

September 1, 2015

Dear Colloquium Members:

In a 1990 Supreme Court case, Justice Brennan highlighted the global scope of the American regulatory state. “Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes,” he wrote. “The enormous expansion of federal criminal jurisdiction outside our Nation’s boundaries has led one commentator to suggest that our country’s three largest exports are now ‘rock music, blue jeans, and United States law.’” In just a few decades, the relatively weak American state that existed at the dawn of the twentieth century began to regulate conduct around the world. My dissertation, *Regulating the World: American Law and International Business*, traces this transformation and describes efforts to regulate foreign and multinational businesses using American law.

I seek to recover what Sam Moyn has called “the forgotten radicalism” that led U.S. policymakers to extend U.S. law overseas to reform foreign legal systems and to regulate foreign actors. Yet my research has led me to a deeper appreciation of the limits on this radicalism. Like the New Deal within the United States, which required its own compromises with the continued sovereignty of the southern states over race, the spread of American law effected important changes only because it left the basic structure of the international system intact.

As I researched the emergence of a global regulatory state during the New Deal, I began to appreciate the deep relationship between U.S. law and U.S. foreign relations. As historian Mary Dudziak has recently pointed out, scholars of U.S. foreign relations have tended to dismiss law’s significance as a causal force and focused instead on more “fundamental determinants” like power and interest. But the principal architects of U.S. foreign policy were lawyers, and legal thought shaped the way they perceived the U.S. role in the world. In particular, they drew on principles of federalism that regulated relations between the federal government and the several states to understand relations between the United States and foreign nations.

My growing appreciation of the way legal thought structured foreign relations led me to pay more attention beginning of the twentieth century, an era the diplomat George Kennan complained was plagued by “moralism-legalism.” The three chapters gathered here focus on this period. Chapter 1 argues that legal formalism and dual federalism explain why the “conservative progressive” Elihu Root promoted international law and international courts to organize international and hemispheric relations. Chapter 2 contends that Justice Holmes’ 1909 *American Banana* opinion furthered Root’s formalist program of international law but also undermined its intellectual foundations, paving the way for the sociological critique. Chapter 3 then argues that sociological jurisprudence explains Wilson’s conception of the League of Nations as a global parliament and his corresponding rejection of Root’s vision of a court-dominated league. My later chapters then explore how the extraterritorial application of American law emerged during World War II as a solution to the stalemate generated by Root’s and Wilson’s competing ideas.

Thank you for reading, and I am looking forward to your comments.

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CHAPTER ONE

INTERNATIONALIZING DUAL FEDERALISM: ELIHU ROOT AND INTERNATIONAL LAW

I. Introduction

In 1901, the Supreme Court began to determine the legal status of the territories acquired by the United States during the Spanish-American War. In a series of decisions known as the Insular Cases, the Court held that Congress could decide whether or not to “incorporate” these territories. The full protections of the U.S. Constitution did not apply to unincorporated territories.¹ The Constitution, in other words, did not follow the flag, or as then-Secretary of War Elihu Root quipped, it “follows the flag—but doesn’t quite catch up with it.”²

As the Insular Cases worked their way through the courts, however, American enthusiasm for formal colonization waned, and energy returned to informal economic expansionism. While national economies remained the “basic building-blocks” of capitalism, the economy was becoming steadily more global.³ Sooner or later, courts would face questions about how new laws regulating corporations in the United States affected their operations overseas. As legal scholar Owen Fiss has written, “By 1905 the real question was not whether the Constitution

¹ The Insular Cases also broke the pattern established by the Northwest Ordinance that territories would eventually become states. Christina Duffy Burnett and Burke Marshall, “Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented,” in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, ed. Christina Duffy Burnett and Burke Marshall (Durham, NC: Duke University Press, 2001), 7–17.

² Root quoted in Philip C. Jessup, *Elihu Root* (New York: Dodd, Mead & Company, 1938), 1:348.

³ See Eric Hobsbawm, *The Age of Empire, 1875-1914* (New York: Pantheon Books, 1987), 40–41.

would follow the flag, but whether it would follow the United Fruit Company.”⁴ As in the *Insular Cases*, this question turned on determining the proper boundaries of U.S. law.

Boundaries were particularly important for law at the turn of the century, the peak of the classical legal era. As Morton Horwitz has written, “Perhaps the most fundamental architectural idea of legal orthodoxy was embodied in its faith in the coherence and integrity of bright-line boundaries.”⁵ In the United States, boundaries distinguished the powers of the federal government from those of the states, and they separated the powers of the legislature from the rights of individual citizens and property owners. Both governmental and nongovernmental actors enjoyed full freedom as long as they stayed within their proper spheres.⁶

Policing these boundaries, meanwhile, was the task of the judiciary, whose “function was to prevent the various kinds of usurpation” “between neighbors, between sovereigns, or between citizen and legislature.”⁷ As legal scholar G. Edward White has written, “Sometimes the cases involved separation of powers issues, sometimes issues of federalism, but the search in both

⁴ Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, vol. 8, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan Publishing Company, 1993), 22. “Fiss’s comment,” writes Brooks Thomas, “suggests that in order to understand the forces of United States imperialism at this time, we need to look not only at the *Insular Cases* but also at legal decisions making way for the rise of what Martin Sklar has called ‘corporate liberalism.’” Brook Thomas, “A Constitution Led by the Flag: The *Insular Cases* and the Metaphor of Incorporation,” in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, ed. Christina Duffy Burnett and Burke Marshall (Durham, NC: Duke University Press, 2001), 96.

⁵ Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 199.

As Duncan Kennedy points out, developments in the United States reflected wider transnational developments. German thinkers drove rise of classical legal thought in the nineteenth century and shaped the American preoccupation with boundaries. The unique American contribution was to extend the classical paradigm to public law. Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 25 n.6; Thomas C. Grey, “Langdell’s Orthodoxy,” *University of Pittsburgh Law Review* 45 (1984 1983): 5n.17; Anglo-American thinkers influenced by Adam Smith were another important influence. Herbert J. Hovenkamp, *Inventing the Classical Constitution*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 25, 2014), 4, <http://papers.ssrn.com/abstract=2486612>.

⁶ Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940,” *Research in Law and Sociology* 3 (1980): 7–8; Horwitz, *Transformation of American Law, 1870-1960*, 17–19; Thomas C. Grey, “Langdell’s Orthodoxy,” 5.

⁷ Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness,” 7–8.

cases was for the appropriate sphere of constitutional autonomy. Boundary pricking . . . was the essence of guardian judicial review in constitutional law.”⁸ Judges were well suited to this task of boundary pricking because law was “an objective, quasi-scientific” discipline whose general principles ensured that judges themselves did not become usurpers.⁹

U.S. foreign policy was in the hands of lawyers steeped in this way of thinking about law. Elihu Root, the most important of these lawyer-statesmen, had been a leading New York corporate lawyer when President William McKinley called on him to serve as secretary of war in the wake of the Spanish-American War.¹⁰ After Theodore Roosevelt’s own election as president and John Hay’s death, Root became secretary of state in 1905.

For Root, the legal formalism that ordered relations between the federal government and the states provided a model for organizing international relations between the United States and foreign nations. Root believed that national governments should manage their own internal affairs. But he also expected that multinational corporations would transcend these formal boundaries and promote economic integration. Extending the principles of federalism to regulate the relationship between the United States and foreign nations would secure a stable climate for international business, one that would also assuage the security concerns of the U.S. government and preserve peace in a competitive world.

Because this system entailed territorial sovereignty of nation-states on the one hand, and integration on the other hand, Root decided that international peace required an impartial umpire that could play the role that the judiciary played within the United States. International law

⁸ G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), 36.

⁹ Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness,” 7–8; Horwitz, *Transformation of American Law, 1870-1960*, 16–20.

¹⁰ Root, “The Lawyer of Today,” Address Before the New York County Lawyers Association, New York City, Mar. 13, 1915, in Elihu Root, *Addresses on Government and Citizenship*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 503–504.

would delineate the boundaries within which nation-states were sovereign, and the umpire would ensure that no government encroached upon the domain of another. While Root shared the formalist belief that law was an objective science, he believed that national judiciaries lacked the impartiality to administer international law. Instead, he sought to build an international judiciary and to develop international tribunals that would use legal expertise to resolve international disagreements.

In addition to guiding his diplomacy as secretary of state, Root's support for international legal institutions had important implications for federalism and the separation of powers within the United States. The checks and balances of domestic constitutionalism complicated Root's internationalist ambitions. The system would not work if Congress, the courts, and the several states could set aside the decisions of international tribunals. The need for finality therefore encouraged a unitary foreign policy and favored a shift to executive/diplomatic over congressional and (national) judicial power for resolving international disputes and monitoring multinational businesses.

II. Subjects Without a Sovereign: Corporations under Dual Federalism

Root's goal of preserving national sovereignty while promoting international economic integration resembled the goal of nineteenth-century American jurists of safeguarding the sovereignty of the several states while furthering national economic integration.¹¹ To understand the place that international law assumed in the early twentieth century, it is useful to appreciate the framework underlay federalism within the United States. The theory of federalism that reached its apex during the late nineteenth century had its origins in the law and politics of the

¹¹ On the symbiotic relationship between nationalism and internationalism, see generally Glenda Sluga, *Internationalism in the Age of Nationalism* (Philadelphia: University of Pennsylvania Press, 2013).

antebellum era. Jacksonians like Roger B. Taney sought to encourage the creation of a national market while preserving the sovereignty of the states and their power to exclude hated corporations like the Bank of the United States. In a series of decisions in the 1830s and 1840s, the Taney Court developed a jurisprudence that balanced these objectives.

In *Bank of Augusta v. Earle*, the Bank of Augusta, a corporation chartered in Georgia, brought an action on a bill of exchange against Joseph B. Earle, a citizen of Alabama. The case hinged on the rights of corporations under the U.S. Constitution. In *Dartmouth College v. Woodward*, Chief Justice John Marshall had maintained that a corporation was “an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it either expressly.”¹² According to Earle, an artificial entity existing only in contemplation of Georgia law had no right to conduct business in Alabama, and thus he was not liable for the money he owed.

By contrast, the bank urged the Court to treat corporations as citizens of the states in which their shareholders lived. This view of the law, which had some support from prior jurisprudence, would entitle corporations to the privileges and immunities of citizens of the United States. Since these privileges included the right to purchase bills of exchange, a Georgia bank could do business in Alabama. But recognizing this form of corporate citizenship would deprive the states of sovereignty over foreign corporations. If corporations were treated as citizens, a state could not exclude them without violating the privileges and immunities clause.¹³

¹² *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

¹³ *Bank of Augusta v. Earle*, 38 U.S. 519, 586 (1839) (citing *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809)).

Taney split the difference between these two approaches. A corporation, he agreed, “exists only in contemplation of law and by force of the law, and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.”¹⁴ But this did not mean that corporations could only conduct business in the states that had chartered them, a result which would have had a deleterious effect on interstate commerce. Instead, Taney presumed that out-of-state corporations were welcome in other states:

But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another. . . . The court can perceive no sufficient reason for excluding from the protection of the law the contracts of foreign corporations when they are not contrary to the known policy of the state or injurious to its interests. . . . It is but the usual comity of recognizing the law of another state.¹⁵

Absent “the known policy of a state” indicating otherwise, in other words, corporations chartered in one state were welcome in another state. After examining Alabama’s policy towards out-of-state corporations, he found no law restricting them. A private citizen, not the state itself, was objecting to the Bank of Augusta’s presence in Alabama. The presumption that Bank of Augusta was welcome to make contracts in Alabama therefore held.¹⁶ *Bank of Augusta* reconciled the sovereignty of the states over their own economies with the goal of advancing the creation of a national market in the United States.

Three years later, the Supreme Court made another important contribution toward balancing state sovereignty and national economic integration. In *Swift v. Tyson*, the Court faced a question of whether a preexisting debt was valid consideration for a negotiable instrument. The

¹⁴ *Bank of Augusta v. Earle*, 38 U.S. 519, 588 (1839).

¹⁵ *Ibid.*, 588–590.

¹⁶ *Ibid.*, 597.

case was in federal court because of the parties' diversity of citizenship, and Section 34 of the Judiciary Act of 1789 required federal courts to apply "the laws of the several states" to decide diversity cases. The Supreme Court had to determine what this provision meant before it considered the substantive question about consideration. New York had passed no legislation that addressed this question, but its courts had held that a preexisting debt was not valid consideration. If the laws of the several states included the decisions of state courts interpreting the common law, federal courts would be bound to apply those decisions. In this case, the Supreme Court would have to accept the rule of New York courts that preexisting debts were not valid consideration.

Writing for the Court, Justice Joseph Story determined that the language in the Judiciary Act referred only to state statutes enacted by the legislature and to uniquely local law, not to the decisions of state judges interpreting legal questions of a more general nature. When a state legislature had not expressly addressed a question by legislation, federal judges were free to "express [their] own opinion" on "the general principles and doctrines of commercial jurisprudence." This federal commercial law would advance "the benefit and convenience of the commercial world." Surmising that a rule treating preexisting debts as valid consideration would better promote commerce, Story ignored the conclusion of the New York courts and adopted this contrary rule.¹⁷

Two years later, the Taney Court returned to the question of corporate citizenship that had come up in *Bank of Augusta*. In that case, Taney had decided that corporations were not citizens for purposes of the privileges and immunities clause, a decision that had preserved the freedom of states to restrict or even exclude foreign corporations if they chose to do so. But

¹⁷ Swift v. Tyson, 41 U.S. 1, 18–20 (1842).

corporate citizenship had other implications as well. In particular, diversity jurisdiction—that is the power of federal courts to hear cases between citizens of different states—required complete diversity of citizenship. No party that brought the lawsuit could share state citizenship with a party against whom the lawsuit was brought.¹⁸ In *Bank of the United States v. Deveaux*, the Supreme Court had decided that for the purposes of suing and being sued, federal courts would look to the citizenship of the corporation’s shareholders.¹⁹

This made sense in a world of closely held corporations in which all a corporation’s shareholders resided in the same state. But in the expanding U.S. economy, shareholders were likely to come from a range of states. If any one of the plaintiff’s shareholders resided in the same state as the defendant’s shareholders, complete diversity would be destroyed and the federal courts would not be able to exercise diversity jurisdiction to hear the case. The power of federal judges to develop a federal common law for “the benefit and convenience of the commercial world” would mean little if corporations lacked a realistic ability to bring their cases to federal court.

As a result, the U.S. Supreme Court reversed itself for the first time (and overturned an opinion written by John Marshall, no less). In *Louisville, Cincinnati & Charleston Railroad Company v. Letson*, the Court held that for purposes of diversity jurisdiction a corporation was a citizen of the state that chartered it. This ensured that corporations could more easily sue in federal court and better allowed them to take advantage of this general commercial law recognized by Justice Story’s opinion in *Swift v. Tyson*.²⁰

¹⁸ *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

¹⁹ *Bank of the United States v. Deveaux*, 9 U.S. 61, 91–92 (1809).

²⁰ *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 558 (1844).

Bank of Augusta v. Earle, *Swift v. Tyson*, and *Louisville, Cincinnati & Charleston Railroad Company v. Letson* worked together to balance the goals of national economic integration and state sovereignty. They preserved the freedom of the states to legislate to limit out-of-state corporations. But in the absence of such legislation, the federal courts would presume that out-of-state corporations were welcome to do business like any other citizen. When controversies arose, moreover, federal judges would employ their own interpretation of the common law, furthering a national rather than a parochial outlook.

The great constitutional scholar Edward S. Corwin has identified the key features of this system, which he labeled “dual federalism”: the federal government is one of enumerated powers, the federal and state governments are each sovereign and equal within their respective spheres, and their relation is “one of tension rather than collaboration.” Nonetheless, the Taney Court had mitigated the “anarchic implications” of this tension by establishing a “final judge” of the scope each sovereign’s power. “This was the function of the Supreme Court of the United States,” Corwin explained, “which for this purpose was regarded by the Constitution as standing outside of and over both the National Government and the States, and vested with authority to apportion impartially to each center its proper powers in accordance with the Constitution’s intention.”²¹

After the Civil War, dual federalism’s nationalizing impulse began to outweigh its regard for state sovereignty. Beginning with *Welton v. Missouri* in 1875, the Supreme Court began to use the commerce clause to strike down state and local restrictions on out-of-state corporations.²² As railroads and other technological transformation made a truly national market possible for the first time, *Welton* initiated a series of decisions striking down local taxes or police power

²¹ Edward S. Corwin, “The Passing of Dual Federalism,” *Virginia Law Review* 36 (1950): 4, 15.

²² *Welton v. Missouri*, 91 U.S. 275 (1876).

regulations that forced foreign corporations to compete on unequal terms. As Charles W. McCurdy explains, “[T]he post-Civil War Court eagerly embraced the opportunity to deduce from the commerce clause a new and fundamentally important constitutional right: the right of foreign corporations, even without express congressional license, to engage in interstate transactions on terms of equality with local firms.”²³ The Supreme Court recognized other corporate rights as well. In *Santa Clara v. Southern Pacific Railroad Company*, for instance, it determined that the equal protection and due processes clauses of the Fourteenth Amendment protected corporate as well as natural persons.²⁴

Nonetheless, the basic Jacksonian framework of dual federalism endured, and the Supreme Court continued to defend the power of the several states over corporations. This power rested on a distinction between commerce and production. States could not prohibit foreign corporations from selling their products made elsewhere (commerce), but they could prohibit them establishing mines or factories (production). States could prohibit corporations from owning property for production or establishing a corporate office, and when corporations did own productive property within a state, they were required to register and became subject to taxation and regulation. As McCurdy writes, “[T]he Court protected the mobility of foreign goods but not the mobility of foreign corporations.” While the federal government had exclusive authority to regulate commerce, corporate law was left to the several states.²⁵

²³ Charles W. McCurdy, “The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903,” *Business History Review* 53 (Autumn 1979): 314.

²⁴ *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886). (“The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does.”). As Morton Horwitz has argued, this was not the sweeping, pro-business break with tradition that later commentators perceived it to be. Morton J. Horwitz, “*Santa Clara* Revisited: The Development of Corporate Theory,” *West Virginia Law Review* 88 (1985): 173–224.

²⁵ McCurdy, “Knight Sugar Decision,” 314–316.

Even with the rise of the great trusts in the late nineteenth century, a majority of the Court continued to believe that this framework was sufficient to manage a changing economy. To be sure, the passage of the Interstate Commerce Act in 1887 and the Sherman Act in 1890 augured a greater federal role in regulating the economy. But as the umpire that ensured that the federal and state governments stayed within their proper spheres of authority, the Supreme Court interpreted these new statutes through the prism of dual federalism.

This prism explains the Court's otherwise puzzling decision in *United States v. E. C. Knight Company*, the government's first attempt to enforce the Sherman Act. In the early 1892, the American Sugar Refining Company sought to purchase stock of four refineries in Pennsylvania. The company already controlled close to two-thirds of the sugar market, and the deal would have brought its market share to 98 percent. Facing public pressure to take action against the giant "New Jersey corporations," Attorney General Richard Olney set aside his misgivings and brought suit to block the deal. As Olney expected, the government lost the case.²⁶

Justice Melville Fuller's decision rested on the distinction between manufacture/production and commerce. While Congress had authority to regulate commerce between states, manufacture was an intrastate activity that remained the responsibility of the states. Under dual federalism, each level of government was sovereign within its sphere of authority. Congress' power over commerce worked "to the exclusion of the states." Accepting Congress' authority over intrastate production would likewise destroy the states' autonomy to set their own corporations policy, the autonomy that Taney had been so careful to preserve in *Bank of Augusta*. Boundaries would be impossible to maintain, and Congress' authority would extend over "every branch of human industry." Manufacturing did affect interstate commerce, but only

²⁶ Fiss, *Troubled Beginnings*, 8:112; McCurdy, "Knight Sugar Decision," 328.

indirectly. Congress' power to regulate interstate commerce required a direct relation to commerce.²⁷

Since the companies acquired by the American Sugar Refining Company were chartered in Pennsylvania, however, a straightforward remedy lay at hand. The state of Pennsylvania could bring a quo warranto action against those companies for exceeding their powers under their charters, which they had done by purchasing the stock of out-of-state corporations. As McCurdy puts it, it was "a simple problem in corporation law."

Nonetheless, federalism complicated this simple problem. New Jersey had loosened its own corporation laws, leading companies to incorporate there. No single state wanted to risk taking action against its own companies knowing that they could flee to more welcoming environments.²⁸ In other words, collective action problems made states unwilling to use their authority over corporations. The state autonomy Taney had been so careful to preserve was proving increasingly unworkable in an economy increasingly dominated by large corporations. Calls therefore arose to bring their local operations within Congress' power to regulate national commerce, even if it sundered the symmetries of dual federalism and destroyed the power of states to regulate or exclude foreign corporations.²⁹ As President Theodore Roosevelt declared in his 1905 Message to Congress,

[T]here at present exists a very unfortunate condition of things, under which these great corporations doing an interstate business occupy the position of subjects without a sovereign, neither any State Government nor the National Government having effective control over them. Our steady aim should be by legislation, cautiously and carefully

²⁷ United States v. E. C. Knight Co., 156 U.S. 1, 12-13, 14-17 (1895); see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 142.

²⁸ McCurdy, "Knight Sugar Decision," 336-342; Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991), 241-267; James May, "Antitrust Practice and Procedure In the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918," *University of Pennsylvania Law Review* 135 (1987): 495-593.

²⁹ McCurdy, "Knight Sugar Decision," 335-336.

undertaken, but resolutely persevered in, to assert the sovereignty of the National Government by affirmative action.³⁰

Dual federalism, Roosevelt was suggesting, no longer allowed for “effective control” of the economy.

Roosevelt’s words, however, came amid a string of government antitrust victories.³¹ Over the next decade and a half, a divided Supreme Court breathed new life into the Sherman Act, and eroded the significance of *E. C. Knight’s* distinction between commerce and production, even as it formally adhered to the distinction. In *Northern Securities Company v. United States*, for instance, the Court continued to insist that Congress could not “control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce” or regulate “the organization of state corporations authorized by their charters to engage in interstate and international commerce.” But Congress could block “a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce.” In other words, *Northern Securities* shifted the focus from the corporate structures driving corporate consolidation and instead focused on the behavior alleged to impede commerce.³² As a result, the distinction between direct and indirect effects on commerce weakened, and though it did not disappear, it was becoming less “rigidly categorical.”³³ As Owen Fiss writes, “After the 1911 cases there was little life left to the federalism objection: As long as the product was sold in national markets, a manufacturer fell

³⁰ Theodore Roosevelt, Fifth Annual Message to Congress, December 5, 1905, in Theodore Roosevelt, *State Papers as Governor and President, 1899-1909*, ed. Hermann Hagedorn, National ed., vol. 15, The Works of Theodore Roosevelt (New York: C. Scribner’s Sons, 1926), 273.

³¹ *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, - (1897); *United States v. Joint Traffic Assn.*, 171 U.S. 505 (1898); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *N. Sec. Co. v. United States*, 193 U.S. 197 (1904); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

³² *N. Sec. Co. v. United States*, 193 U.S. 197, 334–335 (1904).

³³ Barry Cushman, *Rethinking the New Deal Court*, 169.

within the regulatory province defined by the Sherman Act.”³⁴ For the next half-century, such struggles to reconcile the fundamental boundaries of classical legal thought with the exceptions brought about by litigation would define American constitutional law.

III. Elihu Root and the Internationalization of Dual Federalism

As the struggle over dual federalism played out within the United States, a group of lawyers inside and outside the Theodore Roosevelt administration championed law as a way of organizing international politics outside of the United States. This project gained considerable steam when Elihu Root returned to Washington to serve as secretary of state under President Roosevelt in 1905. Root sought to develop a system for foreign commerce like the one that Taney and Story had developed for the domestic interstate market. Root’s program incorporated many key features of dual federalism: it promoted the sovereignty of nation-states and discouraged interference in their internal spheres; it looked to multinational corporations to bridge the formal boundaries established by sovereignty; and it sought an umpire to smooth the inevitable tensions that would arise. Whereas the Jacksonians turned to the U.S. Supreme Court to serve this function within the United States, Root strove to find a similar institution to manage international conflict.

A. Sovereignty over Imperialism

After the bloody war in the Philippines and Roosevelt’s brazen acquisition of land for the Panama Canal, popular enthusiasm for U.S. imperialism was waning.³⁵ Congress and the public

³⁴ Fiss, *Troubled Beginnings*, 8:147–148. Dual federalism would linger on in other areas of law. Corwin, “Passing of Dual Federalism.”

³⁵ The literature on imperialism and anti-imperialism is abundant. See Kristin L. Hoganson, *Fighting for American Manhood: How Gender Politics Provoked the Spanish-American and Philippine-American Wars* (New Haven: Yale University Press, 1998), 248 n. 2; Eric T. Love, *Race over Empire: Racism and U.S. Imperialism*,

were increasingly opposed to further adventures abroad.³⁶ As Roosevelt told Taft in 1907, “[T]he public is very shortsighted. It is interested in things at home and not in the Philippines or the Canal”³⁷ A year later, Roosevelt again remembered the challenges:

In Cuba, Santo Domingo and Panama we have interfered in various different ways, and in each case for the immeasurable betterment of the people. I would have interfered in some similar fashion in Venezuela, in at least one Central American State, and in Haiti already, simply in the interest of civilization, if I could have waked up our people so that they would back a reasonable and intelligent foreign policy which should put a stop to crying disorders at our very doors. . . . But in each case where I have actually interfered—Cuba, Santo Domingo, and Panama, for instance—I have had to exercise the greatest care in order to keep public opinion here with me so as to make my interference effective, and I may have been able to lead it along as it ought to be led only by minimizing my interference and showing the clearest necessity for it.³⁸

Likewise, Root told one correspondent that it was “quite evident that forcible measures would merely react on the Administration.”³⁹ As a result, Roosevelt needed other means of exerting influence abroad.

Root’s assessment of international politics convinced him that Latin America would be a fruitful avenue for reform. “It has seemed doubtful whether the Latin Americans would ever acquire any more than the most rudimentary capacity for consistent organization,” Root wrote. “There are, however, now strong indications that they are beginning to . . . acquire that capacity, with Central America lagging behind.”⁴⁰ Respect for this capacity might bear fruit in improved relations. “The South Americans now hate us,” he wrote in 1905, “largely because they think we

1865-1900 (Chapel Hill: University of North Carolina Press, 2004); Rubin Francis Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1893-1946*. (Columbia: University of South Carolina Press, 1972).

³⁶ Rosenberg, *Financial Missionaries to the World*, 31–32; Richard D. Challener, *Admirals, Generals, and American Foreign Policy, 1898-1914* (Princeton: Princeton University Press, 1973); William C. Widenor, *Henry Cabot Lodge and the Search for an American Foreign Policy* (Berkeley: University of California Press, 1980), 122–123, 131, 150–154.

³⁷ Roosevelt to William Howard Taft, September 3, 1907, in *Letters of TR*, 5:782.

³⁸ Roosevelt to William Bayard Hale, December 3, 1908, in *ibid.*, 6:1408; see generally Widenor, *Henry Cabot Lodge*, 118–68.

³⁹ Root to Whitelaw Reid, May 22, 1908. Elihu Root Papers, Library of Congress, Box 189, Part 1.

⁴⁰ Root to Silas McBee, Apr. 10, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 1; see also Schoultz, *Beneath the United States*, 192.

despise them and try to bully them. . . . I think their friendship is really important to the United States, and that the best way to secure it is by treating them like gentlemen.”⁴¹

Amid public pressure to cut back on imperial entanglements, President Roosevelt had hinted at a shift in his thinking about the state of Latin American civilization in his Fifth Annual Message to Congress in 1905. The president suggested that Latin Americans were ready to assume their responsibilities as sovereign states, opening the door to equality and cooperation in place of tutelage. As Latin Americans more effectively governed themselves, international law’s presumption of non-interference would carry the day, freeing the United States from the obligation to intervene.⁴²

In a sense, Roosevelt’s thinking about international relations was developing inversely to his views about federalism within the United States. In the American system of federalism, the police powers are the several states’ general powers to legislate to protect the health, safety, and morals of their citizens. But there was no general federal police power; the federal government had only the powers enumerated by the constitutional text. Roosevelt’s New Nationalism sought to address what he saw as a resulting vacuum: “[W]henver the states cannot act, because the need to be met is not one merely of a single locality, then the national government, representing all the people, should have complete power to act.”⁴³ In the realm of foreign relations, President Roosevelt had advocated the United States’ responsibility to exercise a hemispheric police power. Indeed, the Roosevelt Corollary could be restated along lines similar to Roosevelt’s New Nationalism: whenever foreign states cannot act, then the U.S. government, representing all the

⁴¹ Root to Benjamin R. Tillman, Dec. 13, 1905, Elihu Root Papers, Library of Congress, Box 186, Part 1.

⁴² See Roosevelt, Fifth Annual Message, December 5, 1905, in *Works of TR*, 15:15:300–303.

⁴³ Roosevelt, Speech at Ossawatimie, Kansas, August 31, 1910, quoted in Robert Eugene Cushman, “National Police Power under the Commerce Clause of the Constitution,” *Minnesota Law Review* 3 (1919): 294. Later commentators like Cushman interpreted Roosevelt as advocating a national police power.

people of the hemisphere (particularly against European powers), should have the power to act. Roosevelt's Fifth Annual Message, however, marked a shift away from this idea that United States had a general power to intervene to promote hemispheric welfare.

Implementing this shift was the primary objective of Root's tenure as secretary of state, and he devoted his energy to establishing a new relationship between the United States and Latin America based on sovereignty and equality rather than armed intervention and U.S. domination.⁴⁴ One of Root's first steps to reorient U.S. policy was to cultivate Joaquim Nabuco, Brazil's ambassador to the United States, as well as other Latin American diplomats in Washington. Although Washington society often shunned Latin Americans, Root urged colleagues to welcome them and to accept their invitations. These relationships led to Root's decision to make an unprecedented tour of South America. As he later recalled, he had been dining with a group of diplomats to discuss the upcoming Pan American Conference, which would be held in Rio de Janeiro in July 1906. Root surprised his guests by announcing that he would personally attend.⁴⁵

Root delivered the most important address of his journey in Brazil on July 31, 1906.⁴⁶ "That is the only speech made by me which was prepared beforehand," Root noted afterwards, "and it was designed as a formulation of our policy towards South America . . . and it will

⁴⁴ For excellent analyses of the Roosevelt administration's search for alternatives to armed interventions, see Healy, *Drive to Hegemony*, 126–144; Lester D. Langley, *The United States and the Caribbean, 1900-1970*, 4th ed. (Athens: University of Georgia Press, 1980), 44–49; Rosenberg, *Financial Missionaries to the World*, 31–60; Hannigan, *New World Power*, 11, 15–16, 34–35, 65, 215–18.

⁴⁵ Jessup, *Elihu Root*, 1:473–477; see also Elihu Root, *Latin America and the United States*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1917), xiii. On U.S.-Brazilian relations during this period, see Joseph Smith, *Unequal Giants: Diplomatic Relations between the United States and Brazil, 1889-1930* (Pittsburgh: University of Pittsburgh Press, 1991), 35–76; E. Bradford Burns, *The Unwritten Alliance: Rio-Branco and Brazilian-American Relations* (New York: Columbia University Press, 1966). For examples of Root urging U.S. officials to accept a Brazilian dinner invitation, see Root to the Admiral of the Navy (Dewey), Jan. 6, 1906, Elihu Root Papers, Library of Congress, Box 186, Part 1, and Root to Henry Cabot Lodge, Jan. 6, 1906, *ibid.*

⁴⁶ Speech of the Secretary of State, July 31, 1906, in Root, *Latin America and the United States*, 6–11.

doubtless be referred to often in years to come as fixing a standard which the United States is bound to live up to. I meant to have it so, for I think we ought to live up to that standard.”⁴⁷ Root began his speech by noting the worldwide trend toward democratic government, and he linked the Latin American struggle for self-government to the United States’ own. He praised “mutual interchange and assistance between the American republics” as the means to progress, and he declared that the conference’s real achievement would be laying a foundation for future growth and cooperation. Implicitly acknowledging Latin America’s mistrust of the United States, Root declared, “We wish for no victories but those of peace; for no territory except our own; for no sovereignty except over ourselves. . . . We neither claim nor desire any rights or privileges or powers that we do not freely concede to every American republic.”⁴⁸

Root concluded his speech by urging Latin American nations to participate in the upcoming Hague Conference, an invitation which emphasized their equality with the civilized states of Europe. Of American nations, only the United States, Brazil, and Mexico had participated in the First Hague Conference in 1899, and the United States had since worked to secure invitations for the other nations of the Western Hemisphere. Their participation, Root declared in Brazil, would serve as “the world’s formal and final acceptance of the declaration that no part of the American continents is to be deemed subject to colonization.”⁴⁹ Root thought that his speech was “exceedingly well received” and that it would “serve to clarify the ideas of a good many people in the Conference and out of it.”⁵⁰

⁴⁷ Root to Albert Shaw, Oct. 8, 1906, Elihu Root Papers, Library of Congress, Box 186, Part 2; see also Root to Roosevelt, Aug. 2, 1906, Library of Congress, Series 1.

⁴⁸ Speech of the Secretary of State, July 31, 1906, in Root, *Latin America and the United States*, 6–11.

⁴⁹ *Ibid.*, 10; Jessup, *Elihu Root*, 2:68–69; Healy, *Drive to Hegemony*, 137; Collin, *Theodore Roosevelt’s Caribbean*, 497.

⁵⁰ Root to Roosevelt, Aug. 2, 1904, Library of Congress, Series 1.

Some of the more important discussions during Root's time in South America concerned the upcoming Second Hague Conference. As the U.S. delegates' report noted, the armed collection of debts "overshadowed in interest all other topics before the [Pan American] conference." In 1902, Argentine Foreign Minister Luis María Drago had proposed a prohibition on the use of force to collect debts. Now, the Pan American Conference recommended that participants invite the Hague Conference to consider this question. The Pan American delegates refrained from making more definite recommendations lest they pit a bloc of American debtors against European creditors.⁵¹ In an August 17, 1906, speech in Buenos Aires, Root endorsed the Drago Doctrine. "The United States of America has never deemed it to be suitable that she should use her army and navy for the collection of ordinary contract debts of foreign governments to her citizens," he declared. "We deem it to be inconsistent with that respect for the sovereignty of weaker powers which is essential to their protection against the aggression of the strong."⁵²

B. Economic Integration and the Open Door

But respect for Latin American sovereignty came at a cost. As international law theorist Lassa Oppenheim put it, "In consequence of its internal independence and territorial supremacy, a State can adopt any Constitution it likes, arrange its administration in a way it thinks fit, make

⁵¹ Report of Delegates, in *FRUS, 1906*, 2:1583–1584; James Brown Scott, ed., *The Hague Peace Conferences of 1899 and 1907* (Baltimore: Johns Hopkins Press, 1909), 392–400; Jessup, *Elihu Root*, 2:73–75.

⁵² Reply of Mr. Root to Speech of Dr. Luis M. Drago, August 17, 1906, in Root, *Latin America and the United States*, 98. At the Second Hague Conference, however, the United States took a different position, and Root's efforts to improve hemispheric solidarity by defending national sovereignty gave way to the need to maintain some means of redressing delinquency. The Hague Conference adopted the Porter resolution, which prohibited the forcible collection of debts except in cases when the debtor nation refused to arbitrate. Feeling that the exception swallowed the rule, the Latin American delegations rejected this compromise, which nevertheless passed. Scott, *Hague Peace Conferences*, 1:1400–1422; Collin, *Theodore Roosevelt's Caribbean*, 495–500; David S. Patterson, *Toward a Warless World: The Travail of the American Peace Movement, 1887-1914* (Bloomington: Indiana University Press, 1976), 155; Healy, *Drive to Hegemony*, 137–139; Jessup, *Elihu Root*, 73–75. "A peculiarity of the Latin races," Root complained, "is that they pursue every line of thought to a strict, logical conclusion and are unwilling to stop and achieve a practical benefit as the Anglo Saxons do." Root to Elbert F. Baldwin, Nov. 1, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 2.

use of legislature as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on.”⁵³ Under dual federalism in the United States, the several states could choose to exclude foreign corporations, and state sovereignty could easily give way to efforts to impede competition, as the Supreme Court’s post-*Welton* commerce clause jurisprudence revealed. Taney had dealt with this problem by establishing a presumption that states welcomed foreign corporations unless they expressly legislated otherwise. Root likewise balanced his emphasis on Latin American sovereignty with a similar presumption that Latin Americans desired commerce with the United States and that the U.S. and Latin American economies were in natural harmony.⁵⁴

Root developed these ideas in speeches across the United States on his return from South America. In a November 20, 1906, speech at the Trans-Mississippi Commercial Congress in Kansas City, Missouri, Root outlined how trade would bridge the formal divisions resulting from national sovereignty.⁵⁵ At the heart of Root’s speech was an evolutionary view of civilization. For most of its history, he argued, the United States had been inwardly focused, using all available resources in the nation’s internal development. Now, it faced an era “of distinct and radical change,” as the nation poured out its surplus capital into the rest of the world. Latin America, too, had evolved. “Coincident with this change in the United States,” Root said, “the

⁵³ Oppenheim, *International Law: A Treatise*, 1:171–172.

⁵⁴ These ideas were not unique to Root. For description of similar rhetoric from before the Spanish-American War that combined ideas of U.S.-Latin American equality with a notion of U.S. superiority, see Benjamin A. Coates, “The Pan-American Lobbyist: William Eleroy Curtis and U.S. Empire, 1884–1899,” *Diplomatic History* 38, no. 1 (January 1, 2014): 34–43. Like John Barrett, Curtis was also an important influence on Root. According to Jessup, Curtis helped convince Root of the importance of cultivating the press. Jessup, *Elihu Root*, 1:224.

⁵⁵ “How to Develop South American Commerce,” Address Before the Trans-Mississippi Commercial Congress, Kansas City, MO, November 20, 1906, in Root, *Latin America and the United States*, 245–267; see also Jessup, *Elihu Root*, 1:489–492; Walter LaFeber, “Technology and U.S. Foreign Relations,” *Diplomatic History* 24, no. 1 (Winter 2000): 1–19. LaFeber labels Root’s speech “one of the earlier Point IV plans.” “How to Develop South American Commerce,” Address Before the Trans-Mississippi Commercial Congress, Kansas City, MO, November 20, 1906, in Root, *Latin America and the United States*, 245–267; see also Jessup, *Elihu Root*, 1:489–492; Walter LaFeber, “Technology and U.S. Foreign Relations,” *Diplomatic History* 24, no. 1 (Winter 2000): 1–19. LaFeber labels Root’s speech “one of the earlier Point IV plans.”

progress of political development has been carrying the neighboring continent of South America out of the stage of militarism into the stage of industrialism.” This coincided with a rejection of revolution—“of the revolutionary general and the dictator”—and a new embrace of stability.⁵⁶

Thus, Root contended that U.S. and Latin American interests were in perfect harmony: “Immediately before us, at exactly the right time, just as we are ready for it, great opportunities for peaceful commercial and industrial expansion to the south are presented.” He argued that the two continents were complementary in material resources and in people. South Americans, for example, were “polite, refined, [and] cultivated” where the North Americans were “strenuous, intense, [and] utilitarian.”⁵⁷ Thus, trade would benefit both regions, and Root saw himself continuing the Pan Americanism inaugurated by Secretary of State James G. Blaine.⁵⁸

For Root, however, Pan Americanism depended not upon the actions of governments, but upon the efforts of private American citizens. Root went on to outline a number of concrete steps that needed to be taken. The American merchant, Root advised, “should learn what the South Americans want and conform his product to their wants.” He should learn Spanish and Portuguese. He “should arrange to conform his credit system to that prevailing in the country where he wishes to sell his goods.” He “should himself acquire, if he has not already done so, and should impress upon all his agents that respect for the South American to which he is justly entitled and which is the essential requisite to respect from the South American.” Banks should

⁵⁶ “How to Develop South American Commerce,” in Root, *Latin America and the United States*, 245–247.

⁵⁷ *Ibid.*, 247, 250.

⁵⁸ *Ibid.*, 250–253. On Pan Americanism, see Carolyn M. Shaw, *Cooperation, Conflict, and Consensus in the Organization of American States* (New York: Palgrave Macmillan, 2004), 45–48; David Sheinin, ed., *Beyond the Ideal: Pan Americanism in Inter-American Affairs* (Westport, CT: Greenwood Press, 2000).

be opened and capital invested under the direction of experts. And above all, better networks of communications—mail, passenger, and freight—needed to be established.⁵⁹

Root's speech was a textbook illustration of William Appleman Williams' "imperialism of idealism." What was good for the United States was good for the world; there was no tension between ideals and interests.⁶⁰ Root reiterated this theme in a January 14, 1907, speech in Washington, D.C., before the National Convention for the Extension of the Foreign Commerce of the United States. There, he addressed the particular problem posed by the smaller nations of the Caribbean. "Some of them have had a pretty hard time," he admitted. "The conditions of their lives have been such that it has been difficult for them to maintain stable and orderly governments. They have been cursed, some of them, by frequent revolution." U.S. policy towards these countries, Root said, rested on three core elements: "First. We do not want to take them for ourselves. Second. We do not want any foreign nations to take them for themselves. Third. We want to help them."⁶¹

Reality, of course, belied Root's optimistic outlook. At times, Root sounded very modern in his prescriptions: North Americans should learn local languages, respect local cultures, and should follow the Golden Rule. Yet the underlying equality Root presupposed was absent. Just as workers lacked equal bargaining power with corporations, despite a contract system that presupposed they did, Latin American governments lacked the political, economic, and military strength of the United States.⁶² The complementarities Root imagined ran into the reality of Latin

⁵⁹ "How to Develop South American Commerce," in Root, *Latin America and the United States*, 253–267.

⁶⁰ Williams, *Tragedy*, 58–89; cp. Robert Endicott Osgood, *Ideals and Self-Interest in America's Foreign Relations; the Great Transformation of the Twentieth Century*. (Chicago: University of Chicago Press, 1953).

⁶¹ "South American Commerce," Address at the National Convention for the Extension of the Foreign Commerce of the United States, Washington, DC, January 14, 1907, in Root, *Latin America and the United States*, 274–275.

⁶² On the role of contract in masking bargaining disadvantages, see generally Rosenberg, *Financial Missionaries to the World*, 72–76; Emily S. Rosenberg and Norman L. Rosenberg, "From Colonialism to

American resentment at North American hegemony and North American frustration at Latin American backwardness. The Latin Americans would trade armed interventionism for economic subjugation.⁶³

But Root's gendered rhetoric helped to mask these problems and suggested that North American corporations could successfully bridge the Western hemisphere.⁶⁴ As Michael Hunt observes, U.S. depictions of Latin Americans ranged from the lazy male to the "fair-skinned and comely" señorita. In times of peace, when "Americans saw themselves acting benevolently, they liked to picture the Latino as a white maiden passively awaiting salvation or seduction."⁶⁵ Root's rhetoric of muscular Anglo-Saxon productivity meeting Latin American passivity and receptivity fits this pattern. Indeed, an Argentine cartoon from later in his trip depicted a kneeling Root proposing to Argentina beneath a stern portrait of Theodore Roosevelt. "I love you, I adore you, Miss Argentina, and I want to unite my heart . . ." the caption read. "Yes, yes; you have just told my sisters the same thing. Pure sweet nothings and pure foreign relations."⁶⁶

C. An International Judiciary

During his trip to Latin America, Root had made strong statements of U.S. respect for Latin American sovereignty. On his return home, he shared his expectations that American business would bridge national boundaries and his vision of U.S.-Latin American complementarity that would minimize conflict. But conflict would undoubtedly arise, just as it

Professionalism: The Public-Private Dynamic in United States Foreign Financial Advising, 1898-1929," *The Journal of American History* 74, no. 1 (June 1, 1987): 60–61, 65–66, doi:10.2307/1908505; Horwitz, *Transformation of American Law, 1870-1960*, 10–11; William M. Wiecek, *The Lost World of Classical Legal Thought Law and Ideology in America, 1886-1937* (New York: Oxford University Press, 1998), 10, 48, 87, 91, 102–105, 152–156, 183, 192, 230, 248–49.

⁶³ Root to Melville K. Stone, Mar. 7, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 1.

⁶⁴ See generally Rosenberg, *Financial Missionaries to the World*, 33; Hoganson, *Fighting for American Manhood*, 3–4; Hannigan, *New World Power*, 3–4.

⁶⁵ Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven: Yale University Press, 1987), 58–62.

⁶⁶ Cartoon reprinted in Jessup, *Elihu Root*, 1:484–485 (cartoon between these two pages).

did within the United States. Under dual federalism the Supreme Court served as the umpire that kept the federal and state governments in their proper spheres. When international disagreements arose, however, there was no institution to fulfill this role. The obvious solution was force: the stronger power could impose its way on its weaker. Root's final endeavor was to think about a more principled way of resolving international conflict.

Root's desire for institutions capable of resolving international disagreements peacefully reflected wider trends. The beginning of the twentieth century witnessed a tremendous growth in internationalist organizations committed to ending war and to promoting world organization. One of the most important was the American Society of International Law, with its accompanying publication, the *American Journal of International Law*. The society's officers and the publication's editors were a who's who of U.S. government officials. Officers included Root, who was the society's president; Supreme Court Justices Melville Fuller, William R. Day, and David J. Brewer; cabinet secretaries John W. Foster, Richard Olney, John William Griggs, and William Howard Taft; and industrialist and philanthropist Andrew Carnegie. The editorial board included James Brown Scott, solicitor to the State Department, delegate to the Second Hague Conference, and trustee and secretary of the Carnegie Endowment for International Peace; future Secretary of State Robert Lansing; and State Department adviser and law professor John Bassett Moore.⁶⁷ (Roosevelt himself, absent from this list, sometimes sided with internationalists, but tended to view internationalism more instrumentally.)⁶⁸

As this catalog suggests, many of the same policymakers who championed imperialism and sought to expand American military power aligned themselves with an organization

⁶⁷ Carl Landauer, "The Ambivalences of Power: Launching the American Journal of International Law in an Era of Empire and Globalization," *Leiden Journal of International Law* 20, no. 02 (2007): 326–327.

⁶⁸ John P. Campbell, "Taft, Roosevelt, and the Arbitration Treaties of 1911," *The Journal of American History* 53, no. 2 (September 1, 1966): 293.

committed to the peaceful resolution of international disputes.⁶⁹ Their commitment to international law was not simply a mask for power politics.⁷⁰ They genuinely worked to build international institutions that would bind the United States. The centrality of legal formalism in their thinking helps to explain what might otherwise seem a troubling paradox. International legal institutions were essential for monitoring the boundaries by which they organized the world. Steeped in the world of classical legal thought, international courts and the judges who would sit on them did not entail frightening incursions on sovereignty but instead offered a means of globalizing the ordered, rational system that ensured stability and social peace at home.

International arbitration offered the most basic avenue for advancing international legalism. The First Hague Conference in 1899 had created a Permanent Court of Arbitration, which at first was little more than a list of judges from which nations could choose arbitrators. Internationalists hoped to expand its power at successive Hague conferences.⁷¹ Roosevelt's Fifth Annual Message had promoted international arbitration and called for The Hague conference to adopt a general arbitration treaty.⁷² Meanwhile, a series of treaties called for the pacific settlement of international disputes with particular nations, including the 1897 Olney-

⁶⁹ Davis, *United States and the Second Hague Peace Conference*, 19, 55, 72; Patterson, *Toward a Warless World*, 257–259; Landauer, “The Ambivalences of Power”; Campbell, “Taft, Roosevelt, and the Arbitration Treaties.”

⁷⁰ Nor was arbitration was not an end in itself, however. It also served strategic goals, such as keeping European competitors out of the Western Hemisphere. “We must not on any account sacrifice our position of asserting the national equality of American states with the other powers of the earth,” Root said during the Hague Conference. “It is far more important to us than the whole court scheme.” By accepting the Latin Americans as sovereign equals at the Hague Conference, the European powers would concede the logic underlying the Monroe Doctrine: there would be no basis for European colonization in a Western Hemisphere full of sovereign states. Root quoted in Jessup, *Elihu Root*, 2:77; Speech of the Secretary of State, July 31, 1906, in Root, *Latin America and the United States*, 10.

⁷¹ Davis, *United States and the Second Hague Peace Conference*, 4.

⁷² Roosevelt, Fifth Annual Message, December 5, 1905, in Theodore Roosevelt, *Works of TR*, 15:15:295–300. The president also championed an “organization of the civilized nations, because as the world becomes more highly organized the need for navies and armies will diminish.”

Pauncefote Treaty, the 1905 Hay treaties, the 1908-1909 Root treaties, and the 1911 Taft treaties.⁷³

Nonetheless, arbitration presented a difficult conceptual problem for these legal positivists. In the municipal context, the power of the state enforced the law. But in international law, there was no supreme sovereign power backing up legal obligations. Observing that people obeyed laws for reasons other than fear of punishment, Root championed the power of public opinion as a solution: “The force of law is in the public opinion which prescribes it.”⁷⁴ In the international arena, states avoid “the moral isolation created by general adverse opinion” and instead seek “general approval.” Of course, Root noted that this logic only worked with “comparatively simple questions and clearly ascertained and understood rights.” This was why international arbitration was promising, however. If neutral means of resolving disputes existed, public opinion could rally behind the “exceedingly simple” idea of arbitration, thereby channeling the underlying questions into peaceful resolution. The public’s moral clamor, in other words, would force the parties to arbitrate, which would stall the momentum for war and provide a forum for dispassionate experts to work through the more complicated issues.⁷⁵

But international arbitration was only the first step. Internationalists like Root grew frustrated with arbitration because arbitrators tended to favor the side which chose them, rendering arbitration political rather than impartial. Legalists instead wanted a permanent court of neutral judges, which, like the U.S. Supreme Court, would theoretically be immune from

⁷³ Campbell, “Taft, Roosevelt, and the Arbitration Treaties,” 279–280.

⁷⁴ “The Sanction of International Law,” Presidential Address at the Second Annual Meeting of the American Society of International Law, April 28, 1908, in Elihu Root, *Addresses on International Subjects*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 27–28.

⁷⁵ *Ibid.*, 30–32.

popular pressure.⁷⁶ Recognizing the limitations of arbitration, Root maintained the need to move beyond “these extemporized tribunals, picked at haphazard” and to establish “real courts.” In permanent tribunals, “judges, acting under the sanctity of the judicial oath, [would] pass upon the rights of countries, as judges pass upon the rights of individuals, in accordance with the facts as found and the law as established.” Such professional judges, moreover, would exert an important influence on international law itself, which was “still quite vague and undetermined,” with “different countries tak[ing] different views as to what the law is and ought to be.” But professional judges working for permanent tribunals would produce “a bench composed of men who have become familiar with the ways in which the people of every country do their business and do their thinking, and you will have a gradual growth of definite rules, of fixed interpretation, and of established precedents, according to which you may know your case will be decided.” Eventually, international affairs would come under the sway of an objective science of law just like the one that guided domestic affairs.⁷⁷

Root’s faith in international law had limits, but the three planks of his program worked together to compensate for the limitations on international law. He recognized that his commitment to national sovereignty required limits on arbitration and the international adjudication of disputes. Nations viewed certain matters—the Monroe Doctrine, for example—as

⁷⁶ Patterson, *Toward a Warless World*, 153–155; According to Herman, “A veneration of law itself was so basic in their thinking that they conceived of international reform as purely legal. The ground was thus laid for their pervasive distrust of any international system that was not primarily juridical.” Herman, *Eleven Against War*, 31. “I am just a lawyer, from the ground up,” Root declared in a speech in 1916, “and everything that I have done in my life has been as an incident to a lawyer’s career, responding to the calls made upon a lawyer under the responsibilities of his oath and his conception of a lawyer’s duty.” “Individual Liberty and the Responsibility of the Bar,” “Individual Liberty and the Responsibility of the Bar,” Address at the Annual Dinner of the New York State Bar Association, January 15, 1916, in Root, *Government and Citizenship*, 511.

⁷⁷ “The Importance of Judicial Settlement,” Opening Address at the International Conference of the American Society for Judicial Settlement of International Disputes, December 15, 1910, in Root, *International Subjects*, 148–149; “The Hague Peace Conferences,” Address in Opening the National Arbitration and Peace Congress, April 15, 1907, in *ibid.*, 142.

so tied to their safety, independence, and sovereignty that they could never consent to let citizens of other nations decide upon them. As Root explained in his Nobel Peace Prize address, “[Q]uestions of public policy supposed to be vital cannot be submitted to arbitration, because that would be an abdication of independence and the placing of government *pro tanto* in the hands of others. The independence of a state involves that state's right to determine its own domestic policy and to decide what is essential to its own safety.” But Root remained optimistic nonetheless. In the first place, states willing to wage aggressive war for some reason of national policy would not do so without a pretext. And international law could peacefully resolve these pretextual disputes. And where it could not, the second element of his program offered hope. The growth of international commerce had created a web of interconnections and changed the nature of self-interest. “[T]he prize of aggression must be rich indeed,” Root declared, “to counterbalance the injury sustained by the interference of war with both production and commerce.” More generally, the bases of international public opinion had broadened, raising the costs to would-be aggressors. Social and economic change was creating “an international community of knowledge and interest, of thought and feeling.”⁷⁸

IV. Conclusion: “There Is But One Nation”

Root’s program for refashioning international relations between the United States and Latin America reflected the turn-of-the-century legal culture from which it emerged. At its core, Root’s vision rested on the sovereign equality of nation-states, which had the exclusive right to govern their own territory. Because the evolutionary course of development had brought about a natural harmony of economic interests among the states making up the hemisphere, such

⁷⁸ Elihu Root, Nobel Peace Prize Address, in Root, *International Subjects*, 165–69.

sovereignty posed little threat to trade and economic integration. Nevertheless, Root was not naïve, and he recognized that sovereign nation-states often came into disagreement with one another. Arbitration and eventually an international court would play the role that the U.S. Supreme Court served in the United States: they would ensure that no nation-state stepped beyond the boundaries the law assigned it and usurped the powers of another nation-state. And just as the federal courts had developed a general commercial law for the United States, furthering commerce and deepening the ties of Union, international judges, sensitive to diverse national traditions, would develop a scientific system of international law that synthesized the customs and practices of civilized nations.

Of course, dual federalism's carefully drawn boundaries within the United States were already subject to a sustained assault from progressives, who charged that they favored a rentier class at the expense of workers and other less powerful groups in society. Moreover, Root's assumption of hemispheric harmony failed to foresee the rise of revolutionary nationalism that would engulf the hemisphere and the world within a decade.⁷⁹ In addition, he was unwilling to give international courts jurisdiction over matters of vital national interest, an exception that threatened to swallow his entire program. Recognizing this limitation, he turned, not unreasonably, to nebulous abstractions like international public opinion and the emergence of an international community, concepts he himself condemned as insufficient to keep peace.⁸⁰ As a result, Root's program was unlikely to deliver peace and promote economic integration in the way he expected. Still, Root was not a utopian; he expected law to mitigate conflict, not end it.

⁷⁹ Healy, *Drive to Hegemony*, 171; Carl P. Parrini, *Heir to Empire: United States Economic Diplomacy, 1916-1923*, 1 edition (Pittsburgh: University of Pittsburgh Press, 1969), 251–252. Though Root did predict “troublesome times for Mexico” when “the strong, wise leadership of President Diaz is withdrawn.” Root to Enrique C. Creel, Nov. 23, 1908, Elihu Root Papers, Library of Congress, Box 189, Part 2.

⁸⁰ Elihu Root, “Nobel Peace Prize Address,” in Root, *International Subjects*, 155.

Despite its questionable foundations, Root's program attracted the support of the legal and foreign policy elite and achieved concrete victories through arbitration treaties and the creation of institutions like the Central American Court of Justice.⁸¹

But its most important impact came within the United States, for it anticipated important constitutional changes in the conduct of U.S. foreign relations, changes that have shaped U.S. foreign policy into the twenty-first century. Within the United States, dual federalism regulated relations between two primary sets of sovereigns: the federal government and those of the several states. Root's conception of an internationalized federalism, meanwhile, governed a different set of sovereigns: the United States and the other civilized nation-states. Root's program raised challenging questions about how these two systems—the system of dual federalism within the United States and the emerging system of international law abroad—related to one another.

As G. Edward White has pointed out, the “orthodox” regime that shaped Root's vision did not draw a sharp dichotomy between foreign relations and other fields of law. It saw all exercises of federal power as limited by the enumerated (and reserved) powers in the Constitution. It assumed that Congress would play an active role in foreign affairs, particularly through the Senate's responsibility for ratifying treaties, and it presupposed that the judiciary would police the boundaries of issues touching foreign affairs just as it did in issues concerning domestic matters. The orthodox regime also recognized the autonomy of the states in a federal

⁸¹ Healy, *Drive to Hegemony*, 141–142; Collin, *Theodore Roosevelt's Caribbean*, 487–488; Thomas L. Karnes, *The Failure of Union: Central America, 1824-1960*. (Chapel Hill: University of North Carolina Press, 1961), 188–193; Jessup, *Elihu Root*, 1:509–512; Hannigan, *New World Power*, 38; Ralph Lee Woodward, *Central America: A Nation Divided*, 3rd ed. (New York: Oxford University Press, 1999), 192–193; For the U.S. delegate's report, see U.S. Department of State, *Foreign Relations of the United States: 1907* (Washington, DC: Government Printing Office, 1910), 2:665–727; Carnegie quoted in Jessup, *Elihu Root*, 1:512. The Nobel Foundation's website today touts the court as one of the reasons Root deserved the prize. “Elihu Root: The Nobel Peace Prize 1912,” http://nobelprize.org/nobel_prizes/peace/laureates/1912/root-bio.html.

system, and it assumed that the sovereignty of the states in the federal system limited the power of the federal government in the realm of foreign affairs.⁸²

At least on the surface, Root remained wedded to this orthodox vision. He acknowledged, for example, “certain implied limitations arising from the nature of our government and from other provisions of the Constitution,” and conceded that in principle “states rights” imposed limitations on international agreements. But Root’s internationalism undermined these limitations. Root admitted, for example, that state officials did have authority over certain aspects of implicate international affairs, and this authority sometimes created “a supposed or apparent clashing of interests.” But he countered that the federal government and state governments “could not be really in conflict; for the best interest of the whole country is always the true interest of every state and city, and the protection of the interests of every locality in the country is always the true interest of the nation.” In practice, the local therefore had to give way before the national. As Root declared in 1907, “In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen in every state.”⁸³

In addition to shifting authority from the state governments to the federal government, this need for a unitary national voice in foreign affairs had implications for the separation of

⁸² See White, *Constitution and the New Deal*, 33–93. Contrast David Kennedy’s assessment about traditional international law scholarship:

The traditional scholar tends to distinguish municipal and international law quite sharply. The two legal orders are different as well as separate. The traditional scholar views the municipal realm as a vertical legal order of sovereign powers and citizen rights. The international order, by contrast, is a horizontal order among sovereign authorities, concerned with allocating jurisdictions and building order among independent sovereigns. The international legal order is contractual, while the municipal order is a matter of public authority. As a result, the sovereign plays a far more central role in traditional thought, for he is the source of vertical authority and has the capacity for horizontal contract. The sovereign is the boundary between two major legal spheres.

David Kennedy, “Primitive Legal Scholarship,” *Harvard International Law Journal* 27 (1986): 8.

⁸³ “The Real Questions Under the Japanese-Treaty and the San Francisco School Board Resolution,” Presidential Address at the First Annual Meeting of the American Society of International Law, April 19, 1907, in Root, *International Subjects*, 14, 20–21.

powers within the federal government. In the first place, Root questioned the capacity of federal judges to decide international legal questions. Instead, Root hoped that international tribunals would supplant national ones. Judges “trained under different systems of law, with different ways of thinking and of looking at matters,” lacked the breadth of vision needed to adjudicate sensitive international matters, especially given the “very wide difference between the way in which a civil lawyer and a common-law lawyer will approach a subject.”⁸⁴ Just as Justice Story’s opinion in *Swift v. Tyson* assumed that federal judges might bring a broader outlook than state court judges to matters of general commercial law, Root favored international judges whose outlook would transcend the parochial limitations of judges tied to national systems of law.

Committing the United States to arbitration or to international courts also raised questions about Congress’ power over U.S. foreign relations, particularly the responsibility of the Senate to ratify treaties. International tribunals would make little difference if the Senate could reject decisions that it did not like. Root maintained a formal commitment to the Senate’s power to approve arbitration agreements, but in practice he sought to minimize the chamber’s interference by promoting general arbitration agreements that committed the United States to submit a class of controversies to arbitration. The Senate would debate such treaties after they were signed by the president, but afterwards power no longer remained in its hands: “The difference between a special treaty of arbitration and a general treaty of arbitration is that, in a special treaty the President and Senate agree that a particular case shall be submitted to arbitration, while in a general treaty the President and Senate agree that all cases falling within certain described

⁸⁴ “The Importance of Judicial Settlement,” Opening Address at the International Conference of the American Society for Judicial Settlement of International Disputes, December 15, 1910, in *ibid.*, 148.

classes shall be submitted.”⁸⁵ In other words, he wanted Congress to delegate its power over foreign affairs to international institutions.

As Root’s internationalist vision took shape in the first decade of the twentieth century, Senator George Sutherland of Utah was laying the intellectual foundations for a new foreign relations law that would culminate in the robust assertion of executive power over foreign relations announced in *United States v. Curtiss-Wright Corporation* and *United States v. Belmont* in the 1930s.⁸⁶ “These changes,” White explains, “included not only the continued employment of executive agreements as principal mechanisms of foreign relations policymaking but also the virtual disappearance of consideration for the reserved powers of the states in constitutional foreign affairs jurisprudence and, perhaps most startlingly, the sharply reduced role of not only the states and the Senate, but of the courts, as significant overseers of executive foreign policy decisions.”⁸⁷ The erosion of these various constitutional checks would clear the field for presidential power.

Root was not a proponent of an unbridled executive, and in his rhetoric and probably in his own mind he continued to support traditional constitutional checks and balances. Pre-committing the nation to arbitration could be done through a valid exercise of the treaty power, and it limited the president along with the Senate and the judiciary. Root’s goal was for a viable international judiciary to decide international questions, and this would curtail presidential discretion, too. “What we need for the further development of arbitration,” Root explained, “is

⁸⁵ Senate Committee on Foreign Relations, Report on General Arbitration Treaties with Great Britain and France, August 21, 1911, 62nd Cong., 1st Sess., S. Doc. 98, p. 9. Root would mitigate this consequence by excluding “any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy” from the class of issues eligible for arbitration.

⁸⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937). These cases are the paradigmatic statements of the constitutional primacy of the executive branch in foreign affairs. See generally White, *Constitution and the New Deal*, 33–93.

⁸⁷ *Ibid.*, 47.

the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility.”⁸⁸

The logic of Root’s internationalism, however, accorded with Sutherland’s argument that the limits on national power in the domestic affairs did not apply to the realm of foreign affairs.⁸⁹ Judicial decisions required finality, and congressional, judicial, and state authority to second-guess the United States’ international commitments would hinder the credibility of the American internationalism. If there were but one nation in foreign affairs, the president was its natural voice. Root’s diplomacy looked backwards to nineteenth century law, but it also pushed forward towards the imperial presidency of the twentieth century. And as the next chapter discusses, Root’s views about the unsuitability of national judicial power in international affairs entailed a robust role for the executive branch on behalf of U.S. companies operating overseas.

⁸⁸ “The Hague Peace Conferences,” Address in Opening the National Arbitration and Peace Congress, April 15, 1907, in Root, *International Subjects*, 142.

⁸⁹ George Sutherland, “The Internal and External Powers of the National Government,” *The North American Review* 191, no. 652 (March 1, 1910): 389.

CHAPTER TWO

AMERICAN BANANA AND THE REGULATION OF FOREIGN COMMERCE

I. Introduction

Unlike domestic law, by which nations governed their citizens, international law at the turn of the century regulated sovereign nation-states, not individuals, corporations, or other non-state entities.¹ As international commerce developed and multinational enterprise became increasingly common, lawyers needed to determine which nation's municipal law applied to companies operating internationally and to resolve conflicts that arose between different legal systems. As a result, Root's vision faced the sorts of questions that plagued dual federalism within the United States. At home, the question of whether business activity fell under Congress' commerce power or the corporate law and police powers of the several states became increasingly contentious, and progressive jurists challenged the idea that judges could ascertain such boundaries apolitically.²

¹ Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 31; David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 27 (1986): 8; For a contrary argument, see generally Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion," *Virginia Journal of International Law* 51 (2011 2010): 977 (arguing that international law has formally recognized non-state actors for centuries).

² See, e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). Even when activity fell within the power of the state, moreover, the Supreme Court increasingly identified constitutional limitations on the police power, generating frustration as the Court seemed to limit the states' power to deal with changing social conditions. Led by Justice Oliver Wendell Holmes, Jr., jurists increasingly challenged classical legal thought's idea of law as distinct from politics and the corresponding idea that neutral judges could fairly prick boundaries. Unless "a rational and fair man" had no doubt that legislation "would infringe fundamental principles," judges should accept "the right of a majority to embody their opinions in law." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting);

For a while, Root's ideology helped to mask analogous choice-of-law questions for companies operating abroad. In general, Root saw business as a cause of harmony rather than division. His gendered vision of the masculine U.S. economy pouring goods into a receptive Latin America obscured economic conflict. Instead, Root argued that multinational enterprise brought about "the recognition of interdependence of the peoples of different nations [and] their dependence upon each other for the supply of their needs and for the profitable disposal of their products."³ But as Congress and the courts grappled with the problem of the trusts at home through new legislation like the Sherman Act, the question of whether U.S. law regulated companies operating overseas became impossible to avoid: When companies had operations in more than one country, whose laws regulated their behavior? Did the Constitution (or laws passed pursuant to it) follow the United Fruit Company?⁴

In the spring of 1909, after the Taft administration took office and Root stepped aside as secretary of state, the Supreme Court at last addressed this question. The American Banana Company had brought suit under the Sherman Act alleging that the United Fruit Company was monopolizing the banana trade in Central America.⁵ In addition to driving purchasers from the market, acquiring the companies that remained, and undermining the American Banana Company's efforts to compete, it had induced Costa Rican troops to seize a banana plantation in a disputed area of territory. Writing for the Supreme Court in *American Banana Company v. United Fruit Company*, Justice Oliver Wendell Holmes, Jr., held that the Sherman Act applied only on U.S. soil—the presumption against extraterritoriality—and that U.S. courts could not

G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 487.

³ Elihu Root, Nobel Peace Prize Address, Root, *International Subjects*, 167.

⁴ Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, vol. 8, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan Publishing Company, 1993), 22.

⁵ On the United Fruit Company's activities in Central America, see Jason M. Colby, *The Business of Empire: United Fruit, Race, and U.S. Expansion in Central America* (Ithaca: Cornell University Press, 2011); Marcelo Bucheli, *Bananas and Business: The United Fruit Company in Colombia, 1899-2000* (NYU Press, 2005).

consider the propriety of the Costa Rican government's actions—the act of state doctrine. The United Fruit Company escaped liability.⁶

By confining U.S. law to U.S. soil, *American Banana* accepted national sovereignty as the foundational principle of international law. And by limiting legislative and judicial interference, Holmes's decision promoted executive discretion over foreign economic relations. Unless Congress said otherwise, its statutes would not govern activities overseas. U.S. courts, meanwhile, would not decide cases implicating the acts of foreign governments. As a result, companies facing disputes abroad were left to turn to the executive branch to advance their interests, and the State Department would assume responsibility for negotiating with foreign governments. In other words, disagreements pitting U.S. companies against other nations would in the first instance be diplomatic rather than legal disputes. This dynamic in turn drove Elihu Root's campaign for international arbitration. Rather than leaving these disagreements to ad hoc diplomatic resolution, which might lead to war, international tribunals would provide an impartial forum for their peaceful resolution. In short, *American Banana* reinforced Root's vision of a world of sovereign nation states governed by law.

But Holmes's reasoning in fact emerged from his longstanding critique of the classical legal thought that guided Root. Holmes was resisting the formalist idea that there was general law rooted in reason, that law was “a brooding omnipresence in the sky” rather than “the articulate voice of some sovereign or quasi-sovereign that can be identified.”⁷ All law, he was insisting, was positive and local. This reasoning challenged the intellectual foundations of Root's

⁶ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). This presumption against extraterritoriality would limit the reach of U.S. law for the next three decades and would be revived by the Rehnquist and Roberts Courts. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) [hereinafter *Aramco*]; *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

⁷ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

program for developing international law and set the stage for alternative theories of international order.

II. *American Banana: A Hard Extension of the Rules*

The events leading to the U.S. Supreme Court's decision in *American Banana Company v. United Fruit Company* began in July 1899, when American businessman Herbert Lee McConnell formed a partnership to grow and export Central American bananas to the United States. Within six months, the United Fruit Company, which was consolidating its hold on the banana trade, acquired McConnell's company and incorporated it in New Jersey. United Fruit's Andrew Preston held a controlling number of shares. McConnell signed an agreement promising not to compete in the banana business and was made president of United Fruit's newest subsidiary.⁸

In the spring of 1903, however, McConnell decided to resume growing bananas on his own. He chose some land along the Sixoala River, on disputed territory that separated Costa Rica from Panama, then still under Colombian sovereignty. According to McConnell, an arbitrator had given the land to Colombia, and it merely remained under Costa Rican control until it could be surveyed. Recognizing that he needed an outlet on the Caribbean to ship the bananas to the United States, he also obtained a railroad concession leading to the coast from Ricardo Roman Romero, a Colombian citizen. But Costa Rican soldiers, perhaps at the instigation of United Fruit, were interfering with his new plantation.⁹ Meanwhile, instigated by the United States,

⁸ The basic narrative for the account that follows is provided by The basic narrative for the account that follows is provided by B. W. Palmer, *The American Banana Company* (Boston: Geo. H. Ellis Co., 1907), i–xxix His introductory explanation is obviously biased against McConnell but nevertheless provides a helpful outline of the key events. McConnell's side of the story emerges in his correspondence and in litigation. See John T. Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976), 93.

⁹ McConnell to T. D. Nettles, April 23, 1903, in Palmer, *American Banana Company*, A–B.

Panama revolted from Colombia and became an independent nation. The disputed land now lay on the border between Costa Rica and a sovereign Panama.¹⁰

In June 1904, McConnell transferred his interests in his new endeavor to the American Banana Company, an Alabama corporation that he controlled.¹¹ He also made a formal appeal to the U.S. State Department asking for assistance in ending Costa Rican interference. Secretary of State Hay directed the U.S. minister in Costa Rica to arrange a *modus vivendi*.¹² Costa Rican Foreign Minister Astua Aguilar denounced McConnell's behavior and asserted Costa Rican sovereignty over the territory in question. Pointing out that McConnell had only now requested a concession from the Costa Rican government, he complained that McConnell was offering no compensation "in return for such valuable grant."¹³

On April 16, 1906, Root cabled the American ministers in Costa Rica and Panama and laid out the U.S. government's position. Root largely sided with McConnell. He declared that arbitration had awarded the disputed land to Colombia (and thus Panama), that McConnell had "expended large sums" cultivating the land on the basis of Colombian laws, and that a pending treaty was likely to give it to Panama. Acknowledging that Panama and Costa Rica had an understanding that Costa Rica would exercise *de facto* control, it was nonetheless "undeniable" that Panama had *de jure* sovereignty over the land in question. Costa Rica's *de facto* sovereignty thus put it "in the position of a usufructary." While it was "entitled to the fruits and profits of the territory during the period of tenure," it could "rightfully exercise no jurisdiction within the territory which Panama could not exercise," including the right to deprive someone of property

¹⁰ McConnell to Hay, September 24, 1903, in *ibid.*, 55–57; Hay to Merry, November 12, 1903, in *ibid.*; Amended Complaint, par. 24, printed as part of the Record in *American Banana v. United Fruit Company*, 213 U.S. 347 (1909), [hereinafter Complaint].

¹¹ Complaint, par. 26.

¹² Hay to Merry, February 8, 1905, in *ibid.*, 85–88.

¹³ José Astua Aguilar to McConnell, April 12, 1905, in *ibid.*, 93–99.

without due process. But Root recommended that Panama proceed diplomatically rather than by force. In conclusion, he instructed the diplomats to insist that Panama and Costa Rica respect McConnell's claims until they could be decided by the courts.¹⁴

In September 1906, McConnell brought suit in the Circuit Court of the Southern District of New York, beginning the proceedings that would bring the issue to the U.S. Supreme Court. McConnell alleged that the United Fruit Company's campaign to consolidate control over the Central American banana business violated the Sherman Act. It had destroyed the market, restrained trade, monopolized the banana trade, and prevented the American Banana Company from competing. The company alleged that it sustained \$2 million in damages. If it won, the Sherman Act would allow it to recover triple that amount.¹⁵

On March 4, 1908, District Court Judge Charles Hough granted the United Fruit Company judgment on the pleadings for most of its claims. American Banana had failed to state a justiciable claim because the alleged Sherman Act violation hinged on the actions of Costa Rica. According to the act of state doctrine set forth in *Underhill v. Hernandez*, U.S. courts could not pronounce on the actions of foreign sovereigns, and a letter from Secretary of State Root had established Costa Rica's de facto sovereignty. Since it was "impossible to adjudicate this matter without sitting in judgment on the *right* of Costa Rica to do what was done," the claim had to be dismissed "on grounds of highest public policy." As another ground for sustaining the demurrer, Judge Hough pointed out that American Banana sought damages for *prospective* profits. But the

¹⁴ Root to Merry and Magoon, April 16, 1906, in *ibid.*, 163–166. Proceedings begun in the Costa Rican courts had determined that the disputed territory belonged to the Northern Railway Company, a company with ties to the United Fruit Company. Complaint, pars. 28-29.

¹⁵ Complaint, pars. 34-37.

Sherman Act, he opined, only allowed a cause of action for those deprived of existing profits. Since American Banana never established its banana business, its claim had to fail.¹⁶

On appeal to the Second Circuit, Judge Walter C. Noyes rejected this latter basis for throwing out American Banana's claim. His opinion therefore hinged on Costa Rica's role in shutting down the McConnell plantation. Like Hough, Judge Noyes based his opinion on Root's letter, which acknowledged Costa Rica's de facto sovereignty, and he likewise invoked *Underhill v. Hernandez* and the act of state doctrine.¹⁷

The case now reached the U.S. Supreme Court, which heard arguments and decided the case in April 1909. Writing for the Court, Justice Holmes affirmed the lower court's decision. But Holmes's opinion began from a different standpoint. "It is obvious, Holmes wrote, "that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by acts of Congress." To be sure, Holmes acknowledged that states can exercise jurisdiction on the high seas or over lawless areas, or in cases affecting important national interests beyond their borders. "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done."¹⁸

Holmes then preceded to more general reflections on the nature of law: "Law is a statement of the circumstances in which the public force will be brought to bear upon men

¹⁶ American Banana Co. v. United Fruit Co., 160 F. 184 (Cir. Ct. S.D.N.Y. 1908) (citing *Underhill v. Hernandez*, 168 U.S. 250 (1897)). Hough did allow a claim that United Fruit abused its position as a common carrier in preventing the plaintiff from using its transportation line.

¹⁷ American Banana Co. v. United Fruit Co., 166 F. 261 (2nd Cir. 1908)

¹⁸ American Banana Co. v. United Fruit Co., 213 U.S. 347, 355–356 (1909). As Kramer points out, Holmes's analysis here rested on the vested rights theory developed by Joseph Beale. Kramer, "Vestiges of Beale," 186.

through the courts. But the word is commonly confined to such prophecies or threats when addressed to persons living within the power of the courts.” This brought Holmes to what has come to be known as the presumption against extraterritoriality: “in case of doubt to [construe] any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”¹⁹

Holmes’s decision also rested on another foundation: “For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all” Here, Holmes cited *Underhill v. Hernandez* and invoked the act of state doctrine. It did not matter that Panama was the de jure sovereign. Sovereignty, wrote Holmes, “is pure fact.” It would be absurd to say that it was a tort to persuade a sovereign power to do something, for “it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . . . It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.”²⁰

Holmes then distinguished an English case relied on by the American Banana Company, which held an Indian Nabob who was technically sovereign was nonetheless held to be liable because he was “a mere tool of the defendant, an English Governor. . . . But of course it is not alleged that Costa Rica stands in that relation to the United Fruit Company.” And since the plaintiff’s injuries were “the direct effect of the acts of the Costa Rican government,” American Banana’s claim failed: “A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by local law.”²¹

¹⁹ *American Banana*, 213 U.S. at 356.

²⁰ *Ibid.*, 357–358.

²¹ *Ibid.*, 358–359.

Contemporary commentary was surprisingly hostile to Holmes's opinion. Political scientist Warren B. Hunting, for example, argued that the focus on the seizure of the plantation in Costa Rica misstated the issue in a case arising under the Sherman act. "The essence of the offense is not the unlawful seizure of the property The criminal act is restraining the foreign commerce of the United States. It takes effect *in* the United States, and, therefore, may be punished *by* the United States." This case was essentially the same as if the defendant had fired a gun from Mexico into the United States. Recognizing that the true violation was restraining trade also resolved the problem of Costa Rica's sovereignty:

It is immaterial that the particular means used in restraining trade are lawful in themselves. . . . It is an elemental proposition, laid down in the early case of *U.S. v. Trans-Missouri Freight Association*, that acts may be otherwise absolutely lawful, and yet be unlawful, under the act, because they restrain trade. In final analysis, the particular act of the defendant which was unlawful was the persuasion of the Costa Rican government to act so as to put the plaintiff out of business, and so restrain the foreign trade of the United States of which it had or planned to have a part.²²

Similarly, a brief analysis of the case in the *Harvard Law Review* noted that inducing governmental action was often tortious, as in cases of malicious prosecution.²³

Chief Justice Melville Fuller unwittingly made perhaps the most potent objection. Scrawling a note on Holmes's opinion, he wrote, "Yes, but very hard extension of the rules. Panama is no more an independent state than Nabob— But this is a fine opinion and worthy of the writer, which is saying a good deal."²⁴ For legal scholar and future federal judge John T. Noonan, Jr., this remark encapsulates all that is wrong with Holmes's opinion. In the first place, Fuller could not even keep his Latin American countries straight, since Costa Rica was the nation

²² Warren B. Hunting, "Extra-Territorial Effect of the Sherman Act American Banana Company Versus United Fruit Company," *Illinois Law Review* 6 (1911): 42–43 (citing *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897)); "Recent Cases," *Harvard Law Review* 22 (1909): 615.

²³ "Recent Cases," 615.

²⁴ Holmes Bound Opinions, Holmes Papers, Harvard Law School Library, quoted in Noonan, *Persons and Masks of the Law*, 103.

whose sovereignty was at issue, a mistake that “showed as pointedly as possible how these dependencies of American empire were fungible from the perspective of Washington.”²⁵ But more significantly, fixating on rules allowed Holmes to ignore the true issue in the case: “the story of domination of a small country’s government by a predatory American business which had brutally suppressed a challenge to its monopoly.” According to Noonan, sovereignty was a mask that allowed Holmes to ignore the real human beings affected by the litigation.²⁶

For Noonan, then, the presumption against extraterritoriality and the act of state doctrine created a legal vacuum that gave the United Fruit Company free rein to extend its power overseas in Latin America. Holmes’s decision that the Sherman Act did not apply extraterritorially freed U.S. corporations from governmental regulation. This understanding finds support in Holmes’s disdain for antitrust regulation. Holmes hated the Sherman Act, calling it a “humbug based on economic ignorance and incompetence” and “a foolish law.”²⁷ After *American Banana*, corporations operating abroad could ignore its provisions without fear of litigation.

III. Instigate, Urge, and Persuade: Government-Business Relations After *American Banana*

Noonan’s critique mirrors the progressive assault on classical legal thought. For generations, scholars have assumed that legal formalism enabled and masked a commitment to laissez-faire capitalism. Critics increasingly complained that judges applied not objective,

²⁵ Ibid., 103–104.

²⁶ Ibid., 19–20, 106–110.

²⁷ Holmes to Pollock, April 23, 1910, in Mark De Wolfe Howe, ed., *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*. (Cambridge, MA: Belknap Press of Harvard University Press, 1961), 1:163; Holmes to Laski, March 4, 1920, in Mark De Wolfe Howe, ed., *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, (Cambridge, MA: Harvard University Press, 1953), 1:248–249; see also Fiss, *Troubled Beginnings*, 8:8:143.

scientific principles of law, but controversial social theories that supported capitalists and entrepreneurs at the expense of workers and other less powerful groups in society. According to the great constitutional scholar Edward Corwin, moreover, the fixation on boundaries created a legal “twilight zone” giving free rein to big business. These ideas share the essence of Noonan’s attack on *American Banana*.²⁸

More recent scholarship, however, has challenged the laissez-faire characterization of the classical era. While not denying that Gilded Age capitalists often benefitted from legal formalism at the expense of other groups of society, legal historians have shown that judges and elite lawyers were not mere pawns for their class. As Robert Gordon points out, “[T]heir vision was often broader, more cosmopolitan, and more farsighted in anticipating that compromises would have to be made for the sake of industrial peace.”²⁹ They instead sought to preserve longstanding legal principles that, for instance, prohibited laws from benefitting one class of society at the expense of others.³⁰

While Noonan is right that these legal principles often reduced individuals to judicial abstractions, his understanding of *American Banana* risks reinforcing the “all too common laissez-faire mischaracterization of the American turn of the century.”³¹ Rather than creating a twilight zone for American companies overseas, Holmes’s commitment to sovereignty reinforced the system of international law that Root and likeminded lawyers were developing to

²⁸ See Edward S. Corwin, *The Twilight of the Supreme Court; a History of Our Constitutional Theory*, (New Haven: Yale University Press, 1934), 20.

²⁹ Robert W. Gordon, “The American Legal Profession,” in *The Cambridge History of Law in America, Vol. 3, The Twentieth Century and After (1920-)*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 96.

³⁰ See, for example, Howard Gillman, *The Constitution Besieged: The Rise & Demise of Lochner Era Police Powers Jurisprudence* (Durham, North Carolina: Duke University Press Books, 1992); Charles W. McCurdy, “Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897,” *The Journal of American History* 61, no. 4 (March 1, 1975): 970–1005.

³¹ Marc-William Palen, “The Imperialism of Economic Nationalism, 1890–1913,” *Diplomatic History*, 2014, 5; Charles S. Maier, “Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era,” *American Historical Review* 105, no. 3 (June 2000): 822.

govern international relations in the Western Hemisphere. Though this vision of sovereignty freed American corporations operating overseas from American laws like the Sherman Act, it also presupposed the right of foreign sovereigns to issue their own regulations. Indeed, their sovereignty over their territory was supposed to be absolute—involving “the right to determine one’s own actions—to pay or not to pay, to redress injury or not to redress it, at the will of the sovereign.”³²

In practice, however, U.S. policymakers were unwilling to give foreign nations that degree of autonomy. Though Root sought to instill greater respect for Latin American sovereignty in U.S. foreign policy, he also insisted upon limits to sovereignty, using an analogy with municipal law. As Root argued, “The conditions under which this sovereign power is exercised among civilized nations do, however, impose upon it important limitations, just as the conditions under which individual liberty is enjoyed in a free civil community.” While municipal law generally didn’t compel citizens to be virtuous, Root explained that domestic peace required “the existence of a community standard of conduct” apart from law itself. Citizens who failed to live up to that standard would be ostracized and would open themselves to harm by enabling others to ignore it, too. According to Root, the international system similarly required “a standard of international conduct.”

This standard had the character of natural law. As Root explained, “The chief principle entering into this standard of conduct is that every sovereign nation is willing at all times and under all circumstances to do what is just. That is the universal postulate of all modern diplomatic discussion.” And this was also the basis of international law: “This obligation is by universal consent interpreted according to established and accepted rules as to what constitutes

³² Root, “The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts,” Presidential Address at the Third Annual Meeting of the American Society of International Law, April 23, 1909, in Root, *International Subjects*, 33–34.

justice under certain known and frequently recurring conditions; and these accepted rules we call international law.” Thus, governments negotiated a tension between sovereignty and principles of justice embodied in the particular rules of international law, principles which qualified that supposedly supreme sovereignty.³³

In certain circumstances, these principles allowed Americans operating abroad to complain about mistreatment at the hands of foreign authorities. Even when a government acted entirely within its own territory, it had to comply with the international standard of justice embodied by international law. Because this system only recognized states as legal entities, however, corporations had only limited legal recourse. Unless the foreign nation consented to adjudicate the dispute, Americans abroad had to turn to their government to vindicate their rights. Legally, in other words, the alleged wrong became a dispute between nations. As Root wrote, “So far as questions arise out of alleged wrongs by one government against a citizen of another, the sovereignty of one nation is merely confronted by another sovereignty”³⁴

Because Americans abroad needed the sovereignty of the United States to uphold their interests against foreign governments, *American Banana* was not a blueprint for laissez-faire. Instead, the case tied American corporations operating overseas more closely to the U.S. government. Holmes himself suggested this reality in his opinion. “But seizure by a state is not a thing that can be complained of elsewhere in the courts,” Holmes wrote, citing *Underhill v. Hernandez*.³⁵ American courts would not sit in judgment on the acts of foreign states. *Underhill* pointed to the alternative: “Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”³⁶ If the

³³ *Ibid.*, 34–36.

³⁴ *Ibid.*, 33–34.

³⁵ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357–358 (1909), 213:357–358.

³⁶ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

courts were not the proper venue, diplomatic solutions were. And these diplomatic solutions required corporations to cultivate government support.

This theme runs through the documentation generated by the *American Banana* litigation and is driven home in United Fruit's brief to the U.S. Supreme Court. The brief highlighted many of the words used in American Banana's complaint to connect the United Fruit Company to the Costa Rican government actions: instigated, induced, urged, persuaded. But such words equally described American Banana's relationship to the U.S. government. United Fruit

is connected with these acts of Costa Rica only as it is charged with *instigation*, *urgency*, and *persuasion* addressed to the governments and officials of the United States and Costa Rica. The word "induce" must mean the same thing when used to describe the acts of the plaintiff and the defendant. Thus . . . the plaintiff [American Banana] says it "has been diligent to *induce* the Government of the United States to interfere on its behalf." Had it succeeded, the interference would have been the act of the government, not of the plaintiff.³⁷

From the standpoint of understanding multinational enterprise in this era, the passage is revealing. Without a reliable and impartial tribunal to resolve overseas disagreements, corporations were dependent on their governments to take up their complaints. American Banana had turned to the State Department for help again and again. Indeed, in the diplomatic context, Root's letter championed the company's rights against Costa Rica. It was only when McConnell turned from the State Department to the courts of the United States that the letter began to be used against him, as judges employed its acknowledgment of Costa Rica's de facto sovereignty to invoke the act of state doctrine.

By favoring diplomatic solutions and closing the courts to disputes involving foreign states, *Underhill* and *American Banana* meant that Americans overseas were dependent on the State Department. As the United Fruit Company argued, "If the plaintiff has suffered any wrongs

³⁷ Brief for the Defendant in Error, at 5, *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1908). Of course, American Banana's claim turned on what was induced rather than the act of inducing itself.

at the hands of the Costa Rican authorities which they will not redress, its proper course is to ask the executive department of this government to interpose its influence.”³⁸ To be sure, the interests of the U.S. government and of business were never fully in line. As John Braeman argues, “The United States government was most activist in supporting business abroad when such action coincided with its strategic needs, political goals, or ideological values” Multinational companies, meanwhile, tended to seek U.S. government support in less developed markets.³⁹ But while the government was dependent on corporations to bridge sovereign boundaries and promote a growing international market, corporations remained dependent on the government, too.⁴⁰ Alison Frank has uncovered an especially remarkable example of this cooperation. Even as the Justice Department prosecuted Standard Oil in the courts of the United States, it vigorously advanced the company’s interests overseas. As Frank explains, “[M]obility of capital did not always mean that corporations were more powerful than states. Sometimes it meant that they needed states’ help more than ever before.”⁴¹

Ideally, American diplomats in such situations would negotiate the sorts of *modi vivendi* that Minister Merry sought for McConnell in Costa Rica. But when these sorts of informal approaches failed, there was a strong incentive to do what McConnell’s lawyer Everett Wheeler urged in his second memorial to the State Department: to turn unfavorable foreign acts from the standpoint of the company into “unfriendly acts” against the United States.

³⁸ *Ibid.*, at 19.

³⁹ John Braeman, “The New Left and American Foreign Policy during the Age of Normalcy: A Re-Examination,” *Business History Review* 57, no. 01 (March 1983): 94–99.

⁴⁰ Mira Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (Cambridge, MA: Harvard University Press, 1970), 166; Matthew F. Jacobs, “World War I: A War (and Peace?) for the Middle East,” *Diplomatic History* 38, no. 4 (September 1, 2014): 782–83.

⁴¹ Alison Frank, “The Petroleum War of 1910: Standard Oil, Austria, and the Limits of the Multinational Corporation,” *American Historical Review* 114, no. 1 (February 2009): 41. “Austria’s expectation that it could challenge Standard with impunity,” Frank adds, “was based on its mistaken assumption that the State Department would tolerate—or even appreciate—foreign attacks on a company targeted for prosecution at home. The State Department could not allow such presumption to stand.”

This pressure to turn private disagreements into diplomatic disputes between nations in turn made it all the more important to develop impartial institutions to manage disputes between states. The U.S. Constitution provided a model. Since even a well-meaning state court judge would struggle to be impartial when a case pitted a citizen of his own state against the citizen of a different state, the framers of U.S. Constitution gave federal courts jurisdiction over cases between citizens of different states. The “the liability of courts to be affected by local sentiment, prejudice, and pressure” likewise drove Root’s support for international arbitration. Just as federal judges promoted national harmony by overcoming the narrower interests and prejudices of the particular states, international judges would further international harmony by impartially applying the principles of international law.⁴² In other words, Root drew on American federalism to develop international law in part because of the increasing prevalence of the sorts of disputes driving the *American Banana* litigation.

IV. An International *Erie*

Because *American Banana* shared Root’s emphasis on national sovereignty, the case represents a seeming anomaly in Justice Holmes’s jurisprudence, in which the key forerunner of legal realism embraced a formalist conception of sovereignty that aligned him with conservative lawyers like Elihu Root. Like Noonan, other scholars have highlighted Holmes’s fixation with sovereignty.⁴³ In 1939, law professor G. Kenneth Reiblich observed “the extent to which the ideas of territorial sovereignty and state power to act within (but only within) its territory were

⁴² Root, *International Subjects*, 36–41.

⁴³ Noonan, *Persons and Masks of the Law*, 106–109.

firmly embedded in the mind of Mr. Justice Holmes from his first days on the bench and how, accepted as *a priori* truths, they influenced and perhaps controlled his decisions.”⁴⁴

Given Holmes’s status as a critic of legal realism, this has long troubled commentators. Larry Kramer admits that it “is surprising is to see this formalistic reasoning invoked by the author of *The Common Law* and *The Path of the Law*.” Kramer’s complaint echoes Reiblich’s earlier puzzlement. “One might have expected from Mr. Justice Holmes in the latter case some reference to the purpose of the Sherman Anti-Trust Act and the need for applying it to the instant facts in order to accomplish that purpose,” Reiblich wrote. “But Mr. Justice Holmes seems to have been blinded by what he sub-consciously accepted as eternally true—his interpretations of the concepts of territorial sovereignty and power.”⁴⁵

Though *American Banana*’s outcome accorded with Root’s diplomacy in key respects, however, Holmes was approaching law in a very different way. Rather than a puzzling inconsistency, Holmes’s embrace of sovereignty flowed from his efforts to forge an alternative to formalism, and his reasoning links him to the jurisprudence of his future partner on the Supreme Court, Louis D. Brandeis.⁴⁶ Their different vision of law raised questions about the foundations of Root’s conception of international law.

Holmes’s critique of formalism began decades earlier. As editor of the *American Law Review* in the 1870s, Holmes became dissatisfied with the existing commentaries on Anglo-American law and saw the need for scholars to systemize and rationalize the common law. While not directly inspired by their example, Holmes’s desire to bring order to American law reflected

⁴⁴ G. Kenneth Reiblich, “Conflict of Laws Philosophy of Mr. Justice Holmes,” *Georgetown Law Journal* 28 (1939): 6.

⁴⁵ *Ibid.*; Kramer, “Vestiges of Beale,” 189 n.34.

⁴⁶ Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 566–570.

global trends. In Germany, the great jurist and historian Friedrich Carl von Savigny had begun a similar project for the civil law.⁴⁷

Savigny's scholarship responded to the philosophical innovations of Immanuel Kant. Kant had sought to ground philosophy in universally applicable principles. This led him to base his ethics on pure reason, independent of experience. Because the consequences of acts depended upon particular circumstances, they were irrelevant for assessing an action's morality. Instead, the actor's will alone provided a standard of morality. Kant's ethics therefore reflected a wider shift to individualism at the end of the eighteenth century. Kant privileged human autonomy, and law became an external and formal guardian of individual freedom. It preserved the rights of individuals to achieve their own goals, provided this did not interfere with rights of others to do the same. Given Kant's interest in pure reason over experience, moreover, his philosophy tended to encourage logic and deduction from general principles.⁴⁸

Savigny, by contrast, believed law embodied the particular historical experiences of a people; therefore, the study of law required history. Jurists identified a people's true foundations in the past and then examined their unfolding over time. But Savigny did not jettison all Kantian influence, for deduction and logic provided the tools needed to systemize the historian's findings. "Historical research dug out the material," observes law professor Mathias W. Riemann, "and philosophical analysis provided the method to process it." Savigny therefore tended to promote a "double, if not contradictory" jurisprudence. As legal scholar Duncan Kennedy explains, "The law of a nation was a reflection of the spirit or culture of its people, and in this sense, inherently political, but could be developed in a scientific manner by jurists who

⁴⁷ Kennedy, "Three Globalizations," 25–29; Mathias W. Riemann, "Holmes's Common Law and German Legal Science," in *The Legacy of Oliver Wendell Holmes, Jr.*, ed. Robert W. Gordon (Stanford: Stanford University Press, 1992), 76–78.

⁴⁸ Riemann, "Holmes's Common Law and German Legal Science," 81–82; Kennedy, "Three Globalizations," 25–26.

presupposed its internal coherence.” After his death, Savigny’s successors magnified this tension. While some continued to emphasize historicism and promoted the German origins of German law, the dominant school of Pandectists favored the logical work of deducing rules from more general principles of law inherited in Rome, work that culminated in Germany’s code in 1900.⁴⁹

In the late nineteenth century, this effort to systemize law made Germany’s jurisprudence a model for the world, and classical legal thought in the United States was one example of a wider internationalization of the formal and scientific study of law pioneered in Germany. Indeed, the double nature of Savigny’s historical school made it well suited for globalization. The formal reasoning employed by the German jurists provided common “conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments” that linked elites around the world, but Savigny’s idea that law expressed the underlying spirit of a particular nation allowed them to emphasize their own national distinctiveness and independence. As Duncan Kennedy writes, “Receiving CLT permitted a gesture of striking cosmopolitanism, without any sacrifice of local autonomy (in the sense of legal autonomy vis à vis other countries).”⁵⁰

In the late nineteenth-century United States, American jurists combined ideas of German legal science with older traditions like natural rights. As Morton Horwitz argues, they were setting aside the German preoccupation with the individual will and beginning to advocate objective rules. For most American legal thinkers, however, these rules simply reflected underlying natural rights of individuals. The prevailing tendency of orthodox U.S. legal scholarship was to identify a few key principles rooted in natural rights, such as right to property,

⁴⁹ Mathias W. Riemann, “Holmes’s Common Law and German Legal Science,” 82–85; Duncan Kennedy, “Three Globalizations,” 27, 29.

⁵⁰ Kennedy, “Three Globalizations,” 25–26.

and to deduce a series of legal rules from these basic principles that covered the range of legal disputes that might arise.

When Holmes set out to explain American law in his lectures *The Common Law*, published in 1881, he had developed a strong disdain for the formalist idea that law was a matter of deduction from general principles. He also thought the prevailing idea of the relationship of rights and rules was backwards; rights arose from legal rules that created certain obligations rather than others. Holmes associated natural rights with subjectivism and morality in law because he thought that they forced the law to take account of an individual's actual state of mind. Holmes's attack on natural rights therefore stemmed from his desire for objective rules that judges could uniformly apply in a range of cases, a desire Horwitz connects to a wider post-Civil War desire for stability shared across American society. When Holmes published his classic *The Common Law* in 1881, this was his primary concern. "If there is a single, overriding, and repetitive theme running through Holmes's writing," Horwitz declares, "it is the necessity and desirability of establishing objective rules of law, that is general rules that do not take the peculiar mental or moral state of individuals into account."⁵¹

Yet Holmes's rejection of natural law carried troubling implications and raised the question of whether there were any limits on a state's sovereign power. As Horwitz asks, "If law was not the recognition of some pre-political natural right of individuals, was it inevitably the arbitrary command of a legislative sovereign?"⁵² Holmes's *The Common Law* provided an answer to this question. Rather than reflecting eternal truths or abstract reason, Holmes asserted, "the substance of the law at any given time pretty nearly corresponds, so far as it goes, with what

⁵¹ Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 110, 116, 128–129, 138–139; Robert W. Gordon, "Holmes' Common Law as Legal and Social Science," *Hofstra Law Review* 10 (1982): 722–726.

⁵² Horwitz, *The Transformation of American Law, 1870-1960*, 121–123.

is then understood to be convenient” for a given society. As a result, Holmes pointed out that the “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, all have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”⁵³ This carried Holmes towards the idea that law was simply the command of the sovereign.

But society did not have carte blanche to adapt law to its needs. Instead, “the form and machinery” of the rules society used to achieve its goals were constrained by what had already come before. “The law embodies the story of a nation’s development through many centuries,” Holmes contended, “and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” Holmes pointed out that many laws reflected “manifest good sense” and clearly served the needs of society. But many other legal principles lingered from earlier eras and made sense only if one understood how they had served the needs of the German tribes or Roman jurists who had first created them.⁵⁴ As Horwitz explains, because law was not the product of conscious decision of judges and legislators, but rather, in Holmes’s words, “the unconscious result of instinctive preferences and inarticulate convictions,” customary rules provided external, objective standards that could be used by judges.⁵⁵ History therefore served a twofold purpose in Holmes’s common law. It undermined the formalists who put logic before experience, and it also moderated the danger that his objective theory of law rested on the unrestrained power of the sovereign. It thereby preserved a distinction between law and politics.

⁵³ Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1909), 1–2.

⁵⁴ *Ibid.*

⁵⁵ Oliver Wendell Holmes, Jr., “Path of the Law,” *Harvard Law Review* 10 (1897): 32; Horwitz, *The Transformation of American Law, 1870-1960*, 125.

In *The Common Law*, Holmes dismissed the work of the German Pandectists as irrelevant for the common law experience of the United States and as indifferent to the true social bases of law. Yet as Riemann points out, Holmes's thought in fact bore strong affinities with important elements of Savigny's thought. Both men saw historical evolution at the heart of legal development, and they each treated the study of that evolution as the jurist's task.⁵⁶ As Kennedy argues, "The paradox of Savigny, and the probable source of his seminal importance, was the combination, in the single idea of legal science as the elaboration of 'the system,' of a universalizing legal formalist will theory with the idea that particular regimes of state law reflect diverse underlying nonlegal societal normative orders. His approach sharply attacked the notion that all national legal regimes are simply better or worse approaches to a religiously or rationally based transnational natural law."⁵⁷

Something similar could be said about Holmes. He rejected the idea growing more prevalent in American law that all legal rules could be deduced from a few general principles and instead emphasized law's development in history. Yet his recognition that law served societies needs allowed him to classify law according to the purposes that it served. As Horwitz explains, "While rejecting [formalism], Holmes nevertheless seemed quite confident . . . that there was an underlying rational basis for the distribution of legal rules and doctrines Viewed from the vantage point of a legal anthropologist, one could demonstrate how the doctrines developed and how their placement . . . was related to the function that the doctrine was called on to serve."⁵⁸

⁵⁶ Mathias W. Riemann, "Holmes's Common Law and German Legal Science," 96–104.

⁵⁷ Duncan Kennedy, "Three Globalizations," 27.

⁵⁸ Horwitz, *The Transformation of American Law, 1870-1960*, 129–130. On Holmes's affinities with classical legal thought, see Grant Gilmore, *The Death of Contract* (Columbus, OH: Ohio State University Press, 1995), 143, 165.n256; Morton J. Horwitz, "Book Reviews," *University of Chicago Law Review* 42 (1975): 796–797; Gordon, "Holmes' Common Law as Legal and Social Science," 726–745; R. Blake Brown and Bruce A. Kimball, "When Holmes Borrowed from Langdell: The Ultra Legal Formalism and Public Policy of Northern Securities (1904)," *American Journal of Legal History* 45 (2001): 278.

By the time Holmes published “The Path of the Law” in 1897, however, Holmes’s faith in the mediating power of custom had vanished, and he came to see law the product of social struggle alone. According to Morton Horwitz, this transformation had two main causes. First, the dramatic social, intellectual, and economic changes of the late nineteenth century—changes which highlighted new social problems like the struggle between capital and labor—created new divisions and undermined custom as a source of external, objective rules. Second, natural rights theorists increasingly used objective rules, eradicating Holmes’s distinction between objectivism and subjectivism.⁵⁹

As a result, Holmes abandoned the possibility of objective rules altogether, and “The Path of the Law” set aside *The Common Law*’s emphasis on historical inquiry.⁶⁰ “We must beware of the pitfall of antiquarianism,” Holmes now wrote, “and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.” Instead of history, “the man of the future is the man of statistics and the master of economics.”⁶¹ By the beginning of the twentieth century, Holmes had abandoned his commitment to a distinction between law and politics and saw law as nothing more than what judges and legislators said it was.⁶²

These ideas lay at the heart of Holmes’s opinion in *American Banana*. “Law,” Holmes had written in *American Banana*, “is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.” Over the course of his career, Holmes

⁵⁹ Horwitz, *The Transformation of American Law, 1870-1960*, 130–142.

⁶⁰ *Ibid.*

⁶¹ Oliver Wendell Holmes, Jr., “Path of the Law,” 469, 474.

⁶² Horwitz, *The Transformation of American Law, 1870-1960*, 142.

would consistently cite the definition of law he laid out in *American Banana* as best capturing his understanding of what law is.⁶³ Whereas Holmes's earlier work had referred to rules, consistent with his hope that jurists could ascertain objective, external rules that judges could apply across different cases, he now referred only to circumstances, circumstances not limited by reason, natural law, or even custom.⁶⁴ In *American Banana*, Holmes followed this definition of law with a jurisdictional gloss: "But the word is commonly confined to such prophecies or threats when addressed to persons living within the power of the courts." This too followed his understanding of law, for it made no sense (at least to Holmes) to imagine that two sovereigns governed the same territory. Holmes's critique of formalism had paradoxically driven him to sovereignty, the concept at the heart of classical legal thought and legal formalism.

And once Holmes embraced sovereignty as the foundational principle, it is clear that Holmes's presumption against extraterritoriality entailed the act of state doctrine, and vice versa. The presumption against extraterritoriality simply reflected Holmes's assumption that each territory had one sovereign, which had absolute power over its own territory but would not normally legislate in the territory of other sovereigns. But judges also made law when they interpreted cases. As Holmes's biographer G. Edward White has written,

In short, everywhere in his exploration of jurisprudential issues Holmes saw the "fact" of sovereignty. Even where no legislative or constitutional mandate appeared to exist—the sphere of the common law—judges exercised a "sovereign prerogative of choice." Their choices were "sovereign" because the common law they created was itself the creature of the state. . . . The great fallacy in jurisprudential thinking, Holmes believed, was the idea that judicial authority came from somewhere other than the sovereignty of the state.

⁶³ See Holmes to Frankfurter, November 4, 1915, in . Robert M. Mennel and Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934* (Hanover, NH: University Press of New England for the University of New Hampshire, 1996), 36–37; John Chipman Gray to Holmes (undated), Holmes Papers, Harvard Law Library, box 33, folder 23; Letter from Holmes to Gray, Oct. 27, 1914, Holmes Papers, box 33, folder 26, Harvard Law Library.

⁶⁴ Patrick J. Kelley, "The Life of Oliver Wendell Holmes, Jr.," *Washington University Law Quarterly* 68 (1990): 439 n.40.

Common law was not the product of some independent system of reason (“logic”) or the innate wisdom of judges.⁶⁵

As a result, the courts of one state should not set aside rules established by another sovereign in its own territory by applying its own, contrary law.

If it remains puzzling that Holmes’s critique of formalism would lead him to such a rigid conception of sovereignty, Holmes’s reasoning becomes more understandable when we consider his attack on the thinking that underlay *Swift v. Tyson*. This attack paved the way for *Erie v. Tompkin*’s rejection of “an independent, transcendent body of federal common law” three decades later.⁶⁶ Indeed, connecting *American Banana* to the demise of *Swift* makes clear the consistency of *American Banana* with Holmes’s larger jurisprudential commitments.

As Chapter 1 discusses, *Swift v. Tyson* had led federal judges to develop a federal common law that could promote unity in an expanding interstate economy. Story’s 1842 decision hinged on a distinction between local and general law, a distinction which implicated the relative competence of federal and state courts to make decisions. State courts were best suited to interpret matters unique to that particular state. Thus federal courts hearing state law claims in diversity cases had to follow state statutes, state court interpretations of those statutes, and local law, that is customs peculiar to the locality, such as real estate, which were “immovable and intraterritorial in their nature and character.”

By contrast, state courts and legislatures had no special insight into “questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation,” such as basic questions of contract interpretation. For these matters of general law, state courts were “called upon to perform the like functions as [federal courts,] that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition . . . or what is

⁶⁵ White, *Justice Oliver Wendell Holmes*, 379–381.

⁶⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

the just rule.” Because federal courts were equally competent, federal judges sitting in diversity cases could make these determinations on their own, setting aside state court precedents if they so chose. Indeed, because federal judges encountered these issues in a broader range of circumstances, they might even be better suited than state court judges to decide matters of general law. And at the very least, they could promote uniform rules across the entire nation.⁶⁷

While some commentators maintain that this general law remained state law despite its general nature, Story’s language suggested that federal judges were interpreting a federal common law, distinct from state law. Holmes, by contrast, was adamant that this made no sense. “The law of a state does not become something outside of the state court, and independent of it, by being called the common law,” he wrote in *Kuhn v. Fairmount Coal. Co.* In fact, what judges did when they decided cases was analogous to what legislatures did when they passed statutes. In both cases, law was being made—or as Holmes put it in *Kuhn*, law “does issue, and has been recognized by this Court as issuing, from the state courts as well as from the state legislatures.” Since Congress had no authority under the Constitution to legislate on matters reserved to the states, legislation at issue in diversity cases must be the law of the state. And if federal courts had to follow state law in the form of statutes, Holmes could think of no compelling reason they should not also have to follow state law as articulated by state courts. Because Holmes collapsed the distinction between judging and legislating, *Swift’s* distinction between general law and local law no longer made sense for him.⁶⁸

⁶⁷ *Swift v. Tyson*, 41 U.S. 1, 18-20 (1842); Caleb Nelson, “A Critical Guide to *Erie Railroad Co. v. Tompkins*,” *William & Mary Law Review* 54 (2012): 922–949; John Harrison, “Power of Congress over the Rules of Precedent, The,” *Duke Law Journal* 50 (2000): 526–527; William A. Fletcher, “General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance,” *Harvard Law Review* 97 (1984 1983): 1513.

⁶⁸ *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 372 (1910); Nelson, “A Critical Guide to *Erie Railroad Co. v. Tompkins*,” 975 Holmes conviction that law “does issue, and has been recognized by this Court as issuing, from the state courts as well as from the state legislatures,” was aided by municipal bond cases like *Gelpcke v. Dubuque*. The Supreme Court had held that state court decisions overruling prior constructions of state law could violate the

Over time, as progressive reformers came to perceive the federal courts wedded to formalism as obstacles to needed change, opposition to *Swift v. Tyson* began to grow, burnished by the scholarship of Charles Warren purporting to show that Justice Story had misconstrued the original meaning of the Judiciary Act of 1789. Reformers complained that the idea of a federal common law promoted pro-business forum shopping, for savvy plaintiffs could easily find a judge who would interpret the law in their favor.⁶⁹ While Holmes himself had been unwilling to overturn a “settled” precedent like *Swift*,⁷⁰ Justice Brandeis pointed to mounting criticism in the wake of Holmes’s dissent in *Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company* as justification to sweep *Swift* aside in *Erie*.⁷¹

In his 1938 opinion in *Erie*, Justice Brandeis drew repeatedly on Justice Holmes’s understanding of the nature of law. “If,” Holmes had written in his dissent in *Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company*,

there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law, so far as it is enforced in a state, whether called common law or not, is not the common law generally, but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.⁷²

The similarities with Holmes’s definition of law in *American Banana* are obvious. While Holmes and Brandeis had somewhat different motivations—with Holmes bristling at any idea of transcendental general law and Brandeis more eager to erase what he saw as *Swift*’s perverse

Contracts Clause. For Holmes, this was proof that the Court had recognized that judges make law and do not merely discover it. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (citing *Gelpcke v. Dubuque*, 68 U.S. 175 (1864)).

⁶⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73-75, 79-80 (1938); Urofsky, *Louis D. Brandeis*, 743-747.

⁷⁰ See, *Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company*, 276 U.S. 518, 533-534 (1928) ((citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372 (1910)).

⁷¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938).

⁷² *Black & White Taxicab*, 276 U.S. at 533-534; Nelson, “A Critical Guide to *Erie Railroad Co. v. Tompkins*,” 978-981.

effects for litigants⁷³—resistance to general law had generated similar conclusions. Their frustration with the concept of general law led to a seemingly formalistic embrace of sovereignty—of the several states in Brandeis’ case and of the nation-state in Holmes’s case. Ironically, however, this commitment stemmed directly from their efforts to combat prevailing classical orthodoxy.

Holmes’ hostility to general law, in turn, raised important questions about Root’s project to develop international law, questions first raised by the positivism of John Austin in the early eighteenth century but that would not become acute for international law until after the First World War.⁷⁴ Root envisioned a world in which impartial international tribunals applied international law to resolve many of the disputes that led to war. As discussed above, Root argued that international law embodied nations’ “universal consent” to rules that embodied an international standard of just conduct.⁷⁵ By speaking of a standard rather than a law, and by emphasizing its voluntary nature, Root sought to evade the Austinian challenge. But in so doing, he cast international law as the sort of “brooding omnipresence in the sky” that provoked Holmes to write *American Banana*.

By contrast, Holmes insisted that law was not “something outside of the state court [or legislature], and independent of it.” Law did not express a general standard of conduct—of justice or natural law—but reflected the sovereign will of legislatures and courts. There was no reason that a law declaring x could not be reversed to declare y as opinion changed. Because nation-states were sovereign, however, no sovereign rested above them to issue and enforce one

⁷³ Urofsky, *Louis D. Brandeis*, 746.

⁷⁴ David Kennedy, “International Law and the Nineteenth Century: History of an Illusion,” *Nordic Journal of International Law* 65 (1996): 396–397, 403–406, 415–416.

⁷⁵ Root, “The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts,” Presidential Address at the Third Annual Meeting of the American Society of International Law, April 23, 1909, in Root, *International Subjects*, 34–36.

set of rules rather than another. The reasoning underlying Holmes's opinion in *American Banana* raised the question of whether international law was even law at all.

V. Conclusion: Monsters of Two Natures?

Modern scholars tend to remember *American Banana* for establishing a presumption against extraterritoriality. But the case was not just about extraterritoriality. Holmes's opinion was a mini-treatise on sovereignty, one that also invoked *Underhill v. Hernandez's* act of state doctrine. These two strands—the presumption against extraterritoriality and the act of state doctrine—point to the decision's wider implications for separation of powers in foreign affairs. *Underhill* established that courts would not intervene if the acts of foreign nation-states were at issue. *American Banana* established a strong presumption that statutes passed by Congress did not apply overseas unless Congress specifically declared that they do. The Court had therefore ceded the floor to the executive branch, channeling the path of the law from *Underhill* and *American Banana* to the robust assertions of executive power over foreign relations announced in *United States v. Curtiss-Wright Corporation* and *United States v. Belmont*.⁷⁶

If a vision of separation of powers among the branches of the federal government lay at the heart of the case, it also had major implications for the relationship of the federal government to foreign states. The framework of dual federalism weakened within the United States over the course of the early twentieth century, as reformers called for greater federal power to deal with a changing economy. Overseas, however, a dual federalism was providing a legal model for informal expansionism. The United Fruit Company made this connection explicit by urging the Supreme Court to apply *United States v. E. C. Knight's* distinction between commerce and

⁷⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937). These cases are the paradigmatic statements of the constitutional primacy of the executive branch in foreign affairs.

production to the *American Banana* case to order U.S. foreign economic relations: “No statute of the United States can regulate trade in a foreign country. The power of Congress extends only to the regulation of commerce ‘among the several states or with foreign nations.’ Trade within the limits of a state is beyond its jurisdiction, and *a fortiori* must this be true of trade wholly in a foreign country.”⁷⁷ Holmes did not cite *E. C. Knight*, but the presumption against extraterritoriality achieved a similar outcome. In both cases, the existence of other sovereigns imposed a limit on the scope of federal power. *American Banana* therefore contributed to the internationalization of dual federalism advocated by Root.

This internationalization augured a twilight zone that would free corporations abroad from the sorts of legal obligation they faced (or should have faced) at home. From their beginnings, after all, corporations have played an important role in imperial expansion, giving them an ambiguous relationship to state power. As Lord Macaulay wrote,

the transformation of the [British East India] Company from a trading body, which possessed some sovereign prerogatives for the purposes of trade, into a sovereign body, the trade of which was auxiliary to its sovereignty, was effected by degrees and under disguise. . . . The existence of such a body as this gigantic corporation, this political monster of two natures, subject in one hemisphere, sovereign in another, had never been contemplated by the legislators or judges of former ages.⁷⁸

This was Roosevelt’s complaint about the trusts in the United States as they exploited the two levels of government to evade regulation. And now the presumption of extraterritoriality seemed to turn corporations into sovereigns overseas by further freeing them from such responsibilities.⁷⁹

But the shift in power to the executive branch and the development of international law ensured that corporations remained subjects—or rather citizens—both at home and overseas. For

⁷⁷ Brief for the Defendant in Error, at 42, *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1908).

⁷⁸ Thomas Babington Macaulay, *Government of India, A Speech Delivered in the House of Commons*, July 10, 1833, in Thomas Babington Macaulay, *The Miscellaneous Works of Lord Macaulay*, vol. 19 (Philadelphia: University Library Association, 1910), 142–154, 162–153.

⁷⁹ Though interestingly, even in the foreign policy context the possibility that the states who chartered corporations could act to regulate them remained. Cf. Dennis James Palumbo, “The States and American Foreign Relations” (Unpublished Ph.D. Dissertation, University of Chicago, 1960), 48–88.

while Congress' statutes were presumptively limited to the territorial United States, and while courts would stay out of any controversy involving the acts of foreign governments, the executive branch remained to protect the interests of corporations overseas and challenge protectionism or unfair treatment. This created a certain affinity between government and business that ensured corporations continued to operate under the flag. In these respects, *American Banana* supported and furthered the goals of Root's foreign policy.

Nevertheless, Root and Holmes disagreed on the nature and sources of law, and Holmes's critique of formalism raised questions about the intellectual foundations of Root's program for international law. As the next chapter explains, jurists frustrated by classical legal thought's inability to deal with the social problems generated by industrialization would develop Holmes's critique of formalism and create radically new approaches to jurisprudence. Their critique carried important implications for law's place in U.S. foreign relations. Inspired by this revolution, President Woodrow Wilson would reject Root's faith in court-administered international law, in the harmonizing power of economic interdependence, and even in the centrality of sovereignty itself. *American Banana* therefore stands at a junction in the law of U.S. foreign relations, furthering Root's vision of an international system rooted in national sovereignty while anticipating an alternative framework.

CHAPTER THREE

THE HIGHER LEGALISM OF WOODROW WILSON

I. Introduction

No individual is more pivotal in the history of World War I than Woodrow Wilson, and Wilsonianism has become synonymous with the idea that law should govern international affairs as well as domestic ones.¹ But in recent years historians have undermined the easy association between law and Wilsonianism that long prevailed. Wilson in fact rejected the ideas of the international lawyers who promoted law as the basis for postwar peace. As Stephen Wertheim has argued, Wilson's conception of the League of Nations relied "on the expedient proclamations of political councils, not on legal rulings backed by automatic sanctions." Whereas George Kennan and others after him tended to conflate Wilsonian internationalism with previous law-based schemes like The Hague system,² Wilson broke from this legalist tradition. According to Wertheim, the failure to recognize this divergence "has reduced early twentieth-century internationalism to a caricature: one-dimensional, polarizing, and, not least, inaccurate."³

¹ On Wilson's importance, see John Milton Cooper, *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (New York: Cambridge University Press, 2001), 2. For an example of the association of Wilsonianism with law, see, for example, Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Routledge, 2002), 9.

² George F. Kennan, *American Diplomacy, Sixtieth-Anniversary Expanded Edition* (Chicago: University of Chicago Press, 2012), 82-83; George F. Kennan, "Lectures on Foreign Policy," *Illinois Law Review* 45 (1951): 731-42.

³ Stephen Wertheim, "The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914-1920," *Diplomatic History* 35, no. 5 (November 2011): 798, 830.

Wertheim is right about the disagreement between Wilson and the international lawyers who favored a court-centered league. But by casting Wilsonianism as political rather than legal, he risks a similarly one-dimensional understanding of American law in the early twentieth century that obscures the diverse ways legal thought impacted U.S. foreign relations. The battle over the League of Nations in the United States was not a struggle between legalism and “a looser, organicist alternative” as much as it was a struggle between competing understandings of law.⁴ Above all, the divide between classical legal thought and sociological jurisprudence familiar to historians of domestic American law influenced the way Americans thought about international affairs at this pivotal moment.

The early twentieth century marked the high point of classical legal thought (or legal formalism), which rested on the ability of judges to draw boundaries through a process of deduction from general principles. At home, legal formalists worked to maintain the boundary separating the powers of the federal government from those of the several states. Internationally, they sought to extend this framework to clarify the boundaries separating one nation or empire from another, believing this to be the key to global peace. In developing the League of Nations, however, President Woodrow Wilson rejected their program. While most international lawyers favored international tribunals that could clarify a nation’s obligations, Wilson wanted a legislative body that could more flexibly address international instability. Unlike the state-centered legal formalists preoccupied with sovereignty, Wilson emphasized transnational threats like Bolshevism, disease, and the struggle between labor and capital. Yet law equally shaped Wilson’s program, which emerged from the sociological critique of classical legal thought

⁴ Ibid., 798. For an excellent analysis of Wilson’s “view of law as ratifying social practice rather than originating it” that anticipates some themes of my argument, see John A. Thompson, “Woodrow Wilson and a World Governed by Evolving Law,” *Journal of Policy History* 20, no. 1 (January 2008): 113–25.

pioneered by jurists like Harvard Law School Dean Roscoe Pound and Supreme Court Justice Louis Brandeis.⁵

In other words, the debate between classical legal thought and sociological jurisprudence had an enormous impact on U.S. policy during the First World War, and the fight over the League of Nations was in part a struggle between two different understandings of law. For legal formalists, national sovereignty remained paramount, even in an increasingly interconnected world. For sociological jurists, however, growing global interdependence required greater international cooperation that overrode the formalist understanding of sovereignty. The League's failure in the United States stemmed from a stalemate between these two competing theories of law, a stalemate that would not be overcome until the Great Depression and the Second World War.

II. Classical Legal Thought and the First World War

As I argued in the first two chapters, the legal formalism that ordered relations between the federal government and the states provided a model for organizing international relations between the United States and foreign sovereigns. Drawing on dual federalism, Secretary of State Elihu Root emphasized that national (and imperial) governments should manage their own internal affairs. But Root balanced this new emphasis on foreign sovereignty with a presumption

⁵ While some commentators have suggested I use the terms conservative and progressive to describe these two theories of law, the distinction conservatism and progressivism is too muddled. Consider, for example, Jonathan Lurie, *William Howard Taft: The Travails of a Progressive Conservative* (New York: Cambridge University Press, 2011). Instead, I regard the debate as one between classical legal thought and sociological jurisprudence. Classical legal thought fits the boundary-drawing approach of "progressive conservatives" like Taft and Elihu Root well. While my terminology raises other complicated issues (for example, about the relationship between sociological jurisprudence and legal realism), one benefit of this approach is that it links developments in the United States to wider global trends. While less convincing after 1945, Duncan Kennedy's framework generally accords with my argument during the first half of the twentieth century. Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 19-73. Thus the story I tell is particular to the United States but also part of a transnational evolution in legal thought.

that less powerful nations desired commerce and that their economies were in natural harmony with the United States'. Relying on a gendered theory of civilizational difference, he expected that private actors—U.S. corporations and businesspeople—would transcend the formal boundaries between nations and promote economic integration. Finally, he concluded that international peace required an impartial umpire that could play the role that the judiciary played within the United States. International law would delineate the boundaries within which nation-states (and empires) were sovereign, and the umpire would ensure that no state (or empire) encroached upon the domain of another. While Root shared the formalist belief that law was an objective science, he believed that national judiciaries lacked the impartiality to administer international law. Instead, he sought to build an international judiciary and to develop international tribunals that would use legal expertise to resolve international disagreements.⁶

But the First World War seemed to discredit their program, for war broke out despite unmistakable international legal obligations. In December 1914 international lawyer John Bassett Moore addressed the American Political Science Association in the shadow “of one of the most appalling wars in history,” which was then only five months old. The war was appalling, Moore admitted, “not only because of its magnitude and destructiveness but also because of its frustration of hopes widely cherished that the progress of civilization had rendered an armed conflict between the leading powers of the world morally impossible.” The war seemed to expose international law as resting on nothing more than force.⁷ As German Chancellor

⁶ Root, *International Subjects*, 36–41.

⁷ John Bassett Moore, “Law and Organization, Presidential Address [at] the Eleventh Annual Meeting of the American Political Science Association,” *The American Political Science Review* 9, no. 1 (February 1915): 1–2.

Theobald von Bethmann-Hollweg infamously remarked, the treaty guaranteeing Belgian neutrality was merely a “scrap of paper.”⁸

Indeed, Germany had invaded Belgium even though it had pledged to respect Belgian neutrality. There was no ambiguity for a court to resolve, no need for judges to develop principles that would better mark the boundary between Germany and its Belgian neighbor. “No code, convention or treaty, could establish rights any more clearly than the rights of Belgium were established, or, indeed, the rights of Serbia,” Root confessed. “Yet Germany overran Belgium's rights in confessed violation of law, and Austria overran Serbia’s rights under a perfectly transparent pretence [sic].”⁹

International lawyers horrified by the war, however, refused to concede law’s futility.¹⁰ Between the fall of 1914 and the spring of 1915, Anglo-American opinion converged around the idea of a new international institution that would prevent future wars. In the United Kingdom, a group of critics of British diplomacy under former British Ambassador to the United States Lord Bryce distributed their “Proposals for the Avoidance of War.” This document called for a moratorium on war, for the submission of justiciable disputes to arbitration, for a multilateral council that would resolve political disputes, and for a regular conference to develop international law.¹¹ The Proposals, in turn, influenced American visions for an institution to end war. The most prominent association, the League to Enforce Peace (LEP), was founded in 1915

⁸ On the Chancellor’s remark, see T. G. Otte, “A ‘German Paperchase’: The ‘Scrap of Paper’ Controversy and the Problem of Myth and Memory in International History,” *Diplomacy & Statecraft* 18, no. 1 (February 22, 2007): 53–87.

⁹ Letter from Root to George Gibbons, Dec. 8, 1916, Elihu Root Papers, Library of Congress, Box 136..

¹⁰ See Benjamin Allen Coates, “Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919” (Unpublished Ph.D. Dissertation, Columbia University, 2010), 396.

¹¹ Martin David Dubin, “Toward the Concept of Collective Security: The Bryce Group’s ‘Proposals for the Avoidance of War,’ 1914-1917,” *International Organization* 24, no. 2 (April 1970): 288–297.

under the leadership of former U.S. President William H. Taft and current Harvard President A. Lawrence Lowell.¹²

To Root's idea of the international adjudication of justiciable disputes, the LEP added the Bryce group's idea of a council of conciliation for non-justiciable ones. Most importantly, the LEP advocated a sanction to make its dispute resolution provisions effective and to address the challenge the war posed to the very idea of international law. The LEP proposed that members of a league of nations "shall jointly use forthwith both their economic and military forces against any one of their number that goes to war, or commits acts of hostility against another of the signatories," before submitting the matter to the judicial tribunal or the council of conciliation. While members could ignore the league's decisions and recommendations, failure to at least submit a dispute for peaceful resolution triggered an economic boycott and then authorized military force against the offending party.¹³

With its powerful roster of backers, the LEP became the leading organization in the drive to devise postwar reforms to preserve peace, but its prominence aroused the suspicion of a jealous President. In May 1916, a year before the U.S. entry into the war, Wilson addressed the organization. Careful to emphasize that *he* was the "spokesman of our government," the President refused to discuss the LEP's agenda, which he found "a very much too definite programme." But he did hope that "a great consummation" would bring about "some common

¹² Ibid., 299–301; Coates, "Transatlantic Advocates," 380–381, 385–392; Lloyd E. Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition: The Treaty Fight in Perspective* (New York: Cambridge University Press, 1987), 6.

¹³ League to Enforce Peace, *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace, Washington, May 26-27, 1916* (New York: The League to Enforce Peace, 1916), 189–190; Coates, "Transatlantic Advocates," 386–388; Dubin, "Toward the Concept of Collective Security," 300–301.

force” that would promote justice and preserve peace around the world, and he outlined his general sympathy for the idea of a postwar organization.¹⁴

Meanwhile, eager to retain a broad base of support that included many pacifists, the LEP found itself at odds with more pugnacious advocates of U.S. entry into the war like former President Theodore Roosevelt.¹⁵ Once the United States joined the war against Germany, however, such gaps narrowed. Members joined Roosevelt in condemning any settlement short of victory.¹⁶ American belligerency also masked the divisions with President Wilson. “The American people,” Roosevelt wrote, “must support President Wilson unflinchingly in the stand to which he is thus committed, against any slackening of effort, and against accepting any premature peace or any peace other than the peace of overwhelming victory”¹⁷ As everyone now recognized, implementing any postwar plan first required defeating Germany, a goal that united Wilson, Roosevelt, and the LEP.

III. The Sociological Alternative

Yet in the spring of 1918, Taft envisioned Wilson “alone, solemnly closeted with a typewriter in the White House,” drafting the peace treaty “until he gets stuck and then calls in those eminent statesmen and international jurists, Col. House and Mr. Creel,” non-lawyers unconnected to the League to Enforce Peace and the formalist legal program.¹⁸ Taft’s sarcasm highlighted an important fact about Wilson’s postwar planning. Rather than calling upon these

¹⁴ From the Diary of Colonel House, August 15, 1918, in *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1966), 49: 267.

¹⁵ See Letter from A. Lawrence Lowell to Theodore Roosevelt, Jan. 3, 1917, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20; Letter from Roosevelt to Lowell, Jan. 6, 1917, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20.

¹⁶ Letter from Lowell to Roosevelt, May 6, 1918, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20.

¹⁷ Draft by Theodore Roosevelt, *The Dangers of a Premature Peace*, [1918], Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20.

¹⁸ William H. Taft to Lowell, March 19, 1918, *ibid.*

statesmen and jurists, Wilson actively rejected their input. The president's leading legal adviser at the Paris Peace Conference was David Hunter Miller, "a virtual unknown in international law circles."¹⁹

Colonel House, one of Wilson's key advisers, suggested that the president include Roosevelt, Taft, or Root in the peace delegation. Wilson rejected Taft and Roosevelt out of hand, and told House that Root had a "lawyer's mind and since he was getting old his mind was narrowing rather than broadening."²⁰ Lawyers *within* Wilson's administration received similar treatment. Secretary of State Robert Lansing, who had ties to Root and other international lawyers through the American Society of International Law, offered Wilson some advice in Paris on a draft of the league covenant. The president informed Lansing that he was uninterested in any of his suggestions. "He also said with great candor and emphasis," Lansing added, "that he did not intend to have lawyers drafting the treaty of peace."²¹ In November 1917, Wilson told Swiss envoy William Emmanuel Rappard that the league's constitution was "a matter of moral persuasion more than of legal organization."²²

Scholars have identified Wilson's *rejection* of law and lawyers as an important reason for the failure of Wilson's plans for a postwar international organization.²³ As Stephen Wertheim writes, "Even though embracing legalistic ideas might have won him the backing of key

¹⁹ Coates, "Transatlantic Advocates," 413–414.

²⁰ From the Diary of Colonel House, August 15, 1918, in *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1966), 49: 267.

²¹ Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin Company, 1921), 107.

²² William E. Rappard, "Woodrow Wilson, La Suisse et Genève," in *Centenaire Woodrow Wilson, 1856-1956* (Geneve, Switzerland: Centre Europeen de la Dotation Carnegie, 1956).

²³ Thomas J Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (Princeton: Princeton University Press, 1995); David S. Patterson, *Toward a Warless World: The Travail of the American Peace Movement, 1887-1914* (Bloomington: Indiana University Press, 1976), 254–255; Warren F. Kuehl, *Seeking World Order: The United States and International Organization to 1920* (Nashville: Vanderbilt University Press, 1969), 332–335.

Republicans, Wilson refused. He sidestepped Root's overtures, dismissing lawyers as relics."²⁴ Wertheim attributes the president's disdain for law to his "organicist and evolutionary understanding of political development" which entailed "an anti-institutional institution—never too fixed, constantly remolding itself around the vital forces of society," and which sought a "radical transformation" of the international system. According to Wertheim, this desire for a "plastic enough" League reflected the influence of Edmund Burke, Walter Bagehot, and Hegel on Wilson's constitutional thought, along with his "quintessentially American rejection of European power politics."²⁵

Wilson's disdain for lawyers and his insistence that the league was a moral rather than legal endeavor suggest that law was peripheral to his vision for the League of Nations.²⁶ But just as Wilson's plan for the league "was actually the product of specific political and diplomatic circumstances," it was also the product of particular legal circumstances.²⁷ Legal formalism was under strident attack at home. As Root sought to extend American-style federalism overseas to organize international relations, other American lawyers questioned classical legal thought and laid the foundations for a new approach to thinking about law that would lead to legal realism.²⁸

Chicago law professor and Harvard Law School Dean Roscoe Pound was the foremost exponent of this new "sociological jurisprudence." It aimed to enable legislators and judges "to take more account, and more intelligent account, of the social facts upon which law must

²⁴ Stephen Wertheim, "The League That Wasn't," 799; Niels Thorsen, *The Political Thought of Woodrow Wilson, 1875-1910* (Princeton: Princeton University Press, 1988), 89–116; Thompson, "Woodrow Wilson and a World Governed by Evolving Law."

²⁵ Stephen Wertheim, "The League That Wasn't," 828–830.

²⁶ *Ibid.*, 801, 818.

²⁷ Thompson, "Woodrow Wilson and a World Governed by Evolving Law," 119.

²⁸ On the differences between sociological jurisprudence and legal realism, see G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," *Virginia Law Review* 58 (1972): 999–1028; Duncan Kennedy, "Three Globalizations," 25; Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 169–171.

proceed and to which it must be applied.” This first involved “study of the actual social effects of legal institutions and legal doctrines.”²⁹ Pound therefore rejected “a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles,” and he decried judges who “aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance.” Instead, he believed law was “a practical matter” and urged judges to set aside “a mechanical administration of justice” and to think about justice “in concrete cases.”³⁰

Sociological jurisprudence began with Pound’s realization that law was out of touch with reality, that law in the books did not accord with law in action.”³¹ Social and economic change had created “gaps” that the law needed to fill. Whereas legal formalists regarded themselves as “logically compelled” to fill these gaps in a certain way by the need for coherent principles, social jurists complained that this kept them from honestly adapting law to changing conditions. Formalist judges merely pretended to be objective as they adapted law to fill those gaps. In reality, they took sides in social struggles under a veneer of objectivity.³²

The sociological jurists also rejected formalist orthodoxy’s preoccupation with boundaries and categorical thinking. They tended to “transform differences of kind into differences of degree, replacing formalism’s black and white with new shades of grey.”³³ They called into question not just deduction from general principles to more specific ones, but also

²⁹ Roscoe Pound, “Scope and Purpose of Sociological Jurisprudence,” *Harvard Law Review* 25 (1912): 512–513.

³⁰ Roscoe Pound, “Scope and Purpose of Sociological Jurisprudence,” *Harvard Law Review* 24 (1911): 596.

³¹ Roscoe Pound, “Law in Books and Law in Action,” *American Law Review* 12–36 (1910); Horwitz, *The Transformation of American Law, 1870-1960*, 187–188.

³² Duncan Kennedy, “Three Globalizations,” 39–40.

³³ Horwitz, *The Transformation of American Law, 1870-1960*, 199.

analogical reasoning from one case to a similar category of cases.³⁴ As Horwitz argues, “Analogical reasoning—the ability to say that one case was like another—was central to all theories that distinguished legal reasoning from political reasoning or sought to show that judging was a function of reason, not of will.” If judges simply applied settled principles to analogous situations, then judging was not legislating and judges could plausibly claim neutrality. Sociological jurists, by contrast, scoffed at this idea of judicial neutrality³⁵

In fact, Pound charged that legal formalism generated a misplaced focus on the appellate judges “employed in working out a consistent, logical, minutely precise body of precedents.” Echoing Oliver Wendell Holmes, Jr., Pound countered that “the life of the law is in its enforcement.” The trial judge who actually heard real cases deserved more serious attention.³⁶ And a fixation on courts was misplaced to begin with. As Pound explained, common law judging served a purpose when judges stood between the crown and the people. But in twentieth-century America, there was no longer any need for judges to do the work of the legislature. As Pound wrote, “Today, when [a court] assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it. Hence the side of the courts is no longer the popular side.”³⁷

Sociological jurists concluded that courts were ill suited to regulating a modern society. “They have the experience of the past,” Pound declared. “But they do not have the facts of the present.” Legislation was more democratic, and legislatures could put “the sanction of society on

³⁴ Ibid., 202–203.

³⁵ Ibid.

³⁶ Pound, “Scope and Purpose of Sociological Jurisprudence,” 1912, 514.

³⁷ Roscoe Pound, “Common Law and Legislation,” *Harvard Law Review* 21 (1908): 403–407.

what has been worked out in the sociological laboratory.”³⁸ Social jurists therefore turned to the social sciences to inform law, to sociology, economics, and psychology. One of their favorite tools was the “study,” which sought to alert the middle class to pressing social problems in the belief that they would then advocate for change.³⁹

Louis D. Brandeis, whom Wilson appointed to the Supreme Court in 1916, observed that the industrial revolution had wrought a dramatic change in American society. While slavery had ended, workers began to toil in factories, and inequality between worker and employer prevailed. According to Brandeis, political scientists and economists heeded these changes and began to prescribe remedies to alleviate the new dangers to liberty wrought by large corporations. But judges stood in the way. “In the course of relatively few years,” Brandeis explained, “hundreds of statutes which embodied attempts (often very crude) to adjust legal rights to the demands of social justice were nullified by the courts, on the grounds that the statutes violated the constitutional guaranties of liberty or property.” By 1912, a full-blown assault on the judiciary was under way as Americans became exasperated with a narrow elite impeding necessary change.⁴⁰

But Brandeis rejected calls to set aside judges and courts. “What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task.”⁴¹ Brandeis called for an “alliance between the social sciences and the movement for legal reform,” an alliance embodied by his 1908 brief in *Muller v. Oregon* presenting the Supreme Court with social science rather than legal citation.⁴²

³⁸ Ibid.

³⁹ Duncan Kennedy, “Three Globalizations,” 43.

⁴⁰ Louis D. Brandeis, “The Living Law,” *Illinois Law Review* 10 (1916): 463–464.

⁴¹ Ibid., 468.

⁴² Horwitz, *The Transformation of American Law, 1870-1960*, 209; Duncan Kennedy, “Three Globalizations,” 43. The case involved the constitutionality of a maximum hour requirement for women workers.

According to Brandeis, lawyers and judges needed to study economics, politics, and sociology, fields “which embody the facts and present the problems of today.” The result would be a “living law.”⁴³

Pound’s and Brandeis’ ideas revealed the sociological jurists’ belief that a better understanding of social realities would drive legal reform. This, in turn, called into question the legal formalists’ assumption that law was “natural, neutral, and apolitical.”⁴⁴ As Morton Horwitz has argued, the sociological attack on formalism entailed a critique of the efficacy and efficiency of the market: “This vision of a self-executing, competitive market constituted the foundation of all efforts to create a sharp separation in legal thought between processes and outcomes, between means and ends, and between law and politics.”⁴⁵ Faith in a global market had reconciled Root’s commitment to national sovereignty with his commitment to international economic integration.⁴⁶ The sociological jurists replaced the formalists’ faith in processes with a new consequentialism that instead examined actual outcomes. Legal rules were simply a means to social purposes.⁴⁷

Sociological jurists also attacked the formalists’ distinction between a public realm of law and a private realm in which individuals were free to operate without constraint.⁴⁸ The breakdown of the public-private distinction was not unique to the United States. As Duncan Kennedy argues, it was part of a global transformation in which the preeminence of German legal science gave way to new intellectual influences, particularly from France.⁴⁹ One

⁴³ Brandeis, “The Living Law,” 470.

⁴⁴ Horwitz, *The Transformation of American Law, 1870-1960*, 188–189.

⁴⁵ *Ibid.*, 194.

⁴⁶ See, e.g., “How to Develop South American Commerce,” in Root, *Latin America and the United States*, 245–267.

⁴⁷ Horwitz, *The Transformation of American Law, 1870-1960*, 194–195; Duncan Kennedy, “Three Globalizations,” 39.

⁴⁸ Horwitz, *The Transformation of American Law, 1870-1960*, 206–207.

⁴⁹ Duncan Kennedy, “Three Globalizations,” 37–38.

consequence of this shift was a changing conception of society. Social jurists rejected the individualist ethos of classical legal thought and placed a new emphasis on interdependence brought about by urbanization, industrialization, and globalization.⁵⁰

In addition to a general emphasis on interdependence, sociological jurists no longer conceived of society as individuals living in a nation-state. Instead, they began to argue that intervening groupings of individuals in society—groupings like class, labor and capital, and national minorities—also mattered for law. As Duncan Kennedy writes, “So the social people were against the tendency in [classical legal thought] to deny the juristic reality of anything other than an individual or a state.” These non-state entities contributed to the health of the entire body politic, and they had developed their own norms. Instead of letting individuals vote in order to aggregate the preferences of individuals composing society, social jurists believed the state should simply coordinate these preexisting groups to ensure that they fit together harmoniously, deferring to their own norms. Unlike Marxists who predicted inherent conflict among these different groups, social jurists assumed these groups could work together. Their thinking tended toward corporatism.⁵¹

The struggle between labor and capital was perhaps the paradigmatic example of this dynamic. The growing interdependence of society meant that “industrial warfare” entailed dire consequences for society. Whereas the legal formalists would have deferred to the sanctity of the contract between a worker and his employer, social jurists claimed the public’s interest in social cohesion and industrial peace trumped private law notions of contract. They expanded law into “the domain of right, will, and fault,” the heretofore prevailing conception of law that gave free

⁵⁰ Ibid.

⁵¹ Ibid., 41–42.

scope to individuals' freedom to act so long as they did not impede the right of others to do the same.⁵²

With the outbreak of World War I, the sociological jurists' thinking about industrial peace spilled over into discussions of international law and led to "the self-conscious rejection of the 'logic of sovereignty.'" As Kennedy suggests, the language of "industrial warfare" fed into discussions of regular war, and attacks on property law naturally supported critiques of sovereignty.⁵³ In other words, sociological jurisprudence, like classical legal thought, bore important implications for international law and offered powerful analogies with which to think about international problems.⁵⁴ "Holmes, and later Roscoe Pound, would be the great theorists of sociological jurisprudence, but Louis Brandeis would be its great practitioner," observes Brandeis' biographer Melvin Urofsky.⁵⁵ And Woodrow Wilson would be its great practitioner in the realm of international affairs.

IV. The League Fight and Wilson's Social Vision of Law

Wilson had an above-average familiarity with debates about law. As a professor of politics, Wilson had taught classes on legal history and jurisprudence. In 1894, the *Daily Princetonian* published a list Wilson prepared of recommended books on law and jurisprudence. Wilson's list was a mixture of German, English, and American scholarship and included Puchta, Maine, Austin, and Holmes.⁵⁶ But Wilson's administrative responsibilities as Princeton's president cut back on his ability to stay abreast of emerging legal scholarship. "My days are full of business," he wrote to Mary Hulbert Peck, his alleged mistress, "my head goes round with the

⁵² Ibid., 42–43.

⁵³ Ibid., 47.

⁵⁴ Perhaps ironically, given sociological jurists attacks on analogical reasoning.

⁵⁵ Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 76n.

⁵⁶ Recommending Reading in Jurisprudence and the History of Law, January 9, 1894, in *PWW*, 8:421.

confused whirl of university politics; I read no books, no, nor anything else that might renew my mind or quicken my imagination”⁵⁷ “I don’t have time, either, to keep up with the present books,” he told the *New York World*, “though I get some idea of the best of them from what my friends tell me.”⁵⁸

One of those friends was Brandeis. Wilson said he “had formed a very high opinion of him, and many of his ideas have made a deep impression on me.”⁵⁹ As House told Wilson, “His mind and mine are in accord concerning most of the questions that are now to the fore.”⁶⁰ Brandeis’ views particularly shaped Wilson’s antitrust platform in the 1912 election.⁶¹ Whereas Theodore Roosevelt had advocated more robust government regulation to ensure that large corporations did not abuse their power, Brandeis advised Wilson to “restore” competition by breaking up trusts.⁶²

As a scholar, Wilson also expressed sympathy and familiarity with key tenets of sociological jurisprudence. For instance, Wilson’s presidential address to the American Political Science Association maintained that law

is subsequent to fact; it takes its origin and energy from the actual circumstances of social experience. Law is an effort to fix in definite practice what has been found to be convenient, expedient, adapted to the circumstances of the actual world. Law in a moving, vital society grows old, obsolete, impossible, item by item. It is not necessary to repeal it or to set it formally aside. It will die of itself,—for lack of breath,—because it is no longer sustained by the facts or by the moral or practical judgments of the community whose life it has attempted to embody.

Wilson shared the sociological jurists’ belief that the public-private distinction had broken down amid society’s greater interdependence. “Business is no longer in any proper sense a private

⁵⁷ Wilson to Mary Allen Hulbert Peck, June 19, 1909, in *ibid.*, 19:261.

⁵⁸ Interview with the *New York World*, September 18, 1910, in *ibid.*, 21:136.

⁵⁹ Wilson to Abbott Lawrence Lowell, November 12, 1912, in *ibid.*, 25:541.

⁶⁰ Edward Mandell House to Wilson, November 22, 1912, in *ibid.*, 25:558.

⁶¹ Urofsky, *Louis D. Brandeis*, 341–352, 384–396; John Milton Cooper, *Woodrow Wilson: A Biography* (New York: Alfred A. Knopf, 2009), 162–163, 167.

⁶² See Brandeis to Wilson, September 30, 1912, in Link, *PWW*, 25:287–304.

matter . . . conducted by independent individuals, each acting upon his own initiative in the natural pursuit of his own economic wants,” he declared. Instead, the large companies that composed the economy “exist only by express license of law and for the convenience of society, and which are themselves, as it were, little segments of society.” Law thus managed not individuals but aggregations. “As experience becomes more and more aggregate,” Wilson insisted, “law must be more and more organic, institutional, constructive. It is a study in the correlation of forces.”⁶³

For all his talk of disdaining lawyers, moreover, Wilson also sounded strong notes in defense of law. As Wilson told the American Federation of Labor, “There are some organizations in this country whose object is anarchy and the destruction of law, but I would not meet their efforts by making myself partner in destroying the law.”⁶⁴ Yet Wilson also shared the sociological jurists’ mistrust of judges. “The Constitution, like the Sabbath, was made for man and not man for the Constitution,” Wilson declared. Many judges, however, “seemed to think that the Constitution was a straitjacket into which the life of the nation must be forced, whether it could be with a true regard to the laws of life or not.” Such judges would soon “pass unnoticed from the stage. And men must be put forward whose whole comprehension is that law is subservient to life and not to law. The world must learn that lesson—the international world, the whole world of mankind.”⁶⁵

Through the League of Nations, Wilson sought to teach the world this lesson that law must serve society’s needs. Wilson’s program for the League rejected each of the core elements of Root’s vision of international law: it replaced national sovereignty as the basic principle of

⁶³ Woodrow Wilson, “The Law and the Facts: Presidential Address, Seventh Annual Meeting of the American Political Science Association,” *The American Political Science Review* 5, no. 1 (February 1911): 1, 9.

⁶⁴ An Address in Buffalo to the American Federation of Labor, November 12, 1917, in *PWW*, 45:16.

⁶⁵ An After-Dinner Talk to the Gridiron Club, December 9, 1916, in *ibid.*, 40:196.

international relations, it eschewed Root's rosy faith in the inevitability of harmonious economic integration, and it rejected an international court as a cornerstone of the hope for peace.

The origins and evolution of Article X of the League Covenant illuminate Wilson's radically different conception of sovereignty. For Wilson, Article X "constitute[d] the very backbone of the whole covenant. Without it the league would be hardly more than an influential debating society."⁶⁶ In Article X, the League's signatories pledged "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." The article presupposed sovereignty as a foundation of international order, but members of the League agreed to limit their own sovereignty to uphold this framework. As Root complained to Henry Cabot Lodge, "It stands upon its own footing as an independent alliance for the preservation of the status quo."⁶⁷ The final version therefore contained a certain tension, which opponents of the League exploited in 1919. Wilson himself, of course, tried to cut through this tension by insisting that the commitment under Article X "is a moral, not a legal obligation, and leaves our Congress absolutely free to put its own interpretation upon it in all cases that call for action. It is binding in conscience only, not in law."⁶⁸

Wilson's original vision, however, was far more radical. Article X was only a shell of the provision contained in Wilson's First Paris Draft. This draft, produced around January 8, 1919, amended an earlier draft Wilson had worked out in the summer and fall, "the most important

⁶⁶ A Conversation with Members of the Senate Foreign Relations Committee, August 19, 1919, in *ibid.*, 62:343.

⁶⁷ Root to Henry Cabot Lodge, June 19, 1919, Elihu Root Papers, Library of Congress, Box 161.

⁶⁸ A Conversation with Members of the Senate Foreign Relations Committee, August 19, 1919, in *PWW*, 62:343.

document that he would take with him to the Paris Peace Conference.”⁶⁹ Wilson’s First Paris Draft incorporated the ideas of South Africa’s Jan Smuts laid out in a December 26 memorandum, such as Smuts’ mandate proposal and basic structure for the League.⁷⁰ But Wilson left his own Article III unchanged. “The Contracting Powers,” it read

unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination and also such territorial readjustments as may be in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.⁷¹

This eventually became Article X. But whereas Article X enshrined political independence and territorial integrity, Wilson’s original version gave the League a substantial and continuing power to readjust borders, and it elevated “the peace of the world” at the expense of sovereignty.

Not surprisingly, this radical proposal generated considerable opposition. David Hunter Miller, Wilson’s legal adviser, thought it went too far. With respect to the first sentence, Miller agreed that nations should pledge to respect the independence and integrity of other states, but requiring them to guarantee it against the acts of other states “looks towards intervention and war by one or more of the guarantors, and is in accord only with the spirit of the old diplomacy.” He accepted the rationale for rest of Article III; after all, the peace conference could not solve all the territorial claims generated by the breakup of the major empires. But he thought Wilson’s language was counterproductive. Article III would make “dissatisfaction permanent” and would

⁶⁹ Wilson to House with enclosure, September 7, 1918, in *ibid.*, 49:467–471; A Draft of a Covenant of a League of Nations, c. January 8, 1919, in *ibid.*, 53:655 n.1; Knock, *To End All Wars*, 153–154; Cooper, *Breaking the Heart of the World*, 29–30.

⁷⁰ A Memorandum, December 26, 1918, in *PWW*, 53:515; Peter Raffo, “The Anglo-American Preliminary Negotiations for a League of Nations,” *Journal of Contemporary History* 9, no. 4 (October 1974): 167.

⁷¹ A Draft of a Covenant of a League of Nations, c. January 8, 1919, in *PWW*, 53:656–657.

“legalize irredentist agitation in at least all of Eastern Europe.” Miller instead urged Wilson to downplay the redrawing of borders and emphasize the rights of minorities. His revised provision abandoned collective security and added a provision codifying the Monroe Doctrine.⁷²

Despite these misgivings, Wilson retained the provision in his revised Second Paris Draft.⁷³ A complicated series of negotiations with the British then ensued. First, Miller met Lord Robert Cecil, the head of the League of Nations section of the British delegation, and they produced a revised draft based on Wilson’s Second Paris Draft that rested on Wilson’s underlying ideas. Miller developed another draft with his British counterpart Sir Cecil Hurst in another attempt at compromise, this draft based on Hurst’s own draft and thus more British in nature. In the process, Wilson’s objectionable language in Article III about border revision was set aside, and only the initial clause about political independence and territorial integrity remained. As Peter Raffo has observed, “The article became, therefore, a straightforward, unqualified, guarantee of territorial integrity and political independence. In effect, what was to become the infamous Article X sort of sneaked into the Covenant!”⁷⁴

Wilson, however, was not happy with the Hurst-Miller Draft and rewrote his Second Paris Draft. But this Third Paris Draft contained the abridged form of Article III: “The Contracting Powers undertake to respect and to protect as against external aggression the political independence and territorial integrity of all States members of the League.”⁷⁵ Yet having won considerable concessions from the Americans, the British reacted with fury as Wilson sought to backtrack on the Hurst-Miller Draft. Just before the opening of the first

⁷² Wilson’s Second Draft or First Paris Draft, January 10, 1919, with Comments and Suggestions by D. H. M. in David Hunter Miller, *The Drafting of the Covenant* (New York: G.P. Putnam’s Sons, 1928), 2:70–72.

⁷³ Wilson’s Second “Paris Draft” of the Covenant, January 18, 1919, in *PWW*, 54:140.

⁷⁴ Raffo, “The Anglo-American Preliminary Negotiations for a League of Nations,” 168–171; For the Hurst-Miller’s version of Article III (now Article VII), see The Hurst-Miller Draft of the Covenant of the League of Nations, February 2, 1919, in *PWW*, 54:435.

⁷⁵ The First Version of the Third “Paris Draft” of the Covenant of the League of Nations, February 2, 1919, in *PWW*, 54:442.

meeting of the Commission of the League of Nations, Wilson agreed to reinstate the Hurst-Miller Draft.⁷⁶ A confused Miller had arrived with copies of Wilson's Third Paris Draft and had to rush back to obtain copies of the Hurst-Miller Draft.⁷⁷

The Hurst-Miller draft therefore became the basis of negotiations at Versailles. Three articles of this draft were “undeniably Wilsonian”: Article VIII on disarmament, Article X's territorial guarantee, and Article XI's stipulation that threats of war implicated all members of the league. The rest of the provisions bore the imprint of Jan Smuts or the Phillimore Report, an earlier British report focused on arbitration.⁷⁸ Yet Wilson's Article III [now Article X] had been gutted. As Erez Manela observes, “After insisting on the retention of the offending paragraphs in several consecutive drafts, he finally allowed the legal experts—despite his famous quip that he would never allow the League to be designed by lawyers—to delete everything but the first section of the article”⁷⁹

Yet if Wilson conceded on Article X's actual language, he did not concede the broader point. For one thing, Article XI still recognized “the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.” As Manela points out, this was a frequent theme of Wilson's public speeches in support of the League, and Wilson regarded it as “a back door” for his original version of Article X.⁸⁰

⁷⁶ Raffo, “The Anglo-American Preliminary Negotiations for a League of Nations,” 174.

⁷⁷ Miller, *The Drafting of the Covenant*, 1:30.

⁷⁸ Raffo, “The Anglo-American Preliminary Negotiations for a League of Nations,” 159, 175. There was a provision calling for the creation of a court, which was originally proposed by House but ultimately made its way into the treaty at the insistence of the British.

⁷⁹ Erez Manela, “A Man Ahead of His Time? Wilsonian Globalism and the Doctrine of Preemption,” *International Journal* 60, no. 4 (October 2005): 1120.

⁸⁰ *Ibid.*, 1122.

Speaking in Kansas City in early September 1919, for example, Wilson emphasized that it would be “the privilege of any member state to call attention to anything, anywhere, that is likely to disturb the peace of the world or the good understanding between nations upon which the peace of the world depends.” Wilson did not hide the radical nature of such a provision: “And every people in the world that have not got what they think they ought to have is thereby given a world forum in which they can bring the thing to the bar of mankind. An incomparable thing, a thing that never was dreamed of before.” Wilson underscored that this right applied “within the confines of another empire which was disturbing the peace of the world and good understanding between nations.” Wilson sought to replace traditional sovereignty with the “common judgment of mankind.”⁸¹

Later that month in Salt Lake City, Wilson again championed Article XI: “[I]t is made the right of any member of the League to call attention to anything, anywhere, which is likely to affect the peace of the world or the good understanding between nations upon which the peace of the world depends.” Wilson pointed to the Shantung controversy as an example of the salutary nature of this provision. Wilson explained that the United States had not protested Germany’s acquisition of the province from China because international law required that the action implicate the United States’ own material or political interests. American diplomats “could not lift a little finger to help China. They could only try to help the trade of the United States.” China was thereafter carved up by England, Russia, France, and Japan. Article XI would change this, and Articles X and XI worked together to preserve peace.⁸² In Colorado, Wilson reiterated the complementary nature of Articles X and XI. “You will see that international law is revolutionized by putting morals into it,” the president declared. He again used China as an

⁸¹ An Address in Convention Hall in Kansas City, September 6, 1919, in *PWW*, 63:72.

⁸² An Address in the Tabernacle in Salt Lake City, September 23, 1919, in *ibid.*, 63:460–461.

example of a country that would benefit. The obligation to respect the territorial and political independence of League members and the right to call attention to any threat to world peace meant that “China is for the first time in the history of mankind afforded a standing before the jury of the world.”⁸³

Root, shaped by legal formalism, had turned to sovereignty as an alternative to interventionism after the Philippines war and the bloodier-than-expected aftermath of 1898. This reliance on sovereignty, in turn, rested on Root’s confidence that commerce would nonetheless harmoniously stitch the world together. While borders would continue to separate peoples, trade would bring them together.⁸⁴ Wilson’s alternative to state sovereignty rested on a very different, darker view of economic interdependence.⁸⁵ “[T]he seed of war in the modern world is industrial and commercial rivalry,” Wilson argued.⁸⁶ Global connectivity brought new dangers, including aggression, Bolshevism, and labor strife. For Wilson, the League would have a *continuing* role in managing these dangers. In other words, just as Wilson set aside Root’s view of sovereignty, he also rejected Root’s belief that trade would bridge national differences and provide a strong reason for nations to maintain peaceful relations. Instead, the international community had to assume an active role in managing the threats to peace that spread disorder across borders like a contagion.

Wilson argued that without the League smaller and weaker nations would be continually at the mercy of larger and more powerful nations. Root himself conceded that something like the

⁸³ An Address in the City Auditorium in Pueblo, Colorado, September 25, 1919, in *ibid.*, 63:507–508.

⁸⁴ See, e.g., “South American Commerce,” Address at the National Convention for the Extension of the Foreign Commerce of the United States, Washington, DC, January 14, 1907, in Root, *Latin America and the United States*, 274–275.

⁸⁵ As Manela writes, “He wanted—he thought it imperative for international peace—to challenge the primacy of state sovereignty in international relations, and to institute a world council that would have the authority to intervene in the internal affairs of states, redraw boundaries, and rearrange sovereignties in the interests of peace.” Manela, “A Man Ahead of His Time?,” 1122.

⁸⁶ An Address in the St. Louis Coliseum, September 5, 1919, in *PWW*, 63:45.

League might be necessary to deal with the breakdown of empires in Central and Eastern Europe, which is now “filled with turbulent masses without stable government, unaccustomed to self-control and fighting among themselves like children of the dragon’s teeth.” Article X was fine for the purpose of restoring order—but only in the short term. Once the system began working normally again, Root believed, there would be no need for anything like the League.⁸⁷

Wilson had a less rosy view of the international system. For Wilson, minorities and weaker nations depended upon the League’s constant and continuing vigilance. For example, Wilson explained that Italy’s military situation dictated that it seek a foothold on the other side of the Adriatic, in areas populated by Slavs. Without the League, therefore, Italy’s security would be in tension with these Slavic peoples’ right to self-determination. Because Italy could depend on the League’s security guarantees, however, it could relinquish its claims to the disputed territory.⁸⁸ “[I]t is our business to prevent war,” Wilson insisted, “and if we don’t take care of the weak nations of the world, there will be war.”⁸⁹

Wilson pointed out that the very states Germany and Austria had tried to dominate were now being given their independence. “We are giving them what they never could have got with their own strength” Wilson insisted. “But we have not made them strong by making them independent. We have given them what I called their land titles.” But this new situation required continuing attention. “If you do not guarantee the titles that you are setting up in these treaties, you leave the whole ground fallow in which again to sow the dragon’s teeth with the harvest of armed men.”⁹⁰

⁸⁷ Root to Will H. Hays, March 29, 1919, Elihu Root Papers, Library of Congress, Box 137.

⁸⁸ An Address to the Columbus Chamber of Commerce, September 4, 1919, in *PWW*, 4:11–12.

⁸⁹ A Luncheon Address to the St. Louis Chamber of Commerce, September 5, 1919, in *ibid.*, 63:35.

⁹⁰ An Address at Coeur d’Alene, September 12, 1919, in *ibid.*, 63:215.

While preventing war was the League's most obvious function, it also served other important goals. For instance, the League was also a safeguard against revolution.⁹¹ "Revolutions don't spring up overnight," Wilson explained. "Revolutions come because men know that they have rights and that they are disregarded. And . . . one of the chief efforts of those who made this treaty was to remove that anger from the heart of great peoples" It was necessary to "right the history of Europe."⁹² At times, Wilson explicitly acknowledged the Bolshevik threat in Russia. More generally, he cast the Bolsheviks as autocrats not unlike the Germans and warned his audiences about the need to stand against such minority rule. "The danger to the world, my fellow citizens, against which we must absolutely lock the door in this country, is that some government of minorities may be set up here as elsewhere."⁹³ The League of Nations offered a mechanism for ensuring that minority factions could not seize power. "I want to declare that I am an enemy of the rulership of any minority, however constituted," the president said in Tacoma. "Minorities have often been right, majorities wrong, but minorities cease to be right when they use the wrong means to make their opinions prevail. We must have peaceful means; we must have discussion; we must have frank discussion: we must have friendly discussion. And these are the very things that are offered to us by the Covenant of the League of Nations."⁹⁴

One of the basic pillars of sociological jurisprudence was the "study." It presupposed that by gathering data on social problems and presenting it to the public, the people would rally to fix them.⁹⁵ The League would serve this function for the international community. Members would submit disagreements to the council, "laying all the documents, all the facts, before the Council,

⁹¹ On Wilsonianism as a response to Bolshevism and revolution, see Norman Gordon Levin, *Woodrow Wilson and World Politics: America's Response to War and Revolution* (New York: Oxford University Press, 1968); Arno J. Mayer, *Wilson vs. Lenin: Political Origins of the New Diplomacy, 1917-1918* (Cleveland: World Pub. Co., 1964).

⁹² An Address to the Columbus Chamber of Commerce, September 4, 1919, in *PWW*, 63:13.

⁹³ An Address in the Minneapolis Armory, September 9, 1919, in *ibid.*, 63:134.

⁹⁴ An Address in the Tacoma Armory, September 13, 1919, in *ibid.*, 63:245.

⁹⁵ Duncan Kennedy, "Three Globalizations," 43.

and consenting that the Council shall publish all the facts, so as to take the world into its confidence for the formation of a correct judgment concerning it.” Wilson praised the “illuminating process of public knowledge and public discussion,” calling it “a 98 per cent insurance against war.”⁹⁶ The League’s purpose was not just to prevent war and revolution. It would also bring the world’s collective expertise to bear on problems like the drug trade, human trafficking, and arms trafficking, on combating illness and disease through organizations like the Red Cross, and in regulating international commerce by promoting communications and transportation.⁹⁷

Managing relations between labor and capital was one of the League’s most important functions, and the peace conference had established an International Labor Organization to promote the interests of workers and ensure international industrial peace.⁹⁸ Wilson recognized that labor relations were a global and transnational phenomenon, not simply a national one. As the president declared in Minnesota, “[W]e have got to realize that we are face to face with a great industrial problem which does not center in the United States. It centers elsewhere, but we share it with the other countries of the world. That is the relation between capital and labor, between those who employ and those who are employed. . . . Everywhere there is dissatisfaction, much more on the other side of the water than on this side.” Wilson insisted that the treaty contained “a Magna Carta of labor” that would alleviate this problem.⁹⁹

⁹⁶ An Address in the Tacoma Armory, September 13, 1919, in Link, *PWW*, 63:245.

⁹⁷ An Address to the Columbus Chamber of Commerce, September 4, 1919, in *ibid.*, 63:16; An Address in the Minneapolis Armory, September 9, 1919, in *ibid.*, 63:137; An Address in the Seattle Arena, September 13, 1919, in *ibid.*, 63:262.

⁹⁸ Elizabeth McKillen, *Making the World Safe for Workers: Labor, the Left, and Wilsonian Internationalism* (Urbana: University of Illinois Press, 2013). For many workers, however, the ILO merely served the interests of the capitalist class. *Ibid.*, 3.

⁹⁹ An Address to the Columbus Chamber of Commerce, September 4, 1919, in *PWW*, 63:14; An Address in the Des Moines Coliseum, September 6, 1919, in *ibid.*, 63:78; An Address in St. Paul to a Joint Session of the Legislature of Minnesota, September 9, 1919, in *ibid.*, 63:127.

Wilson's solution to address these questions was "to lift them into the light, . . . to lift them out of the haze and distraction of passion, of hostility, into the calm spaces where men look at things without passion."¹⁰⁰ This attention would be transformative. The League of Nations enshrined political democracy around the world. But the world needed more. "[O]ur civilization is not satisfactory," Wilson announced in Tacoma, Washington. "It is an industrial civilization, and at the heart of it is antagonism between those who labor with their hands and those who direct labor. You . . . cannot advance civilization unless you have a peace of which you make the peaceful and fullest use of bringing these elements of civilization together into a common partnership"¹⁰¹ The League of Nations would bring about this common partnership. "What the world now insists upon," Wilson declared

is the establishment of industrial democracy, is the establishment of such relationships between those who direct labor and those who perform labor as shall make a real community of interests, as shall make a real community of purpose, and shall lift the whole level of industrial achievement above bargain and sale into a great method of cooperation by which men, purposing the same thing, justly organizing the same thing, may bring about a state of happiness and of prosperity such as the world has never known before.¹⁰²

The League of Nations would end industrial warfare at home just as it ended political warfare overseas.¹⁰³

Wilson's famous call for a community of power rather than a balance of power in his "Peace Without Victory" speech recognized both the national and transnational threats to the stable order necessary for democracy and liberal capitalism to flourish.¹⁰⁴ These threats required a flexible response. Wilson therefore called for a dramatic transformation in the international

¹⁰⁰ An Address in the City Auditorium in Pueblo, Colorado, September 25, 1919, in Link, *PWW*, 63:502.

¹⁰¹ An Address in the Tacoma Armory, September 13, 1919, in *ibid.*, 63:244.

¹⁰² An Address in the Tabernacle in Salt Lake City, September 23, 1919, in *ibid.*, 63:463.

¹⁰³ Cf. Duncan Kennedy, "Three Globalizations," 57.

¹⁰⁴ Address to the Senate, Jan. 22, 1917, in Link, *PWW*, 40:533–39.

system.¹⁰⁵ Through the League of Nations, the international community would come together to address new dangers. To be sure, the American role would be unique; the world required American leadership.¹⁰⁶ But the United States would lead through a multilateral league that would guide and harmonize the competing elements of international society. The League would study problems and generate facts, and ensure that international law accorded with international realities.

The League of Nations therefore marked a major break with prior conceptions of international law. Earlier efforts to promote international law envisioned new international courts burnishing national autonomy by policing boundaries. Wilson instead argued that transnational problems required ceding autonomy to international institutions. If the autonomy of the states in the United States was giving way to greater national power to deal with problems like the trusts, Wilson's approach handed an important chunk of that national power to an international League.

These progressive impulses were the hallmarks of sociological jurisprudence. It is interesting, in this respect, to compare Wilson's thinking with Brandeis'. In 1918, Brandeis dissented in the case of *International News Service v. Associated Press*, which had arisen when INS began appropriating AP news bulletins after its own news collection infrastructure was shut down by the war. While Brandeis had earlier defended the continuing importance of judges educated in the social sciences, his dissent in *INS v. AP* emphasized the limitations of courts compared to legislatures. "But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones," Brandeis explained. While this system had generally worked so far, "with the increasing complexity of society, the public interest tends to become omnipresent; and the

¹⁰⁵ Cf. Stephen Wertheim, "The League That Wasn't," 829.

¹⁰⁶ See, for example, An Address at Bismarck, September 10, 1919, in Link, *PWW*, 63:160–162.

problems presented by new demands for justice cease to be simple.” As Brandeis continued, “It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.” In the paragraphs that followed, Brandeis then cataloged the reasons why a legislature was better suited than a court to this type of problem-solving. Above all, legislatures could make the sorts of investigations that courts were “ill-equipped to make” and could “prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement.”¹⁰⁷

Brandeis’ opinion is a perfect summary of some of the key themes of sociological jurisprudence. It also perfectly encapsulates the rationale underlying Wilson’s rejection of a world court in favor of the League of Nation’s more legislative constitution. Wilson was arguing that nations work together to develop a common, international legal regime to regulate transnational activity. Wilson assumed that this new regime would cover a range of subjects: business, labor, health, transportation, communications, and security. Unlike a court, the League of Nations would have the flexibility to study international and transnational problems on a case-by-case basis, bringing the latest expertise to bear. The president’s tour to promote the league covenant confirmed the radicalism of his vision. He was laying the foundation for a new approach to international affairs that he expected to grow and develop over time. International matters would now be subject to international regulation even as national matters would remain within national authority. As the global ramifications of previously local activities were better

¹⁰⁷ 248 U.S. 215, 262-267 (1918) (Brandeis, J., dissenting); see Horwitz, *The Transformation of American Law, 1870-1960*, 203–205.

appreciated, moreover, power might shift from national governments to the league, just as it was shifting from the several states to the federal government.¹⁰⁸

V. Conclusion: Stalemate and Alternatives

The United States' failure to ratify the Treaty of Versailles and to join the United Nations revealed a stalemate between competing understandings of how to structure international affairs, understandings rooted to an important degree in legal thought. For Wilson, the League of Nations could prevent traditional conflicts between states while also providing a flexible forum for regulating newer threats that spilled across national borders. He envisioned states' ceding their authority over transnational and international problems to the League of Nations while retaining responsibility for their own internal affairs. By contrast, former Secretary of State Elihu Root and other opponents of the League of Nations supported the existing international order rooted in territorial sovereignty. They promoted international law to better delineate the proper boundaries between states, presuming that this would be sufficient to preserve peace. Despite their differences, however, both Root's and Wilson's approaches presumed limits on U.S. power. They assumed that overseas threats to peace were best addressed by the foreign nations where they occurred or by the international community acting collectively, not by the United States acting alone.

But during World War II, even as they synthesized the earlier paradigms, American lawyers pioneered a third approach to international economic problems that bypassed the earlier stalemate between classical legal thought and sociological jurisprudence: they extended U.S. law overseas to reform foreign legal systems and to regulate foreign actors directly, ignoring the

¹⁰⁸ On the evolutionary nature of Wilson's vision, see Thompson, "Woodrow Wilson and a World Governed by Evolving Law."

sovereignty of foreign states when it got in the way. The 1945 case of *United States v. Aluminum Co. of America (Alcoa)* embodied this new approach.¹⁰⁹ This new approach to international economic problems, however, awaited the transformations brought about by the Great Depression and World War II.

¹⁰⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) [hereinafter *Alcoa*]. See generally Spencer Weber Waller, “The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases,” in *Fox and Crane’s Antitrust Stories*, ed. Eleanor M. Fox and Daniel A. Crane (New York: Foundation Press, 2007).