

INTERNATIONAL LAW AND THE NINETEENTH CENTURY: HISTORY OF AN ILLUSION

By David Kennedy*

I. INTRODUCING A MEMORY

I would like to thank the Quinnipiac College School of Law for the invitation to participate in this review of international legal history. I have been working for some time on a general history of international law, focusing, like most histories of the discipline, on the modern period and on the early writers of the seventeenth and eighteenth centuries.¹ But I have found myself returning again and again to the nineteenth century, and to the break which opened the modern period at the beginning of this century. In this chapter I would like to sketch some broad hypotheses for further reflection about the place of the nineteenth cen-

* Henry Shattuck, Professor of Law, Harvard Law School. An earlier version of this piece was originally presented at Quinnipiac College School of Law on November 9, 1995. I would like to thank Nathaniel Berman, Jarat Chopra, and Dan Danielsen for their comments on an earlier draft, and Outi Korhonen for research assistance. This piece has benefited in many ways from the work and conversational talents of Duncan Kennedy and Mort Horwitz.

1. Other essays in the project include David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. (1986); David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987) [hereinafter *Institutions*]; David Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 329 (1994) [hereinafter *A New World Order*]. This project has been much influenced by Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992) [hereinafter *Rhetoric of Reconstruction*]; Nathaniel Berman, "But the Alternative is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993) [hereinafter *But the Alternative*]; David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT'L L. 1 (1988); Antony Anghie, "The Heart of my Home": *Colonialism, Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993); Antony Anghie, *The Nineteenth Century: Positivism and the Colonial Encounter*, in *Creating the Nation State: Colonialism and the Making of International Law (1995)* (unpublished dissertation, Harvard Law School) (on file with author) [hereinafter *The Nineteenth Century*]; Carl Landauer, *J.L. Bribery and the Modernization of International Law*, 25 VAND. J. TRANSNAT'L L. 881 (1993); ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* (1986). MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989) has also powerfully influenced my understanding.

tury in the tradition of international law, and in the imaginary life of international lawyers today.

I have asked numerous international lawyers what the nineteenth century means to them, what were its contributions, which of its insights and contributions remain relevant, and how did that discipline differ from our own. For today's international lawyer, the nineteenth century seems long ago and far away, in many ways more distant from current problems and reflections than the great publicists of the seventeenth and eighteenth centuries—Hugo Grotius, Franciscus Suarez, Emmerich de Vattel and the rest. Moreover, the international lawyer's memory of the nineteenth century, as of our nineteenth century disciplinary forebearers, is connected only very loosely to anything that happened or was thought between 1800 and 1900. To understand the nineteenth century's contribution to the field, we must start with this gap, this forgetfulness, and with the thin factual and doctrinal traces which remain from what was a comparatively peaceful and law abiding century when compared with our own.

At the same time, however, a memory nags, a nineteenth century drifting just beneath the surface, as the doctrine we have outgrown, the method we eschew, the theory we reject. Modernists all, today's international lawyers remain acutely aware of what it means not to be modern, and this, more than any doctrinal or theoretical heritage, remains with us as the nineteenth century we are glad to have done with. For today's international lawyer, the twentieth century is truly an exceptional one, a time of new ideas, new institutions, new scholarly methods, and new roles for international lawyers and scholars. More than a gap in memory, the nineteenth century offers an image of the pre-modern, a baseline against which to measure the discipline's progress and this century's exceptionalism. This image, of a method before frustration with formalism, a doctrine before the erosion of sovereignty, and a legal philosophy before the pragmatic flight from theory, remains an active part of twentieth century disciplinary argument, although it reflects only dimly the actual doctrine, method or philosophy of the field before the First World War. Indeed, it would be more accurate to say that this image of the pre-modern arose alongside the modern, only to be projected back as the screen memory over an otherwise forgotten nineteenth century.

In the field of international law, it has been conventional to remember the nineteenth century in two ways: first, for the philosophical controversies between naturalism and positivism, which, after the rela-

tive triumph of positivism, gave way to the more pragmatic discipline we know in this century and second, as a classical period, in which sovereignty and the state were consolidated as the fundamental doctrinal and philosophical underpinnings for international law, only to be eroded, rejected and replaced by twentieth century international law. In both memories, the nineteenth century legal order is finally a thing of the past and it has been the discipline's preoccupation from the first moments of the League of Nations to keep it that way.²

These memories suggest the terms which mark our century's progress. In the conventional story, an obsession with sovereignty as absolute, autonomous, and living in a state of nature, has given way over the last hundred years to an international community and a general legal order, a largely institutionalist regime of procedural regularity and normative proliferation in which most actors abide by most norms most of the time. International law has taken us, or followed us, from coexistence to cooperation, and from autonomy to community. At the same time, an old fashioned legal formalism has given way to a modern legal science of context, process, and value, moving us from absolute to relative norms, from a disembodied and autonomous legal culture to one engaged with other fields and attuned to the needs of real-world problem solving. As legal scholars, we have progressed from a legal theory split between incompatible and unsatisfying philosophical explanations for the existence of international law, like "positivism" or "naturalism," to a more pragmatic attitude about philosophical explanation in general, and increased disciplinary attention to what is useful, or what functions, for real actors in concrete situations.

It is not unusual for the modern international lawyer to experience these disciplinary developments as a maturation. Although it may often seem that disciplinary progress is threatened, there remain those (often in politics, or in the third world, or new to the field) who would return us to a time of sovereignty, formalism, positivism. Mainstream international lawyers are usually confident that with vigilance they can defend what they have wrought, for their progress has been a natural one, hard fought at times, but part of a drama of social evolution. Their disciplinary advances have also been our century's and our civilization's progress. In a real sense, international lawyers have felt that at its best, history is on their side.

2. Indeed, the antipathy of international lawyers associated with the League system for the ad hoc arbitral traditions of the Hague is striking. See CHARLES DEBENEDETTI, *ORIGINS OF THE MODERN AMERICAN PEACE MOVEMENT 1915-1929*, at 27-29 (1978).

At the same time, the field has typically understood its progress, from nineteenth century philosophical preoccupations and classical doctrinal formalism to twentieth century cooperative pragmatism, in political terms. The deterioration of classical international law, its replacement by pragmatic institutions and functional doctrinal analysis, is told as a progressive story of modernization, internationalization, and of the left. The turn from the nineteenth century is both history in progress and progressive history. As the nineteenth century ended, international lawyers did share a form of legal consciousness—a way of reasoning, a set of arguments, categories and doctrinal assumptions—which resembles in many ways what we now remember as “classic” international law. It does sound, to modern ears, unduly formal and fixated on sovereignty. *It seems plausible to blame this set of ideas, forged at the apogee of imperialism and unable to prevent the First World War, for facilitating colonial domination and failing to build a satisfactorily cooperative international public order.* As the nineteenth century gave way to the twentieth, it was international law conservatives who defended the Hague system, and progressives who sought a “new” international law. The great innovations of twentieth century international law—a theoretical and doctrinal pragmatism, the dramatic expansion of international institutions and non-state actors, the doctrinal disestablishment of sovereignty and blurring of the boundaries between public and private or international and municipal law, decolonization and the engagement with politics, economics and sociology, not to mention the great normative projects of state responsibility, human rights, and so on—have begun largely as the projects of disciplinary progressives. At least within the intellectual establishments of the West and North, public international law in the twentieth century has largely been a progressive and humanist discipline, marked by its hostility to what is remembered as the classical system. This more pragmatic approach may well provide the lawyer a broader tool kit of solutions to transboundary problems, from AIDS to the environment.

My own preliminary thinking about the legacy of the nineteenth century for international lawyers, however, leads me to stress a few counterpoints to this conventional narrative. It is important to remember, for example, that what we think of as the classical system, of both legal philosophy and doctrine, has never been as thoroughly rejected as this conventional picture suggests. It survives in the most progressive of contemporary polemics for a new international law. Sovereignty, formalism, positivism, and a rule of coexistence rather than cooperation,

all remain with us, not only as echoes and remnants to be excised root and branch, but as dreams, projects, and goals for our work. This continuity in twentieth century disciplinary argument leaves me skeptical of the claim that a shift away from formalism or sovereignty can ensure, or even mark an argument as progressive, or internationalist, or modern. And so I return to the nineteenth century, drawn to the hypothesis that the classical synthesis I have been taught to anticipate may in fact have been generated by very twentieth century argumentative habits.

Indeed, it seems that the classic synthesis did arise, at least to consciousness, alongside its rejection. It may even have been largely the retrospective fantasy of those who would define their politics by its rejection. In international law, the traditional narrative has always had a problem with dates, caused partly by the continuity of "classical" elements in modernism, and partly by the rather late appearance of many elements of what came to seem ageless classic truths. A search for classical legal thought quickly presents us with an incredible shrinking nineteenth century, since most of the "classics" contemporary international lawyers associate with the nineteenth century actually appeared in the first decades of the twentieth, contemporaneous with the most insistent calls for modernization of the field. This observation suggests that we think less of a nineteenth century system deteriorating into the twentieth than of an explosive break, severing modernism from the nineteenth century by the simultaneous combustion of a "classic" and its critique.

At the same time, I am skeptical of the political link often imputed between the classical synthesis and the bad old nineteenth century. It may have been that the imperial project expressed itself in the language of a classical sovereignty, but it is possible also that colonialism could have been, and indeed has since often been, pursued in thoroughly modern terms, and not just because elements of the classic system, such as the post-colonial state, have survived the onslaught of pragmatic modernization. The problem of engaging and governing the culturally different has preoccupied the field across a wide range of historical periods, scientific methods and doctrinal conventions.³ Just as the failure of the Hague left the field with false hopes for the League, so it seems that any hopes we now place in the peaceful entailments of a pragmatic as opposed to a formal international legal order are probably exaggerated.⁴ It is customary to think of the mysterious powers of nationalism shattering

3. See Anghie, *The Nineteenth Century*, *supra* note 1.

4. See Berman, *But the Alternative*, *supra* note 1.

our cosmopolitan illusions, as aided and abated by the dark doctrines of sovereignty, the scorched earth individualism of positivist formalism, and so on. But nationalism is itself a modern, pragmatic, anti-formal concoction, and I wonder whether the modernism of our discipline's twentieth century sensibility should much reassure us.⁵ Taken together, it seems that developments within the discipline, style changes in the practice of argument, criticism, and scholarship, fashion shifts in the intellectual and cultural backdrop to international law arguments in other fields and disciplines, may have had as much to do with the consolidation and deterioration of the classical system as its political and pragmatic efficiency. Here, my hypothesis is that the nineteenth century may teach us that the modernism, pragmatism and progressivism of today's international law is more rhetorical effect and polemical claim than historical achievement, and more part of the internal dynamic of the field's development than artifact of a distant era.

Still, this rhetorical break, the break to a rejected synthesis, rather than the break from a synthesis to its rejection, is of great significance. Only by shooting its rapids can international lawyers become successful polemicists for the new. In this century, international law has become a discipline of persuasion, its doctrines and institutions harnessed to narratives of progress toward the international, a place figured as both practical and humane.

But if pre-modernism remains active as a set of commitments against which we must remain vigilant, acknowledged as a largely imaginary nineteenth century continually in need of repression, then the origins of this practice, this narrative posture so peculiar to twentieth century international lawyers as missionaries for modernism, is much more obscure. I conclude these preliminary reflections with the hypothesis that this intellectual posture might be the most significant legacy of the break with the nineteenth century: the transformation of international lawyers into polemicists for internationalism in a self-consciously evolutionary narrative, inaugurating a disciplinary practice of progress narration which continually restates international law forward of what can then be remembered as the nineteenth century. It was

5. Everything I think about nationalism I learned from Berman. See Berman, *Rhetoric of Reconstruction*, *supra* note 1; Berman, *But the Alternative*, *supra* note 1. See also Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353 (1992); Nathaniel Berman, *Nationalism, Legal and Linguistic: The Teachings of European Jurisprudence*, 24 N.Y.U. J. INT'L L. & POL. 1515 (1992).

late in the nineteenth century when international lawyers first became advocates for what they saw as civilization's natural evolution, an advocacy which came to seem only more urgent after 1918. If, as I suggest, the nineteenth century's main disciplinary contribution was turning itself into a past, a past related only obliquely to its own theoretical and doctrinal practices, then this story about the nineteenth century is, in the end, a story of our own century's originalism—and the origins of that exceptionalism in the illusions of memory and the practice of progress narration.

II. A MEMORY LAPSE

It would be easy to study international law today and learn next to nothing about the nineteenth century. For today's international lawyer, the history of legal doctrines and cases and institutions is largely a twentieth century tale, rooted in great principles from the mid-seventeenth century break to a state system in Europe. The nineteenth century floats in our memories as a non-legal context for an emerging legal order, even a pre-legal background of diplomatic, rather than social or economic, history. There are some standard facts, points on the line of this long century, running from 1789 until 1914. It is largely a European story: the Concert of Europe, the balance of power, nationalism in Europe and Latin America, the Age of Empire, and the opening of Japan. Napoleon's new European political and legal order was followed by a century of reinforcement, reaction and revolution. There were imperial ambitions in Africa and Asia, and Great Power competition, an arms race, and ultimately, war. There was nostalgia for a peaceful Central European order, before the explosions of nationalism. In North America, there was manifest destiny, slavery, civil war, and a new nation coming of age, sorting out its internal issues of sovereignty, statehood and federalism, and coming into its own internationally in an imperial and commercial age. The nineteenth century was also the age of commerce, of liberalism, of robber barons and trusts, of revolutions in transport and technology. Both within the United States and internationally, the nineteenth century was an age of frontiers, of Indian and Colonial wars, of consolidation at the margin.

If the century has a direction, it is simultaneously from Europe outwards and from politics to commerce. The move to commerce brings a move from public to private order, and foreshadows a move from the imperial capitals of Paris, London and Berlin to the financial centers of London and New York. More than any other, this is Britain's

century, naval power and sterling straddling empire and finance.

In our memory, the century starts thin and flat, as 1815 anticlimactically ushers in a century of peace. It builds slowly to the drama of its final decades, when all that we know as the nineteenth century reached its apogee in empire, commerce, and nationalism. Now, when international lawyers speak of the nineteenth century, they really mean its final decades, from roughly 1870 (the Franco-German war of 1871 will do) until 1914. Also, the history of ideas builds slowly to the revolutions of Darwinism and legal positivism, from nature to history and custom, until the climax of romanticism, and the inauguration of the progress narrative, civilizations and cultures evolving to survive, in the years before 1914. For international law, as for much of the rest of the twentieth century legal thought, it is really only the last five minutes of the nineteenth century that count.

In fact, contemporary international law casebooks mention the nineteenth century rarely. Of the more than 650 cases discussed in the 1993 edition of Henkin, Pugh, Schachter and Smit's "classic" casebook, there appear only two dozen from the nineteenth century. The majority are squib cites concerning the force of treaties in American constitutional jurisprudence.⁶ In the casebook's short "historical introduction," the nineteenth century fades entirely from view, sandwiched between theorists of the seventeenth and eighteenth centuries, such as Richard Zouche (1650), Christian Wolff (1679-1754) and Vattel (1758), and the League of Nations.⁷ The international legal order which emerged "out of" or "against the backdrop" of nineteenth century diplomatic history remains present only in the odd case, treaty, institution or publicist. The Hague system of arbitration has disappeared from view, or been blended in memory with the jurisprudence of the Permanent Court of International Justice (PCIJ) of the interwar years.

Sometimes these fragments are presented as partial, immature precursors for contemporary arrangements, exceptional legal innovations, sporadic and experimental in an age of diplomacy and great power politics. This is particularly true for international institutions, a self-consciously twentieth century discipline which looks back on the nineteenth century as a diplomatic system whose failures called forth the first mature international organizations after 1918. The Rhine River Commission (1815), the Universal Postal Union (1874), and the Inter-

6. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 165, 198-206 (3d ed. 1993).

7. *Id.* at xxv-xxvi.

national Meteorological Organization (1878) are precursors, foreshadowing particular technologies like voting procedures, multilateral treaties of establishment, and international civil servants, which would come together after 1918 in the general standing institutions of the League system, legalizing the practice of great power diplomacy as collective security and rejecting the nineteenth century system of power politics.⁸ In this view, the League promised to reverse the nineteenth century relationship of law and politics, bringing politics into law through the new discipline of political science and the technique of the standing plenary.

More often, the nineteenth century tidbit which remains in the canon is a case or author presented as the relic of an earlier, more complete legal terrain, a dinosaur which has withstood the fragmenting assaults of modernism. Moving through the casebook we find *The Schooner Exchange v. McFaddon* (1812) on sovereign immunity; *Church v. Hubbard* (1804) on the contiguous zone; the *Wildenhus's Case* (1887) on coastal state jurisdiction over crimes on foreign ships in port; the *Finlay Claim* (1849) on taking the property of aliens; *United States v. Rauscher* (1886) on extradition; *Ker v. Illinois* (1886) on jurisdiction over foreigners seized abroad; and *Red Rock v. Henry* (1883) on the Alien Tort Claims Act.⁹ Secretary of State Daniel Webster appears twice, once stating United States views on self-defense (1842) and once commenting on the effects of recognition (1852).¹⁰ The first statement survives in the *Caroline Case* and Article 51 of the United Nations Charter, while the second has become one of several competing "theories" of recognition.

The status of these nineteenth century scraps is unclear, as if important only as historical trivia. Thus, the 1815 Final Act of the Congress of Vienna merits mention for its recognition of riparian rights.¹¹ We learn that there were hundreds of arbitrations in the nineteenth century, following the 1794 Jay Treaty between the United States and Great Britain, under the 1858 Chinese Claims Treaty, before the 1868 Mexican-United States Claims Tribunal, and at the 1885-86 Venezuela Claims Commission, but none of them remain significant enough to

8. *Id.* at xxvi-xxvii.

9. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804); *Wildenhus's Case*, 120 U.S. 1 (1887); *Finlay Claim*, 39 BR. & FOR. STATE PAPERS 410 (1849); *United States v. Rauscher*, 119 U.S. 407 (1886); *Ker v. Illinois*, 119 U.S. 436 (1886); *Red Rock v. Henry*, 106 U.S. 596 (1883).

10. HENKIN ET AL., *supra* note 6, at 927, 260-61.

11. *Id.* at 1353.

warrant specific comment or citation.¹² The 1888 Convention of Constantinople internationalized navigation in the Suez Canal, as did the Hay-Pauncefote Treaty of 1901 for the Panama Canal.¹³ The 1868 Declaration of St. Petersburg offers an early effort to ban inhumane weapons, and so on.¹⁴ In short, to revisit the nineteenth century in contemporary treatments is to remember how much international law, for all its archaic references, its penchant for Latin, and its interest in custom, is a product of this century. In its own terms, international law has left the nineteenth century behind, its details rejected, revised and renewed. A thoroughly modern construction, international law takes its history light.

Still, the fragmentation of the nineteenth century into many isolated memories masks a second nineteenth century, in many ways more significant for the field. International lawyers also remember a consolidated system, an international legal order, indeed the "classic" or "traditional" system of international law. Across the twentieth century, international lawyers have struggled against this classic system; the fragmented memories in a contemporary casebook mark their success. All those formal doctrines have now been happily displaced by more functional, practical arrangements, ironically just as the era of diplomacy has given way to the era of law.

Many doctrinal fields of international law are now taught as evolutions from or rejections of a "traditional" doctrinal synthesis. It was the tradition of the Hague—stuffy, formal and legalistic—from which the League sought to distance itself, the twentieth century hiving off its link to the nineteenth. We study the law of war as a "classic" system of declarations, neutrality, and belligerency, displaced first by the League and then by the United Nations system, outlawing, regularizing, and relativizing war as a collective instrument and a gradation of justifiable "interventions."¹⁵ We find that a three mile territorial sea was uniformly accepted in the nineteenth century, until extended and fragmented into functional zones in the codifications of the mid and late twentieth century.¹⁶ An absolute theory of sovereign immunity has given way to a more nuanced, functional approach, just as in the law of sources a sharp distinction between law and politics has been replaced by gradations of

12. *Id.* at 788-89, 793, 800.

13. *Id.* at 1263-64.

14. HENKIN ET AL., *supra* note 6, at 1020.

15. *Id.* at 868-1018.

16. *Id.* at 1240-49.

hard and soft law and theories of relative normativity.¹⁷

In both doctrinal and theoretical terms, the twentieth century in international law has been a story of renewal, with waves of renewal energy reacting to a discipline gone astray and the nineteenth century representing the classic synthesis which each generation of enthusiasts must modernize, remake and reject. It is this memory, more than a list of disparate doctrines, which hangs loosely about the nineteenth century. Flipping through the casebook, however, it is interesting how many of the doctrines, cases and publicists remembered as classics actually date to the last moments before the First World War, or to the enthusiastic modernization of international law in the 1920's, including: *Hilton v. Guyot* (1895) and the *Paquete Habana* (1900) on the relationship between municipal and customary law; the restatement of *The Caroline Case* (1906); and *American Banana v. United Fruit* (1909) on the territoriality of legislative jurisdiction.¹⁸ The "Hague System" of arbitration developed only just before the First War, while rules on diplomatic immunities and sources of law were a product of the codifications of the 1920's and the jurisprudence of the PCIJ. The Mexican Claims, which we remember for their contribution to state responsibility doctrine, date from the twenties, as, of course, do the great cases and arbitrations concerning jurisdictional conflict and territorial title: *The Case of the S.S. Lotus* (1927); *The Island of Palmas* (1928); and the *Aaland Islands* (1920).¹⁹

In a strange way, the doctrinal corpus of the classical system was produced in the codifications of the 1920's, understood at the time both as a project of renewal and as the systematic recording of practices and rules which had been devised in the previous century. Exactly as the institutional constructions of the twentieth century sought distance from the nineteenth, much of the doctrine—in many ways the entire project of doctrinal codification, the idea that there should be doctrine and legal reasoning and procedures and responsibility, that the existence of these things required an idea, an argument, an urgent practice of recollection and recording, a whole doctrinal system to ascertain the "sources" of international law, all of which arose in the twenties—was both an act of

17. *Id.* at 14-19, 36, 51-54, 87-92, 112-29, 126-48.

18. *Hilton v. Guyot*, 159 U.S. 113 (1895); *The Paquete Habana*, 175 U.S. 677 (1900); *The Caroline Case*, 2 JOHN BASSETT MOORE, DIG. OF INT'L L. 412 (1906); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

19. *Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10; *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829 (1928); *The Aaland Island Question*. Report of the Committee of Jurists, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 8-9 (1920).

recollection, revisiting, and rewriting the nineteenth century and an act of innovative self-consciousness. The order that had simply been, would now have to be urgently reconstructed, precisely that it might be rejected—or rejected that it might be rebuilt.

This modern project of renewal through recollection, the ex-post reconstruction of a classic doctrinal system, seemed urgent in the post-war nineteen twenties. The possibility for international order, organization and law seemed tenuous, fragile, and new. Part of the reason was certainly the war and the failure of the pre-war legal order to hold, but the new discipline also understood itself in philosophical battle with doubt, and in argument against legal order denial. How was international order possible in a world of sovereign states? How was law to be possible in a world of politics? This challenge, which would become the preoccupation of international lawyers in the nineteen twenties and dog the discipline throughout the century, was backdated to the nineteenth century, a century which had, by and large, taken the existence of international law, the immersion of sovereigns in a system of rights and obligations, for granted. This backdating, strangely, became part of the discipline's response to denial. All those questions, really of more concern to philosophers than practical men, were relevant in the last century, but it was precisely such philosophical speculation which distracted the field from the need for pragmatic attention to problems of diplomatic order. In a way, the discipline asserts, foundational doubts are always already passé.

For legal thought in the nineteenth century, the Henkin, Pugh, Schachter and Smit casebook offers us very little. Of scholarly writers, those who had not come too early, like Zouche, Vattel and Wolff, came too late for the nineteenth century, such as Heinrich Triepel (1899), Georg Jellinek (1905), and G. del Vecchio (1929).²⁰ From the nineteenth century, only Henry Wheaton (1836) remains in the canon, and he's hanging by a thread, unmentioned in this text. In their brief paragraphs on the nineteenth century, Henkin, Pugh, Schachter and Smit offer only three emphatic, and quite different, denials of international law.

First, G.W.F. Hegel, "constructed an elaborate dialectic system, culminating in the glorification of the national (monarchic) state and denying the validity of international law (for which he substituted 'The Passing of the State into World History')." ²¹ Then Karl Marx who, from the opposite angle, "challenged the national state and its legal system as

20. See HENKIN ET AL., *supra* note 6, at xxv-xxvi.

21. *Id.* at xxvii.

an instrument of exploitation of the working class by the capitalist bourgeoisie, and called for revolution by the working classes of the world."²² For the editors, "[t]his, of course, was incompatible with the structure of the law of nations, built on a system of sovereign national states."²³ The nineteenth century, diplomatic, political, teaches us that international law can be denied by either celebrating or eliminating the state—ours will be a middle way.

Only one paragraph of nineteenth century legal thought makes it into the 1500-page book: John Austin's famous 1832 suggestion in *The Province of Jurisprudence Determined* that:

[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.²⁴

This paragraph sets up a lengthy chapter on international legal theory, elaborating the variety of responses which have been made in this century to such doubts—international law is enforced, if horizontally and is followed, if voluntarily and so on. But the best response is simply the rest of the book. Hundreds of doctrines and cases, arguments and incidents somehow do constitute an order which, it is hard to deny, seems familiarly legal. And anyway, as the editors admit, international law is also political.²⁵ Like all law, such distinctions are revitalized and placed on a continuum in contemporary pragmatic legal thought. If early in the twentieth century this Austinian paragraph would state a bold challenge, by now, it seems, as it did through most of the nineteenth century, a plausible enough description of how the international

22. *Id.*

23. *Id.*

24. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 201 (Isaiah Berlin et al. eds., 1954); see also HENKIN ET AL., *supra* note 6, at 11.

25. In an astonishing transformation between the second and third edition, the editors now begin with what would have been a resounding admission against interest: "[L]aw is politics." HENKIN ET AL., *supra* note 6, at 1. The preface suggests a reason: once communism vanished, it became possible for American liberals to say what they had always known. *Id.* at iii. The text nevertheless continues with the same fifty-page defense of international law as law which had figured in the earlier edition, before the politics of law could be so boldly announced.

legal system actually functions.

At the end of the twentieth century we remember the nineteenth for a challenge to the possibility of legal order and for a classic doctrinal synthesis. In a way, we have responded to the challenge precisely by rejecting the synthesis. It was by disestablishing the state, rejecting formalism, and fragmenting the absolute sovereignty of the classical period that a pragmatic discipline emerged, capable of responding to the Austinian challenge: yes, we have no foundation—law is as law does, tested by the behavior of nations. And we think of the challenge and the synthesis together. Austin was right about the old order; preoccupation with law's formal purity left it open to the challenge of irrelevance.

But is this right? To the extent the urgency of the Austinian challenge, along with the formal preoccupations of the classical system with sovereignty, were back formations of the break to modernism, back formations which remain with us still, we might be less confident that we have pulled their sting. We can only explore this question by returning to the classic tradition, and exploring its roots in both the nineteenth and early twentieth centuries.

III. INTERNATIONAL LEGAL THEORY

First and foremost, international law remembers the nineteenth century, along with the eighteenth and seventeenth, as a period of philosophy. When the history of the field is told in broad sweeps, two dates stand out, 1648 and 1914. The year 1648 is thought significant because the Treaty of Westphalia, which ended the religious wars in Europe by settling a system of territorial authority over religious questions, came to be remembered as the legal inauguration of the "state system," and the beginning of international law. Before, we remember precursors, even in the ancient world, and famous publicists who foresaw one or another doctrinal element of what was to come. But it was largely a pre-legal international world of politics, war, religion, and ideology. The broad period from 1648 to 1914 is remembered primarily for the developments in legal philosophy which refined this state system, until their culmination in the classic synthesis of the late nineteenth century. The modern era, in turn, is seen as the period of pragmatism and reaction against the theoretical preoccupations of the years 1648 to 1900.

In this story, the traditional era is remembered less as a period of diplomatic maneuver, institutional invention or doctrinal authority than as a period in which famous writers thought deeply about the funda-

mental questions of law in a state system, namely, how it might be possible to have a legal order among states which are sovereign, which admit no higher authority, no legislator, whose powers are equal, and hence do not overlap, each sovereign absolute within its territory. In the received history, international law, as it consolidated itself in the post-1648 period, toyed with various answers to this question, all of which have come to be thought of as "naturalism." The story of the nineteenth century is that of the defeat of these "naturalisms" by "positivism."

These terms, "naturalism" and "positivism," take on somewhat special meanings in the theory of international law. They suggest alternative answers to what became international law's central riddle: How can there be law among sovereigns when sovereignty, by definition admits no higher authority? Naturalism refers to theories of international law which locate the binding force of international norms in some source outside sovereignty, which precedes the sovereign, or can be implied from the nature of a community of sovereigns. The source might be reason, or religion, or moral values, or it might be the traditions of the community in which sovereigns find themselves. In the traditional story, nineteenth century international legal theorists gradually realized that these various ideas could not explain the source of law's binding force in a way consistent with the absolute nature of sovereignty and the equality of states, because these all implied some order as means of enforcement beyond the sovereign which simply was not available in a world of sovereign states. Hence, positivism rooted the binding force of international law in the consent of sovereigns themselves, on a loose analogy to the private law of contract, and found the law in expressions of sovereign consent, either through a laborious search of state practice or a catalog of explicit agreements. International legal positivism is simply the working out of the private law metaphor of contract applied to a public legal order.

In one sense, remembering a late nineteenth century triumph of positivism puts international law on the road to pragmatism, for positivism orients us to the actual practice of states, and seems less likely to degenerate into wishful thinking or moralizing about what the law should be. The twentieth century traditions of realism, sociological jurisprudence, and international relations theory continue this tendency. In this sense, ours is a positivist century. Positivism lays the ground work for pragmatism, extinguishing for a century international law's flirtation with religion and ideology.

It is a paradoxical inheritance. International law rids itself of faith

only by enshrining the state, making the task of international public order both more realistic and more difficult. International legal philosophy in this century has been committed to explaining how, given sovereignty, international legal order is possible. It is a committed, engaged, polemical philosophy. To the question, "How can there be order among sovereigns," there cannot be the answer, "Well, maybe it's not possible." To do so would be to deny the facts, since there appear to be lots of rules and legal institutions. More importantly, it would betray the internationalist project. In this sense, it was by eliminating religion that international lawyers became priests.

To fulfill their polemic mission, to render plausible a legal order among sovereigns, the philosophy which sets this question, which makes sovereigns absolute or requires a sovereign for legal order, must be tempered, if not rejected. As a result, to inherit positivism is also to inherit a tradition of response to the skepticism and deference to absolute state authority, which renders legal order among sovereigns *implausible* in the first place.

A group of ideas arise together: the philosophical priority of the state, the identification and rejection of naturalism, the challenge to the possibility of international public order, and a polemical tradition of international legal philosophy which could evolve only by rejecting extreme positivism. In this sense, what is now remembered as nineteenth century positivism sets in motion a practice of affirming its premises and rejecting its conclusions.

There have been two broad traditions of response. The first approach responds theoretically, revitalizing either the positivist or the naturalist tradition against skepticism. Beginning with the notion of "consent" and an analogy to private law, and proceeding through the range of twentieth century theories of international law, the existence of international law has been variously affirmed and explained by modifying the image of absolute state sovereigns floating in a legal vacuum. It is this tradition of response which gropes most eagerly in the literature of private law theory to develop the analogy to contract for international public law during the first decades of the twentieth century.

A second tradition of response is associated with the twentieth century tradition of international legal pragmatism, and most characteristic of international law after the Second World War. It rejects the theoretical traditions of both positivism and naturalism as irreconcilable extremes between which a middle way must be built, and, more importantly, as sterile intellectual projects, able to speak only to one another

and unhelpful in strengthening the actual or real international legal order. In an unfortunate terminological borrowing from political science, positivism offers no plausible "positive" account of state practice. International legal theorists now customarily present philosophical inquiry into the possibility of international legal order among sovereigns as a dead end and as the preoccupation of an earlier, philosophical age. International law students are now taught: in an earlier age, when people were infatuated with sovereignty, and thought it was absolute, there came a challenge to legal order—now order among sovereigns—and there were naturalist and positivist responses, neither very persuasive. Even today, many an international law theorist has his or her own nuanced theory. I have one, and if you want to be a theorist, you will have to have one too. But for now, let's get on to the doctrines, the institutions, the process, the practice—to something more pragmatic. And there we will see that sovereignty is, in any event, no longer what it once was thought to be.²⁶

Twentieth century international legal theory less accepts the positivist answer to the question how law might be possible among sovereigns than rejects the project of further philosophical inquiry into this question. At the same time, how international law binds, how order is possible among sovereigns, how international law distinguishes itself from politics, and how international norms are enforced in the absence of a supra-sovereign, remain the central preoccupations of the field throughout the twentieth century, just as elaborating the perquisites of sovereignty remains the central doctrinal project. It is not the question which is rejected, but the project of theoretical response and the idea that such questions might yield to philosophical inquiry. They might be addressed doctrinally, through sources doctrine, for instance, fashionable in the interwar period, or procedurally, as in the nineteen fifties and sixties, or, more recently, institutionally, professionally, practically, and ultimately by attention to the behavior of states and pragmatic observation, but not theoretically.

Why? Because the nineteenth century taught us the futility of philosophy, and the urgent necessity of getting beyond speculation if war is

26. When speaking theoretically, the vigor with which contemporary international legal scholars denounce "sovereignty" is quite breathtaking. One can get a flavor from the opening pages of Henkin. For example: Brierly denounces "the confusion which the doctrine of sovereignty has introduced into international legal theory." HENKIN, *supra* note 6, at 13. Henkin states "[s]overeignty is a bad word, . . . a substitute for thinking and precision." *Id.* at 15. Lillich says "the concept of sovereignty in international law is an idea whose time has come and gone." *Id.* at 19.

to be averted and international order maintained. From the League's emphatic rejection of the Hague system at Paris in 1918, we have remembered nineteenth century international lawyers for philosophical fiddling while imperialism raged, alliances hardened, war was prepared and diplomacy failed. This nineteenth century memory inaugurated a disciplinary anti-intellectualism, a repeated practice of demonstrating the unsatisfactory nature of both naturalist and positivist answers to the question of law's force in a world of sovereigns, and of calls for a turn to practical efforts of one sort or another to expand international law in the name of peace and security. The practical project might be institution building, codification, citizen initiatives or litigation, but it would not be a project of theory or philosophy. For the contemporary international lawyer, the most important legacy of nineteenth century philosophy was a question so unanswerable it discredited the project of international legal theory for a century. What is remembered, what remains, is the challenge and the polemical project of response.²⁷

It is interesting, in light of this memory, that nineteenth century international legal scholars and practitioners did not seem particularly preoccupied with theoretical disputation in general or with the question of law's possibility in a world of sovereigns in particular. If anything, their theoretical chapters and arguments take up less space, and the insistent argument about the "science" of international law as the polemic in favor of international law, so characteristic of the early twentieth century, is largely absent. Broadly comparing the Austin/Bentham cite in theoretical chapters from, say 1840 through 1990, we find nineteenth century scholars relatively untroubled by Austin's assertion that international law is not law "properly so called." After citing ideas about how international law should be described and cataloged, including Austin's, they proceed to the materials. In a sense, Austin had not yet become a challenge, let alone the central challenge, and international legal philosophy had not become a tradition of polemical response.

In the first half of the nineteenth century, it seemed obvious that there were restrictions on sovereignty, and natural to experience sovereigns always already enmeshed in a system of rules. We find discus-

27. It is astonishing how uniformly international legal treatises, from the mid-nineteenth century until the present day, begin their theoretical chapter by reference to the challenge of Austin or, less frequently, but to the same effect, Jeremy Bentham. *See, e.g.,* HENKIN ET AL., *supra* note 6, at 10-11. *See also* FRIEDRICH K. SAVIGNY, 1 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 32 (1840); THOMAS ALFRED WALKER, THE SCIENCE OF INTERNATIONAL LAW 41 (1893); *cf.* KOSKENNIEMI, *supra* note 1, at xiii (addressing this phenomenon).

sions about where these rules might be located and how they are generated. It is true these discussions lean ever more steadily away from the law of nature to the law of nations, and stress increasingly the role of custom, treaty and state practice. But these discussions are not presented as theoretical responses to skepticism about the legality or existence of international law. It was only later in the century that the question of international law's possibility in a world of sovereigns was first asked, perhaps indeed by Austin or Bentham. Even then, most of those who quote Austin or Bentham do not do so to present a central challenge to the field, or to call for an "answer," theoretical or otherwise. The preoccupation with state practice and increasing use of an analogy to private contract early in the twentieth century, if presented at all in the nineteenth, is offered primarily as part of a broader articulation of how, mechanically, rules are generated and identified. Wheaton quotes Austin as part of a catalog of thought defining international law.²⁸ Far from seeing it as a challenge, he adopts Austin as a helpful explanation for the obvious fact of an international legal order. In a sense, those who would later be thought of as either naturalists or positivists were less seeking to respond philosophically to what would come to be seen as a fundamental theoretical conundrum, than simply trying to describe what seemed to be a self-evident system of rules.

We find the same assumption in nineteenth century international law cases before the United States Supreme Court, from John Marshall's eloquent opinions in *Schooner Exchange v. McFaddon* (1812) or in *The Antelope* (1825) to Justice Horace Gray's catalog of international practice in the 1900 *Paquete Habana*.²⁹ Both justices take quite for granted the existence of an international legal system and give little thought to the executive's ability to ignore its rules. The *Paquete Habana* is now remembered for the ringing declaration that "international law is part of our law." The interesting point, however, is not that American courts came finally to accept the binding force of international law 124 years after independence, but that it was now necessary to state what previously had been simply accepted. In the twentieth century, American courts would have no trouble confining their jurisprudence to American law,³⁰ often explicitly excluding consideration of international obliga-

28. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE* 38-47 nn.17-18 (1836).

29. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Antelope Case*, 23 U.S. (10 Wheat.) 66 (1825); *The Paquete Habana*, 175 U.S. 677 (1900).

30. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (1945).

tions, until the *Paquete Habana* would come to be taught as a fond memory and utopian hope.

In fact, the question of international law's possibility, the question which would give international legal philosophy a bad name, was much more a product of the early twentieth century, after the First World War. There are aggressive historical interpretations of the pre-1900 "classics" and a categorization of publicists as either "positivists" or "naturalists," or, for those more difficult to classify as the scheme became more insistent, "Grotians" who took an admirable, if muddled, middle way.³¹

It was only in the 1927 *Lotus* case, we should remember, that international law first asked itself whether the international legal order was fundamentally one of sovereign freedom or constraint. The PCIJ famously concluded that "[r]estrictions upon the independence of States cannot therefore be presumed,"³² inaugurating the period of what now seems extreme positivist doctrine. However, the Court came to this foundational conclusion in a sharply divided opinion, not because the international legal order inherited from the nineteenth century was well known as one of sovereign freedom, but because whichever way it was considered, as freedom or as constraint, it would still be necessary to ground either the particular rule or the overall system of constraint in sovereign consent, from which permission could then be granted.³³ In a world of sovereigns, as understood by the Court, philosophical inquiry into the nature of the legal order was unnecessary and unhelpful. Either way, restrictions on sovereignty could not be presumed. It was in the *Lotus* that the Permanent Court of the nineteen twenties, preoccupied with the sources of law, embedded what we now understand as "high positivism" in the theory of international law, and it did so as a thoroughly modern rejection of theoretical inquiry.

As international legal theory, the nineteenth century reminds us of the limits of philosophy. But there is a problem with our memory, a problem typical of many progress narratives which read earlier periods as offering impartial answers to questions which preoccupy us, but which at that time remained to be invented. It is largely in the first half

31. This was the kind of theory animating Andrew Carnegie to translate and republish the "classics of international law," and it defined the ambitions of scholars such as James Brown Scott who participated in the project. J.B. SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* (1934). The search for a Grotian middle way continues, and indeed has recently had something of a resurgence. See, e.g., BENEDICT KINGSBURY ET AL., *HUGO GROTIUS AND INTERNATIONAL RELATIONS* (1992).

32. Case of the S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18.

33. *Id.*

of our century that the Austinian problem troubles and perplexes, and requires an answer. It is there that the responsive theoretical tradition of positivism is elaborated, that naturalism can be seen as its natural, if unsatisfactory, antagonist. It is only in the last fifty years that we find again a more contented theoretical style, almost reminiscent of the nineteenth century. Of course, a pragmatic international law which follows the collapse of philosophy is different from an international law before foundational questions became central to its polemical task, however similar their outward contentment. The late twentieth century's self-confident disinterest in theory is more insistent, even shrill—a difference which we will see marked equally in the doctrines of sovereignty, once again a matter of assumed enmeshment in international norms, but after, rather than before, the doctrinal elaborations of an absolutist sovereignty.

IV. ONE SOVEREIGNTY, ONE LAW: INTERNATIONAL LEGAL DOCTRINE

The most significant doctrines of international law underwent a dramatic transformation in the nineteenth century. Sovereignty became the central reference point for the field and came to have a uniform doctrinal meaning. By century's end, international law would countenance but one form of political authority, absolute within its territory and equal in its relations with other sovereigns. With this sovereignty would come a sharpening of distinctions between law and politics, between international and municipal or domestic law and between public and private. At the same time, international lawyers would sharpen the analogy between international public law and the private law of contract and property, and would increasingly think of a single, universal, international legal fabric ordering relations among civilized and uncivilized states.

This set of ideas about sovereignty and law, doctrinally consolidated in the final decades of the last century, would lead international lawyers in the first decades of our century in two quite different directions. First, the relationship between absolute sovereigns, as monopolies of force and givers of law, and international law itself would come to seem unstable. By the nineteen twenties, such absolute sovereigns seemed to place the very possibility of international law in question. For the first time the Austinian question became urgent: how could sovereigns be subject to law? The international lawyer's task became urgently polemical: sovereigns such as these must be tamed, ruled, brought into institutions through the doctrinal projects of a modern in-

ternational law, while law such as this must be explained, defended or justified.

At the same time, early twentieth century international lawyers began a systematic doctrinal assault on the absolute and formal sovereignty of the nineteenth century. To accommodate the new generation of international institutions to a legal system which seemed to countenance only one form of legal/political authority, it would be necessary to distinguish legal "personality" from sovereignty, the former being a matter of rights and duties which could be parceled out and rearranged in a variety of different ways, leaving institutions with a number of partial, "incomplete" capacities at international law.³⁴ Eventually sovereignty too would be demystified, disaggregated into rights and duties, and transformed into a "social function" performed by different institutions.³⁵

The early twentieth century generated a range of doctrines elaborating the functional perquisites of sovereignty, procedural rules of jurisdiction and state responsibility derived from the absolute nature of sovereignty, as well as doctrines about the coming into being of states—statehood and recognition—at once respectful of the mystical, unspeakable origins of sovereignty and the relative, fragmented sense in which one could be sovereign in different ways for different functions.³⁶ And of course the great doctrinal edifice tying sovereign obligation to sovereign consent, which would be known as the "sources of law" and would so preoccupy the Permanent Court, dramatically shrinking the ambit of international law's substantive rule as obligation became ever more difficult to justify, got its start only in the nineteen twenties, and on the basis of a provision in the Permanent Court's Statute drafted in quite an-

34. See, e.g., P.E. Corbett, *What Is the League of Nations?*, 1924 BRIT. Y.B. INT'L L. 119, 119-48.

35. A classic statement by International Court of Justice Judge Alvarez can be found in *The Corfu Channel Case*. "By sovereignty, we understand the whole body of rights and attributes which a State possesses The sovereignty of States has now become an *institution* an *international social function* of a psychological character." *The Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. 39, 43. Also interesting in this period is the large influence of *Anglo-American political theory on the field*. See, e.g., ROBERT M. MACIVER, *THE MODERN STATE* (1926).

36. Of course the most obvious cases are those elaborately differentiating who is a sovereign for executive and judicial purposes, who has *de jure* and who has *de facto* sovereignty and so forth. See, e.g., *Salimoff & Co. v. Standard Oil of N.Y.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Upright v. Mercury Bus. Mach. Co.*, 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961), *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925); *Sokoloff v. Nat'l City Bank*, 239 N.Y. 158, 145 N.E. 917, 37 A.L.R. 712 (1924); and the *Int'l Tinoco Claims Arbitration (Gr. Brit. v. Costa Rica)*, 1 R.I.A.A. 369 (1923).

other spirit.³⁷ It was only in the twentieth century that nineteenth century sovereignty needed so earnestly to be rejected for law to be possible, and only the twentieth century which felt compelled to generate a doctrinal tradition which could say no to the theoretical doubts imputed to positivism and naturalism.

The interesting point is that both of these twentieth century reforms styled themselves as demystifying, rationalizing, enlightenment gestures, reacting against a sovereignty which had been worshipped as absolute, mystical, and integrated. This mystical element was projected back onto the nineteenth century, the age, after all, of absolute monarchs, diplomatic intrigue and elaborate rituals of inter-sovereign protocol. In fact, from the standpoint of international law, the sovereignty consolidated in the late nineteenth century was a very secular matter, a doctrinal project of practicality in a broader legal fabric whose existence, in turn, was simply obvious. If nineteenth century international lawyers had a blind faith, it was in law, not sovereignty. Sovereignty was their construct, their response, a project of earnest doctrinal elaboration, opening a space for a new form of statecraft in an ancient legal fabric.

The commentaries of the Hague may seem hopeful and complacent when read after the outbreak of World War I, but their conception of sovereignty was anything but mystical, and their project only mildly polemical. The entire doctrinal consolidation of a single sovereignty and a uniform international law was thought of as a scientific project, pursued across the different legal traditions of Europe. It was to be a common sovereignty, participating in a single international law, a shared project of universalization which marked the nineteenth century international lawyer as part of a rational fraternity, broader than the national traditions of Italy or Germany or France or England, broader even than the difference between civil and common law. This sense for a common scientific vocabulary was sharpened by the emerging fields of international private law and comparative law, and supported the intensification of the private law analogy for international public law. It made the international lawyer a partner in the project of colonial administration, and established the field as an arena of university study.

The mystical element which would so disturb the field after the First World War, the taking for granted of sovereignty rather than law,

37. Article 38 of the Statute of the Permanent Court of International Justice was drafted as a guide for judges to rules, not a catalog of responses to Austinian doubt and sovereign challenge. 1920 P.C.I.J. Stat. 38.

the sovereignty which would spark the Austinian question to burn with new urgency, was, in an odd way, a product of the early modern period which would so urgently reject it. Only a fabulous and sacred sovereign could sustain the polemical antipathy of twentieth century international lawyers, even as they harnessed their discipline to the functional disestablishment of what the nineteenth century had wrought.³⁸

A great deal more historical work remains to be done to recover these developments, but some excellent studies are now available, including Anthony Carty's work on the concepts of territory and sovereignty and the rise of the private law analogy in international law treatises during the nineteenth century,³⁹ Martti Koskenniemi's study of nineteenth century international legal scholarship,⁴⁰ David Bederman's study of compulsory pilotage rules,⁴¹ Joel Paul's work on the American traditions of "comity,"⁴² Antony Anghie's study of the relationship between nineteenth century sovereignty and the colonial project,⁴³ and Annelise Riles' examination of the relationship between international lawyers and anthropologists in framing the colonial perspective.⁴⁴ We can now review the broad doctrinal developments of nineteenth century international law in a general way, as the emergence of a "sovereignty" which we might well term "classic," so long as we remember that this classic had a sensibility quite different from the fragile, format piety later associated with "classical international law."

At the beginning of the nineteenth century, the word "sovereign" was used much more often than "sovereignty." Sovereignty was a quality of sovereigns. By the end of the nineteenth century, sovereignty was the key term, an abstract and artificial conception of authority, suitable for doctrinal definition. In the early years, there were many sovereigns and many types of sovereignty, which overlapped unproblematically. For certain purposes and in some places, the East India Tea Company exercised sovereignty, along side local princes and the British Crown.

38. It is hard not to read the insistent denunciations of sovereignty by modern international lawyers as a symptom of a deep and fearful faith. See HENKIN ET AL., *supra* note 6.

39. See CARTY, *supra* note 1.

40. See KOSKENNIEMI, *supra* note 1, at 52-130.

41. Daniel Bederman, *Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*, 64 TUL. L. REV. 1033 (1990).

42. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

43. Anghie, *The Nineteenth Century*, *supra* note 1.

44. Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 1 LAW & CRIT. 39 (1995) [hereinafter *Perspective and Scale*]; Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 723-40 (1993).

Sovereigns came in a variety of shapes and sizes. Their powers and rights differed. Moreover, sovereigns sometimes exercised sovereignty in their private or personal capacity and sometimes as public actors. They had sovereign rights in both capacities, but not yet a single, absolute authority in two different spheres. This was not yet the relative sovereignty of the twentieth century, disaggregated into a bundle of rights to be parceled out among various actors. Nor was it yet the unified sovereignty of the turn of the century, which could be exercised in parts in a world of sovereigns and "half sovereigns." It was a sovereignty which had not yet been consolidated and which described the capacity and powers of a variety of actors.

Across the last century, international lawyers devoted ever more attention to defining "sovereignty" rather than enumerating the rights and powers of sovereigns, slowly consolidating a sovereignty as an artificial and abstract idea located in the state. States came to be international law's only subject. Individuals, including sovereigns in their private capacities, were progressively removed from the field.⁴⁵ Sovereignty in this new sense was "absolute" and was a one-at-a-time affair. To be sovereign was to exclude overlapping authorities. By the end of the period, we find lengthy definitions of sovereignty as a single, absolute capacity, exclusive within its territory, and detailed elaborations of its prerogatives. More and more doctrines were deduced from the nature of sovereignty or from the nature of a community of sovereigns. Sovereigns were understood to be "equal" in a new way. They were not simply equal in dignity, entitled to similar protocol, but equal in an abstract sense, for, if absolute, no sovereign could, by definition, be bound by another. This absolute sovereignty, moreover, could not be a matter of degree; it was an on/off affair. Sovereigns were not simply equal, but interchangeable. There was but one sovereignty, an absolute discretion with a monopoly of force. There might be numerous quotations here. Robert Lansing, writing in the opening years of this century, gives the flavor in his 1907 essay *Notes on Sovereignty in a State*:

It is an accepted principle of the law of nations that every state, whatever

45. If, in 1820, international norms prohibiting piracy were thought to bind individuals and to be enforceable by sovereigns (*see, e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)), by the Harvard Research Draft of the 1920's, such a position seems logically unsustainable. Research in International Law of Harvard Law School, *Piracy*, 26 AM. J. INT'L L. Supp. 739, 754, 759, 760 (1932). Anti-piracy norms can address only states, enabling them to enforce against individuals who might not otherwise be subject to their jurisdiction. *Id.*

may be its population, power and resources, is the political equal of every other state, and that its sovereign is independent and supreme within the state. There is no such thing as *degrees* of sovereignty among states.⁴⁶

In such a system, territory became crucial in separating one sovereign from another. One was, by definition, sovereign somewhere. The old personal rights of sovereigns had been either eroded by consolidation of the state, rather than the sovereign, as the locus of sovereignty, or transformed into personal, private rights. Although sovereignty had, of course, been linked to territory before the classic period, territorial exclusivity was not yet the prime mechanism for resolving conflicts among sovereigns. Sovereigns might well cross, inhabit, or occupy one another's territory, exercising some right and submitting to some local powers.⁴⁷ Sovereigns had various rights over territory, sometimes as individuals and sometimes as governments.

By the end of the century, sovereignty described a relation to territory parallel to the contemporaneous understanding of the relationship between individuals and their property, and the analogy became even more explicit. Territory was the space within which the state exercised absolute competence, a procedural space of jurisdiction. International law did not regulate the use of territory, it registered an absolute and exclusive jurisdiction whose boundaries were territorial. At the start of the century, it seemed obvious that a sovereign's behavior was elaborately enmeshed in a variety of substantive rules which gave rights, required deference, and reflected determinations of moral virtue and sound policy. At the turn of the century, this variegated substantive order had eroded and been replaced by a map of territorial jurisdictions, which removed international law from the business of substantive regulation. Such matters were matters of absolute sovereign discretion, both municipal rather than international, and political rather than legal.⁴⁸

Early in the nineteenth century, moreover, sovereignty was not

46. Robert Lansing, *Notes on Sovereignty in a State*, 1 AM. J. INT'L L. 105, 124 (1907).

47. We might think here of *Schooner Exch. v. McFaddon*, a landmark case on the relationship between territorial jurisdiction and sovereign immunity, in which efforts by American citizens to adjudicate property rights on a French public ship in an American port potentially present a stark conflict between French and American sovereigns. The *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). United States Chief Justice Marshall avoids this conflict by analogy to numerous other situations of sovereign coexistence facilitated by doctrines of implied consent and distinctions between the sovereign's public and private capacities. *Id.*

48. This story is told forcefully by Carty. See CARTY, *supra* note 1.

thought to precede the law nor to supply the power behind law's normative force. Still less was sovereignty incompatible with an international legal order. At the start of the nineteenth century, it was presumed that sovereigns existed in a world of law, and were in many respects creatures of that law. They exercised legal rights, were subject to legal restraints, and affected their legal environment as they were constrained by it. From the start of the century it was understood that one sovereign could not bind another to its law, that absent the implication of consent a sovereign was immune from the jurisdiction of another.⁴⁹ But consent might well be implied on the basis of tradition or the requirements of international order. Only later in the century did international lawyers focus on sovereignty as the power to make law, and then the focus first was upon national, rather than international law. It was certainly recognized that sovereigns might bind themselves, might create international law, but this was not yet a sovereignty which thereby posed a threat to the very possibility of international law. Only very late in the century do we find indications that it might be a contradiction in terms to think of sovereignty subject to a higher law, and a corresponding requirement for consent, not simply as a handy tool for generating and identifying rules, but as a general, abstract explanation for the existence of international legal rules. Only late in the century, on the cusp of the transition to the modern period, was the reduction in the sphere of international law's substantive competence accompanied by an increased anxiety about the source of international law's binding force.

As Carty reminds us, early in the century treaties were not yet regarded as legally binding instruments in the sense that there was an international legal system above states which required fulfillment of treaty obligations. Although treaties were binding, it was not problematic to view there to be nothing but political or moral compulsion behind them. At the same time, it was simply obvious that sovereigns existed in a world of law which regulated their rights, obligations and interactions. Similarly, custom was certainly a form of tacit convention, and a useful place to locate legal rules, but there was no doctrinal corpus regulating the situations under which states would be bound by it. Late in the century, it became common to comment that norms which constrained the exercise of sovereign jurisdiction within its territory were rooted in the consent of the sovereign concerned, and in this sense, the consolidation of an absolute sovereignty increased the need for doctrines regard-

49. See, e.g., *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

ing the binding effects of treaties and custom, doctrine which would be forthcoming only after these questions took on a philosophical urgency early in the twentieth century.

By century's end, there is increasing use of a private law analogy to explain the international legal order. From diverse powers operating in overlapping spheres, a unified sovereignty emerges, analogous in competence to the individual, subject to one law. As sovereigns come to be conceptualized more sharply and uniformly, we find a corollary sharpening of the distinctions between public and private, and between municipal and international. For the first time theoretical disputes concern the relations between these two orders, forcing a choice between "monism" and "dualism."⁵⁰

In this moment of transition, a number of significant conceptual developments coincide, each the project of a newly self-conscious legal science. Among international lawyers, a distinction between public and private international law emerges, and a distinct field of international private law develops, based on a choice of law system among private law orders which lie outside the scope of international public regulation. At the same time, an independent tradition of comparative law begins, devoted to quite different, if parallel, projects in public and private law.

In private law, the new comparativists trace the shared development of private law rules outside national cultural and political differences among states, which are related through public international law. Their project is to affirm the apolitical nature of private law by demonstrating its common Roman roots, its transmission by de-politicized elites, the fortuity of its convergent development in widely diverse settings, and its functionality for a set of economic relations common across national political and cultural divides. This effort would lay the ground work for the twentieth century effort to develop a universal private law, harmonizing local rules, providing for mutual respect and reciprocal enforcement in cases of conflict, and establishing an international system of formal contract rules and consensual arbitration detached from national legal cultures and political influence. In public law, the new comparativists of the late nineteenth century are scientific reformers, seeking the best technical solution to common problems by

50. For definitions of these terms in international law, *see, e.g.*, HANS Kelsen, *REINE RECHTSLEHRE* 321-45 (1960); for "monism" and "dualism," *see* F. TESON, *The Relations Between International Law and Municipal Law: The Monism/Dualism Controversy*, in *INTERNATIONAL LAW AND MUNICIPAL LAW* 107-16 (Bothe & Vinuesa eds., 1982); K. IPSEN ET AL., *VOLKERRECHT* 1072-77 (1990); HENKIN ET AL., *supra* note 6, at 153-54.

comparing the national regulatory regimes which emerged, particularly in Germany and France, in the last decades of the century.

These rationalist projects of systematization and comparison accommodated national private law to foreigners and foreign transactions through comity, harmonization and formalization of common private law rules.⁵¹ What had been simply international law, law among nations, becomes now public international law, its practitioners also newly self-conscious about the distinction between public and private. It is during this period, for example, that the law of war loses its connection to the tradition of private reprisals, the concept of private war seeming ever less plausible once war becomes what sovereigns do; it is, in fact, the ultimate expression and prerogative of a new public sovereignty.⁵²

This new public law sensibility is also linked to a universalist project. At the start of the century, it was common in international legal literature to suggest that international law might be quite different in the various regions of the world. There could be African, Asian, Indian, or American international law. This is seen in Charles Louis Montesquieu's oft quoted aphorism, "All nations have a right of nations; and even the Iroquois, who eat their prisoners, have one. They send and receive embassies, they know rights of war and peace: the trouble is that their right of nations is not founded on true principles."⁵³ This was not what we now know as "regional custom" within a single international framework of rules, but different normative systems existing alongside one another, much as different sorts of entities with widely differing prerogatives coexisted alongside the "sovereign."

As there came to be but one subject for international law, uniform sovereigns, amongst whom territories would be allocated, this idea disappeared from the discipline. By the end of the century, there was but one international law, binding wherever two sovereigns were gathered in its name. Over each territory one sovereign would exercise sovereignty and all sovereigns, in relations with one another, would be subject to the same international law. Paradoxically, the new sovereignty was thus

51. On comity, see Paul, *supra* note 42, and on the distinction between public and private international law, see Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149 (1988).

52. The classic of the sovereign prerogative to war is of course CARL CLAUSEWITZ, *ON WAR* (1918). For the impact of this classic on various writers, see ROBERT JOHNSTON, *CLAUSEWITZ TO DATE, WITH SELECTED QUOTATIONS FROM MILITARY WRITERS AND NEW MATERIAL* (1917).

53. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book I, 8 (Cohler et al. eds., 1990) (1748).

linked both to the reduction in international law's substantive ambition, reduced from the regulation of sovereign behavior to the policing of sovereign jurisdiction, and to the drive toward a single universal public law order. It was truly a case of less become more.

These developments brought with them a different conception of the relation between the European center and the periphery. It was consistently recognized in the nineteenth century that international law was not the same everywhere. Different rules seemed to govern relations among Asian states or African powers, than did European sovereigns. European relations with various North African entities, with the Ottoman empire, and with indigenous peoples were all understood to be subject to different rules. Early in the century, this diversity was explained in a variety of ways. Sometimes it was suggested that there were different international legal orders binding different areas. Sometimes differing sovereign rights or different sovereign powers were distinguished, such as on the Indian subcontinent. Sometimes the law of a distant place would be referred to without distinguishing between national and international rules.⁵⁴

By the end of the nineteenth century, there was only one sovereignty and one international law. All forms of government were assimilated to the territorial state. Territory which did not yet belong to one or another sovereign was *res nullius*, and we get the first systematic doctrinal exposition of this idea.⁵⁵ If you were outside the international legal system, you must be a pirate, a native or a nomad. The pirate, an individual not submitting to the jurisdiction of a state, brought upon himself the full weight of the international legal system as the result of exceptional jurisdictional and enforcement rules which foreshadow the twentieth century treatment of war criminals and terrorists. The native and nomad were quite different. Neither refusing civilization nor part of a different civilization, they lived in a condition increasingly understood as primitive, prior to civilization, at the origins of what increasingly was understood to be a natural evolutionary progression. Gone are the elaborate constructions of indigenous society as sovereign and comparable which marked international law in the seventeenth and eighteenth

54. See *The Antelope Case*, in which Justice Marshall cites the absence of any prohibition on the slave trade in Africa as reason to refuse recognition of any prohibition in respect of the American titles to slaves obtained abroad. *The Antelope Case*, 23 U.S. (10 Wheat.) 66 (1825).

55. See, e.g., GEORG JELLINEK, *DIE RECHTLICHE NATUR DER STAATEN-VERTRÄGE* (1880); HEINRICH TRIEPEL, *VOLKERRECHT UND LANDESRECHT* (1899); JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* (1894).

centuries. By the late nineteenth century, the native and the nomad simply awaited the display of sovereignty and organization into a state.

Of course there remained differences in the rules applicable in different parts of the world. For some, particularly early authors, there was a gradation of substantive rules in different levels of civilization. So, in early Wheaton, the complex rules governing transfer of public title in Europe might be relaxed, perhaps requiring only a public showing of transfer in less civilized regions, or might be altogether different among the civilized states of Asia.⁵⁶ As the classic system became more consolidated, however, these gradations slipped from view. The reference to Asia as a civilized alternative disappeared, perhaps, in part, through the assimilative practices of Japan and the disintegration of China described by Onuma Yasuaki, or the simultaneous assimilation and disintegration of the Ottoman empire.⁵⁷ At the height of classicism, there were two alternatives: "civilization" (even the appellation "Christian" was dropped) where international law governed the relations among sovereigns, including the acquisition of territory if not the coming into being of the state; and everywhere else, a space beyond (or, as it came to be seen, before) international law.

The classical consolidation of sovereignty and the unification of international law were accompanied by a dramatic reduction in the substantive ambitions or ambit of international law, and a changed understanding of the relationship between law and politics. The crucial point here is that in a system of absolute territorial sovereignty, what happens within a sovereign's territory is that sovereign's exclusive prerogative. As Carty has shown, in the late nineteenth century, international law addressed neither the stirrings of nationalism within territories, nor the coming into being of the state subjects of international law.⁵⁸ It limited itself to reinforcing the territorial boundaries which separated one sovereign jurisdiction from another. As international private law, or the law of conflicts, was split from public international law to become a matter of interjudicial accommodation, relations between sovereigns were increasingly understood as a zone for the free play of sovereign authority, as quintessentially political rather than legal, like war, matters of sovereign prerogative. Late in the nineteenth century this had not drawn in-

56. See WHEATON, *supra* note 28, at 44-47.

57. Onuma Yasuaki, "Japanese International Law" in the *Prewar Period—Perspectives on the Teaching and Research of International Law in Prewar Japan*, 29 JAPANESE ANN. INT'L L. 23 (1986).

58. See CARTY, *supra* note 1.

ternational law into question—indeed, quite the opposite. It suggested new models for international legal activism in arbitration and disarmament at the Hague. But it was only a matter of time before what began as a substantive pruning would give way to a theoretical clear cut.

Even quite late in the nineteenth century, however, as sovereignty increasingly divided a domestic sphere of legal authority from an international domain of politics, and the substantive content of international law thinned, international lawyers remained comfortable, resolving apparent or potential conflicts between absolute sovereign rights through a process of legal reasoning which took for granted the existence of a legal order greater than the will of individual sovereigns. If we think of post-1918 international legal reasoning as deduction from sovereign consent, interpreting the sources of law to ensure that the sovereign to be bound had willed his own obligation, late nineteenth century international law reasoned from the nature of sovereignty itself. As a doctrinal matter, international law could enforce the boundaries between sovereigns and explain the entailments of one sovereign's absolute rights for the behavior of another. In this sense, sovereignty becomes not only a description of ultimate political discretion, but also a legal idea. Indeed, it is law which provides a language to explain, ratify, and protect sovereignty. And the most important rules and principles of international law come to be deductions from the idea of sovereignty rather than consensual rules of constraint.⁵⁹

To a certain extent, of course, this remains with international law on into the modern period. As sovereign consent came to seem ever more necessary for obligation and sovereign discretion ever more political, it became increasingly common to make up for the shrinking corpus of substantive doctrines with deductive elaborations of sovereignty. Many of the codification projects of the interwar period, as well as the postwar work of the International Law Commission, have proceeded on this basis. There is a subtle shift even here, however. It is much more

59. Bederman and Paul interpret a corollary development in the fields of international private law and conflicts as a systematic shrinking back from questions of policy to a legal reasoning concerned with managing the boundaries among zones of sovereign discretion, whether in the form of rules about the place of the delict or vague interjudicial policies of comity. The development of a fantasy about common principles of a Roman consensus, floating apolitically from one place to another by accident, and applied through the apolitical reasoning of national judges, detaches international private law from sovereign discretion and policies, exactly as images of the commercially necessary or efficient or functional would protect modern international private law from being understood as an imposition on sovereign authority. See Bederman, *supra* note 41; Paul, *supra* note 42.

common in the late nineteenth century to present a conflict between states or rights as implicating only one sovereignty, perhaps the sovereignty of the place where the incident occurred or was to be adjudicated, and to deduce the result from the entitlements of that absolute sovereignty. When twentieth century lawyers reason from sovereignty, they are more likely to see two sovereignties in play and to work from the nature of a reciprocal system which could accommodate conflicting, if absolute, sovereignties. It is not long before this approach gives way to a fragmentation of sovereign rights, which might then be balanced or exercised only where "reasonable."

The interesting point is that this nineteenth century activity came to be seen quite differently after the First World War, as the project of legal reasoning itself would come to be understood differently. Early in the nineteenth century, when international law was not thought different from other laws and had not unified as an alternative to national law, lawyers and judges approached international legal problems as they did all others. By late in the century, international law seems quite different, and a separate profession and academic specialty has developed devoted to its study. With an increasingly uniform sovereignty and universal international law concerned more with the boundaries between sovereigns than with the norms which constrain their behavior, with a sharpening of distinctions between public and private, law and politics, international and municipal, sovereigns and individuals, the world of international law came to seem quite distinct. A domain of rules had become a practice of reasoning about the nature of sovereignty and the perquisites of power. The question is how the new legal reasoning which accompanied these changes would be experienced, and how it would be remembered.

V. INTERNATIONAL LEGAL METHOD

As the late nineteenth century doctrinal system became more integrated—all powers like sovereignty, sovereigns like property holders, all boundaries like territory—and ever less substantive, international lawyers did not seem anxious about the possibilities for international law. They seem nonchalant about the clarity of rules and full of enthusiasm for arbitration, judicial settlement and the Hague. After the First World War, the enthusiasm about rules remained. But the attitude of the international lawyer to his own legal reasoning had been profoundly changed. In the nineteen twenties, enthusiasm for rules takes the form of urgent calls for codification, which might both root law in norms

which have actually received the imprimatur of sovereign consent and clarify what the rules of international law actually are. To the post-1918 generation, preoccupied with the need for consent but newly doubtful about their deductive powers, it was increasingly difficult to say with any confidence what international law did and did not allow.⁶⁰

This broad shift combined several changes. Understanding legal problems as conflicts between two absolute sovereignties, rather than questions about the interpretation of one sovereign's powers, made deductive solutions less satisfying, since both claims could be presented as the entailments of sovereignty. This problem was compounded by the increasing sense that there could be no overarching or preexisting legal order capable of resolving such conflicts unless explicitly agreed to by the sovereigns concerned. Precisely as the discipline turned more insistently to the sources of international law, to establish with clarity what had and had not been consented to, faith in the stability of interpretation was shaken.

At the same time, enthusiasm for the international judiciary and for arbitration evaporated. To a certain extent, this resulted from the association of the judiciary with the Hague regime, so palpably unable to deal with the crises leading up to the War, as well as, in the eyes of their progressive and American successors, from the political conservatism and Europe-centrism of jurists associated with international law before the War and seeking to revive a judiciary thereafter. But this change was also linked to an altered consciousness of the methodology of legal reasoning itself, which made the judicious reasoning of the pre-1914 period seem naive.

After the War, the Austinian challenge was experienced as a profound threat to the possibility of international law. International law must start again and be built scientifically, from real politics and experience, from sociological observation, through codification. The power of sovereigns and their political authority must be respected. International law must reach out to the new field of political science. The world of doctrines must be replaced by a system of institutions. International law must become substantive, and deal directly with war and peace through institutions of collective security and disarmament.

This rejection of nineteenth century international law, now termed

60. See ALEJANDRO ALVAREZ, "THE NEW INTERNATIONAL LAW" PROCEEDINGS OF THE GROTIUS SOCIETY 35-51 (1929) [hereinafter THE NEW INTERNATIONAL LAW]. "[N]o one knows exactly what are the rules in force . . ." *Id.* at 87. See also ALEJANDRO ALVAREZ, LA CODIFICATION DU DROIT INTERNATIONAL (1912).

“classic” international law, identified the classic synthesis in terms which have been repeated throughout the twentieth century in each wave of international legal reform.⁶¹ It has been thought repeatedly that for international law to expand its substantive capacity, the absolute sovereignty associated with the classic system must be rejected. International law must deal with the coming into being of states through self-determination, as well as the challenges of nationalism and relations among groups within the state. It must recognize the importance of players other than sovereigns by separating “personality” from “sovereignty,” disaggregating “sovereignty” into the rights which compose it, allowing different allocations, so that individuals and institutions might, for some purposes and in some instances, be put back in the equation.

On the one hand, the absolute sovereignty of the classic period must be rejected as a dangerous myth inimicable to international law. International lawyers must fervently reassert that sovereigns exist in a community, or at least in relations of reciprocity. On the other hand, the nineteenth century’s apparent faith in the restraints of legal principle or the persuasiveness of legal argument also must be discarded as utopian and naive. A legal order must be constructed on the decentralized political interactions of absolute authorizes, without illusion about their cooperative impulses or respect for principle. And a doctrinal corpus must be elaborated which is neither slave to sovereign discretion nor autonomous from political reality. International law should no longer be an on/off affair. We might imagine a spectrum of hard and soft norms, investigate the legal effects of non-binding agreements, and see normativity as itself a relative and contingent assessment.⁶²

A consistent strand of this revisionism has focused on the nineteenth century’s method of legal analysis. Classic international law is repeatedly chided for being “formal.” Far from enabling a judicious reasoning about the boundaries between sovereign territories, allowing an international law deduced from sovereignty, the on-off or absolute quality of nineteenth century sovereignty, the sharp distinctions between

61. See Kennedy, *A New World Order*, *supra* note 1, at 356-62.

62. See, e.g., Oscar Schachter, *The Twilight Existence of Nonbinding International Arrangements*, 71 AM. J. INT’L L. 296 (1977); Richard Falk, *The United Nations and the Rule of Law*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 611 (1994); Richard Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT’L L. 782, 784 (1966); Prosper Weil, *Towards Relative Normativity In International Law?*, 77 AM. J. INT’L L. 413, 414-15 (1983). See also David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT’L L. & POL’Y 1 (1987).

public and private, international and national, sovereign and individual, the untroubled practice of deductive legal reasoning from principles which now seem full of unacknowledged conflicts, all suggest an international legal profession with too much faith in too thin a substantive legal fabric.

After the War, it was difficult for modern international lawyers to understand their predecessors. Once it had become obvious that sovereign entitlements conflicted, that competition among sovereigns had brought European civilization to its knees, once an absolute sovereignty seemed incompatible with international order and interpretation seemed a dubious and difficult enterprise, one must have read international law books from the 1890s and thought, "What *could* they have been thinking?" One answer was that they were "formalist," that they believed in legal categories, that they were rigid in their interpretative methods, that they thought legal reasoning could yield deductive results, that they exalted an absolute sovereignty without realizing the threat that posed for legal order. Most importantly, they were not modern, not relativist, and unaware of contradiction. For all their protestations to reason, ultimately they were creatures of faith, their international law an elaborate legal paganism.⁶³

It is difficult to evaluate this charge. Who really knows, after all, what they were actually thinking? Of course it does not seem that nineteenth century international lawyers experienced themselves as formalist—quite the contrary. The new profession of public international law was self-consciously "modern" for its day, flexible and innovative in its reasoning, deferential to state power but cosmopolitan in ambition. Before doubt about the possibility of legal order, before interpretive relativism and preoccupation with contradiction, it simply was possible to generate legal solutions by deduction from notions of sovereignty, and it was a rather advanced way of going about it.

What is clear is that for the international lawyer after 1918, this would not be possible. To stand for the judicious resolution of disputes by deduction from ideas about sovereignty *after* 1918 is to take a position, a position against modernism. In this sense "formalism" is a mod-

63. This would not be the only tradition of the 1920's which would invent its antecedent. See Marie-Claire Belleau's fascinating study of French sociological jurisprudence which, she claims, in many ways invented the "school of exegesis" to which it then styled itself a response. Marie-Claire Belleau, "Les Juristes Inquiets": Currents of Critical Legal Thought in France at the End of the Nineteenth Century (1995) (unpublished S.J.D. thesis, Harvard Law School).

ern idea, an epithet corollary to progressivism and skepticism. And indeed, formalism has remained a primary bete-noir of modern international law. Anyone who takes sovereignty too literally, who separates international law from politics too cleanly, who reasons about law without pragmatic balancing and reasonable difference-splitting, who eschews political institutions for courts, or defends sovereign rights without international responsibilities, will be accused of formalism. So too will anyone who thinks legal philosophy can resolve the riddle of law among sovereigns, now that we know the only answer is a pragmatic one measured in state behavior rather than academic persuasion. For example, it has become routine to note that the third world has become formalist about sovereignty when they should adopt a more sophisticated, functional, and pragmatic perspective, or that the third world takes the distinction between governmental and nongovernmental organizations too seriously, missing out on the contemporary move to an international "civil society."

In fact, it seems that the constellation of ideas we now think of as formalism arose in international law exactly alongside high positivism, in the early modern era. This formalism is a fighting faith, a defense of forms, responsive to skepticism and pragmatism. International law in this century has developed in the clash between these ideas—between a set of forms, legal constructs, and a set of political and sociological sensitivities. Repeatedly in the doctrinal materials developed in the great codifications of the nineteen thirties, forties and fifties, we find doctrines arranged as elaborate couplings of formal rules and pragmatic procedures of reciprocal negotiation or reasonable balancing. Thus, statehood doctrine combines the Montevideo rules, requiring a territory, a government, a population and the capacity for diplomatic relations, with an open-ended process of recognition, of uncertain, conflicting and fragmented legal validity. *The Restatement (Third) of Foreign Relations Law* treats jurisdiction similarly, coupling section 401's enumeration of the classic bases for the exercise of jurisdiction with section 403's suggestion that conflicts be resolved by forbearance where one state's jurisdictional exercise would be unreasonable.⁶⁴

These two sides of international legal modernism, the formal and the pragmatic, are arranged in a spatial and temporal hierarchy. To be formal is to be old-fashioned. The internationalist avant-garde situates him or herself after sovereignty, as a centrist opposed to both legal uto-

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401, 403 (1987).

pianism and surrender to an absolute sovereign discretion, reaching out to political science, confident in the flexible practices of pragmatic reasoning, in balancing, and in the universal liberal principles of reasonable accommodation, reciprocity, and fairness. This cosmopolitan posture experiences itself as progressive, building an international order. If you assert the rights of sovereignty, insist on sovereign prerogatives, hold to territorial inviolability, and reject the fluid partnership of public and private actors, then the mainstream international lawyer will have to admit that the law is on your side. But that is all that will be admitted—one can almost hear the sigh, “You are of course, within your rights, but out of step with history’s march toward a more pragmatic and cosmopolitan world.”

This relationship between formalism and pragmatism has marked the boundary between the center and the periphery as firmly as it has defined the up-to-date. In this century, American international lawyers have played an increasingly important role in defining and manning the discipline. Already in the 1920s, American efforts to displace European influence in the field were launched as pragmatic assaults on formalism.⁶⁵ It was American international lawyers who championed the League, and Europeans who responded with the Permanent Court. The same terms have defined the distinctions between the international legal establishment of North America and the international law first of the socialist world, and then of the third world. North American internationalists have marveled throughout the century that the two great challenges to the hegemony of their political and economic system, from the East and the South, have not, in fact, threatened their international legal order. Socialists and third world scholars, we are constantly reminded, accept the classic international legal order.⁶⁶

But with a difference, for both accentuate sovereignty a bit too firmly, seem too focused on the formal law of coexistence and insufficiently interested in the more pragmatic arrangements of a law of cooperation, stress territorial integrity and legal autonomy without recognizing that this is also a global village, in which law is now enmeshed with policy, politics and practical reason. They are all too apt to fetishize the state and refuse international legal roles to the new actors of international civil society. But all that is also acceptable, it has a place in a

65. See Kennedy, *Institutions*, *supra* note 1, at 899-903; ALVAREZ, *THE NEW INTERNATIONAL LAW*, *supra* note 60, at 35-51; ALEJANDRO ALVAREZ, *LE DROIT INTERNATIONAL NOUVEAU DANS SES RAPPORTS AVEC LA VIE ACTUELLE DES PEUPLES* (1959).

66. See, e.g., HENKIN ET AL., *supra* note 6, at 51-126.