times, he complained that it was a "life of drudgery."[110] His resume epitomized that of the elite lawyer immersed in classical legal thought. He attended Harvard Law School during the Langdellian heyday. James Coolidge Carter, whose writings "represent[] in a clear and unsubtle manner the intellectual paradigm for virtually all orthodox late-nineteenth century legal theory,"[111] arranged for his first legal job—with Elihu Root's law firm. Root served as Stimson's constant mentor and guide until the former's death in 1937.[112] Stimson's first major effort in foreign policymaking came in early 1919, when he helped Root draft the famous letter outlining the Republican Party's program for postwar peacemaking. The program relied heavily on classical legal concepts and assumptions, arguing, among other things, that the causes of war could be divided neatly into the legal

109. *See generally* GODFREY HODGSON, THE COLONEL: THE LIFE AND WARS OF HENRY STIMSON 1867–1950 (1990).

110. Henry Lewis Stimson, Diary (Nov. 9, 1932), *microfilmed on* Henry L. Stimson Diaries, r.5/vol.24/p.70, at 1 (Yale University Library Photographic Services). Stimson made this comment the day after Herbert Hoover's loss in the 1932 general election, when it was fully clear that the secretary would be returning to the private sector within four months.

111. HORWITZ, *supra* note 4, at 122.

112. Stimson noted while he was secretary of state that "a great many people still relied on [Root] and his advice as being the most valuable they could get in the world." From the context, it is clear that Stimson was referring to himself. Henry Lewis Stimson, Diary (Nov. 1, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.116, at 5 (Yale University Library Photographic Services).

and the political, and that the former represented by far the greater source. When Stimson was out of office, he maintained his connection with public affairs through the Association of the Bar of the City of New York, the central forum for classicist professional activities.

When he returned to office, he quickly hired a series of elite lawyers like himself to fill key State Department posts. New Yorker Joseph Cotton became under secretary (and effectively chief of staff).[113] The secretary soon dispatched Assistant Secretary Nelson T. Johnson to China and replaced him with James Grafton Rogers, the former dean of the University of Colorado Law School. Stimson then created the new post of special assistant to the secretary for New York lawyer Allan Klots, Jr. In March 1931, Cotton died suddenly, a loss from which Stimson never fully recovered.[114] As a replacement, the secretary brought in Boston attorney Harvey Bundy, Jr.[115] Seeing Secretary Stimson through the prism of attorney Stimson, then, promises to shed light on American foreign policy during the new era.

When American leaders attempted to apply these background principles to practical policy, they found that they could not do so in a neat and simple fashion. Not all policies reflected classical legal thought, and virtually none *only* reflected classical legal thought. Still, as we will see, classicism injected itself centrally into the most important external affairs

113. Stimson's predilection for lawyers became noticeable to the diplomatic corps. *See* William Castle, Diary (June 6, 1929) (transcribed by the author from materials on file with the Library of Congress) ("The Portuguese [ambassador], who hated both Clark and Olds as sincerely as they hated him asked if we were to have another legal Under Secretary. I told him [that Cotton had been appointed] and he nearly burst—[he] thought the U.S. had a lawyer complex.").

114. *See* HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 161 (1948).

115. Stimson's choices, seen through this prism, help clarify some relevant gaps in the historiography. Several works state that Stimson was high-handed and, at times, abusive toward his associates. *See* FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION, *supra* note 9, at 38–39; CHRISTOPHER THORNE, THE LIMITS OF FOREIGN POLICY: THE WEST, THE LEAGUE AND THE FAR EASTERN CRISIS OF 1931–1933, at 85–87 (First American ed. 1973). Yet other sources report the devotion with which his subordinates regarded him. *See* DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 254, 401 (1969); HODGSON, *supra* note 109, at 4, 244–48; WALTER ISAACSON & EVAN THOMAS, THE WISE MEN 191–93 (1986); The Reminiscences of Harvey H. Bundy, *microformed by* Oral History Research Office, Columbia University (1972) (on file with the Butler Library, Columbia University). The disjunction becomes a little clearer if we put the players in their professional boxes. Attorneys Cotton, Rogers, Klots, and Bundy adored Stimson; professional diplomats Castle, Johnson, (Far Eastern division chief) Stanley K. Hornbeck, and Jay Pierrepont Moffat (Western European division chief) thought him imperious. During World War II, attorneys John J. McCloy and Dean Acheson were devoted to him, but diplomats such as Joseph Grew considered him clumsy and presumptuous.

discussions of the day and powerfully influenced the direction of U.S. policy.[116]

IV. RECONSTRUCTING EUROPE

Rarely has a conflict been described more inaccurately than when observers called World War I the "war to end all wars." With the benefit of hindsight, we know that just twenty years after Versailles, the global structure collapsed. The system's disintegration, however, was apparent from the moment of its birth, particularly in Europe. As A.J.P. Taylor aptly notes about the 1920s,

> 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.[117]

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116. The next three parts detail the influence of classicism in three crucial foreign policy areas: Europe, Asia, and Mexico. I chose Europe and Asia because they represented the most critical areas for achieving global stability—the breakdown of order in these regions eventually caused World War II. I chose Mexico for two reasons: (1) to show that classical legal thought affected U.S. external relations with a secondary (i.e., nongreat) power, and (2) because U.S. policy toward Mexico constituted the most important relationship with a secondary power. Thus, I believe that I am using the most significant cases. In addition, I decided not to examine the influence of classical legal thought on the debate concerning U.S. adherence to the World Court, because this issue was arguably peripheral to U.S. diplomacy and because the subject matter naturally lends itself to legal theory and legal analogies. For an excellent general account of the World Court issue, see generally MICHAEL DUNNE, THE UNITED STATES AND THE WORLD COURT, 1920–1935 (1988). Dunne's book also provides an extended bibliographical essay on other accounts.

117. A.J.P. TAYLOR, THE STRUGGLE FOR MASTERY IN EUROPE 1848–1918, at 567 (Alan Bullock & F.W.D. Deakin eds., reprint 1988) (1954). *See also* A.J.P. TAYLOR, THE ORIGINS OF THE SECOND WORLD WAR 48–49 (1961) (noting the collapse of European balance of power by 1919 and the inevitability of German domination of the Continent). The latter citation should not, of course, be taken to signify an endorsement of Taylor's conclusions in that book.

The power imbalance was even greater than Taylor allows because the fighting on the Western Front took place entirely in France and Belgium, in areas that served as the French industrial and mining heartland. Thus, the war eviscerated French war-making capacity but left Germany untouched. This imbalance did not go unnoticed among the more thoughtful members of the American diplomatic corps. While traveling with his family through Germany to assume the post of minister to Switzerland, Joseph Grew noted,

> But one thing we cannot get over . . . that these people should be cultivating their unspoiled lands and working their undamaged factories with every outward sign of prosperity; while France and Belgium, the victors, plant their new fruit trees and build up their towns, villages and factories from their foundations. Except for the high prices and the depreciation of the mark, no sign of defeat exists.

A. REPARATIONS

Europe, then, faced structural strategic instability, which overwhelmed other critical issues, such as postwar economic reconstruction. Strategy and finance came together in the highly contentious issue of the reparations that Germany was supposed to pay to Britain and France, especially the latter. Ostensibly, these were for economic reconstruction; but they meant much more. The foremost historian of the episode has elegantly expressed the real issues underlying the crisis. "Reparations," he notes,

> took on a symbolic significance that magnified the importance of the actual economic and financial issues at stake. It became the vehicle for prolonging the Franco-German conflict. For the German government, and even at times for the French, it developed into nothing less than a continuation of the war by economic means. Thus, even when the nominal cause of the dispute seemed petty enough—delivery of too few telephone poles or shipment of coal without quality control—the controversy grew into a test of wills. Just as virtually all Germans took exception to the moral judgment made in the Allied nations regarding war guilt, so they rejected the notion that the Treaty of Versailles was immutable. Once they succeeded in nullifying its reparations provisions, they could proceed to demonstrate that other elements of the Versailles edifice were, as a cabaret lyric of the period expressed it, "only paper." In this context it becomes evident why France's decline as a great power cannot be divorced from the outcome of the reparations controversy . . . .[118]

In the end, the eventual settlement, which radically revised the treaty provisions for reparations—a settlement directed and led by Hughes, "not only accurately reflected France's weakness at the time but also prepared the way for further erosion of the nation's diplomatic position on issues ranging from military security to Franco-German economic relations."[119]

Joseph C. Grew, Diary (Oct. 17, 1921) (transcribed by the author from 17 Joseph C. Grew Papers, on file with the Houghton Library, Harvard University).

118. STEPHEN A. SCHUKER, THE END OF FRENCH PREDOMINANCE IN EUROPE: THE FINANCIAL CRISIS OF 1924 AND THE ADOPTION OF THE DAWES PLAN 6 (1976).

119. *Id.* My colleague, Marc Trachtenberg, emphasizes that key French officials wanted early on to cooperate with Germany and achieve greater integration of the French and German economies. *See generally* MARC TRACHTENBERG, REPARATION IN WORLD POLITICS: FRANCE AND EUROPEAN ECONOMIC DIPLOMACY, 1916–1923 (1980). But Trachtenberg acknowledges that "reparation was always far more a political than an economic problem." *Id.* at 342. Although Paris was not trying to crush Germany with reparations payments, it insisted on fulfillment of the terms of the Versailles Treaty for fear of opening up the entirety of the Versailles settlement—particularly the German disarmament clauses that stood as the central protection for France. Cooperative arrangements could be implemented, French officials believed, but only in the context of an overall political settlement—only vaguely worked out in the Quai d'Orsay—that guaranteed French security. *See id.* at 171–72. After all,

Hughes, however, interpreted it quite differently. His entire approach to Franco-German relations denied the centrality of conflicts and demonstrated an abiding faith that neutral adjudicatory institutions could solve the problem in a value-free way. Using the ideological template of classicism, mediated by new individualist progressivism, Hughes worked to craft a solution that eliminated balance-of-power considerations. The irony was that Hughes had to use American financial power in order to do so. The irony, though, was lost on him; indeed, he had to overlook the irony in order to believe that he had solved the crisis.

The crisis started in July 1922, when Germany declared that it could no longer meet its reparations obligations mandated by the Versailles Treaty. Finally, in January 1923, the hard-line French government of Premier Raymond Poincare invaded the Ruhr to seize reparations payments forcibly. Germany responded with "passive resistance," whereby economic activity came to a standstill, causing hyperinflation and providing future generations with images of people using wheelbarrows of paper marks to buy bread. European security, hardly robust to begin with, started to disintegrate.

In this context, isolationism and realpolitik would have dictated opposite responses, but each coherent in its own way. The realpolitik perspective would have argued that the United States had a vital interest in maintaining the European political balance of power and continental stability through fostering European economic growth. This perspective would have dictated American strategic commitments to French security in exchange for a generous reparation settlement allowing German recovery.[120] Such a policy would have been expensive, but would have resembled the American commitment to NATO and the Marshall Plan after World War II—a response that would have been inconceivable only a few months beforehand.[121]

Isolationists, on the other hand, would have argued that such a response demanded too much from Americans without any forthcoming benefits. The United States, isolationists contended, had no interests in

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as Trachtenberg observes, "One inescapable fact dominated the French vision of international politics: forty million Frenchmen faced sixty million Germans, and the demographic gap was clearly widening." *Id.* at 99. This inescapable fact was precisely what Hughes chose to ignore.

120. Trachtenberg argues that the United States should have pursued just such a policy. *See* Marc Trachtenberg, *Versailles Revisited*, SECURITY STUD. 9:2, Spring 2000, at 191, 191–205 (book review).

121. For a persuasive argument linking a French security treaty with postwar realpolitik thinking, see Lloyd E. Ambrosius, *Wilson, the Republicans, and French Security After World War I*, 59 J. AM. HIST. 341, 351–52 (1972).

Europe and could go its own way.[122] Such a policy would have resembled the American attitude toward Europe for most of the 19th century and up until World War I.

Classical legalism, however, acknowledged that European stability was vital to American interests but rejected the need for American strategic or financial commitments to support those interests. Instead, it insisted that, by avoiding political issues and fostering a neutral, objective solution to reparations, America could essentially have its cake and eat it too. In the same way that domestic law could foster stability without resort to coercion, international institutions could find a rational, objective order that satisfied all parties' interests.

From the very beginning, Hughes rejected the notion that the reparations crisis represented anything more than a technical finance problem. He told Henry Cabot Lodge that the United States' role was "to endeavor to get the question out of politics, as the statesmen could not agree, and in the hands of an advisory body . . . to deal with the intricate economic questions . . . ."[123] In order to remove politics from the equation, Hughes believed that some form of adjudication was necessary. He told Jean Jusserand, the French ambassador,

> If a professional man, or a man of highest authority in finance and business, were approached for his opinion upon a question relating to his profession or to the sphere in which he was an authority his answer would be as clear as crystal. He could not by virtue of his own integrity and prestige give any answer except that which corresponded to his intellectual conviction based upon his experience and knowledge.[124]

The formulation was classically 19th century: Impartial adjudication brought by men of "integrity" would yield an answer "as clear as crystal."[125]

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122. This was essentially the thinking of hard-line irreconcilables such as Senator Hiram Johnson of California. *See* SELIG ADLER, THE ISOLATIONIST IMPULSE: ITS TWENTIETH-CENTURY REACTION 173–74 (1957) (describing Johnson's foreign policy views). Robert Johnson argues, with much justification, that many of those whom previous historians had dismissed as isolationists should better be seen as peace progressives, whose ideology focused on anti-imperialism as a way of fostering a just and peaceful world order. *See* ROBERT DAVID JOHNSON, THE PEACE PROGRESSIVES AND AMERICAN FOREIGN RELATIONS 3 (1995). While Johnson's argument is persuasive for many of the senators whom he studies, he does not make this claim for Johnson and William Borah, the two most significant Senate isolationists.

123. Memorandum from Charles Evans Hughes to Henry Cabot Lodge (Feb. 1, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers).

124. Memorandum of Interview with the French Ambassador (Dec. 14, 1922) (on file with the Library of Congress, Charles Evans Hughes Papers).

125. *Id.*

The secretary understood that "there are deep-seated convictions as to national interests on each side that must be reckoned with. These are too profound to be affected by mere advice or moral influence."[126] But he remained steadfastly committed to the idea of solving the problem "apolitically" and decided that the best solution was to wait for public opinion in France to change. Hughes did not acknowledge that the deep-seated convictions were anything more than that: feelings or emotions about security unconnected to the actual objective positions of the nations themselves.[127] If Europeans, then, saw the Ruhr Crisis as a struggle for mastery on the Continent, Hughes perceived it as an emotionally charged bankruptcy proceeding needing a cooling-off period.[128]

Hughes's approach to the problem epitomized the classical legal world view. He held that the reparations problem could be solved through the application of a neutral, general principle—"capacity to pay"—that could be applied uncontroversially through the application of expertise, and would thus avoid the intrusion of politics.[129] In the meantime, the secretary refused to take action, instead hoping that both parties would face exhaustion and appeal to the United States. His strategy worked: By

126. Memorandum from Charles Evans Hughes to Henry Cabot Lodge (Feb. 1, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers).

127. Hughes told Jusserand that the reparations crisis was "political" because feelings of domestic electorates had been inflamed. *See* Memorandum of Interview with the French Ambassador (Nov. 7, 1922) (on file with the Library of Congress, Charles Evans Hughes Papers). This attitude also points up the contrast with Wilsonianism: While Wilson had faith that the democracies were pacific, Republican legalism was skeptical about theories of the democratic peace.

128. U.S. ambassador to France Myron Herrick actually used this analogy, comparing the prospect of German default to "the panic of '93 when some 33% of them were in the hands of receivers and . . . were set up by Reorganization Committees . . . ." Letter from the Ambassador in France (Herrick) to the Secretary of State (Hughes) (Oct. 27, 1922), *in* Telegram from the Secretary of State (Stimson) to the Minister in China (MacMurray) (July 18, 1929), *in* U.S. DEP'T OF STATE, PUB. NO. 1156, 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1922, at 177 (1938). Stimson later made the same analogy when dealing with Latin American debt, without considering the political implications. *See* Henry Lewis Stimson, Diary (Oct. 30, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.107 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Nov. 11, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.146 (Yale University Library Photographic Services). For an elegant explanation of how this reorganization procedure epitomized the late 19th-century legal mind, see Gordon, *supra* note 83, at 100–06.

129. There is little doubt that Hughes was serious about the capacity-to-pay formula. He repeated it privately as well as publicly. *See, e.g.*, William Castle, Diary (Nov. 18, 1922) (transcribed by the author from materials on file with the Library of Congress) ("The Secretary once said that all estimates of German reparations had been based on the needs of the victors in the war, not on the capacity of the loser, and that—until a sane estimate of capacity was attempted—no settlement could be reached."). Castle had his doubts as to whether an accurate estimate could be made, largely because of psychological and political factors such as German unwillingness. *See id.*

autumn, Germany lay prostrate, but France was unable to gain the reparations it wanted and faced a collapsing franc.[130]

Hughes then pushed ahead with his plan for an independent commission of experts to determine Germany's capacity to pay. The result was the so-called Dawes Plan, named after the commission's chair.[131] The plan went through several iterations, but the final upshot was a financial settlement that substantially reduced Germany's obligations to France, while at the same time stripping Paris of its rights under Versailles to occupy the Rhineland in case of default or any other German violation of the peace treaty. It was, in other words, a comprehensive defeat for Poincare. "[T]he French," he concluded after his defeat to the more conciliatory Edouard Herriot, "are too tired to follow me."[132] It was not a matter of physical exhaustion; rather, the entire crisis sharply eroded French finances and essentially forced Paris to capitulate to whatever plan the United States presented. America, as the world's leading creditor, could dominate global finance. At the critical moment, when France was considering resisting the entire program, Hughes bluntly told French officials: "Here is the American policy. If you turn this down, America is through."[133]

Yet neither Hughes nor other American policymakers believed that the plan violated the cardinal principle of avoiding politics;[134] indeed, for the

130. *See* COSTIGLIOLA, *supra* note 9, at 116; SCHUKER, *supra* note 118, at 171–73.

131. SCHUKER, *supra* note 118, is the definitive account generally. *See also* COSTIGLIOLA, *supra* note 9, at 111–27 (providing thorough and insightful analyses from the American perspective); LEFFLER, *supra* note 9, at 82–120.

132. JACQUES CHASTENET, RAYMOND POINCARÉ 260 (1948), *reprinted in* SCHUKER, *supra* note 118, at 231.

133. Beerits Memorandum, The Dawes Plan [hereinafter The Dawes Plan] (on file with the Library of Congress, Charles Evans Hughes Papers). *See also* The European Trip, *supra* note 68; Letter from Robert Olds to Frank B. Kellogg (Aug. 2, 1924) (on file with the Minnesota Historical Society, Frank B. Kellogg Papers); Letter from Charles Evans Hughes to Frank B. Kellogg (Aug. 4, 1924) (on file with author).

134. For his part, President Coolidge insisted that the Dawes Plan "is a simple and plain suggestion that a committee of experts be appointed to try to assess the amount that Germany is able to pay. The rights of France are fixed by her treaty. There can't be any reduction except by the consent of France." Calvin Coolidge, Press Briefing (Oct. 30, 1923), *in* THE TALKATIVE PRESIDENT: THE OFF-THE-RECORD PRESS CONFERENCES OF CALVIN COOLIDGE, *supra* note 27, at 177. Throughout his presidency, Coolidge maintained the position that the United States was offering only disinterested counsel to the Europeans. The next year, Coolidge complained that the constant talk of the reparations and war debts issues gave "the impression abroad that we are trying to coerce them, or something of that kind." Calvin Coolidge, Press Briefing (Feb. 24, 1925), *in* THE TALKATIVE PRESIDENT: THE OFF-THE-RECORD PRESS CONFERENCES OF CALVIN COOLIDGE, *supra* note 27, at 191.

secretary, power never entered into the equation.[135] Hughes's ideological presuppositions led to a transatlantic debate in which France and the United States often talked past each other. Throughout the crisis, Hughes consistently and emphatically denied that his plan for a neutral commission in any way favored Germany, finding French protests to the contrary as indicative of Gallic duplicity.[136] In the wake of the settlement, Hughes dismissed French Ambassador Jean Jusserand's complaints that the agreement had destabilized the European balance of power. The secretary explained that individual agreements could reinforce each other to create a stable world order based on law. The reparations settlement, Hughes contended, would create better feelings in Europe, which would in turn lead to more peaceful relations. Invoking the late 19th-century ideology's belief in legal evolution, Hughes said that the evidence of history backed his position: The United States and Canada had previously had bitter relations and invaded each other's territory, much as France and Germany had; but later, they became amicable to the point where they maintained the world's longest unguarded border. Such a process of building harmony through arms limitation agreements, Hughes told the ambassador, was possible between France and Germany as well. Jusserand, a veteran of European power politics, retorted that France would accept "a similar arrangement on

135. Throughout the Ruhr Crisis, Hughes repeatedly insisted both privately and publicly that any settlement would be based on the "consent" of France. *See, e.g.*, Memorandum by the Secretary of State of a Conversation with the German Ambassador (Oct. 23, 1922) (on file with the Library of Congress, Charles Evans Hughes Papers) ("The Secretary pointed out that nothing could be done without the voluntary action of the Powers entitled to reparations, and that if they were unwilling to consent to the suggestions that had been made nothing further could be done about them."). Moreover, according to the ambassador of Germany,

> The Secretary said that he supposed that the matter came down in the last analysis to an agreement between the Germans and the French; . . . [and] suggested that action seeming to be intended to bring pressure on France from the outside would have the immediate effect of causing an unpleasant French reaction and make the negotiations more difficult. In the last analysis the French agreement would have to be obtained and the question was what was the best course to secure it.

Memorandum of Interview with the Ambassador of Germany (May 3, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers). *See also* Memorandum by the Secretary of State of a Conversation with the French Charge (Oct. 31, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers) ("The Secretary said it had been well understood from the start that the rights of France under the [Versailles] Treaty could not be changed without her consent; that this was an obvious fact which is seemed hardly necessary to emphasize.").

136. *See* William Castle, Diary (Nov. 12, 1923) (transcribed by the author from materials on file with the Library of Congress). According to Castle,

> the Secretary said all he wanted was to be very careful with the French, that they had no sense of Anglo-Saxon square dealing, that they twisted everything we said and that Jusserand tries his best to turn anything suggested as to French unwillingness to have a real investigation into German capacity, into a statement of pro-German leanings. "They are trying to swing the bull around the tail," he said. "They are slipping and you must remember that anything you say which can be twisted out of its meaning will be."

Id.

the continent if [the United States] would take the Germans and give the French the Canadians for their neighbors."[137]

Hughes was not alone. Other key U.S. policymakers—many of whom were lawyers—adopted the same notion. In so doing, they explicitly rejected realpolitik formulations. Dwight Morrow, a partner at J.P. Morgan who eventually became ambassador to Mexico and a U.S. senator, provides an excellent example. J.P. Morgan bankers played a central role in American external policy during the 1920s, particularly on reparations, because in order to pay them, the German government was forced to float debt securities on Wall Street.

Morrow's training and professional background, however, were not in finance but in law. He attended Columbia Law School during the heyday of legal classicism and went to practice corporate law upon graduation, specializing in municipal bond and utility work.[138] He grew bored with law practice after a decade and a half and came to J.P. Morgan on the eve of World War I, eager to involve himself in public affairs.[139] Reparations gave him the opportunity to do so. Morrow was deeply sympathetic to France, having completed a detailed study on economic conditions there after the war.[140] Nevertheless, in agreement with his banking partners, he consistently pushed France and other allies to agree to reduce reparations payments, and, in particular, to relinquish the right to reoccupy the Rhineland in the event of a default. Otherwise, the bankers contended, American investors would simply refuse to subscribe to the German loan.

The Quai d'Orsay insisted on large payments ostensibly for postwar reconstruction and to repay its own large debts to the United States, but

137. Memorandum of Interview with the French Ambassador (J.J. Jusserand) (May 9, 1924) (on file with the Library of Congress, Charles Evans Hughes Papers).

138. *See* HAROLD NICOLSON, DWIGHT MORROW 5, 97–102 (1935).

139. During the war, Morrow served as an adviser to the Allied Maritime Transport Council ("AMTC"), an international body that attempted to regulate the supply of critical merchant shipping between the Allied powers. Morrow became convinced that the AMTC, and other noncooperative bodies like it, represented an important piece of the future of international affairs. These bodies, Morrow argued, showed how international cooperation could evolve on the basis of neutral observation of facts and noncoercive multilateral institutions. Interestingly, Morrow saw these bodies as emanating directly out of the Hague Conference system, once again demonstrating that the New Individualism did not represent a change from classicism, but was an updated example of it. *See* Joseph P. Cotton & Dwight W. Morrow, *International Coöperation During the War*, 123 ATLANTIC MONTHLY 804 (1919). *See generally* Dwight W. Morrow, Address Before the National Conference on the New International Obligations of the United States Under the Proposed Covenant of the League of Nations (June 5, 1919) (on file with Amherst College, Dwight W. Morrow Papers).

140. *See, e.g.*, Henry Lewis Stimson, Diary (Oct. 23, 1931), *microfilmed on* Henry L. Stimson Diaries, r.3/vol.18/p.172, at 5 (Yale University Library Photographic Services) (describing Morrow as "a great friend of France").

Morrow understood the deep strategic reasons for French behavior. If Germany revived economically, then it would quickly dominate the Continent and threaten France again, only a few years after it had allegedly been defeated.[141] Thus, France would accept reducing reparations payments only if it received strong security guarantees from the United States and Britain, or somehow achieved a new political dispensation with its gigantic neighbor across the Rhine.[142]

Morrow responded by rejecting French premises, which he set forth in a lengthy letter to Hughes. Morrow noted,

> Previously reparations have been balanced against security, as though the two things are contradictory. I have never believed that this was so. Such an antithesis really defines security as keeping your enemy weak. There is no real security that way. True security only comes about when you are dead. If you mean, however, the lessening of tbe likelihood of future war, it can only measurably come by such a treatment of Germany as enable her to pay for the damage she has done as quickly and as smoothly as possible.[143]

One wonders how the French would have reacted had they read Morrow's note. Germany had invaded France twice in the previous half century, laying siege to Paris the first time and destroying most of the northern portion of the country the second time. Telling them to buttress the strength of such an adversary would have seemed odd indeed; but Morrow held fast to his views. A few days later, he cabled firm chairman Thomas Lamont that "the Allies are at the parting of the ways and before asking their friends to lend money to Germany . . . they must choose between a rehabilitated Germany with ultimate reparations to them on the one hand, and a broken Germany and what has been called 'security' on the other hand."[144]

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141. *See* Trachtenberg, *supra* note 120, at 99.

142. This interpretation of French policy is well in keeping with the current historiographical consensus on the subject. *See generally* Trachtenberg, *supra* note 120. As Trachtenberg notes, very few historians currently see French policy as being driven by a desire to maintain a "Carthaginian peace" that would severely injure the German economy and thus maintain French security. Indeed, many now acknowledge the desire that France had to cooperate with Germany. But all of this was in the context of maintaining a stable European balance of power. Even the most cooperative settlement was supposed to have major political implications as well, even if the Quai d'Orsay was unclear about what precisely that new political dispensation would be.

143. Letter from Dwight W. Morrow to Charles Evans Hughes (July 12, 1924) (on file with the Baker Library, Harvard Business School, Lamont Papers).

144. Letter from Dwight W. Morrow, Russell C. Leffingwell, and J.P. Morgan to Thomas Lamont (July 18, 1924) (on file with the Baker Library, Harvard Business School, Lamont Papers).

In retrospect, Hughes insisted that the central problem was "the readiness of interested statesmen to treat the problem as a political rather than an economic one."[145] There is no evidence that Hughes saw it as anything other than he repeatedly said he did: a technical problem requiring the need for impartial, expert adjudication.[146] Hughes chose not to entertain the possibility that such adjudication might have far-reaching and destabilizing consequences.[147]

B. KELLOGG AND THE ORIGINS OF THE PACT OF PARIS

Kellogg continued Hughes's and Morrow's notion of security. The Pact of Paris, sometimes known as the Kellogg-Briand Pact, has come to symbolize the naiveté of interwar diplomacy. The treaty "outlawed war as an instrument of national policy" without any enforcement mechanism. Peace groups that fervently advocated for it insisted almost mystically that global public opinion would enforce it, and happily for them, they never had to explain to anyone what exactly they meant by such an enforcement option, or how it would occur.

Kellogg seemed proud that his name was on the treaty, and as suggested above, he genuinely believed that it would be of assistance in regulating international affairs. It is unfair, however, to accuse the secretary of the kind of naiveté evinced by the peace movement. Although he endorsed it, Kellogg did not invent the outlawry concept. Instead, he used it to escape from what he considered to be a diplomatic problem.

This problem was the Franco-German relationship ignored and elided by Hughes, Morrow, and other American foreign policymakers. Here is where the Kellogg-Briand Pact's real significance lies: Kellogg relied on outlawry as a way of avoiding realpolitik. Law served as a substitute for

145. The Dawes Plan, *supra* note 133.

146. His discussion in the AUTOBIOGRAPHICAL NOTES, *supra* note 62, at 257–61, is instructive. It is one of the shortest entries of all in his discussions of foreign policy problems, and he simply mentions it as an economic problem. These notes were composed between 1941 and 1945, when interwar diplomacy came under intense scrutiny and criticism. It stands to reason that Hughes felt little need to defend himself on European questions. By contrast, Hughes spent several pages justifying his failure to insist on the U.S. right to fortify bases in the western Pacific.

147. Kellogg, who at the time was ambassador to Great Britain and helped close the reparations deal, felt the same way. Kellogg was from Minnesota, a state with a large German American population, and so he attempted during the 1924 presidential election to persuade friendly German Americans that the Dawes Plan was good for Germany. He told Hughes, however, "[o]f course I have explained . . . that we did nothing in any way to injure France." Letter from Frank B. Kellogg to Charles Evans Hughes (Sept. 18, 1924), *microfilmed on* Frank B. Kellogg Papers, r.14/fr.54 (Minnesota Historical Society).

politics. Reexamining Kellogg's actions in the development of the treaty reveals how deeply embedded classicism was in his thought and in U.S. diplomacy.

Outlawry became an international social movement in the 1920s thanks to the tireless efforts of policy entrepreneurs such as Salmon Levinson, a wealthy Chicago lawyer, and Columbia University President Nicholas Murray Butler, a close friend of Root's. Indeed, outlawry bore many of the markings of classical legal ideology: the belief that legal instruments could harmonize distinct interests, the rejection of coercion as a basis for social order, and the denial that state power constituted a necessary prerequisite for legal effectiveness.[148] The conservative lawyers who developed the outlawry idea, however, hardly held a patent on it. Indeed, as Charles DeBenedetti persuasively explains, outlawry's political success derived from its "extraordinary cultural appropriateness." The outlawry campaign gained enthusiastic support from across the political spectrum: Wilsonians jumped on the bandwagon while the arch-irreconcilable William Borah saw it as a vehicle to gain the Republican presidential nomination.

Outlawry's usefulness, however, extended beyond American shores. French Foreign Minister Aristide Briand saw the potential for using the peace movement to serve his country's vital strategic interests. France had already concluded several bilateral alliances with any of Germany's neighbors that had political or military clout. By 1927, Paris had signed mutual defense treaties with Belgium, Poland, and Czechoslovakia. These three nations, though, hardly constituted the kind of robust deterrent force that France needed. Her old ally, imperial Russia, was replaced by a Bolshevik regime that was more interested in undermining the Western democracies than helping them. The British had guaranteed France's eastern border in the Locarno Treaties two years earlier, but were uninterested in serious military conversations.

So Briand settled on the second best option: try to protect France against interference in the event of conflict with its restless eastern neighbor. He knew that in the event of a new European war, France (possibly with British support) would attempt to strangle Germany with a blockade. He also knew, though, that such an attempt could risk a collision with the United States, which was still preoccupied with "neutral rights." And American intervention on behalf of Berlin would spell doom for Paris.

148. *See* Zasloff, *supra* note 6, at 247–84.

Briand thus proposed a bilateral nonaggression pact with the United States, forever foreclosing hostilities between the two nations and declaring war outdated as an instrument of national policy. He shrewdly used the language of the new diplomacy in the service of the old.[149] Rather than make the offer directly to the State Department, Briand announced his proposal in a public address directly to the American people, a method calculated to develop American popular support. The gambit worked. Shortly after the speech, the *New York Times* editorialized in favor of the idea, and peace advocates across the country hailed the visionary Frenchman, placing pressure on the Coolidge administration for an answer. The peace movement swung squarely behind an initiative undertaken for the purposes of traditional realpolitik.

This presented Kellogg with a real opportunity. By endorsing Briand's proposal, the United States could promote a stable balance in Europe and gain substantial credit with the domestic peace movement. The secretary, however, insisted on snatching defeat from the jaws of victory. After delaying for months (and thereby causing the peace movement's lobbying to grow more intense), Kellogg made a public counteroffer to make the outlawry multilateral, comprising all nations that would agree to it. The secretary's reasons were straightforward: A bilateral pact would look "too much like an alliance." But Kellogg was less worried about perceptions than reality. He was not worried that the United States would appear to oppose the cause of peace, but that such a move would in fact engage America in power politics. Nothing could be more anathema to the classical legal mind.

Kellogg's public relations gambit should not be confused with cynicism. The secretary genuinely believed that the pact would have an important effect. Kellogg dismissed the argument "that the treaty does not amount to anything because there is not behind it an agreement to punish nations violating it."[150] He accurately observed that "[t]his is the same old question";[151] namely, does deterrence and balance-of-power politics enhance global stability or undermine it? The secretary explicitly placed himself with those who believed the latter. He freely acknowledged that the treaty would not be a "sure guaranty against war," but would be "an additional safeguard and a great moral obligation and in my judgment will

149. FERRELL, PEACE IN THEIR TIME, *supra* note 9, at 72–74, 97, 140–43, is persuasive in arguing for this interpretation of Briand's intentions.

150. Letter from Frank B. Kellogg to Robert McCormick (July 21, 1928), *microfilmed on* Frank B. Kellogg Papers, r.33/fr.385 (Minnesota Historical Society).

151. *Id.*

have a most beneficent effect."[152] Similarly, he told Walter Lippmann that the pact would "raise[] another and a stronger barrier against the recurrence of war. . . . I do not claim it is a complete solvent of war difficulties, but it adds another and an important element."[153] Little wonder, then, that he argued that "every treaty of arbitration, conciliation and treaties against war constitute an additional surety for peace and will have a great moral effect on the world."[154] State Department official William Castle remarked that "[t]he funny thing is that [Under Secretary of State Robert] Olds and the Secretary seem to take it all with profound seriousness . . . ."[155] Castle should not have thought it funny, for the outlawry project actually made perfect sense in light of classical legal assumptions.

Hoisted on his own public relations petard, Briand had little choice but to agree. The result was a completely useless paper instrument, greeted with extraordinary fanfare and delusions of grandeur. While some peace activists reacted warily to what they considered a half measure, legalist diplomats rejoiced and congratulated Kellogg on achieving "due process of law"[156] in international affairs. In keeping with classicism, substantive due process had apparently become a worldwide trend.

V. RECONSTRUCTING PACIFIC SECURITY

After Europe, East Asian policy was America's greatest diplomatic challenge. It is little wonder that the Washington Naval Conference stands as Hughes's most significant diplomatic achievement. Contemporary observers hailed the secretary for bringing order from chaos in seemingly miraculous fashion, and the Harding administration pointed to the conference as proof of how practical Republican diplomacy could yield concrete results—as opposed to the dreamy idealism of Harding's Democratic predecessor. Historians agree on the conference's significance, not only because it concerned the critical sphere of U.S.-East Asia policy, but also because it created the "Washington System" that epitomized America's diplomatic outlook during the 1920s.

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152. *Id.* McCormick was the staunchly isolationist publisher of the *Chicago Tribune*, who opposed the Kellogg-Briand Pact on the ground that it entangled the United States in European affairs.

153. Letter from Frank B. Kellogg to Walter Lippmann (July 21, 1928), *microfilmed on* Frank B. Kellogg Papers, r.33/fr.392 (Minnesota Historical Society).

154. Letter from Frank B. Kellogg to Joseph E. Ransdell (Oct. 24, 1928), *microfilmed on* Frank B. Kellogg Papers, r.35/fr.420 (Minnesota Historical Society).

155. William Castle, Diary (Mar. 6, 1928) (transcribed by the author from materials on file with the Library of Congress).

156. JAMES BROWN SCOTT, YEARBOOK OF THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 1930, at 102 (1930).

Upon assuming control in 1921, Hughes confronted a broken and unstable east-Pacific security situation. The United States, Great Britain, and Japan stood poised on the brink of a naval arms race. Britain and Japan were partners in a two-decade-old alliance, initially designed to balance German and Russian power in the Pacific. With the collapse of both empires, the United States seemed to many to be the next target. Thus, upon convening the conference that November to handle naval and diplomatic questions, few thought that it stood much chance of success.[157]

But Hughes shrewdly recognized that Britain and Japan wanted a deal. Neither government could match the United States' economic strength, and thus, its ability to build a massive fleet. If it came to it, a naval arms race would surely be won by the United States. The Harding administration, meanwhile, faced enormous pressure from Congress for arms control. Thus, circumstances were appropriate for an agreement.[158]

Hughes broke the logjam on the conference's first day by dramatically proposing to freeze the three powers' capital ships at current levels—five (United States) to five (Britain) to three (Japan). Since, at these levels, none of the nations could threaten the others with blockades or attacks, "[p]reparation for offensive naval war will stop now."[159] The secretary's bombshell, carefully guarded for weeks and announced at the opening plenary with hundreds of journalists in attendance, created a global sensation and formed the basis of the eventual "Five-Power Treaty" (which included France and Italy), establishing naval arms limitations.

Moreover, the conference successfully ended the Anglo-Japanese Alliance. London and Tokyo agreed to replace it with an innocuous "Four-Power Treaty" (including France), which provided that the treaty parties would consult if any of their interests were threatened.

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157. Excellent accounts of the background of the Washington Conference include MICHAEL G. FRY, ILLUSIONS OF SECURITY: NORTH ATLANTIC DIPLOMACY 1918–1922 (1972); IRIYE, *supra* note 9, at 1–22; IAN H. NISH, ALLIANCE IN DECLINE: A STUDY IN ANGLO-JAPANESE RELATIONS, 1908–23 (1972); M.G. Fry, *The North Atlantic Triangle and the Abrogation of the Anglo-Japanese Alliance*, 39 J. MOD. HIST. 46 (1967), *available at* http://links.jstor.org. An outstanding study of the United States and the Washington Conference is ROGER DINGMAN, POWER IN THE PACIFIC: THE ORIGINS OF NAVAL ARMS LIMITATION, 1914–1922 (1976), but as its subtitle suggests, it elides considerations of diplomacy and geopolitics and focuses exclusively on the naval issues and domestic politics.

158. *See generally* THOMAS H. BUCKLEY, THE UNITED STATES AND THE WASHINGTON CONFERENCE, 1921–1922 (1970); DINGMAN, *supra* note 157, at 139–59; JOHN CHALMERS VINSON, THE PARCHMENT PEACE: THE UNITED STATES SENATE AND THE WASHINGTON CONFERENCE 1921–1922, at 1–115 (1955).

159. CHARLES E. HUGHES, *Limitation of Naval Armament*, *in* THE PATHWAY OF PEACE, *supra* note 79, at 20, 31 (address delivered on Nov. 12, 1921, when Hughes assumed the duties of presiding officer at the Conference on Limitation Armament at Washington).

In exchange for Japan's agreeing to play third fiddle to the United States and Britain, Washington agreed that it would not fortify any U.S. naval bases in the western Pacific. Hughes took contemporary criticism for this concession, which became increasingly angry in the wake of Pearl Harbor. These complaints were unfair: The secretary carefully checked with two members of the U.S. delegation, Senators Henry Cabot Lodge (the chair of the Foreign Relations Committee) and Oscar Underwood (the Democratic leader), who told Hughes unequivocally that the Senate would never pay the enormous cost of fortifications.[160] In light of fiscal constraints, Hughes made a concession that was more theoretical than real.[161]

The Four-Power and Five-Power Treaties, then, put the United States in a more stable diplomatic position than it had been. After the conference, it no longer faced the prospect of either a hostile alliance or an arms race. The country's basic domestic security seemed intact.

Hughes, however, was pursuing more than basic domestic security, and it is here that we can see the influence of classical legal thought. Although Britain and Japan did not raise the issue, the secretary also placed the question of China on the conference agenda. By necessity, such an emphasis brought America's policy into conflict with Japan's. Tokyo argued that it had special commercial and political rights in China, whereas the United States insisted on the application of the "Open Door" principle.

The Open Door concept centered on the idea of free trade in Asia. Ever since Secretary of State John Hay issued his famous Open Door notes in 1899, American policymakers (including Hay himself) pursued the policy, often more with passion than with coherence. Hay's original notes tacitly accepted other powers' Chinese spheres of influence as long as they did not place extra tariffs on American goods, did not interfere with treaty ports, and did not impose discriminatory railway rates or harbor dues. Yet the very next year, in the wake of the Boxer uprising, Hay issued a second set of Open Door notes, calling for a settlement that would preserve Chinese independence and territorial integrity—notions that opposed the very idea of spheres of influence. Thus, from the very beginning, American policy vacillated inconsistently between cooperating with other

160. Meetings of the American Delegation to the Washington Arms Limitation Conference (Nov. 2; Dec. 1–2, 1921) (on file with the National Archives).

161. *See, e.g.*, Theodore Roosevelt, Jr., Diary (Jan. 29, 1922) (on file with the Library of Congress, Theodore Roosevelt, Jr. Papers) (noting that "we never would have completed" fortifications of western Pacific naval bases due to Congressional opposition). Roosevelt was at this time the assistant secretary of the Navy.

great powers and attempting to undermine the basis of great power imperialism.[162]

Underlying these two contradictory concepts lay a more fundamental weakness: Washington's lack of naval or military power to bring about its goals. Theodore Roosevelt (who was always skeptical of the Open Door) noted that accomplishing the ends of the Open Door policy would require a fleet as good as England's and an army as good as Germany's. While the United States could rival the British at sea, it came nowhere close to the German army, and, in any event, was unprepared to make such a sacrifice of blood and treasure.

Such a predicament suggested a cautious approach to Chinese policy. Hughes, however, pursued a relatively aggressive approach. He was "anxious that a more definitive statement" of the Open Door policy become a central part of the conference's final outcome.[163] While he did not present a striking unilateral proposal as he had on naval limitations, he sympathized with Chinese efforts to have the conference endorse a strong version of the Open Door. When the Chinese delegation introduced a resolution forbidding spheres of influence,[164] Hughes—the conference's chair—agreed to refer the matter to the subcommittee with jurisdiction over East Asian and Pacific questions. Hughes pressed the matter further. The secretary saw an opportunity to reverse what he believed were damaging U.S. diplomatic precedents, particularly the Lansing-Ishii Agreement of 1917. That agreement, notorious even in diplomatic circles for obfuscation and ambiguity, paid lip service to the Open Door, but also recognized Japan's "special interests" in China—a recognition that both Tokyo and Peking believed gave the former a sphere of influence in Manchuria. Lansing-Ishii followed on the heels of the 1908 Root-Takahira and 1907 Taft-Katsura agreements, which many believed also winked at Japan's dominance in northern China.[165]

From the standpoint of classical legal thought, it is easy to see why the earlier agreements were inadequate. They were incredibly vague, preventing them from being effective legal instruments, and they were

162. A superb demonstration of American inconsistency is found in Raymond A. Esthus, *The Changing Concept of the Open Door, 1899–1910*, 46 MISS. VALLEY HIST. REV. 435, 435–54 (1959).

163. Beerits Memorandum, Far Eastern Questions [hereinafter Far Eastern Questions] (on file with the Library of Congress, Charles Evans Hughes Papers).

164. The text of the Chinese resolution is found in THOMAS H. BUCKLEY, THE UNITED STATES AND THE WASHINGTON CONFERENCE, 1921–22, at 151 (1971).

165. *See generally* HOWARD K. BEALE, THEODORE ROOSEVELT AND THE RISE OF AMERICA TO WORLD POWER 253–334 (reprint 1957) (1956); HOGAN, *supra* note 9; Esthus, *supra* note 162.

thoroughly informal. As Hughes later noted, the claims of powers to spheres of influence "were provocative of controversy" because they were "undefined and vague as to their implications."[166]

His solution was found in the final text of the "Nine-Power Treaty," which governed policy regarding China. Article I of that treaty merely restated the Open Door principles in their broadest—and vaguest—formulation. Article II simply pledged that no power would enter into an arrangement contrary to Article I. Article III, however, "went beyond any previous international commitment in specifying the meaning of the Open Door."[167] In that article, the powers (except China) promised that they

> will not seek, nor support their respective nationals in seeking—
>
> (a) any arrangement which might purport to establish in favor of their interests any general superiority of rights with respect to commercial or economic development in any designated region of China;
>
> (b) any such monopoly or preference as would deprive the nationals of any other Power of the right of undertaking any legitimate trade or industry in China, or of participating with the Chinese Government, or with any local authority, in any category of public enterprise, or which by reason of its scope, duration or geographical extent is calculated to frustrate the practical application of the principle of equal opportunity.[168]

These clauses went beyond previous understandings between the powers because they explicitly rejected the concept of spheres of influence. As Hughes noted in the official reports of the American delegation, the clauses "negatived the endeavor to secure not a particular concession or grant, or the facility for conducting a particular enterprise . . . but a status with respect to a designated region which would give general superiority or opportunity and thus conflict with the open-door principle."[169] Japanese objections that the Nine-Power Treaty went farther than any other Open Door formulation met no favor with Hughes; indeed, this was the entire point of the secretary's effort.[170]

The Nine-Power Treaty thus cured the defects of traditional American policy, both on substance and procedure. Hughes privately argued that the

166. Far Eastern Questions, *supra* note 163.

167. GLAD, *supra* note 58, at 289.

168. Nine-Power Treaty, Feb. 6, 1922, art. 3, 44 Stat. 2113.

169. S. DOC. NO. 67-126, at 621 (2d Sess. 1922).

170. *See id.* at 829 (arguing that any Open Door principle necessarily includes Chinese territorial integrity).

treaty was "a substitute for all prior statements and agreements"[171] concerning China. Publicly, he contended that the treaty advanced American interests because "postulates of American policy were taken out of the unsatisfactory form of diplomatic notes and, with a more adequate and explicit statement, were incorporated into a solemn international engagement, signed by the nine Powers especially interested in the Far East."[172] Recalling the Gilded Age's emphasis on Sunshine Commission regulation, Hughes believed that the Nine-Power Treaty reduced the chances of war because "[h]enceforth the principle of publicity was to be applied to all commitments of political significance between the Powers or their nationals on the one side and the public authorities of China upon the other side."[173]

As the secretary noted, the "system [of spheres of influence] had been the cause of so much international friction in the Far East that it was highly desirable that it be formally denounced by the Conference."[174] Spheres of influence did not arise from the fact of international anarchy, but from policymakers' mistaken choices to institute a system based on them. In keeping with classical legal premises, Hughes believed that an alternative system was available that rejected international competition. As he noted in his official conference report, the Open Door and the territorial integrity of China had not been properly guaranteed in the past because they had never been "a matter of binding international obligation among all the powers concerned . . . ."[175] Now, however, things were different: In the same way that domestic law could be created through recognition of common interests, international law could be created as well.

And it would have to be, given the new military balance of power in the Far East. Even though under the Five-Power Treaty Japan retained only sixty percent of the capital ships of the United States or Britain, Tokyo's fleet operated only in the western Pacific, giving it dominance in the region and the ability to coerce China. And since the United States could not fortify its Pacific bases, attempts to project power into the Far

171. Memorandum to the Department of State (Mar. 8, 1934) (on file with the Library of Congress, Charles Evans Hughes Papers).

172. CHARLES E. HUGHES, *The Monroe Doctrine—A Review: Its Relation to American Foreign Policy in the Twentieth Century*, *in* THE PATHWAY OF PEACE, *supra* note 79, at 142, 148 (address was originally delivered on Nov. 30, 1923).

173. Far Eastern Questions, *supra* note 163. *See also* Zasloff, *supra* note 6, at 275–76 (discussing the Sunshine Commission form of regulation, in which regulatory commissions lacked enforcement power and regulated industries through public scrutiny and exposure).

174. Far Eastern Questions, *supra* note 163.

175. S. DOC. NO. 67-126, at 820 (2d Sess. 1922).

East would run enormous risks. In other words, after the signing of the naval disarmament treaty, if Japan decided to break the Nine-Power Treaty, there was little that the United States or Britain could do to stop it.

This may well have been a risk worth running. Since the United States was both unable and unwilling to maintain the Open Door by force, it made sense to present an alternative vision of international relations that would rely on law, cooperation, and the absence of conflict. But without a stable balance of power, Washington needed to understand that Japan always faced the temptation to go it alone, as powers in its position had always done. More importantly, U.S. policymakers needed to take care to dampen domestic expectations about what such a policy could accomplish.[176]

Hughes, however, seemed to do precisely the opposite, hailing the Nine-Power Treaty as an important new era in East Asian politics. This helped to generate public expectations about what the United States could expect in China. Ten years later, when Japan turned to a militaristic policy in China, Americans responded with shock and outrage that the Open Door had been so rudely violated. China lay at the heart of growing tension between Tokyo and Washington, and it did not help that U.S. policymakers saw themselves protected by Japan's promise to maintain Chinese territorial integrity without a stable balance of power to enforce that promise. But it was not mere diplomatic hubris; it represented the core of Hughes's world view. After all, he noted privately in 1924 that "[a] war with Japan during the next generation [is] unthinkable . . . ."[177]

VI. MEXICAN POLICY: LAW AND LEGITIMATION

Europe and Asia represented the core of the international system, but Latin America had traditionally been the focus of American foreign policy, for obvious reasons. The Mexican Revolution of 1913 made it so that the United States could no longer assume quiet along its southern frontier. By 1919, Mexico was no longer in a state of chaos, but the revolutionary government's new policies posed a problem for American diplomacy. Article 27 of the revolutionary constitution, for example, declared that

176. As indeed some did. Senator George Norris, a leading peace progressive with strong isolationist tendencies, observed of the Washington treaties that, since Japan had more military force, "'we ought to be practical and take things as we find them'" in the Far East. 62 CONG. REC. 3052–53, 3194, 4486–97 (1922), *reprinted in* JOHNSON, *supra* note 122, at 170.

177. Joseph C. Grew, Conversation with Hughes on "The Naval Treaty," (May 8, 1924) (transcribed by the author from 26 Joseph C. Grew Papers, on file with the Houghton Library, Harvard University).

minerals under Mexican soil were the property of the people. That obviously did not sit well with American investors, particularly large oil interests that had hoped to exploit Mexican petroleum reserves. Thus, the large question hanging over Mexican policy concerned the very nature of American interests: What did Washington want to see south of the Rio Grande? A country welcoming foreign investment? A democracy? Would a dictatorship that keeps things quiet suffice?

A. POLICY UNDER HUGHES: TO THE BUCARELI CONFERENCE

Hughes attempted to resolve this question by relying on baseline legal assumptions. He explained the interaction between legal principles, national interests, and commerce by insisting on the importance of

> [t]he preservation of the essential bases of international intercourse through the demand for the recognition of valid titles acquired in accordance with existing law and for the maintenance of the sanctity of contracts and of adequate means of enforcing them. . . . [A]nd the most important principle [to] be maintained at this time with the international relations is that no State is entitled to a place within the family of nations if it destroys the foundations of honorable intercourse by resort to confiscation and repudiation.[178]

The United States had never recognized the revolutionary government, and Hughes made it quite clear that recognition would rest on Mexico's adherence to law. Clearly, Hughes's emphasis on legality deeply connected with business interests: The secretary (and the administration) presumably saw business expansion as an important, if not vital, American interest.

Seeing Mexican policy solely through a business interpretation, however, obscures its broader meaning. Law was crucial. Most business interests outside the large oil producers favored recognition because they wanted a piece of the Mexican market.[179] The smaller oilmen desired to

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178. Statement from the U.S. Department of State, United States-Mexican Relations (June 7, 1921) (on file with the National Archives).

179. This was even acknowledged by the president. *See* Letter from Warren G. Harding to (Under Secretary of State) Henry P. Fletcher (Nov. 19, 1921) (on file with the Ohio Historical Society, Warren G. Harding Papers). Harding wrote,

> I am well aware that there is a change of front on the part of many interests which heretofore strongly opposed recognizing Mexico . . . . Apparently a number of these interests have come to an understanding on their own account and are now addressing themselves as agents of the Mexican government as a result thereof. I am sure that this change of attitude has not materially altered the opinion of yourself and your associates, and I know that it has not had anything to do toward effecting a change of mind on my part.

Id.

work out a deal with the revolutionary government. The ubiquitous Lamont, who headed a bankers' consortium restructuring Mexican debt, also had a more conciliatory attitude. Even the large oil producers had a powerful interest in working out an arrangement, whether they realized it or not. The Mexican government did not insist on nationalizing American investments; it insisted on enforcing the general principle of public ownership of subsoil rights, but had no desire to expel foreign producers.

But the State Department resisted this conciliatory attitude, and not out of solicitousness for the oilmen.[180] The central question in the Mexican dispute was one of *legal principle*—Do the oil companies have inalienable property rights or not?—and on this, Hughes refused to budge. Gordon observes that "liberal legal science" kept making things difficult for clients because of its insistence on principle and strict rules.[181] Policy toward Mexico saw this tendency applied to inter-American relations.

Throughout 1921 and 1922, U.S.-Mexican relations remained at an impasse. Hughes and Under Secretary Henry Fletcher insisted that Mexico sign a treaty interpreting Article 27 in a nonconfiscatory, nonretroactive form prior to recognition. Again, Mexico attempted to compromise. In September 1921, the Mexican Supreme Court ruled in the Texas oil case that rights acquired by American oil companies prior to the adoption of Article 27 in May 1917 were complete rights as long as they had performed some positive act indicating intention to exploit the subsoil resources. This was not good enough for the State Department. As Fletcher informed his friend, President Harding, the Mexican Supreme Court's decision reflected a Russian property concept; moreover, he contended that "[t]he problem is not, as many would have you believe, one of approach, but rather one of fundamental differences with respect to the inviolability of private property."[182] In this, the State Department diverged sharply from Lamont, who continually argued that U.S.-Mexican differences were practical and nonideological in nature.

Finally, toward the end of 1923, Hughes's position shifted slightly, especially when Mexican President Alvaro Obregon suggested resolving the issue through an independent commission, which comprised

180. An effective discussion, demonstrating that the Harding administration's policy was not driven by business interests, is found in N. Stephen Kane, *American Businessmen and Foreign Policy: The Recognition of Mexico, 1920–1923*, 90 POL. SCI. Q. 293 (1975), and N. Stephen Kane, *Bankers and Diplomats: The Diplomacy of the Dollar in Mexico, 1921–1924*, 47 BUS. HIST. REV. 335 (1973).

181. *See* Gordon, *supra* note 83, at 92–93.

182. Letter from Henry Fletcher to Warren Harding (Nov. 14, 1921) (on file with the National Archives).

representatives of both countries. Mexico's comparative stability also influenced the secretary: There seemed to be a government in Mexico City that could protect American rights, so it made little sense to refuse to recognize it. He thus agreed to a meeting that came to be known as the Bucareli Conference.

That did not mean, however, that Hughes would accept what he considered to be confiscatory legislation. He instructed the commission delegates that "the fundamental question at issue has been the safeguarding of American property rights in Mexico, especially as against the confiscatory application of the provisions of the Mexican Constitution of 1917." Thus, the delegates were to achieve three goals: (1) "the obtaining of satisfactory assurances against confiscation of the subsoil interests in lands owned by American citizens prior to May 1st, 1917"; (2) "the restoration or proper repatriation for the taking of lands owned by American citizens prior to May 1st, 1917"; and (3) "the making of appropriate claims conventions."[183]

To Hughes, this may have seemed clear enough, but the conference was essentially unable to square the circle. It did agree to set up two claims commissions covering some of the land claims, but was unable to agree on subsoil issues (i.e., oil). The Mexican commissioners insisted on maintaining the Mexican Supreme Court's interpretation, and thus, maintaining the rights of only those owners who performed "some positive act [manifesting] the intention of the owner . . . to make use of or obtain oil under the surface."[184] They defined these positive acts quite broadly, however, and declared that those who had not performed such acts would receive preferential rights against third parties. The American commissioners agreed to this, but also a reservation for *all* the rights of American citizens. This reservation led Dwight Morrow, upon becoming ambassador to Mexico four years later, to wonder whether "an agreement or even an understanding, [was] reached."[185]

For classicists like Hughes, such a fudge must have been frustrating. But it was the best he could get. This prospect opened up a seam in the classical world view. Clear rules respecting private rights, it was argued,

183. Memorandum of Draft Instructions Prepared by Secretary Hughes for the American Commissioners Meeting in Mexico (Apr. 30, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers).

184. ROBERT FREEMAN SMITH, THE UNITED STATES AND REVOLUTIONARY NATIONALISM IN MEXICO 1916–1932, at 2212–22 (1972).

185. Confidential Memorandum from the American Embassy in Mexico City to Mr. Olds (Nov. 30, 1927) (on file with Amherst College, Dwight W. Morrow Papers).

would create a world as free of coercion as possible. But what if the only method to get clear acceptance of these rights was coercion itself? If the Mexican government refused to endorse the classical conception of property rights, then coercive military action might be necessary. But invasion would be prohibitively expensive in American blood and treasure, deeply unpopular politically, and ideologically corrosive of the very law-based order on which classical foreign policy rested. Little wonder, then, that the administration took what it could get at Bucareli, and deferred the harder issues until later.

B. KELLOGG TURNS TO SHEFFIELD

This ambiguity put the onus on Kellogg, and quickly upon assuming office, it became clear that although the United States recognized the Mexican government, everything else was still up in the air. The Bucareli agreement seemed to disappear overnight because the American commissioners had reserved *all* American rights. Kellogg then had to decide how to approach Mexico City. Would he insist on legal principle or try to cut a deal?

The appointment of the U.S. ambassador to Mexico made clear the administration's initial direction. The new envoy was James Rockwell Sheffield, an elite New York corporate lawyer. Sheffield had nothing but contempt for the Mexican Revolution and received most of his information about local conditions from conservative "old Mexicans" who longed for the *ancien regime*. These political views, combined with intense racism,[186] made him a singularly poor choice for a sensitive diplomatic post.

Sheffield's combination of classicism and racism—not to mention his close ties with the oil companies—led him to a hard-line, no-compromise position. Kellogg quickly agreed, and this led to the secretary's first confrontation with Mexico. In June 1925, he announced that "this Government will continue to support the Government of Mexico only so long as it protects American lives and American rights and complies with its international engagement and obligations. The Government of Mexico

186. Sheffield's initial reaction to the Mexican government suffices to set forth his racial views. He told Nicholas Murray Butler that

> there is very little white blood in the cahinet—that is it is very thin. Calles is Armenian and Indian; Leon almost wholly Indian and an amateur bullfighter; Saenz the Foreign Minister is Jew and Indian; Morones more white blood but not the better for it; Amaro, Secretary of War, a pure blooded Indian and very cruel.

Letter from James Rockwell Sheffield to Nicholas Murray Butler (Nov. 17, 1925) (on file with the Sterling Memorial Library, Yale University, James R. Sheffield Papers).

is now on trial before the world."[187] Plutarco Calles responded two days later, arguing that the United States had accepted the principle of Mexican sovereignty over subsoil resources (conveniently avoiding the question of American reservations) and announcing that his government was no more on trial before the world than that of the United States.

Things proceeded more quietly through the summer and fall (partly due to Sheffield's absence in the United States), but the Mexican enactment of the petroleum law in December 1925 brought the issue to the fore once again. The law more tightly circumscribed American property rights, leading to yet another protest from Kellogg regarding confiscation and what the secretary considered violations of international law. Mexican Foreign Minister Aaron Saenz replied a few days later, presenting something of a reply brief. He noted that several laws of the states of the United States regulated the property rights of foreigners, and even quoted John Marshall. The chief justice had noted that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty."[188] So it went for the next year and a half, with the State Department sending stiff notes to Mexico City demanding its adherence to "international law," and its Mexican counterpart replying just as firmly that American companies must respect Mexican sovereignty.

C. MORROW LOOKS FOR A SOLUTION

This impasse left both governments in a box. Kellogg well knew that, in the event of actual confiscation by Mexico, the American public would never countenance invasion. Repeatedly, Sheffield and the oilmen attempted to push the administration; repeatedly, Coolidge and Kellogg said no.

Besides, Kellogg and just about every other lawyer in and outside the State Department subscribed to the "Drago Doctrine," named after the former Argentinian foreign minister, which stated that the use of armed force to collect debts violated international law.[189] The Drago Doctrine had served as the bedrock of American policy since Elihu Root had enunciated

187. U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1870–1931, at 517–18 (Washington, DC, Gov't Printing Office 1870).

188. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

189. For background on America's long-standing espousal of the Drago Doctrine, see 2 PHILIP C. JESSUP, ELIHU ROOT 72–74 (reprint Archon Books 1964) (1938) (discussing the United States' advocacy of the principle at the second Hague Conference).

it two decades previously; indeed, one of Root's central goals at the Hague conferences had been to acquire European acceptance of the idea.[190] Use of military force, then, would have meant that America was destroying international law in order to save it.

Dwight Morrow, who was involved in Mexican matters in his capacity as a J.P. Morgan banker, took a leading role in the new conception.[191] Publicly, he argued that the use of military force to collect debts violated American policy and failed to secure the interests of investors: "Is there any one who thinks that if a man owes him money and cannot pay it, there is profit in going out and killing the debtor?"[192] Like all classicists, Morrow analogized between domestic and international legal institutions, acknowledging that "there is a sanction ultimately applicable to domestic contracts."[193] In a clear echo of Elihu Root, however, Morrow argued that "we do not in practice put much reliance upon the help of a sheriff in enforcing contracts."[194] Although "[t]here is no international sheriff," "there still remains our reliance . . . upon that law which is older than statute law—the acknowledged custom of mankind."[195] Universal custom would evolve to the point of persuading Mexico that American goals were in its own interest.

Privately, Morrow was more pointed. He had little use for the oilmen. He noted sarcastically that they had "decided to enter the international law business" with predictable result: "[T]hey are trying to carry on an international law university with unwilling pupils and untrained instructors."[196] He thus concluded that if international law forbade military enforcement of debts, then relying on it was a loser for the American position. Even more importantly, the Mexican legal team had scored a hit on the United States when it had pointed to various state laws restricting

190. *See* CALVIN DEARMOND DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE: AMERICAN DIPLOMACY AND INTERNATIONAL ORGANIZATION 1899–1914, at 134, 137–38 (1975).

191. Like most of the prominent lawyer-diplomats of the new era, Morrow's public statements echoed his private sentiments. It is thus very instructive to read his article, Dwight W. Morrow, *Who Buys Foreign Bonds?*, FOREIGN AFF., Jan. 1927, at 219, as a succinct statement of his approach.

192. *Id.* at 231. As a technical matter, Morrow was only talking about "'ordinary contract debts,'" but the implication of his argument was clear: Forswearing military force made sense in virtually every instance "where the sole issue is a pecuniary claim." *Id.* at 228, 231 (quoting Secretary of State Root in Buenos Aires in 1906).

193. *Id.* at 232.

194. *Id.*

195. *Id.*

196. Letter from Dwight W. Morrow to S. Parker Gilbert (Mar. 26, 1928) (on file with Amherst College, Dwight W. Morrow Papers).

subsoil rights. If any provision restricting property violated international law, what did that say about America's embrace of Prohibition?[197]

Morrow went personally to his college classmate, President Coolidge, and told him that not only would further instability jeopardize American investments in Mexico, but that the hard-line policy was internally inconsistent. Morrow presented Coolidge with a memorandum written by former State Department official J. Reuben Clark, Jr., an attorney characterized by Philander Knox as "'the most helpful man in international law in the United States.'"[198] Clark picked apart the legal assumptions of the oilmen and found them wanting, concluding that no confiscation had actually taken place.[199]

For its part, the Mexican government was seeing very few concrete results from its own hard-line course. It had borrowed heavily from the international bankers' consortium to keep up its debt service and, therefore, needed oil revenue badly. Through a series of back-channel attempts, Calles signaled to the administration that he was willing to compromise. He and his advisors still believed in national control of the Mexican economy, but Lamont and other bankers—one of whom was Dwight Morrow—worked quietly with Mexican officials to *educate* them about orthodox economics.

By September 1927, when Coolidge formally appointed Morrow to replace Sheffield, the bases for rapprochement had already developed; but formidable obstacles remained. Mexico City wanted a new relationship, but would not compromise on maintaining the principle of national sovereignty. Washington wanted the same thing, but would not compromise on maintaining adherence to the law. It was left to the resourceful new ambassador and his staff to reconcile these seeming contradictions.

D. CLOSING THE DEAL

Mexicans reacted skeptically to the appointment. "After Morrow come the Marines," intoned one major Mexico City newspaper.[200] The new envoy, however, surprised his hosts with a new attitude: Unlike Sheffield, Morrow genuinely liked Mexico and respected its culture. More

197. *See* ELLIS, *supra* note 94, at 50; NICOLSON, *supra* note 138, at 328–29.

198. ELLIS, *supra* note 94, at 50 (quoting Philander Knox).

199. *See* Letter from Dwight W. Morrow to Calvin Coolidge (Feb. 4, 1927) (on file with Amherst College, Dwight W. Morrow Papers).

200. Smith, *supra* note 22, at 244.

importantly, in keeping with his views on the Franco-German dispute, he strongly rejected the use of military force in international relations. Security did not mean military domination; it meant arriving at a solution that satisfied all parties, a prospect that Morrow firmly believed was possible.

But if Morrow wished to reach a *modus vivendi* with Calles, he also desired to protect American property rights. Indeed, Morrow insisted that he was not changing American policy.[201] While a J.P. Morgan partner, Morrow had invested considerable time in persuading the revolutionary government to pursue more orthodox economic policies.[202] He was sympathetic to Mexican social reform and devoted to American capitalism, and eagerly went about the business of reconciling the two.

Not surprisingly, he did it through the law, but not through the international legal authorities that the State Department had advocated without success for the better part of the decade. Instead, Morrow focused on Article XIV of the revolutionary Mexican Constitution, which forbade retroactive legislation. The ambassador's task, then, was to ensure that Mexico interpreted the petroleum law as retroactive, and thus unconstitutional, under Mexican law. Armed with this brief, he went to see Calles.[203]

As noted above, President Calles was anxious to solve the problem, but was firmly insistent on maintaining Mexican sovereignty. After the usual pleasantries, Calles asked Morrow whether he had any ideas about solving the diplomatic impasse.

"Diplomatic?" Morrow questioned. "I am a lawyer, Mr. President, and not a diplomatist. The problem suggests itself to me as a legal problem, not as either a political or a diplomatic problem."[204] Having piqued Calles's interest, Morrow then entered into a "learned disquisition [concerning] the rulings of the Mexican Supreme Court . . . [about] oil rights acquired before 1917."[205] Calles then inquired as to whether similar

201. *See* Letter from Dwight W. Morrow to J.P. Morgan (Aug. 31, 1927) (on file with Amherst College, Dwight W. Morrow Papers); Letter from Dwight W. Morrow to Thomas W. Lamont (Jan. 3, 1928) (on file with Amherst College, Dwight W. Morrow Papers).

202. *See* Smith, *supra* note 22, at 275.

203. The foregoing description relies heavily on the account in NICOLSON, *supra* note 138, at 329–31.

204. *Id.* at 330.

205. *Id.* Nicolson is alluding here to the Texas oil case, discussed above. Nicolson's emphasis on Morrow's legal background is confirmed by Morrow's own report of the discussion:

> I told [Calles] that I thought an almost necessary preliminary to any solution would be a clear decision of the Supreme Court [of Mexico] following the Texas Oil cases. I told him that I

Mexican Supreme Court rulings could be helpful. When Morrow replied that they would, the president stated that a ruling could be expected within two months.[206] Calles was better than his word: The decisions holding the petroleum law unconstitutional were handed down ten days later.

Morrow was not fazed by Calles's dominance of all branches of Mexican government, although he acknowledged it. His reasoning not only reflected a refreshing absence of racism, but also the hallmarks of late 19th-century legal evolutionary thought. While the executive's influence on the judiciary "may seem quite shocking to those trained in American jurisprudence and English jurisprudence," he conceded,

> it is not an essentially different situation than has existed in all early governments and is substantially the same situation that existed in England two or three hundred years ago. The King's Bench was originally more than the name of the court; it was the bench that belonged to the King, and administered justice for him.[207]

Despite appearances, the law was ultimately upheld. Legal evolution would take care of any seeming dissonance.

Calles then went to work drafting new legislation, which the pliant Mexican Congress duly enacted. The legislation reflected the new U.S.-Mexican arrangement. The Mexican government maintained the principle

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had been a lawyer, and it was not easy to get out of the habit of talking as a lawyer, and asked him to bear with me while I explained to him the Texas Oil Company case as I understood it.

See Letter from Dwight W. Morrow to Frank B. Kellogg (Nov. 8, 1927) (on file with Amherst College, Dwight W. Morrow Papers).

206. Nicolson's account is essentially confirmed in a memorandum written a few years later by George Rublee. *See* Report by George Rublee from Notes Taken at the Time (Nov. 1927) of the Account Given Him by Ambassador Morrow of a Conversation Between Ambassador Morrow and President Calles at Chapultepec Castle in the Late Autumn of 1927, About a Week Before the Supreme Court of Mexico Declared the Unconstitutionality of the Mexican Oil Law in Certain Respects (Jan. 13, 1934) (on file with Amherst College, Dwight W. Morrow Papers). Morrow recalled,

> I agreed [with Calles] that the oil companies had not behaved well, but I added that there was a principle for which they were contending which was right and which the United States Government was bound to support. This was the principle of stability of property, so that men might depend on getting the fruits of what they had sown. I told the President to think of his ranch and asked him how he would feel if, after he had planted his alfalfa crop and it had ripened, some one came along and took it without paying him for it. I then made a long and full explanation of the Texas amparo cases in which the Mexican Supreme Court had declared unconstitutional laws of equal authority to the laws now under consideration.

Id. Morrow's reference to "principle" went too far, as the ambassador himself acknowledged. The Mexican government in one important way could take the alfalfa harvest without paying for it through taxation. And as Saenz had pointed out, several states enacted legislation that took property through regulation. The important thing was that Morrow believed, in best Langdellian fashion, that he was acting on principle.

207. Letter from Dwight W. Morrow to Frank B. Kellogg (Nov. 8, 1927) (on file with Amherst College, Dwight W. Morrow Papers). It is interesting that while other historians have cited this letter, none have discussed this important section dealing with law.

that the subsoil was the property of the state, but explicitly withdrew its claim to limit enjoyment of oil rights prior to 1917 to fifty years. In other words, if the American oil producers had performed a positive act on the land, they had vested rights to the oil underneath. For its part, the United States, in exchange for the recognition that all rights obtained prior to 1917 be retained *in toto*, agreed that lands that had *not* received positive acts ("untagged lands") remain subject to national control, although owners or lessors would receive "preferential" consideration for thirty-year concessions. "In other words, the United States had maintained the principle of vested property rights; the Mexican Government had maintained the principle of the nationalization of the sub-soil. Both were content."[208]

At one level, Morrow's solution to the oil problem was merely diplomatic legerdemain. All the law talk simply represented a clever way for Mexico to retain its national pride while backing down in the face of Washington's insistence on supporting U.S. oil companies. This interpretation, however, does not ring true. Most importantly, the ambassador's legal solution did not satisfy the oil companies. For years, they continued to protest what they perceived as Morrow "giving away our national shirt."[209] But Morrow never had much sympathy for the oil companies: "[M]y main task," he told Vice President Charles G. Dawes, was not to satisfy the oil companies, but "to settle the controversy between the two Governments . . . ."[210]

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208. NICOLSON, *supra* note 138, at 332. The principle of "vested rights" was one of the oldest in American law, dating at least from Chancellor Kent's famous opinion in *Gardner v. Newburgh*, 2 Johns Ch. 162, 166–68 (N.Y. Ch. 1816) (voiding the village's diversion of the plaintiff's stream as "unjust, and contrary to the first principles of government" because the plaintiff had already begun to use stream water for his business).

209. *See* Smith, *supra* note 22, at 257–58. *See also* Letter from Walter Lippmann to Dwight W. Morrow (Apr. 30, 1928) (on file with Amherst College, Dwight W. Morrow Papers). Lippmann relayed

> a rather interesting discussion . . . with Chester Swain of the Standard Oil of New Jersey. I gathered from his discussion that you were all right on the more materialistic and selfish plane, having safe-guarded all the substantial interests of his company, but that you did not fully grasp, or at least had failed to live up to those very high and disinterested ideals which have always characterized the conduct of the oil companies. He shook his head very sadly about the untagged lands.

Id.

210. Letter from Dwight W. Morrow to Charles G. Dawes (Feb. 9, 1928) (on file with Amherst College, Dwight W. Morrow Papers). He explained to Dawes that "[t]he importance of having the oil companies come in and cooperate is largely because the [Mexican] Government needs badly increased revenue." *Id.* He was not prepared, however, to pressure Mexico City for further concessions once he had achieved his legal framework: "I sometimes think that the price of oil will be the only thing that will bring all the oil companies around." *Id.* Morrow clearly wanted his plan to benefit the oil companies and believed that it genuinely did so, despite the criticism from corporate headquarters and

Nor does it work to say that Morrow designed his legalisms to allow Calles to save face. Mexico did not need this interpretation for face-saving purposes. The final agreement allowed Mexico to maintain national control over those minerals that had not been exploited prior to 1917. This had been the Mexican goal all along. Any Mexican Supreme Court interpretation was somewhat superfluous.

It makes better sense, rather, to suggest that Morrow's solution was designed not to satisfy the oilmen or the Mexicans, but to satisfy *Morrow*—and, of course, Clark, Kellogg, Olds, and the lawyer-diplomats back in Washington. Olds emphasized repeatedly that the department sought a solution to U.S.-Mexican relations that rested firmly on legal precedents.[211] Clark authored an article the following year in which he went to great lengths to argue that the Mexican position insisting on subsoil rights found substantial authority in Coke, Blackstone, and Kent![212] Kellogg wanted the World Court to decide the issue, even if it did not endorse the oilmen's hard-line stance, because that would ensure that the settlement adhered to *legal* principles.[213] In other words, American policy aimed fundamentally

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some newspapers. *See, e.g.*, Letter from Dwight W. Morrow to George Rublee (Feb. 2, 1928) (on file with Amherst College, Dwight W. Morrow Papers); Letter from Dwight W. Morrow to Walter Lippmann (Apr. 3, 1928) (on file with Amherst College, Dwight W. Morrow Papers). But he was not attempting to please the oil companies as the central goal of the policy. *See* Letter from Dwight W. Morrow to Thomas W. Lamont (Jan. 3, 1928) (on file with Amherst College, Dwight W. Morrow Papers) ("I do not expect the New York people to be satisfied, but I am not going to let that disappoint me."). This appears to have been Clark's attitude as well:

> [Clark] told me that he thought Mr. Sloane was misleading the oil people in advising them that American stockholders in Mexican companies could get the Department to intervene on their behalf against Mexican legislation which applied to all property owners alike and did not discriminate against or destroy American owned property because of American ownership. He said that in fact Mr. Sloane is making himself very objectionable in trying to bully the Department into accepting his view, which, in Clark's opinion, was not justified by the previous action of the Department, or by international law.

Chandler P. Anderson, Diary (Aug. 17, 1927), *microfilmed on* Papers of Chandler P. Anderson, ser.1/vol.3 (Library of Congress Duplication Service). *See also* Memorandum of Mr. Morrow's Dinner with Mr. Pani and Mr. Negrete (Feb. 23, 1927) (on file with Amherst College, Dwight W. Morrow Papers) ("Mr. Morrow and Mr. Cochran explained to Mr. Pani that we were not interested primarily in the oil problem except as it affected the good relations between the two countries.").

211. *See* Chandler P. Anderson, Diary (Feb. 2, 1927; Apr. 26, 1927; May 28, 1927), *microfilmed on* Papers of Chandler P. Anderson, ser.1/vol.3 (Library of Congress Duplication Service).

212. J. Reuben Clark, Jr., *The Oil Settlement with Mexico*, FOREIGN AFF., July 1928, at 600, 605–06.

213. Chandler P. Anderson, Diary (Mar. 25, 1927), *microfilmed on* Papers of Chandler P. Anderson, ser.1/vol.3 (Library of Congress Duplication Service). Kellogg went on to acknowledge that such a resolution was impossible because the United States had not adhered to the World Court. The emphasis on "legal" (which is mine) indicates the vagueness of what it actually meant for any settlement to reflect legal principles. Anderson, who represented oil interests, noted that he objected to the secretary's preferred solution, but pointedly failed to say that Kellogg backed down—a point he often mentioned at other times.

at upholding legal principle,[214] while simultaneously demonstrating that Mexican law and Anglo-American law were really harmonious. Morrow's work demonstrated that, once again, a seeming conflict had disappeared.[215] Coolidge noted with satisfaction (and no small relief) that "this matter has been taken out of diplomatic channels. There is nothing further to be done about it through diplomatic channels. It has been transferred into judicial channels."[216]

The role of law in the Mexican oil dispute was more than mere superstructure. For the better part of a decade, American policy had deadlocked because of the inability to reconcile Mexican claims of sovereignty with American property rights conceptions. Perhaps the law might eventually have proved unnecessary. Perhaps the Americans would have eventually engaged in a straightforward trade of raw national interest. Perhaps they would have recognized that overwhelming American financial power could cow the Mexicans into capitulation. The fact is that they did not. They needed to uphold the image of a law-bound world, and Morrow and Clark's solution did so beautifully: It refrained from using military force, it followed Mexican precedent, it protected the venerable Anglo-American principle of vested rights, and it satisfied Mexico. All was complete, and Coolidge's "system of law" remained intact.

VII. "TUMULTUOUS CHANGES": HENRY STIMSON AND THE COLLAPSE OF LEGALISM

Classicism faced its severest crisis shortly after the inauguration of Herbert Hoover in 1929. As with domestic policy, the assumptions and beliefs of the late 19th century could no longer be sustained under the pressure of the Great Depression. Domestically, this message arrived from Wall Street; internationally, it arrived from the Far East, where the

214. *See, e.g.*, Chandler P. Anderson, Diary (Mar. 7, 1927), *microfilmed on* Papers of Chandler P. Anderson, ser.1/vol.3 (Library of Congress Duplication Service) (noting, with respect to a conversation with Clark, that "[o]ne point we both thought was of great importance was that these issues [Mexican oil rights] present a broad question of principle").

215. The oilmen had an instrumental reason for adhering to "principle." They argued that if the United States compromised on subsoil rights in Mexico, then this would open the door for other Latin American countries abridging their rights. Morrow and the other lawyers, however, generally dismissed this notion. *See, e.g.*, Letter from Dwight W. Morrow to S. Parker Gilbert (Mar. 26, 1928) (on file with Amherst College, Dwight W. Morrow Papers) ("Unfortunately, however, [the oil companies] take the position that they must make an example of Mexico in order to make their properties safe in other countries."). *See also* Letter from Dwight W. Morrow to Harlan F. Stone (Feb. 7, 1928) (on file with Amherst College, Dwight W. Morrow Papers).

216. Calvin Coolidge, Press Briefing (Jan. 10, 1928), *in* THE TALKATIVE PRESIDENT: THE OFF-THE-RECORD PRESS CONFERENCES OF CALVIN COOLIDGE, *supra* note 27, at 250.

"Manchurian Crisis" confronted Stimson with overwhelming problems and no coherent responses.

Stuck in the classical paradigm, Stimson was unable to find a compelling new way of thinking. It is to his credit, however, that he recognized the problems before virtually any other U.S. policymaker. Unable to formulate a response, he at least realized that American foreign policy would have to take a new approach.

A. FIRST (MIS)STEPS IN MANCHURIA: MAINTAINING THE LEGALIST TRADITION

Stimson's first major diplomatic foray foreshadowed the dominant position that the Far East would play in his tenure at the State Department. The secretary was acting on the background laid by his lawyer-predecessors. Charles Evans Hughes created the Washington System for Asia and the Pacific based on classical legal principles, and the Kellogg-Briand Pact conceivably applied everywhere. But if Stimson inherited a framework, he also inherited the gaps and ambiguities in that framework. By the end of the decade, when those flaws became apparent, it fell to Stimson to maintain it.

The late 1920s saw what appeared to be a resurgence in Chinese military strength. The Chinese Nationalists under Chiang Kai-shek launched the "Northern Expedition" and conquered Peking.[217] This, however, hardly meant that the country was unified: Warlords dominated vast swathes of the country, and the Communists continued their drive for revolution. Chiang thus looked for a way to crack down on warlordism while attempting to unify the country under his banner. He found a suitable target in Manchuria.

Manchuria was agriculturally rich, filled with important minerals, and relatively thinly populated, making it comparatively easy to conquer and hold. It was, as Robert Ferrell well put it, "a place worth fighting for,"[218] and for most of the 20th century, the great powers had happily obliged. Japan held the preeminent position, but Russia, and later the Soviet Union, exerted considerable strength in the region, largely through its management of the Chinese Eastern Railway. The railway thus became a highly tempting target for Chiang. And it seemed to make sense both militarily and politically. First, confronting the Soviets would rally support in his

217. Chiang, however, maintained his capital at Nanking, which was closer to his domestic power base.

218. FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION, *supra* note 9, at 45.

own Kuomintang Party. Second, of all the powers, Moscow seemed the weakest, making the chances of success greater. Finally, the Soviet Union supported the warlord Feng Yu-hsiang, who commenced open rebellion against Nanking in June of 1929.

Chiang made his move the next month, demanding the closure of Soviet commercial offices in Manchuria and the expulsion of Russian officers of the railway. Moscow retaliated by giving Nanking three days to cancel the orders. Chiang refused to yield, and diplomatic relations were soon severed. The Soviets then mobilized troops along the Manchurian border, threatening war.

Did the United States have interests at stake in this confrontation? The facts on the ground said no. American commercial and financial penetration of Manchuria was negligible. Sino-Soviet conflict could not threaten the balance of power in East Asia, since Japan would prevent any power from threatening its dominance in Manchuria. If Chiang won his conflict, no one in Washington would shed tears over a retreat by the Soviet Union; conversely, no one believed that Moscow was strong enough to make any serious inroads into China. And since the United States held extraterritorial privileges in Chinese ports, it would not mourn the Nationalists getting their hands slapped. In any event, the United States did not even recognize the Soviet government, making it even more difficult to mediate a conflict.

Stimson, however, believed that the United States had a vital interest in maintaining and strengthening the treaty system constructed by his predecessors, and saw the Sino-Soviet confrontation as threatening that system, particularly the Kellogg-Briand Pact. The treaty was supposed to be formally declared on July 24, 1929, and it would surely be ironic if war between two signatories broke out before that date with no response from the other signatories.[219] On July 18, Stimson conferred with representatives of Britain, France, Japan, and China, and admonished them about the "grave responsibility imposed by the present situation" on all signatory and adhering powers to the pact.[220]

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219. *See* William Castle, Diary (July 18, 1929) (transcribed by the author from materials on file with the Library of Congress) ("I told him that I thought nothing would come of it but he felt that we, largely because we were responsible for the Kellogg Pact, ought to do something, and he did not know what to do.").

220. Telegram from the Secretary of State (Stimson) to the Minister in China (MacMurray) (July 18, 1929), *in* U.S. DEP'T OF STATE, PUB. NO. 2033, 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1929, at 210 (1949). The United States did not recognize the Soviet Union at the time, and thus, Stimson could not confer with any Soviet representative.

The next day, Stimson announced his proposed solution: a "Commission of Conciliation" to adjudicate the dispute. The plan reflected the quintessential classical legal mode of thought in two respects. First, it recommended an unenforced arbitration that could adequately harmonize the interests of the parties.[221] Second, it ignored the powerful political interests of the relevant parties. Little wonder, then, that Stimson's demarche was greeted with, at best, polite demurrals and, at worst, derision. The Japanese ambassador to Washington, Katsuji Debuchi, told Stimson that Tokyo simply would not tolerate international interference in Manchuria, even for something as relatively harmless as conciliation. Japan regarded its economic primacy as one of its most vital interests, where it could develop its interests without Western obstruction. Britain and France were hardly inclined to challenge Japan, where they had few concrete interests. London did not even respond to Stimson's call.

Yet the secretary pushed ahead, especially after the Soviets took military action against Chinese-controlled areas in mid-November. This action was largely symbolic, as neither side reported casualties. Some Chinese soldiers actually quit to work for the invading Soviets as unskilled laborers because they could make more money than fighting for Chiang. In Washington, though, legal principle was more important: The Russian advance, Castle complained, was "making the Kellogg Pact look like 30 cents."[222] Stimson decided to send a formal admonition to Nanking and Moscow, warning them that "the respect with which China and Russia will hereafter be held in the good opinion of the world will necessarily in great measure depend upon the way in which they carry out these most sacred promises [of the Kellogg Pact]."[223]

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221. This was generally Stimson's view of how the machinery of conciliation should work under the Kellogg-Briand Pact: It would be an international version of the late 19th-century Sunshine Commission, which would "make clearer public opinion on any disputed or blind point." Henry Lewis Stimson, Diary (Nov. 20, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.167, at 1 (Yale University Library Photographic Services).

222. William Castle, Diary (Nov. 25, 1929) (transcribed by the author from materials on file with the Library of Congress). This statement suggests that in 1929, Castle was beginning to move toward the secretary's position. Several years later, Castle was to write, "There seems little doubt that this . . . move as custodian of the Kellogg Pact was unwise. . . . [It] 'did not enhance the value of the Pact, but tended to make it a little absurd.'" William R. Castle, American Foreign Relations 203 (unpublished manuscript), *quoted in* FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION, *supra* note 9, at 65. This assessment seems generally accurate, but at the time, Castle seemed more to temporize.

223. Telegram from the Secretary of State (Stimson) to the Chargé in Japan (Neville) (Nov. 26, 1929), *in* 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1929, *supra* note 220, at 350–52. Castle noted that the insistence on intervention was Stimson's, although it should also be observed that the two men's personal relationship was strained: Stimson never accorded Castle the deference that the latter thought he deserved.

In its veiled threat regarding public opinion, this latest missive echoed classical legal culture's assumptions about how legal institutions acquired force. As for its effect, the message carried all the force of Stimson's previous two messages—which is to say, nothing. China and Russia ignored it; the other powers looked the other way.

Undaunted, Stimson tried yet again, his fourth effort in less than five months. This final attempt constituted little more than a great bluff, cabling the various powers and announcing *their* approval of his previous admonition—even though no other country had done such a thing. The statement invoked the Kellogg-Briand Pact and expressed the hope that the other powers themselves communicate similar statements to China and Russia. This attempt appeared to gain some traction: France, Italy, and Britain all adopted the text of the U.S. admonition. Even Japan's ambassador expressed some friendly sentiments toward the effort, although his government remained silent.

One has to wonder, however, whether this success had any concrete meaning. Even with similar messages from the other powers, Stimson's messages were fairly ineffectual. The Soviets and the Chinese had been negotiating for some time to resolve the conflict and reached a final agreement on December 3. The agreement mentioned nothing about the Kellogg-Briand Pact. In other words, Nanking and Moscow settled the conflict the old fashioned way and seemed to see Washington's procession of notes as external noise.

Stimson saw things differently.[224] He told the Japanese ambassador that he did not wish to challenge Tokyo in Manchuria, but was intent on preserving the strength and force of the Kellogg-Briand Pact.[225] As far as the secretary was concerned, his plan had worked. He told a friend shortly thereafter that the pressure of his diplomatic actions, together with actions of the other powers, influenced Russia in not pushing further into

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> Nelson Johnson and Cotton and Hornbeck and I also discussed at some length the Chinese-Russian situation. The Secretary is eager to be the Great Peacemaker and telegraphed Japan, France, Great Britain and Italy the text of a statement he wants to issue reminding the two nations again of their obligations under the Kellogg Pact etc. and suggesting that the other nations issue simultaneously similar statement [sic]. . . . [P]robably the Secretary's latest demarche will be a flop.

William Castle, Diary (Nov. 27, 1929) (transcribed by the author from materials on file with the Library of Congress).

224. At least at the time. His memoirs, written with the benefit of hindsight—and the second World War—obliquely confessed the emptiness of his efforts in 1929. *See* STIMSON & BUNDY, *supra* note 114, at 188–89.

225. Memorandum by Henry Lewis Stimson of a conversation with Katsuji Debuchi (Dec. 2, 1929) (on file with author).

Manchuria.[226] Publicly, Stimson was even stronger, although clearly operating along the same lines. He declared to the press that

> [t]he efficacy of the Pact of Paris depends upon the sincerity of the Governments which are party to it. . . . Its sole sanction lies in the power of public opinion of the countries, constituting substantially the entire civilized world, whose Governments have joined in the covenant. If the recent events in Manchuria are allowed to pass without notice or protest by any of these governments, the intelligent strength of the public opinion of the world in support of peace cannot but be impaired.[227]

By December 1929, Stimson seemed to believe that public opinion had force. The next three years were to severely test this belief.

B. COLLAPSING PARADIGMS: STIMSON AND THE FAR EASTERN CRISIS

On the night of September 18, 1931, soldiers of Japan's Kwantung Army blew up portions of the South Manchurian Railway, a few miles north of the city of Mukden. They thus closed a chapter in Far Eastern politics and set the stage for the collapse of the interwar order. The Manchurian Crisis dominated Stimson's diplomacy until the end of his tenure at the State Department. In fact, however, the phrase is somewhat of a misnomer, for it extended beyond Manchuria and reflected not an acute crisis, but a fundamental instability in the Washington System that Hughes had constructed a decade earlier.

At Washington, Japan had signed the Nine-Power Treaty and thereby agreed to protect Chinese territorial and administrative integrity. The Washington System reflected the classical legal ideology and assumed that nations could advance their national interests within a framework of economic cooperation mediated by international law while ignoring the regional power balance. Such a view, however, coexisted uneasily with Tokyo's belief that Japanese dominance in Manchuria constituted the nation's vital economic, social, and political interests. Japan suffered from an absence of raw materials and overpopulation, both of which would be alleviated by dominance in Manchuria; moreover, much of the Japanese

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226. Letter from Henry Lewis Stimson to Charles P. Howland (Nov. 3, 1930) (on file with the Sterling Memorial Library, Yale University, Henry L. Stimson Papers). *See also* Henry Lewis Stimson, Diary (Oct. 21, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.86, at 1 (Yale University Library Photographic Services) (noting the "signal service which this country had rendered to the Kellogg-Briand Pact by what we did" in regard to the Russian-Chinese crisis in Manchuria).

227. Press Release, U.S. Department of State, Russian-Chinese Situation (Dec. 7, 1929) (statement by Henry L. Stimson on Dec. 2).

ruling elite believed that the province's proximity to Japan's home islands made its pacification strategically critical.

Faced with a choice between the Washington System and traditional realpolitik (which, in this case, would entail colonial conquest or a dominant sphere of influence), Japan temporized throughout most of the 1920s. Civilian governments adhered to the Washington treaties and based their policies on cooperation with Great Britain and the United States. Lurking underneath the political surface, however, was a military establishment hostile to Democratic control, deeply suspicious of America, and skeptical that the civilians' policy would accomplish anything for Japan. The military's long-term goal was a new restoration of the emperor—code word for the overthrow of the nation's fledgling democracy and the creation of an authoritarian regime under the control of the aristocratic military caste.

The Great Depression severely undermined civilian policy and authority. The civilian foreign minister, Baron Shidehara, argued that his cooperative policy would yield important economic benefits, and through the 1920s, he retained power by force of this argument, as U.S. and British capital poured into Japan. The global financial crisis, however, laid waste to the Japanese economy. Meanwhile, in Manchuria, which many Japanese considered to be their economic lifeline, the pressure of Chinese nationalism, continuing civil war, and the growing strength of the Soviet Union created what seemed to be endless chaos.

Junior army officers in Manchuria, contemptuous of what they saw as civilian weakness, resolved to take matters into their own hands. With the tacit support of their military superiors in Tokyo, they planned and carried out the explosion at Mukden and used it as an excuse to take direct military action. Within a matter of hours, all of Mukden fell under Japanese control. From there, the Japanese army moved with speed and precision, overwhelming local Chinese troops under the control of the local warlord and replacing the informal Japanese sphere of influence with direct military control. The civilian ministry in Tokyo remained powerless to stop the army's fait accompli.

The Manchurian invasion implicitly raised the fundamental question of American interests in East Asia. What were they, anyway? Why was it important to maintain the status quo and avoid Japanese military dominance there? Here, realists traditionally took a different tack from European policy because they doubted any one country's ability to dominate the Asian continent in the same way that Germany threatened

Europe.[228] Europe was also far more significant as a trading partner or site for investment than Asia.[229] Little wonder, then, that Theodore Roosevelt told William Howard Taft that "our interests in Manchuria are really unimportant," and counseled restraint.[230] Alternatively, a realist could argue for confrontation with Japan. He or she could contend that (1) Japan actually would be able to dominate the Asian continent, destabilizing the global balance of power and threatening the United States; or (2) American economic interests in Asia were as important as those in Europe.[231] Thus, prevention of Japanese aggression would be necessary.

Stimson, however, approached the question quite differently. He immediately placed the Japanese invasion within the legalist context, noting that the Kwantung Army's actions constituted violations of both the Kellogg-Briand Pact and Nine-Power Treaty. President Hoover immediately decided that the United States would not undertake any coercive measures (such as military action or economic sanctions) to enforce the treaties. The crisis erupted just as the Great Depression landed its most crushing blows to the global and American economy. In this

228. This also extended to the postwar period, when realists such as Kennan and Hans Morgenthau were early critics of intervention in Vietnam. *See* JONATHAN HASLAM, NO VIRTUE LIKE NECESSITY: REALIST THOUGHT IN INTERNATIONAL RELATIONS SINCE MACHIAVELLI 214–15 (2002); MICHAEL JOSEPH SMITH, REALIST THOUGHT FROM WEBER TO KISSINGER 127–28, 157–58, 185–88 (1986).

229. For an excellent quantitative demonstration of Europe's dwarfing Asia's importance in terms of the American economy, see BUREAU OF FOREIGN AND DOMESTIC COMMERCE, U.S. DEP'T OF COMMERCE, ECON. SERIES NO. 23, THE UNITED STATES IN THE WORLD ECONOMY: THE INTERNATIONAL TRANSACTIONS OF THE UNITED STATES DURING THE INTERWAR PERIOD (1943) [hereinafter U.S. DEP'T COMMERCE].

230. Letter from Theodore Roosevelt to William Howard Taft (Dec. 22, 1910), *in* 7 THE LETTERS OF THEODORE ROOSEVELT 189–92 (Elting E. Morison & John M. Blum eds., 1951–54) [hereinafter ROOSEVELT LETTERS]. Roosevelt repeated this advice throughout 1910, as a warning to Taft's and Knox's aggressive legalistic policy in Manchuria. *See* Letter from Theodore Roosevelt to William Howard Taft (Dec. 8, 1910), *in* 7 ROOSEVELT LETTERS, *supra*, at 180–81. Roosevelt also emphasized this point in his advice to Knox. *See* Letter from Philander Knox to William Howard Taft (Dec. 19, 1910) (on file with the Library of Congress, Philander Knox Papers). In my previous work, I argued that Taft's and Knox's aggressive stance in Manchuria arose in part out of classical legalism. *See* Zasloff, *supra* note 6, at 314–21.

231. This latter point would have been very difficult to make, as the statistics on American trade and investment demonstrated the greater importance of Europe. *See* U.S. DEP'T COMMERCE, *supra* note 229. *See also* WARREN I. COHEN, THE CHINESE CONNECTION: ROGER S. GREENE, THOMAS W. LAMONT, GEORGE E. SOKOLSKY AND AMERICAN-EAST ASIAN RELATIONS 288–90 (1978) (noting that American business never developed an important stake in China, and "the very fluidity of Chinese affairs left China unattractive to . . . men who prized stability—a safe investment"). Nevertheless, the dreams of the vast "China market" were prevalent in American policy discourse. *See generally* THOMAS J. MCCORMICK, CHINA MARKET: AMERICA'S QUEST FOR INFORMAL EMPIRE 1893–1901 (1967); CARL P. PARRINI, HEIR TO EMPIRE: UNITED STATES ECONOMIC DIPLOMACY, 1916–1923, at 62, 77, 203, 246 (1969).

political and economic climate, the president reasoned, the public would simply not stand for American blood and treasure being sacrificed for (as he put it) "scraps of paper." Stimson, however, noted privately that

> [t]he question of the "scraps of paper" is a pretty crucial one. We have nothing but "scraps of paper." This fight has come on in the worst part of the world for peace treaties. The peace treaties of Modern Europe made out by the Western nationsof [sic] the world no more fit the three great races of Russia, Japan, and China, who are meeting in Manchuria, than, as I put it to the Cabinet, a stovepipe hat would fit an African savage. Nevertheless they are parties to these treaties and the whole world looks on to see whether the treaties are good for anything or not . . . .[232]

In other words, the integrity of the treaty system itself constituted a sufficient American vital interest, trumping even Stimson's crude racial categories. The United States should strive not to maintain a balance of power or expand economically, but to preserve the "system of law."[233] Stimson rejected the comparison (made by a *London Times* correspondent) between Japan's action in Manchuria and Roosevelt's seizure of the Panama Canal, for "in those days there was no Kellogg Treaty, no Nine Power Treaty, and no Article I of the League of Nations . . . ."[234] The old rules of the game no longer applied; law was an interest for its own sake.

Stimson, however, never clarified—even to himself—what means he advocated as a way to defend the rule of international law. Subsequent accounts, some by Stimson himself, suggest that the secretary was ready for an economic boycott or military confrontation. The record at the time, however, reveals doubt and confusion. At a critical cabinet meeting in November of 1931, Stimson was faced directly with a version of the realist argument, courtesy of War Secretary Patrick Hurley.[235] Hurley argued that Japan was committed to seizing Manchuria and, therefore, any American attempt to stop Tokyo through words would result only in a "rebuff and a loss of prestige."[236] Stimson's response was revealing in its assumptions and its tensions:

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232. Henry Lewis Stimson, Diary (Oct. 9, 1931), *microfilmed on* Henry L. Stimson Diaries, r.3/vol.18/p.112, at 2 (Yale University Library Photographic Services).

233. CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC 317, 330–31 (1926).

234. Henry Lewis Stimson, Diary (Mar. 3, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.21/p.32, at 3 (Yale University Library Photographic Services).

235. Hurley later became a controversial figure in American foreign policy, mostly due to his efforts to unify China and assist Chiang Kai-shek. *See generally* RUSSELL D. BUHITE, PATRICK J. HURLEY AND AMERICAN FOREIGN POLICY (1973) (describing Hurley's career).

236. Henry Lewis Stimson, Diary (Nov. 13, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.36, at 1 (Yale University Library Photographic Services).

> I pointed out how the only alternative when this thing came up was either to lie down and destroy all the peace treaties, or else to do the best we could with the force of public opinion and that alone. I pointed out the policy of imposing sanctions of force, which Hurley suggested as the only thing possible, had been rejected by America in its rejection of the League of Nations; and America had deliberately chosen to rest solely upon treaties with the sanction of public opinion alone; that this was not the choice of this Administration, but a deliberate choice of the country long before we came in . . . .[237]

The only alternatives, Stimson suggested, were to abandon the country's policy or keep muddling through.[238]

Stimson's alternatives, however, raised more questions than they answered, not the least for the secretary himself. Stimson knew very well that the 1920 election, which had *rejected* the League, had actually done no such thing; indeed, Stimson himself had signed the famous public letter in September of that year proclaiming that voting for Harding was the best way to secure internationalism.[239] In any event, did he truly mean to suggest that American foreign policy should be controlled by an ambiguous election twelve years earlier? Stimson noted virtually simultaneously that public opinion was growing angry with Japan's behavior. Surely something had changed.[240]

Stimson simply did not know what to do. He knew that (1) Japan was directly violating the treaty system through violent means; (2) defending those treaties was in the vital national interest; and (3) the entire idea of the treaty system was that forcible measures, such as military confrontation or even economic boycotts, ran directly counter to the legally bound global vision that underlay the treaties.[241] These three points, however, could not

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237. *Id.* at 1–2.

238. *Id.*

239. *See* STIMSON & BUNDY, *supra* note 114, at 105–06. For excellent arguments that the election of 1920 did not represent a referendum on the League, see AMBROSIUS, *supra* note 13, at 287–89, COSTIGLIOLA, *supra* note 9, at 30–33, and 2 JESSUP, *supra* note 189, at 413–14. Stimson's good friend, Walter Lippmann, also rejected the notion that the 1920 election was a referendum on the League. *See* WALTER LIPPMANN, PUBLIC OPINION 195–96 (1922).

240. *See* Henry Lewis Stimson, Diary (Nov. 19, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.75, at 4 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Dec. 3, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.131, at 1 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Dec. 7, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.135, at 2 (Yale University Library Photographic Services). It is not necessarily true, of course, that Stimson was correct in his assessment of American public opinion. The key point, however, is that he surely believed that U.S. opinion was becoming aroused.

241. Stimson appeared to accept the idea that an economic boycott of Japan would lead to war. He quoted approvingly Castle's argument that it would lead to war because "Japan would at once

all be true. Faced with this cognitive dissonance, Stimson did what most people would do: play for time.

Time, however, did not figure to solve things. And little wonder. Classical legal thought's ideological power lay in its promise of replacing *force* with *law*—to remove "compulsion" (as President Coolidge put it) from both domestic and international life. But what would happen if some entity (in this case, a state) decided that its interests or values were different from those embodied in that law? Classicism did not provide the answer.

C. THE STIMSON DOCTRINE: NONRECOGNITION AS A SOLUTION

Stimson could bide his time for much of the autumn. He recognized that the army had acted in defiance of the civilian authorities in Tokyo and hoped that Shidehara could reassert control.[242] Such hopes, though, collapsed along with Shidehara's government in early December.

Finally, on January 7, 1932, the United States promulgated what became known as the "Stimson Doctrine" of nonrecognition.[243] In notes to China and Japan, Washington informed them that it refused to

> admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the open-door policy; and that it does not intend to

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blockade China and that that would very likely bring about a clash with us." Henry Lewis Stimson, Diary (Dec. 6, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.131, at 2 (Yale University Library Photographic Services). *See also* Henry Lewis Stimson, Diary (Jan. 25, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.90, at 2 (Yale University Library Photographic Services) ("A blockade would play hob with both our interests and the much larger ones of Britain."); Henry Lewis Stimson, Diary (Jan. 26, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.100, at 2 (Yale University Library Photographic Services) (noting "how important our influence was in China, and how important it was not to forfeit that interest").

242. *See, e.g.*, Henry Lewis Stimson, Diary (Sept. 22, 1931), *microfilmed on* Henry L. Stimson Diaries, r.3/vol.18/p.53 (Yale University Library Photographic Services).

243. Historians have engaged in a prolonged debate over the origins of the nonrecognition idea. The first mention of it in the historical record appears to have come from President Hoover. *See* Henry Lewis Stimson, Diary (Nov. 9, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.23–24, at 1–2 (Yale University Library Photographic Services). Hoover, however, never connected nonrecognition to the violation of treaties. And the president later seemed to give his secretary of state a great deal of credit for it. *See* Henry Lewis Stimson, Diary (Jan. 26, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.101, at 3 (Yale University Library Photographic Services). It seems fair to conclude that both men adopted the idea independently and latched onto it for a variety of reasons, with Hoover seeing its political value and Stimson latching onto it as an ideological mooring.

> recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris . . . .[244]

This announcement put into sharp relief an implicit assumption of American policy throughout the 1920s: The very maintenance of legal arrangements themselves constituted a vital U.S. interest. Indeed, the treaties were necessary because they advanced the interests of all nations. American interests at times did not even figure prominently in the equation. Stimson later explained to the Japanese ambassador that his opposition to Japanese actions in Manchuria stemmed not from hostility, but from "a desire to preserve and maintain certain peace treaties which I regarded as vital and important not only to the world at large but also to Japan."[245]

Nonrecognition stood as the central initiative of the Hoover administration's Far Eastern policy and led to extended scholarly comment. The real question with nonrecognition, however, lies in why policymakers thought it so important. Seventeen years earlier, Japan had made similarly aggressive moves in China during World War I. In keeping with its obligations under its alliance with Britain, Tokyo seized German possessions on the Shantung Peninsula; but then, it presented Peking with the "Twenty-One Demands," which essentially gave Japan dominance over Shantung, Manchuria, and inner Mongolia, as well as bring much of the mainland into Japan's economic orbit. Tokyo correctly sensed that the Western powers, tied down by the carnage in Europe, could not intervene, and it was right. U.S. Secretary of State William Jennings Bryan, backed by President Wilson, simply sent a note to the Japanese ambassador refusing to recognize any gains Japan made from the Twenty-One Demands and moved onto other matters. Future adjustment would have to await the outcome of the war.[246]

Stimson, however, saw nonrecognition as a powerful policy in and of itself. He rejected the notion advanced by Far Eastern division chief Stanley Hornbeck by arguing that "this remedy didn't amount to anything because we had tried it in 1915. But there the situation was wholly

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244. HENRY L. STIMSON, THE FAR EASTERN CRISIS: RECOLLECTIONS AND OBSERVATIONS 96–97 (2d ed. 1936). *See also* FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION, *supra* note 9, at 151–70 (reprinting the note).

245. Henry Lewis Stimson, Diary (Feb. 27, 1933), *microfilmed on* Henry L. Stimson Diaries (Yale University Library Photographic Services).

246. So peripheral were the Twenty-One Demands to Wilsonian diplomacy at the time of their issuance that the two leading accounts of Wilson's foreign policy fail to mention them at all. *See generally* KNOCK, *supra* note 66; N. GORDON LEVIN, WOODROW WILSON AND WORLD POLITICS: AMERICA'S RESPONSE TO WAR AND REVOLUTION (1968).

different as I pointed out. Under present circumstances, particularly if the disavowal is made by all of the countries, it ought to have a very potent effect."[247] What would this "very potent effect" be? The secretary did not elaborate, but his belief in the potency of *worldwide* nonrecognition reflected the new legal theory that Root had enunciated thirteen years earlier, about which he consulted closely with Stimson. Root argued that international law needed to move from a "civil justice" analogy to a "criminal justice" model. In the event of a crisis threatening war, he contended, every country should have a right to call for an international conference or arbitration: "When you have got this principle accepted . . . by the whole civilized world, you will for the first time have a Community of Nations." Root argued that the "practical results . . . will naturally develop" because refusing the demand would put the offending nation "clearly . . . in the wrong in the eyes of the entire world."[248] The key sanction, then, was global opprobrium: If a nation was clearly seen in the world's eyes to have broken international law, then the nation would change its offensive policy.[249] The League of Nations adopted this principle in Article XI of the League Covenant, which declared that war or the threat of war was of concern to every member of the League.

The Stimson Doctrine did not involve the calling of a conference or mandatory arbitration, but it used the notion of global opprobrium as a sanction. The situation was different in 1915, Stimson suggested, because the new principle had become effective; as a result, it would enable worldwide condemnation to *naturally develop* the practical results.

D. WAR IN SHANGHAI AND MORE DOCTRINE

Events in China quickly tore the Stimson Doctrine to shreds. Less than a month after Stimson announced the nonrecognition policy, the Japanese army broke out of its extraterritorial district in Shanghai[250] and

247. Henry Lewis Stimson, Diary (Nov. 9, 1931), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.19/p.24, at 2 (Yale University Library Photographic Services).

248. Zasloff, *supra* note 6, at 340–41 (quoting a 1918 letter from Elihu Root to Edward M. House).

249. *See generally* Elihu Root, The Sanction of International Law, Address at the Second Annual Meeting of the American Society of International Law (Apr. 24, 1908), *in* ELIHU ROOT, ADDRESSES ON INTERNATIONAL SUBJECTS 25 (reprint 1969) (Robert Bacon & James Brown Scott eds., 1916) (refusing to specify more concrete or coercive sanctions).

250. From the 19th century through the second World War, the great powers maintained areas within China where their nationals were not subject to Chinese legal jurisdiction and where their own domestic laws applied. Unsurprisingly, these autonomous areas were anathema to Chinese Nationalists. For an excellent history of U.S. extraterritorial jurisdiction in China that also reviews the general history

assaulted Chinese positions throughout the city. In retrospect, the violence appears to have been a mistake: The Japanese army thought that it actually was being fired upon, and authorities in Tokyo quickly started drawing up plans to escape from the crisis and Shanghai. At the time, however, the world did not understand these dynamics and probably could not have, given the opacity of Japanese politics. Instead, it witnessed a massacre of Chinese civilians brought about by Japanese air superiority. "'For terrifying ghastliness,' wrote one correspondent, 'the aerial bombardment of [a Shanghai suburb] is . . . appalling beyond appreciation except by those who had seen the same in the European war . . . .'"[251] Pessimists could easily point to the Japanese actions in Shanghai as the actions of a rapacious aggressor bent on conquering all of China.

Stimson responded by writing a letter to Borah detailing the fundamentals of U.S. policy. His letter is instructive not only for its view of the relationship of international law to international politics, but also because it demonstrates how legalism could interpret (and misinterpret) historical events to conform to preexisting assumptions. It also showed how, under pressure from power politics, these assumptions quickly imploded in on each other.[252]

The secretary began by briefly recounting the history of the Open Door's and the Nine-Power Treaty's effort to codify Hay's original principles. He then set forth the fundamental tenet of classical legal thinking: The nations signed the treaty not because they were coerced into doing so, or even because they received other benefits (what modern theorists might call "side payments"), but because only under the "protection of such an agreement, could the fullest interests not only of China but of all nations which have intercourse with her best be served."[253] Interest harmony was preserved through international contract.

Furthermore, Stimson argued, the Nine-Power Treaty "received a powerful reinforcement" from the Kellogg-Briand Pact. Together,

> [t]hese two treaties represent independent but harmonious steps taken for the purpose of aligning the conscience and public opinion of the world in favor of a system of orderly development by the law of nations including

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of foreign presence there, see ELAINE P. SCULLY, BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA, 1844–1942 (2001).

251. THORNE, *supra* note 115, at 209 (omissions in original) (quoting the Feb. 1932 *North China Herald*).

252. The text of Stimson's letter to Borah can be found in STIMSON & BUNDY, *supra* note 114, at 249–54.

253. *Id.* at 251.

> the settlement of all controversies by methods of justice and peace instead of by arbitrary force.[254]

Properly constructed, legal instruments could "align" the goals of disparate governments and would be enforced by "public opinion." This opinion would create a world governed by *law* and not by *force*.

But then Stimson turned 180 degrees, making the veiled threat for which his letter is now famous. He noted that the Five-Power Treaty on naval disarmament was the true basis of the Washington Conference and argued that the United States had agreed to limit its navy only because Japan had promised to honor the Open Door in China. "One cannot discuss the possibility of modifying or abrogating those provisions of the Nine-Power Treaty," he stated, "without considering at the same time the other promises upon which they were really dependent."[255] In other words, Stimson suggested that if Japan broke its promises under the Nine-Power Treaty, the United States might reciprocate by using its greater economic power and building more battleships than the Five-Power Treaty allowed, as well as fortifying its positions in Guam and in the Philippines.

Such an oblique warning, however, undermined the entire promise of a legally bound world. If the treaty system remained stable only because nations would build armaments and go to war to defend it, then how did it constitute a redefinition of world politics? To be sure, going to war to defend treaties might be different from doing so in order to defend selfish national interests, but it certainly undermined the antimony between law and force. Little wonder, then, that Stimson qualified the traditional law/force distinction in a crucial way: It was not *all* force that law made obsolescent, but only *arbitrary* force.

And little wonder, because at the time, the secretary was not very serious about his threat. Neither President Hoover nor Congress was willing to embark on new naval building or fortifications; a few weeks after Stimson wrote the letter, the president had Under Secretary Castle deliver a speech declaring that the United States would always follow peaceful methods. But Stimson agreed with this policy: America's failure to act should not simply be laid at the president's doorstep, as Stimson's associates were later anxious to do.[256] At times, the secretary made noises

254. *Id.* at 253.

255. *Id.* at 252.

256. *See* The Reminiscences of Harvey H. Bundy, *supra* note 115. "Stimson was prepared to go a long way in applying sanctions to the Japanese for their conduct in Manchuria," but Hoover

> was very reluctant to go forward. . . . [Stimson] had been brought up in the Teddy Roosevelt tradition and believed in the exercise of power, and not waiting. . . . He believed in taking the

about an economic boycott of Japan, but he never actually advocated it, either publicly or privately.[257] Just the opposite was true: Stimson himself acknowledged that the real difference between he and Hoover was that the president "has not got the slightest element of even the faintest kind of bluff."[258]

Stimson did hope that broadcasting the threat might cause Tokyo to worry about the United States using its power to disrupt the Japanese army's actions. He was sorely mistaken. Japan simply ignored the statement. The voluminous Japanese governmental and diplomatic records of the period fail to mention it. The rest of the world's reaction was similar. American newspapers were preoccupied with the kidnapping of the Lindbergh baby. They paused, approved the statement, and then forgot about it. The British considered it trivial. Deterrence limited to words, even the best legal ones, seemed a relic of the pre-Depression era.

One could ascribe Stimson's failure to advocate stronger measures to domestic politics. An economic boycott would probably have been impossible during the Depression, as a public starved for economic activity would have been hard pressed to understand why the administration would reduce exports.

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bit in his teeth and going forward. . . . [He] was on his horse and ready to shoot the Japanese at sunrise.

Id.

257. *See* Henry Lewis Stimson to (former Under Secretary of State) Henry P. Fletcher (Feb. 27, 1932) (on file with the Sterling Memorial Library, Yale University, Henry L. Stimson Papers).

I agree with you as to the dangers of a boycott, and since January 7 [the announcement of the Stimson Doctrine] we have tried to stake out an alternative policy which would not involve its dangers. But I see no advantage as yet in saying that under no circumstances would we ever use any particular weapon.

Id.

258. Henry Lewis Stimson, Diary (Jan. 26, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.103, at 5 (Yale University Library Photographic Services). *See also* Henry Lewis Stimson, Diary (Jan. 29, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.113, at 3 (Yale University Library Photographic Services).

I said that I was using no threats and that I would not use any, but that I did not want to have the natural fear of the weapons which we did have which now existed in the Japanese minds to be taken away by any statement which we made.

Id. Henry Lewis Stimson, Diary (May 19, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.13–14, at 1–2 (Yale University Library Photographic Services) (noting that Stimson was upset at Hoover's no-boycott pledge because it reversed "my policy of not telling the Japanese what we were going to do," not because Stimson actually wanted a boycott); Henry Lewis Stimson, Diary (Oct. 21, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.24/p.41, at 4 (Yale University Library Photographic Services) (declaring, with respect to a meeting with a high-ranking Chinese visitor, "I told him finally pretty frankly that he could not expect me to ask any of the other nations to use force and that we were taking the long-distance view, in which view I felt sure the Japanese would fail in their venture").

But Stimson also failed to advocate what would be the obvious contemporary response: American assistance to the Chinese. Some combination of military and economic assistance to Chiang Kai-shek could have bogged the Japanese down in Manchuria while not forcing a complete break with Tokyo. Such a policy would have resembled American assistance to the Afghan Mujahideen during the 1980s following the Soviet invasion of Afghanistan.[259]

Stimson, however, rejected that option.[260] Late in 1932, he revived a proposal to give the president the unilateral power to embargo arms sales from U.S. companies to nations that violated the Kellogg Pact, but he specifically stated that it would not be used to influence the Far East.[261] Besides, he argued that an embargo solely against Japan would be ineffective: "[I]t was a little bit like making a face at her."[262] If such a

259. For an excellent survey of the American covert war in Afghanistan and its impacts, see generally Milton Bearden, *Afghanistan, Graveyard of Empires*, FOREIGN AFF., Nov.-Dec. 2001, at 17. The U.S. covert war is now often seen as a failure, given that the Taliban filled the power vacuum left by the collapse of the pro-Soviet government; but this is far too hasty a reading. As Bearden (and others) have noted, the Mujahideen campaign was a rousing success: It exhausted the Soviet Union and eventually forced its withdrawal. The United States committed an egregious error by subsequently losing interest in Afghanistan, thereby preparing the way for Taliban (and Al-Qaeda) rule. This subsequent error, though, does not eviscerate the basic success of the U.S. covert war.

260. The subject was at times discussed in other circumstances, suggesting that the failure to aid China was not due to a simple lack of ability. *See, e.g.*, Henry Lewis Stimson, Diary (Oct. 29, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.103–04, at 1–2 (Yale University Library Photographic Services) (regarding aiding factions in Brazil).

261. *See* Henry Lewis Stimson, Diary (Nov. 9, 1932), *microfilmed on* Henry L. Stimson Diaries, r.5/vol.24/p.70 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Dec. 21, 1932), *microfilmed on* Henry L. Stimson Diaries, r.5/vol.25/p.27 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Dec. 23, 1932), *microfilmed on* Henry L. Stimson Diaries, r.5/vol.25/p.40 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Feb. 15, 1933), *microfilmed on* Henry L. Stimson Diaries (Yale University Library Photographic Services). Stimson emphasized that "no embargo would be risked over the Far Eastern Crisis." THORNE, *supra* note 115, at 346.

262. Henry Lewis Stimson, Diary (Feb. 24, 1933) (on file with author). Stimson told the British that such an approach would lead to a Japanese blockade of China and to complications with the West. British Foreign Secretary Sir John Simon "emphatically agreed." *See* Memorandum by the Secretary of State (Stimson) (Feb. 24, 1933), *in* U.S. DEP'T OF STATE, PUB. NO. 3508, 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, at 204–05 (1949); Letter from the Ambassador in Great Britain (Mellon) to the Secretary of State (Stimson) (Feb. 28, 1933), *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, *supra*, at 217–18; Telegram from the Minister in China (Johnson) to the Secretary of State (Stimson) (Mar. 11, 1933), *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, *supra*, at 231; Letter from the Department of State to the British Embassy (Mar. 11, 1933), *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, *supra*, at 231; Telegram from the Minister in Switzerland (Wilson) to the Secretary of State (Stimson) (Mar. 11, 1933), *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, *supra*, at 232; Telegram from the Secretary of State (Stimson) to the Minister in Switzerland (Wilson), at Geneva (Mar. 11, 1933), *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC

description seemed particularly apt for the Stimson Doctrine, the secretary did not seem to realize it.

The secretary was clearly a changed man from the one who confidently waded into the Sino-Soviet dispute two and a half years earlier. "[T]umultuous changes in my mind and attitude" were taking place.[263] The record reveals a heightened skepticism of the legalist model, a greater openness to the necessity of force, and a growing sense that something fundamental was amiss. Challenged again by Hurley, Stimson, in the wake of the collapse of the Japanese civilian government and the attack on Shanghai, subtly altered his perspective from the answer that he had given the previous November. Once again, he defended the treaty system and the "peace machinery which had been thus created . . . . But I said that of course . . . I realized the importance of having Japan fear this country."[264] The secretary emphasized his pleasure at the U.S. fleet's presence in the Pacific. "The whole situation," he noted three weeks later,

> is beginning to shake me up and get me back to a little bit nearer my old view that we haven't yet reached the stage where we can dispense with police force; and the only police force I have got to depend upon today is the American Navy. Pretty soon I am going to tell the President so.[265]

E. THE FINAL STATEMENT—FOR NOW

Although Stimson did mention the matter to Hoover and kept telling himself that the U.S. Navy constituted the great stabilizer in the Pacific,[266]

PAPERS 1933, *supra*, at 233; Telegram from the Minister in Switzerland (Wilson) to the Secretary of State (Stimson) (Mar. 12, 1933), *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1933, *supra*, at 234.

263. Henry Lewis Stimson, Diary (Feb. 19, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.191, at 1 (Yale University Library Photographic Services).

264. Henry Lewis Stimson, Diary (Jan. 26, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.100, at 2 (Yale University Library Photographic Services).

265. Henry Lewis Stimson, Diary (Feb. 18, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.20/p.189, at 4 (Yale University Library Photographic Services).

266. This was a constant theme of Stimson's writing throughout the spring. *See* Henry Lewis Stimson, Diary (Apr. 29, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.21/p.180 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (May 14, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.1 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (May 18, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.11 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (May 20, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.17–18 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (June 7, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.79, at 2 (Yale University Library Photographic Services); William Castle, Diary (June 7, 1932) (transcribed by the author from materials on file with the Library of Congress); William Castle, Diary (June 27, 1932) (transcribed by the author from materials on file with the Library of Congress).

he never pursued the implications of his thinking. Instead, he found himself preaching the old religion. In August of 1932, the Council on Foreign Relations asked him to deliver an address on American foreign policy. Stimson chose to argue for the efficacy of the Kellogg-Briand Pact.[267] Such an action, he noted privately, would "lay[] the foundation stone for the whole policy by giving my views of the Kellogg Pact and the importance of the concerted action of the nations under it."[268] In the speech, Stimson denounced the notion that the pact was merely aspirational or designed for political consumption. Instead, like any good Langdellian, he found the necessary consideration to make it a binding contract. "On its face it is a treaty containing definite promises. In its preamble it expressly refers to the 'benefits furnished by this treaty,' and states that any signatory power violating its promise shall be denied those benefits."[269]

Stimson emphasized that the pact "provides for no sanctions of force. . . . Instead, it rests upon the sanction of public opinion, which can be made one of the most potent sanctions in the world. . . . [If this opinion] desire[s] to make it effective, it will be irresistible."[270] The secretary thus recalled Elihu Root's 1908 argument that the sanction of international law rests on the notion that the violator will be seen in the eyes of the world as

267. *See* Henry L. Stimson, The Pact of Paris: Three Years of Development, Address Before the Council on Foreign Relations (Aug. 8, 1932), *in* FOREIGN AFF., Oct. 1932, at ii [hereinafter Stimson, Pact of Paris]. This was clearly Stimson's choice, a decision he made shortly after returning from Europe. Hoover resisted for political reasons, but eventually relented. *See* Henry Lewis Stimson, Diary (May 20, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.20, at 4 (Yale University Library Photographic Services) (noting "my proposition to implement the Kellogg Pact with a declaration as to what we would do in not recognizing a nation which . . . had [ ] broken the Kellogg Pact," and stating, in margin notes, that this decision was "Germ of Aug. 7 speech"). *See also* Henry Lewis Stimson, Diary (June 5, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.72, at 3 (Yale University Library Photographic Services) (noting "my proposition for carrying out the nonrecognition doctrine to aid the Kellogg Pact"); Henry Lewis Stimson, Diary (July 14, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.23/p.65, at 5 (Yale University Library Photographic Services) ("I feel sure that an authentic speech on [the Kellogg Pact] would help tremendously over in Europe at this time.").

268. Henry Lewis Stimson, Diary (July 20, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.23/p.83, at 3 (Yale University Library Photographic Services). *See also* Henry Lewis Stimson, Diary (July 25, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.23/p.98, at 4 (Yale University Library Photographic Services) ("My speech is intended to support the Kellogg Pact as the fulcrum upon which eventually we will have our issue with Japan."). Stimson personally arranged for a forum by calling Walter Lippmann and asking to give the speech before the Council on Foreign Relations. *See* Henry Lewis Stimson, Diary (July 23, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.23/p.92 (Yale University Library Photographic Services). He privately noted that "the speech which I have written is a very important one and a very critical one . . . ." Henry Lewis Stimson, Diary (July 25, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.23/p.97–98, at 3–4 (Yale University Library Photographic Services).

269. Stimson, Pact of Paris, *supra* note 267, at iv.

270. *Id.* at v–vi.

"the merchant who does not hold to his promises."[271] As far as Stimson was concerned, Root's prophecy was working: "Those critics who scoff at it have not accurately appraised the evolution in world opinion since the World War."[272]

If the critics thought that Stimson would apologize for the pact's failure to prevent war in the Far East, they were mistaken; indeed, the secretary cited the Far Eastern crisis as evidence that the pact represented a new era in international relations. He insisted that his November 1929 letter to the Soviet Union and China had halted their conflict,[273] and also contended that the pact had a significant impact on Japan's incursion into Manchuria. The reasoning derived straight from Root's argument in 1918: "Under the former concepts of international law when a conflict occurred," Stimson stated, "it was usually deemed the concern only of the parties to the conflict. . . . But now . . . such a conflict becomes of legal concern to everybody connected with the Treaty."[274] Why did this new legal concern matter? Stimson admitted that the world's "refusal to recognize the fruits of aggression might be of comparatively little moment to an aggressor"; but "[m]oral disapproval, when it becomes the disapproval of the whole world, takes on a significance hitherto unknown in international law. For never before has international opinion been so organized and mobilized."[275]

What did such organization and mobilization signify? Not force—Stimson had explicitly excluded that. Not economic sanctions—that was regarded as force, too. Not aid to China—no one advocated that. Not an arms embargo—that was merely making faces, and would lead to war.

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271. 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 379, 385 (Robert Bacon & James Brown Scott eds., 1916).

272. Stimson, Pact of Paris, *supra* note 267, at vi. Stimson noted the same ideas privately. For example, in a conversation with Prime Minister Ramsey MacDonald and Foreign Secretary Sir John Simon of Great Britain, he contended that if a unified declaration could be made by the signatories to the Nine-Power Pact endorsing nonrecognition, it would be highly effective. He pointed to "the continuous pressure of condemnation of world opinion, which was operating more effectively than we dreamed of . . . ." Henry Lewis Stimson, Memorandum of Conversation (Apr. 28, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.21/p.178 (Yale University Library Photographic Services). Together with the cost and difficulty of the occupation itself, it "would tend sooner or later to bring Japan to search a reasonable solution of this question." *Id.* It seems reasonable to believe that Stimson placed great emphasis on public opinion—just three weeks later, he expressed the belief that Japan could in fact "unsettle" the future of China despite its smaller size. Henry Lewis Stimson, Diary (May 22, 1932), *microfilmed on* Henry L. Stimson Diaries, r.4/vol.22/p.27, at 1 (Yale University Library Photographic Services).

273. Stimson, Pact of Paris, *supra* note 267, at vi–vii.

274. *Id.* at viii.

275. *Id.*

Neither Stimson nor Hoover nor any other policymaker offered any policy outside of nonrecognition. At the bottom of legalism stood the void.

By the end of his term, the secretary seemed to grasp this. A few days before leaving office, he noted, "I am trying to make up my mind . . . what the ultimate objective will be with regard to sanctions for such treaties as the Kellogg Pact, after we reach the point where public opinion will not be effective."[276] He wondered aloud to members of his staff,

> Had the theory of offensive defense gone by the board? Did the Kellogg-Briand Pact so change human nature that only the defense of one's actual territory was essential? . . . [H]e, for one, was by no means sure. He had had to unlearn a great deal of what was considered axiomatic in his youth, and did not have very clear-cut convictions as to the new order.[277]

But any major reformulations would have to wait. The truth of the matter was hardly complex. "The situation in the world," the secretary noted on his last full day in office, "is very bad."[278] Five weeks earlier, Hitler had become German chancellor; on the other side of the globe, Tokyo had consolidated its hold on Manchuria. Stimson, meanwhile, was happy to get out of the State Department, feeling he was "the servant of events, and not their master."[279]

VIII. HISTORIOGRAPHICAL CROSSCURRENTS

This Article argues that classical legal thought influenced the development of American foreign policy during the 1920s. Skeptics will contend, however, that decisionmakers followed these policies not because of ideology, but because of domestic politics. Moreover, they will contend that much of what I call "legal" ideology was actually no more than the ideology of "corporatism," a theme deeply explored in the current literature. Finally, others might contend that while ideology was crucial, placing such emphasis on legal ideology ignores broader ideological context. I address all three in turn.

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276. Henry Lewis Stimson, Diary (Feb., 14, 1933), *microfilmed on* Henry L. Stimson Diaries (Yale University Library Photographic Services). Seven months earlier, Stimson had been far more confident about the ability of public opinion to change the course of Japanese policy. *See* Stimson, Memorandum of Conversation, *supra* note 272.

277. Jay Pierrepont Moffat, Diary (Jan. 4, 1932) (on file with author).

278. Henry Lewis Stimson, Diary (Mar. 3, 1933), *microfilmed on* Henry L. Stimson Diaries (Yale University Library Photographic Services).

279. STIMSON & BUNDY, *supra* note 114, at 191.

A. DOMESTIC POLITICS

Domestic politics emerges as a dominant theme from the existing historiography of American foreign policy during the 1920s. Policymakers in the Harding, Coolidge, and Hoover administrations were severely constrained by both a public that wanted little of international entanglements, and a Senate prejudiced against foreigners and seemingly impervious to reason. Senators scoured the most innocuous international treaties for surreptitious administration conspiracies to entangle the United States in European intrigue. They hamstrung the administrations through endless senate resolutions, inadequate budgets, and straightjacketing policies. The Constitution's requirement of two-thirds approval for treaties only made matters worse because it allowed a small group of senators to hold up treaties that had broad support. The public, meanwhile, retreated into isolationism and prejudice.

On this account, administration policymakers simply did the best they could in an enormously difficult political environment. Unlike their counterparts after World War II, they received little support from the White House. They thus maneuvered carefully and achieved a lowest-common-denominator internationalism—the maximum that a broad majority of Americans and the Senate could support. Their failure to accomplish more should be laid at the feet of others.

This explanation is persuasive. One cannot avoid, while examining contemporary sources, the constant protests of senators and domestic constituencies for isolationist policies. Still, such an account at another level simply proves too much because it essentially treats domestic politics as an exogenous variable—a brooding omnipresence over which policymakers have no influence and in which they did not participate, unchangeable and unmalleable. The best political science literature on the subject shows this to be in error.[280] Among historians, Ernest May has recognized the degree to which elite opinion can drive mass opinion.[281]

U.S. policymakers understood this: The entire historiography of early 20th-century American foreign policy reveals politicians' consistent efforts to manage, manipulate, and shape public opinion. Robert C. Hildebrand's work is particularly good on the McKinley and Wilson presidencies,[282] but not a single historian has continued Hildebrand's work for the new era,

280. *See generally* JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992).

281. *See* ERNEST R. MAY, AMERICAN IMPERIALISM (Atheneum 1968) (1967).

282. *See generally* ROBERT C. HILDEBRAND, POWER AND THE PEOPLE: EXECUTIVE MANAGEMENT OF PUBLIC OPINION IN FOREIGN AFFAIRS, 1897–1921 (1981).

perhaps because the entire period was about public relations, particularly when it came to foreign policy. Joan Hoff Wilson demonstrates this for the indefatigable Herbert Hoover.[283] Ellis Hawley shows how the notion of public relations management permeated most critical U.S. institutions.[284] The entire notion of "associationalism" fundamentally relied on government-by-exhortation (and hence, not by coercion). It thus stands to reason that American officials cited "public opinion" as a basis for their policies when, for their own reasons, they believed those policies to be substantially justified in any event. This returns us, however, to the basic question of the basis for their beliefs.

The record is devoid of evidence that officials wished to pursue a more realpolitik foreign policy, but refrained from doing so for fear of the political consequences.[285] At times, officials would complain privately about Congress not giving them the flexibility to negotiate more lenient war debt settlements as a way of solving the reparations problem.[286] These arguments, though, occurred within narrow parameters: No one argued for reconceptualizing the bases of American foreign policy, even when—as in Briand's original outlawry offer—it would have been politically feasible and even advantageous to do so.[287]

Moreover, the argument from domestic politics overlooks the fluidity and murkiness of public opinion, or even senatorial opinion, during the decade. Consider the crucial example of policy toward France and Germany. As noted above, the French government repeatedly asked the

283. *See* WILSON, *supra* note 51, at 79–121.

284. *See* HAWLEY, *supra* note 46, at 80–100 (1979).

285. Historians have noted the strong consistency between Hughes's private statements and his public pronouncements. *See* GLAD, *supra* note 58, at 3. Hughes told a friend privately that he made a "rule of saying what I have to say in my public addresses and announcements from time to time." Letter from Charles Evans Hughes to Herbert S. Houston (Oct. 10, 1922) (on file with the Library of Congress, Charles Evans Hughes Papers). This appears to have been the strong trend of the New York antimachine elite that comprised (among others) elite lawyers. *See* MCCORMICK, *supra* note 231, at 112 ("It is difficult to read the correspondence of Low, Roosevelt, Root, or even Reid . . . without feeling that they believed what they espoused.").

286. *See, e.g.*, Letter from Thomas Lamont to J.P. Morgan (Oct. 6, 1922), File 108-13 (on file with the Baker Library, Harvard Business School, Lamont Papers) (recounting a conversation with Hughes); Henry Lewis Stimson, Diary (Nov. 23, 1932), *microfilmed on* Henry L. Stimson Diaries, r.5/vol.24/p.120–23, at 1–4 (Yale University Library Photographic Services).

287. Stimson would very often argue to Hoover that the president should take a stronger lead in foreign policy as a way of overcoming domestic political opposition. *See, e.g.*, Henry Lewis Stimson, Diary (Nov. 8, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.134 (Yale University Library Photographic Services); Henry Lewis Stimson, Diary (Dec. 11, 1930), *microfilmed on* Henry L. Stimson Diaries, r.2/vol.10/p.215–16, at 1–2 (Yale University Library Photographic Services) (arguing that vigorous leadership could change domestic political obstruction). But he never argued for a balance-of-power orientation.

United States for a defensive security pact. Most historians contend that Washington refused for lack of public support. In fact, however, opinion seemed unformed. In the autumn of 1921, the *Literary Digest* surveyed newspaper editors throughout the nation, asking what the American government should do to protect France from another attack. The vast majority of respondents (228 out of 273) favored military and financial aid in case of unprovoked aggression.[288] Fewer than a quarter of them, however, thought it wise to sign a formal treaty guaranteeing French security.[289] This tells us not that the public opposed military assistance to France, but that it was ambivalent about the nature and form assistance should take. In other words, political space existed to persuade the public of the need for an alliance. Policymakers, however, simply were unconvinced of the need to make the argument.[290] Later, American policymakers jumped to the conclusion that the French occupation of the Ruhr had made Paris a pariah in public opinion and that, therefore, this required first a hands-off policy and then a substantial tilt toward Germany. But, in fact, public opinion remained somewhat pro-French throughout the Ruhr Crisis.[291] Perhaps U.S. officials *believed* that the public would not permit a commitment to France,[292] but the most extensive monograph surveying public opinion on the subject concludes otherwise.[293]

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288. *See What We Will Do if France Is Attacked Again*, LITERARY DIG., Dec. 31, 1921, at 5. For additional concern from the press with France's strategic problems, see *France to Disarm, if—*, LITERARY DIG., Oct. 22, 1921, at 5.

289. *What We Will Do if France Is Attacked Again*, *supra* note 288.

290. Hughes, for example, simply dismissed the argument for an alliance out of hand, without really offering a rationale. *See, e.g.*, Memorandum of Interview with the Ambassador of France (J.J. Jusserand) (July 12, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers). In regard to the Ruhr Crisis,

> The Ambassador said that if the tri-party treaty to provide security for France had been approved the whole matter would have been settled long ago, and that he thought it would have been approved if it had been submitted by President Wilson at the right time. The Secretary said that was going a long ways back and the question was now what could be done to meet the exigency.

Id. *See also, e.g.*, Memorandum of Interview with the Ambassador of France, J.J. Jusserand (Nov. 5, 1923) (on file with the Library of Congress, Charles Evans Hughes Papers).

> The Ambassador then recited the injuries sustained by France, . . . the failure of the United States to ratify the Treaty of Versailles, the failure of the treaty of guarantee, etc. etc. . . . The Secretary said . . . that it was not to much purpose to review the past; that the question was what was to be done in existing conditions.

Id.

291. *See* LEFFLER, *supra* note 9, at 84.

292. *See, e.g.*, William Castle, Diary (Jan. 16, 1922) (transcribed by the author from materials on file with the Library of Congress) ("There is in this country a good deal of feeling against forcing Germany to pay [reparations] . . . .").

293. *See* ELIZABETH BRETT WHITE, AMERICAN OPINION OF FRANCE: FROM LAFAYETTE TO POINCARÉ (1927). *See also* Glen Howard Coston, The American Reaction to the Post-First World War

The best conclusion is that policymakers relied on public opinion to justify their own reluctance to make commitments. This reluctance became a self-fulfilling prophecy: Policymakers failed to make the case for balance-of-power foreign policy, leaving the field open for antirealpolitik thinkers and effectively undermining any public support for it. What were the reasons for such a failure? Classical legal ideology is one important source.

B. THE IMPACT OF BUSINESSMEN

Attaching such importance to legal thought, it could be said, overlooks the profound influence of other intellectual sources of U.S. foreign policy. More particularly, it could be argued that classicism's influence was marginal as compared with "business corporatism." Historians have identified corporatism as the leading ideological focus of the new era, particularly in foreign policy,[294] and there are some important similarities between classical legal thought and business thinking. Many of the new businessmen of the new era stressed objective, neutral, and scientific solutions to political problems and rejected state coercion as a basis for public policy. It is little wonder that historians, who need documents to do their job, have gravitated to this explanation: The leading apostle of corporatism was Herbert Hoover, who managed to churn out an endless stream of reports, articles, and papers. The argument for corporatism suggests that classical legal thought was simply piggybacking on the more fundamental business trend of the 1920s.

Like the argument concerning domestic politics, the corporatist case has merit. Closer inspection, however, reveals a more complicated interplay of intellectual causation. Consider first the intellectual history of American foreign policy in the two decades before the new era. Roland Marchand has observed that lawyers dominated American thinking about foreign policy during the first twenty years of the 20th century.[295] Lawyers

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Search of France for Security, 1919–1930: A Periodical and Period Piece Study (1971) (unpublished Ph.D. dissertation, University of Georgia) (on file with the University of Georgia).

294. For more on the corporatist school, both in domestic and foreign affairs, see generally Michael J. Hogan, *Corporatism*, *in* EXPLAINING THE HISTORY OF AMERICAN FOREIGN RELATIONS 226 (Michael J. Hogan & Thomas G. Paterson eds., 1991), John Lewis Gaddis, *The Corporatist Synthesis: A Skeptical View*, 10 DIPL. HIST. 357 (1986), Michael J. Hogan, *Corporatism: A Positive Appraisal*, 10 DIPL. HIST. 363 (1986), Thomas J. McCormick, *Drift or Mastery? A Corporatist Synthesis for American Diplomatic History*, 10 REV. AM. HIST. 318 (1982), and William Appleman Williams, *The Legend of Isolationism in the 1920's*, 18 SCI. & SOC'Y 1 (1954).

295. *See* C. ROLAND MARCHAND, THE AMERICAN PEACE MOVEMENT AND SOCIAL REFORM, 1898–1918, at 39–73, 99–143 (1972).

and judges developed the intellectual frameworks for considering world politics and constructed the institutions that disseminated the thinking about international relations in the period. Businessmen, on the other hand, "brought with them few original or 'business-oriented' programs for the peace movement. Except for the promotion of peaceful contact through commerce they offered few proposals."[296] This makes sense. As Robert Gordon has noted, lawyers play a salient role in the production of ideology.[297] They justify ideas, manipulate symbols, and develop frameworks for understanding the world. It stands to reason that they would play the leading role in the production of foreign policy ideology, especially since world politics did not directly concern the matters particularly within businessmen's expertise.

Charles DeBenedetti has noted that the same pattern held during the 1920s, when "conservative legalists" dominated internationalist thinking.[298] Led by Elihu Root, but comprising figures such as Hughes, Kellogg, Stimson, and Borchard, "conservative legalist leaders slid with smooth influence along the inner rims of Republican policymaking circles."[299] DeBenedetti has also noted that conservative legalism appealed deeply to businessmen.[300] If anything, businessmen followed the lawyers, not vice versa. It was lawyers who put broader ideas into specific foreign policy contexts, lawyers who served in the key policymaking posts, and lawyers who advocated the international institutions that would establish a new world political order. This is hardly surprising, given the legal influence on business thinking in domestic affairs; after all, as noted above, lawyers heavily influenced economists' conceptions of ruinous competition.[301]

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296. *Id.* at 96–97.

297. *See* Gordon, *supra* note 83, at 81–82, 100–10 (using corporate reorganization law as an example of the production of ideology).

298. *See* CHARLES DEBENEDETTI, ORIGINS OF THE MODERN AMERICAN PEACE MOVEMENT, 1915–1929, at 44–58 (1978).

299. *Id.* at 240–41.

300. *Id.* at 240.

301. *See supra* Part II.B. Another excellent example of the independent importance of legal thinking is General Electric chairman Owen Young, who epitomized the business ideology of the 1920s. Young was legally trained and argued that the law drove both his and others' business philosophy. The new era saw the emergence of welfare capitalist business practices that sought to harmonize the interests of labor and capital through private benefits measures and conciliatory labor policies. Young, however, argued that

> the new idea in management . . . sprang largely from the fact that lawyers were advanced to high managerial posts. . . . If there is one thing that a lawyer is taught, it is knowledge of trusteeship and the sacredness of that position. Very soon we saw rising a notion that managers were no longer attorneys for stockholders; they were becoming trustees of an institution.

When it came to establishing a foreign policy outlook, then, lawyers and legal culture led the way.

Furthermore, the salience of legal language in interwar foreign policy discourse carries the same strong implication of a dominant role for legal culture and the legal profession. When Calvin Coolidge and Herbert Hoover, neither of whom was a lawyer, needed to express their visions of a peaceful world order, they used the language of law to do it. Law served both as a crucial metaphor and a practical institutional program.

In any event, as a methodological matter, if two groups of people adhere to a set of ideas, this does not imply that they must have acquired them from the same source. To argue otherwise overlooks the ways in which coalitions form. Consider the example of American anticommunism during the cold war. Dean Acheson, George Kennan, and other realists, who were known as "cold warriors," favored anticommunism. So did the right wing of the Republican Party. So did John Foster Dulles and the strategists in the Eisenhower administration. Even though each of these groups took a tough line against the Soviet Union and saw the United States as the leader of the free world, no one could argue that they therefore received their ideology from the same source.

Thus, even if businessmen developed their own set of ideas concerning world politics, this hardly vitiates the idea that law played a powerful role in constructing and influencing foreign policy ideas during the interwar period. As we have seen, lawyers formed and developed a coherent ideology containing robust implications for world politics. Lawyers served in critical diplomatic and governmental offices and drew on this ideology in forming policy. These facts alone demonstrate the powerful influence of legalism in shaping American policy. If lawyers and businessmen formed a coalition that took policy in the same direction, it is important to acknowledge a key member of this coalition.

DAVID BRODY, *The Rise and Decline of Welfare Capitalism*, *in* WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE 48, 51 (reprint 1982) (1980) (omissions in original) (citing to a 1929 edition of *Nation's Business*). Not surprisingly, Young also played a critical role in American foreign policy during the new era, particularly on the reparations issue. *See* COSTIGLIOLA, *supra* note 9, at 210–17; LEFFLER, *supra* note 9, at 202–19; SCHUKER, *supra* note 118, at 174.

This is not to say that businessmen sheepishly followed lawyers in developing their thoughts, but that it is misplaced to suggest that legal ideology simply represented an artifact of business thinking.

C. LIBERALISM

Finally, an argument can be made that reliance on either classical legalism or business corporatism as explanatory variables is too narrow. Such an argument would contend that looking at liberalism generally yields more explanatory power because many of classical legal ideology's core beliefs—such as interest harmony and disdain for politics—were also held by other professional groups, most prominently businessmen.[302] Indeed, scholars such as Gordon refer to the late 19th-century legal culture as "liberal legalism."[303] It makes sense, then, to argue that the broader liberal ideological context influenced lawyers and other social groups, and assign the explanatory power to this broader context.

While attractive, such a view overlooks the way in which broad ideological trends take hold through concrete institutions. Like public opinion, neither ideology nor law (nor ideology about law) is a brooding omnipresence in the sky. At some point, some person, or group of persons, needs to adopt and act on ideas for them to become relevant. In the late 19th and early 20th century, that group comprised the lawyers. As noted above, lawyers created the institutions that served as the nerve center of American internationalism. The legal profession provided the key personnel for U.S. diplomacy. Liberalism wielded influence only because the legal profession and legal academy embraced it and constructed a usable ideology with ready implications for foreign affairs. It was hardly inevitable that lawyers should do this. During the American Revolution and early national period, the lawyers running American foreign policy rejected liberal foreign policy, and instead, exquisitely played the game of European realpolitik.[304] About 125 years later, their successors did not, in no small part because they had subsequently developed a powerful legal ideology that blocked them from doing so. In both periods, liberalism triumphed because the lawyers allowed it to.

In any event, assigning explanatory value to liberalism has little value, given the ambiguous role of liberalism in foreign policy discourse. Scholars have suggested that many of classical legal thought's core beliefs—such as interest harmony, evolutionary progress, and the sharp

302. *See* WIEBE, *supra* note 46, at 206–07.

303. *See* Gordon, *supra* note 83, at 99.

304. *See* JAMES HUTSON, JOHN ADAMS AND THE DIPLOMACY OF THE AMERICAN REVOLUTION 143 *passim* (1980) (concluding that the Framers' ideas "[i]n foreign affairs . . . comprised what has been called the classical theory of the balance of power"). *See generally* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 375–449 (1993); FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY (1979).

law/politics distinction—simply reflect the fact that classicism was a form of liberal thought.[305] These claims do not withstand scrutiny and represent a caricature of liberalism. For example, there is nothing in liberalism that necessarily implies a belief in progress. Indeed, Judith Shklar has eloquently (and repeatedly) pointed out that liberalism derives in large part from the constant fear of chaos and repression and brutality, and from the recognition that the abuse of power represents the norm and not the exception.[306] Similarly, James Madison and the Framers, who constructed the first liberal state in history, would have been surprised to discover that they either believed in interest harmony or were sanguine about the state's ability to restrain itself from tyranny.

Thus, while classical legal tenets may represent certain aspects of liberalism, their dominance in legal thought cannot be explained *solely*, or even predominantly, by reference to liberalism. Fierce foreign policy debates have split liberal political parties precisely because the overarching liberal ideology fails to provide a single, unified outlook. One can speak of "cold war liberalism" just as easily as "legalist liberalism." Franklin Roosevelt and Harry Truman, both good liberals, ushered in the strategy of anti-Soviet containment. It is also little wonder that the biography of Adolf

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305. For good examples of equating classical legal ideology with liberalism, see, for example, Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History*, 4 THEORETICAL INQUIRIES L. 451, 464 (2003) (noting that "the failure properly to acknowledge and investigate law's conjunctions with the institutional structure of state violence" represents a failure of "liberal legal theory *tout court*").

306. Properly footnoting this would, strictly speaking, require the citation of the entire Shklar *oeuvre*. The best examples of Shklar's observation that liberalism derives from a keen sense of power and coercion are Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 21 (Nancy L. Rosenblum ed., 1989), JUDITH N. SHKLAR, ORDINARY VICES 227 (1984) ("[C]onflict among 'us' [is] both ineluctable and tolerable, and entirely necessary for any degree of freedom."), and JUDITH N. SHKLAR, THE FACES OF INJUSTICE 115 *passim* (1990). According to Shklar,

> intimations of shared meaning, as divined by prophetic or traditionalist avatars of the spirit of the people, are never checked against actual opinions, least of all those of the most disadvantaged and frightened people. . . . In the absence of a clear and free account of their feelings, we should assume that the least advantaged members of a society resent their situation [and their society's 'shared' principles], even though—like many a black slave—they smile and sing in a show of contentment.

SHKLAR, THE FACES OF INJUSTICE, *supra*, at 115. For an excellent description of Shklar's outlook, see Bernard Yack, *Liberalism Without Illusions: An Introduction to Judith Shklar's Political Thought*, *in* LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 1 (Bernard Yack ed., 1996).

Berle, whose legal writings launched a withering critique of classicism[307] and long advocated realpolitik in foreign affairs, is titled *Liberal*.[308]

In sum, arguments based on an overarching ideological framework suffer from a lack of specificity. Simply ascribing foreign policy trends to liberalism underexplains central phenomena; similarly, refusing to acknowledge the salient position of the law in the formation of foreign policy overlooks too many crucial facts. While broader ideological arguments are helpful, in the end, we must return, as policymakers did, to the language and structure of the law.

IX. RETROSPECT: CLASSICISM, AMERICAN DIPLOMATIC HISTORY, AND INTERNATIONAL RELATIONS THEORY

In the end, of course, the whole edifice collapsed. The legalist internationalism of the new era failed to stabilize either Europe or Asia, and the world hurtled toward war. America responded by retreating into isolation. Franklin D. Roosevelt quickly decided to focus on the Depression at home and leave the "old world" to confront its own problems alone. Classicism's determination to avoid world politics only ensured that a new politics would arise, more violent and threatening than ever. The attempt to replace force with law left the world with more of the former and none of the latter.

Does this criticism distort new era foreign policy? Did the "long decade" of Republican dominance actually represent policy success? Akira Iriye has championed this view, contending that

> [t]he 1920's made a significant contribution to man's long quest for peace by emphasizing themes such as economic interdependence, international cooperation, and cultural diffusion. Just because the attempts did not succeed, and were followed by a decade and more of war, aggression, and atrocities, it would be wrong to attribute these crimes to the efforts made in the opposite direction during the preceding decade.[309]

By focusing exclusively on economic interdependence, international cooperation, and cultural diffusion, however, the diplomacy of the 1920s

307. Berle's legal writings are voluminous. His classic early work is ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harcourt, Brace & World, Inc. 1968) (1932).

308. JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA (1987).

309. IRIYE, *supra* note 9, at viii–ix.

(and thus its defenders) overlooked the brute fact that none of these goals can be achieved outside a stable balance of power. As James Madison, one of the founders of American foreign policy, importantly observed, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[310] To this, Samuel Huntington has noted that the "primary problem is not liberty but the creation of a legitimate public order. Men may, of course, have order without liberty, but they cannot have liberty without order."[311] Realpolitik is not a substitute for interdependence and cooperation, but their prerequisite.[312]

Classicism ignored Madison's basic point. It did so because of deep ideological assumptions that enabled its followers to overlook contrary evidence and alternative interpretations for its optimistic predictions. Stephen Krasner incisively notes that research programs

> have both a denotation and a connotation. While the denotation, or explicit logic, of a research program based upon the investigation of market failure is not inconsistent with a power-oriented analysis, the connotation of this research program is that power can be ignored. The connotation of a research program suggests which questions are most important, what kind of evidence should be gathered, and, often tacitly, which issues should be ignored.[313]

Krasner is not accusing other researchers of obtuseness; rather, he means to highlight how asking certain questions leads even the finest researchers down certain roads that ignore vital questions and fail to examine important evidence.

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310. THE FEDERALIST NO. 51 (James Madison).

311. SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 7–8 (1968).

312. Consider the example of reparations, treated by American policymakers strictly as an economic problem. France maintained a hard-line stance on reparations largely due to security fears: Allowing Germany to escape reparations payments would have reopened the very nature of the Versailles settlement. Only if France received strong security guarantees from England and the United States would it have been willing to accept a liberal policy. Interdependence and cooperation in this context—without a simultaneous political settlement guaranteeing French security—would have fallen on deaf ears in the Quai d'Orsay, as in fact it did. Even those scholars who stress the cooperative aspects of French reparations policy note that "reparation was always far more a political than an economic problem." TRACHTENBERG, *supra* note 119, at 342. Eventually, America's brute financial power made Paris yield; but this hardly symbolized a new era of cooperation. Instead, it represented a serious strategic mistake.

313. Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 361 (1991).

Similarly, policymakers such as Hughes, Kellogg, Morrow, Coolidge, and Stimson were hardly obtuse; but they failed to consider other frameworks for understanding world politics. For most of the 1920s, and into the 1930s, they did not have to look further because it appeared as if their reliance on international legal principles and institutions had stabilized the globe. By the time it became apparent that the old framework had failed, it was too late.

The irony is that the current debate appears to have adopted the classical world view, even in the wake of the 20th-century experience; indeed, some of the best new international legal scholarship appears to represent a sustained effort to reclaim foreign policy classicism.[314] The "managerial" theory of treaty compliance, recently advanced by Abram Chayes and Antonia Handler Chayes, serves as a case in point.[315] Chayes and Chayes argue that

> [i]n today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system. Isolation from the pervasive and rich international context means that the state's potential for economic growth and political influence will not be realized. Connection to the rest of the world and the political ability to he an actor within it are more important than any tangible benefits in explaining compliance with international regulatory agreements.[316]

Under this managerial model, which Chayes and Chayes argue represents a qualitative shift in world politics, states' chief fear is not destruction, but isolation. Failure to comply with international treaties derives not from the desire to achieve relative gains, but from the ambiguity and indeterminacy of treaty language, lack of compliance capacity, and friction—the simple time frame it takes for a nation to move from signing a treaty to complying with it.

Reading Chayes and Chayes at times appears to be a recapitulation of classical legal tenets. Their arguments concerning the primacy of isolation avoidance resuscitates Elihu Root's assertion that if a nation does not keep

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314. For a recent excellent survey of this literature, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002). Engaging in a full critique of this new literature, much of which is superb, is outside the scope of this Article. In examining the work of Chayes and Chayes, however, I hope to suggest ways in which much of this literature repeats the same mistakes as its classical ancestors.

315. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 1–28 (1995).

316. *Id.* at 27.

faith with international agreements, then it "will be in the position of the merchant who is known to all the world to be false to his promise."[317] Since ambiguity is a principal source of noncompliance, then it should be reduced by clearer and more specific rules—a proposal that seems to repeat the enthusiasm for the codification of international law. Since agreements promote compliance by incorporating a transparent information system, future international legal regimes should focus on reporting, data collection, and monitoring—a notion that directly recalls the late 19th-century theory of the Sunshine Commission. Chayes and Chayes sharply contrast their managerial model for compliance with the enforcement model, which stresses sanctions and coercion as causes for compliance.[318] This stark managerial/enforcement distinction essentially mirrors classicism's sharp law/force dichotomy.

And in repeating classical tenets, Chayes and Chayes repeat classicism's oversights. For example, their sharp managerial/enforcement distinction "create[s] the false impression that the two are alternatives."[319] It ignores the possibility that international bargaining takes place within the shadow of power, much as domestic legal bargaining takes place within the shadow of the law. Consider the theory of hegemonic stability, which argues that nations can arrive at a cooperative, mutually reinforcing trade system based on absolute gains only because the hegemon enables them to do so. In other words, the hegemon's power enables it to set the rules of the game—then, and only then, does the managerial model assume salience. Thus, in the same way that contending domestic legal parties obey legal rules because they fear judicial sanctions, nations follow international law only to the extent that the underlying power correlations dictate it. This, in turn, means that international law is basically superstructure: The critical base is relative national power capabilities.[320] Chayes and Chayes overcome hegemonic stability theory by ignoring it.

In similar fashion, one could explain American and Soviet adherence to the ABM Treaty (one of Chayes and Chayes's favorite examples) not by managerialism but by underlying power correlations, the touchstone of neorealist theory. On this account, the United States and the Soviet Union signed the ABM treaty because of their relative power capabilities, which

317. ROOT, *supra* note 249, at xx.

318. *See* CHAYES & CHAYES, *supra* note 315, at 1–3.

319. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2639 (1997) (book review).

320. *See, e.g.*, STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Richard H. Steinberg, *In the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

were essentially balanced and provided each with adequate security. Soviet violations, such as the Krasnoyarsk radar site, could be tolerated within this framework. Had there been no treaty, the United States might have responded with protests and cheating of its own, but no escalation. Put another way, the mere fact of compliance means little unless we know what states would have done otherwise. Yet the best study that attempted to answer this question concluded, from a close examination of cases, that states would otherwise have done the same thing; that is, international law as an independent variable accounts for little.[321] Chayes and Chayes never consider this possibility.

This can happen because managerialism's connotation overwhelms its denotation. What begins as an interesting insight into specific behaviors slides into an overall framework for understanding world affairs. Chayes and Chayes treat the question as being, What is the effectiveness of sanctions in enforcing international treaties? They come to the conclusion that sanctions play little role. All of this, however, assumes that treaties represent the core of world politics. It ignores the high probability that the difficulties of world politics stem from precisely those areas in which treaties cannot be concluded, and that the successful conclusion represents not a triumph over raw power calculations but their codification.[322]

Past is not necessarily prologue. Classicism's historic failure does not necessarily imply that its contemporary successors will meet the same fate. Classicism's record, however, should induce profound caution among contemporary theorists about the possibilities of a legally bound global order and institutional solutions for deep political problems. The historical record strongly suggests the need to proceed from pessimistic assumptions and seek to falsify them, rather than seize on apparent cooperation and declare victory.

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321. *See* George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 379–80 (1996). It is significant that Raustiala and Slaughter refer to the Downs piece as "trenchant," and do not cite any work that has refuted it, even though they offer the most rigorous and encyclopedic review of the international relations/international law literature. Raustiala & Slaughter, *supra* note 314, at 543.

322. Proponents of Chayes and Chayes's theory might retort that it does demonstrate that nations will comply with treaties when they are successfully concluded; but this would elevate form over substance. It is not the fact of the treaty, but the interests of nations involved that would be at issue. The question, then, again centers on the structure of international politics, and this must consider those important issues of international politics where there is no treaty instrument.

X. CONCLUSION: VIOLENCE AND THE LAW

Nearly two decades ago, Robert Cover famously argued that "[l]egal interpretation takes place in a field of pain and death" and "[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another."[323] This was, of course, true in terms of interpretation: Cover saw much legal interpretation as "jurispathic" because it destroyed certain worlds of legal meaning to achieve intellectual order and coherence.[324] Cover expressed this in a more direct way as well: "[M]ost prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk."[325] We do not "talk our prisoners into jail."[326]

Cover devoted an essay to a point that even he considered obvious because "the growing literature that argues for the centrality of interpretive practices in law blithely ignores it."[327] Cover was not attacking minor figures; instead, his targets were the likes of Ronald Dworkin and James Boyd White. His indictment hit the legal academy at its heart for denying the inevitable link between law and violence. This denial was ideological in nature, for it obscured choices that legal actors could make to reduce the field of pain and death.[328] Judges and jurisprudes, Cover persuasively argued, sit atop a hierarchy that represses the immanence of violence in all legal actions. Only by unmasking this bureaucratic hierarchy can the violence be reduced. The interpretive turn in legal scholarship insulated and bolstered the hierarchy it should have been undermining, and for this, it warranted condemnation. But Cover was under no illusions. Violence would always accompany the law at some level because it is "intrinsic to the activity" of lawmaking.[329]

I dwell on Cover because my account of the structure may seem simply unbelievable. Could lawyers and judges really have distinguished between law and force? Could they truly have believed that right answers existed that did not implicate conflicts of interests and values? Could they actually have had faith in gradual, non-Darwinian evolution? Cover's

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323. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

324. Cover had previously coined this term in opposition to the notion of "jurisgenerative" interpretation that expands the possibilities of legal meaning. *See* Robert Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

325. Cover, *supra* note 323, at 1607.

326. *Id.* at 1609.

327. *Id.* at 1601 (footnote omitted).

328. This notion of ideology is my definition, not Cover's.

329. Cover, *supra* note 323, at 1629.

indictment demonstrates that the answer to all these questions is an emphatic yes. And this answer present dangers to American foreign policy because it holds out the illusory promise of international institutions in an anarchical, violence-ridden world.

Lawyers do not necessarily think in the classical mode; indeed, classical legal thought may seem bizarre to us now because it was superseded by legal realism in the 1920s and 1930s.[330] In future work, I hope to explore how legal thinkers involved in the realism movement, such as Adolf Berle and Dean Acheson, used realist insights in the development of foreign policy Realism—suggesting that the term "realism" in both areas is more than a linguistic fortuity. Moreover, contemporary lawyer-diplomats have a wide-ranging series of intellectual resources—think tanks, military strategists, international relations scholars, not to mention the cold war paradigm of American foreign policy—leading them away from the assumptions of the interwar period.

Nevertheless, the classical mode of legal thought persists like an oceanic undertow, dragging eager lawyers back into the previous century. We can hardly blame them. The classical world view says that international law matters, that international lawyers are not mere onlookers in the great game of diplomacy but the central players. That is a comforting vision not only for international lawyers but also for humanity. The legally bound world eluded us then, but no matter. Tomorrow we will run faster and stretch our arms farther. So we beat on, boats against the current, borne back ceaselessly into the past.

330. *See* Grey, *supra* note 4, at 3 (suggesting that "orthodoxy is the thesis to which modern American legal thought has been the antithesis"). While Grey's pioneering article has influenced me greatly in the preparation of my own work, my definition of classicism is much broader than his. I also believe (unlike Grey) that many modern legal thinkers, particularly in the international law field, are continuing the classical tradition.