The International Style in Postwar Law and Policy

*David Kennedy**

I. FROM KELSEN TO JACKSON: INTERNATIONAL POLICY PRAGMATISM

To bemoan the shortcomings of the international political class remains a commonplace in much contemporary commentary on international law and policy. The indictment: as ever broader dimensions of public life have come to be discussed in international terms, the terms of the discussion have become ever narrower and more technocratic. International regimes seem too weak to pursue a political program of their own, or even to withstand serious challenge, while being too technocratic to respond adequately to the political needs of national clients or the democratic participation of citizens.

This Article is a study of the intellectual sensibilities of the largely liberal mainstream international post-World War II intelligentsia. My aim is to articulate the network of ideas—sometimes critical, sometimes utopian, sometimes descriptive—which, in the international arena, produce this rather common sense of technocratic inevitability and of the need for political renewal. Although the combination of technocratic strength and political weakness is, in some sense, undeniable as a description of the contemporary international system, I end up skeptical of both those who would right the balance by rejuvenating the international political machinery and those who would have us bow to the inevitability of the technocratic. As I read the consciousness of the international intelligentsia, these common sense observations and criticisms have somehow grown up together as part of a common puzzle, as if there were a division of labor between two sensibilities—one which holds out the political as a promise, and another which holds out the techno-

---

* Professor of Law, Harvard University. I would like to thank Tony Anghie, Jose de Areilza, Nathaniel Berman, Robert Chu, David Charny, Dan Danielsen, Ioannis Drossos, Karen Engle, Guenter Frankenberg, Jerry Frug, Duncan Kennedy, Annelise Riles, Joel Paul, Ileana Porras, and Chris Tennant for their comments on earlier drafts. I would like to thank the organizers and participants in conferences at which portions of this paper were presented: Professors Terry Kogan and Karen Engle and the University of Utah College of Law for the symposium on Violence and the Outlaw in March 1993; Professor Agostino Carrino and the University of Naples for the conference on Hans Kelsen in December 1993; and Professor Joel Paul and the American Society of International Law for the conference on International Economic Law in Washington in February 1994.

cratic as a fact.

My approach to this puzzle questions a number of ideas often taken for granted in conversation about contemporary international policy. It is common, for example, to place the relationship between the disciplines of public international law and international economic law in the postwar academy at the center of this puzzle; the one asleep with our political hopes, the other furiously weaving our technocratic fears. Many see a lag between the bold new world of international commerce, communications, regulation, and policy which *has* adapted to life in a global village and the international political institutions which have not.

For many, this lag is as inevitable as internationalization. In this view, whether tragic fact or wise strategy, the process of internationalization must strengthen the technocratic at the expense of the political. It is technical developments which will force the international, technicians who may sneak up on sovereignty, and political institutions which will resist. In a sense, internationalization seems destined to complete the critique of sovereignty for good and ill. The international policy maker need only help the process along, ever on guard against backsliding. Two modest reforms have obvious appeal: rejuvenate international public dialogue and eradicate pockets of formal sovereign particularism which remain.

I do not share the common sense that the internationalization of public policy is inevitable or salutory, or that the difficulty with the international policy regime is either a *general* political weakness or a technocratic style which impoverishes international politics in a general way. I question, moreover, whether the relationship between "public and private" disciplines or "political and technocratic" discourses adequately captures the central tension in the postwar international policy sensibility.

I am interested in the rather common perception in left or populist circles that the international is somehow skewed against progressive politics, particularly when so many internationalists and policy makers are liberals. In this view, some sorts of politics only seem possible at the national level, or require a form of state and sovereignty which, tragically, the new international order cannot provide. To the extent I share this perception, I locate its origin neither in the politics of international policy makers nor in the lack of an extra-sovereign government which might regulate newly interdependent social and economic forces. Rather, I locate the politics of the international style in its commitment to a particular sovereign form. Surprisingly, it is a sovereignty which has been universally rejected by contemporary internationalists and is normally thought almost automatically outdated by internationalization. Sovereignty

as the juridical concentration of power in public hands for intervention in civil society has brought with it a constellation of familiar ideas: politics as public discourse about state intervention in civil society; law as a technical mechanism to focus and enable an interventionist politics; power as a force to be juridically concentrated and allocated; the national state as the primary organ of politics; sovereignty as a juridical absolute. These ideas are commonly associated with a commitment to the separation of public and private, especially in law, with public law the discourse of state action toward a passive civil society, itself structured by the apolitical or consensual rules of private law.

Criticism of these ideas about sovereignty has, of course, been a staple in many strands of modern political and legal theory for a century. Internationalists have always seemed to stand somewhat apart from these debates, as if in turning to the international they have left this entire set of ideas about sovereignty and the state behind. At least since sovereignty was consolidated as a uniform, universal, and territorial idea in the late nineteenth century, internationalists have also routinely rejected these ideas and associated them with their predecessors, whether nineteenth-century formalism, interwar positivism, or postwar liberalism. But the repressed returns.[1]

In this Article, I explore these familiar claims, criticisms, and intuitions about postwar international law and policy by reading two international legal texts: *Law and Peace in International Relations*, the Oliver Wendell Holmes Lectures delivered by Hans Kelsen at the Harvard Law School in March of 1941;[2] and *The World Trading System: Law and Policy of International Economic Relations*,[3] a "clear and accessible introduction to the intricacies of the world trading system"[4] published in 1989 by John Jackson.

To a certain extent, my reading confirms the general thinking about international law and policy. It does seem that at least these two participants in the international intelligentsia share in a largely liberal and centrist tradition we might term "pragmatic." This pragmatic sentiment distinguishes policy fashion precisely by its sophisticated attitude about the death of sovereign forms. At the

---

1. *See* David Kennedy, *Some Reflections on "The Role of Sovereignty in the New International Order,"* 21 CAN. COUNCIL INT'L L. PROC. 236, 238 (1992) (describing sovereignty as both problem and aspiration).

2. HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES, 1940–41 (1942).

3. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989).

4. The MIT Press, *Book Jacket Copy* to JACKSON, *supra* note 3.

same time, an often paradoxical call for a reinvigoration of international public life is also characteristic of this style. Linked to both cultural modernism and legal realism, this pragmatic style dates at least from Kelsen, and has been inherited by Jackson.[5]

Although liberal and centrist, this international sensibility is also polemical. The vibrant community of policy experts who aspire to manage international political, legal, and economic affairs is usually both the author of and the intended audience for such commentary. Adept co-polemicists, participants are partisans for their own post-sovereign vision and are vigilant critics of one another's failure to follow the latest post-sovereign fashion. They are skilled at rooting out their interlocutors' commitments to outmoded sovereign forms, their own presuppositions and commitments defended by agnostic modesty.

As a result, the international style has changed as successive generations have criticized their forbearers, each renewing the uneasy balance between sovereign sophistication and enthusiasm for international public order. The sophisticated international pragmatist is currently both committed to the fluid and managed interpenetration of international public and private order and aware that public institutions, whether national or international, repeatedly disappoint. Today's international policy scientists are neither formalists nor sovereignty fetishists: interdependence is a fact, sovereignty a relic. To be internationalist today is to be post-formalist, post-sovereign, post-national, and post-political.

We should be skeptical, however, of the suggestion that the international pragmatic tradition is held together only by a rejection of sovereignty. It may be more accurate to say the tradition is united by its fealty to a rejected sovereignty. This reading is suggested by an alternative strand of commentary on international economic law and policy best represented by the work of Dan Tarullo[6] and Joel Paul.[7] This perspective stresses that a continuing unsatisfacto-

---

5. In this, I follow Nathaniel Berman's important work on the international cultural modernists of the interwar period, including Hans Kelsen. *See* Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework,* 33 HARV. INT'L L.J. 353 *passim* (1992) [hereinafter Berman, *Perilous Ambivalence*]; Nathaniel Berman, *"But the Alternative is Despair": Nationalism and the Modernist Renewal of International Law,* 106 HARV. L. REV. 1792, 1800–08 (1993) [hereinafter Berman, *Despair*]; Nathaniel Berman, *Modernism, Nationalism and the Rhetoric of Reconstruction,* 4 YALE J.L. & HUMAN. 351 *passim* (1992) [hereinafter Berman, *Modernism*].

6. *See* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade,* 100 HARV. L. REV. 546 (1987).

7. *See* Joel R. Paul, *Comity in International Law,* 32 HARV. INT'L L.J. 1 (1991) [hereinafter Paul, *Comity*]; Joel R. Paul, *The Isolation of Private International Law,* 7

ry juridical image of sovereignty in mainstream internationalist commentary has resulted in an underestimation of law's constitutive role in civil society, of the fluidity of power throughout a culture, and of the potential for politics outside the traditional discourses of public authority.[8] To this tradition, pragmatic international commentary remains haunted by the ghost of a sovereignty it explicitly rejects, the mainstream's critical tone somehow part of the normal practice of the political class whose failure it bemoans. This common thread is most strongly suggested by Tarullo's identification of a presumptively "normal" image of international commercial relations beneath the trade regime.[9]

Beyond this continuity, Kelsen and Jackson exemplify two different roles in the development of the pragmatic sensibility. Simply put, Jackson is our disappointing reality, Kelsen our failed dreams. The dynamic between these different sensibilities illustrates the gridlock of optimism and tragedy in the international pragmatic sensibility, and the sense of inevitable technocratic strength and political weakness. This difference is rooted in their respective reactions to the difficulties of eliminating sovereignty, formalism, or politics through internationalization.

Taken as a whole, this critical tradition suggests that we think not of the *general* failure of a political class, or of a *necessary* erosion of the national by the international, but rather of the triumph in international law and policy of one conception of politics—as a general site for the management of allocative efficiency—over another—as a set of particular sites for struggle over distribution and social policy, supported by important background assumptions about the relatively de-politicized character of private law and the correlative unavailability of a meaningful politics outside the state apparatus, whether national or international. It suggests that we think not of displacing technocracy with democracy, nor of taming politics with expertise, but that we abandon both a politics of dreams and a realism of technique. This critical tradition is skeptical of both of the two reform trajectories offered by more mainstream commentary: rejuvenate public order and eradicate sovereign form. In this view, each fails to escape the vision of an active public politics and a passive civil society associated with traditional notions of sovereignty. Periodic reformist efforts of this sort seem an intimate part of the international policy elite's routine practice.

WIS. INT'L L.J. 149 (1988) [hereinafter Paul, *Isolation*].

8. In this I follow Duncan Kennedy's essay, *The Stakes of the Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

9. *See* Tarullo, *supra* note 6.

Paul's work on the relationship between the fields of international public and private law observes that despite the widespread sense that international public and private fields, methods, doctrines, and institutions have, for better or worse, gradually merged over the past fifty years, a difference remains, not only at the level of doctrine and academic discipline, but between two logics or ways of thinking about international affairs.[10] At one level, we may be seeing one enduring imprint of sovereignty's dead hand in the continued viability of "public" and "private" international law disciplines long after all experts have accepted both their practical interpenetration and the indefensibility of a formal distinction between them.

Paul uses the terms "public" and "private" to suggest two broadly different ways of approaching international matters which are loosely associated with the traditions of public international law and international economic law.[11] This is a difficult difference to hear. In a discipline which marks its modernism by downplaying the distinction between public and private and which is committed to the obsolescence of a sovereignty which might distinguish public from private, analysis of the endurance of the public-private distinction will inevitably seem simply to have missed the boat. Assertion of the continued viability of the distinction between public and private seems inseparable from the more common reform proposal that the public be rejuvenated. At the same time, because so many differences have become condensed on the terms "public" and "private," Paul's broader observation might easily be missed.

In this Article, I use other perhaps equally overdetermined terms—"metropolitan" and "cosmopolitan"—to suggest a very general split between two international policy styles or sensibilities, without offering a polemic in support of one or the other. My intention is to evoke lived sensibilities which have evolved from one generation to another, often in response to quite sophisticated criticism, and which relate to one another as forms or styles of thought rather than as sets of propositions or commitments. Purely conceptual differences, such as that between "public" and "private," might seem to delineate more continuous disciplines, fields, or "models" subject to conceptual defense or critique. If we criticized "private law" and really showed that it could not be separated from "public" elements of coercion, politics, and the like, we might expect the sensibility we associate with private law to disappear. Our analysis might itself seem a project of reform. It is in precisely this sense that repeated

10. *See* Paul, *Isolation*, *supra* note 7.
11. *Id.*

calls for the rejuvenation of the public, like calls for the final elimination of sovereignty, have become a part of the discipline's ongoing routine.

We should, however, have no such illusions about the cosmopolitan or metropolitan sensibility. Although a deep difference remains between these two sensibilities, it is no longer simply the difference between public and private. Each has something to say about both public and private while fully absorbing criticism of the distinction between them. The difference between them is not, moreover, the difference between the political and the technocratic. Both offer political strategies and both celebrate law's peculiar technique. As a result, arguments for or against the "public" or "private," the "technocratic" or "political," in international affairs will no longer cross swords with the discipline's most sophisticated commentators.

The style I term "metropolitan" is in many ways suggested by Kelsen's lectures and remains characteristic of public international lawyers and institutions. In my experience, the metropolitan policy scientist lives in a conceptually delineated space arranged in interconnected levels, planes, or spheres of international and national, each related to the others as jurisdictional arenas for public-policy development and implementation. This metropolitan situates himself with the international and worries about the triggers, conditions, and opportunities for intervention in the national. Despite his repeated gesture against sovereignty, he works for sovereignty's renewal, if at the international level. At a rhetorical level, despite a characteristic gesture toward practice, the metropolitan remains committed to theoretical issues and problems. He is concerned about government and administration, and beckons the intelligentsia to a personal commitment to public service with an internationalist orientation.

The cosmopolitan style, by contrast, typifies those associated with international economic and business law, whose gesture toward the interpenetration of public and private unleashes a war of the private against the public, and of society against the state. The cosmopolitan policy scientist, often working side-by-side with his metropolitan colleagues, lives in a much more fluid world, outside—or perhaps beyond—the neat jurisdictional delineations of public authority. He is concerned about harnessing public and private actors to the management of complex forces—public, private, governmental, and commercial—which constitute the international market. His goal is less a strengthened international order than a widespread and vigorously liberal spirit. Jackson's short treatise in many ways epitomizes this sensibility.

Although in this piece I locate these sensibilities in two *texts*,

my own sense is that they are also, in some way, manifestations of two cultural moments, even lifestyles, rooted in professional trajectories, common histories, arguments or slogans, trade routes, and novels. I juxtapose these texts, in part, to contrast different ways of thinking, different problems to solve, and different roles for law, which might in turn suggest different places to eat or shop, even different patterns of conflict or different erotics. In my fantasy, for example, the metropolitan lives in a radial space rooted in international capitals like London or Paris and linked to the world of colonialism as much as to the United Nations's "new world order." This is the international world of war and peace, norms and national interests, intergovernmental interventions, cultural representations, and universal rights. The cosmopolitan world, by contrast, is an ethereal rootless space, suggestive of international finance and private commerce, associated perhaps with New York or Frankfurt or Hong Kong. In this world, sovereigns seem more marginal, bundles of rights to be avoided or deployed.

Both of these international styles are familiar, modern, and pragmatic. Most international policy makers and commentators move easily between them, just as most international legal arguments blend elements of both. I think of them as broadly recognizable strategies for internationalization—for accepting and promoting the end of sovereignty as we know it. As such, they are recognizably different, and they characterize different institutions. The metropolitan is more familiar from public law advocacy, international human rights or United Nations debates, the cosmopolitan more familiar from the economic sphere of business regulation.

These styles are also associated with different reform tendencies. The metropolitan will often be more interested in public rejuvenation. Indeed, improved international public discourse has come to mean an expanded metropolitanism. The cosmopolitan's stress on the eradication of sovereign forms and the liberation of private energies likewise gives programs for privatization a distinctive cosmopolitan look and feel. When placed side-by-side, moreover, the cosmopolitan sensibility and program often seems refreshingly contemporary, the metropolitan a bit out of date.

To the extent that internationalism will necessarily or inevitably triumph with the elimination of sovereignty, the metropolitan style is put at something of a disadvantage. This weakness results in part from a limit on the metropolitan's pragmatism. No matter what particular issue international public law purports to address, it remains obsessed with the struggle somehow to reinvent at an international level the sovereign authority it was determined to transcend.

At the same time, one might read these two styles, taken together, as a sort of collusion to eviscerate the public or the political and eliminate the fora of social participation and collective responsibility from international life. In this familiar view, the public is attacked by a self-effacing (largely private) cosmopolitanism and left undefended by a (largely public) metropolitan imagination cross-dressing its theoretical obsession with the unsolvable riddles of sovereign order as pragmatism about world public policy. My reading of Kelsen and Jackson confirms this *pas de deux* of cosmopolitan days and metropolitan nights.

We can, however, go further than this, for this is a dance with its own politics. To the extent the international is achieved through the elimination of sovereignty, it is easy to see that internationalization will have an impact on the political agenda. Sovereignty, after all, remains the conceptual locus for "intervention" in a presumptively "free" or "normal" set of market practices. In his work on contemporary public international law, for example, Joel Paul notes that important doctrines of public international law (in his case "comity" doctrines), despite having become suffused with an apolitical and technocratic rhetoric of evenhandedness and economic functionality, in fact operate to demobilize local political approaches rooted in redistributional or other social concerns to make way for a general international policy of allocative efficiency.[12]

Tarullo's broad critique of trade law and policy develops a parallel analysis of contemporary cosmopolitanism. Tarullo highlights the unstated assumptions about "normal" and "abnormal" trade, traders, and trade policy which structure the international regulatory framework for commerce. The international trade regime, Tarullo argues, is made for, by, and as a continuation of "normalcy."[13] The significance of this observation lies less in its geography—the regime is made for the center rather than the periphery—than in its politics. Tarullo uses the normal/abnormal distinction to demonstrate the differential disempowerment of local redistributive politics. Most significantly, he claims, the international trade regime is based, implicitly and explicitly, on a model of sovereign non-intervention, at the national and international level, in "normal" commercial activity.[14] This underlying "market standard,"[15] which we might also read as a theory of sovereignty, presumptively eliminates what would otherwise be political opportunities for judg-

12. *See* Paul, *Comity*, *supra* note 7.
13. Tarullo, *supra* note 6, at 550.
14. *Id.* at 552.
15. *Id.*

es and legislators to be active in making social policy.[16] As he sees it, the apparent evenhandedness of an international policy, rooted in respect for comparative advantage, contains a set of political choices not fully captured by the general idea that the "public" is internationally disempowered or that the cosmopolitan defends the "private."[17]

Although Tarullo focuses on the results for national political culture, his analysis is also suggestive at the international level, where the result is a differential demobilization of the political class.[18] For normal nations, there is a path of assimilation to the international economic law regime—perhaps with an "industrial policy" of appropriate temporary safeguards and adjustment policies—and an exceptional set of offsetting mechanisms to account for "unfair" situations and "competing" objectives. So long as they are operating in the spirit of liberal trade, the policymakers of normal traders can hardly go wrong. Abnormal traders, by contrast, can hardly get it right. They must be disciplined and weaned, sanctioned and induced. Their internal political debates must be either transformed into technocratic questions of international efficiency or hyperbolised as issues of the nation's suitability to participate in the international order in the first place.

Although much of this criticism is familiar, the distinctiveness of the Paul/Tarullo line is significant. It is a quite familiar move these days to criticize international economic law for insufficient attention to strengthening the capacity of international public law to *replace* the regulatory initiatives of national sovereigns with international harmonization. This idea lies behind much post-Maastricht criticism of the European Community, as well as the broad sense that an international "free trade" regime somehow disempowers both those who would use local political machinery to achieve non-economic goals through social, environmental, labor, or consumer protection policy and those seeking overtly redistributive economic objectives.[19]

This has become, in a way, a staple of metropolitan argument, responded to by international economic law cosmopolitans with a hope and a shrug. The hope: an international public order remains

16. *Id.* at 579.

17. *Id.* at 601–04.

18. For an elaboration of Tarullo's ideas in the context of Central and Eastern Europe's relations with the European Community, see David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L. L.J. 373 *passim* (1991).

19. *See* RALPH NADER ET AL., THE CASE AGAINST FREE TRADE: GATT, NAFTA AND THE GLOBALIZATION OF CORPORATE POWER (1993).

a noble, if distant future. The shrug: of course we *could* reduplicate the welfare state internationally, but why would we? The cosmopolitan criticizes the international public order for repeating the worst technocratic ills of the modern welfare state. This familiar trope, however, is easily deflected by the metropolitan as reflective merely of the growing pains of still primitive institutional structures.

At its most adventurous, the Paul/Tarullo line is significant precisely because it does not repeat these easy criticisms. It does not imply that efficiency is privileged over redistributive and other social policy because internationalists have become advocates of private over public order. Nor does it suggest that the remedy could be international redistributive intervention, an international New Deal. In basing their work on the sovereignty which has survived in the sensibilities of the most contemporary and sophisticated international liberals and pragmatists, Paul and Tarullo encourage us to remember that the metropolitan has internalized criticism of the national welfare state, just as the cosmopolitan has embraced the need for international public order.

In this Article, I continue this theme, identifying in Kelsen and Jackson the most sophisticated strands of contemporary metropolitan and cosmopolitan sensibility. It will seem odd to develop these general themes about postwar international law and policy through comparison of these two very different international legal texts. Yet, to the extent there is something distinctive about work in the field of international law and policy in the second half of the twentieth century, these two texts suggest its range and its trajectory.[20] I

---

20. I mean to include in the "canon" of "international policy science" the widest variety of disciplines and approaches, including:

Law: *see, e.g.*, ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (two vol. set 1968); GRENVILLE CLARK & LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS (3d ed. 1966); RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979); MYRES S. MCDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER (1960); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 86 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL (R.C.A.D.I.) 133 (1954); *see also* INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1988); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992).

Trade policy: *see, e.g.*, KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990); JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT (2d ed. 1986); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); JACKSON, *supra* note 3; JOHN H. JACKSON, WORLD TRADE AND THE LAW OF

isolate these texts to mark the boundaries of a canon whose project, assumptions, and intellectual habits might be further explored. The juxtaposition highlights a common sensibility which frames the broader field of postwar international legal and political commentary. I also contrast them to begin rethinking the *internal* history of international law in the postwar period.

To begin with, the quite obvious differences between the texts easily illustrate a traditional story about international law and policy after the Second World War, exemplifying the virtues and vices of two sides of the postwar policy vision. Kelsen comes from public international law and worries about politics. Jackson comes from the law of trade and finance and worries about economics. Kelsen's background is public law and legal theory. Jackson's is private commerce and institutional administration. Kelsen is remembered as a legal theorist, a jurist, a jurisprud; Jackson is known as a pragmatist and policy maker.

Seen conventionally, Kelsen's Holmes Lectures remain poised in the experience of the war, looking back on the failures of interwar international legal policy. Jackson summarizes postwar

---

GATT (1969); ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM (1991); STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (Paul R. Krugman ed., 1986). On the domestic trade regime, see RONALD ROGOWSKI, COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS (1989); Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992); Tarullo, *supra* note 6.

Development: *see, e.g.*, SAMIR AMIN, MALDEVELOPMENT: ANATOMY OF A GLOBAL FAILURE (1990); MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); ALBERT O. HIRSCHMAN, *The Rise and Decline of Development Economics, in* ESSAYS IN TRESPASSING: ECONOMICS TO POLITICS AND BEYOND 1 (1981); David Lipton & Jeffrey Sachs, *Creating a Market Economy in Eastern Europe: The Case of Poland, in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY, NO. 2, at 293 (William C. Brainard & George L. Perry eds., 1990); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,* 1974 WIS. L. REV. 1062; David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development,* 82 YALE L.J. 1 (1972).

Institutions: From law, see, e.g., D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS (3d ed. 1975); FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING (2d ed. 1993); HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW (1980). From political science, see, e.g., INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

International Finance: *see, e.g.,* SYDNEY J. KEY & HAL S. SCOTT, INTERNATIONAL TRADE IN BANKING SERVICES: A CONCEPTUAL FRAMEWORK (1991).

These works are more suggestive than authoritative, and more exemplary than canonical. Together they suggest the intellectual terrain of "international policy science."

developments, shaping an international economic agenda for the coming century. Between them, we can trace the great trajectory of international law and policy over the last half century, from public to private, public law to public policy, theory to practice, politics to economics, public international law to international economic law, legal science to policy science, and positivism to pragmatism. Kelsen is the international law we have had and the discipline we have cast off. He remains in the canon only as a theoretical and historical reminder of mistakes no longer made and henceforth to be avoided.[21]

In fact, academic commentary as a whole is usually given only a bit part in the postwar history of international law and policy. The displacement of "theory" by more practical concerns is traditionally regarded as a significant advance over the interwar years, as well as over the nineteenth century. In this traditional history, before 1945 there were only false starts (The League of Nations) and philosophy. There were only Europeans, the Americans having come and left in 1918, and the colonial peoples having yet no voice. What international law there had been was mired in foolish debates about form: monism versus dualism, municipal versus international, naturalism versus positivism, public versus private, law fiddling while Europe, and then the world, burned. The few doctrinal and institutional contributions of the prewar period seemed almost accidental. In the immediate postwar period, by contrast, there was an enormous burst of inventive energy out of which a new international system was fashioned. Led by Americans, this system was pragmatic and institutional in focus, and was as much private (Bretton Woods) as public (United Nations).[22]

This canonical turn to pragmatism gives international academic commentary a surprisingly self-deprecating tone. Meaningful international work was carried on by lawyers, bureaucrats, statesmen, bankers, businessmen, and even academics. They absorbed decolonization, oil shock, petrodollars, terrorism, ozone-depletion, and Islam

---

21. Richard Falk's acknowledged "debt" to Kelsen is typical of a generation. Like McDougal, Kelsen taught Falk an extreme to be avoided. *See* FALK, *supra* note 20, at 7–59.

22. *See, e.g.*, LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS xli–xliii (2d ed. 1987) ("The United Nations, its specialized agencies and other international organizations, some on a universal and others on a regional level, marked the transition of international law from the traditional system of formal rules of mutual respect and abstention to an incipient system of organized, cooperative efforts."); JACKSON & DAVEY, *supra* note 20, at 2 ("To a great extent contemporary international economic interdependence can be attributed to the success of the institutions put in place just after World War II, what we call in this book the Bretton Woods System . . . .")

into the framework of international policy making. International commentary styles itself reactive, at best aggressively proactive, but always "other" to the terrain of its engagement or the source of its authority. The international academic cultivates a broadly anti-intellectual orientation towards action.

This attitude makes the project of elaborating the intellectual sensibility of postwar international pragmatism a difficult one. There seems no sense probing the intellectual assumptions of commentary—talking about talk. Good analysis leads to a proposal, solves problems, promises policy, and proposes future action. At the same time, traditional international commentary can be extremely agnostic about its own foundations, at once self-critical and confident. This familiar and well-defended posture is particularly useful in an academic tradition which prizes criticism of other scholars and theories. Indeed postwar international writing often seems pragmatic precisely to the extent it is critical, even dismissive, of other international scholarly work.

The canon's inability or unwillingness to shake its theoretical image, along with its repeated insistence on moves from theory to practice, from doctrine to institutions, from law to politics, and politics to policy, in an odd way helps constitute the field's apparent pragmatism. In the name of a self-consciously anti-intellectual policy pragmatism, each postwar generation has fervently rejected what they see as their predecessors' formalism, conceptualism, and naturalism. This repetition—sons replacing the word of the fathers with the promise of deeds—is a sophisticated gesture in an intellectual style which becomes pragmatic through a continual theoretical debate with its forefathers—always situated as a movement from theory to a polemic for practice.

As this pragmatic orientation has been practiced over time, a canonical history of postwar international policy has emerged which locates its origins in the postwar work of statesmen, rather than scholars, their products the hundreds of extant public, private, intergovernmental, and non-governmental international organizations now sometimes referred to collectively as the international "system" or "regime."[23] International commentary only came to seem possi-

23. There is a great tradition of reimagining international political and economic phenomena as a system, or regime, throughout this period. An inaugural work in this tradition is DAVID MITRANY, A WORKING PEACE SYSTEM (1943). Other institutional works of the 1940s include LINDEN A. MANDER, FOUNDATIONS OF MODERN WORLD SOCIETY (rev. ed. 1947); PITMAN B. POTTER, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION (5th ed. 1948). This tradition continued in the 1950s and 1960s with such works as ERNST B. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964); and ERNST B. HAAS, THE

ble once this "regime" could be recognized as a fact and extended as a program. Consequently, the scholarly canon now begins only in the fifties with scholarship focusing on policy-making, institutions, administration, and what was called the "international legal process."[24] Imbued with a new practical spirit, an orientation to process and policy at once contextual, purposive, and functional, the new international lawyer/academic for the sixties would be an ethical pluralist and technician, the consummate advisor to enlightened government or business, and the skilled architect of a new "transnational" order.[25]

From this vantage point, Kelsen has come to be treated as a leftover European philosophizer who could never quite get with the program in the United States after the war, and is remembered as much for his tin ear toward specific international legal issues as for his old worldly philosophical arguments.[26] By contrast, Jackson

---

UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950–1957 (1958). By no means politically monotonic, the tradition found its radical moment in the 1970s. *See* IMMANUEL WALLERSTEIN, THE CAPITALIST WORLD ECONOMY (1979); IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (1974); IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM II: MERCANTILISM AND THE CONSOLIDATION OF THE EUROPEAN WORLD ECONOMY, 1600–1750 (1980); *see also* BEDJAOUI, *supra* note 20.

At roughly the same period, a decidedly different tendency which could claim the same tradition can be found in ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE (1977).

By the early 1980s, we see the (re)consolidation of the tradition under the rubric of "regime theory" and "neorealism." For an exemplary work see INTERNATIONAL REGIMES, *supra* note 20; *see also* ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (1987); KEOHANE, *supra* note 20; NEOREALISM AND ITS CRITICS (Robert O. Keohane ed., 1986). For a critical rethinking, see BARRY BUZAN ET AL., THE LOGIC OF ANARCHY: NEOREALISM TO STRUCTURAL REALISM (1993); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979); *see also* Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986).

24. *See e.g.*, CHAYES et al., *supra* note 20, at viii (describing textbook subject matter as "legal process by which interests are adjusted and decisions are reached on the international scene"). As late as 1991, the appeal of applying the insights of Henry Hart and Albert Sacks's monumental legal process project to the international sphere remained strong. *See, e.g*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 224–28 (1990) (applying "process" argument to Iran-Contra); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2394–402 (1991).

25. *See, e.g.*, PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956) (defining "'transnational law' to include all law which regulates actions or events that transcend rational frontiers"); HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT, at xi–xii (1968).

26. For early criticisms in this mode, see A.H. Feller, Book Review, 51 COLUM. L. REV. 537 (1951) (reviewing HANS KELSEN, THE LAW OF THE UNITED NATIONS: A

represents the new American pragmatism in its most mature form. By placing Kelsen back in the canon, and using his lectures as a mark of the canonical, I mean to call this repetitive critical practice into question.

Doing so might cast new light on the international public law scholarship of the late fifties and sixties (exactly midway between Kelsen and Jackson), which styled its turn to legal process and the transnational as "avant-garde" precisely by rejecting what seemed the formal and substantive images of the sovereign as a veil between national and international. This work promised a rejuvenation of international public life while opening a new frontier for internationalists in domestic, national, and private institutions. Placed between Kelsen and Jackson, these scholars seem rather pale figures, reviving the bold initiatives and insights of the modernist or realist moment as domesticated defenses of the American status quo, their dismissal of Kelsen less renewal than repetition, a rotation in disciplinary criticism, metropolitans optimistically styling as virtue the vices of a cosmopolitan age. At its best, their work continued the uneasy relations between technocratic fact and political vision, spawning new calls to hurry the vision and temper the fact. These calls reinforced the lag between the futurist projects of international public law and the modernist achievements of the international private or commercial sector.

Kelsen's lectures are interesting precisely because their refreshingly contemporary sound confounds the criticisms inherited from the sixties: the metropolitan is no bean-counting formalist. It turns out that Kelsen is adept at many of the criticisms to which we have learned to think him easily subject. Kelsen is himself a critic of forms, a skeptic about international public order, and a critic of public international law. In this, Kelsen's wartime Holmes Lectures are not alone.[27] In the late thirties and forties others—MacDougal,[28] Morgenthau,[29] and Laswell[30]—were bidding

---

CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS (1950)); Oscar Schachter, Book Review, 60 YALE L.J. 189 (1951) (same); Louis B. Sohn, Book Review, 64 HARV. L. REV. 517 (1951) (same).

27. *See, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1945); KELSEN, *supra* note 2; HANS KELSEN, PEACE THROUGH LAW (1944); HANS KELSEN, THE POLITICAL THEORY OF BOLSHEVISM: A CRITICAL ANALYSIS (1948); HANS KELSEN, SOCIETY AND NATURE (Arno Press 1974) (1946); Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75 (1941).

28. *See* Harold D. Laswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

29. *See, e.g.*, HANS J. MORGENTHAU, PEACE, SECURITY AND THE UNITED NATIONS (1946); HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1948); HANS J. MORGENTHAU, SCIENTIFIC MAN VS. POWER POLITICS

for center stage in precisely the project of the late fifties: bringing a modern pragmatic sensibility to international policy.[31] By 1960, all would have drifted or been pushed to the margins of the field by repetitions of the turn to pragmatism they set in motion.

In one sense, the surprisingly modern tone of Kelsen's lectures unites Kelsen with Jackson in a common pragmatic tradition. All postwar international pragmatists have been rebels against form, ideology, religion, and parochialism. All have promoted a universalist respect for fact-based particularism and the "case-by-case" approach, even when their policies have repeated a sort of liberal pluralism for all seasons. They have been ethical relativists and committed pluralists, who have approached problems functionally and purposively. They have championed technocratic, administrative solutions, their institutional structures oriented only intuitively by broad principles and personal commitments. Their products are the programs, budgets, rights, treaties, doctrines and commentaries, interventions, justifications, and pedagogies we now know as the disciplines of international law, international relations, and international institutions.[32]

If Kelsen seems an unlikely originator for such a canon, however, Jackson seems an unlikely heir. We stand now at the end of a further pragmatic rotation, this time away from the liberal public-international-law tradition of the sixties and seventies. Again we find the displacement of academics by practitioners, the initiative passed to lawyers, financiers, businessmen, and regulators responsi-

---

(1946); PRINCIPLES & PROBLEMS OF INTERNATIONAL POLITICS: SELECTED READINGS (Hans J. Morgenthau & Kenneth W. Thompson eds., 1950); Hans J. Morgenthau, *Positivism, Functionalism, and International Law,* 34 AM. J. INT'L L. 260 (1940) [hereinafter, Morganthau, *International Law*].

30. *See, e.g.,* HAROLD D. LASWELL, DEMOCRACY THROUGH PUBLIC OPINION (1941); 2 HAROLD D. LASWELL, LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS (1949); HAROLD D. LASWELL, POWER AND PERSONALITY (1948); HAROLD D. LASWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY (1950); HAROLD D. LASWELL, PROPAGANDA TECHNIQUE IN THE WORLD WAR (Garland Publishing 1972) (1927); HAROLD D. LASWELL, THE ANALYSIS OF POLITICAL BEHAVIOR: AN EMPIRICAL APPROACH (1948); HAROLD D. LASWELL, WORLD POLITICS FACES ECONOMICS (3d ed. 1945); HAROLD D. LASWELL & DOROTHY BLUMENSTOCK, WORLD REVOLUTIONARY PROPAGANDA (1939); BRUCE L. SMITH ET AL., PROPAGANDA, COMMUNICATION AND PUBLIC OPINION (1946); Laswell & McDougal, *supra* note 28.

31. This reading of Kelsen follows that of Nathaniel Berman who places Kelsen in the context of an interwar cultural modernism. *See* Berman, *Perilous Ambivalence, supra* note 5, at 362–68; Nathaniel Berman, *The Paradoxes of Legitimacy: Case Studies in International Legal Modernism,* 32 HARV. INT'L. L.J. 583, 591 (1991).

32. In short, they have participated in the loose collection of modernist ideas and intellectual tendencies often associated with the legal sociology and legal realist movements. *See* AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993); Berman, *Despair, supra* note 5.

ble for embellishing the regulatory environment for international business transactions, for transnational investment and debt, commerce, arbitration, and regionally integrated markets. This wave has also spawned a network of institutions, primary and secondary markets, doctrines, and commentary transnational and private in orientation, often delinked from organs of national or international public policy, advertising their distance from academic theory and the profession of commentary.[33]

We might well expect Jackson, representative of the new field of "international economic law," to embody this change, to be dismissive of public international law and institutions, and to prefer private over public actors and economic over legal analysis. Observing him from the field of public international law, we expect Jackson to be the villain of the turn from public to private order: the cosmopolitan, a suave financier, liberating commerce from public scrutiny. We expect him to participate in the now canonical rejection of public international law as insufficiently pragmatic, and to view its liberal commitments as both utopian (or naive) and antiquated.

Like Kelsen, however, Jackson eludes our expectations: our

---

33. On international finance, see generally Joseph Gold, *Developments in the International Monetary System, the International Monetary Fund, and International Monetary Law Since 1971,* 174 R.C.A.D.I. 107 (1982). On international trade, see generally JACKSON & DAVEY, *supra* note 20; *see also* Wilhelm Röpke, *Economic Order and International Law*, 86 R.C.A.D.I. 203 (1955); Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 R.C.A.D.I. 1 (1967). Röpke presents a neoclassical economist's conception of the international economy. He imagines a liberal order premised on "the largest possible 'depolitisation' of the economic sphere with everything that goes with it." Röpke, *supra*, at 224. He wants to caution us against "collectivism," defined as "a system which involves the complete politisation of the economy." *Id.* at 236. For Röpke, socialism, the prototypical "collectivism," presents the clearest threat to the liberal project of international integration. *Id.* at 240. Even though socialism claims an international vision, its concrete practices are confined to the geography of the nation, with planning and administration vested in the national government. *Id.* at 237. Hence a dilemma: the practices of planning devour its justification.

Coming 12 years later, Schwarzenberger's lecture does not cite Röpke's, but we hear echoes. Where Röpke warned against "collectivism," Schwarzenberger attacks "sovereignty," as a "relic from the naturalist doctrine of the basic rights of States in international law." Schwarzenberger, *supra*, at 31. Sovereignty (such as the "economic sovereignty" claimed by developing countries) has to be curtailed in an up-to-date rule-based international economic law. *Id.* Schwarzenberger offers the most-favored nation standard as an example of the sort of building block out of which to construct an international economic order: "In the absence of any undertakings to third States," Schwarzenberg suggests "the m.f.n. standard is but an empty shell. In operation, it is a shell with variable, and continuously varying, contents." *Id.* at 72. On the public and private split in international law, see generally Paul, *Isolation*, *supra* note 7.

cosmopolitan turns out to be a liberal. Jackson is himself skeptical of market logic and critical of those who are not broadminded about national industrial policy or the participation of non-market economies in the international trade regime. He takes a sixties sense of international public order very much for granted. He is skeptical of what he takes to be technocratic fact and hopeful about a renewal of the international political spirit. He brought international economic affairs into the domestic legal regime precisely to strengthen international public order by harnessing national institutions and courts to its spirit.

If we are uneasy about the drift from public to private or the triumph of technocracy over political vision in international affairs, the villain is not the cosmopolitan. In a way, Jackson updates the GATT's metropolitan political promise by imbedding it in a range of institutions, both private and public, the managers of which might promote public international order if animated by an appropriately liberal systemic commitment. He is clear that the political vision of an international public order can only be achieved in the future if technocrats manage in the right liberal spirit today.

Placing Jackson in the canon alongside Kelsen focuses our attention on the symbiotic relationship between two sensibilities that repeat a political promise as they construct a field of technocratic governance. We expect Kelsen (and the metropolitan) to be at once too theoretical, too formal, and too utopian—even too progressive. We expect Jackson (and the cosmopolitan) to be too technical and ideological—perhaps too conservative. The *pas de deux* of these expectations defines debate in international law and policy. They misunderstand one another, however—or we misunderstand them both—for they are both practical centrists and agnostic liberals who agree about what is important: the nature of sovereignty and the urgency of the international. Seen dynamically, it is precisely uneasiness about the technocratic strength and political weakness of the international order which continually redeems the promise and entrenches the expert, exhorting us constantly to practice in the name of a redeemable politics.

In this sense, the relationship between Kelsen and Jackson is more complex than mere continuity. These texts are interesting not simply because both authors, surprisingly, are modern liberal pragmatists. The canon has changed as it has rotated within its pragmatic commitment. The differences between Kelsen and Jackson can be seen as different strategies for dealing with both the obsolescence of the national sovereign and the public/private distinction. It is in this difference that our nostalgia for lost political possibility takes root.

Although both strategies are rooted in a critique of sovereignty, thereafter their paths diverge. It is here that we can see the programmatic impulses of the metropolitan and the cosmopolitan sensibilities. Kelsen hopes that an international governmental structure will emerge as a natural evolution, assisted by wise and committed intellectuals. Although he criticizes sovereignty as a mental habit and as a form of thought, his polemic is not directed against the state. Indeed, Kelsen would closely model the international governmental regime on the national sovereign. It is as if Kelsen felt that the only way to redeem the sovereign system was to reinvent it in a universal international framework. Jackson, by contrast, often writes about sovereignty, taking every opportunity to denounce it as an outmoded form of political organization. His international vision seems to have set sovereignty aside, its obsolescence now already a matter of fact, in favor of a diffuse set of actors and governmental levels.

Neither Kelsen nor Jackson feel the boundary between public and private order is particularly significant, perhaps because each is hostile to a sovereignty which could mark the difference between public and private, any more than that between international and national. Nevertheless, Kelsen's policy project—his proposals for international order—are elaborated in the public domain and will be secured through international public law. He appeals to citizens to reconstitute governments internationally, and to establish an international administration and court with compulsory jurisdiction. All of this need not change the private order in the slightest. It could either remain national or become a subject of international regulation, administration, and adjudication. His proposals seem compatible with the widest variety of international regulatory interventions.

Jackson's project, by contrast, is to be elaborated in both the public and private realms, or, perhaps better, without regard to their separation. After sovereignty, there is no need to treat governments any differently from firms. They are all transactors, and even regulators may compete in markets. Policy experts in private as well as public institutions, at the national and international level, are called upon to make wise international policy choices. Jackson has much the same ecumenical spirit about non-market economies and state-owned enterprises.

In Jackson's post-sovereign world, the special status of public order—along with Kelsen's project for a new international public order—has been eliminated. The same cannot be said, however, of the private legal order. Jackson explicitly validates and extends into international economic law those rules (presumptively of contract) which support commerce by reducing the risks and vulnerabilities of

international transactions as well as those (presumptively of property) which generate differential national economic efficiencies—those which make comparative advantage possible by differentiating national economic cultures, and those which permit those advantages to be exploited through trade. Similarly, public international law rules which reduce the risks and facilitate trade remain part of the new discipline of international economic law.

In some sense, then, Kelsen and Jackson wrote as if they shared a "theory of sovereignty" akin to the "theory of the market" identified by Tarullo—as if they thought it obvious that a system of private transactions operated outside or before the sovereign, constituted on the basis of a different sort of politics, perhaps more minimal or consensual. Were Kelsen's proposals implemented, this "private" sphere would simply exist in the context of an international rather than a national public sovereignty. He makes no plans for its international elaboration. For Jackson, the elimination of sovereignty will simply release this sphere onto a broader terrain. In one sense, this difference gives their proposals a different political flavor. Although Kelsen's lectures say nothing about private law, they demonstrate no hostility toward it, and they could easily be read as promoting an international public order more capable of regulating commerce. Jackson's treatise, on the other hand, seems tilted toward the private.

The problem, of course, is that Jackson is not an advocate of private order, any more than Kelsen is an advocate of sovereignty. Jackson presents himself as agnostic about the virtues of the market, and about the truth or usefulness of economic theory. The traditional description of a postwar move from public to private order is in this sense incorrect: it underestimates the sophistication of both Kelsen and Jackson. Both have absorbed criticisms of the idea that sovereignty entails an active public law and a passive private law. It is precisely their rejection of sovereignty in this form that generates their commitment to the international.

Nevertheless, there is a difference between the sorts of politics which seem possible in a metropolitan and a cosmopolitan imagination. Both Kelsen and Jackson write as if they thought the political realm of sovereignty could be rearranged, even eliminated, without altering the background norms of civil society. For Kelsen, the ability to impose regulations on this basic order is not altered by the move from national to international order: we could imagine an international as easily as a national welfare state. He proposes that a public system be made available for politics, yet claims to be agnostic about the political ends to which it will be put. The move to internationalism remains a project for the future, a polemic, for the

international public order remains weak and primitive. Still, the international politics we should dream about is precisely that of the liberal welfare state.

For Jackson, the eradication of the state can be enjoyed now. He is also a political agnostic, but his regime is a matter, not of speculation, but of fact. He rejuvenates national and private managers by linking them to a new public international spirit. Rather than liberate a regime of private ends, international economic law asks all managers to take responsibility for a liberal public order. Technocracy is not a private order, but an enlightened public spirit.

Were thinking about international law and policy split plainly between public and private visions, we might easily prefer one to the other, or tinker with the appropriate balance between them. Our sense of nostalgia for lost political opportunities, for example, might take the form of advocacy of a rejuvenated international public order. Were international law and policy split between a technocratic and a political approach, we might also prefer one to the other, advocating the wisdom of expertise or the populism of politics.

Reading Kelsen and Jackson together makes these troubling choices. Although they seem quite different, their differences are not those of public and private, or of politics and technocracy. Each hopes for a rejuvenated public order; each is enthusiastic about international legal technique and expertise. It is hard to prefer either the metropolitan or the cosmopolitan, hard to advocate one or the other, or to worry about the balance between them. To choose one or the other seems likely to revitalize only our awareness of the international regime's political promise and technocratic strength, for it is a product of their interaction, while leaving our nostalgia for lost political possibility untouched. In the end, it seems more significant that they are both "-politans," committed to an image of the relationship between law and politics which condenses public order in the activist sovereign and projects it forward as activism on the base of commercial and civil fact.

An alternative, of course, would be to think of the international not as a departure, but as a continuation of the terrain upon which law participates in ongoing social, cultural, and economic conflicts and negotiations. Under such a conception, internationalization would have no necessary or particular impact on the disciplining and distributive activities of the institutional and normative fabric. If institutions other than the state are to be stressed in a new international order, the stress should be less on efforts to reinvigorate the public than on imagining a broader set of sites for negotiation and struggle over distribution and social policy. In such a field, law

might already play a larger role and the political possibilities might already be broader than metropolitan dreams and cosmopolitan fears.

For both the metropolitan and the cosmopolitan internationalist, however, efforts to rethink the politics of sovereignty or law are beside the point. Their own theory of sovereignty remains largely implicit. In a way there is no need to be explicit—they are both *against* sovereignty. It is their commitment to the international—to the difference between the international and the national—which operates as a guarantor of their modernity about sovereignty even as it reinstates the sovereign boundary.

In one sense, my intention in placing Kelsen and Jackson side-by-side is to dislodge the isolation of the international canon and rethink the discontinuity between national and international law or policy, as well as the perceived urgency of internationalization. In both cases, the sense of having rejected or replaced sovereignty works, perhaps ironically, to insulate the text from actual political conflict. For the metropolitan, the time is not yet ripe; the international order has not yet begun to regulate. For the cosmopolitan, it is already too late: the consensual background rules for a secure commercial environment are all that remain. In this sense, people talk about the international as a means of avoiding talk of the political, or (perhaps better) of only talking about the political while living the technical.

The ongoing dialogue between metropolitan and cosmopolitan sensibilities responds to the international regime's technocratic strengths and political weaknesses by reactivating this argumentative economy of hope, inevitability, and nostalgia. In domestic legal theory, we might root this repetition and its corollary privileging of allocative efficiency over redistribution or social policy in a vision of sovereignty, state, and law as a coercive interventionist alternative to civil society. The international pragmatic tradition confirms this with a twist: the same result can be achieved by a decisive rejection of that vision, the hand of sovereignty writing those most committed to its death.

II. HANS KELSEN AND THE OLIVER WENDELL HOLMES LECTURES

Kelsen delivered the Oliver Wendell Holmes lectures at Harvard Law School in March of 1941, less than one year after arriving in the United States with his family.[34] He was fifty-nine years old

34. For biographical data concerning Kelsen, see RUDOLF A. METALL, HANS KELSEN: LEBEN UND WERK (1969). *See also* HANS KELSEN, INTRODUCTION TO THE

and looking for a job. A preeminent constitutional law scholar and legal theorist, Kelsen had held chairs in law at Vienna, Cologne, Prague, and Geneva. He had already twice delivered the Hague Lectures at the Academy of International Law and had received numerous honorary doctorates, including one from Harvard University in 1936. He was no stranger to public law practice and institutional innovation, having designed the Austrian Constitutional Court (he was appointed to a "life term" at the age of forty in 1921), and having served as Dean of the Faculty of Law at Cologne in 1932–33 as the National Socialists came to power.

In short, as of 1941, Kelsen's was already an astonishing European academic career.[35] Roscoe Pound had described Kelsen as "unquestionably the leading jurist of the time."[36] Kelsen arrived in Cambridge to a position as "research associate" on a Rockefeller Foundation stipend and spent six months preparing what would be his "job talk" for the American legal academy: the triennial Holmes Lectures. Like many job talks, however, these lectures didn't do the trick. Not only did Kelsen fail in his ambition to be appointed to the Harvard Law School faculty, he failed to secure a position at any American law school. At the end of his stipend, he took a one-semester job at Wellesley College before moving permanently to the University of California at Berkeley to accept a "visiting lectureship" in the political science department, where he would receive a full professorship in 1945, and from which he would retire in 1952.

To the extent he was thinking about an appointment in the winter of 1940–41, it is not difficult to conjecture about Kelsen's intellectual strategy in preparing the lectures, nor is it difficult to imagine what a supporter on the faculty might have advised him. He came with three sorts of work which might have interested the American legal academy: Austrian/German public law, legal theory, and international law.

The Austrian public law work needed to be disregarded. Although he might have sought a position as a comparativist or expert in foreign/civil law, the idea for such a position was, in 1941, only just being conceived.[37] In any event, comparative law seemed natu-

---

PROBLEMS OF LEGAL THEORY app. at 139–43 (Bonnie L. Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934).

35. For Kelsen's earlier works, see the bibliography in METALL, *supra* note 34, at 122–55. *See also* HANS KELSEN, GENERAL THEORY OF NORMS app. at 44–54 (Michael Hartney trans., Clarendon Press, 1991) (1979).

36. Roscoe Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L.J. 525, 532 (1934).

37. American and British academic journals of comparative law were not launched until several years after Kelsen's arrival. For example, the *American Jour-*

rally more comfortable with private law. Since the nineteenth century, the relevance of foreign experience had seemed more a matter of insight into the forms and regulations of commercial behavior abroad, whether from the perspective of an enlightened regulator or an informed trader.[38] Perhaps foreign public law felt irrelevant because a constitutional order seemed linked to a nation's idiosyncratic culture and history, perhaps only because Americans think our own constitutional order has nothing to learn from European experience. In any event, in the United States, neither public law, nor American constitutional law were fields in which a foreign expert could reasonably be expected to succeed. The tradition of comparative law had tended to rely on emigrés for general theoretical frameworks—primarily during periods of broad enthusiasm for civil law. In 1941, German law was not in style.

Legal theory was Kelsen's strongest suit, but he would need to get over a general American skepticism toward theory, even at law schools willing and able to make appointments which would not support the basic teaching program. The title "Pure Theory" was hardly auspicious—could he show that he had something helpful or programmatic to say about an enduring problem of interest to the American legal professorate? Maybe something about adjudication or the separation of powers? Public international law seemed the right direction. If private law assimilated the foreign through comparison, public law did so through the development of an international public order, and was always connected to the study of theories of the state, sovereignty, and the like. It would also give him a course, other than "jurisprudence," which he might teach.

Kelsen's international law work certainly was both rigorous

---

nal of Comparative Law and the *International and Comparative Law Quarterly* began publishing in 1952, the *International Law Quarterly* in 1947. The *Annual Bulletin of Comparative Law Bureau of the American Bar Association*, which catered to practitioner interest in comparative law, commenced in 1908, and the *Annuaire de Legislation Étrangèrre*, which exemplified the continental tradition of interest in comparative legal issues, was launched in 1872.

38. *See* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVILIAN, COMMON LAW AND SOCIALIST TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH AND SOVIET LAW 9–11 (1985).

> Generally, comparative legal studies have concentrated on private law subjects . . . .
>
> . . . .
>
> The historical reasons for this emphasis are obvious. Modern comparative law took shape as a discipline in the late 19th century in the heyday of private law and laissez-faire. It came into existence mainly to serve a variety of practical ends primarily in the domain of private law.

Id.; see also id. at 1–38 (providing useful citations).

and precise, but one had to admit that to an American reader it seemed textual and formal, disconnected from political reality. Actually it would be better if people did not read his 1939 commentary on the League Covenant.[39] However much his supporters might explain it as a European exercise in legal dogmatics—a good performance in a foreign genre—it was bound to raise questions about his ability to do doctrinal work which recognized the political and social context, and about his ability to teach doctrinal skills to a savvy American audience. In late 1940, Kelsen's resolve to focus only on the technically "juridical" difficulties with the League Covenant—overlapping provisions, provisions without meaning, technical omissions, contradictory provisions[40]—would only provide ammunition for those who felt "pure theory" could never contribute much of real relevance to thinking about existing legal institutions.

Still, his overall scholarly project seemed to have been moving in an interesting direction, and his politics were perfect. Both the right and the left had attacked him quite ruthlessly, and he had become interested in legal sociology and the work of Roscoe Pound, who was himself comfortably modern and pragmatic while hostile to the perceived nihilism and relativism of the "realists" at Yale.[41] At first, Kelsen's enthusiasm for Pound (who had been Dean at Harvard from 1916 to 1936) seems hard to square with his reputation for formal, theoretical positivism, and might be dismissed as brownnosing were it not so insistent and early. This was the jurisprudence—universalist and secular while hostile toward the secular state's legal pretensions to political absolutism—which, along with his Jewish background, had gotten him into political trouble in Europe.[42] Kelsen and his supporters may quite earnestly have thought that the key to a crossover career in American jurisprudence might lie here, in bringing the weight of his theoretical reputation to bear on an expansion (in the international law field) of whatever he thought most promising about Pound's practical side, in an American intellectual climate perhaps more hospitable to

---

39. HANS KELSEN, LEGAL TECHNIQUE IN INTERNATIONAL LAW: A TEXTUAL CRITIQUE OF THE LEAGUE COVENANT (Geneva Research Centre, Geneva Studies Vol. 10, No. 6, 1939).

40. Kelsen writes: "The jurist is as little justified in determining, as jurist, the social ends of legislation, as his intervention is indispensable when it is a question of assuring the realization of a given social objective by establishing the rules of law technically appropriate to this objective." *Id.* at 15 (footnote omitted).

41. *See generally* AMERICAN LEGAL REALISM, *supra* note 32; LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986).

42. *See* Klaus Günther, *Hans Kelsen (1881–1973): Das Nüchterne Pathos der Demokratie*, *in* STREITBARE JURISTEN 367 (Herausgeber de Kritischen ed., 1988).

liberal and pragmatic universalism.[43]

The strategy, in short, would be to bring a practical, sociologically informed approach to the study of international law. The field seemed open to renewal and was a plausible place for a foreigner. Kelsen had been Professor of "International Law" in Cologne. If done right, his general analysis would move toward a concrete proposal for reform, which would be neither as technical as his League commentary, nor utopian, but reasonable and realistic. On this score, Kelsen followed through after moving to Berkeley, developing his Holmes lectures on the relationship between law and peace in international relations into a book-length proposal for achieving "Peace Through Law."[44] This book, published in 1944, situated itself explicitly in Woodrow Wilson's American progressive tradition,[45] and was something of a blue print for the United Nations.

Had the strategy succeeded, or had his supporters been right, Kelsen might have become America's first post-war international pragmatist, bringing realism and interdisciplinarity and rigorous theoretical sophistication to the international law field. Perhaps, in the end, he overestimated the field. In 1941, international law in the United States remained dominated by doctrinalists rather than progressives. Perhaps he couldn't escape the reputation of his early work.

In any event, Harvard's Manley Hudson would give the position of institutional innovator to another emigré, Louis Sohn, who arrived from Poland in 1939 at the age of twenty-five to become Hudson's research assistant. Kelsen inscribed a copy of the lectures after they were published in April 1942 to "my friend Manley Hudson, with my kindest regards, Hans Kelsen,"[46] and departed for California. The European jurisprud who had tried to be an American lawyer ended up a political scientist. Sohn would struggle in Hudson's shadow for more than a decade before making his international reputation for innovation with *World Peace Through World Law*[47] in 1958, establishing a legacy of idealism about international institutions. But his book would be out only a few years be-

43. Hans Kelsen, *Roscoe Pound's Outstanding Contribution to American Jurisprudence,* 6 HARV. L. SCH. Y.B. 12–13 (1945–46); *see also* HANS KELSEN, DER SOZIOLOGISCHE UND DER JURISTICHER STAATSBEGRIFF (2d ed. 1928).

44. KELSEN, PEACE THROUGH LAW, *supra* note 27.

45. *See id.* at vii–ix; *see also* KELSEN, *supra* note 39, at 16 ("President Wilson did a very bad turn to his great ideal, the institution of the League of Nations, by surrounding himself with an insufficient number of jurists, individuals whom he strongly detested.").

46. Original on file at Harvard Law School Library.

47. CLARK & SOHN, *supra* note 20.

fore it, like Kelsen's positivism, would seem remote from an emerging disciplinary pragmatic and realist consensus focused on either the "international legal process" or the neither-public-nor-private world of "transnationalism."[48] Neither of these Europeans, for quite different reasons, would be credited with the pragmatic spirit. Should precursors be needed, the next generation would turn to Philip Jessup's little 1956 book *Transnational Law*.[49]

Kelsen was allocated a different role in the American international law academy. His was the theoretical, positivist pole against which Sohn's more optimistic institutionalism would be defined. By 1960, the discipline would seem to have entered the pragmatic era split between positivism and idealism—as between statesmen and scholars. In this conception, the integration into the field's mainstream of abstract doctrinal rigor and sociologically animated institutional pragmatism would await the arrival of transnationalism and the legal-process school. By then, Kelsen, along with others, including Sohn, McDougal, Lasswell, and Morgenthau, who might have brought a modernist or realist perspective to international law, had been pushed to the periphery as formalists, idealists, realists, ideologues, political scientists, or extremists.[50] I will never forget the American Society of International Law's tribute to McDougal on his seventy-ninth birthday in 1985 at which speaker after speaker honored this apparent pillar of the American academic establishment as a lifelong rebel and outsider.[51]

The Holmes Lectures come, then, at an interesting crossroads. It would be easy to argue that the transition from Europe to the

---

48. *See, e.g.*, CHAYES et al., *supra* note 20, at vii–xv (describing authors' focus on international legal process).

49. JESSUP, *supra* note 25.

50. *See, e.g.*, FALK, *supra* note 20, at x–xi (describing shortcomings of Kelsen and McDougal); *see also id.* at x–xii. Falk first tells us: "My own outlook has been very much shaped by the intellectual dialectic that exists between the work of Hans Kelsen and Myres S. McDougal, two great international lawyers of our era who have each developed and sustained a coherent interpretation of the international legal order." *Id.* at x (footnotes omitted). The very acknowledgment of debt hints at obsolescence: either the "intellectual dialectic" continues (unproductively) or it is resolved (productively). Falk presents his book as the synthetic moment to the Kelsen-McDougal dialectic:

> In my judgment Kelsen has gone too far to establish the autonomy of international law, whereas McDougal has gone too far to establish its relevance. This book is an attempt to develop a conception of the international legal order that effectuates a reconciliation between these intertwined considerations of autonomy and relevance.

Id. at xi–xii.

51. *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 286 (Paula Wolff rep., 1985).

United States would mark a shift in Kelsen's work. Under this conception, his most significant earlier European work was theoretical, rather than political or doctrinal. His international work was committed to the separation of law and politics: his theory was pure, his technique juridical. After coming to the United States, never would his theory be as pure as in its 1934 restatement.[52] In the heavily reworked 1960 second edition to the *Pure Theory of Law*, [53] Kelsen had more than doubled its length under the weight of new arguments, modifications, and qualifications, encumbering the "pure theory" of his early phase with a reliance on will or volition.[54] As comparison of his United Nations Charter commentaries[55] with the 1939 League piece[56] readily demonstrates, his technical work would also bear the mark of his exposure to American pragmatism and political science.

To both European and American ears, this story of European-American migration might seem tragic—either the withering of European intellectual commitments in the California sun, or a conversion too late in middle age to master the new tricks necessary for participation in postwar policy management. Either way, Kelsen became simply one more idiosyncratic legal theorist from the past, reduced in the collective memory of the discipline to a few code words like "grundnorm." When I studied international law in the 1970s, it was made clear that Kelsen had basically wasted his life on a theoretical problem no one really cared about anymore. He was remembered as a European—theoretical, without politics, doctrinally wooden, everything but pragmatic. When I mentioned to the current Harvard Law School Dean that I was working on a piece about Kelsen, I was not surprised that he wondered why anyone would still read Kelsen, and that he doubted I would find anything interesting there anymore.

International law scholars who kept the faith with Kelsen saw themselves at the margins of what they perceived to be the hopelessly idealistic world of American postwar international law scholarship.[57] They were rigorous about limiting international law to

---

52. HANS KELSEN, REINE RECHTSLEHRE (1934); *see also* KELSEN, *supra* note 34 (translation of *Reine Rechtslehre*).

53. HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., Univ. of Cal. Press 1967) (1960).

54. *Id.* at 5.

55. KELSEN, *Peace Through Law*, *supra* note 27.

56. KELSEN, *supra* note 39.

57. This Kelsenian tradition in American international law scholarship is perhaps best exemplified by Leo Gross. For Gross's views on Kelsen, see INTERNATIONAL LAW IN THE TWENTIETH CENTURY (Leo Gross ed., 1969); Leo Gross, *Hans Kelsen:*

clear cases of interstate agreement, and to a progressive international law student of the sixties or seventies, seemed least idealistic about international law's capacity to replace state power or to address issues of justice. Far from dethroning the state, they hoped to remain realistic about state power without having to become political scientists, as if rebelling on Kelsen's behalf against his rejection by the American legal establishment. To them, realism meant formalism and respect for sovereignty. They developed a unique style of doctrinal analysis, at once European in its formalism and American in its reliance on what states *actually do* as the basis for legal science.

In all these readings, Kelsen stands as a European pole in the great debates—between idealism and realism, theory and practice, or law and politics—which gripped the American international-law establishment after the Second World War, representing theory, formalism, realism, or the autonomy of juridical technical in various combinations. Somewhat ironically, in all these readings, Kelsen moves to the disciplinary periphery as his work is perceived as moving toward the pragmatic center. It is almost as if, in moving from Vienna to California, Kelsen moved *back* from modernism rather than *toward* it.[58] His commitment to technique, his skepticism about sovereignty, and his polemic for international renewal are all downplayed.

I propose that we read the Holmes Lectures less as a point on a line from Europe to America than as part of an ongoing polemic for a form of legal pragmatism which has had both a European and an American manifestation.[59] In this reading, Kelsen struggled throughout his career with an evolving set of ideas about sovereignty and the role of law that we might loosely associate, in Europe, with the legacy of Viennese modernism and, in the United States, with the traditions of pragmatism, progressivism, or realism. My proposal is that we approach Kelsen's job talk just as his audience might have approached those lectures, asking ourselves whether

---

October 11, 1886—April 15, 1973, 67 AM. J. INT'L L. 491 (1973); Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation, in* LAW AND POLITICS IN THE WORLD COMMUNITY: ESSAYS ON HANS KELSEN'S PURE THEORY AND RELATED PROBLEMS IN INTERNATIONAL LAW 1 (George A. Lipsky ed., 1953), *reprinted in* LEO GROSS, SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 167 (1963).

58. I am indebted for this observation to Robert Chu. *See* Memorandum from Robert Chu to David Kennedy (Mar. 25, 1993) (on file with author).

59. One of the most interesting early documents in this tradition is the speech by Professor Alvarez of Chile to the Grotius Society in 1930. *See* Aljandro Alvarez, *The New International Law, in* TRANSACTIONS OF THE GROTIUS SOCIETY: PROBLEMS OF WAR AND PEACE 35 (1930).

this man (this European) should be given the job of bringing sociology, politics, and pragmatism to American public international law.

In the end, of course, that audience concluded he should not. Maybe someone else—perhaps an American—coming later could do, or did do, a better job. Perhaps we missed a good bet. In any event, Kelsen would end up but one in a line, for the pragmatic tradition would develop by rejecting its forbears just as Kelsen had rejected his, for their formalism about sovereignty, their lack of realism about international society, and their lack of commitment to international renewal. This repetition would emasculate the field for a generation, leaving public international law defenseless against the predations of a cosmopolitan imagination.

But let us turn to the lectures themselves. Imagine the program, for six evenings, promising discussion of six rather heterogenous subjects. The titles alone might arouse our concern about Kelsen's comprehension of the pragmatic spirit. Here are the titles, as they were later published:[60]

I. The Concept of Law
II. The Nature of International Law
III. International Law and the State
IV. The Technique of International Law
V. Federal State or Confederacy of States
VI. International Administration or International Court

While we wait for the crowd to settle, we might read these and consider what lies ahead. The first three titles seem rather theoretical, while the last three move in a practical direction. Should we return only twice—he is, after all, a famous theorist—or should we return only at the end, to see what he has to propose.

Looked at fifty years later, the list tracks our impression of public international law scholarship in the period—in transition from theory to pragmatism, generating its program from a (perhaps too lengthy) project of conceptual definition. From this vantage point, Kelsen's titles seem a bit out of touch. He writes out of his theoretical preoccupations, moving very late to practical points, and remains hung up on rather outdated choices like "administration or court," "confederacy or federal state." If we are to be honest, we must admit that is hard to imagine who might actually read the first three lectures. To the jaded, practical, and ambitious student of international law today, it seems obvious that Kelsen will have

60. KELSEN, *supra* note 2, at ix–xi.

some theory (all those old guys did) but it also seems obvious that his will not be any more persuasive than anyone else's. The important point is "how nations behave."[61]

At the same time, the two large practical problems Kelsen will raise seem to pose false, unduly rigid choices to the current student of international law: should international society be a federal state or a confederacy, and should we build an international administration or an international court? Were we to hear Lecture V in 1994, we can anticipate our reaction: what you call the international order is either irrelevant or is important only as a rhetorical technique of legitimation and justification. The important issue is the mix of specific mechanisms and techniques—some federal, some confederal—brought to international difficulties. The same is true of Lecture VI: what we need is a good mix of judicial and administrative techniques, even as the boundary between them blurs. Sometimes an international court should act as an administration and vice versa. If ours is the era of boundaries blurred, of forms mixed and matched to solve particular problems, the Kelsen of these titles seems very out of date.

The most idiosyncratic title, and the one providing the clearest hint that this is a document from another time, is the fourth: "The Technique of International Law." We expect a plural, "techniques," for we have come to think of international law as an expanding grab bag of policy techniques.[62] Indeed, this fragmentation or proliferation seems central to the pragmatism of the policy age.

International law is now studied as an expanding list of doctrinal, institutional, and governmental mechanisms to handle problems. This is the legacy of transnationalism and the legal-process school. International crises or "incidents" are remembered for their innovative contribution to the legal technologies available to the policy scientist. Most famous, of course, was the "quarantine" of the Cuban missile crisis, confounding traditional categories of blockade, act of war, and the like.[63] Jurisdictional doctrines are now seen not as expressions of right, or as theoretical entailments of a conceptu-

---

61. HENKIN, *supra* note 20, at 1–7; *see also* David Kennedy, Book Review, 21 HARV. INT'L L.J. 305 (reviewing Henkin's book).

62. *See* Berman, *Perilous Ambivalence*, *supra* note 5 (remembering and analyzing array of legal techniques—plebiscites, partition, minority protection, internationalization, supernational integration, international supervision—deployed during interwar period in response to European nationalism); *see also* Kennedy, *supra* note 18 (analyzing "break, movement, and repetition" theme in development of international institutions).

63. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE RULE OF LAW 8–40 (1974).

ally defensible "sovereignty," but as judicial techniques for the management of international conflicts. In the hands of a creative legal scholar, judge, or government official (all now policy scientists), they might be creatively expanded to address torture, terrorism, bank fraud, or environmental policy. Indeed, all the doctrinal and institutional components of international law have been loosened from what we think of as their stodgy Continental formalism or positivism for deployment as practicality dictates. At most, in this reading, we might credit Kelsen's focus on the question of technique. Although he could hardly have foreseen the institutional proliferation of the fifties and sixties, he was at least attuned to the possibilities for institution building, and to that extent might be placed in the pragmatic tradition.

It is not, however, simply Kelsen's use of the singular "technique" which draws our attention. To our pragmatic ears, this title also implies a commitment to the singularity of law that marks its author as outmoded: law itself should have *a* particular technique. We have come to think of law itself as having no specificity, sharing instead attributes with its various sister disciplines of sociology, religion, economics, management science, and philosophy. In that light, it is hard to imagine that international law might be able to cabin its method. To credit Kelsen, we must entrench him in an earlier age, before the erosion of law's claim to special knowledge. Of course, even in Europe, assaults on law's specificity in the name of interdisciplinarity were also common before 1940.

It is consequently hard to read Kelsen's commitment to law's specificity. Kelsen had presented his 1939 commentary on the League Covenant as an exercise in self restraint, sticking to a narrow vision of the appropriately "juridical," and forswearing contemplation of the "properly" political—a confusing gesture.[64] In this emboldened age of lawyer/social engineers, therefore, the commentary seems boring, technical, and flat. Kelsen seems to have sided, at least in European debates, with opposition to the open-ended methods associated with sociological jurisprudence (despite his enthusiasm for Pound). Perhaps he was simply appealing to the audience which is always ready to have lawyers taken down a peg, demystified in their pretenses to mandarin knowledge. Perhaps

64. KELSEN, *supra* note 39, at 14.

> The 'jurists' believe and would like to persuade others that they possess an objective or even a scientific method which permits them to designate the single 'just' meaning from among those which the interpretations reveal. In reality no such method exists. The choice between several meanings can only be dictated by a judgment of subjective, political value.

Id.

Kelsen had had enough of politics and yearned for a purely technical expertise. Perhaps it was simply strategy, to present his analysis of the League's failures in the language of neutral technique: he ultimately manages to touch on almost every disappointment in the Covenant using the bland language of drafting inadequacies. We might also read his commitment to law's specificity as an engagement with the politics of public law in Central Europe; law was coming to replace religion as the ideology of an absolutist state. Perhaps he hoped that by criticizing absolutist notions of sovereignty while expanding the field of juridical technique, he might contribute to a universal legal order without validating the legal pretenses of politicians.

In any event, Kelsen's 1939 insistence on law's special and limited "technique"—his modesty about law—also gives a first clue to the continuity between Kelsen and the pragmatic age. For the pragmatist, it is law's lack of specificity which emboldens: law as nexus of a practically mobilized interdisciplinary smorgasbord. In this, interdisciplinarity would come to play a different role in international legal pragmatism, less cabining law's special claims than reinforcing them, situating law in a broader cultural field, a development foreshadowed in Kelsen's own use of anthropology. For the Kelsen of 1941, it seems the obverse—the jurist emboldened by the narrow specificity of law's technique. For both, it is humility which empowers.

This disciplinary humility, however, is part of a disciplinary polemic about what are thought to be political choices. Indeed, to capture Kelsen's sense for the technique of international law, we must return to his lectures as an argument, as a polemic. There is much that is familiar in his project. The main argument flows from a general conception of law, cleanly presented in the opening line and familiar from the scholarly tradition of public international law:[65] "Law is, essentially, an order for the promotion of peace."[66] To be for the law is to be for peace, for "peaceful living together . . . without the use of force, in conformity with an order valid for all."[67] The lectures present an argument for international law—for its existence and for its value—as an argument for peace.

There is an immediate difficulty. Is international law also such an order? This "theoretical" problem will be the subject of the first

65. *See, e.g.*, Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 724–32 (1993) (discussing nineteenth-century tradition embodied by Thomas J. Lawrence).

66. KELSEN, *supra* note 2, at 1.

67. *Id.*

three lectures, in which Kelsen argues against those who might assert that a legal order is incompatible with the absolute authority of sovereigns. Kelsen frames the argument as a battle between order and violence, only to conduct it as a battle between law and sovereignty.

He has this in common with most of his successors. At first we might think his preoccupation with the question: "Is international law really law?" a classic sign of his antiquated attachment to theoretical matters. We believe we have long since determined that this is either an insignificant question (compared to what might actually be done using these tools in the real world) or one unlikely to be resolved by further theoretical inquiry. Indeed, rather than the theoretical conundrum of the post-war world, the question of international law's legality seems a question to be set firmly aside.

And yet, do we really set it aside? It is not hard to demonstrate the continuing fascination this theoretical dilemma holds for the structure of public international law doctrine and argument.[68] It has been the subject of book-length treatments by renowned pragmatists in the 1960s,[69] 1970s,[70] and 1980s.[71] The important question is precisely how Kelsen moves from this issue to technique, how he invokes the dilemma of order among sovereigns or law outside the state, and then sets it aside. In this gesture, he is not outdated at all.

He indicates early on that once this matter has been resolved, he will "formulate the problem in a more modest and more realistic fashion," as a "political" rather than a "theoretical" issue: "[H]ow can an international community embracing the greatest possible number of states be organized within the limits of international law, and in accordance with the specific technique of this law, to

---

68. *See* DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); MARTTI KOSKENNIEMI, FOR APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 1–50 (1989).

69. *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964). Friedmann casts the problem as a clash between the internationalization of economic interests and the national organization of political identity; and between functionality and culture: "The increasing internationalization of industry, commerce and trade in the advanced stages of the industrial revolution, and the consequent internationalisation of the activities of the modern corporation, are challenging the legal and political monopoly of the state." *Id.* at 21; *see also* KARL DEUTSCH, THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS (Karl W. Deutsch & Stanley Hoffman eds., 1968).

70. *See* HENKIN, *supra* note 20, at 2–7. International law, in Henkin's account, provides structure of shared interests that tames ideological behavior.

71. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

form a community really fostering peace?"[72] This will be the subject of the last three lectures, identifying the "technique" specific to international law and mobilizing it "to shape a legal reality which from a certain point of view—that of the ideal of peace—is regarded as an improvement upon the present state."[73] In short, theoretical inquiry will give way to a program of international social engineering. In this, Kelsen the policy scientist situates himself (like most later public international lawyers) firmly within the international, as an intellectual agent of internationalization.

In this gesture, peace has become an ideal, animating our "regard" for international law, establishing our "point of view" with respect to it, the goal our efforts will "foster." Although the "ideal of peace" will provide an important touchstone in the ensuing argument at moments of analytical choice, when we must choose between two propositions of equal logical force, this is not simply an evaluative exercise. It is also an exercise in "reform of international relations—one of the most burning problems of the times, upon whose solution the fate of civilization depends."[74] Kelsen announces himself as an advocate of "reform," pursuing an "improvement upon the present state" toward an ideal, a political idealist and technical realist. While the gesture is grandly animated by a distinctly apocalyptic invocation, it is no more situated in the ongoing European war than in Kelsen's arrival as a Jew in Cambridge. It is situated only in the international, a space at once universal, secular, legal, and committed—both realist and liberal.[75]

Peace and civilization as hyperbole, as project, as orientation, as moral compass: these are familiar points of departure for international law scholarship. It is also familiar, if somewhat surprising, that we hear very little more about peace until the conclusion. Imagine the scene: a Viennese Jew arrives in Cambridge, fleeing a European war to which the United States is not yet a party and gives six lengthy lectures about "law and peace in international relations"—all without mentioning the ongoing conflict. War is floated as a motive behind the effort, peace as a point-of-view, an ideal, a goal. Then they fade away so that he can turn to his subject: international law's particular relationship to sovereignty and the specificity of its "technique."

The shoe falls only at the end, when Kelsen advises the "forces working for world peace," presumably also his audience as part of

---

72. KELSEN, *supra* note 2, at 1.
73. *Id.* at 1–2.
74. *Id.* at 2.
75. *Id.* at 1–2.

the intelligentsia who "are wedded to the idea of peace," to mobilize their energies behind the policy proposal he has developed in the last lecture. He encourages "the establishment of an international court with compulsory jurisdiction,"[76] a proposal warranted by his conclusion that "[t]he idea of law, in spite of everything, seems still to be stronger than any other ideology of power."[77] Kelsen renders law an ideology in the age of ideology, to be harnessed for peace as law has harnessed force. In the conclusion, Kelsen leaves his audience empowered for the newly practical work of ideological development.

Still, this is Kelsen as he is remembered in the discipline: a bit theoretical, preoccupied with philosophical questions about the "nature" of law, his doctrinal work rather out of touch with real issues, driven by philosophical forms rather than practical problems. This Kelsen is remembered as a European, never fully assimilated to realism, his international law work increasingly disregarded as too formal, too "positivist." His theory, however erudite, has become but one in a list of idiosyncratic efforts to answer a question which seems increasingly old-fashioned, or answerable only in the lexicon of empiricism: How do nations behave?

In the unfolding of this Kelsen, a rather abstract image of force plays a large role. Take the first lecture, on the "concept of law." We can see where Kelsen got his theoretical reputation. The project of the chapter is to develop an abstract definition of "law," against which "international law" can be compared in the second lecture. He defines law theoretically, "not from a political but from a scientific point of view—that is to say, if no subjective judgment of value in regard to the shaping of social relations is to play a role consciously or unconsciously."[78]

He defines law as a "coercive" order which "applies measures of coercion as sanctions."[79] The "decisive criterion" for law is the presence of "coercion" rather than of "freedom" in the pressure brought to bear on individuals to alter their behavior. Law's specific "instrument" is the "coercive measure," its contribution to the "promotion of peace" is the "organization of force."[80]

> Law and force must not be understood as an absolute antithesis. Law is an organization of force: the law attaches certain conditions to the use of force in relations among men. It authorizes the em-

76. *Id.* at 169.
77. *Id.* at 170.
78. *Id.* at 3.
79. *Id.* at 7.
80. *Id.* at 11–12.

> ployment of force, acts of coercion, only by certain individuals and only under certain circumstances . . . . Hence one may say that the law makes the use of force a monopoly of the community. And precisely by so doing, law insures peace to the community.[81]

Law therefore concerns itself with two terms: the "delict" and the "sanction." The final paragraph of the lecture puts it bluntly: "Delict and sanction: these are the two fundamental facts of the law. To connect them as condition and consequence is the fundamental function of the law."[82]

You can see why this would seem a hard test for international law to meet, indeed it echoes what we remember of Austin: law is command backed by force. This is Kelsen as uptight positivist, hoarding the word "law" for the narrowest of cases. Kelsen's suggestion that delict and sanctions must be facts, connected as condition and consequence, before we should call it "law" seems niggardly. No wonder his policy proposal—establish a *court* of all things—seems so out of touch, a throw-back to the Permanent Court of International Justice rather than a reform of the League, at once too utopian or progressive and insufficiently imaginative.

Although Kelsen goes in a slightly different direction, it at first seems only to confirm our sense of a man lost in theory. He stresses that the point is not the "efficacy" of the norm, but its "validity."[83] The point is not that force actually greets the delict—maybe it does, maybe it doesn't. The point is also not that people believe that a sanction will follow a delict—maybe they do and maybe they don't. Juridical science is about the validity of the norm itself: "Law . . . is a coercive order not because the idea of the legal norm induces men to proper behavior, but because the legal norm provides a coercive measure as a sanction."[84] Or, later, "[v]alidity means that the norms of the order ought to be obeyed and applied."[85]

We are back to Kelsen the Abstract, uninterested in the "relevance" of international law. Kelsen seems to say as much: "The rule of law, the term used in this descriptive sense, is a hypothetical judgment in which certain definite consequences are attached to certain definite conditions."[86] The lecture ends with precisely this reference to the hypothetical: "If the rule of law describes this connection [between delict and sanction] in a hypothetical judgment

---

81. *Id.* at 12.
82. *Id.* at 26.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 20.

which attaches a measure of coercion as a sanction to certain conditions, among which the delict has its specific place, it expresses the very essence and nature of law."[87]

Kelsen seems to worry more about the grammar of law than its enforcement. I feel myself dozing off in this lecture, worried that he will never be able to make the turn back to the practical proposal he has promised. This was the Kelsen criticized for a generation as insufficiently engaged with the real world. It was the Kelsen who seemed to dismiss *a priori* the theories which would underlie the progressive pragmatism of the postwar period, that the point was precisely whether statesmen believed international law binding, or whether they acted as if international law were binding, and not its conceptual pedigree which mattered. This was the Kelsen indifferent to values, human rights, and democracy, with nothing to offer a world shattered by war and genocide.

We might read these lectures in yet another way, as a turn not so much to theory as to language or interpretation, to a social process which imagines a natural origin and history, and to the sociological as myth. The key is the hypothetical—the grundnorm as hypothesis. It recalls Freud's unconscious, also misunderstood by Americans as a matter of fact rather than interpretation. Perhaps Kelsen was not an archaic European formalist, but a Viennese modernist, awaiting his Lacan.[88] We catch the first glimpse of this in Kelsen's second lecture, on the "nature of international law."[89]

The question he sets for himself is "whether or not the norms called international law are law in the same sense as the norms of national law." He assures us that "[t]his question is by no means merely a theoretical one."[90]

If international law and municipal law are, "in principle, the same social phenomenon . . . , it may be presumed that international law is susceptible to the same evolution as national law. If this be true, then a relatively certain way is opened to the successful reform of international legal relations."[91] The argument will indeed point toward the policy proposal.

The question hinges on the nature of force—not as a matter of fact, but as a matter of interpretation.

---

87. *Id.* at 26 (footnote omitted).

88. *See, e.g.*, SHOSHANA FELMAN, JACQUES LACAN AND THE ADVENTURE OF INSIGHT: PSYCHOANALYSIS IN CONTEMPORARY CULTURE (1987); JACQUES LACAN, ECRITS: A SELECTION (Alan Sheridan trans. & ed., W.W. Norton & Company, Inc. 1977) (1966) (anthologizing works of this modern French philosopher of psychoanalysis).

89. KELSEN, *supra* note 2, at 29.

90. *Id.*

91. *Id.*

> International law is law in this sense if a coercive act on the part of a state, the forcible interference of a state in the sphere of interests of another, is permitted only as a reaction against a delict and the employment of force to any other end is forbidden—only if the coercive act undertaken as a reaction against a delict can be *interpreted* as a reaction of the international legal community. If it is possible to *describe the material which appears in the guise of international law* in such a way that the employment of force directed by one state against another can be *interpreted* only as either delict or sanction, then international law is law in the same sense as national law.[92]

That there are materials lending themselves to interpretation as indicative of delicts—materials presenting themselves as norms—is the easy part. What about sanctions? Reprisals clearly take this form. War is a more troubling case.

Kelsen begins by announcing that "[t]wo diametrically opposite views exist as to the interpretation of war."[93] According to one, "war is neither a delict nor a sanction."[94] The other view holds that "according to general international law war is forbidden in principle"[95] and may therefore be seen either as a delict or a sanction. The most interesting part of the analysis follows. He begins by clarifying that he will not prove—either theoretically or empirically—either interpretation:

> It would be naive to ask which of these two opinions is the correct one, for each is sponsored by outstanding authorities and defended by weighty arguments. This fact in itself makes any definite choice between the two theories extremely difficult.[96]

The lecture ends on a similar note:

> The situation is characterized by the possibility of a double interpretation. It is one of the peculiarities of the material which forms the object of the social sciences to be sometimes liable to a double interpretation. Hence, objective science is not able to decide for or against one or the other.
>
> It is not a scientific, but a political decision which gives preference to the *bellum justum* theory. This preference is justified by the fact that only this interpretation conceives of the international order as law . . . . From a strictly scientific point of view a diametrically opposite evolution of international relations is not absolutely excluded. That war is in principle a delict and is permitted only as a sanction is a possible interpretation of international relations, but

92. *Id.* at 30 (emphasis added).
93. *Id.* at 34.
94. *Id.*
95. *Id.* at 35.
96. *Id.*

> not the only one. We *choose* this interpretation, hoping to have recognized the *beginning* of a development of the future and with the intention of strengthening as far as possible all the elements of present-day international law which tend to justify this interpretation and to promote the evolution we desire.[97]

The issue has become an interpretive problem, to be resolved by the speaker and his audience of interpretation mongers as a matter of choice, politics, and desire. Science has clarified the choice; we must make it. Do we choose life and work for peace? Or do we choose war and weaken the positive evolution of international society? The intellectual is an activist in his interpretation.

Kelsen orients our choice not simply with hyperbole, but also with myth. His goal is to render both interpretations plausible and then link them to alternative progress narratives—this way forward, that way back. At this point, his argument takes us on a detour from violence to the outsider—informing us about "primitive society."[98]

As Kelsen tells it, primitive man makes no distinction between "nature and society, a characteristic element of modern thinking . . . completely unknown to the primitive mentality."[99] As a result, "primitive man is not yet aware of death due to natural causes" and, "[i]nterpreting the facts of nature solely by social categories, he sees in every death either a punishment . . . or a murder."[100] It is quite natural for the primitive, then, to interpret violence either as a delict or a sanction, when performed alternatively by his tribe or another. Kelsen turns to anthropologists—in his case Arthur Thomson and A.R. Radcliffe-Brown—for corroboration of the fact that for primitive law, war was interpreted as *just* or *unjust*.[101] Kelsen turns briefly to the ancient world to demonstrate the same, concluding that it was only in the Christian world between the eighteenth and the early twentieth century that this interpretation fell out of fashion.[102]

On this basis, Kelsen turns to the arguments against the bellum justum theory, all of which he concludes, focus on particular "technical" aspects of international law, deficiencies or differences from modern municipal law—the absence of a judicial organ, the predominance of self-help—which suggest dramatic decentraliza-

---

97. *Id.* at 54–55 (emphasis added).
98. *Id.* at 40.
99. *Id.*
100. *Id.*
101. *Id.* at 42–43.
102. *Id.* at 43–45.

tion.[103] This, it turns out, is exactly what "the primitive legal order" is like.[104] International law is, in this sense, "primitive."[105]

Kelsen uses a quite traditional equation of international and primitive law to dismiss his predecessors for supposedly harboring more formal or grandiose ideas about international law. By turning to anthropology to support this contention—as if anthropology were a unified field, as if its insights into primitive society were matters of consensus or easy verification—Kelsen is squarely in the pragmatic tradition of interdisciplinary borrowings, which give legal theory its momentum toward practice and legal technique its tip toward reform. We might read Kelsen's "primitive law" as itself a hypothesis, operating in these lectures much as images of rational statesmen or bureaucracies or businessmen have functioned in later pragmatisms more influenced by public choice or game theory, theory of organization, or economics.

This parallel has two strong interpretive advantages. First, all the defects of international law are paralleled by primitive law—which, we saw, had all the elements of bellum justum necessary to view it as law. Second, "[h]istory teaches that evolution everywhere proceeds from blood revenge toward the institution of courts and the development of a centralized executive power; this is, toward steadily increasing centralization of the coercive social order."[106] Taken together, these two elements ground an inevitable and apparently self-evident progress narrative: "As the embryo in a woman's womb is from the beginning a human being, so the decentralized coercive order of primitive self-help is already law—law *in statu nascendi*."[107]

We can begin to see a different Kelsen, a Kelsen whose project is the rhetoricization of violence. War is central to his lectures although international law may not act directly upon it, nor upon states or sovereigns, nor be redeemed in practice through its efficacy. International law is an ideological order in which violence is both the central preoccupation and poses the most significant interpretive choice. In this scheme, the international lawyer/interpreter—Kelsen and his audience—is both objective scientist and activist in a world of subjective antinomies. In this interpretive space, the progress narrative becomes crucial, orienting intellectual choices by reference to the evolutionary ground of primitivism, as

103. *Id.* at 48–49.
104. *Id.* at 51.
105. *Id.*
106. *Id.*
107. *Id.*

both a parallel and a launch pad.

It is here that we come to the fourth lecture, on the "technique of international law." Here, Kelsen considers aspects of international law which have been the basis for criticism of the field, not as facts or as symptoms of conceptual departure from some ideal of law, but as aspects of international law's particular "technique" for fulfilling law's function—for differentiating and linking delict and sanction. Each turns out to be part of the technique of primitive law as well, leading to speculation about the evolutionary direction of international law, and setting the stage for the latter programmatic lectures.

Thus, "absolute" is opposed to "fault-based" liability. Kelsen tells us absolute liability is thought inappropriate "according to modern ethical views," but is as much a part of primitive, as of international law.[108] As individuals become more directly obligated by international law, this will naturally pass, as it did as modern law emerged from primitivism, by differentiating individuals instead of merely tribes or hordes. Similarly, the "differentiation of the sanction" amongst civil and criminal delicts and the principle of proportionality: "In international law this differentiation of the sanction in punishment and in civil execution that is so characteristic of modern national law is lacking. This differentiation is just as foreign to international law as to the law of the primitive community."[109]

It is the decentralization of international and primitive law which seems the most significant.[110] International, like primitive law, lacks courts, centralized legislative organs, and so forth. All these are provided through an interactive process of mutual self-help among sovereigns—for which the recognition of new sovereigns provides the classic instance. None threaten the existence of international law, yet all are part of its specific technique. Most importantly, all are likely to disappear with the natural process of development. "As the direct obligating and authorizing of individuals by international law increases, the border between international law and national law tends to disappear."[111] This is what sets the agenda for the final lectures: assisting in the path of evolution already seen at the national level by working for centralization and for the establishment of a court. Indeed, he asserts, after primitivism, "[t]he next stage of legal development is characterized by cen-

108. *Id.* at 101.
109. *Id.* at 104.
110. *Id.* at 106–22.
111. *Id.* at 96.

tralization of the application of the law by the establishment of courts."[112] Our policy choices are to be guided by the historical example of evolution from primitive to contemporary, our international political model a familiar liberal constitutional order of consolidated and juridically constituted authorities.

But something more is going on here—a more significant stress on language in a modernist sense. In the process of transforming all of these specific aspects of international law into a "technique" for accomplishing a conceptual function, Kelsen, far from establishing a world of forms or of pure theory, manages to deconstruct almost every formal distinction which seemed important to what he could look back on and firmly reject as a "traditional" international legal theory. This had been the project of the third lecture on the relationship between state and law, and would continue throughout the fourth.

The distinction between international and national law is, for Kelsen, the first to go, to be followed by "state" and "sovereignty" as he saw them traditionally understood. In his view, national and international differ in technique only and the one is on an evolutionary trajectory toward the other. This conclusion leads Kelsen to reconsider a number of international law's other disciplinary canards. For example, "traditional theory" holds that "the subjects of international law are states and only states, while the subjects of national law are men."[113] Kelsen explains that this formulation is a misperception:

> The fact that international law obligates and authorizes states does not mean that it does not obligate and authorize individuals, but only that it obligates and authorizes individuals whose acts are *interpreted* as the acts of a state . . . . [T]he fact that states are the subjects of international law means that international law obligates and authorizes individuals in a special way, a different way from that in which national law does. Thus international law and national law do not regulate the behavior of different, but of the same, subjects; both regulate the behavior of individuals. It is the technique of the regulation that is different.[114]

Or later: "Hence, the assertion that international law regulates the external and national law the internal affairs really means only a difference between the technique of international law and that of national law."[115]

Indeed, it turns out that international law's technique envisions

112. *Id.* at 60.
113. *Id.* at 82.
114. *Id.* at 83 (emphasis added).
115. *Id.* at 84–85.

a role for national law in its implementation—a decentralized form familiar from primitive law. But Kelsen takes this turn to technique one step further:

> It is not that national law regulates certain affairs because they are "internal" affairs of the state and international law regulates certain affairs because they are "external" affairs; it is just the reverse: certain affairs are internal affairs of the state because and insofar as they are regulated by national law; and certain other affairs are external affairs because and insofar as they are regulated by international law.[116]

The reorientation appears to be from the conceptual to the real: what matters is who actually regulates, not the conceptual picture we have of the matter. This Kelsen is a realist, enthusiastically debunking old formalisms. Legal technique is no longer responsive to external realities, or deployed by formally constituted authorities, but is itself in the driver's seat, giving rise to what appear as states or sovereigns. But remember, the question of what actually regulates—whether it is international law or not—was itself an interpretive choice, an ideological position, not a fact. The only ground for the image was the metaphor of primitivism.

In this way, Kelsen's rhetorical maneuver is a double one—first establish the existence of international law as a matter of interpretation rather than efficacy, and then criticize contrary images of authority for their remove from reality. This doubling is most readily apparent in the third lecture. Kelsen begins by defining the state as a description of a particular—centralized—legal technique. This description is linked to a very explicit evolutionary theory: "[B]y the establishment of . . . special organs, by centralization of the use of force, the primitive legal community becomes a state."[117]

> The essential characteristic of this development from a pre-statal to a statal legal community is the centralization of coercive power in addition to its monopolization. Regarded juristically, . . . the state is nothing but a centralized legal order, or, in other words, a community constituted by a centralized legal order.
>
> . . . .
>
> It is just in the degree of this centralization that the legal community of the primitives—the pre-statal legal community—like the international—the super-statal—legal community, is distinguished from the community we call "state."[118]

The elements of the first move are in place—an interpretive

116. *Id.* at 84.
117. *Id.* at 59.
118. *Id.*

habit, backed by an evolutionary myth. At this point, Kelsen begins his response to critics of international law, and in particular to Austin. He describes the essence of the argument he will refute this way:

> So-called international law cannot be classed as "law" in the same sense as national law (regarded as law *par excellence*), because an important difference exists between the two systems of norms. This difference lies in the fact that back of national law—true law—stands the state . . . . Hence, according to this view, law is an order whose sustainer, guarantor, or creator—sometimes the expression "source" is also used—is the state, a political supreme authority or power which constitutes the relationship of superiority and inferiority.
>
> . . . .
>
> This line of argument stands or falls with the statement that international law does not constitute a relationship of superiority and inferiority as does national law, but a relationship of equality.[119]

Each element of this story will turn out only to be a figurative expression; once shorn away, there is no reason not to accept his mythically grounded vision of international law. He begins by arguing that the superior/inferior relationship is, in fact, only a "figurative" one:

> As far as the relationship of individuals among themselves is concerned, they are always on an equal footing, since they are all subject in the same degree to the order superior to them because regulating their mutual conduct. They are all obligated and authorized by the order; if the order is a legal order, they are all legal subjects, irrespective of what the substance of their duties and rights may be. Superiority and inferiority, as must be emphasized again and again, are only figurative expressions. They mean only a normative bond, the relationship of the individual to the normative order.[120]

Understood as different techniques for constructing an order obligating individuals, "there is no difference between international and national law."[121]

Why individuals obey the norms is, from this point of view, irrelevant—and probably unknowable.

> For what reasons the norms are obeyed and applied is of no importance for the question of the validity of the norms. The norms may be obeyed because it is believed that they are an expression of divine will, or because it is desired to avoid the disapprobation of

119. *Id.* at 62–63.
120. *Id.* at 64.
121. *Id.* at 66.

> one's fellow men . . . or because one fears the act of coercion that the order itself attaches . . . .[122]

Despite the unplumbable source of this efficacy, precisely "the efficacy of an order is the 'power' which, to express it figuratively, stands back of it."[123]

This analysis has particular importance for Kelsen's understanding of international law's two key terms: "state" and "sovereignty."[124] A literal understanding of the state is criticized in both of its significant dimensions: as a source of authority; and as a boundary between national and international.

> If one speaks of the power of the state one probably thinks first of prisons and the electric chair, guns and cannon, and if one is a believer in the materialistic interpretation of history, of the bank accounts of the employers and of their factories. One should not forget, however, that all these are dead things . . . . Power is not prisons and electric chairs, guns and cannon, bank accounts and factories; power is not a substance, not a thing distinct from the social order, hidden somewhere back of it. Social power is only the efficacy of an order regulating the mutual conduct of individuals.[125]

For this Kelsen, power is a figure of speech that refers to the efficacy of an order whose sociological source cannot be seen. To treat "power" or the "state" as the origin of law is to confuse cause with effect:

> What is the basis of the efficacy of a social order, the motives for the obedience accorded it, the secret of power, is sociologically a very significant problem. Whether we can solve it scientifically today, whether we shall ever be able completely to solve it, is doubtful. But it lies outside the field of the question of the nature of law . . . . [T]he assertion that back of the legal order is a power means only that the legal order is by and large efficacious, that its norms are actually observed . . . .
>
> . . . .
>
> The state as a power back of the law, as sustainer, creator, or source of the law—all these expressions are only verbal doublings of the law as the object of cognition, those typical doublings toward which our thinking and our language incline, such as the animistic presentations according to which "souls" inhabit things; dryads, trees; nymphs, springs; or, to give an example not only from the thinking of the primitives but also from that of civilized peoples,

---

122. *Id.* at 67.

123. *Id.*

124. For an earlier development of these arguments, see HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS (2d ed. 1929).

125. KELSEN, *supra* note 2, at 68–69.

the concept of force in modern physics.[126]

Or later:

> The figurative characterizations of the state as "creator," "sustainer" or "source" of the law can only mean that individuals who are regarded as organs of the state create the law. But these individuals can be regarded as organs of the state only if they are authorized to function thus by the very order which they create . . . . Again and again the "state" that is sought back of the legal order proves to be the legal order itself, just as God, who is sought behind nature . . . can be conceived of only as this very nature itself.[127]

At the same time, Kelsen reasons, it is a mistake to think literally of the state as the boundary between national and international.

> [T]he state is conceived of as having existence in space, and, accordingly, events are distinguished as happening within the state and without the state. We speak of internal and external affairs of the state. The object of national law is *within* the state; the object of international law is *without* the state . . . .[128]

He declares, however, that "[t]he idea of the state as a body in space having an 'inside' and 'outside' is only a picture."[129] Indeed, the metaphor is a product or effect of the regulatory technique.

Kelsen repeats this analysis for "sovereignty," concluding that "[i]n the world of physical reality, there is no such thing as sovereignty," that it can only indicate an idea about God, and that "[i]t goes without saying that sovereignty in this sense has no place in the realm of science."[130] We can leave behind illusions about the state or sovereignty because we are situated in a universal legal order, or better, in a universal legal hypothesis, an ongoing opportunity for interpretation.

His final move comes somewhat as a surprise, as it seems to put back in place all that has been uprooted, and understood as mere habits of expression rather than realities. If we say there is a "sovereign" or a "state" behind the national legal order, we may just as well say that

> back of international law is the international legal community constituted by this order just as the state stands behind "its" law. And this international legal community can be called the sustainer, guarantor, source of international law in just the same sense as the

126. *Id.* at 69–70.
127. *Id.* at 73–74.
128. *Id.* at 82.
129. *Id.* at 83.
130. *Id.* at 78.

> state can be called the sustainer, guarantor, or source of national law.[131]

The point is that "[w]e must never forget that these are all only figurative expressions, personifications, that have no independent meaning."[132]

In many ways this Kelsen is a familiar figure, more contemporary than the positivist we have come to remember. This Kelsen initiates what we know as the pragmatic style of international policy science. There is the jargon of objectivity and science, and the stance of the heroic realist, rooting out fantasies and mystifications to tell it like it really is. In this reading, Kelsen's admiration for Pound seems less misplaced. Like Morgenthau in the same years,[133] Kelsen shares much with sociological jurisprudence. We also find a familiar linguistic turn: reinterpreting old doctrinal forms and theoretical distinctions into an open field of interpretive possibility, and liberating international law from habits of thought which would leave it rooted in a conceptual fantasy about the real rather than in actual constructed political authority. Indeed, Kelsen deconstructs the doctrinal forms of international law into a plastic field of rhetoric, rooted in the real world, but in a real world the structure and movement of which in some way cannot or need not be known. It is not too much to think of this as an autonomous rhetorical field, anchored only in the imagination.

At the same time, however, Kelsen has a program. He shares with later policy scientists a general reformist ambition and a focus on the importance of proper technique. This is not a polemic for theory; it is a specific metropolitan polemic for a more centralized international legal order and the establishment of a court with compulsory jurisdiction. Perhaps most importantly, the work of interpretation has been transformed into a political field in which Kelsen expects scientists of international law to choose sides. Even as he orients us toward the real, he lets us know that what we understand of the real is a matter of our own interpretation. Once the classic terms of international law have been reinstated as interpretive choices, it is the *intellectual* class which is called upon to act, whether as scholars or lawyers, statesmen or publicists.

This is also familiar from the work of policy scientists who would follow, until the discipline would come to seem little more

---

131. *Id.* at 81.

132. *Id.*

133. *See, e.g.*, Morgenthau, *International Law*, *supra* note 29, at 261 (re-examining methodological assumptions on which traditional science of international law has been based).

than an ongoing argument for itself with itself. Precisely the issue which was to be set aside—whether law is possible among sovereigns—becomes a matter of commitment, even *the* crucial matter of commitment, among intellectuals who would concern themselves with international reform. The very terms Kelsen came to demystify—"sovereign" and "state"—are reinstated as commitments analogous to our commitment to international law itself: concepts destroyed that they might be saved. The result is the familiar world of post-war public international law, populated by people as personally committed to sovereignty and statehood as they are insistent about their demystification.

It is this commitment, of course, which leaves Kelsen open to those who would, in turn, take up this gesture against him. It would be easy for the transnationalists to see his commitment to international law and to sovereignty, as well as his faith in international courts, as unrealistic: mystifications, forms, personal, subjective choices which would easily be criticized in the name of realism about international society.

But if we are to read Kelsen as a polemic, we should see his manifesto as a model which would often be repeated. It is in this sense that we should pay particular attention to the two tropes he deploys to stabilize his narrative: the invocation of the potential for violence should we stray from his reading; and a simple "progress narrative," suggesting the inevitability of his proposals.

Violence plays a key role in Kelsen's story, but not where it is most discussed, as a baseline indicator for the presence of law in the relationship between delict and sanction. The main role for violence is a much more nebulous one, as the broader motive and context for the book. The invocations in the introduction and conclusion suggest a context—Kelsen's arrival here, and the ongoing European struggle—which need not be mentioned to fulfill its function.

The point is not to address this war particularly, as law addresses fact, but to mobilize the interpretive class to a peace-orientation. Just as the origin of law need not be known, so the goal need never be reached, and the context need never be specified. The point is the trajectory within a rhetorical space which has lost its sure frontiers and conceptual landmarks. It is the primitive which situates the move to pragmatism in a historical narrative of evolution. The primitive is critical here, not because the periphery is the scene for international law's operation, but because the primitive serves as the mythical guarantor of proper policy choices.

Kelsen ends the fourth lecture promising that "we can now turn to the political problem," asking: "How can peace among states be secured within the framework and by means of the specific tech-

nique of international law?"[134] The fifth lecture answers the question by moving to an ever more centralized international legal order, and ultimately to federation. Kelsen concludes, however, by acknowledging that this goal must remain utopian for the moment, and he promises that in the sixth and final lecture he will become yet more practical:

> From the political point of view, the only serious question is what is the next step to be taken with a view to success on this road. Obviously it is only an international union of states that should first be set up. In this connection, the decisive question is what direction the centralization should be given in the constitution of the international community to be set up, in order that it may better assure international peace than the League of Nations.[135]

The last lecture sets out to answer this question decisively, and begins with the simple progress narrative which will guide the effort:

> The evolution of law from its primitive beginnings to its standard of today has been, from a technical point of view, a continuous process of centralization. It may also be thought of as a process of increasing division of labor in the field of the creation and application of law. The functions of law-creating and law-applying, originally performed by all members of the community, have been gradually passed on to specified individuals and are now executed exclusively by them. In the beginning, every individual subject to the legal order participates in all the functions of creating and applying the law. Later, special organs develop for the different functions . . . .
>
> . . . .
>
> . . . In the field of law, this process is characterized by the surprising fact that the centralization of the law-applying function precedes the centralization of the law-creating function. Long before special legislative organs come into existence, courts are established to apply the law to concrete cases.[136]

Kelsen characterizes this movement as a "law of evolution."[137] He describes "a certain regularity of evolution originating in the sociological and especially in the sociopsychological nature of law,"[138] and suggests that

> [t]here is perhaps in the social field a certain analogy with the phenomenon called the biogenetic law, that is, the law according to

134. KELSEN, *supra* note 2, at 122.
135. *Id.* at 144.
136. *Id.* at 145.
137. *Id.* at 148.
138. *Id.*

> which the human embryo in the womb passes through the same stages man as a species has passed through in the process of evolution from a lower to a higher stage of life. Thus perhaps the law of the universal, the international, community has to pass through the same evolution through which the law of the partial community, national law, has already passed.[139]

Ultimately, according to Kelsen, this proves more than a suggestion:

> These facts show clearly that the law of the interstate community develops in the same direction as the primitive law of the pre-state community.[140]

More importantly, those facts lay a basis for successful policy.

> They also suggest the direction in which a relatively successful attempt may be undertaken to secure international peace by emphasizing and strengthening the given tendency toward centralization. Natural evolution tends toward an international judiciary.[141]

We may want more, but the evolutionary narrative forces us to be modest and realistic in our expectations:

> Political idealists whose desires soar beyond this possibility to a world-state should always bear in mind that their ideal is attainable only by way of the intermediate stage of compulsory international jurisdiction. Nature makes no jumps; and neither can law.[142]

Kelsen ends where he began, with a manifesto inviting his audience to join him in a common cause:

> Let us . . . concentrate and mobilize the energies of those who are wedded to the idea of peace for the establishment of an international court with compulsory jurisdiction, thus preparing the indispensable prerequisite for the achievement of any further progress.
>
> . . . .
>
> The idea of law, in spite of everything, seems still to be stronger than any other ideology of power.[143]

If the strategy of Kelsen's job talk was to situate him in the mainstream of American pragmatic thought regarding international law and policy, he certainly did so. The only criticism might be that he was a bit ahead of his time. His turn from theory to practice seemed decisive; indeed, it was the central trajectory of his talk. His theory was hard-headed and realistic. His approach to jargon was shrewd and modern. His commitment to construct a metropolitan

---

139. *Id.* at 148–49.
140. *Id.* at 149.
141. *Id.* at 149–50.
142. *Id.* at 151.
143. *Id.* at 169–70.

international order was sincere.

Kelsen's difficulty was that his persistent reinstatement of all that had been criticized sounded idiosyncratic and preachy. This same difficulty would plague his successors. The commitment to international law, to sovereignty, and to an international public legal order, would remain simply a matter of individual choice, faith, or commitment, as succeeding generations thought of ever-more-sophisticated debunkings of their predecessors' formalism in the name of a renewed pragmatic orientation. Soon Kelsen himself would be relegated to obscurity as others reinvented his turn to language.

Each of those who followed Kelsen's lead would be confident that he had already given up false idols for the most sophisticated modern appreciation of culture and language. Each would know that he, at least, was a realist, shrewd in his understanding of statesmen, sovereigns, and the limits of international law. Each would feel his own conversion to the struggle for international public order as if it were the first, and would find it necessary to build his faith as if from nothing. Each would experience the modesty of his metropolitan achievements as proof of his pragmatism. Spurred on by the specter of violence, and reassured that history was on their side, the public international lawyers who followed in Kelsen's footsteps would fail to hear the steady advance of an alternative international policy, equally modern, equally realist, but committed to the disestablishment of sovereignty, the state, and the possibility of an international public policy.

III. JOHN JACKSON AND THE WORLD TRADING SYSTEM

John Jackson's book on trade law[144] ranks with the best contemporary international policy scholarship, as the words on the cover indicate, at once an "introduction," a "treatise," and a "reference." A classic work in the field of international economic law by perhaps its leading North American academic practitioner, the book exemplifies the ideas and practices which make contemporary international economic law a distinctive genre. Fifty years after Kelsen's lectures, the book expresses the wisdom of the post-war international economic order, poised for the challenges of the next century.

A senior law professor at the University of Michigan, Jackson presides over the field of trade law in the United States. Indeed, it was Jackson who largely invented the field, transforming his experiences with the United States Trade Representative's office from a

144. JACKSON, *supra* note 3.

narrowing regulatory speciality into a recognized subject of legal study. In many ways, we can see Jackson's as a classic academic project—founding and developing a field or school. He began by getting trade law recognized as a significant field of study for American lawyers. In *The World Trading System*, he goes further, claiming, quite modestly and tentatively, to represent what he terms "international economic law."[145] Seen this way, it is not difficult to imagine his strategy, both institutionally and intellectually.

At the institutional level, he developed his teaching materials into a casebook[146] and taught numerous students who would follow him into law teaching. He has participated in the conference scene for American law professors, presiding and speaking at nu-

---

145. Writing in 1948, Georg Schwarzenberger makes "the case for recognizing a special branch of law" addressing international economic relations. Georg Schwarzenberger, *The Provence and Standards of International Economic Law,* 2 INT'L L.Q. 402, 405 (1948). In the familiar mode of a social science funding proposal, Schwarzenberger juxtaposes the bewildering array of world events with a scholarly inattention that demands remedy. Schwarzenberger opened his article with an announcement:

> International economic relations are front page news. The Marshall Plan, devaluation of the French franc, Geneva and Havana Trade Conferences, Anglo-Russian trade relations, the Andes Trade and International Wheat Agreements, inter-Allied discussions on German currency, foreign assets in Austria, nationalisation of British and American owned property in Eastern and South Eastern Europe and proposals for a Western Customs Union are but a few items selected at random. Each of these problems has its intricate legal aspects, and they all are within the province of public international law. It may not be inappropriate, therefore, to inquire whether the science and practice of international law are properly equipped to deal with this host of topical issues.
>
> . . . .
>
> The answer to this question can hardly be an unqualified affirmative . . . .

Id. at 402. Schwarzenberger continued:

> A glance at the textbooks of the inter-war period and at the syllabuses in international law of the law schools of the leading universities all over the world will indicate how the challenge was met. It is probably no exaggeration to say that it was done largely by ignoring the problem . . . .
>
> . . . .
>
> It would seem that the time has come for the establishment of separate branches of international law, supplementing treatises on, and teaching in, the general principles of international law. Such specialisation will not only result in providing more adequate knowledge in the narrower fields, but is likely to enrich insight into the nature, functions and principles of the law of nations as such . . . .

Id. at 403–04.

Eighteen years later, Schwarzenberger would cover the same ground more comprehensively and more confidently. *See* Schwarzenberger, *supra* note 33; *see also* Röpke, *supra* note 33 (taking neoclassical economics approach).

146. JACKSON & DAVEY, *supra* note 20.

merous panels on trade law which place him between the world of trade practice and the academy. Although experienced in American government, he has been careful to distance himself from the positions of the United States Trade Representative, acting as a sort of pragmatic conscience for liberal trade, without becoming identified with any one issue or policy dispute.

Academically, his project faced a number of obstacles. When he began, none of the options available to students interested in the business or commercial side of international law—what might be called "private international law" outside the United States—could easily be imitated by trade law. There were advanced "international" offerings in recognized areas of domestic law, international tax being the most well developed. Trade was far too specialized a regulatory subject, however, to be routinely offered as part of the domestic law curriculum. Jackson's main competitors were general courses in transnational law or international business transactions.[147] Each represented itself as a broad subject, addressing structural and institutional issues beyond the details of particular transactions and deals. There was a good deal of overlap, transnational law focusing slightly more on courts and regulatory conflicts, international business transactions more on international contracts, property, and business regulation. Both dealt primarily with American law, and both self-consciously straddled a number of domestic law fields bearing on international transactions. When Jackson began, an American law school with limited room in the curriculum for international "specialty" courses would almost certainly have offered (faculty resources being equal) any of these courses before international trade.

The achilles heel of the operation was limited attention to both foreign law and the public international law structure. Neither transnational law nor international business transactions gave much attention to international public law rules, other than those covering expropriation and various quixotic efforts to monitor multinational companies. Where treaties or executive agreements were relevant, both were more interested in the American reception of international rules than in their international generation or foreign applicability. All of these courses had begun as efforts to render the American legal curriculum less parochial, but each had drifted back to domestic law at the highest point of the American century under

147. *Compare id. with* STEINER & VAGTS, *supra* note 25 (transnational-law approach) *and* ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS (1991) (international-business-transactions approach).

the pressure of student interest, the perceived influence of American law internationally, and the perceived poverty, even irrelevance, of the public international law and comparative law fields in the same years.

Jackson's success was to exploit these weaknesses without invoking either comparative law or public international law. Comparative law had marginalized itself by stressing either a deep foreign expertise incapable of being generalized, or a savvy knowledge of how business is conducted in a particular region unlikely to be seen as part of the basic curriculum. Public international law had reacted to the wide American perception of its irrelevance to the conduct of foreign policy by proliferating specializations (law of the sea, human rights, etc.) and becoming itself immersed in American public law by focusing on the foreign relations law of the United States.

In the GATT, Jackson had an international institutional apparatus and regulatory machinery which was relatively unknown, and which was linked to an American statutory regime. Public international law teachers generally avoided the economic institutions, except to comment on their constitutional structure or voting procedures, unless they were interested in development issues, in which case they would likely focus on the International Monetary Fund and the World Bank, rather than the GATT.

Jackson's academic achievement was to displace international business transactions and the tradition of transnationalism by capturing the intellectual energy and hope for international public law and the felt necessity of dealing with the "foreign" without losing the basic American legal materials and the national private law order. By focusing largely on the reciprocal interaction of national governmental and legislative institutions, he imagined an international "trade constitution" which brought international trade into the domestic public order to revitalize it as an international system.

At the same time, he recast clashes between national regimes not as political disputes awaiting international regulatory harmonization nor as deeply estranged cultural differences to be compared, but as an imperfect "interface" mechanism through which different legal cultures related to one another. He was consequently able to develop a broad theory of international economic relations from the details of trade law which would seem liberal, pluralistic, and internationalist by contrast to the tradition of transnationalism, while seeming pragmatic and realist about commercial matters when contrasted with public international law. In short, he made international trade a "regime" you could study, like the European Economic Community, as a working example of international regulation.

As a result, we can anticipate the distance travelled from Kelsen's lectures before opening the text. The discipline of trade and economic law has displaced public international law, and management of economic relations has replaced the problems of peace and war. Traditionally, we read the move to international economic law as the displacement of one discipline by another—from public law to private law, from a concern with national sovereignty to an international order removed from sovereign forms, from law to policy, and from adjudication to administration, with economics replacing politics as law's sidekick and nemesis.

At the same time, however, we sense a move away from, or perhaps beyond, these sorts of distinctions. As this familiar story goes, international law was preoccupied with the distinctions between public and private, law and politics, diplomacy and trade, international and national. For contemporary international economic law, these distinctions have been relaxed, or set aside. The contemporary international policy scientist—however much he prefers the economic to the legal, the legal to the political, the private to the public, the international to the national, and so forth—is fully at ease with a relaxed and ad hoc mixture of all these elements. In this, the world of Jackson seems not simply a different or parallel discipline, but seems also more up to date and more sophisticated than that of Kelsen.

This double movement—simultaneously from public to private and beyond the sovereign forms which mark the distinction between public and private—makes the field of public international law seem doubly out of touch to the international economic law specialist. From this perspective, it seems mired in politics and formalism. It is an image which tracks rather faithfully the conventional reading of Kelsen as a European formalist, theorist, etc. To the extent we have read Kelsen as an early pragmatic modernist in public international law, however, we should also expect continuity between Kelsen and Jackson, this double progressive movement perhaps fulfilling Kelsen's evolutionary hopes for an international policy machinery.

A. Preface and Introduction: The New Discipline of International Economic Law

Above all, Jackson's book offers a succinct, readable description of the various elements which have come to comprise international economic law. Of the fourteen chapters (308 pages), only the introduction and conclusion seem at all theoretical or speculative (a total of thirty-six pages). Even here the voice is pragmatic, ushering us into an existing "trading system." Gone is Kelsen's elaborate specu-

lation on the existence and nature of international law. The introduction is entitled "The Policies and Realities of International Economic Regulation."[148]

Jackson speaks directly of international law only in the penultimate section of this first chapter, after introducing liberal trade theory and the science of policy in international economic affairs which will be the main background and subject for the book. The section, labeled "International Law and International Economic Relations: An Introduction,"[149] gives us some important clues about the relationship between Jackson's project and that of Kelsen. The section has three parts: "International Economic Law,"[150] "International Law and Economic Relations,"[151] and "Functional Approach to International Law."[152] Jackson takes up international law just after introducing the term *international economic law* to name the discipline to be covered in his book, by way of contrast. He opens: "By way of introduction to the international law bearing on economic affairs, and as part of an historical introduction to it, several observations may be useful to the reader."[153] International law will be history, background.

He introduces us to the basic "sources" of international law, treaties and custom, but notes that "[u]nfortunately, customary international law norms are very often ambiguous and controverted."[154] Indeed, often "scholars and practitioners disagree not only about their meaning but even about their existence."[155] As it turns out, in economic affairs,

> there is very little in the way of *substantive* international law customary norms (that is, norms other than ones dealing with procedures for government-to-government relations, or of relations among firms or individuals in the few cases when international law is deemed to apply to firms or individuals).[156]

As a result, the reader can readily ignore the elaborate speculations of the international law field, concerning himself only with the relatively straightforward world of treaties.

Here, Jackson introduces his "functional approach."[157] People,

---

148. JACKSON, *supra* note 3, at 1.
149. *Id.* at 21.
150. *Id.*
151. *Id.* at 22.
152. *Id.* at 23.
153. *Id.* at 22.
154. *Id.*
155. *Id.*
156. *Id.* at 23.
157. *Id.*

he tells us, particularly "the public," sometimes question the importance and effectiveness of international law, and Jackson acknowledges that this is not surprising, given how often these rules are violated.[158] But, he suggests, this is less true when "reciprocity and a desire to depend on other nations' observance of rules" leads "nations to observe rules even when they don't want to."[159] This seems particularly the case "in the context of economic behavior" where rules have important "operational functions," providing "predictability or stability" without which "trade or investment flows might be even more risky."[160]

Broadly speaking, these paragraphs offer an unexceptional introduction to the sorts of arguments international lawyers make for the efficacy of their discipline in the pragmatic age. For the international lawyer, the only surprising elements are Jackson's suggestion that there are few international law rules of relevance to economic affairs (dismissing the broad range of contemporary international law sources and procedures in favor of treaties), and his further suggestion that those which do exist are perhaps particularly likely to be followed for reasons of economic self-interest.

Public international lawyers have developed what they term a "functional" approach in ways precisely counter to Jackson's first suggestion. Rather than emphasizing the narrow range of substantive rules about which one might be skeptical, they have celebrated the importance of sources and procedural rules in establishing a regime of international public order, even in the absence of agreement on particular substantive norms. It is to the project of elaborating substantive rules—whether extending the list of human rights or articulating more precise standards for air traffic safety—that international lawyers have been beckoned by polemics like Kelsen's for two generations. Jackson seems simply to be setting this procedural regime and this project of international public order aside—to be replaced by a network of market relations for which only a few substantive rules will be necessary.

Jackson rather weakly defends the second proposition by reference to the traditional arguments for free trade which he has earlier introduced: "If such 'liberal trade' goals (for reasons discussed in section 1.2) contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare."[161] At this point, Jackson's argument goes off in two quite different

158. *Id.*
159. *Id.*
160. *Id.* at 24.
161. *Id.*

directions.

If we follow his parentheses and return to section 1.2, we find a lengthy discussion of "liberal trade" policy and the theory of comparative advantage.[162] Jackson is extremely modest about the conclusions which can be drawn from economic theory, even though he has warned us that "the basic economic propositions of international trade policy . . . will lie at the center of this exposition."[163] Although the "theory does have strong intuitive appeal,"[164] Jackson is careful to summarize major criticisms and point out obvious weaknesses. Jackson notes that "[o]f course, this basic 'economic goal' is not the only goal of international trade policy,"[165] an assertion he discusses in a subsection entitled "Competing Policy Goals and Noneconomic Objectives."[166]

Liberal trade theory is defended only as a fact. Thus, for example, "regardless of their validity or intellectual persuasiveness, there is no question that [economic arguments for liberal trade] . . . have been influential. The basic 'liberal trade' philosophy is constantly reiterated by government and private persons, even in the context of a justification for departing from it!"[167] He continues: "[T]here can be little doubt of the general policy underpinnings of the post-World War II international economic system . . . ."[168] As a result, Jackson does not need, among his qualifications, to introduce the reader to any conflicts or counter-arguments within economics; they have been netted out by consensus. Economic theory, now a possible justification for international law, is a matter of observation. He does not claim that economics tells us that some international law rules will be followed, only that some legal rules will be part of a liberal trade system.

Jackson is not a "law and economics" scholar in any traditional sense. He does not follow the entailments of specific arguments of economic theory for particular rules, nor assess aspects of legal culture in economic terms. Economics plays a much more general role in the text. Jackson deploys economic theory much as public international lawyers deploy reflections about the way "nations behave,"[169] and as Kelsen deployed anthropology—to establish a factual baseline, even if a mythical one, for his international regime

---

162. *See id.* at 8–17.
163. *Id.* at 6.
164. *Id.* at 13.
165. *Id.* at 9.
166. *See id.* at 17–21.
167. *Id.* at 8.
168. *Id.* at 9.
169. *See, e.g.*, HENKIN, *supra* note 20.

and momentum for his policy proposals. He validates in a general way those rules and those aspects of the overall public international law system which seem, for whatever theoretical or fanciful reasons, necessary or desirable to promote trade and advance, in Jackson's definition of "liberal trade," "the goal to minimize the amount of interference of governments in trade flows that cross national borders."[170] Where international law is useful to that end, it too has become simply a matter of fact—clear, orderly, without significant internal contradiction or bias, a significant part of the policy context.

If we continue reading, rather than following the parentheses, we come to what seems a more direct discussion of the relevance of law, a rather confused meditation on the relationship between theory and practice suggested by Maitland's phrase "the 'seamless web' of the law."[171] Jackson reminds us that despite the importance of "coming face to face with the complexity and coarseness of reality with the aim of solving real problems there is always the risk of losing sight of the forest because one's gaze focuses on particular trees."[172] Anecdotes can be as misleading as theories. "Thus we see the dilemma of a book like this."[173]

In response, Jackson will offer "a little of both."[174] The book will be neither deductive nor inductive, but will "state issues or questions . . . without in all cases trying to formulate answers."[175] The result is a number of "themes or problems," widely divergent in type, including "[t]he dilemma of rule versus discretion," the "'effectiveness' of the trade rules," the need to relate conflicting policy goals, some of which "have to do with the legal and constitutional structure of the 'system,'" and so forth.[176] The result of this direct theoretical excursion into the seamless web of the law is a dispersion of dilemmas in the face of which one can only be modest. Jackson concludes the introduction on a typical note: "Thus I have expressed a sort of 'consumer warning.' Don't expect too much of this book."[177]

Jackson has differentiated his new discipline from public international law—and his own work from that of Kelsen—in two steps.

---

170. JACKSON, *supra* note 3, at 8.
171. *Id.* at 24 (quoting F.W. Maitland, *A Prologue to a History of English Law*, 14 LAW Q. REV. 13, 13 (1898)).
172. *Id.*
173. *Id.* at 25.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 26.

First he treats those rules which seem, either actually or hypothetically, to serve a liberal trade system (i.e., those which either reduce barriers to trade or enhance security and predictability). Such rules should properly be a focus of study for the international economic lawyer. Jackson suggests no difficulty, at this level, in figuring out which rules those are. Where, on the other hand, there are difficulties and confusions, we have the enduring dilemmas of policy—dilemmas less to be solved than, in Jackson's terminology, managed. The rest of public international law—its system of procedural order, its theoretical arguments for itself, its polemics for personal commitment—has been set aside, promoted, or demoted. For the international economic system, this international law seems relevant only as introductory background, as history, or as theory.

Unlike Kelsen's powerful argument for international law among nations, Jackson makes the argument for international economic law softly, less rejecting international law and setting up a parallel discipline, a preferable optic, than describing international law's general displacement and restricted arena of continued relevance. Indeed, when Jackson speaks about these matters, he stresses the law's entanglement with economic policy. The book's preface opens this way: "Trade law and policy involves a remarkably intricate interplay of international law, national law, and nonlaw disciplines, including economics and political science."[178]

He introduces the new discipline of international economic law as something to which "one has heard references" in "recent years," stressing that "[u]nfortunately, this phrase is not well defined,"[179] and has been used so vaguely that it might refer to "almost all international law."[180] He suggests, but does not embrace, a "more restrained" definition, involving only those matters relevant to cross-border transactions.[181] In the end, he takes his cue from fact rather than theory: "In any event, the subject of international trade, whether in goods or in services (or both), is clearly at the core of international economic law."[182] His book will build from the rules which concern this core.

The key points here are Jackson's transformation of theoretical propositions into factual observations, his dismissal of international law's classic concerns as matters of theory, and his correlative modesty about the alternative he advances. In one sense, this is simply

178. *Id.* at ix.
179. *Id.* at 21.
180. *Id.*
181. *Id.*
182. *Id.*

the work of one realist displacing another. Jackson, like Kelsen, wants to move things from theoretical concerns to practical realities. Jackson's greater informality, shorter theoretical prolegomena, etc., simply mark the progress made along the road Kelsen signalled. In another sense, however, Jackson has changed roads altogether, for now the driving image is not a public order of sovereigns, but a market of economic actors.

Jackson characterizes the introduction and the three chapters which follow as concerned with "the institutional and legal structure of the world trade system."[183] The next seven chapters take up "the most important" of the "substantive regulatory policies of that system."[184] His final chapter offers "conclusions and perspectives."[185] Beyond the apparent logic of this division—a general policy framework followed by specific policies—the three structural chapters develop the theoretical argument sketched in the introduction, illustrating both the similarity of Jackson's pragmatism to that of Kelsen and the differences he establishes between the old discipline of international law and the new international economic law. The later substantive chapters suggest the geographic and conceptual contours of the international economic law regime Jackson presents.

B. The Institutional Chapters: Phases in the Development of the Pragmatist Voice and Polemic—New Relations Among Some Familiar Distinctions

Like other modern pragmatists, and in many ways like Kelsen, Jackson is deeply skeptical, even rudely dismissive, of the traditional distinctions (international/national, economic/legal, law/politics) which might be thought necessary for "international economic law" to have an autonomous coherence. Like Kelsen, however, Jackson finds such distinctions easier to disparage than to eliminate.

The three chapters which follow the introduction, presenting the "institutional and legal structure" for trade, both dismiss and reinstantiate these distinctions. They are not, of course, organized directly to make a theoretical argument of this sort. Rather, their titles suggest a descriptive and logical general structure:

183. *Id.* at 115.
184. *Id.*
185. *Id.* at 299–308.

The International Institutions of Trade: The GATT[186]
National Institutions[187]
Rule Implementation and Dispute Resolution[188]

Still, after reading the introduction, the reader might be forgiven for finding the list somewhat puzzling. For one thing, in the first chapter Jackson is adamant that "national" and "international" dimensions of the trade system neither could nor should be distinguished:

> An even less fortunate distinction of subject matter is often made between international and domestic rules. This book will not indulge in that separation. In fact, domestic and international rules and legal institutions of economic affairs are inextricably intertwined. It is not possible to understand the real operation of either of these sets of rules in isolation from the other.[189]

He adds that "[t]he tendency for academic subject matters to separate international from national or domestic issues becomes an important source of misunderstanding."[190]

At the same time, the last of these chapters, concerning dispute resolution and rule implementation, although surely general, is surprisingly legal in its focus. Indeed, the problem of "compliance" with international norms[191] and the importance of dispute resolution mechanisms in the process of rule implementation has become a central preoccupation of the public international law field. In a habit which follows Kelsen's interest in the establishment of an international court, dispute resolution and compliance are selected for special treatment in international law texts not because they are particularly germane or well developed in given substantive areas, but because, as primitive and decentralized judiciary substitutes, they seem to provide the most practical arena for investigating the efficacy of international law as a whole. By contrast, Jackson had introduced law almost apologetically in the introduction:

> Thus the purpose of this book is to examine the theory and real implementation of the policies of international trade in our contemporary world in a way that attempts to explain how the theories have been effectively constrained by the processes of real human institutions, especially legal institutions. The perspective of this book is that of a legal scholar, of course. (My "comparative advan-

186. *Id.* ch. 2.
187. *Id.* ch. 3.
188. *Id.* ch. 4.
189. *Id.* at 22.
190. *Id.* at 25–26.
191. *See id.* at 7.

> tage" would not realistically support any other perspective.) Yet my goal—not too ambitious, I hope—is to explore the multidisciplinary context of trade-policy rules . . . . I will state the basic economic propositions of international trade policy, and they will lie at the center of this exposition.[192]

Given Jackson's insistence that problems of "policy," oriented around specific dilemmas or "themes" of practical relevance, are central to his conception of international economic law, it is surprising to find the traditional preoccupation of public law regime builders so central to his discussion of the "'constitutional structure' of the contemporary world trade system."[193] The deployment of dismissed distinctions is, of course, familiar in contemporary legal pragmatism. The difficulty is to determine precisely how and where, and with what strategy, the two attitudes are deployed.

Jackson's second chapter introduces the "international institutions of trade" by focusing on the GATT. It reads like a disquisition on what may and may not be considered either "law" or a "legal institution," even as the descriptive focus on the GATT makes law and questions about what might count as "legal" seem both theoretical and historical.[194] The chapter responds, in a diffuse way, to an opening paradox: "Although the GATT is featured in headlines of major daily newspapers as the most important treaty governing international trade relations, the fact is that the GATT treaty *as such* has never come into force."[195] We might dismiss this as the sort of professional trivia or historical detail that experts and insiders are supposed to know. Indeed, Jackson "must hasten to clarify, however, that the obligations of GATT are clearly binding under international law,"[196] but the "no-it-isn't/yes-it-is" theme continues throughout the chapter.

Indeed, we get almost no substantive information about the GATT in the chapter on the international trade system. That is postponed for later more particular chapters. This general treatment focuses on the broad framework which holds those substantive practices together, much like the typical public international treatise which begins with procedural matters, and then covers particular substantive topics as illustrations. At first glance, however, Jackson's general structure seems far less advanced, in part because he eschews discussion of international law's procedural ele-

192. *Id.* at 6.
193. *Id.* at 7.
194. *Id.* at 27.
195. *Id.*
196. *Id.*

ments as irrelevant to a system structured by a market rather than by inter-governmental accommodation. As a result, he seems preoccupied with the legality of the structure—precisely the issue modern international lawyers are most obsessive about forgetting.

Jackson tells us that the international trade regime is a complex edifice of institutions and treaties, of which the GATT is the most important.[197] Yet, he goes on, the GATT is not really an institution and not really a binding treaty, partly as a result of historical oversight and error. The GATT, Jackson maintains, had "flawed constitutional beginnings."[198] Still, Jackson continues, "any fair definition" would deem GATT an "international organization."[199] Although in theory "not an 'organization'" and therefore without "members,"[200] the GATT has contracting parties, and we can list nations which participate in GATT obligations.[201] These contracting parties can act jointly, often by majority vote.[202] Jackson concludes that it is actually better to think of the GATT as an "elaborate group of committees, working parties, panels, and other bodies."[203]

If we look at legal norms, Jackson maintains, the GATT's many and varied bilateral commitments and tariff concessions are the key legal obligations; beyond that there is simply a "code of conduct."[204] This code of conduct, however, does have several key obligations. Of course, these vary a great deal in application[205] and are often not complied with.[206] There is now also a great deal of bilateral breach brought about by the so-called "voluntary export restraints."[207] In any event, he continues, the official sphere of application of the GATT code is rather limited. It applies only to products and is binding only on governments.[208] It does, however, greatly influence other sectors and actors as well. Still, it is riddled with exceptions—grandfather clauses, waivers, balance-of-payments exceptions, and many more.[209] There are also many loopholes and sectoral exemptions for products, including agriculture and tex-

197. *See id.* at 27–29.
198. *Id.* at 30.
199. *Id.* at 38.
200. *Id.* at 45.
201. *Id.* at 45–46.
202. *Id.* at 48.
203. *See id.*
204. *See id.* at 41.
205. *Id.*
206. *See id.*
207. *See id.*
208. *Id.* at 42.
209. *See id.* at 42–43.

tiles.[210] The point, Jackson tells us, is that the GATT is "complex, constantly changing, and furnishes both pitfalls and opportunities for constructive diplomacy."[211]

Like many public international lawyers, Jackson sets aside issues of law's specificity. He does so, however, neither in recognition of the reality of national behavior and the existence of a sophisticated procedural regime, nor out of any personal peace-orientation or optimistic desire to view the glass half-full. Quite unlike Kelsen, Jackson relaxes the sharp distinction between the legal and the nonlegal in his appreciation for the apparent maturity or flexibility of an international system not preoccupied with its own binding force. He does so because it seems that the existing international trade system, in this way the most sophisticated of international regimes, is itself a mélange of law and non-law, institutions and non-institutions—a scattered array of obligations and sites for bilateral or multilateral engagement. Thus, for example, in looking at the last completed round of GATT negotiations, Jackson concludes that the "overall impact of these results was to substantially broaden the scope of coverage of the GATT system" despite the fact that "[t]he legal status of these various agreements and understandings . . . is not always clear."[212]

At other times, however, Jackson quite firmly defends law's specificity, often at precisely the moment he is most relaxed about the distinction between national and international. It is as if, for Jackson, the end of one distinction requires the reinstatement of the other. This relationship is most apparent in Jackson's notion of the world's increasing "interdependence,"[213] introduced as a factual observation at the very start of the book: "[T]he world has become increasingly interdependent."[214] He notes that trade "constitutes over 50 percent of the gross national product of some countries," and is significant even for countries (like the United States) with large internal markets.[215] Nevertheless, interdependence is not primarily a matter of statistics. It is rather a matter of interlocking political fears. "[G]overnment leaders, businessmen, and almost anyone else feels some anxiety about those mysterious foreign influences that can affect daily lives so dramatically."[216] Interdepen-

210. *Id.* at 44–45.
211. *Id.* at 30.
212. *Id.* at 55.
213. *Id.* at 2.
214. *Id.* at 3.
215. *Id.* at 2.
216. *Id.*

dence is significant because with it "has come vulnerability."[217]

> National economies do not stand alone: economic forces move rapidly across borders to influence other societies . . . .
>
> . . . .
>
> . . . Economic interdependence creates great difficulties for national governments. National political leaders find it harder to deliver programs to respond to needs of constituents. Businesses fail or flail in the face of greater uncertainties. Some laboring citizens cannot understand why it is harder to achieve the standard of living to which they aspire.[218]

This interdependence has been achieved over the past forty years in part through the effort of international institutions, and in part through technological advances. It has created a world for international economics, whose task, "today . . . is largely a problem of 'managing' interdependence."[219] What is to be managed? The "host of new problems" brought about by the fact that "[w]hen economic transactions so easily cross national borders, tensions occur merely because of the differences between economic institutions as well as cultures."[220] Management, for the international economic law specialist, means addressing anxieties about the foreign and bridging cultural differences in a key distinctly different from that of national politics. Because of interdependence, national governments on their own simply become "frustrated" addressing these new problems.[221]

Nevertheless, governments "respond" in many ways.[222] Some of these responses are legitimate policy options examined later in the book: "creat[ing] an international regulatory system," and "develop[ing] internal policies designed to enable their nations to better cope with the challenges of the world economy" which Jackson terms "industrial policies."[223] When responding in these ways, governments "confront international as well as national sets of rules, procedures, and principles"[224]—the very same rules that were called forth by the imperatives of an expanding international market's need for security, predictability, and the like.

Sometimes, however, governments are tempted to disregard these rules or to interpret them cynically, exploiting the "ease with

---

217. *Id.* at 3.
218. *Id.*
219. *Id.* at 4.
220. *Id.*
221. *Id.* at 5.
222. *Id.*
223. *Id.*
224. *Id.*

which detailed legal criteria can be overcome for political purposes."[225] This behavior typifies a

> larger dilemma . . . today: the tension that is created when legal rules, designed to bring the subject a measure of predictability and stability, are juxtaposed with the intense human needs of government to make "exceptions" to solve short-term or ad hoc problems. This tension poses difficult problems for the practitioner and the scholar.[226]

In short, when the issue is government's political resistance to the interpenetration of national and international, scholars and practitioners stand with the rules. When the issue is residual attachment to the particularity of law, the practitioner/scholar stands with the international, where those sorts of distinctions no longer seem relevant.

Where Jackson's consideration of international trade law and institutions is preoccupied with displacing law's specificity, his treatment of national institutions in the following chapter is closely focused on the relationship between international and national. In a sense, Jackson pursues the theme of his introduction, elaborating on the centrality of national institutions to the international trade system. He reasserts their importance[227] and introduces a number of significant national institutions, beginning with the United States presidency and Congress. Indeed, the chapter is significant in part because we can begin to see the outlines of the international trade regime's physical geography: Jackson devotes sixteen pages to the United States, three and one-half pages to the European Community, and one-half page to Japan.

More significant, however, is the role and nature of the national institutions Jackson outlines. The chapter opens with a short disquisition on the nature of sovereignty:

> The erosion of the concept of sovereignty in international affairs has been much commented on. Perhaps in no context more than international economic affairs has this erosion actually occurred.[228]

---

225. *Id.* at 6.

226. *Id.*

227. *Id.* at 59 ("It is also clear today that any coordinated activity of governments, especially in connection with economic affairs, requires a complex set of individual governmental actions by both international and national institutions.").

228. *Id.* Interestingly, Jackson cites only Wolfgang Friedmann's, *The Changing Structure of International Law*—the 1964 high water mark of post-war liberalism in American public international law, and square in the tradition of Kelsen's Holmes Lectures—for this proposition.

What Jackson describes is a matter of fact: sovereignty has been "eroded," itself an interesting physical metaphor. The point is at once familiar and puzzling. For a public international lawyer, such an observation might well be followed by an analysis of the importance of international norms and institutions, the history of their triumph, and a polemic for their development. This is precisely the sort of history Jackson gives us in introducing the erosion of law's specificity in the preceding chapter. Here, by contrast, Jackson uses sovereignty's erosion to introduce the importance of national institutions.

He dismisses the possibility that sovereignty might still be used to "argue against either international rules or foreign government demands for consultation or representation, on the basis that it 'interferes with our sovereignty,' or that it encroaches on the 'internal affairs' of a given government."[229] Given interdependence, this "is usually a misplaced argument in today's world."[230] At the same time, however, no "proposed course of international action" is possible except through the "legal/constitutional/political constraints" imposed by national "procedures."[231] In Jackson's world, the international has become substantive: The national provides procedures for implementation.

The national works best as a mopping-up operation, attuned to the needs and rules of the international regime, and deploying its institutions in that context. But Jackson uses the section he labels "United States Law and the International System—Synergy or Conflict"[232] to make a broader point. It is not simply that, for example, "to achieve any meaningful initiative . . . the GATT requires not only action by some body of that organization, but also action by at least the United States and the European Community—and probably also by Japan, Canada and certain other key countries."[233]

The erosion of sovereignty has also eliminated both the necessity and the possibility of dealing with the United States or the European Community as units in favor of a dispersed set of institutions and actors, both within and without the government.[234] Indeed, the most significant lesson of Jackson's chapter on national institutions is not that the national should be put at the disposal of the international trade regime, but that a manager of the international

229. JACKSON, *supra* note 3, at 6.
230. *Id.*
231. *Id.* at 60.
232. *Id.*
233. *Id.* at 59–60.
234. *Id.* at 77–78.

trade regime, wherever he or she works, internationally or nationally, must harness a wide variety of international, domestic, and foreign entities to get anything done.[235] Jackson goes on to present the significant institutional players and statutory regimes in the United States, the European Community, and Japan.

Between this and the preceding chapters, we can see two quite different roles for national actors: one, handmaiden to the trade regime (facilitator, translator, implementer); the other, an autonomous actor, resisting the international. The first role, leading to synergy, is preferable, not because it will promote free trade, but because it reflects a more accurate understanding of the facts of contemporary international life—interdependence brings with it a fragmented sovereign with many players, which the sophisticated policy manager will understand as numerous opportunities for engagement. This is a national unit to be welcomed into the international trade regime: indeed, we should insist upon it, refusing theoretical separations of the national and international. The point of Jackson's meditation on sovereignty is to set the "facts" of interdependence against the assertion of national autonomy where it might threaten the international trade regime.

At the same time, there is another type of national behavior in which the nation fancies itself autonomous, unitary, and sovereign, and operates out of theory rather than practice. This outmoded role for the national—familiar from the introduction as the illegitimate attempt to swamp law with politics—relies on the sort of autonomy for national institutions, the sort of distinction between national and international, which Jackson will not "indulge."[236]

Thus, in considering the implementation of international economic law, Jackson divides "opposition" to the effectiveness of international rules into two categories, both rooted in national governments. Some opposition "can be traced to . . . older concepts of national sovereignty,"[237] which translates, for Jackson, into illegitimate self-dealing by national leaders:

> The chance to go "tooting off in private jets to negotiate with other national leaders at comfortable locations or three-star restaurants" is a key plum of otherwise dull government jobs, a high government ex-official once indicated.[238]

---

235. See, for example, Jackson's treatment of United States courts, executive, and Congress and the European Community's "departure" from theories of "strict sovereignty" in following up the implementation of the Tokyo Round agreements in the United States, *id.* at 197–99.

236. *Id.* at 22.

237. *Id.* at 84.

238. *Id.*

But the "wise" national leader should also advocate breach of international economic law obligations when the rule is "bad policy" or "outdated" or "when reform of the rule is badly needed."[239] In short, when the national leader is the more appropriate agent for implementation of a sound international economic policy.

We can begin to see here the complex geography of Jackson's international economic law. It is not simply radiation out from the United States toward Europe and Japan, but involves activities on two conceptual levels pursuing incompatible logics: a trade regime, associated with the international and with law, but agnostic about their specificity; and a lower level, associated with national institutions and politics when these cannot be recruited into "synergy" with the international economic regime and insist on making old-fashioned arguments about "sovereignty." In the well-functioning trade regime, there is no particular role for clearly legal or international institutions. In an interdependent world, a variety of social forms and institutions can, as a matter of fact, be used in managing commercial transactions. Law regains its specificity when necessary to counterbalance national sovereign recidivism, cabining the tendency of governments to stray from the range of acceptable responses to the new interdependence.

For Jackson, an "interdependent" sovereignty involves a tension, presented as such, between the use or deployment of state institutions as an instance in international economic regulation or management, and removing the state as a political instance altogether. The tension could be resolved, of course, and conflict could give way to synergy, if those involved in the national systems would change their orientation from an outmoded political nationalism to a broad, more sophisticated management ethic. They should be moved to do so, Jackson suggests, for a familiar reason: that is the direction in which history is moving.

Jackson's chapter on dispute resolution, which follows the chapters on international and national institutions, takes up the effectiveness of the international economic law system in classic terms. Jackson quotes a lengthy passage "adapted from" two previous articles of his written in the metropolitan tradition of legal process and transnationalism which followed the Kelsen of the Holmes Lectures.[240] We find again the opposition between a "'power-oriented'

239. *Id.* at 84–85.

240. *Id.* at 85–88 (adapting text from John H. Jackson, *Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98–101 (1978) [hereinafter Jackson, *Crumbling Institutions*]; John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1,

technique" and a "'rule-oriented' technique."[241] Every "observable" international system involves "some mixture of both,"[242] and both involve action by national as well as international actors, public as well as private negotiations. In the rule-oriented approach, however, all actors can participate democratically, having "their inputs" at various levels, and all can rely on "stability and predictability."[243] The power-oriented technique, by contrast, requires secrecy and executive discretion, hallmarks of a unitary and undemocratic sovereignty. In the power-oriented technique, players' "bargaining chips" are perceptions of relative authority rather than rule interpretations, and the stronger will be at an advantage. In the rule-oriented technique, raw power differentials are not crucial. Rather, they are tempered by good faith, and by the fairness of the rules themselves. The crucial point is again historical:

> To a large degree, the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, toward a rule-oriented approach . . . .
>
> . . . [A] particularly strong argument exists for pursuing gradually and consistently the progress of international economic affairs toward a rule-oriented approach.[244]

This historical narrative, bracketed in lengthy quotations from earlier works, sits uneasily with Jackson's usual take-it-as-it-comes posture of management realism. This chapter ends as Kelsen's lectures ended, "looking at the future" of dispute settlement and advocating work to improve the international dispute settlement system for economic matters.[245] In this sense, the chapter is more aggressively situated in the development of the legal system than the book as a whole, and certainly more so than the conclusion. Here, Jackson advocates attention to the system, rather than resolution of any particular dispute: "[I]t must be recognized that in most cases it is *not* the resolution of the specific dispute under consideration which is more important. Rather, it is the efficient and just future functioning of the overall system which is the primary goal . . . ."[246]

As a consequence of Jackson's redefinition of the national

3–4 (1979) [hereinafter Jackson, *Governmental Disputes*]).

241. *Id.* at 85.

242. *Id.* at 85–86.

243. *Id.* at 87–88 (quoting Jackson, *Crumbling Institutions*, *supra* note 240, at 98–101; Jackson, *Governmental Disputes*, *supra* note 240, at 3–4).

244. *Id.* at 86–87 (adapting from Jackson, *Crumbling Institutions*, *supra* note 240, at 98–101; Jackson, *Governmental Disputes*, *supra* note 240, at 3–4).

245. *Id.* at 109.

246. *Id.* at 112.

state's appropriate role, the system which Jackson promotes is no longer Kelsen's. In one sense, the state remains the defining unit for international economic law, as it was for public international law. Indeed, the "more restrained" definition for international economic law Jackson proposes, involving transactions "that cross national borders" and the "establishment on national territory of economic activity of persons or firms originating from outside that territory,"[247] is obviously parasitical on the public international law scheme of territorial jurisdiction. Here, however, the point is not to relate governments peacefully to one another in a broader international public law regime, but to facilitate "flows" across their boundaries by eliminating national governmental interference.

The state's role is either passive, like a map, staying out of the way as economic activity flows about, or facilitative, enlisted in the implementation of international objectives. In this, international economic law, like public international law, insists on the obsolescence of sovereignty. Only here, the sovereign has not been embroidered in a broader politics, but has disintegrated into a broader economy. The international legal system to be developed is moving, not toward centralization, but toward fragmentation, as individuals at all levels become its agents in myriad proliferating contexts and institutions. Jackson notes the increasing "balkanization" of dispute resolution[248] and stresses the importance of bilateral or "minilateral" negotiations[249] and "citizen initiative."[250]

The result is again a regime divided into two zones: one of international economic flows, and another of the underlying terrain of national politics. The upper zone is sophisticated, rational, and humane; the lower zone is murky, indulgent, physical, and frightening. In this, Jackson has reversed his initial anxieties about interdependence. We are no longer situated nationally, anxious about things foreign. We are now secure in the cosmopolitan world of international economic law, and uneasy only about the shady doings of an outmoded national politics.

It is a structure which Jackson naturalizes throughout the book with metaphor, exactly as Kelsen naturalized his policy proposal with the metaphor of an evolution from primitivism.[251] Here, however, the image is spatial—a "landscape"—rather than temporal.[252]

---

247. *Id.* at 21.

248. *Id.* at 52.

249. *Id.* at 110–11.

250. *Id.* at 103–14.

251. *See supra* text accompanying notes 98–102 (discussing Kelsen's metaphorical use of primitive society).

252. *See, e.g.*, JACKSON, *supra* note 3, at 28 (describing "landscape of internation-

The conclusion vividly presents the international trade regime, not as an embryo about to be born,[253] but as an anatomically detailed body in space:

> What we have explored in the preceding chapters can be characterized as the "constitution" for international trade relations in the world today. It is a very complex mix of economic and governmental policies, political constraints, and above all (from my perspective) an intricate set of constraints imposed by a variety of "rules" or legal norms. It is these legal norms which provide the skeleton for the whole system. Attached to that skeleton are the softer tissues of policy and administrative discretion. Even the skeleton is not rigid or always successful in sustaining the weight placed upon it. Some of the "bones" bend and crack from time to time. And some of the tissues are unhealthy.[254]

The body is fragile, the prognosis uncertain. No one can say "for certain" that "worldwide economic disaster" can be avoided.[255] Indeed, Jackson, like Kelsen, is adept at wrapping his polemics in apocalyptic invocations, such as "[o]ne can only hope that mistakes of the 1920s and 1930s can be avoided."[256] Jackson ends the book with the hope that the body will experience the "predictability and stability needed not only for solid economic progress, but also for the flexibility necessary to avoid floundering on the shoals of parochial special national interests."[257]

The metaphoric change suggests the difference between Jackson and Kelsen as polemicists. Kelsen's metaphor was temporal, naturalizing his advocacy of a new international regime as evolution, and the public international lawyer has, in many ways remained frozen in the becoming of that regime.[258] Jackson's spatial metaphor welcomes the neophyte into the natural architecture of an existing regime. Jackson's objective is not to further progress toward a new regime, but to improve management of the "world trading system."

It is the "economic diplomats" who, in Jackson's final sentence, "we" hope will steer international economic law clear of the shoals

---

al economic institutions"); *id.* at 251 (referring to "landscape of national and international rules").

253. *See supra* text accompanying note 107 (Kelsen's image is that of an "embryo in a woman's womb").

254. JACKSON, *supra* note 3, at 299.

255. *Id.* at 308.

256. *Id.* at 187.

257. *Id.* at 308.

258. *See supra* notes 134–43 and accompanying text (discussing Kelsen's view of new international regime).

of "parochial special national interests."[259] In the only passage in the book addressing the reader as a "you," Jackson suggests who these economic diplomats might be. In the very first sentences of the book, Jackson presents "puzzles" which call for thought experiments: "Suppose you are the minister for trade of a small Asian country that is rapidly developing," and "[s]uppose you are advising a large multinational corporation based in the United States."[260] The reader is not asked to play the role of an "economist" or "expert,"[261] but of a policy maker outside the explicitly international institutional structure. Public international law texts are always asking us to imagine ourselves working for the State Department, the United Nations, or as citizens engaging in civil disobedience or working for non-governmental advocacy groups, struggling to build a new international society. Jackson has us working for companies, law firms, and governments, all representing clients with economic interests.

We can now begin to make out Jackson's own charge to the policy establishment: to beat their plowshares into résumés. Jackson's is a call to work rather than to public participation. It is a call to work not with a personal commitment to renewal of the international order, but with a day-to-day creativity in the exploitation of opportunities for wise action within the international trade system. Jackson addresses not a citizen intelligentsia concerned about peace, but students interested in careers in international economic law. In this sense, Jackson is, as Kelsen was not (and would never become) an American professor of international law.

C. The Substantive Chapters: A Cosmopolitan Architecture for International Economic Law

The bulk of Jackson's book takes up the substantive structure of the international economic law regime. Four chapters consider the most significant regulatory principles governing the normal trade situation: tariff reduction, most-favored-nation status, nondiscrimination, and permissible safeguards and adjustment mechanisms.[262] Three chapters consider more abnormal or exceptional situations: national policies which might legitimately "compete" with a free trade orientation, and responses to "unfair" trading practices like dumping and subsidies.[263] Two chapters take up

259. JACKSON, *supra* note 3, at 308.
260. *Id.* at 1.
261. *Cf. id.* at 2 (noting puzzle not solvable by any one academic discipline).
262. *Id.* chs. 5–8.
263. *Id.* chs. 9–11.

"economies that do not well fit the roles of the world trading system": developing economies and state traders.[264]

In their overall pragmatism, these chapters confirm Jackson's Kelsenian lineage. Jackson builds upon the elements of international policy pragmatism: a proliferation of contexts and players, an admixture of law and politics, a rejection of fetishism about sovereignty, a modesty about reform, an evolutionary progressive faith, a skepticism of grand theoretical claims or plans, a practical orientation, and a case-by-case approach. Bargaining occurs over the meaning or range of legal and political solutions, as well as over their content.[265]

We are far from formalism. All the key terms— "subsidy," "tariff," even "product," "industry," and "causation"—are presented as ambiguous.[266] Although meanings will be open to negotiation, even the basic bargaining concepts are ambiguous. We cannot be sure what a "reciprocal" deal might be, nor whether a nation has bargained for an "advantage."[267] Indeed, people often call their actions "concessions" when these actions should be seen as having been to their advantage and vice versa. Even the basic policy arguments and legal interpretations, which might be helpful in sorting out whether a deal was reciprocal or whether an advantage was obtained, are insufficiently precise. Legal interpretations and policies inevitably conflict,[268] and the policy scientist cannot say which interpretation is right.[269] In all this, Jackson follows the Kelsen of the Holmes lectures.

Jackson also follows Kelsen's linguistic turn. Throughout the book, dozens of terms—some technical, others colloquial—are "placed" in quotations, not to ground the term in authority (Jackson is not quoting anyone in particular), but to signal his distance from any formal or essential approach to the language of international economic policy. Everything is a term of art, as if the modifier "so-called" were placed before every noun, Jackson sharing with the reader a sophisticated appreciation for the ambiguity of all terms of art. The only people who appear in the text as authorities to stabi-

---

264. *Id.* chs. 12–13.

265. In discussing the myriad specific tariff "bindings" or "concessions" which make up the bulk of the GATT rule system, for example, Jackson stresses the bargained, potentially reciprocal, dimension of both political exceptions and legal commitments. *Id.* at 118–26.

266. See especially his discussion of GATT Article XIX, *id.* at 156, 159–60, introducing the idea of "variable" concepts.

267. *See id.* ch. 5.

268. *Id.* at 170–72.

269. *Id.* at 172.

lize this interpretive ambiguity are unnamed policy managers—a "European diplomat" or a "senior GATT official" who provide aphorisms and anecdotes, precisely as Kelsen's anthropologists grounded his embrace of linguistic ambiguity in stories about the primitive. The ground is no longer movement from the primitive, but a cosmopolitan present, peopled by roles. Like Kelsen, Jackson cabins the policy process only with a hope and an apocalyptic invocation should we lose our orientation.[270]

Jackson's departure from the world of Kelsen is as stark as the continuity of his pragmatism. He transforms the possibility, direction, and politics of public policy, both nationally and internationally. After Jackson, it is not simply the details of Kelsen's proposal which seem outdated. Jackson puts in question the entire notion of a peculiarly international order—indeed of a juridically structured order at all. Jackson fragments both the subjects and arena of international order, envisioning a shifting process of bargaining, at once legal and political. He reorients us away from the *level* at which the economic law regime operates and toward its substantive spirit and policy orientation.[271] From this vantage point, he offers the policy scientist a substantially narrowed vision of the possibilities for national public policy and a transformation of international public policy from the sphere of politics to that of technical expertise. The result is an international economic law regime with a completely different geography from that of Kelsen's internationalist dreams.

We should take the elements of this dramatic reorientation, this move from metropolitan to cosmopolitan, one at a time. Jackson's broad rearrangement of both the players and the field of international order, to focus on spirit rather than structure, is evident in the general framework and role he gives to international economic law and in his chapter seven treatment of safeguards.[272] The consequent narrowing of national public policy is well-illustrated both by chapter seven and by chapter nine, which concerns national policies which "compete" with liberal trade objectives.[273] Chapters ten (on anti-dumping rules)[274] and eleven (on subsidies),[275] which together address what are often thought "unfair" trading practices, give a sense of the difficulties of mounting an

---

270. *See, e.g., id.* at 187.

271. For a comparable deconstructive move in public international law see Philip Allott, *Power Sharing In The Law of the Sea,* 77 AM. J. INT'L L. 1, 5–6 (1983).

272. JACKSON, *supra* note 3, at 149–88.

273. *Id.* at 203–16.

274. *Id.* at 217–48.

275. *Id.* at 249–74.

international public policy to replace what has been lost at the national level.

Jackson presents the managed reduction of barriers to trade as the core problem of international economic law.[276] The book is concerned with an idealized world of governmental behavior in which the key actors are the policy makers of the national and international regimes. The basic activity is the levying of tariffs and their removal or reduction. Governments set tariffs, disrupting the flow of trade, and the international economic regime tries to reduce or eliminate the disruption through law, politics, bargaining, or adjudication, initiated either privately or publicly.

It is important to remember that this idealized structure of national regulation is all background to an idealized vision of normal trade among private traders. In this market foreground, presumptively private players are continuously bargaining and dealing, reaching out to one another across an abyss of uncertainty to engage in commercial transactions on the basis of a stable currency.[277] In this book, Jackson tells us very little about the legal or political basis for this activity. There is nothing, for example, about the law of international commercial contracts.[278] He does, however, tell us two crucial things. First, given the number of practical departures and exceptions, the focus on the industrial trade in goods, imagined as an activity of private traders, may be as much the exception as the rule.[279] Second, the international economic regime handles this problem by assimilating these exceptions as far as possible to the core image of an arm's-length private transaction through the use of analogy.

In this, international economic law facilitates the risk-taking behavior of private traders by modeling it: developing international rules about contracts and private property, and policies of privatization and currency stabilization to serve the imagined needs and interests of "normal" private traders. Where trade and traders are not "normal," the policy scientist can devise exceptional and temporary adjustment policies by analogy, treating the state trader's exports for dumping purposes, for example, on the basis of a con-

---

276. *Id.* at 149.

277. For analysis of the role this image plays in the structure of international economic law, see Tarullo, *supra* note 6, at 546–628.

278. For a fuller treatment of these matters, see JACKSON & DAVEY, *supra* note 20, ch. 2.

279. *See id.* at 139–40 (stating that industrial trade in goods accounts for only fraction of actual world trade; percentage would, of course, be even less if transfer priced trade within enterprises and bartered exchanges were considered).

structed cost.[280]

This basic approach is important because international economic law takes the same attitude, imagining all governmental activity as either a barrier or a spur to trade. The image of nations assessing and reducing tariffs is the basic conception. Other governmental activity is considered against this image and is taken up in the order of our relative ability to analogize a given activity to this structure. Thus, we move from tariffs to quantitative restrictions (which are elaborately demonstrated to be equivalent to tariffs), to subsidies, and then to other "nontariff barriers."

Jackson describes the landscape: "The receding waters of tariff and other overt protection inevitably uncover the rocks and shoals of nontariff barriers and other problems."[281] As it turns out, the range of governmental activities which can be analogized to the tariff, like the number of human social activities which can be reimagined as bargained exchanges among separate private actors, seems limited only by the imagination.

One consequence is that the stringency of the policy system, the intensity of the bargaining, the strength of the rules, and the overall clarity of the policy choices, relax as we move outward from the core of tariff reduction, just as the precision of the private trading system erodes as we move toward trade in services, bartered exchanges, transfer pricing, and government procurement. In the case of private contracts, we usually react to this erosion with some alarm, even moral indignation, and a call for the restructuring of what could seem corrupt insider deals into arm's-length transactions so as to narrow the gap between law and society. In the case of government regulation, however, we have an altogether different reaction. Particularly if we have a background in public international law, we might anticipate that as the analogy necessary to see national governmental activity as a barrier to trade becomes attenuated, the legitimacy of international intervention will fade. We will enter what a public international lawyer might call the zone of "exclusive domestic jurisdiction" or "sovereignty."

The interesting point is that Jackson reacts to this inevitable erosion of the model of tariffs as we might to the erosion of contract. We remember that for Jackson, arguments about "sovereignty" are no longer meaningful in an interdependent world. Consequently, as the analogy weakens, and as the international policy machinery becomes both more complex and less effective, governments are, Jackson asserts, more able to hide their parochialism, more likely to

280. JACKSON, *supra* note 3, at 221–22.
281. *Id.* at 4.

manipulate the rules, and more ingenious in their efforts to thwart free-trade objectives. As it becomes conceptually more difficult to see governmental action as a quantifiable barrier to trade, Jackson presents the national authorities as increasingly sneaky and cynical in pursuit of their parochial aims.[282] Actually, Jackson suggests, there is no limit to the ingenuity with which governments can invent ways to get around their basic obligations and reintroduce (in the form of non-tariff barriers)[283] barriers to trade previously eliminated by tariff concessions. It is like evading the income tax.[284]

Were they upfront about it, governments would be as open to good-faith bargaining or reciprocal concessions in the area of non-tariff barriers as they are about tariffs. The process of international economic bargaining can deal easily with tariffs and relatively easily with quotas, but things become more difficult for subsidies and practically impossible for other non-tariff barriers. When it comes to non-tariff barriers, rather than trying to define a level of national governmental activity as off limits to the international regulator, Jackson focuses on the need for a change in spirit at the national level: the enlistment of national policy managers to the broader goals of liberal trade.[285]

Ultimately, this change in spirit is far more important than a rearrangement of jurisdictions or the development of a particular international institutional apparatus. Indeed, Jackson is no knee-jerk supporter of either the international or the multilateral. In discussing the most-favored-nation obligation and "its politics," for example, Jackson describes a policy both legal and non-legal, to be carried out both multilaterally and bilaterally. Because the multilateral process seems to have gotten stuck, Jackson supports bilateral moves to stimulate trade—so long as the policy experts at the national level operate in the right spirit.[286]

For Jackson, the goal is no longer rearranging sovereigns into an international legal order. Policy might be bilateral or multilateral, formulated by governments or private parties, internationally or nationally. The issue is the spirit with which policy is devised—whether it advances the project of international economic

282. *Id.* at 129–31. It is no wonder that in the recent GATT round, negotiators have pressed the "principle" of "tariffication without exception" to force conversion of all trade restrictions into tariffs. Francis Williams, *Uruguay Deadline Seen as Last Chance*, FIN. TIMES, Sept. 30, 1993, at 8.

283. JACKSON, *supra* note 3, at 130.

284. *Id.*

285. *Id.* at 123–26.

286. *See id.* at 145–48.

law.[287] This shift away from a coherent and progressively developing international regime of delineated competencies toward a more fluid network of shifting bargains, united only by an orientation toward liberal trade, defines Jackson's cosmopolitan vision most cleanly.

Throughout the book, Jackson gives short pragmatic sermons about the constant temptation, and, consequently, the enduring reality of official cynicism and manipulation, inevitably shading off into a parochial politics.[288] His proposal is to bring these activities to light, placing all such temptations in a general process of mutual awareness and bargaining, in the hope that, like tariffs, they will be reduced by mutual concession. Given the strength of the temptations, and the meager and ambiguous conceptual framework for such a discussion, he is inevitably modest in his expectations. Indeed, we can really only hope that governments will take their cue from the international policy scientist and become more responsible. It is at this point that Jackson invokes a catastrophic image of autarchy and war to kick-start the reorientation of spirit he thinks necessary.

Transparency—the transformation of hidden governmental policies into quantifiable trade restraints which might then be the object of bargaining—creates what might be thought of as a market for policy. The danger, of course, is that this process of reinterpretation will be taken too far, disrupting even the settled norms of private law which facilitate commerce by seeing them as political choices. This danger is often thought of as the threat posed to national "culture" by international technocratic governance, a danger inherent in broad scale trade talks such as America's Structural Impediments Initiative with Japan. Here, the cosmopolitan leaves us only with caution and recognition of the importance of differences in generating trade through comparative advantage. There can be no sure line between national regulation which should be foreswarn, harmonized, or bargained, and the more apolitical background norms and cultural differences which are to be left intact, any more than there can be a clear line between public and private in a post-sovereign world. For Jackson, a reciprocal national vigilance about what seems foreign "unfairness," moderated by awareness of the irreducibility of differences among national economic cultures, provides a sort of interface between necessarily different

287. *Id.*

288. *See, e.g., id.* at 135 (discussing preferential systems in relation to most-favored-nation status); *id.* at 149–53 (identifying arguments for safeguards measures); *id.* at 165 (discussing Article 19 obligations).

national regulatory systems.

This approach is apparent in his presentation of national "safeguards" and "adjustments."[289] It is perfectly legitimate for nations to help their societies adjust to an open-trade regime. As trade barriers fall, Article XIX of the GATT permits restrictions, and when justified, these are what we might term "industrial policy."[290] Jackson warns, however, that these "economic adjustment" goals are almost always enmeshed in "practical politics."[291] Indeed, the ambiguity of the concepts involved makes it practically impossible to tell where adjustment ends and protection begins and makes all legal and policy regimes attempting to demarcate legitimate and illegitimate safeguard activity complex and uncertain. In the end, Jackson suggests, there simply is no practical way either finally to prohibit or permit safeguards and adjustment policies at the national level.[292] This is reminiscent of Kelsen's frank acknowledgement that there is no principled way to choose between a just war and a sovereign freedom approach to the war power. It will be a matter of individual choice and orientation.

For Jackson, the way out is not to propose any single institutional or legal solution for which right-thinking policy managers will be recruited, but to place safeguard policies, in the broadest sense, among the decentralized bargaining chips in international economic negotiation, like tariffs.[293] This avoids the pretense of a legal solution, but sets in motion a process that avoids excessively prolonged adjustments or protection masquerading as industrial policy. In the end, he asserts,

> [i]t is difficult at this juncture to evaluate the potential for progress on safeguards discipline in the near future. Nevertheless, it does appear that the lack of substantial progress on this matter poses risks in an increasingly interdependent world. One can only hope that mistakes of the 1920s and 1930s can be avoided.[294]

That the matter had been one of spirit rather than structure was evident in his introduction of the topic:

> If there were no "liberal trade" policy or practice, we would not need to consider safeguards as such. It is only because international economic policies have emphasized reduction of border barriers to trade that the subject of safeguards, as an exception to the

289. *See id.* at 149–57.
290. *Id.* at 151–58.
291. *Id.* at 149.
292. *Id.* at 184–87.
293. *Id.*
294. *Id.* at 187.

general rule of liberal-trade opportunities, comes into play.[295]

It would be easy to miss the significance of this approach and to underestimate its difference from the contemporary public law pragmatism of the "international legal process" and "transnational" schools who inherited Kelsen's pragmatism. Like them, Jackson analogizes many different types of activities to pronouncements of the sovereign. Like them, he transforms an ambiguous set of policy and legal interpretive choices into an ongoing decentralized process of bargaining and mutual accommodation. Jackson's suggestion that national particularist activities come out as formally visible barriers to trade in a decentralized international bargaining process[296] resembles the efforts of public international lawyers to see any contact between people of different nationalities as the international public order at work. But Jackson does not drift toward national or private law. On the contrary, in his vision, the domestic policy manager has been reinvigorated by an internationalist spirit.

Unlike these public law scholars, however, Jackson does not present his bargaining process as a regime, nor his free-trade orientation as an international public policy choice to be implemented by an international policy apparatus, however decentralized. He does not accompany his criticism of national particularism with advocacy of a broader international regime. He does not imagine that good international rules might reduce the conceptual difficulties obscuring the legal distinction between legitimate and illegitimate national action. In fact, his view is quite the opposite.

Jackson presents national policy either as already part of international economic law (because, as a matter of fact, it facilitates international economic activity) or as an unfortunate deviation. In Jackson's view, the choice is not between those areas of national public life which are part of "domestic jurisdiction" and those which have come to be regulated internationally, but between areas that do and do not support liberal trade. The public international mind searches for a way to understand this shift. It only seems possible within an invigorated monism, in which all of national policy has become subject to the international public policy of trade liberalization, enforced, however imperfectly, by the GATT and the primitively decentralized institutions of the international public regime. Again, nothing could be further from Jackson's conception. International policy is simply absent from his system, other than as the working out of reciprocal self-restraint.

---

295. *Id.* at 149.
296. *Id.* at 149–53.

This approach to national public policy is most evident in chapter nine, which explicitly considers national policies which "compete" with liberal trade objectives.[297] Jackson identifies two "threads" that run through the chapter: "the existence of important policies competing with those of comparative advantage and liberal trade, and the desirability of protecting the value of tariff and other trade rules by plugging 'loopholes' and preventing the protectionist use of a variety of ingenious import restraints."[298] The core opposition is familiar—national policies which promote liberal trade and the ingenious exploitation of so-called loopholes for parochial objectives. This chapter considers situations which depart from that general structure, "in which import-restraining activity is required by legitimate government goals."[299]

These situations turn out to be few in number and hard to specify. The most obvious case is "national security," and Jackson quickly recognizes that "the competing policy of protecting a nation's continued existence is obviously more important than economic welfare or other potential benefits of comparative advantage."[300] It turns out, however, that policy makers are often mistaken in developing national security policies. For example, "[i]n a world where some wars could be over in minutes, traditional notions of the need for production facilities are not always applicable."[301] Indeed, the aggressive pursuit of comparative advantage may itself maximize security. Import restrictions may blunt national research and technical proficiency, or encourage national defense industries to go soft in the absence of vigorous competition.

The main point, however, is that the GATT language allowing national security exceptions is so broad, self-judging, and ambiguous that it obviously can be abused. "It has even been claimed that maintenance of shoe production facilities qualify for the exception because an army must have shoes!"[302]

This problem becomes even more grave when we come to the "general exceptions for health and welfare."[303] Jackson lists the exceptions of GATT Article XX,[304] and indicates that "[m]ost of

297. *Id.* at 201–16.
298. *Id.* at 203.
299. *Id.*
300. *Id.* It is interesting that the "benefits of comparative advantage," introduced quite modestly, appear here as a sizeable and concrete factual matter to be weighed against national existence. *Id.*
301. *Id.* at 203–04.
302. *Id.* at 204.
303. *Id.* at 206–08.
304. *Id.* at 206. He lists public morals, protection of human, animal or plant life

these measures might be thought of as falling within the general 'police powers' or 'health and welfare powers' of a government."[305] Again the crucial point is that "[m]any of these exceptions are quite general; for example, 'public morals' or 'human health.' Obviously, clever argumentation could be used to justify practices which have as their secret goal preventing import competition."[306]

Again, the difficulty is that it will be impossible to tell in any clear way where legitimate objectives shade off into the illegitimate. Jackson works through a number of examples which demonstrate that even apparently legitimate efforts to prevent pollution or promote worker safety can wreak havoc with the trade system.[307] From a logical point of view, he acknowledges, it is perfectly possible to argue that products produced under less stringent national labor, safety, pollution, or health regulations ought not be imported. Consequently,

> [i]t is an issue fraught with dangerous potential. If this principle were extended . . . it could be the basis of a rash of import restrictions, often defeating the basic goals of comparative advantage. Government regulations vary so greatly that the already difficult conceptual questions of the world's rules on subsidies would pale into insignificance beside the problems which the cost of regulation equalization would create.[308]

The solution is neither an international regime nor recognition of a sphere of domestic jurisdiction. Instead, Jackson urges us to move in two familiar directions. First, toward vigilance against the abusive deployment of these exceptions, and second, toward "'benign neglect' with the possibility that over time many of these problems will sort themselves out as the necessity of health and safety regulation becomes more apparent to more nations."[309] As policy managers, we must preserve in the first instance our free-trade orientation, avoiding the temptation toward national parochialism. Rather than being recruited to build an international regime, we are left hoping that enlightenment will bring regulatory harmonization, eliminating the temptation to use these exceptions and the need for

---

or health, gold or silver trade, customs enforcement, monopoly laws (antitrust), patents, trademarks, copyrights, preventing deceptive practices, banning products of prison labor, protecting national treasures, conserving natural resources, carrying out an approved commodity agreement, export restrictions to implement a price stabilization program. *Id.*

305. *Id.*

306. *Id.* at 207.

307. *Id.* at 208–10.

308. *Id.* at 210.

309. *Id.*

more aggressive international enforcement.

There remains one sort of national policy which should be vigorously pursued to prevent private parties from erecting barriers to trade commensurate with the governmental restrictions so laboriously dismantled: antitrust laws.[310] Jackson unleashes national governments not where their own existence is at stake, but where they might contribute to the effort to remove barriers to trade by focusing on the private barriers they seem most suited to police. The only proviso is that nations not use their antitrust policies to implement "buy domestic" attitudes. Even here, Jackson hesitates to advocate substituting an international for a national regime.[311] Voluntary codes may be as good as mandatory ones, and national enforcement better or worse than international enforcement. The crucial point is that trade barriers must be reduced.

The public international lawyer may have difficulty making sense of Jackson's approach. If a public international lawyer wanted to move the international system toward more liberal trade, he would seek to limit governmental actions which obstructed this goal. He would rely on the decentralized mechanisms of the international regime, and enhance both the strength of that regime and its commitment to free trade, perhaps through new treaties, institutions, and court decisions. Indeed, it is tempting to understand the GATT system in just these terms.

By contrast, Jackson begins with the persuasiveness to policy makers of liberal trade arguments, and analyzes the policy dilemmas which result.[312] National governments are, and will be, oriented toward free trade. In public-international-law speak, they are already the primitive decentralized agents of an international free-trade public policy. Where they can do more, they should and will. When it comes to an international regime, Jackson counsels "benign neglect."[313] His concern is with the quite serious conceptual difficulties—the indeterminacies of rules and standards—one encounters in trying to legislate what is and what is not a barrier to trade or a legitimate national exception. Only vigilance toward devious motives at all levels can answer this threat.

In chapters ten and eleven, Jackson comes closest to considering the possibility of an international public policy which, from a public international lawyer's perspective, could guarantee limits on national trade policies or replace the prerogatives sacrificed by na-

310. *See id.* at 211–13.
311. *Id.* at 212–13.
312. *Id.* at 203–13.
313. *Id.* at 210.

tional sovereigns to free trade.[314] Both chapters take up the distinction in the liberal-trade regime between "fair" and "unfair" trade practices. Chapter ten considers national regimes' responses to "dumping" by foreign competitors.[315] Chapter eleven considers national export "subsidies."[316] These chapters illustrate two related approaches to what we might think of as international public policy.

Jackson begins by placing the terms "fair" and "unfair" quite firmly in quotation marks, stating that "[t]he distinction between fair and unfair trade has become increasingly blurred in recent years, partly because of some fundamental disagreement about what should be called unfair."[317] People use the terms in a variety of shifting and vague ways. More importantly, however, conflicts about the meaning of fairness reflect unbridgeable cultural differences: "Societies and their economic systems differ so dramatically that what seems unfair to members of one society may seem perfectly fair to those of another society."[318]

As public international lawyers, we are immediately drawn to the possibilities for international negotiation, consensus building, treaty drafting, adjudicating, harmonizing, carving out spheres of cultural difference to be respected, and realizing predictably stable international terms for trade. We might even expect Jackson, a well-known proponent of free trade, to begin such an international exercise by treating as unfair those policies which distort free trade. This, however, is not Jackson's approach.

Instead, Jackson warns us that "trading practices that . . . have been considered unfair because they interfere with or distort free-market-economy principles" are equally difficult to specify.[319] The problem is the irreducible differences among economies.

> [E]ven among the relatively similar western industrial-market economies, there are wide differences to do with the degree of government involvement in economy, in the forms of regulation or ownership of various industrial or other economic segments. As world economic interdependence has increased, it has become more difficult to manage relationships among various economies.[320]

Even slight differences in "acceptance of basic free-market economy principles" can result in "situations that are considered unfair, even though these differences may not have resulted from any conscious-

---

314. *See id.* at 217–74.
315. *See id.* at 217–48.
316. *See id.* at 249–74.
317. *Id.* at 217.
318. *Id.* at 218.
319. *Id.*
320. *Id.*

ly unfair policies or practices."[321]

When presented with the difficulty of interpreting liberal trade principles in national situations, Jackson responds with a call to vigilance against national tendencies to deviate, hiding their parochialism under manipulations of terms like "barrier to trade." When presented with the ambiguities of an international regulatory term like "fairness," Jackson responds by validating the diversity of national interpretations. Indeed, an international goal to achieve a "level playing field" might "imply that all governments must adopt uniform policies."[322] Even economic theory stands against such a result, as comparative economic advantage depends precisely on the continued existence of cultural differences. "Besides," Jackson asks, "isn't trade to some degree based on differences between countries . . . ?"[323]

For Jackson, the difficulty here is

> analogous to the difficulties involved in trying to get two computers of different designs to work together. To do so, one needs an interface mechanism to mediate between the two computers. Likewise, in international economic relations, particularly in trade relations, some "interface mechanism" may be necessary to allow different economic systems to trade together harmoniously.[324]

This "interface" concept is perhaps the book's most significant and original contribution. It reappears at several points and expresses extremely well a central theme of Jackson's approach to international public policy. The international regime, to the extent it must exist, should be quasi-mechanical and facilitative, focusing on communication and correspondence between systems rather than on the construction of a new international legal order or system. The best we can do is to make assumptions and approaches visible, and hope for their bargained amelioration as the liberal-trade spirit becomes more widespread.

Jackson illustrates this approach in his discussion of national anti-dumping regimes.[325] Jackson, like many other international economic law specialists, is quite skeptical of anti-dumping statutes. It is difficult, as an economic matter, to see what is wrong with discriminatory pricing, except perhaps in limited cases of predatory behavior. Even then, it appears a nation's consumers would have more to gain than its producers would have to lose. At best, it is

---

321. *Id.* at 219.
322. *Id.* at 218.
323. *Id.*
324. *Id.*
325. *Id.* at 221–47.

difficult to measure dumping with any precision, and national administration of anti-dumping regimes, triggered by national producers' complaints, are likely to provide an ample wardrobe for dressing up protectionist measures in the rhetoric of fairness. At worst, anti-dumping can perpetuate "medieval notions of 'fair price.'"[326] As with national policies which might be exceptions to free trade, the case for anti-dumping legislation is clearest when it tracks antitrust concerns most closely, enforcing rather than disturbing the liberal trade system.[327]

Nevertheless, for all this skepticism, Jackson advocates neither an international dumping regime restricted to antitrust concerns nor a mandated dismantling of national regimes.[328] He describes ways in which a national anti-dumping system can be managed without using it as a means of disguised protection through, for example, stringent injury and causation requirements. Conceptual and legal tools are not available to mandate this, but vigilance by policy managers can help resist the temptation toward disguised protectionism.

Jackson concludes by proposing that we think of anti-dumping rules as an "interface" mechanism through which differing national conceptions of fairness will be brought visibly into relationship with one another.[329] He suggests that the rules might be tested against the imperatives of trade liberalization and be the subject of a shifting negotiation process, which will be legal and political, national and international, private and governmental. Jackson writes:

> Finally, it is both interesting and potentially provocative to suggest the possibility that for all its faults, the system of antidumping rules may be performing a useful function in world trade, *not* as a response to so-called unfairness, but rather as an "interface" or buffer mechanism to ameliorate difficulties . . . caused by interdependence among different economic systems. Could it be that the antidumping rules are acting as a crude or blunt instrument to cause different economic systems to more equitably share the burdens of adjusting to shifts of world trade flow? If so, perhaps we should view antidumping rules as part of the subject of "safeguards" (described in chapter 7) rather than as part of a subject of "unfair trade."[330]

---

326. *Id.* at 223.

327. *See id.* at 223–25.

328. Compare Jackson's follower Denton on this point. Ross Denton, *(Why) Should Nations Utilize Antidumping Measures?*, 11 MICH. J. INT'L L. 224, 265–71 (1989) (urging public interest analysis when enforcing anti-dumping laws).

329. JACKSON, *supra* note 3, at 244.

330. *Id.*

In this conception, the element of "unfairness," which might have been the key to an international regime, has been eliminated. In fact, "[s]ome of the 'unfairness' problems are in reality 'difference' problems."[331] Anti-dumping regimes are reconceptualized as decentralized mechanisms to facilitate trade liberalization. This happens either directly in cases of antitrust violation, or indirectly, through mechanisms rendering visible the protectionist sentiment that springs naturally from cultural differences. Such a protectionist sentiment might be reduced by policy managers bargaining in the spirit of free trade.

If we are to think of this as an international public policy regime, it is a very odd one indeed. There is no delimited role for the national state, nor for any structured international legal process. Rather, we have a naturally occurring adjustment process operated by agents of liberal trade sentiment throughout the existing institutional and legal system. The regime follows free trade—not promoting it, but assisting it, mopping up, and adjusting—less the idea of a regime than the regime of an idea.

Chapter eleven, concerning subsidies, presents a comparable image of the possibility of international public policy.[332] The visibility of subsidy policies and their root in government, rather than private initiative, makes this the most fruitful of various "unfair" trading practices around which to develop an international regime.

> [B]y way of contrast with dumping matters, in the case of subsidies we are almost always talking about government action, rather than to individual enterprise action. Thus, issues of subsidies and countervailing duties are often significantly more visible and involve a higher level of government-to-government diplomacy than do many other trade policy matters.[333]

It also seems an appropriate area for international regulation since the strongest economic argument for subsidy reduction is at the aggregate, international level, rather than from the perspective of importing nations, which might well benefit from a foreign export subsidy.[334]

Nevertheless, Jackson does not advocate a public international law-style regime to address the distortions which subsidies might bring to liberal trade. He is critical of the existing international regime for attempting to do too much with normative concepts far

331. *Id.* at 26.
332. *See id.* at 249–73.
333. *Id.* at 250.
334. *Id.* at 252.

too indeterminate to provide much guidance.[335] The existing system lacks even a definition of "subsidy," and therefore allows national regimes to give free reign to their protectionist impulses in managing countervailing duty mechanisms.[336]

Jackson repeatedly emphasizes the "controversy," "perplexity," "confusion," and "ambiguity" which plague the subject. Are subsidies "unfair"? Do they damage anyone but the country which awards them? Should trading partners respond with outrage or with a thank-you note? Can subsidies be distinguished from all other national government activity? Is every government policy not likely to reward some producers and shift the costs of participating in trade? Can "export" subsidies be distinguished from "general" subsidies with any precision?

In fact, the international subsidies regime itself may be as dangerous as the practice of subsidization.

> [I]t may be seen that the whole area of subsidies activity in international law, including the rules designed to constrain the use of subsidies and the other rules designed to allow national governments the unilateral privilege of responding to subsides with countervailing duties, is not only extremely complex but holds the potential, if misapplied, of undermining the basic policy goals of the post-World War II liberal trade system.[337]

The problem arises because "governments can use subsidies to evade a liberal trade system" while at the same time "the unilateral national government response of countervailing duties, can be implemented in such a way as to undermine liberal trade policies."[338] In the context of national temptation to misuse controversial and ambivalent international rules, the prospects for an international regime are meager indeed.

> The reader may now detect that there is great controversy about economic policies with respect to subsidies in international trade. It is not possible at this point in time, nor in this book, to resolve these issues. One thing is clear: for more than a century, the international trade rules, and some national systems, have been established on the basis of the proposition that imports which are subsidized by foreign governments are somehow "unfair."[339]

Again Jackson builds from fact: subsidies are thought unfair, even if there is no good reason for thinking so or no clear way of as-

---

335. *Id.* at 255–61.
336. *See id.* at 257–58.
337. *Id.* at 269.
338. *Id.*
339. *Id.* at 254.

certaining when. As a result, he proposes that international policy makers focus quite narrowly on an "actionable subsidy," which would make the most specific and trade distorting subsidies visible subjects of international debate.[340] He does not propose a new international regime, which could easily become the object of manipulation. Instead, he suggests "a series of principles that could be entertained by negotiators or national policy leaders in connection with the further elaboration of the international subsidy rules."[341] Rather than a regime, we get guidance in right-thinking. Each principle seems aimed at limiting attention to the most visible and formally identifiable subsidies, narrowing the ambit of attempted policy initiatives both internationally and nationally which might backfire against the liberal-trade order.[342] For the rest, we return to benign neglect, relying on the advancing spirit of trade liberalization.

D. A Cosmopolitan Geography: International Economic Law and the World Trading System

The trading system Jackson describes, the "trade constitution" of which he imaginatively projects, is universal in both aspiration and fact: a "world" trading system, to which the widest variety of economies and national regimes are assimilated. From a metropolitan point of view, Jackson's focus on the United States, the European Community, and Japan suggests a world radiating out from a center toward a periphery. For Jackson, it is far more significant that the trade constitution has room even for "economies that do not fit the rules of the world trading system," including both the less developed and those with nonmarket economies.

Jackson's international spirit is, in this sense, liberal and ecumenical. In considering "state trading and nonmarket economies," he observes that although "the post World War II international trading system is obviously based on rules and principles which more or less assume free market-oriented economies," it may well make sense to seek ways of "incorporating" non-market economies into this system.[343] Although Jackson acknowledges that "the assimilation of China into the GATT is a formidable task," he feels an

340. *See id.* at 262–69.

341. *Id.* at 270.

342. For example, Jackson proposes "specificity," "cross border effects," "*per se* violations" to assist "administrability," and a de minimus cut-off rule. *Id.* at 270–71. All these would render the subsidy subject to scrutiny as similar in its identifiability to the tariff as possible. *Id.*

343. *Id.* at 283.

"interface" mechanism might distinguish those aspects of the international regime which might be applied *prima facie* to non-market economies *as if* their trade was normal, and those situations which would need to be bargained into correspondence, by analogy, constructed costs, and so forth.[344]

Jackson's political vision is equally open textured. Although he invokes the specter of a dark national parochialism to orient the vigilance of his new economic diplomats and managers, it is hard to identify a national partisan political program which cannot be accommodated by an appropriate "interface." Perhaps only secretive or duplicitous policies which do not make themselves available to reciprocal bargaining. But such policies, he seems sure, are likely in any event to be counterproductive and hard to sustain. Along with sovereignty, the new interdependence has eroded the possibility for a national regulatory state to pursue purely selfish policies without taking account of international pressures.

At the same time, "interdependence" does not inaugurate a new international political order. Jackson does not propose that an international regime legislate a liberal trade order. He finds the basic legal terms far too ambiguous to sustain a project of regime building. In any event, Jackson has left the public international lawyer's geography of international "planes" and national sovereign "spheres" behind in favor of a relentlessly fragmented order of conflicting sites and subjects for international bargaining and regulation. Kelsen's lectures had concluded with a concrete proposal for action by concerned international policy scientists and politicians: build an international court, administration, and eventually legislature, which might then pursue an international politics of development, peace, redistribution, or regulation. In its place, Jackson leaves us only with participation in an already ongoing process of "management." "The problem of international economics today, then, is largely a problem of 'managing' interdependence."[345] The public international policy process has been replaced by decentralized adjustment and bargaining by managers and economic diplomats acting out of an invigorated liberal commercial spirit and vigilant against reassertions of national particularism.

In the final chapter, Jackson assesses the "trade constitution" of the GATT system. Although it "operates better than any one had reason to expect,"[346] he nevertheless acknowledges that it "clearly

344. *Id.* at 291.
345. *Id.* at 4.
346. *Id.* at 302.

. . . is defective."[347] He surveys at length the "weaknesses," "infirmities," and "gaps" in the system: there are too many loopholes, the legislative machinery is defective, much economic activity remains outside the GATT, procedures are confused, rule implementation is lax.[348] Rather than proposing construction of a new international regime which might ameliorate these faults, Jackson treats as a matter of fact the regime he has imagined as a constitution, and then focuses on ways to "manage interdependence" in this situation. He suggests that the manager will need to mix a number of "techniques," including those given prominent mention in the book: harmonization, reciprocity, and interface.[349] The resolution of practical dilemmas concerning the appropriate mix of political and economic objectives, or the appropriate role for law and the distribution of power between courts and administrative officials, is left to the practice of economic diplomats and managers. These managers will mesh political, legal, and economic considerations, acting as both public and private officials both nationally and internationally.

For Jackson, traditional questions about the politics of international law are simply not easily answered. Jackson asks, for example, whether the "world trading rules are fair to developing countries."[350] It turns out that the relevant rules are "remarkably vague and 'aspirational,'" and although a few discriminate on their face against developing countries, some seem to favor them.[351] But Jackson does not dwell on the point, for "this subject has been extensively treated elsewhere and generally involves the expertise of economists rather than lawyers."[352] He suggests that a "deeper" analysis might well reveal that the predominance of large powerful countries in the institutions of the world trading system puts developing countries at somewhat of a disadvantage,[353] or might focus on the "question of debt."[354] On the other hand, developing countries "are able to take advantage of either explicit or implicit exceptions in GATT so as to to [*sic*] pursue almost at will any form of trade policy they wish."[355] In the end, Jackson leaves these questions "to works that are more focused on the economic consider-

347. *Id.* at 307.
348. *Id.* at 302–03.
349. *Id.* at 305.
350. *Id.* at 276.
351. *Id.* at 275.
352. *Id.*
353. *Id.* at 276.
354. *Id.*
355. *Id.* at 277.

ations of world trade."[356] International economic law begins where the policy responses to these difficulties leave off, treating their resolution, wise or unwise, as matters of fact.

An imaginary trade constitution, liberal trade ideas, national and international political judgments, a decentralized regime of bargained reciprocity: Jackson presents all these as *facts* rather than commitments. It is a strategic epistemology—the cosmopolitan's accrediting claim and aura of contact with reality are a matter of its internal narrative. As a result, that Jackson presents himself as a realist means more that he prefers a case-by-case approach or is sophisticated about the erosion of sovereignty and avoids utopian schemes.

His realism, like Kelsen's, is also a rhetorical device. Both display their awareness of the limits, ambiguities, and illusions of a legal and policy argument which relies on the traditional vocabulary of sovereignty. Both invoke a world of facts outside of law—in anthropology or economics or politics—which will operate as a check on law's illusions. Both place an interpretive project of responding to these facts center stage as a project of personal and professional commitment by members of their audience. For both, this is a largely technical project—deploying the "technique" of law or "managing" interdependence—which holds out a general political vision of peace or economic security as a distant promise and modest hope. It is here that we encounter the policy pragmatist as a polemicist, situated in a cultural dialogue with an audience—a law faculty, law students—that they might experience immersion in the technocratic as mobilization for a cause.

Beyond highlighting this common pragmatic or realist international style, reading Jackson in light of Kelsen's lectures focuses one on the ongoing development in the field of international legal commentary generated by a continuing duet between their quite different, if equally pragmatic, sensibilities. A mainspring of that development is the repeated deployment of this rhetorical realism as a criticism of each generation by its successors. The apparent renewal of this relationship to the real gives policy pragmatism a progressive sensibility, constantly working against past abstractions for future engagement. The result is a continually contested intellectual terrain, hurrying toward an internationalist ideal against a projected factual backdrop, generating—almost as a by-product—a technocratic regime of rejected sovereignties and political dreams.

The dialogue between the relative sensibilities of Kelsen and

356. *Id.* at 278.

Jackson seems to address the difficulties of this international regime, its technocratic excesses and political weaknesses. The public international lawyer—hip and pragmatic—mobilizes governments to both multilateralism and internationalism. His expectations are modest, but the direction is sure. He sets himself against what he interprets as the cosmopolitan's defeatist attitude toward public order or ideological commitment to private ends and domestic laws. He will renew the international political order: there should be built a great ark for international policy, many cubits in all directions, and there should be assembled all forms of public life for embarkation.

Meanwhile, the cosmopolitan international economic lawyer reinvents the terms of policy debate, placing governments and companies in an idealized and incessant process of market bargaining, developing a cosmopolitan élan at once vigilant against parochial politics and open to the widest range of policy choices. He understands the technocratic regime as a political process—at once liberal, ecumenical, and modest—and recruits managers who will use it in the right spirit. The cosmopolitan sets himself against the public international lawyer's idealism and nostalgic romance with international institutions and regulatory regimes.

When the public international lawyer explains the evolutionary urgency of his task, the cosmopolitan can only smile at his naivete. But when the international economic lawyer talks about the end of the regulatory state, the obsolescence of national regulation, and the new interdependence, the metropolitan looks up from his work and agrees. He knows this all already. That is why he is building an ark.