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ARTICLES

The Ambivalences of Power: Launching the *American Journal of International Law* in an Era of Empire and Globalization

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Abstract
This article uses the first issue of the *American Journal of International Law*, one hundred years after its creation in 1907, to analyse the state of American international legal thought following the acquisition of Pacific and Caribbean island territories in the Spanish–American War and the creation of a new international identity. Traditionally, the American Society of International Law (of which the journal was the organ) has been placed in the context of the US peace movement. However, both the society and the journal were led by individuals occupying major positions in the administration of Theodore Roosevelt and earlier administrations, including the sitting and a former secretary of war. The society and its journal were vehicles of the US foreign policy establishment. Despite a mixture of imperialists and anti-imperialists, a cultural coherence is discernable in the journal's pages. In essence, the journal can be placed within what the article calls the genteel tradition of US international law, involving an effort at educating the public away from over-excitement, adopting science in the newly professionalized administrative state, and advocating an arbitrational model of legal ordering to promote international peace.

Key words
American Journal of International Law; Elihu Root; genteel tradition; history of international arbitration; James Brown Scott

1. Introduction: a roster of eminences and their vocation

On the familiar teal cover that has graced the *American Journal of International Law* over the last several decades, along with its outdated font is the seal of the American Society of International Law, picturing a seated, wreathed, classical female figure

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with a large palm frond in one hand and scales in the other.[1] To one side of her is a large mounted globe and to the other a striped shield representing the United States, all hovering over two scrolls reading 'Inter Gentes Jus et Pax'. On the cover in recent years, this motif suggests, together with the font, the age and venerability of the society. The same motif, however, modified by shading to suggest an architectural element or ancient coinage, appeared on the frontispiece of the January–April 1907 issue, the first number of the journal. For the inaugural issue, there was no pretension to the age of the society. Rather, the motif conveyed the weightiness and authority of the society and its journal.

This impression was reinforced in the next number, where the write-up from the society's first annual meeting included the list of newly elected officers, headed by its president, the sitting secretary of state Elihu Root. Root has been described by Jonathan Zasloff as 'the Zelig of American politics from the Gilded Age to the New Era'.[2] But turn-of-the-century US politics were filled with Zeligs, men who jumped from attorney general to secretary of state or from the cabinet to the Supreme Court – and prominent men of exactly that sort were named officers of the society. Indeed, it is worth surveying some of the names on the roster. After Root's name on the list were the sitting chief justice of the Supreme Court, Melville Fuller, who managed Stephen Douglas's campaign against Lincoln, and two of the Court's associate justices, William R. Day, who had been secretary of state under McKinley, and David J. Brewer. Other vice-presidents included John William Griggs, attorney general under McKinley and former governor of New Jersey, later to be appointed to the Permanent Court of Arbitration at The Hague; George Gray, then on the Permanent Court of Arbitration and formerly a senator from Delaware; John W. Foster, secretary of state for Benjamin Harrison and minister to Mexico, Russia, and Spain; Richard Olney, attorney general for Grover Cleveland and then secretary of state; the energetic industrialist-turned-philanthropist-and-reformer Andrew Carnegie; and future president William Howard Taft, who was at the time Roosevelt's secretary of war but had earlier served as US solicitor general and a federal circuit court judge. The society's recording secretary, James Brown Scott, was solicitor to the State Department, professor at George Washington University, and a member of the US delegation to the second Hague Conference, and would become a trustee and secretary of the Carnegie Endowment for International Peace in 1910 as well as president of the American Institute of International Law from 1915 to 1940.[3] The American Society of International Law did not invent the practice of naming an embarrassingly expansive list of eminent vice-presidents to establish a society's importance. Among many other examples, the Anti-Imperialist League when it was

1. The cover has recently been changed for the centennial edition of the journal, with the seated classical figure now inserted into the second zero of the '100' marking the centennial, poised to disappear with the 101st volume.
2. J. Zasloff, 'Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era', (2003) 78 *New York University Law Review* 239, at 244.
3. Also among the vice-presidents were William W. Morrow, a judge on the Ninth Circuit Court and a former member of the US House of Representatives from California; Oscar Straus, Roosevelt's secretary of commerce and labour; and Joseph Choate, president of the 1894 New York state constitutional convention, ambassador to the United Kingdom, and leader of the US delegation to the Second Hague Peace Conference.

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founded in November 1898 appointed 18 luminaries as vice-presidents and later expanded the list to 40.[4] By this measure, the American Society of International Law may have even been modest in the size of its officer list, but there was no question as to the prominence of those listed.

Turning to the *American Journal of International Law*, James Brown Scott, the society's secretary and a strong force in its creation, guided the journal as its managing editor. His editorial board differed from the society's officers only in being somewhat more academic and 'technical'. In addition to several individuals who were also officers of the society, the editorial board included Theodore S. Woolsey, an international lawyer from Yale and the son of its former president; Leo S. Rowe, president of the American Academy of Political and Social Science from 1901 to 1930; John Bassett Moore, who taught law at Columbia, advised the State Department, and had just completed an eight-volume digest of international law commissioned by Congress; Robert Lansing, who represented the State Department in international cases and who would follow William Jennings Bryan as Woodrow Wilson's secretary of state; and David Jayne Hill, part of the US delegation to both Hague Peace Conferences, former president of the University of Rochester, and US minister to a number of European countries in succession.[5]

The list of the society's officers and the journal's editorial board suggests membership of one large club, and indeed they were. To some degree, I mean that quite literally. Many of them were likely to rub elbows at the Cosmos Club in Washington with author/historian/journalist/political confidant Henry Adams, who was one of its founding members;[6] at the Metropolitan Club, also in Washington, where the society's president, Elihu Root, was in 1907 elected the club's president while he was secretary of state; or at the Century Club in New York.[7] But I also mean it figuratively and, in fact, the literal and the figurative mesh. The various officers of the society were part of the interlocking directorate of the US legal and international relations establishment, and very much part of what has been identified as a new American 'gentry' class.[8] As I shall suggest, this positioning will help to characterize the pages published by the society. John William Griggs may have successfully argued as attorney general in *Downes* v. *Bidwell* – one of the first trio of so-called 'insular cases' in 1901 before the Supreme Court, establishing the fact that the Constitution did

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4. Including former president Grover Cleveland; Andrew Carnegie; Charles Francis Adams, Jr, the economist and historian great-grandson of John Adams, grandson of John Quincy Adams, and brother of Henry Adams; Carl Schurz, the foremost anti-imperialist voice in the US Senate; and Samuel Gompers, the first president of the American Federation of Labor. E. B. Tompkins, *Anti-imperialism in the United States: The Great Debate, 1890–1920* (1970), at 127–8. By summer 1899 the number of vice-presidents expanded to forty, including Stanford president David Starr Jordan, one of the celebrity university presidents of the turn of the century; and William Graham Sumner, the Yale sociologist and leading American exponent of social Darwinism. Ibid., at 128.
5. Also Charles Noble Gregory of the University of Iowa.
6. W. Zimmerman, *The First Great Triumph: How Five Americans Made Their Country a World Power* (2004), 181.
7. Ibid.
8. '[A] new urban, middle-class group of professionals, literary gentlemen, and some businessmen whose commitment was to genteel standards as prescribed in the printed media'. D. Garrison, *Apostles of Culture: The Librarian and American Society, 1876–1920* (1979), 10. For general discussions of this 'gentility', see, e.g., S. Persons, *The Decline of American Gentility* (1973); and J. Tomsich, *A Genteel Endeavor: American Culture and Politics in the Gilded Age* (1971).

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not automatically apply in full to territory annexed in the Spanish–American War – while Chief Justice Melville Fuller may have led the dissent to the Court's decision in the case.[9] Nevertheless, as I shall argue, that did not set them entirely apart. Despite significant political differences, I shall point to the more important convergences among the key personalities at the head of the society and the journal.

Identifying the society's officers and members of the journal's editorial board underscores the important role many of them played in guiding a US foreign policy that included significant activism and expansion in the Western hemisphere and the Pacific. Typically, the American Society of International Law has been seen as an offshoot of the US peace movement, which itself has been viewed as having religious and abolitionist roots. Frederic Kirgis, for example, has described the founding of the society in the context of US anxieties about war emanating from the European system:

> The belief was stirring in those concerned to establish a nonviolent world order that the interaction of nation-states would benefit from exposure to American values, American economic dynamism and the lessons to be drawn from the American federal experience. This belief, combined with a deep aversion to what was seen as essentially a European proclivity for settling disputes by resort to war, motivated some of the more influential participants in the American peace movement. That movement, in turn, gave birth to the American Society of International Law.[10]

Certainly, there was a strong sense of the susceptibility of Europe to war. And the plan for the society was, indeed, hatched in one of a series of annual conferences at Lake Mohonk in upstate New York focusing on advancing the cause of international arbitration as an answer to the threat of war.[11] But I shall be suggesting along the same lines as Elizabeth Borgwardt in her new book on the Atlantic Charter, *A New Deal for the World: America's Vision for Human Rights*, in describing the advocates of arbitration: 'Far from being woolly-headed peace advocates, these legalist advocates [of arbitration] were sober men of affairs, often Republicans, many with international business connections.'[12] Here it is important to emphasize that, as dedicated to international arbitration as the American Society of International Law was, its officers included two of Roosevelt's secretaries of war, Root and William Howard Taft.

Significantly, the society and the journal were created in the aftermath of the Spanish–American War and with the growing understanding that the United States had gained an empire. But it was also a time of demonstrably accelerated social, economic, and cultural change, creating a great deal of anxiety and intensifying various inter-class suspicions and animosities. Historian Michael McGerr, in his recent study of American progressivism, has pointed to the 'essentially middle-class character of the movement to remake Americans'.[13] Yet it aimed mainly to address

9. *Downes v. Bidwell*, 182 US 244 (1901).
10. F. L. Kirgis, 'The Formative Years of the American Society of International Law', (1996) 90 AJIL 559; cf. F. L. Kirgis, *The American Society of International Law's First Century, 1906–2006* (2006), at 1.
11. Kirgis, 'Formative Years', *supra* note 10, at 560.
12. E. Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (2005), 63.
13. M. McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920* (2005), at 94.

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the flaws of other classes: the very wealthy (Roosevelt's 'merely rich'), the working class, and the farming class. Progressivism, however, represented an expression of broader concern. Here I would like to point to the broad elite fear – shared by that fearless president of the United States, Teddy Roosevelt – of popular energies. Symptomatically, Edward A. Ross in *Social Psychology* (1908) saw American progress as marred by religious fervor, dangerous swings in public opinion, and hysteria in foreign affairs.[14] This fear of popular energies can be read between the lines in the first issue of the *American Journal of International Law*. One of the key answers to these popular energies offered by the intellectual/professional elite was education. In her study of the American librarian, Dee Garrison describes the public librarian – very much part of the urban gentry culture and more often than not coming from prominent New England families – as focused on educating public responsibility and taming radicalism.[15] The *American Journal of International Law* was engaged in this same vocation of public education.

As I shall describe in this article, that education aimed largely at giving the professionals of the State Department room to do their job and not have the country rushed into war with every popular commotion. If the journal showed a lack of confidence about the American public's commitment to international society based on the rule of law and even engagement in the world, the journal itself was often preoccupied with rather provincial concerns, giving inordinate attention to cases before the US Supreme Court. The journal was drawn to very American foreign policy preoccupations, such as the rules pertaining to neutrals and its core belief in arbitration as the embodiment of the rule of law in international affairs. It envisioned a legal order that at once benefited US commercial interests abroad and outwardly projected the domestic faith in the administration of the rule of law as the best answer to domestic strife – just as Teddy Roosevelt followed his mediation, aided by Root, of domestic labour conflicts with his immensely successful role in international mediation. The *American Journal of International Law* took special pride in the success of Roosevelt as mediator, and generally in the US role abroad. With Root at the helm of the society, the journal advertised the successes of the State Department and, unsurprisingly, Root's own South American tour. More importantly, it advocated State Department positions, such as the United States' assuming control of Cuba under a clause in the Cuban Constitution devised by that most adept of lawyers, Elihu Root.

But if the journal's articles often seem to have been written in an antechamber of the State Department, I shall argue that they also revealed the ambivalence across the genteel class about the US imperial project – the imperialists ambivalent in their imperialism, and the anti-imperialists ambivalent in their anti-imperialism. There was great uncertainty because of the clash between two American exceptionalisms, the traditional American exceptionalism imperiled by imperialism – with

14. See Persons, *supra* note 8, at 253.
15. For example, after the great railroad strikes of 1877 in the run-up to this period, an editorial in the *Library Journal* asserted that 'every book that the public library circulates helps to make . . . railroad rioters impossible'. Garrison, *supra* note 8, at 43.

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its admonitions about European-style foreign adventure and foreign entanglements – and the exceptionalism that boasted of American ingenuity, energy, and prosperity with the expansion of US business interests and US territory abroad.

In my conclusion I shall place the journal in the context of the values of the United States' elite genteel class of intellectuals and professionals – and its 'search for order'.[16] In part, the professional class's answer to domestic social unrest was science and administration. So too was it the journal's answer internationally, envisioning the administration of an open legal system of arbitration and negotiation. Ultimately, the voices in the journal were the voices of American legal classicism, not read in the narrow confines of Langdellian formalism but rather in terms of a stable legal order administered by dedicated professionals. In an article on the turn-of-the-century New York City bar, Robert Gordon has observed that the 'lawyers at the very center of [well known corporate] scandals were prominent voices in science and reform'.[17] So too were the advocates of a peaceful international order based on science and reform often the very same lawyers who led US expansion or represented US interests abroad. At the core, then, of the inaugural number of the *American Journal of International Law* – just as one sees in the genteel professional class more broadly and the elite urban lawyer – we find an abiding ambivalence underlying the confident exterior of educational mandate and the exercise of power.

2. An American elite in perilous times

It seems that every age is identified by its historians as an 'age of anxiety'. But the particular juncture of the founding of the *American Journal of International Law* has special claim to that title, notably among the educated class of white men of mostly Anglo-Saxon Protestant background that formed the era's so-called gentility. This was a period of immense social, economic, and cultural conflict. As the historian John Milton Cooper has pointed out, 'Racial, regional, and ethnic disparities were not new to the United States in 1900, but a heightened sense of alarm about them was novel.'[18] From an economic perspective, the consolidation of US industrial power was explosive in the few short years between 1897 and 1903, a period that witnessed 300 consolidations affecting 40 per cent of US industrial output. Industrial strife also hit new heights. Significantly, the Industrial Workers of the World, known for its radicalism, was launched in 1905. At the same time, the American public was treated to a wave of 'muckraking' investigative reporting led by the staff of *McClure's Magazine* mostly between 1902 and 1907, revealing corruption and scandal throughout American society, from the serial descriptions of urban government corruption in New York, Pittsburgh, Philadelphia, and other cities by Lincoln Steffens starting in 1902, to the sensational series on the Standard Oil Company by Ida M. Tarbell, all supplemented by Upton Sinclair's depiction of the grotesque conditions

16. R. H. Wiebe, *The Search for Order, 1877–1920* (1967).
17. R. W. Gordon, '"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910', in G. W. Gewalt (ed.), *The New High Priests: Lawyers in Post-Civil War America* (1984), 51, at 57.
18. J. M. Cooper, Jr, *Pivotal Decades: The United States, 1900–1920* (1990), 7.

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of the Chicago stockyards in his 1905 novel, *The Jungle*.[19] If Roosevelt publicly attacked muck-raking in 1906, calling it an 'unhealthy condition of excitement and irritation in the popular mind,'[20] the journalists joined him in discerning a nation in trouble. We should also remember the context of Roosevelt's reaching office due to an anarchist's assassination of McKinley in 1901 and the death of a former governor of Idaho when his house was blown up in 1905.

These fears and anxieties fed into what Joan Shelley Rubin has called the 'American affinity for diagnoses of declension', or Sacvan Bercovitch's 'American Jeremiad'.[21] Indeed, there was a strong sense of actual or potential decline at the turn of the century. Henry Adams's brother, Brooks Adams, published a book in 1896 that was closely read by Roosevelt, entitled *Civilization and Decay*, in which he raised the threat of civilizational decline. But Adams's book expressed only one vision of American decline. There was a sense of foreboding also about the decline of the republic and its republican virtue – Americans were only too well versed in the long historical tradition of declining republics, starting with the Roman republic.[22] The sense of the end of a period was heightened by the announcement with the census of 1890 of the closing of the US frontier, underscored by the historian Frederick Jackson Turner's famous enunciation of his frontier thesis at the World's Columbian Exposition in 1893.

America's educated elite had a tradition of attacking both the lower classes as well as an indolent segment of the upper reaches, so that, for example, in 1878 the historian Francis Parkman announced in one of the principal organs of genteel opinion, the *North American Review*, 'Two enemies, unknown before, have risen like spirits of darkness on our social and political horizon, an ignorant proletariat and a half-taught plutocracy.'[23] In 1907, the inaugural year of the *American Journal of International Law*, Henry Adams published his classic, *The Education of Henry Adams*, in which he famously bemoaned his marginalization by an increasingly industrialized American society – his 'eighteenth-century education' was unsuited for the industrial world he faced. Despite his complaint, Adams was a confidant of presidents and cabinet members and set up his home across Lafayette Park from the White House directly next to that of his best friend and secretary of state John Hay. But his sense of marginalization was – if often expressed in less tragic terms – part of the self-identity of the genteel class, so that, for example, the novelist William Dean Howells often used intellectual characters to view society from an exterior position.[24]

As I have suggested, this class was not merely characterized by ironic detachment but also by fear of popular energies, and the antidote to the dangers of popular energies was instruction. They were imbued with confident ownership of superior

19. See ibid., at 83–9.
20. Quoted in ibid., at 89.
21. J. S. Rubin, *The Making of Middlebrow Culture* (1992), 34; S. Bercovitch, *The American Jeremiad* (1978).
22. Persons, *supra* note 8, at 172.
23. Quoted in A. Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (1982), 153. E. Wharton's *House of Mirth* (1905) provides an example of the genteel critique of the 'fashionable' classes.
24. Persons, *supra* note 8, at 121.

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culture and character and, as Joan Shelley Rubin writes, there was a strong sense of the 'vocation of the writer as educator of public taste'.[25] More broadly, they 'assigned to the "best men" (like themselves) the task of freeing society at large from superstition, conformity, mediocrity, and debilitating economic competition'. As Alan Trachtenberg has suggested, the 'White City' of the Chicago Columbian Exposition of 1893 'would show how a place like Chicago might be governed as well as how it might look'.[26] The very design of the exposition was to lead by example in close proximity to a dysfunctional city. Principally, the genteel vocation was explicitly that of teacher. In explaining his role as the *Evening Post*'s literary editor between 1903 and 1909, Paul Elmer More wrote that 'the goal of the honest reviewer is to *form* the reader and the future writer, not merely to guide them in one instance'.[27] As Dee Garrison wrote in her discussion of the genteel culture of librarians,

> They expected that a free-thinking people would not challenge, but would rather uphold, the traditional standards that governed morality and political and economic organization. As teachers and pastors of the public library – the 'people's university' – the librarian could 'soon largely shape the reading, and through it, the thought of his whole community'.[28]

And Chautauqua in upstate New York, with its famous lecturers and beautiful grounds, became the emblem of adult education. The philosopher William James may have derided it after his visit as the 'quintessence of every mediocrity', but reformer Jane Addams and economist Richard T. Ely were among its dedicated lecturers, and William Rainey Harper, the future president of the University of Chicago, ran its educational programme, which branched out to home-study courses. Chautauqua became a franchise.[29]

Members of the legal elite took on education as part of their own vocation. Thus, for example, Moorfield Storey in his presidential address at the meeting of the American Bar Association in 1894 underscored the educational role of the educated elite.[30] The lawyer participated in returning American society to its original republican virtues. In shoring up the republic, the lawyer focused particularly – along with social scientists – on civil service reform and professionalism in government. Elihu Root played a leading role in civil service reform and in the professionalization of both government and the bar. He was so deeply involved in the professionalization of the bar that in 1919 he became head of the American Bar Association's Section on Legal Education and Admissions to the Bar.[31] As secretary of war he professionalized the army, creating the Army War College and instituting the army's first general staff. In New York City politics he was a staunch advocate of civil service reform in opposition to city's political machine, Tammany Hall, and, significantly in this

25. Rubin, *supra* note 21, at 11.
26. Trachtenberg, *supra* note 23, at 211.
27. Rubin, *supra* note 21, at 39 (emphasis in original).
28. Garrison, *supra* note 8, at 38–9, and quoting M. Dewey, 'The Profession', (1876) 1 *Library Journal* 6.
29. McGerr, *supra* note 13, at 61, 69–70.
30. Persons, *supra* note 8, at 175.
31. P. C. Jessup, *Elihu Root, 1905–1937* (1964), II, 468. See also Zasloff, *supra* note 2, at 254–5.

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context, its immigrant constituents. Root fitted perfectly into the civil service reform agenda of the Roosevelt administration. But he serves here only as an example of the broader genteel investment in professionalization and the reform of society through education, values that were embedded in the mandate of the American Society of International Law and its journal.

3. The education of Elihu Root and James Brown Scott

The American Society of International Law and its journal were designed to have both an intellectual and an educational charge, so that the journal's first pages were dedicated to Elihu Root's 'The Need of Popular Understanding of International Law'. According to Root, 'Governments do not make war nowadays unless assured of general and hearty support among their people; and it sometimes happens that governments are driven into war against their will by the pressure of strong popular feeling.'[32] His fear of popular energies getting in the way of the professionals, if men of good will, is clearly articulated:

> One of the chief obstacles to the peaceable adjustment of international controversies is the fact that the negotiator or arbitrator who yields any part of the extreme claims of his own country and concedes the reasonableness of any argument of the other side is quite likely to be violently condemned by great numbers of his own countrymen who have never taken pains to make themselves familiar with the merits of the controversy or have considered only the arguments on their own side.[33]

To arrive, then, at a 'willingness to recognize facts and to weigh arguments which make against one's own country as well as those which make for one's country' – which sounds like the stock-in-trade of the lawyer – Root proposes 'to increase the general public knowledge of international rights and duties and to promote a popular habit of reading and thinking about international affairs'.[34]

Root's call to promote popular education derives from his long-standing distrust of popular emotion. Indeed, during a public controversy in New York City in 1881, Root asserted that 'We are not to be intimidated by the vulgar cry of an excited populace.'[35] And in the run-up to the Spanish–American War in 1898, he wrote in a private letter to the secretary of the interior that

> when it is once certain that diplomacy has failed and that the Government of the United States is about to engage in war with Spain, the duty of restraint is ended and the duty of leadership begins. Fruitless attempts to retard or hold back the enormous momentum of the people bent upon war would result in the destruction of the President's power and influence, in depriving the country of its natural leader, in the destruction of the President's party.[36]

That view was widely shared, especially in the wake of the sinking of the *Maine*. In his volume on US diplomacy, published in 1905 and reviewed in the first issue of the

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32. E. Root, 'The Need of Popular Understanding of International Law', (1907) 1 AJIL 1.
33. Ibid.
34. Ibid., at 2.
35. R. W. Leopold, *Elihu Root and the Conservative Tradition* (1954), 20.
36. Zimmerman, *supra* note 6, at 259.

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journal, John Bassett Moore contended that '[t]he destruction of the *Maine* doubtless kindled the intense popular feeling without which wars are seldom entered upon.'[37] And another member of Scott's editorial board, Theodore S. Woolsey, explained in a talk to the Yale Club of New York in 1898 that it was the 'fact' of the explosion of the *Maine*, 'working upon the passions of the great body of the people, which made peace no longer practicable'.[38] Woolsey did go on to explain, 'Not that self-restraint was thrown away. I wonder what other people would have awaited so patiently an official and technical report of such tremendous import.'[39] Nevertheless, he was not always so generous. In a paper read in 1896 he spoke about the importance of the diplomatic process in successfully settling international disputes. 'Whatever detracts from the proper working of [diplomatic correspondence]', he explained, 'is mischievous.' The quiet work of diplomacy worked because of the very fact of its quiet seclusion:

> Many and many a question is raised, discussed, and settled without exciting the attention of Congress, the notice of the newspapers, the passions of the people. How much better this is than to expose the moves of a state department to the daily inspection and criticism of the undiplomatic world![40]

Similarly, Columbia University's president, Nicholas Murray Butler, delivering the chairman's opening address at the Mohonk Lake Conference on International Arbitration in 1912, noted the contagious force of popular passion on men in power:

> It is astonishing how even men of the highest intelligence and the largest responsibility will be swept off their feet in regard to international matters at some moment of strong national feeling, or on the occasion of some incident which appeals powerfully to the sentiments or to the passions of the people. At the very moment when the nation most needs the guidance of its sober-minded leaders of opinion, that guidance is likely to be found wanting.[41]

And it was, Butler thought, too easy to touch off American public sentiment: 'Here in the United States it is the easiest thing possible for some public man or some newspaper to arouse suspicion and ill-feeling against Japan, against Mexico, against England, or against Germany by inventing a few facts and then adequately emphasizing them'.[42]

The anxiety about popular passions expressed in Root's opening essay was, then, standard fare. But that did not mean complete submersion in the pessimism of the cultural Cassandra. Quite the opposite, for both the society and the journal were formed to promote a positive project. Indeed, the 'Prospectus' for the society placed in the middle of the first issue of the journal suggests that the flurry of international events in the years prior to the creation of the society

37. J. Bassett Moore, *American Diplomacy: Its Spirit and Achievements* (1905), 142.
38. T. S. Woolsey, 'The War with Spain' (address before the Yale Club of New York, 13 May 1898), in T. S. Woolsey, *America's Foreign Policy: Essays and Addresses* (1898), 71, at 81.
39. Ibid.
40. T. S. Woolsey, 'Some Thoughts on the Settlement of International Controversies' (13 June 1896), in Woolsey, *America's Foreign Policy*, *supra* note 38, 241, at 246–7.
41. N. M. Butler, 'The International Mind', in N. M. Butler, *The International Mind: An Argument for Judicial Settlement of Disputes* (1913), 97, at 105.
42. Ibid., at 104–5.

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> has not only given to our country a more prominent and influential position in the family of nations than it had previously enjoyed, but has brought government and people into closer and more intimate relations with the Spanish-American states in the western world and the peoples of the eastern, it is at once evident that Government and the people are fundamentally and constitutionally interested in International Law, and that a correct understanding of the system as a whole is an essential element of good citizenship.[43]

The major voice of the journal, that of James Brown Scott in all the book reviews and probably all the editorials, is quite popular, at times coming across like a chatty alumni newsletter. In his book reviews he is quite pleased to announce that John Bassett Moore's *American Diplomacy* could be commended 'without reserve to the general reader', which, of course, is little surprise since he began the review by explaining that 'Professor Moore was happily inspired to prepare a series of articles for Harper's Magazine on the spirit and achievements of American diplomacy, and author and publisher have put the reading public under obligation to them by rescuing the articles from the magazine and giving them a separate and permanent form.'[44] *The Practice of Diplomacy as Illustrated in the Foreign Relations of the United States* by John W. Foster – like Moore, a prominent member of the society – is 'emphatically a work of *vulgarization* and as such a distinct success'.[45] These statements express the primacy Scott placed on accessibility. And if Moore's book came from a series of essays in *Harper's Magazine*, one of the principal genteel publications, much of the text of the journal read like the prose of *Harper's* – or that of the *North American Review*, with its articles on the Spanish treaty claims, the Panama Canal 'from a contractor's perspective', rate-making, the Russo-Japanese war, and 'World-Politics' seen from three European capitals, interspersed with a three-part series by Henry James on his impressions on returning to New England.[46]

Not all Scott's contributors played along. George Davis in his article on Francis Lieber's *Instructions for the Government of Armies in the Field* – the Civil War-era predecessor to the Geneva Conventions – references the German international lawyer, Johann Caspar Bluntschli, 'whose efforts to codify the law of nations are too well known to require particular mention'.[47] And in discussing the present and future of international law, John Bassett Moore gestured, 'Of the congress at the Hague, in 1899, it is unnecessary to speak.'[48]

Of course, no one could expect the *American Journal of International Law* to reach the average home. Yet, in this elitist environment, education was a trickle-down affair. And there was still a hope of reaching fairly widely. As Root asserted in his opening statement, 'Of course, it cannot be expected that the whole body of any

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43. 'Prospectus', (1907) 1 AJIL 130.
44. J. Brown Scott, 'Review of John Bassett Moore, *American Diplomacy: Its Spirit and Achievements*', (1907) 1 AJIL 250, at 252.
45. J. Brown Scott, 'Book Review of John W. Foster, *The Practice of Diplomacy as Illustrated in the Foreign Relations of the United States*', (1907) 1 AJIL 257, at 258 (emphasis in original).
46. See *North American Review*, January–June 1905.
47. G. B. Davis, 'Doctor Francis Lieber's Instructions for the Government of Armies in the Field', (1907) 1 AJIL 13, at 22.
48. J. Bassett Moore, 'International Law: Its Present and Future', (1907) 1 AJIL 11, at 12.

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people will study international law; but a sufficient number can readily become sufficiently familiar with it to lead and form public opinion in every community in our country upon all important international questions as they arise.'[49] Four years after the creation of the Commonwealth Club in San Francisco, providing a major public-speaking venue, we have a sense of the Chautauquasization of international law.

These themes of the journal and the society are mirrored in the series of addresses at the Mohonk Lake Conference between 1907 and 1912 published together by Columbia president Nicholas Murray Butler as a volume under the title *The International Mind*, which has already been introduced for his diagnosis of popular passions. In his preface Butler tells us that the 'establishment of an independent international court of justice to hear and to decide causes between nations will not make war impossible. The brute elements in man must be wholly eliminated and passion must be entirely subordinated to reason before that end can be reached'.[50] And to arrive at that goal '[t]here must be a state of public opinion which regards other peoples not as rivals to be antagonized, but as friends to work with in the accomplishment of a common purpose. To create such a public opinion there must first be developed among statesmen, journalists, and men of affairs a true international mind.'[51] In 1910 Butler told the Mohonk Lake Conference that the very aim of the conference 'and of every gathering of like character, must insistently and persistently be the education of the public opinion of the civilized world'.[52] In 1907, the year of the inauguration of the journal, in his opening address to those gathered at Mohonk Lake, he considered that '[t]he splendid accomplishment of this Conference during all the years of its existence has been the arousing and directing of public opinion'. But he was particularly sanguine about the success of the week-long National Arbitration and Peace Congress that met in New York: 'A public opinion which, in the person of 10,000 or more of its most responsible representatives, could participate with joy and satisfaction in the discussions in New York, will not fail to make itself heard in the council chambers of governments, nor will the aroused public opinion of the United States be without large influence in Europe.'[53]

Nicholas Murray Butler, who first met James Brown Scott on a voyage from Alexandria to Jaffa in the 1890s and who competed with Root in having his tentacles extend to all sorts of political and cultural projects – not to mention a bafflingly long list of prominent clubs and organizations – was a guiding force in the creation of the Carnegie Endowment for Peace in 1910, with two of its three divisions headed by Butler and Scott respectively.[54] I am mentioning Butler here because his own efforts – if often part of a brash campaign of self-promotion – overlapped and interwove with

49. Root, *supra* note 32, at 3.
50. Butler, *International Mind*, *supra* note 41, at ix–x.
51. Ibid., at x.
52. N. M. Butler, 'The World's Armaments and Public Opinion' (1910), in Butler, *International Mind*, *supra* note 41, 21 at 42.
53. N. M. Butler, 'The Progress of Real Internationalism' (1907), in Butler, *International Mind*, supra note 41, 3 at 10–11.
54. M. Rosenthal, *Nicholas Miraculous: The Amazing Career of the Redoubtable Dr. Nicholas Murray Butler* (2006), at 97, 156, 168.

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those of the key figures of the society and the journal, and consequently provide broader context for all of their efforts.

4. The American Adam steps abroad

In his centennial essay on the *American Journal of International Law*, David Bederman argues that the journal 'projected a unique set of American attitudes about international law', such as 'the acceptance of the place of international institutions and tribunals in promoting stable and predictable relations between states'.[55] Bederman is quite correct in his argument, but what is particularly striking about the inaugural issue of the journal (if also true of later numbers) is just how parochial its vision really is. The journal announces that it is addressing a 'lack in the English-speaking world of any periodical devoted exclusively to International Law'.[56] The conceit of this assertion, if not carried through the issue, is that the journal might speak for the Anglo-American tradition in international law. Nevertheless, it is remarkable just how much the journal is explicitly framed by US concerns.

In its 'editorial comments', for example, the journal gave excessive space to US Supreme Court decisions. Admittedly, this was a period when municipal court decisions were still viewed as the major source of international law for lawyers in common-law countries. In the international law treatise that editorial board member George Grafton Wilson co-authored with George Fox Tucker, the very first source treated in the source-of-law chapter was domestic precedent: 'The domestic courts of those states within the family of nations, may by their decisions furnish precedents which become the basis of international practice.'[57] Wilson and Tucker acknowledged that this was a common-law predilection, noting that 'British and American courts rely more particularly upon precedents, while the Continental courts follow more distinctly the general principles laid down in codes and text writers, and place less reliance upon previous interpretation of these principles as shown in court decisions.'[58] In his review of de Lapradelle and Politis's *Recueil des arbitrages internationaux*, Scott noted that the French-based editors

> have carefully distinguished between international arbitrations in the strictest sense on the one hand, and internal commissions appointed for the purpose of adjusting claims against foreign nations assumed by the home government, and arbitrations really diplomatic, on the other. Observing strictly this line of cleavage, many of the boards whose proceedings were quite fully reported in Moore's International Arbitrations receive no attention at the hands of the editors, who consider that their opinions are not in the fullest sense evidence of international law.[59]

55. D. J. Bederman, 'Appraising a Century of Scholarship in the *American Journal of International Law*', (2006) 100 AJIL 20, at 23.
56. 'Prospectus', *supra* note 43, at 131.
57. G. Grafton Wilson and G. Fox Tucker, *International Law* (1910), 37.
58. Ibid., at 38.
59. J. Brown Scott, 'Book Review of A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*', (1907) 1 AJIL 252, at 253.

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This civil law/common law split, however, does not explain the number of US Supreme Court cases reported in the journal.

A number of the Supreme Court cases discussed in the journal involved some aspect of US federalism. There are, for example, cases involving jurisdictional disputes between states over extradition of individuals to a foreign country. There is the dispute of *Louisiana* v. *Mississippi* with respect to 'oyster fishing in the waters of Louisiana and Mississippi' in which the Court turned to the concept of *thalweg*, which 'is applicable in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea'.[60] This analogy to international law also brought attention to a Swiss cantonal case in another comment, 'Decision by the Swiss Federal Court Concerning the International and Constitutional Effects of Territorial Possession and the Duty of a Succeeding State to Recognize the Concessions Granted by Its Predecessor'.[61] Certainly, the United States was not alone in analogizing federal to international structures, so that, for example, a journal blending the two under the title *Zeitschrift für Völkerrecht und Bundesstaatsrecht* was launched a year prior to the launch of the journal. In its interest in federalism the *American Journal of International Law* did not restrict itself entirely to the federal/international analogy, for the 'editorial comment' on *Missouri* v. *Illinois* about the discharge of Chicago sewage into the Des Plaines river concluded that the issue was ultimately a national matter: 'Some sovereignty must control; the state sovereignties cannot; the national sovereign therefore does'.[62] In short, federal issues were still taking up a good deal of the imaginative space of international legal thinking in the United States.

Beyond the idiosyncratic focus on federalism, the journal naturally showed interest in areas of international law that had long been important to US lawyers. US international lawyers were particularly preoccupied by maritime issues and the law of neutrality. If Wheaton's *Elements of International Law*, edited by Richard Henry Dana, devoted more pages to the 'Rights of War as to Neutrals' than to the 'Rights of War as between Enemies', the Wilson–Tucker treatise devoted its fifth of five parts entirely to the 'International Law of Neutrality'.[63] Indeed, in his review of John Bassett Moore's book on US diplomacy, Scott commended Moore's judgement on the system of neutrality, 'the establishment of which [Moore] rightly attributes to American publicists'.[64] There are a number of discussions of neutrality and maritime law in the journal, such as Charles Burke Elliott's long essay on 'The Doctrine of Continuous Voyages', which describes when the stopping of ships carrying contraband at a neutral port breaks a voyage that might otherwise be entirely subject to capture for the whole voyage into two legs, one to the neutral port not subject to

60. Editorial Comment, 'Louisiana v. Mississippi', (1907) 1 AJIL 204, at 205.
61. Editorial Comment, 'Decision by the Swiss Federal Court Concerning the International and Constitutional Effects of Territorial Possession and the Duty of a Succeeding State to Recognize the Concessions Granted by Its Predecessor', (1907) 1 AJIL 235.
62. Editorial Comment, 'Missouri v. Illinois', (1907) 1 AJIL 215, at 217.
63. H. Wheaton, *Elements of International Law* (1936), at 342–411, 412–537. Wilson and Tucker, *supra* note 57, at 285–345. With their immense global expanse, the British were, of course, also preoccupied with the law of neutrality, so that, for example, W. E. Hall devotes the last of four parts of his *International Law* to 'The Law Governing States in the Relation of Neutrality'. W. E. Hall, *A Treatise on International Law* (1904).
64. Scott, *supra* note 44, at 250.

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capture and one from the neutral port that is. The rule of 'continuous voyages was developed by the English courts to defeat the devices' used by American merchants and then was applied by the American government to English ships using Nassau to break up a trip to the American South during the Civil War.[65]

If the law of neutrality played a prominent role in the journal's pages, it was part of a larger constellation that held the interest of American lawyers. And it was also clear in the pages of the first issue of the journal that American lawyers had contributed a great deal to international legal development. That was true of international law generally. George B. Davis opened his article on Francis Lieber with an assertion that

> International law owes much to American judges and American jurists. The list of those who have contributed to its advancement is not short and includes the names of Marshall, Story and Field, Kent, Wheaton, with his able commentators, Dana and Lawrence, Halleck and Lieber and, among recent writers, Taylor, Moore and Snow.[66]

Of course, it says something about the need to highlight the American contribution by devoting space to Francis Lieber's Civil War-era work on the law of war four decades after its promulgation in a journal that made it clear in Scott's opening 'Announcement' that each of its quarterly issues would 'deal wholly or principally with the quarter immediately preceding the date of issue'.[67] To register Lieber's currency Davis was allowed thirteen pages near the very front of the journal. Indeed, he concluded by asserting the relative superiority of Lieber's American code to other efforts: 'Subsequent codes are characterized by a certain vagueness and want of positiveness of statement which is calculated to seriously impair their usefulness when it is attempted to apply them to the practical operations of warfare on land.'[68] And Davis indulged himself in replicating an extended quotation from Colonel Birkhimer's *Military Government and Martial Law* to make the point that 'the Brussels code, and also that agreed upon in 1880 by the Institut de droit International, which has been published to the world as the best modern thought on this subject, has the disadvantage of being adopted in times of peace, when the minds of men in dealing with military affairs turn rather to the ideal than the practical'.[69] Birkhimer was marshalled to help place the United States at the forefront of both international legal thinking and the practical development of international law. In broad terms, Moore could be quoted by Scott as asserting in his book that 'American diplomacy was also employed in the advancement of the principle of legality. American statesmen sought to regulate the relations of nations by law, not only as a measure for the

65. C. Burke Elliott, 'The Doctrine of Continuous Voyages', (1907) 1 AJIL 61. In their discussion of continuous voyages, Wilson and Tucker note the practical history, initially being used by the English and later being adopted by the United States in the context of the Civil War. Indeed, they are frank that '[t]his position of the United States, which has been so criticized, is liable to be abused to the disadvantage of neutral commerce. The absence of some such rule would open the door to acts which, though neutral in form, would be hostile in fact.' Wilson and Tucker, *supra* note 57, at 339.
66. Davis, *supra* note 47, at 13.
67. 'Announcement', (1907) 1 AJIL front matter.
68. Davis, *supra* note 47, at 24.
69. Ibid., at 25.

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protection of the weak against the aggressions of the strong, but also as the only means of assuring the peace of the world.'[70]

The particular American investment in 'assuring the peace of the world' was a commitment to the development of arbitration. This was hardly new in 1907. Secretary of State James G. Blaine enthusiastically described the Convention for an American International Court established by the first International American Conference held in Washington in 1889–90 as a '*Magna Charta* which abolished war and substitutes arbitration between the American Republics, as the first and great fruit of the International American Conference'.[71] Mark Janis has pointed out that David Jayne Hill, in his 'International Justice' published in the *Yale Law Journal* in 1896 and 1897, 'reviewed the history of arbitration, especially in the nineteenth century, noting that nearly half of the modern arbitration cases involved the United Sates'.[72] It is therefore no coincidence that the Jay Treaty and the *Alabama* case make their presence known in the first issue of the *American Journal of International Law*. And in his review of John W. Foster's *Practice of Diplomacy as Illustrated in the Foreign Relations of the United States*, Scott observes that the story Foster tells in the chapter on arbitration 'outlines a record of peace and justice which will rebound to the lasting credit of our country'.[73] Discussing the Drago and Calvo doctrines in the journal, Amos Hershey made it clear that the US commitment to arbitration has made an impact on the maintenance of peace: 'Our insistence upon arbitration in the case of the famous boundary dispute between Great Britain and Venezuela in 1895, points the way toward what is at once the easiest and most equitable settlement of such disputes.'[74]

In the 1950s the literary critic R. W. B. Lewis related the Adamic myth in *The American Adam* as envisioning 'an individual emancipated from history, happily bereft of ancestry, untouched and undefiled by the usual inheritances of family and race; an individual standing alone, self-reliant and self-propelling, ready to confront whatever awaited him with the aid of his own unique and inherent resources'.[75] The American ideal of self-reliance, as Lewis describes it, comes with ambivalences, ironies, and countercurrents, and, as I shall suggest, so did the mythologies surrounding the image of international law as ultimately American international law.[76]

70. Scott, *supra* note 44, at 252.
71. J. W. Gantenbein (ed.), *The Evolution of Our Latin-American Policy: A Documentary Record* (1950), 58, cited in D. D. Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference', (2000) 94 AJIL 4, at 9. It is interesting in this context to note the journal's editorial board member Theodore Woolsey's scepticism about arbitration 11 years before the journal's founding: 'But when we dream of the arbitration of the future, we picture to ourselves a permanent court of unblemished character and the higher dignity, which shall be always ready to pass upon all questions submitted . . . I do not say that this is only a dream, but perhaps we do not realize the tremendous step from the one method to the other, and the very serious difficulties in the way.' T. S. Woolsey, 'Some Thoughts on the Settlement of International Controversies', in T. S. Woolsey, *America's Foreign Policy supra* note 38, at 253.
72. M. W. Janis, *The American Tradition of International Law, Great Expectations: 1789–1914* (2004), at 147.
73. Scott, *supra* note 45, at 259.
74. A. S. Hershey, 'The Calvo and Drago Doctrines', (1907) 1 AJIL 26, at 45.
75. R. W. B. Lewis, *The American Adam: Innocence, Tragedy, and Tradition in the Nineteenth Century* (1955), 5.
76. It is interesting in this context to think of the Chilean international lawyer Alejandro Álvarez's *Le droit international américain* of 1910 and his view of international law as largely developed in the Western hemisphere and in certain ways based on the Latin American contribution with only an admixture of US contribution.

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5. THE AMBASSADORS

In the wake of Teddy Roosevelt's intervention aiding Japan and Russia's coming to terms to end the Russo-Japanese war with the Peace of Portsmouth, it seemed clear that the United States' using its good offices to defuse international antagonism could be repeated. The journal's editorial comment on the later Peace of Marblehead opens by declaring, 'In 1905 President Roosevelt earned the world's gratitude by persuading Russia and Japan to end the bloodshed in Manchuria by a fair and full discussion of the questions at issue', and consequently, '[i]n a lesser degree but in no different spirit the United States appeared as a pacifier in the affairs of Central America' – if this time with the partnership of President Diaz of Mexico to encourage Guatemala, San Salvador, and Honduras to reach agreement that, among other things, they would call on the US and Mexican presidents to arbitrate any future dispute.[77] The editorial concluded, 'The happy and joint actions of Presidents Roosevelt and Diaz show the vast influence for peace that our larger states possess and the result of this peaceable intervention shows power to be not a danger but a means of unmixed good if wisely used.'[78]

The United States also played a useful role in the Algeciras Conference to settle German and French differences with regard to Morocco, if not quite the part played in Portsmouth or Marblehead. 'American interests in Morocco', the editorial on the conference explained, 'are not extensive', and then, choosing an interesting turn of phrase, 'platonic rather than business like, but the United States was interested in the conference, namely that an agreement should be reached by the powers; that in such agreement the open door policy should prevail and that religious and racial intolerance should find no place.'[79] If the editorial observed that '[i]t is perhaps not wide of the truth to say that the American representative played the modest but not unimportant rôle of the fly-wheel',[80] it could end by quoting Prince von Bülow's praise for the US role: 'This was the second great service which America rendered to the peace of the world, the first being the reëstablishment of peace between Japan and Russia.'[81]

The pages of the journal were not, however, entirely advertising copy for the United States. In his extensive article on the Drago and Calvo doctrines on the inviolability of states (typically Latin American) by other nations (typically European) resorting to force to collect debts, Amos Hershey identified the US hypocrisy on the remedies for attacks on foreigners due to mob violence, or what Hershey calls 'this double inconsistency'.[82] 'Foreigners', he asserted, 'cannot be expected to appreciate

See C. Landauer, 'A Latin American in Paris: Alejandro Álvarez's *Le droit international américain*', (2005) 19 LJIL 957.

77. Editorial Comment, 'The Peace of Marblehead', (1907) 1 AJIL 141.
78. Ibid., at 143.
79. Editorial Comment, 'The Algeciras Conference', (1907) 1 AJIL 138, at 139.
80. Ibid.
81. Ibid., at 140. And one should remember here that the administration's international role mirrored its visible domestic role mediating industrial conflict, and Root himself, still in the office of secretary of war, met privately with J. P. Morgan on his yacht to move him towards a resolution of the 1902 coal strike. McGerr, *supra* note 13, at 124.
82. Hershey, *supra* note 74, at 34.

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the merits (?) of our present "peculiar" national institution of lynching, and foreign states have an undoubted right to demand a better protection of their nationals against this species of violence than is afforded them by our own local authorities and courts in some parts of this country.'[83] There is bite as well to Scott's statement in his review of John Bassett Moore's book on US diplomacy that the doctrine of expatriation is 'peculiarly American, as was to be expected from a nation that exterminated the only natives of the country'.[84]

Nevertheless, despite Roosevelt's criticism of the San Francisco school board's segregation of Japanese schoolchildren – which he called a 'wicked absurdity'[85] – the journal's editorial comment on the 'Japanese School Question' was exceptionally delicate for a journal touting its antagonism to prejudice, concluding: 'From the summary of the arguments for and against the action of the San Francisco authorities, it will be seen that the question is intricate and technical, and the decision of a test case in state or federal court will be awaited with uncommon interest.'[86] Roosevelt would resolve the issue later in 1907 by sending William Howard Taft to Japan to negotiate the so-called 'gentleman's agreement', in which the US recognized – all the talk of 'open doors' aside – the Japanese dominance in certain parts of northern China and an end to the specific discrimination, while Japan agreed to place its own restrictions on emigration to the United States.[87]

If the journal's intolerance of intolerance and genteel criticism of disturbing trends within the United States could be muted, the tone of the journal was self-congratulatory, even to the extent of following the society's president on his 1906 Latin American tour in 'Mr. Root's South American Trip'. The comment began,

> The presence of the Honorable Elihu Root, secretary of state, at the third international conference at Rio de Janeiro, on July 31, 1906, and his prolonged visit to the sister republics to the south was an event of more than passing interest, and while it is impossible to estimate accurately at this moment its effect upon the relation of the North to the South, it is little less than a moral certainty that the visit in itself and the friendliness everywhere evidenced will draw the republics into closer relations.[88]

Significantly, the comment reported that

> Mr. Root pointed out repeatedly that the full development of the material resources of the South could only follow in the wake of law, order and justice; that railroads and manufacturers required the inflow of capital, and that the United States not only wished them well, but that the people of the United States were sincerely desirous to contribute financially and materially to the republics of the South.[89]

There is little mystery here in the relationship of US business and finance to US foreign policy and the form of the international legal order espoused in the pages

83. Ibid. And Hershey states in a footnote that '[t]his was notably so in the cases of the 43 Chinese killed and wounded at Rock Springs, Wyoming in 1885 and of the Italians lynched in New Orleans, in 1891'. Ibid., note 23.
84. Scott, *supra* note 44, at 251.
85. Quoted in Zimmerman, *supra* note 6, at 471.
86. Editorial Comment, 'The Japanese School Question', (1907) 1 AJIL 150, at 153.
87. See, e.g., Cooper, *supra* note 18, at 108.
88. Editorial Comment, 'Mr. Root's South American Trip', (1907) 1 AJIL 143.
89. Ibid.

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of the journal. The various references to open doors, freedom of the seas, fishing rights, and neutrality all make the world safe for US trade and finance. The tie between international legal order and success of business is clearly established in Root's opening statement on 'The Need of Popular Understanding of International Law'. Making the domestic comparison, he writes,

> In every civil community it is necessary to have courts to determine rights and officers to compel observance of the law; yet the true basis of the peace and order in which we live is not fear of the policeman; it is the self-restraint of the thousands of people who make up the community and their willingness to obey the law and regard the rights of others.[90]

In part, this is Root's answer to the Austinian charge that consumed most late nineteenth- and early twentieth-century advocates of international law, that international law was not law because of its lack of enforcement and command over individual sovereign states. But Root goes on to say that 'it is voluntary observance of the rules and obligations of business life which are universally recognized as essential to business success'.[91] This was standard fare among conservative lawyers, and there was, it seems, no seam between Root's former corporate law practice in New York and the idealism of the opening pages of the *American Journal of International Law*.[92]

The economic instrumentality of the international legal order advocated by American international lawyers is hardly a mystery. But I should like to dwell here on a recent narrative about the run-up to the adoption of the 'Roosevelt Corollary' in moving militarily into the Dominican Republic, Cyrus Veeser's *A World Safe for Capitalism: Dollar Diplomacy and America's Rise to Global Power*.[93] Veeser tells of the machinations of the US-based San Domingo Investment Company (SDIC), which was a major creditor of the Dominican government. With the Dominican economy in disarray, the government agreed to international arbitration with the United States to settle a payment schedule for its debts to the SDIC. This is where Veeser's story becomes particularly interesting to us. One of our familiar protagonists, John Bassett Moore, author of the eight-volume digest of international arbitration, was at the same time the paid representative of the SDIC and the State Department.[94] He steered the membership on the arbitration panel, which would include a Dominican jurist, a US jurist chosen by the State Department, and a US jurist chosen by the Dominicans from a list created by Moore. Again, it is interesting to note that George Gray, also familiar to us from our list of the society's vice-presidents, was empanelled as the US designee. Significantly, this sort of arbitration was fairly representative of the pattern of US arbitration. Between 1870 and 1914, Veeser tells us, the

90. Root, *supra* note 32, at 2.
91. Ibid., at 2.
92. In the context of Root, it is important to remember that the Sugar Trust, which began in 1888 and dominated sugar production in Cuba before the Spanish–American War, was legally counselled by Root. As Warren Zimmerman explains, American sugar interests 'had no love for Spanish rule [of Cuba] because it was exercised by conservative politicians who favored protectionist policies to the advantage of Spain over the United States'. Zimmerman, *supra* note 6, at 250.
93. C. Veeser, *A World Safe for Capitalism: Dollar Diplomacy and America's Rise to Global Power* (2002).
94. Ibid., at 110.

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United States was party to 74 Latin American arbitrations, and typically the disputes involved private claims.[95] We fully expect that the international law advocated by US international lawyers was tied to US business interests and there were numerous actual ties between the lawyers and those interests. Still, the example of Moore – arguably the dean of international arbitration – and his simultaneous representation of the SDIC and the US government is particularly powerful.

In the context of US corporate interests, the title of John W. Foster's article in the journal directly following Root's opening statement, 'International Responsibility to Corporate Bodies for Lives Lost by Outlawry', promises to be significant in the corporate context. It did not, however, deal with business interests abroad but with a very different, if also large, US presence abroad, that of missionaries, and the corporation referred to was a missionary board. Basically, Foster's article explained that after the Boxer uprising in China in 1900, which resulted in the death of a large number of missionaries, none of the diplomatic representatives of the victims' 11 countries sought indemnities for casualties other than on behalf of individual widows or orphans. Yet, in this context, Foster describes the missionary board's effort to obtain financial redress for the death of four missionaries and one child during a mob attack on the American Protestant Mission Station at Lienchou. Foster ends his article on an ironic note: 'It is stated that the action of the board, setting forth its position, as above quoted, was submitted to the leading Protestant boards domiciled in New York, and that they unanimously concurred in its position. Whether such action was wise or Christlike is not a legal question, and I abstain from expressing an opinion upon it.'[96] Not very much sympathy for the missionary board in New York, but this genteel sarcasm had no impact on the American business corporation.

If, as I have said, there is an economic instrumentalism to the first issue of the *American Journal of International Law*, the interests of the State Department were particularly well represented, which, of course, is fully to be expected in the light of the significant overlap of personnel. Consequently, the editorial comment on 'The Nature of the Government in Cuba' argued forcefully that Roosevelt's appointment of Charles E. Magoon as provisional governor of the island did not affect the independence of Cuba. In a period of instability and rebellion during the administration of Cuba's first president, Estrada Palma, Roosevelt took advantage of a clause that had been inserted into the Cuban Constitution at Root's prodding. The inserted clause, a sort of reversionary right, provided that

> the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.[97]

95. Ibid., at 111.
96. J. W. Foster, 'International Responsibility to Corporate Bodies for Lives Lost by Outlawry', (1907) 1 AJIL 4, at 10.
97. Editorial Comment, 'The Nature of the Government in Cuba', (1907) 1 AJIL 149.

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There was little hint of embarrassment in what was flatly reported in the journal: 'The personnel of the government has changed; the constitutional administration of Palma has been succeeded by the no less constitutional government of Magoon and the Cuban republic is intact.'[98] Root's legal manoeuvring for the insertion of the clause into the Cuban Constitution of 1902 worked exactly as planned, and the *American Journal of International Law* argued the technicality with not so much as a gesture to Robert Lansing's extended essay on sovereignty theory. There was a reason why 450 copies of the journal were ordered on an annual basis for the staff of the State Department, including copies for each of its foreign embassies, consulates, and legations.[99]

6. A HAZARD OF NEW FORTUNES: EXCEPTIONALISM AND ITS AMBIVALENCES

All was not, however, pure instrumentalism in the pages of the journal. The managing editor, James Brown Scott, would later become the foremost proponent of the natural law camp in the United States. In the 1920s and 1930s he would spend a good deal of energy arguing that Francisco de Vitoria, the sixteenth-century Dominican professor of theology at the University of Salamanca, was the true father of international law rather than Hugo Grotius, and, although not Catholic himself, he came to see Vitoria also as the embodiment of a Catholic international law.[100] As editor of the Carnegie Endowment's 'Classics of International Law', he would give Vitoria an important place, and in 1934 he published his own study, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations*. In his preface to the book, Scott envisioned

> an international law still of the future, in which law and morality shall be one and inseparable, in which States are created by and for human beings, and every principle of international law and of international conduct is to be tested by the good of the international community and not by the selfish standards of its more powerful and erring members.[101]

As Christopher Rossi has told us in his study of Scott, the advocacy of Vitoria was in part a response to the First World War. Indeed, Scott's essay published in the second issue of the journal, 'The Legal Nature of International Law', reveals someone who was absorbed by the common-law image of a slowly evolving body of international law, someone who drew from Henry Sumner Maine's historical jurisprudence, rather than a natural law theorist. But the force of Scott's essay in the journal, a revision of two articles he had published in the *Columbia Law Review* in 1904 and 1905, is directed against the assertion by John Austin and the analytical school of jurisprudence that international law was not law at all but rather a form of 'positive morality'. In his extensive response, he demonstrated how international

98. Ibid., at 150.
99. Kirgis, *First Century*, *supra* note 10, at 25.
100. See generally C. R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of International Law* (1998).
101. J. Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (1934), 11.

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law was enforced, bringing us first back to Blackstone and then guiding us through the legality of international law in both the English and US systems.

Responding to Austin's argument is, of course, a standard exercise for international lawyers, but Scott's essay is especially extensive and intense. In his criticism of Austin, he argues that 'a devotion to law in the abstract, without an adequate appreciation of the importance of history in the law, has led to a system at once artificial, inadequate and, indeed, inaccurate'.[102] And he could assert forcefully that 'Laying aside theory and coming to the realm of tangible fact it will be seen that courts of justice acknowledge and administer international law untroubled by, perhaps unconscious of, the doubts and misgivings of Austin and the analytical school of jurisprudence.'[103] Scott here was deep in the fact and circumstance of actual legal practice, but he was also a scholar in the service of idealism. Thus, if Scott's view of law is of 'an organism and the result of organic growth', he is determined to demonstrate the existence of international law: 'Now, it is indisputable that nations so recognizing this body of usages and customs have existed at least since the middle ages, and it is more than a metaphor to call those so doing, the family of nations'.[104] This, then, was part of the idealism of the scholar and lawyer who helped to found the society and the journal, and who would shortly become a trustee and secretary of the Carnegie Endowment for International Peace.

With Scott at the helm we should not be surprised that the journal proclaimed its own idealism; it would be 'an organ of progressive and scientific thought'[105] and it 'is the handmaid of science and its pages will be closed to the language of prejudice and bias'.[106] As I have suggested, prejudice and bias are relative terms among the legal elite leading the society and its journal. Root, for example, after describing the large percentage of the Cuban population that was white, stated in a report of the secretary of war for 1900, 'On the whole this exhibits rather better material for government than had been anticipated, although if sixty-six per cent of the people were to continue illiterate, the permanence of free constitutional government could hardly be expected'.[107] Rather, the closure to the 'language of prejudice and bias' reflected a genteel strain typified by the publication in 1911 by George Harvey, the editor of *Harper's*, of occasional pieces under the title *The Power of Tolerance*.[108] In a 1909 commencement speech published in his book, Harvey admonished the graduates that '[t]o deny the power of bigotry would be to deny the facts of history. The superior capacity of concentration possessed by a narrow mind makes for strength.'[109] If he inveighed against the 'power of Determination, Narrowness, Relentlessness, even

102. J. Brown Scott, 'The Legal Nature of International Law', (1907) 1 AJIL 831, at 865.
103. Ibid., at 852.
104. Ibid., at 849.
105. 'Constitution', (1907) 1 AJIL 131, at 134.
106. Ibid., at 135.
107. E. Root, 'Excerpt from the Report of the Secretary of War for 1900', in R. Bacon and J. Brown Scott (eds.), *Military and Colonial Policy of the United States* (1924), 193.
108. G. Harvey, *The Power of Tolerance* (1911).
109. G. Harvey, 'The Power of Tolerance' (1909), ibid., at 3.

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Bigotry',[110] this expression of superior genteel morality was also behind the gentle warning of the genteel *American Journal of International Law*.

This strain of tolerance expressed by the journal was, I think, closely tied to the journal's vision of American exceptionalism. I have already mentioned the current of American exceptionalism in the journal, assuming the special nature of the US contribution to international law, particularly in the law of neutrality and the promotion of arbitration. This exceptionalism in turn should be placed in the context of the intensely confident American exceptionalism in foreign policy. Walter Russell Mead has recently attempted to write the narrative of US foreign policy in *Special Providence*, identifying four national traditions: a Jeffersonian, a Hamiltonian, a Jacksonian, and a Wilsonian.[111] Unfortunately, despite – or perhaps because of – its own exceptionalism, the book is overly schematic and not sufficiently historically textured. But there was a special guiding ideology impressed on US foreign-policy-making. If Mead produces a long list of nineteenth-century American military engagements and asserts that '[t]he nineteenth century was no time of arcadian isolation from the rigors of the world market',[112] that does deny the mythology its vitality. No doubt there was immense complication and variety, but the constant refrain about avoiding 'entangling alliances' seemed always present.[113] Over and over again, during the initial burst of the country's imperial expansion, there were worries expressed about avoiding the European example of empire, part of the mythic American Adam's 'separation from Europe' as well as 'separation from its history and its habits'.[114]

It is, of course, natural for countries to view their own foreign policy as an expression of the best traits of their national character.[115] But for the United States much of the emphasis was on the American departure from European ways. Thus it is not surprising that John Bassett Moore concluded his *American Diplomacy* with the success of Roosevelt's mediation between Russia and Japan in 1905, observing that those results 'afford a convincing proof of the nation's power; and not merely of its power, but also of the exercise of that highest influence which proceeds not so much from material forces as from the pursuit of those elevated policies that have identified American diplomacy with the cause of freedom and justice'.[116] Much of

110. Ibid., at 4.

111. W. R. Mead, *Special Providence: American Foreign Policy and How it Changed the World* (2002).

112. Ibid., at 15, 24.

113. It is interesting in this context to see Garry Wills's new portrait of Henry Adams in turn portraying Thomas Jefferson as significantly enhancing the nation's size and stature by a sort of indirection. Basically his concerns about entangling alliances and national reach led to the opposite effect; in Wills's words, 'the Jeffersonians wrought better than they knew while they thought they were doing something else. In the end, they made a nation.' G. Wills, *Henry Adams and the Making of America* (2005), at 393.

114. Lewis, *supra* note 75, at 5.

115. One thinks, for example, of French pride in their role in the Hague Peace Conferences expressed in the talks of Louis Rénault and Léon Bourgeois at the École libre des science politiques in 1908. L. Renault, *L'oeuvre de la Haye, 1899 et 1907* (1908).

116. Moore, *supra* note 37, at 266. In this context of US exceptionalism, it is worth noting that one of the main themes of Dorothy Ross's study of the origins of American social science is the varying strength of a US exceptionalism that separates American social development from the course of European development, and even at its low ebb – she entitles Part II of her book 'The crisis of American exceptionalism, 1865–1896' – there is always a certain vibrancy to the exceptionalist myth. D. Ross, *The Origins of American Social Science*

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the rhetoric focused on the American movement away from the European path. Moore in his history of US diplomacy even discussed the question of 'diplomatic dress' and the impact of the 'democratic spirit'.[117] From his conservative perspective he distinguishes US and European revolutionary traditions: 'On the continent of Europe, the apostles of reform, directing their shafts against absolutism and class privileges, spoke in terms of philosophical idealism, while the patriots of America, though they did not eschew philosophy, debated concrete questions of constitutional law and commonplace problems of taxation.'[118] If Moore refers throughout his book to various special American traits, the force of practicality, the commitment to free markets, the focus on legality, and the like, one of the overriding elements of US self-mythology in the realm of international affairs was the legacy of Washington's Farewell Address and Jefferson's concern with entangling alliances – American foreign affairs would simply be conducted differently.

The turn of the twentieth century has often been described as a watershed in the international position of the United States. In a few short years the United States annexed Hawaii; obtained control of Cuba, Puerto Rico, the Philippines, and Guam in the Spanish–American War; wrested control of the Panamanian isthmus for the creation of a canal between the Atlantic and the Pacific; and announced the 'open door' policy in China. Over and over again, one sees, both in the contemporary record and later historical narrative, a list of these changes as marking a divide in the United States' global position. As Warren Zimmerman has recently written, 'A turning point had been reached in the way the United States related to the world.'[119] Significantly, it is typical for historians to refer to this divide in the passive. Mark S. Weiner provides an example, even identifying exact dates, when he tells us, 'With the conclusion of the Treaty of Paris on December 10, 1898, and the exchange of formally ratified agreements between Spain and the United States on April 11, 1899, the American national government found itself in a new geopolitical position.'[120] Although not in the case of Weiner, the common use of the passive voice in this context is, I think, an attempt to register not only the suddenness of the change but also its dissonance with some of the previous commonplaces of the US self-image in foreign policy. In essence, the passive suggests the United States as accidental colonizer, suggesting discomfort or at least strangeness with its new role.

Indeed, one finds a good deal of discomfort with foreign expansion in the years before the birth of the *American Journal of International Law*. Prior to the

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(1991). The mythology of optimism has been so central to American thought and literature that literary critic Everett Carter could identify it as the 'American idea'. E. Carter, *The American Idea: The Literary Response to American Optimism* (1977).

117. Moore, *supra* note 37, at 261. It is interesting that Moore sees that spirit at its height in the middle of the nineteenth century, and although America has made its impact, it too has changed: 'On the other hand, there has grown up a visible tendency towards conformity to customs elsewhere established, and the progress of this tendency has been accelerated by the natural drift of a great and self-conscious people towards participation in what are called world-affairs'. Ibid.

118. Ibid., at 248.

119. Zimmerman, *supra* note 6, at 8.

120. M. S. Weiner, 'Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War', in C. D. Burnett and B. Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (2001), 48 at 63–4.

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Spanish–American War, as the controversy over the annexation of Hawaii raged, Theodore S. Woolsey expressed a widespread view when he wrote in one of his *Yale Review* articles that 'annexation of territory beyond the sea' (as opposed to the purely Continental expansion of Manifest Destiny) violated US traditions.[121] Hearing about the results of the negotiations with Spain in Paris, William James expressed to two other Harvard philosophers, George Santayana and George Herbert Palmer, his feeling of having 'lost his country' and asked rhetorically with regard to taking over the Philippines, 'What could be a more shameless betrayal of American principles?'[122] William Graham Sumner went so far as to characterize the change reflected in US foreign policy as the 'Conquest of the United States by Spain', warning that the result of the victory of the United States over a European nation was that the United States had become European.[123] Similarly, Harvard medievalist Charles Eliot Norton mourned the fact that America had 'lost her unique position as a potential leader in the progress of civilization, and has taken up her place simply as one of the grasping and selfish nations of the present day'.[124] And prominent Southerner Tennant Lommax likened the US moral declension in international affairs to the corruption of Republican Rome.[125]

During the events leading to the Spanish–American War and the course of the war, one finds the extreme expressions of jingoism and expressions of the need for war to revitalize the United States. But there was, even in the imperialist camp, a good deal of ambivalence about the sudden war and sudden imperial possessions. There was a reason why at the moment of launching into the Spanish–American War, the Teller Amendment was unanimously passed disclaiming any US interest in retaining Cuba. And one can discern a certain amount of discomfort with the idea of 'imperialism'. We are, in fact, told that Teddy Roosevelt and Henry Cabot Lodge, despite their strident positions, shied away from using the word, adopting instead words like 'Americanism' on Roosevelt's part (despite all his emphasis on the 'strenuous life') and 'large policy' on Lodge's.[126]

More to the substance of the policy goals, the historian Eric T. L. Love, in his recent *Race over Power*, has demonstrated quite convincingly the enormous depth and breadth of racial fear that acted as a tremendous break on US expansion and annexation.[127] He is quite clear about that fear inhabiting both sides of the imperialist/anti-imperialist divide to the extent that, for example, the annexationists finally won the decision over Hawaii because Hawaii could be framed as a white

121. T. S. Woolsey, 'The Law and the Policy for Hawaii', (1894) 2 *Yale Review* 351, at 354, cited in Tompkins, *supra* note 4, at 58–9.
122. Quoted in G. Santayana, *The Middle Span* (1945), 167–70, as cited in R. L. Beisner, *Twelve against Empire: The Anti-imperialists, 1898–1900* (1968), at 49.
123. See, e.g., ibid., at 229–30.
124. Charles Eliot Norton to William Roscoe Thayer, 16 August 1898, quoted in W. R. Thayer, 'The Sage of Shady Hill', (1921) 15 *The Unpartizan Review* 84, cited in ibid., at 81.
125. T. Lommax, 'An Imperial Colonial Policy: Opposition to It the Supreme Duty of Patriotism' (Commencement Address, University of Alabama, 20 June 1898), cited in Tompkins, *supra* note 4, at 113–14.
126. Zimmermann, *supra* note 6, at 13.
127. E. T. L. Love, *Race over Empire: Racism and US Imperialism, 1865–1900* (2004).

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nation.[128] Historians other than Love have noted the racial motivations. Robert Wiebe, for example, noted in 1967, 'Theorists who had once blessed the war as sign and source of a new national cohesion fretted about the ill effects from so many inferior people under the American flag.'[129] And Robert Beisner explained in 1968 that US anti-imperialists marshalled racial hierarchy with regard to the populations of Puerto Rico and the Philippines 'to justify excluding such peoples from a place in the American political system'.[130] But Beisner here set off the racism of the anti-imperialists against that of the imperialists: 'those in the imperialist camp usually proceeded from these racist assumptions to a belief in the duty of Americans to uplift and care for the backward and benighted savages of Puerto Rico and the Philippines'.[131] By comparison, Love sees the same racial anxieties as a force strongly informing – rather than being a justification for – the views of imperialists and anti-imperialists alike.

If Eric Love is convincing on the US ambivalence regarding the country's imperial expansion as a result of its racism, there were a number of other sources of that ambivalence based on the country's traditions. It is important to remember here that the principal argument for entering the Spanish–American war was humanitarian intervention. As Root asserted in 1898, 'The Cubans are exercising their inalienable rights in their rebellion. They have a hundred times the cause that we had in 1776 or that the English had in 1688.'[132] So it should not be surprising that, following the war with Spain, there was immense revulsion in the press over US atrocities committed in putting down the Philippine insurrection and an uproar that led to Senate hearings. Root himself – and this will sound eerily familiar – wrote a white paper arguing that, in fact, the incidents of brutality were rare and the culpable had been appropriately punished.[133] In a letter during the controversy in 1899 Root asserted that 'it is not a function of law to enforce the rules of morality'.[134] I shall return to this comment, but the forces around Root are significant here. The Spanish–American War was initially framed as a war of liberation, and the actions after the war clearly damaged the exceptionalist image of the US foreign presence. But I think the strength of the exceptionalist faith was too great. Indeed, Norman Graebner has written: 'What characterized the American outlook on the world in the years after 1898 was not merely the assumption of omnipotence but the identification of that omnipotence less with physical power than with the peculiar qualities of American civilization itself . . . the nation found its strength rather in its low taxes, its free-enterprise system, and the moral promise of its democratic structure.'[135]

128. Ibid., at xvii. Warren Zimmermann observed, 'Most of the arguments in Congress against Hawaii's annexation had been racial.' Zimmermann, *supra* note 6, at 291.
129. Wiebe, *supra* note 16, at 242.
130. Beisner, *supra* note 122, at 219.
131. Ibid.
132. Quoted in Zimmerman, *supra* note 6, at 259.
133. Ibid., at 411.
134. Ibid.
135. N. A. Graebner, 'The Year of Transition', in N. A. Graebner (ed.), *An Uncertain Tradition: American Secretaries of State in the Twentieth Century* (1961), 1, at 20.

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I have been arguing that almost everyone's anti-imperialism was an admixture of imperialism and vice-versa, so that even Andrew Carnegie, who strenuously advocated peace and opposed imperialism in public and private, came to advocate the annexation of everything taken from Spain with the exception of the Philippines.[136] Andrew Carnegie may have been a man riddled with contradictions, but he was hardly alone. Theodore S. Woolsey's series of essays for the *Yale Review* and the *Yale Law Journal* elegantly expressed his concerns about US expansionism and belligerency.[137] So it is interesting that this same Yale professor of international law came to the aid of the Roosevelt administration in battle against the Philippine insurgency led by Emilio Aguinaldo by adopting the perverse logic that Aguinaldo was constrained by the Hague Convention because he was fighting a civilized power, but since Aguinaldo's insurgents were not signatories of the Hague Convention, 'there was no obligation on the part of the United States Army to refrain from using the enemy's uniforms for the enemy's deception'.[138] In the expansionism of anti-imperialists, one sees, for example, David Starr Jordan's advocacy for 'permeating' Asia instead of occupying territory, or anti-imperialist Edward Atkinson expressing his admiration for a British colonial rule that emphasized open doors.[139] And in the anti-imperialism of imperialists, we learn of Root's hesitations. Clearly, as the historian T. J. Jackson Lears has demonstrated in *No Place of Grace*, the transition that ended the nineteenth century and began the twentieth created a great deal of ambivalence.[140]

7. The genteel tradition in US international law

If the cultural ambivalence described by Lears is discernable in the pages of the *American Journal of International Law*, there is also a strange continuity. Despite the presence of Republicans and Democrats, prominent imperialists and anti-imperialists, the journal seems to evince an attitudinal cohesion. The passages of former secretary of state Richard Olney's article in the second issue that sharply criticize the Roosevelt Corollary to the Monroe Doctrine[141] and the disingenuousness of Roosevelt's Panama Canal manoeuvre with his attempt to frame the United States

136. Beisner, *supra* note 122, at 175–6.
137. E. Berkeley Tompkins describes one of Woolsey's essays as presenting 'a particularly cogent critique of the prevailing trend, which constitutes an excellent summary of the anti-imperialist position in the anxious years'. Tompkins, *supra* note 4, at 25.
138. Quoted from S. C. Miller, *'Benevolent Assimilation': The American Conquest of the Philippines, 1899–1903* (1982), at 169–70, cited in Weiner, *supra* note 120, at 74.
139. Beisner, *supra* note 122, at 88, 91. In this context it is worth noting Efrén Rivera Ramos's argument: 'There were obvious differences between the position of the expansionists and the so-called anti-imperialists. But there were also shared assumptions and objectives. In the first place, it was clear that many among the anti-imperialist group were not opposed to overseas economic expansion, nor would they object to the enlargement of the country's military and naval capabilities'. E. Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (2001), at 41.
140. T. J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880–1920* (1981).
141. 'It is too plain for discussion that the Monroe Doctrine can not be invoked to support any such pretensions'. R. Olney, 'The Development of International Law', (1907) 1 AJIL 418, at 424.

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as the 'mandatory of civilization',[142] are interesting here for the very fact that his voice seems to lie outside the general tenor of the journal.

This raises a question as to how a journal representing a seemingly broad spectrum of political positions expressed itself in such a homogenized voice. In this context it is useful to turn here to the historian Henry May's depiction of the cohesiveness of the US elite at the end of the nineteenth century and the beginning of the twentieth. Indeed, May begins *The End of American Innocence* by describing an immense New York party in honor of the novelist William Dean Howells. Everyone was there, from President William Howard Taft, who had travelled up from Washington, to the muck-raker Ida M. Tarbell, and from the anti-imperialist Charles Francis Adams Jr to Admiral Alfred Thayer Mahan, the man whose book on the importance of naval might, *The Influence of Seapower Upon History*, not only captured Teddy Roosevelt's imagination but also helped to fuel the naval arms race between Britain and Germany. 'The dinner', May explained, 'was really a testimonial to the unity, excellence, and continuity of American nineteenth-century civilization.'[143] And it is this sense of unity, excellence, and continuity of the genteel tradition that seems to infuse the pages of the *American Journal of International Law*.

This is also the time that has often been identified as the high point of legal classicism, and legal historian Jonathan Zasloff has adopted Elihu Root as his archetypical classicist. Despite references to William Wiecek's study of American legal classicism, Zasloff charts out a new, rather different definition of legal classicism, one that seems more imprinted by Henry Sumner Maine than by Wiececk's '[g]eneralization, abstraction and certitude'.[144] It is Maine's insistence on legal and social evolution and the place of non-state social control that stamps Zasloff's legal classicists.[145] Wiecek himself in his book on legal classicism defines its ideology, including its formalism (despite the disclaimer on the opening page of his book that he did not want to use the term 'formalism' to define the ideology because the term would be 'excessively narrow and potentially misleading'),[146] but seems to lose sight of the intellectual framework he has sketched when he progresses to the instrumental judicial moves and countermoves about the beginnings of the regulatory state – the 'classicism' Wiecek defines seems to disappear in the twists and turns of early twentieth-century case law. Whether or not Zasloff's portrait is really of legal 'classicism' or a depiction of some broader orthodoxy, it captures a 'congenial worldview

142. 'There is no pretense that that republic ever parted with its territory voluntarily. The territory was practically expropriated by the United States claiming – and it is the best justification the circumstances could afford – to act as the "mandatory of civilization"'. Ibid., at 426.

143. H. F. May, *The End of American Innocence: A Study of the First Years of Our Own Time, 1912–1917* (1964), at 6.

144. W. M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (1998), at 5. Regarding the significance of Henry Sumner Maine, it is interesting that Wiecek refers to Maine only twice in his book and both times with regard to the famous 'status to contract' trope marshalled for the benefit of economic liberalism rather than Maine's historical organicism, which is part of Zasloff's understanding of his contribution to classical liberalism.

145. 'Law evolved according to secular causes and grew through time in both strength and effectiveness.' Zasloff, *supra* note 2, at 256. 'They acknowledged that state enforcement was often important but they strongly emphasized that custom and informal social controls could establish a modicum of social order in the absence of the coercive state.' Ibid., at 255.

146. Wiecek, *supra* note 144, at 3.

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for elite lawyers',[147] much of the world-view expressed in the *American Journal of International Law*.

Zasloff does well to focus on the centrality of legality and stability to Root's sense of himself and of his mission, drawing attention to a quotation that – even after taking into account the setting of the annual dinner of the New York State Bar Association – captures Root's belief that he was 'just a lawyer, from the ground up, and everything that I have done in my life has been as an incident to a lawyer's career, responding to the calls made upon a lawyer under the responsibilities of his oath and his conception of a lawyer's duty'.[148] This represents the foundation of Root's self-image, for Root was appointed as secretary of war by President McKinley with the task in mind of administering the newly won island territories *because* he was so much the lawyer. In an oft-quoted account, Root described his telephone call with McKinley's representative, who responded to Root's disavowal of any knowledge of military affairs as follows: 'President McKinley directs me to say that he is not looking for any one who knows anything about war or any one who knows about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants.'[149] As Steinberg and Zasloff have argued, 'Policymakers had to search for some sort of paradigm to make this new world clear and coherent.' And '[t]hey found that paradigm in law.'[150] Indeed, they tell us that law so framed policy that only lawyers served as secretaries of state from 1889 to 1945.

Lawyers, however, were only part of a broader move in the professionalization of the administrative state that paired newly professionalized social scientists with professionalizing lawyers. One only has to read Root's papers on US military and colonial policy to see how much he was engaged in building the administrative state. The emerging technocracy comes through his statement that 'Only thorough system could arrange, record, and keep available for use the vast and heterogeneous mass of reports and letters and documents which this business has involved, furnish the answers to questions, conduct the correspondence, and keep the Secretary of War from being overwhelmed in hopeless confusion.'[151] And there were plenty of academics he introduced to apply their science, such as Professor J. H. Hollander of Johns Hopkins, who went to Puerto Rico 'as a special commissioner to aid the military governor in the framing of an adequate system of taxation'.[152] In part, the colonial science, with its complement of social scientists studying local societies, was only an extension of the domestic practice of studying Native American

147. Zasloff, *supra* note 2, at 256.
148. E. Root, 'Individual Liberty and the Responsibility of the Bar' (address at the Annual Dinner of the New York State Bar Association, 15 January 1916), in R. Bacon and J. Brown Scott (eds.), *Addresses on Government and Citizenship* (1916), 511, quoted in Zasloff, *supra* note 2, at 252.
149. E. Root, 'The Lawyer of Today' (address before the New York County Lawyer's Association, New York City, 13 March 1915), in Bacon and Brown Scott, *supra* note 148, at 503–4, quoted, e.g., in P. C. Jessup, *Elihu Root, 1845–1909* (1964), I, at 215; Zasloff, *supra* note 2, at 286; Zimmerman, *supra* note 6, at 147–8.
150. R. H. Steinberg and J. Zasloff, 'Power and International Law', (2006) 100 AJIL 64, at 65.
151. E. Root, 'Extract from the Report of the Secretary of War for 1901' (1901), in R. Bacon and J. Brown Scott (eds.), *Military and Colonial Policy of the United States* (1924), 246 at 287.
152. E. Root, 'Extract from the Report of the Secretary of War for 1899' (1899) in Bacon and. Brown Scott, *supra* note 151, 177 at 182.

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cultures – just as the last Native American resistance was extinguished – by the Bureau of American Ethnology with its various books and papers.[153]

The professionalization of the social sciences described by Dorothy Ross in *The Origins of American Social Science* in tandem with the professionalization of the lawyers was very much an expression of genteel culture.[154] The references to 'science' in the *American Journal of International Law* may have contemplated the applied science in the emergence of the administrative state, but science also implied participation in literary culture. In the ether of America's genteel culture, the various vice-presidents of the society and the members of the journal's board negotiated the course from government and industrial practice to literary engagement. Melville Fuller, the chief justice of the Supreme Court, who was chosen out of his prominent Chicago corporate law practice, was a member of the Chicago Literary Club, made regular contributions to a literary magazine that had revived the name *Dial*, and invested real energy in his membership ex officio as chief justice of the board of the Smithsonian Institution.[155] If Fuller edited a collection of essays which appeared under the title *The Professions* in 1910, it was clear that his professional identity was permeated by the full atmosphere of genteel culture. And Fuller here serves only as one example of the role of the lawyer in administration, profession, and culture.

But there were also very specific *legal* tasks. If Root was committed to legality and stability in foreign affairs, he was emblematic of a broader elite ideological commitment to legality and stability. That was true domestically – the message of the second half of Wiecek's study of the 'lost world of legal classicism' with its emphasis on the independent judiciary and judicial settlement, and the resulting stability. And it applied as well to the foreign sphere. Earlier I quoted Root's words from his opening statement in the journal to the effect that

> In every civil community it is necessary to have courts to determine rights and officers to compel observance of the law; yet the true basis of the peace and order in which we live is not fear of the policeman; it is the self-restraint of the thousands of people who make up the community and their willingness to obey the law and regard the rights of others.

It is significant that Mark Janis, in his chapter on the 'Promise of International Law', reproduced this sentence as emblematic of Root's appreciation of the force of public opinion, for this particular sentence emphasizes the grounding of that public in legality.[156]

That legality, for Root and for many of his peers, may have had its foundation in public sentiment, but, as his quote states, it was still 'necessary to have courts to determine rights', for ultimately they were deeply committed to a judicially administered order, and that is why he and so many of his peers reacted so strongly to progressive calls for judicial recall. The independent judiciary was part of the foundation of their world. Columbia president Nicholas Murray Butler asserted in

153. See, e.g., Trachtenberg, *supra* note 23, at 34–5.
154. Ross, *supra* note 116, at 110.
155. J. W. Ely, Jr, *The Chief Justiceship of Melville W. Fuller, 1888–1910* (1995), at 14, 55.
156. Janis, *supra* note 72, at 150.

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his preface to *The International Mind*, 'Independent courts of justice protecting the individual from invasion of his guaranteed constitutional rights, whether by other individuals or by agencies of government itself, are the epoch-marking contribution of the United States to political science.'[157] Butler's book was a series of lectures, originally delivered to the Mohonk Lake conferences, turning the domestic lesson outwards internationally. His views fitted well into those of the legal elite, but I have quoted Butler in part because he was not a lawyer, but a trained philosopher and university president, and his views and the cultural assumptions into which they fitted express the ideology of a broader cultural elite with a shared sense of the place of law.

As I have argued, the genteel culture was wrought with ambivalence, and in the international sphere the sense of the imperialist nation that was not supposed to be imperialist was palpable. Garry Wills's recent book on Henry Adams's nine volumes on early American history depicts Henry Adams praising Thomas Jefferson for expanding the American nation and strengthening the government as a result of wanting to do the opposite. As Wills describes Adams's point, the Jeffersonians 'assumed power to decrease power, to de-centralize the government, to withdraw from international "entanglements"'.[158] It is their very virtuosity – as opposed to the failings of Adams's great-grandfather – that led to the strength of the country. Henry Adams was, of course, the great ironist. But I think his irony may not have been entirely as distinctive as one might imagine from the general reputation of *The Education of Henry Adams*, for it was a culture in which even the characters of William Dean Howells's *Indian Summer* talk repeatedly about their irony. Nevertheless, the dissonances of US foreign policy provide an ironic underlayer that shows through international law writing like pentimento.

The ruptures of the insular cases are only beginning to be appreciated for their importance.[159] These cases, working out the precise identity of the various islands obtained from Spain, the applicability of the US Constitution, the reach of its protections, and the characterization of the islands' populations as potential Americans, often involved five–four splits on the US Supreme Court and concurring opinions showing fissures within the majority. In a very agile analysis of the various insular cases *in seriatum*, Efrén Rivera Ramos has identified, as have others, Justice Edward Douglas White's concurrence in *Downes* v. *Bidwell* as the ultimate winner in the shuffle of viewpoints, and his characterization of the constitutional penumbral status of Puerto Rico and the Philippines came to dominate: 'White was constructing a new category in American constitutional jurisprudence: the unincorporated territory.'[160] In his review Ramos provides a good sense of the immense complexity of the cases and the mixing of analytical tools. As to the nine cases that were decided

157. Butler, *supra* note 41, at viii–ix.
158. Wills, *supra* note 113, at 2.
159. Sanford Levinson describes his conversion to the importance of the cases: 'What I now realize, in a way that was simply not part of my consciousness prior to my immersion in Downes, is how much the entire story of American expansionism has been ignored within the currently operative canon(s) of constitutional law.' S. Levinson, 'Symposium: The Canon(s) of Constitutional Law: Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism', (2000) 17 *Constitutional Commentary* 241, at 251.
160. Rivera Ramos, *supra* note 139, at 81.

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together on 27 May 1901, he states that, despite their simultaneous appearance, 'in important respects they do not form a consistent set of decisions, especially because Justice Henry Billings Brown, who wrote the majority opinion in *De Lima* v. *Bidwell* and in the first *Dooley* v. *United States*, joined the judges who formed the minority in those cases to constitute a new majority in *Downes* v. *Bidwell*'.[161] Perhaps Ramos's depiction of the cacophony from which Justice White's opinion emerged may have understated the fissures in the court. Indeed, I would suggest that those fissures cut across much of the writing, not only on the United States' relations with its new territories, but also on the country's foreign relations law.

In this context I should like to return to one of the key parts of the journal's agenda, its democratic reach. I have already discussed the goal of the new society and its journal to educate the American public. It is in this context that it is worth turning to Robert Lansing's essay on sovereignty in the first issue, 'Notes on Sovereignty in a State'. The highly abstract article does not address the common sovereignty issue typically discussed by international lawyers, that is, the sovereign-state basis for identifying the subjects of international law and their relationship to one another, which was the core postulate of turn-of-the-century positivist international legal thought. Instead, Lansing's article focuses on how sovereignty developed within the state – he means his title – from the 'formative period of human society, when man was little better than a beast', and 'the strongest in a community overcoming his fellows in combat or causing them to fear his superior strength compelled obedience to his will'.[162] Lansing follows the development through a 'social compact' of 'the later theory of "habitual obedience"', where a split appears between the 'real' and the 'artificial' sovereign, the 'real' sovereign having the actual final power and the 'artificial' sovereign having a sort of outward sovereignty on loan. At a certain point, the true sovereign emerges.[163] 'Since the execution of Charles I', Lansing explains, 'the English people have known that they were sovereign in England.'[164] Moreover, '[s]uch momentous events in the world's history, as the rebellion of the Netherlands against Spain, the English revolution of 1688, the American war for independence in 1776, and the French revolution of 1792, are manifestations of real sovereignty'.[165] Lansing makes an elision to federalism and ends by asserting that since 'domestic peace is essential to the existence of a federal state, a federal sovereign, and federal sovereignty, the further consideration of such sovereignty in these notes must be predicated upon internal peace and with a full recognition of the artificial character of such sovereignty'.[166] But it is not the national government that Lansing is identifying as sovereign but rather the citizens of the United States.[167]

Lansing's essay seems a rather odd detour for the journal until one returns to Root's opening statement in the journal, his announcement that '[g]overnments do

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161. Ibid., at 76.
162. R. Lansing, 'Notes on Sovereignty in a State', (1907) 1 AJIL 105, at 113.
163. Ibid., at 115–16.
164. Ibid., at 120.
165. Ibid., at 120–1.
166. Ibid., at 128.
167. Ibid., 125–6.

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not make war nowadays unless assured of general and hearty support among their people; and it sometimes happens that governments are driven into war against their will by the pressure of strong popular feeling'.[168] Similarly, in building his argument against Austin, James Brown Scott asserts that it is 'common knowledge that a law with the appropriate legal sanction is not and cannot, for any length of time, be enforced in the teeth of public opinion, and many a law on the statute book is, for all intents and purposes, a dead letter'.[169] This is true domestically – and here he cited the example of English criminal law – as well as internationally. Ultimately, legal development is driven by 'public opinion', making the educational agenda so important. Nevertheless, one senses that the civilizing mission of the journal is, in part, rooted in anxiety over popular energies. The 'artificial sovereigns' on the masthead of the journal and the helm of the society had a hold that they may not have felt to be entirely secure.

But perhaps more important were all the logical tensions that characterized the leaders of the society and the journal, and which they shared more broadly with the United States' elite legal culture. The legal elite was marked by a series of seemingly binary oppositions. They were committed to professionalization and created new professional organizations, but, as I have mentioned, they also identified themselves with a broad cultural milieu. They believed in law that allowed for private contracting with an emphasis on judicial administration that they argued should be deployed both domestically and – at the very core of the American Society of International Law's mission – internationally; and yet they were so often participants in the growing administrative state and its executive, rather than judicial, solutions. They were committed to democratic principles while indulging in immensely elitist practices and fearing the energies of the very classes they hoped to educate. They were often conservative in their social and economic values and simultaneously reformers, even if, as I have mentioned, their deep involvement in civil service reform set them in opposition to the patronage systems of party machines. In addition, as Robert Gordon has explained in his study of the New York City lawyers around the turn of the century, the lawyers who pushed strongly for reform, even reform of the industrial system, were the same men who professionally represented the very interests they were often reforming. Looking at the new leaders of New York City's Bar Association, Gordon writes: 'It is difficult to escape the conclusion that the reformers' program was partially embraced as a cure for their own condition.'[170] To understand how much the world described by Gordon is the same as that of the American Society of International Law and its journal, one only has to read one sentence from Frederick Kirgis's new history of the society: 'At a meeting on January 12, 1906, in the offices of the Bar Association of the City of New York, the Constitution of the American Society of International Law was formally adopted.'[171] There were, Gordon tells us, a number of ways to deal with the basic tension facing the legal

168. Root, *supra* note 32, at 1.
169. Scott, *supra* note 102, at 844.
170. Gordon, *supra* note 17, at 57.
171. Kirgis, *First Century, supra* note 10, at 11.

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elite, and rather than taking any particular path 'the bar proceeded schizophrenically down all these roads at once, and so gave up on the practical attempt to unify its public and private roles'.[172] These tensions combined with similar tensions experienced over the new US imperial role and the fissures over the insular cases. Nevertheless, all these tensions fitted within the congenial frame of the genteel tradition of American international law.[173]

172. Gordon, *supra* note 17, at 63.

173. As opposed to the 'two mentalities' Santayana describes in his famous attack on the 'Genteel Tradition in American Philosophy', one 'occupied intensely with practical affairs' and the other with 'higher things of the mind', I should like to describe the genteel tradition in US law as fusing these two sides of the American mind into one. G. Santayana, 'The Genteel Tradition in American Philosophy' (1911), in G. Santayana, *The Genteel Tradition: Nine Essays by George Santayana*, ed. D. L. Wilson (1998).

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