# A New Foundation for Freedom of Movement in an Age of Sovereign Control: The Liberal Jurisprudence of August Wilhelm Heffter

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A potential tension in attempts to maximize liberty—between individuals' freedom of movement across borders and citizens' democratic rights to control states—emerged in the nineteenth century amid debates over the sources of law. Many liberals during the middle part of the century promoted the opening of barriers to trade and movement.[1] Yet many were also calling into question the notion that law was grounded in nature or reason, as opposed to human action, and as such, questioned whether individuals truly possessed inherent, universal rights to move across borders or to subsist in foreign territory.[2]

Jurists increasingly held that legitimate law was "positive": grounded in factually evident sources. This emphasis dovetailed with the spirit of an

1. Nancy Green, *The Limits of Transnationalism* (Chicago: University of Chicago Press, 2019), 105–7.

2. Jane McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty," *Melbourne Journal of International Law* 12 (2011): 11.

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increasingly "scientific" age that was concerned with more empirical evidentiary bases than those provided by religion or pure reason.[3] Positivism privileged the manmade laws and actions of states. It also appeared to dovetail better with democratic lawmaking, compared with natural law's potential to legitimate the divine right of kings.[4] Yet state freedom and democratic control could also permit foreigners' exclusion.[5]

Speaking to the variety of nineteenth-century liberalism, scholars have shown how liberals could assert natural and positive law at the same time, or combinations thereof, to overcome such contradictions.[6] Yet this article demonstrates how liberal jurisprudence could work through positivism more directly, placing free movement on what Thomas Kuhn called a new paradigm's "new basis" for a previous activity.[7] It shows how one influential jurist, August Wilhelm Heffter, devised a means by which transnational rights derived from related decisions of states. This approach employed a largely positivist framework while recreating ways that natural law facilitated free movement.

Heffter's 1844 *Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* ("Foundations of the European International Law of the Present Time") argued that states (as positivists contended) possessed fundamental powers. Yet once states decided to enter "communities," the text posited, such communities governed states within them according to their *purpose*: facilitating interstate interaction. Similar logic not only proved lasting even into periods when states restricted more movement, but may hold new relevance today, as freedom of movement again faces rising challenges from concerns about sovereignty and democratic control.

Heffter's arguments were informed by his context. A Prussian academic, judge, and reformist legislator, Heffter was an identifiable period German liberal, seeking to peel back authoritarian rule by expanding personal rights and popular participation in government control. His credentials included

3. Antonio Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge: Cambridge University Press, 2017), 615.

4. Martti Koskenniemi, "Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law," *Constellations* 15 (2008): 190, n. 8.

5. McAdam, "Intellectual History of Freedom of Movement," 16.

6. On the variety of nineteenth-century liberalism, see Duncan Bell, "What is Liberalism?" *Political Theory* 42 (2014): 682–715. On liberals' use of both positivism and natural law together, see Part I of this article; see also Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), 95, 130–31.

7. A paradigm shift could change the "basis" for science, but "science" continued. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 2nd ed. 1970), 6.

defending the freedom of expression of Carl Twesten, a founder of the Prussian National Liberal Party, as well as collaborating with jurist Johann Kaspar Bluntschli on their 1857 *Staatswörterbuch*, a liberal political dictionary.[8] Heffter also advocated for the use of juries to increase citizen participation and experience in government.[9]

He also worked during an important period in the transition between natural law and positivism. Scholarship has now demonstrated that this shift was longer and more complicated than previously assumed. Many period liberal jurists still drew partially on natural law or conceived of an overarching "international community" to achieve ends such as free movement. Yet Heffter managed to do the latter while subordinating "community" to state freedom and locating the origins of rules previously justified by natural law within this relationship at a time when the necessity of demonstrating law's empirical sources was increasingly emphasized.

Heffter's contribution thus opens possibilities for addressing theories of both liberalism and law. His work confronts James Hollifeld's assertion that liberalism presents a "paradox" between free movement and democratic control of borders.[10] This seeming contradiction, Heffter's contribution suggests, could be overcome. Furthermore, unlike more recently influential jurists such as Alfred Verdross, who reasserted natural law to justify free movement, Heffter did so while embracing a greater degree of state freedom, with potential appeal for present-day, renewed concerns about sovereignty.[11]

Such potential has lain undetected as scholarship "seriously neglected" or "forgot" Heffter.[12] Little work centers on him.[13] Scholars who have

8. Friedrich Lauchert, "Heffter, August Wilhelm," in *Allgemeine Deutsche Biographie* (Leipzig: Dunckner & Humblot, 1880), 253; Miloš Vec, "From Invisible Peace to the Legitimation of War," in *Paradoxes of Peace in Nineteenth Century Europe*, ed. Thomas Hippler and Miloš Vec (Oxford: Oxford University Press, 2015), 22.

9. Wilfried Küper, "August Wilhelm Heffter (1796–1880): Ein preußischer Kriminalist und Universaljurist im 19. Jahrhundert," in *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart, und Zukunft*, ed. Stefan Grundmann et al. (Berlin: De Gruyter, 2010), 195.

10. James F. Hollifield, "The Emerging Migration State," *International Migration Review* 38 (2004): 886–87.

11. See Part IV of this article.

12. Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014), 581; and Küper, "August Wilhelm Heffter," 179.

13. Excepting, additionally, Ingo J. Hueck, "Pragmatism, Positivism, and Hegelianism in the Nineteenth Century: August Wilhelm Heffter's Notion of Public International Law," in *East Asian and European Perspectives on International Law*, ed. Michael Stolleis and Masaharu Yanagihara (Baden-Baden: Nomos, 2004), 41–55.

touched on him found him difficult to categorize. Some write that Heffter was positivist because he "dimiss[ed] the law of nature" or cited treaties and customs.[14] Another sees him as *criticizing* positivism.[15] Lassa Oppenheim assessed Heffter as "certainly a Positivist, although he does not absolutely deny the Law of Nature."[16] Another scholar calls him positivist but acknowledges disagreement.[17] Others see Heffter as "quietly" or "more positivist" than previous Germans.[18] Another believes that he moved away from positivism *and* natural law but leaned on the latter when necessary.[19] Some note that he is especially difficult to classify on freedom of movement.[20] Scholars also disagree about whether and how Heffter related to other influences, particularly G.W.F. Hegel and the German historical school of jurisprudence.[21]

Close analysis of his text and context permits this article's perspective that Heffter recreated, in more positivist terms, justifications for free

14. Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), 243; and H.B. Jacobini, *A Study of the Philosophy of International Law as Seen in the Works of Latin American Writers* (The Hague: Martinus Nijhoff, 1954), 27.

15. Rafael Domingo, "Gaius, Vattel, and the New Global Law Paradigm," *European Journal of International Law* 22 (2011): 638.

16. Lassa Oppenheim, *International Law: A Treatise: Volume I – Peace*, ed. Ronald Roxburgh (London: Longmans, Green, & Co., 1920), 115.

17. Neff, *Justice Among Nations*, 228.

18. Hueck, "Pragmatism," 51; and Tetsuya Toyoda, *Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries* (Leiden: Martinus Nijhoff, 2011), 201.

19. Andrew Fitzmaurice, *Sovereignty, Property, and Empire: 1500–2000* (Cambridge: Cambridge University Press, 2014), 223.

20. Georg Cavallar, "From Hospitality to the Right of Immigration in the Law of Nations, 1750–1850," in *Hospitality and World Politics*, ed. Gideon Baker (Basingstoke: Palgrave Macmillan, 2013), 85–86; Hueck, "Pragmatism," 55; and Karl-Heinz Lingens, "Europa in der Lehre des 'Praktischen Völkerrechts'" in *Auf dem Weg nach Europa: Deutungen, Visionen, Wirklichkeiten*, ed. Irene Dingel and Matthias Schnettger (Göttingen: Vandenhoeck & Ruprecht, 2010), 173.

21. Sebastian M. Spitra, "Normativität aus Vernunft: Hegels Völkerrechtsdenken und seine Rezeption," *Der Staat* 56 (2017): 612, sees Heffter following Hegelian patterns. Hueck, "Pragmatism," 54, observes "hint[s]" of Hegel and the historical school. Nussbaum, *Concise History*, 243, claims Heffter had no "philosophical view" beyond "a few somewhat extrinsic pronouncements of Hegelian parentage." Yet Anthony Carty, "The Evolution of International Legal Scholarship in Germany during the Kaiserreich and the Weimarer Republik (1871–1933)," *German Yearbook of International Law* 50 (2007): 41, writes that Heffter *rejected* Hegel. Georg Cavallar, "From Hospitality to the Right of Immigration in the Law of Nations, 1750–1850," in *Hospitality and World Politics*, 86, asserts that Heffter did not adopt Hegel's state-centrism but was influenced by his determinism.

movement that were previously grounded in natural law. For Heffter, principles descended from the purpose of communities that states freely entered. These principles could manifest as empirically verifiable customs. Heffter extended his approach to international law's enforcement. Implicit in positivist critiques of natural law was the question of how to guarantee rights not backed by states. Self-harm stemming from a breach of the purpose of the community itself, Heffter suggested, could serve as its own punishment.

This article's interpretation helps differentiate Heffter from his influences. His use of "custom" does reflect both Hegel and the historical school. Yet Heffter used customary examples to depart from Hegel's far greater level of state-centricity, showing, empirically, how states could build law-generating communities. Like Hegel, he believed in judgment by "history," yet for him this included the self-harm of a state counteracting a community that nourished it.

The remainder of this article substantiates these arguments. Part I discusses the turn to positivism, and how Heffter's thinking formed it and uniquely addressed a critical juncture. Part II examines Heffter's theories of free movement, elucidating how he engaged other period intellectual currents. Part III discusses Heffter's reception in the context of mid-nineteenth-century zeal for free trade and movement, suggesting his success in reconciling them with growing interest in positivism. Part IV reviews similar theories' persistence into the twentieth century, and the robustness of Heffter's approach during more challenging periods for free movement. Part V concludes by suggesting how, after a renewed rise of and new challenges for natural legal thinking, revisiting Heffter may be salutary for contemporary debates over universal rights and sovereignty.

## I. Early Modern Hospitality to Sovereign Border Control? Locating the Positivist Turn

Heffter's new foundation for free movement must be understood as responding to what should be seen as positivism's rising but incomplete influence in the mid-nineteenth century. Some histories of international law posit that a sharp departure from natural law occurred around 1800. This view includes the notion that early modern jurists were more concerned with "hospitality," or rights to cross borders, settle, and trade, and that subsequent jurists abandoned this emphasis. One reason given for this abandonment has to do with Enlightenment reaction against

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colonial infiltration.[22] Immanuel Kant, for example, argued that rooted societies had some right to close themselves off.[23] "Perhaps the most widespread story on the rise of legal positivism," however, emphasizes Jeremy Bentham replacing the term "law of nations" (implying that law governed states) with "international law" (implying that law existed between them) in 1789, and characterizing natural rights as "nonsense upon stilts."[24] Scholars also credit Georg Friedrich von Martens's 1791 treaty collection (creating a new sense of sources), or the Congress of Vienna codifying interstate protocols.[25]

An alternative line of scholarship complicates the abruptness and extent of the positivist turn. It follows trends that question teleological narratives, homogeneous "eras," and the prism of intellectual history alone as means of understanding how international legal thought evolved.[26] This scholarship has redefined early modern jurists as "proto-positivist."[27] An early example is Hersch Lauterpacht's determination that Hugo Grotius "found a viable middle ground between positivism and naturalism."[28] More recently, scholars have noted that seeds of positivism reach back to Samuel Pufendorf's or Christian Wolff's seventeenth-century emphases on sovereignty, and have shown how Vattel attempted to synthesize their ideas with hospitality.[29]

This line has likewise demonstrated how positivism and natural law later persisted alongside one another. Bentham, it finds, hardly broke decisively from natural law. He depended on authorities who grounded

22. On colonial infiltration, see Cavallar, "From Hospitality," 70–72. On the Enlightenment reaction see Jennifer Pitts, "Empire and Legal Universalisms in the Eighteenth Century," *American Historical Review* 117 (2012): 92–121; and Cavallar, "From Hospitality," 69–82.

23. See Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), 27.

24. See Cavallar, "From Hospitality," 84. For an example of such a history, see, for example, Stephan Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism," *European Journal of International Law* 12 (2001): 269–307.

25. On Martens, see, for example, Koskenniemi, "Into Positivism," 190, n. 8; on the Congress of Vienna, see Hueck, "Pragmatism," 42–43.

26. On this scholarly shift, see Ignacio de la Rasilla, "The Problem of Periodization in the History of International Law," *Law and History Review* 37 (2019): 292–96.

27. Pitts, "Empire and Legal Universalisms," 111.

28. See Georg Cavallar, "Immigration and Sovereignty: Normative Approaches in the History of International Legal Theory (Pufendorf-Vattel-Bluntschli-Verdross)," *Austrian Review of International and European Law* 11 (2006): 5.

29. Koskenniemi, "Into Positivism," 180–89, 192; and Vincent Chetail, "Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel," *European Journal of International Law* 27 (2016): 901–22.

law in "reason."[30] Bentham also argued from the perspective of a putative "universal legislator" standing above states' individual interests—a figure who effectively served as a substitute God.[31] Scholars have likewise found that Martens's treaties were taught as a working out of natural law, which for Martens regulated them as a "constitution."[32] Martens, they note, also balanced states' ability to restrict movement with the "morality of peoples" ("*Völkermoral*"), which defaulted to openness.[33]

Scholars also moved away from a "positivist turn" entirely by introducing new categories of jurisprudence. Georg Cavallar posits an early modern "society of states school" emphasizing sovereignty, while a "cosmopolitan school" emphasized hospitality later.[34] Regional variation also confuses any transition narrative; continental and Latin American jurists more readily accepted free movement over sovereignty.[35] A positivist turn subsequently appears to be "myth" or "illusion": the nineteenth century was inflected with natural law, and only subsequently redefined as a positivist period.[36] Positivism was thus more in evidence by the twentieth century.[37] Even then, belief in it was hardly universal.[38] Many scholars discuss an interwar revival of natural law.[39]

Yet arguments that there was never a clear transition to positivism risk losing sight of when it gained steam. One important moment could be

30. Mark Weston Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" *American Journal of International Law* 78 (1984): 411–12; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge: Cambridge University Press, 1989).

31. Janis, "Bentham," 414–15.

32. Koskenniemi, "Into Positivism," 190–91, 196.

33. Cavallar, "From Hospitality," 84.

34. Ibid., 72–77.

35. See Augustin Macheret, *L'immigration étrangère en Suisse à l'heure de l'intégration européenne* (Geneva: Georg, 1969), 16–17; James Nafziger, "The General Admission of Aliens Under International Law," *American Journal of International Law* 77 (1983): 807; and Richard Plender, *International Migration Law* (Leiden: Martinus Nijhoff, 1988), 72–73.

36. David Kennedy, "International Law in the Nineteenth Century: History of an Illusion," *Nordic Journal of International Law* 65 (1996): 385–42; and Miloš Vec, "Sources of International Law in the Nineteenth Century European Tradition: The Myth of Positivism," in *The Oxford Handbook on the Sources of International Law*, ed. Samantha Besson, Jean d'Aspremont, and Sévrine Knuchel (Oxford: Oxford University Press, 2017), 143.

37. Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 1, 20; Plender, *International Migration Law*, 79.

38. Frédéric Mégret, "Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law," *AJIL Unbound* 111 (2017): 14–15.

39. Cavallar, "Immigration and Sovereignty," 16–17.

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called a "Hegelian challenge," stemming from the philosopher's 1820s arguments on sovereignty.[40] "Natural law" existed for Hegel, but it came not from overarching authority but, instead, from eventual self-understanding.[41] Such understanding appeared to have its end in the state, and only seemed destined for perfection in the future.[42] Hegel therefore avoided even the idea of "international law" in favor of the "external law of the state" (*äußeres Staatenrecht*).[43] Less positivistic jurists emphasized more deterministic strands of his thought, yet Hegel's forceful conceptualization of state freedom had serious influence.[44]

Heightened support for sovereignty also drew from growing emphasis on empiricism, forming what has been termed the "Austinian challenge."[45] John Austin's 1832 *Province of Jurisprudence Determined* sought to place boundaries on the place of morality and religion in law, departing from Bentham's equivalence.[46] Henry Wheaton's 1836 *Elements of International Law* went further, denying natural rights' existence (though it still used "reason.")[47] The German historical school emphasized empirically grounded Roman and customary law.[48] By 1865, John Westlake conceptualized natural law as "camouflaging" Roman law.[49] In 1873, the *Institut de droit international*'s founders "stressed the need to find a historical and cultural basis for law."[50]

These interventions rendered previous arguments for hospitality inadequate by the mid-nineteenth century. Liberal jurists subsequently interposed the idea of an "international community" alongside states as a means to reconcile concerns with sovereignty and period interest in free trade and movement.[51] They also attempted to ground the existence of community empirically, often citing custom.[52] Yet their conceptions of "community" tended to limit state freedom, and communities' ultimate source of authority remained mysterious. Carl Kaltenborn von Stachau,

40. Spitra, "Normativität aus Vernunft," 598.
41. See Thom Brooks, "Natural Law Internalism," in *Hegel's Philosophy of Right: Essays on Ethics, Politics, and Law*, ed. Thom Brooks (Oxford: Wiley-Blackwell, 2012).
42. A helpful reading in this regard is Kimberly Hutchings, "Hard Work: Hegel and the Meaning of the State in his Philosophy of Right," in *Hegel's Philosophy of Right*.
43. See Hueck, "Pragmatism," 49.
44. Spitra, "Normativität aus Vernunft," 597, 606–12.
45. Koskenniemi, *Gentle Civilizer*, 48.
46. Janis, "Bentham," 410–11.
47. Ibid. For other scholars' perspectives see Vec, "Sources of International Law," 138.
48. Koskenniemi, *Gentle Civilizer*, 43–47.
49. Ibid., 88.
50. Ibid., 93.
51. Ibid., 25, 32, 67, 93.
52. Ibid., 51.

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in 1840, declared sovereignty to be community's "basis." Yet, community was still a "higher order" and states mere "elements" that somehow arranged themselves according to community's "higher godly calling."[53] Bluntschli, in 1868, wrote that barriers between states were evidently diminishing.[54] Community, for him, limited sovereignty by facilitating cross-border movement, but it was not clear how.[55] Robert von Mohl, in 1860, argued that states entered communities for a purpose, but explicitly grounded this observation in *both* "positive" and "philosophical" terms.[56] He also erred on the side of sovereignty when it came to "the rights of strangers," limiting his ability to justify free movement.[57] Period intellectual currents required a clearer reconciliation between both state and transnational freedoms and their empirical bases.

## II. A Hospitality for the Mid-Nineteenth Century: Heffter's Freedom of Movement

Heffter's *Das europäische Völkerrecht* thus ought to be interpreted in the context in which international law was digesting forceful new arguments for sovereignty and empiricism. Its innovation lies both in its embrace of state freedom and its use of arguments from both "purpose" and "custom" to sell "natura*listic*" (if not natural) rights to cross borders and subsist in foreign states that would appease emerging demands for more "scientific" evidence of bases for law. This section first delineates the work's cosmopolitan features, then describes how Heffter explained their derivation in ways that would render them palatable to the mid-nineteenth century's rising positivism, and finally examines his engagement with other intellectual trends.

### *a. Heffter's Cosmopolitan International Law*

Heffter's international law facilitated hospitality in two ways: first, it guaranteed a certain freedom of movement for people and trade. Second, it guaranteed rights for foreigners who were outside their countries that

53. Carl Kaltenborn von Stachau, *Kritik des Völkerrechts nach dem Jetzigen Standpunkte der Wissenschaft* (1840; repr., Leipzig: Gustav Mayer, 1847), 258, 297.

54. J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (Nördlingen: C.H. Bech, 1868), 220 §381.

55. Ibid.

56. Robert von Mohl, *Staatsrecht, Völkerrecht und Politik*, Vol. 1 (Tübingen: H. Laupp, 1860), 587.

57. Ibid., 595.

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were nearly on par—and in some cases surpassed—those enjoyed by locals. Heffter stressed that states had ultimate freedom. Yet within its boundaries, Heffter's international law was a cosmopolitan system by default—states did not opt into freedom of movement, and could only opt out because of a compelling interest.

A major liberty for which Heffter argued, "*Freiheit des gegenseitigen Verkehrs*" or "*Verkehrsfreiheit*" ("freedom of intercourse" or "freedom of circulation"), historically referred to free movement of both people and goods as well as *Niederlassungsrecht* (the "right of settlement.")[58] His text enumerated a number of "principles" (*Grundsätze*) of *Verkehrsfreiheit* "on which international law…must stand."[59] These included principles that no state could cut another off from necessities without committing an "act of hostility" (*eine Feindseligkeit*), that states could not hinder "land or water routes" or other infrastructure facilitating *Verkehr* within their territory, that states must not take advantage of travelers in their territory, must act in good faith toward them, could not reject or expel foreigners without communicating causes or in an "insulting way" (*fränkender Form*), and that a state's decision to exclude itself from circulation (*Verkehr*) with others meant that that state would be excluded from the enjoyment of international legal rights and protections.[60]

Heffter did list one principle that foreclosed *Verkehrsfreiheit*: against interaction that diminished "general human rights" (*allgemeine Menschenrechte*), by which he meant, specifically, the slave trade.[61] A later edition clarified that states could still not interdict "third parties" whose states had not signed agreements against the trade.[62] Yet this exception was related to Heffter's belief that it was not yet practicable to enforce

58. See, for example, Friedrich Wilhelm Eitzen, *Wörterbuch der Handelssprache: Deutsch-Englisch* (Leipzig: H. Haeffel, 1906), 788 (noting that *Verkehrsfreiheit* could include *Auswanderungsrecht* ["right of emigrating"], *Freihandel* [free trade], *Freizügigkeit* ["right of ingress and egress"], *Handelsfreiheit* ["liberty of trade"], *Gewerbefreiheit* ["liberty of exercising a trade"], *Handelsrecht* ["right of commerce"]).

59. August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, 7th ed. (1844; repr., Berlin: E.H. Schroeder, 1881), 75 §33 ("auf welchen das Völkerrecht…bestehen muβ"). This article generally cites the seventh edition from 1881, which features some clarified language but largely unchanged arguments. The article points to meaningful distinctions between it and other editions, however, when necessary.

60. Ibid.

61. Heffter's use of the term "human rights" is consistent with evolving scholarly understanding of the term's nineteenth-century meaning as connected to but distinct from today's. See Stefan-Ludwig Hoffman, "Human Rights and History," *Past & Present* 232 (2016): 280–82.

62. Compare Heffter, *Das europäische Völkerrecht*, 1st ed., 57–58 §33 with Heffter, *Das europäische Völkerrecht*, 7th ed., 76 §33 ("aber nicht gegen dritte, die ihn dulden").

such a prohibition on the high seas where the trade took place, specifically, rather than a stance in favor of default free trade in slaves.[63]

Heffter acknowledged that states also had freedom, in limited circumstances, to restrict *Verkehrsfreiheit* in the name of self-preservation. He listed measures that states could take to protect themselves should free movement accrue to their "disadvantage" (*Nachtheil*), including passport controls, customs duties, and protection for domestic industries. Yet, Heffter emphasized, state freedom was hardly limited to restrictive measures, and he also detailed ways that states could seize greater "advantage" (*Vortheil*) of movement: expanding trade agreements, for example, or opening free ports.[64] Heffter not only argued, in other words, for free movement as a default, but for thinking of state freedom in terms of *improving movement and trade further* as opposed to restricting them.

While *Verkehrsfreiheit* guaranteed that foreigners could enter and remain in a state's territory, Heffter also enumerated a number of rights that they could enjoy while there. Again, Heffter *ostensibly* agreed that states had control over their affairs. Yet, again, he qualified this position by arguing that states could not place such restrictions on foreigners in a way that would result in those states' exclusion from trade and interaction with other states.[65]

First, Heffter wrote, foreigners enjoyed the protection of host states' criminal laws and could obtain civil law rights as well. They also enjoyed the same civil status they would in their home state, and even if Heffter acknowledged that it might be difficult to replicate the same "conditions of rank" (*Rangverhältnissen*), he claimed that foreigners should still have the ability to enjoy "special preferential treatments" (*besondere Begünstigungen*). Although they could be subject to some fees, neither the financial or military powers of the state fully applied to foreigners to the same extent that they applied to subjects or citizens, effectively granting foreigners *more* rights than a state's citizens. Foreigners' moveable property could not be seized, only "momentarily shared" (*augenblicklich…mitbenutzt werden*) during pressing state emergencies, and even in these cases, the state needed to compensate them. Finally, foreigners should be able to enjoy non-moveable property (land) on the condition that their own states treated foreigners' property with equal respect.[66] Such principles made it clear that Heffter's overt claim that states retained the sovereign right to dispose of foreign residents as they wished, like his claims about their fundamental abilities to foreclose free movement, had serious limits.

63. Heffter, *Das europäische Völkerrecht*, 7th ed., 76 §33.
64. Ibid., 74–75 §33.
65. Ibid., 136–37 §61.
66. Ibid., 137–38 §60.

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*b. Heffter's Community of Free States and Purposive Grounds for Free Movement*

To assert such rights in his mid-nineteenth-century context, Heffter required a new means to reconcile his position that states had broad freedoms, on the one hand, with his position that they could be bounded by "general principles of international law," on the other. He also required means to ground those latter principals in empirical reality. Existing thought was unsatisfactory. As he put it, "even the latest philosophy has not resolved the dispute [between positivism and natural law]...It [either] believes in a legal revelation of the Holy Spirit or...that one sets the law oneself or builds it in community with others."[67] It was the *way* that states achieved the latter that he believed would resolve this tension. Heffter argued that states had the fundamental freedom to *enter* international systems. Yet this decision, he postulated, generated rules that derived from it. States entered communities for a *purpose*, generating principles and thus customs that states would need to follow that effectively created community-wide rights.

States were fundamentally free to engage in relations with other states, Heffter explained, making decisions related to the "necessities and advantages" of doing so.[68] But once states did, their actions became restrained, binding them into a system of international rules: "[t]he individual state that gives up its isolation forms a common law with the others with which it interacts," he wrote.[69] "Where there was a community" Heffter also prefaced his first edition, "there is also a law...when isolated nations come together, they can only coexist on this basis."[70]

State freedom meant that communities needed to have a purpose for which states entered into them. And associations of states were clearly, for Heffter, meant to facilitate those states' interaction. (Although he added the ingredient of state freedom, this purpose thus became one of the ways that Heffter's theory replicated features of natural law; Heffter credits the "greatest insight" [*großartigere Ansicht*] that communities must exist for the sake of interaction to the early modern natural lawyer

67. Ibid., 31 §10 ("Auch die neueste Philosophie hat den Streit der Systeme und Principien noch nicht beseitigt. Sie glaubt...an eine Gesetz-Offenbarung des göttlichen Geistes...oder...der sich selbst das Recht feßt oder in Gemeinschaft mit anderen bildet").

68. Ibid., 138 n. 4 §60 ("Es beruhet zuerst nur auf aüßerer Nothwendigkeit oder äußerlichen Nutzen").

69. Ibid., 2–3 §2 ("Der einzelne Staat...giebt er die Isolirung auf, so bildet sich im Verkehre mit den anderen ein gemeines Recht").

70. Heffter, *Das europäische Völkerrecht*, 1st ed., vi ("Wo eine Gesellschaft ist, da ist auch ein Recht; treten mehere isolierte Nationen zusammen, so können sie nur auf dieser Basis miteinander existieren").

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Francisco Suarez.[71]) "Should associations of nations exist according to the highest goals of international law," Heffter thus wrote, "they *must* also open mutual traffic for their spiritual and material needs."[72] He also added that communities could *not* have a purpose that would threaten states' existence: the basis for one of his few permitted derogations from *Verkehrsfreiheit,* that border closures were possible in emergencies.[73] Natural lawyers and other nineteenth-century liberals had discussed communities' purpose, yet none reconciled them so clearly with state freedom as did Heffter.

Purposive community formation, Heffter explained, was distinct from assumptions that international law was a product of states contracting treaties, of natural law, or of custom developed through "habit."[74] Rather, international law was a product of states' "common will" that did not require treaties nor the development of custom to exist in the first place, but could "formally manifest" through them.[75] In his first edition, in a phrase that later disappeared (perhaps as the influence of positivism grew), Heffter hinted further at the inspiration for this idea: states entering a community, he wrote, understood that doing so required a "*hypothetical* natural law."[76]

Customs' manifestation was an important part of Heffter's schema for establishing the empirical existence of community rules where treaties did not exist. In this, he again joined other liberal mid-nineteenth-century jurists, yet his schema, by establishing customs' derivation from states' original choice, rendered their source more compatible with full state freedom. This understanding of custom meant that some communities had, for Heffter, clearly existed for some time. Heffter located such rights as foreigners' enjoyment of equal civil status as early as the Middle Ages.[77] He also acknowledged that many rights that he believed *should* exist had

71. Heffter, *Das europäische Völkerrecht*, 7th ed., 5 n. 8 §2.

72. Ibid., 79 §33 ("Soll ein dem höchsten Ziel des Völkerrechts entsprechender Verband unter Nationen bestehen, so *müssen* sie sich auch einem gegenseitigen Verkehr fuer ihre geistigen und materiellen Bedürfnisse öffnen") (emphasis added).

73. Ibid., 34 §11.

74. Ibid., 5 §3. Heffter added the clarification that he did not mean custom in the sense of mere "habit" (*Gewohnheit*) in later editions.

75. Ibid. ("Die Wahrheit ist, daß…für unabhängige Staaten ein giltiges Recht wesentlich durch gemeinsamen Willen [*consensu*] besteht, welches zu seiner Giltigkeit weder einer ausdrücklichen Anerkennung in Verträgen, noch einer Bestätigung durch Gewohnheit überall bedarf, vielmehr sind dieses nur einzelne Arten der formellen Erscheinung des Völkerrechtes").

76. Heffter, *Das europäische Völkerrecht*, 1st ed., 12 §7(I) (literally "*hypothetisches Naturrecht*").

77. Heffter, *Das europäische Völkerrecht*, 7th ed., 138 n. 4 §60.

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been curtailed in practice. Communities, he explained (also in line with other period jurists), only gradually evolved customs perfectly suited toward their purpose. In its "higher development" (and with, Heffter wrote, the higher "education level of the people") a community would absorb "morally useful" customs and push "immoral ones" away.[78] International community thus functioned for Heffter the way he believed that a jury did: it allowed for the participation of individuals (or individual states), but "taught" them law through participation.

Heffter, finally, addressed how community allowed cross-border rights to be *enforced*. In having chosen community for its interactive purpose and having become entwined with it, a state could "never renounce [it] —without sacrificing its own existence and interrelationship with the others, or [at least] putting [these things] in danger."[79] The first "danger" would be a state facing public opprobrium, which "serves to protect the interstate community" (*dient. . .als Schutz die Staatsgenossenschaft*). To the extent that this was ineffective at guaranteeing adhesion, however, "history" would serve as the "final court of appeal" (*das letzte Gericht ist die Geschichte*). The "highest punishment" (*hoechste Sanction*) a state could receive was rooted in "world order," which Heffter warned had "a determination to give relations [*Verkehr*] between nations. . .a secure basis."[80] If they were to only consider their own will rather than that of the community, they would enjoy no peaceful interaction, "only power relations" (*Machtverhältnisse*).[81] (Certain practical considerations such as, seen above, the ability to control the high seas, or balance of power between states would, however, assist in ensuring violators were punishable.[82])

### *c. Heffter's Engagement with his Broader Intellectual Context*

The foregoing demonstrates how Heffter addressed the impasse between positivism and natural law as it pertained to free movement. Yet Heffter's text drew on and modified other period intellectual currents in

78. Ibid. ("Mit der Bildungsstufe der Völker. . .In höherer Entwicklung nimmt es aber auch das sittlich Nöthige und Nützliche in sich auf").

79. Ibid., 2–3 §2 ("wovon [ein Staat] sich nicht wieder lossagen kann, ohne seine Existenz und seinen Zusammenhang mit den anderen aufzuopfern oder doch in Gefahr zu bringen").

80. Ibid., 4 §2 ("seine Bestimmung: der allseitigen Entwickelung des Menschengeschlechts in dem Verkehr der Nationen und Staaten eine ſichere Basis zu geben").

81. Ibid.

82. On balance of power, see ibid., 9–10 §5. These practical considerations were, in fact, linked. Heffter believed that balance had not yet been achieved at sea, which led to his belief that a prohibition on the slave trade could not be made default.

ways that helped to overcome their contradictions. His liberalism tended toward support for the state as well as for transnational rights. Popular participation in national politics, he wrote in his first edition, also "gave international law a firmer [*festere*] basis."[83] At the same time, he saw "communities" forged by states such as the Concert of Europe believable as a basis for an international law that "national constitutionalists" could support, albeit in less reactionary form.[84] Popular politics might be best realized in states, but states, he believed, could still forge binding community law.

Heffter also drew on influential Hegelian concepts while nonetheless playing down the philosopher's understanding of state freedom. He credited Hegel for his concept of state freedom, and even that of states building communities.[85] It is possible to conceptualize Heffter's understanding of communities evolving from state needs or their own evolution through gradual self-perfection as an interstate application of Hegel's understanding of individual will realizing itself fully in the state. Yet Hegel explicitly rejected such analogies between state and interstate himself, viewing international associations as mere "provisional" contracts characterized by "caprice."[86] "The subject matter of these contracts is. . .of infinitely narrower range than" the state's, Hegel wrote. In the state, "individuals are dependent upon one another in a great variety of ways, while independent states are wholes, which find satisfaction in the main within themselves."[87]

For Heffter, by contrast, communities were deep bonds. Despite his frequent references to trade, Heffter also referenced "higher" and even "*spiritual* needs" that the freedom of movement that he advocated would fulfill.[88] Compared with the Hegelian search for self-fulfillment in freedom, individual self-fulfillment could for Heffter essentially only be found in a version of Kant's cosmopolitan "universal community" that maximized interaction and understanding.[89] Community could thus only be dissolved with severe consequences. In this, Heffter used Hegel's language of history as court.[90] Yet Heffter emphasized "history" promoting interstate relations (while Hegel emphasized the constant judgment of

83. Heffter, *Das europäische Völkerrecht*, 1st ed., vii.

84. Ibid., 15 §6.

85. Heffter, *Das europäische Völkerrecht*, 7th ed., 31 §10.

86. See G.W.F. Hegel, *The Philosophy of Right*, trans. S.W. Hyde (1896; repr. Kitchener: Batoche, 2001), 262 §330 (addition), 263 §332, 264 §333.

87. Ibid., 263 §332.

88. See, for example, Heffter, *Das europäische Völkerrecht*, 7th ed., 79–80 §33 (emphasis added).

89. See Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," in *Kant: Political Writings*, ed. H.S. Reiss (Cambridge: Cambridge University Press, 1991), 107–8.

90. See Cavallar, "From Hospitality," 86.

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war.) History did not judge states as much as serving as the sentence for their own behavior. To undermine community purpose and to re-enter the violent historical processes that Hegel viewed as judgment was to be already punished.

A certain Hegelian determinism is also discernable in Heffter's discussion of custom, in which "the modern age respected the trend toward cosmopolitanism," pushing customs toward facilitating interaction.[91] This is unsurprising given that there was less clash between Hegel's vision of a *future* cosmopolitanism (grounded in states' free self-realization) and Heffter's vision of community development. Yet Heffter at most suggests that the development of custom could be *overdetermined,* given that he also credited a state's entry into international systems for it.

Hegel's *phenomenology* may have actually proven as important for Heffter as the philosopher's theories of law. Hegel employed custom as a solid ground on which to understand humans' higher purpose, which, just as for Heffter's community purpose, customs did not *constitute*, but reflected.[92] In British thought during this period, custom was also being rendered in a way that replicated natural law arguments pertaining to property rights.[93] Heffter's work deploys a custom in a similar fashion: undergirding rights in a fashion akin to natural law but backed by something seemingly more concrete. His use also shows the influence of the historical school, which he had absorbed as a student.[94] Scholars have used this historical school background to illustrate Heffter's attachment to Roman law alone, or to claim that his idea of international law was rooted in Europe and inapplicable elsewhere.[95] (Heffter's invocation of non-European examples—and claims that "European law" extended beyond the continent—provide grounds for disputing the latter argument.[96])

91. Heffter, *Das europäische Völkerrecht*, 7th ed., 138 n. 4 §60 ("die neueste Zeit hat die weltbürgerliche Richtung eingehelten").

92. See G.W.F. Hegel, *Phenomenology of Spirit*, trans. A.V. Miller (Delhi: Motilal Banarsidass, 1998), 266–409.

93. Andrew Sartori, *Liberalism in Empire: An Alternative History* (Oakland: University of California Press, 2014), 61–95, and generally.

94. Lauchert, "Heffter," 250.

95. On Roman law, see, for example, Domingo, "Gaius, Vattel, and the New Global Law Paradigm," 637–38; and Luigi Nuzzo, "History, Science and Christianity: International Law and Savigny's Paradigm," in *Constructing International Law: The Birth of a Discipline*, ed. Luigi Nuzzo and Miloš Vec (Frankfurt: Klostermann, 2012), 39–40. On concern with Europe see, for example, Wilhelm Grewe, *The Epochs of International Law* (Berlin: De Gruyter, 2000), 464; and Lingens, "Praktischen Völkerrechts," 173.

96. For example, Heffter sees "China, Japan, and Paraguay" as states suffering from self-punishment by turning their backs on cross-border interaction. *Das europäische Völkerrecht*, 7th ed., 81 n. 2 §33. A later edition notes that the Ottoman Empire, "Japan, China, Annam,

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Yet Heffter's use of Roman custom can also be understood as a critique of Hegel and the extant development of positivism more generally. "In its ancient, widest meaning—under Roman jurisprudence—international law, or *ius gentium*, was called the common customs of the people," reads the first line of his treatise (which also suggests a search for a deeply rooted source rather than a concern for Roman antiquity, specifically.) These customs "[were] not merely observed among nations in their mutual intercourse, but also evenly permeated and regulated their internal social relations. Therefore, [international law] consisted partly of external laws regulating states [using Hegel's term *äußeres Staatenrecht*], and partly of human rights."[97] (Here, Heffter was employing a broader understanding of "human rights" [*Menschenrechte*] rather than a prohibition of the slave trade alone, but one including such features as free movement.)

Heffter saw the "modern world" as only considering interstate relations (*äußeres Staatenrecht*) as the proper subject of international law. "The common private law of all people from their common custom" had lost out to the conception that "human rights and private relations" were only regulated by states internally.[98] Yet, he wrote in his first edition, he wanted to "vindicate" the Roman conception of "human rights" instead, including "the rights which each individual, even those living outside the state, may demand in human society."[99] In effect, he used historical school techniques as a means to establish international law on an empirical basis that cut against the state-centricity of Hegel's *äußeres Staatenrecht*. He thus used one branch of positivism (empiricism) against another (a totalizing conception of state freedom) as one of his tools to open a new basis for rights.

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Siam, Persia, Zanzibar, etc." were entering European law's orbit. *Das europäische Völkerrecht*, 8th ed. (Berlin: Müller, 1888), 24 §8.

97. Heffter, *Das europäische Völkerrecht*, 7th ed., 1 §1 ("Völkerrecht, *ius gentium*, hieβ in seiner antiken und weitesten Bedeutung, wie sie die Römische Rechtswissenschaft aufgestellt hat, die gemeinsame Volkersitte, welche nicht allein unter den Nationen in gegenseitigen Verkehr als Regel beobachtet ward, sondern auch die inneren gesellschaftlichen Zustände in den Einzelstaaten gleichmässig durchdrang und regelte. . .Es enthielt demnach theils ein äuβeres Staatenrecht, theils ein allgemeines Menschenrecht").

98. Ibid. ("In der neuen Welt ist ihm nur die erstere Bedeutung eines äuβeres Staatenrechtes, *ius inter gentes, droit international* verblieben. Der andere Bestandtheil des antiken Völkerrechtes, gleichsam das gemeinsame Privatrecht aller Menschen von gleicher Sitte, hat sich dagegen in dem inneren Rechtssystem der Einzelstaaten verloren; dem heutigen Völkerrecht gehoert er nur noch in so fern an, als gewisse Menschenrechte und Privatverhältnisse zugleich unter die. . .Gewährleistung verschiedener Nationen gegenseitig gestellt sind").

99. Heffter, *Das europäische Völkerrecht*, 1st ed., v.

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## III. The Rise and Decline of Heffter's Influence: The Prisms of Free Trade and Movement

Heffter's reception suggests that he was successful in establishing transnational rights within the framework of a growing positivism. While obscure today, his text was globally popular and highly regarded in the mid-nineteenth century, viewed by one scholar as the period's "leading German treatise."[100] Others described it as "famous," and "influential," with significant "impact within German and international academia."[101] Heffter was consequently a "major nineteenth-century publicist."[102] His text has been called "one of the most important compilations of international law of the nineteenth century" and "the most successful" treatise of the age.[103] These views were shared by contemporaries such as Mohl.[104] Heffter's first biographer said that his work had "epoch-making meaning;" the nineteenth-century historian Heinrich von Treitschke called Heffter's a "glittering name" with which no other jurist could compare.[105] *Das Europäische Völkerrecht* was translated into a number of languages and reprinted in at least four French editions alone. German editions were printed into the 1890s. The work earned accolades among Anglophones on both sides of the Atlantic, even with no record of an English translation. Wheaton deemed Heffter "one of the most. . .distinguished public jurists in Germany," and was not alone among Anglo-Americans citing him.[106] An 1880 edition was the first international legal text to appear in Russian since 1828.[107] One scholar suggests that lectures based on Heffter were the source of the first work on international law in Japan, where there was intent to translate Heffter's writings as well.[108]

100. James Godfrey, *The Jurists: A* Critical *History* (Oxford: Oxford University Press, 2013), 216.

101. Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2010), 4; and Eyal Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), 27 n. 43.

102. Onuma Yasuaki, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (Leiden: Martinus Nijhoff, 2010), 221.

103. Lingens, "Praktischen Völkerrechts," 173; and Nussbaum, *Concise History*, 243.

104. Hueck, "Pragmatism," 51.

105. Küper, "August Wilhelm Heffter," 180, 192.

106. Henry Wheaton, *Elements of International Law* (Boston: Little, Brown, 1863), 14 §10; see also Cavallar, "From Hospitality," 85–86; and Nussbaum, *Concise History*, 230.

107. Hueck, "Pragmatism," 50.

108. Shogo Suzuki, *Civilization and Empire: China and Japan's Encounter with European International Society* (Abingdon: Routledge, 2009), 84.

What accounts for such interest in Heffter during this period and his diminished profile today? One suggestion is that Heffter's incorporation of Hegel, diminution of natural law, and "pragmatism" proved a desirable period combination.[109] Yet, as this article has shown, Heffter also replicated the advantages of natural law hospitality in forms appealing to positivists. The editor of later editions of Heffter's work consequently boasted about how the jurist had placed international law on a more solid foundation than Bluntschli, whom he said filled "gaps" (*Lücken*) in law with "opinion" instead, increasing skepticism in the law in the process.[110]

Heffter's text also appealed to the period's liberalism. In Germany, arguments for hospitality had previously emerged as critiques of autocratic states.[111] These states persisted into the pre-revolutionary *Vormärz* during which Heffter penned his text, as well as the reactionary period after 1848. Widespread use of Heffter's work coincided with a period in which advocacy for free movement and trade was taking off among the German states.[112] As a consequence, Heffter's cosmopolitan internationalism could be read as a means to help disrupt forces that German liberals and nationalists believed were holding back interaction between German states and with it a still-unrealized united Germany. At the same time, limitations on the state power to restrict transnational rights aligned with liberals' skepticism of democracy as mob rule. Many period liberals similarly pursued a path of moderation between direct democracy and absolutism, and for them Heffter's approach would have appealed in general.[113]

Outside authoritarian Central Europe, Heffter's treatise held potentially greater liberal value as an accelerant for trade. Indicating this interest, one French edition of the work replaced the ambiguous term *Verkehrsfreiheit* with "*liberté de commerce*."[114] Such appeal may have also stemmed from the perceived failure of adherence to more cumbersome notions of economic sovereignty. In 1844, for example, the United States appointed the more sovereigntist Wheaton as ambassador to Prussia. There,

109. Hueck, "Pragmatism," 53–55.

110. Friedrich Heinrich Geffcken, "Preface to the Seventh Edition," in Heffter, *Europäische Völkerrecht*, 7th ed., iii.

111. Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005), 15.

112. See Dieter Langewiesche, *Liberalism in Germany* (Princeton: Princeton University Press, 2000), 77.

113. See Alan S. Kahan, *Liberalism in Nineteenth-Century Europe: The Political Culture of Limited Suffrage* (Basingstoke: Palgrave Macmillan, 2003), 3.

114. See A.G. Heffter, *Le Droit International de l'Europe*, trans. Jules Bergson (Paris: A. Cotillon, 1883), 37 §33.

he opened trade talks with the German *Zollverein* ("customs union"), but negotiations proved arduous. Wheaton "toiled for seven years" on the process and earned the opprobrium of American industrialists who began to see his legal background as a hindrance.[115] Ultimately, Wheaton did conclude an agreement, but only without consent from Washington—bypassing the United States' democratically derived sovereign freedom to decide.[116]

Such friction relative to the popularity of free trade may have contributed to the promotion of the language of "*natural* law" to promote economic interchange, despite intellectual headwinds moving against it. In 1855, *The Economist* editorialized that free trade had "become. . .acknowledged as the only policy of the whole civilized world. It is pretty clear, therefore, that its roots are implanted in human nature and in the natural laws of society, and from it," the publication continued (echoing Heffter's theories of enforcement) "there can be no retrograde movement to protection and prohibition without ruin and destruction."[117] In his 1886 *Protection or Free Trade*, the American political economist Henry George wrote that "[i]t seems to me impossible to consider the necessarily universal character of the protective theory without feeling it to be repugnant to moral perceptions and inconsistent with the simplicity and harmony which we everywhere discover in natural law." George compared "natural law" to "human law;" in the latter "each nation must stand jealously on guard against every other nation and erect artificial obstacles to national intercourse," complete with "a cordon of tax collectors" and "their attendant spies and informants."[118] For George, "human law" seemed to herald the sort of harmful consequences envisioned by Heffter for states that cut themselves off from associations to which they had become bound. Such sentiments shaped an environment in which Heffter's transposition of aspects of natural legal thinking for a positivist age may have enjoyed a warm reception.

Yet while the mid-nineteenth century was a favorable context for Heffter's influence, later decades set the stage for its undoing. For one thing, the basis for a trade-related opposition to border control began collapsing. Toward the end of the nineteenth century, tariff walls rose again with the rise of a united Germany and the United States as industrial

115. See Alfred E. Eckes, *Opening America's Market: U.S. Foreign Trade Policy Since 1776* (Chapel Hill: University of North Carolina Press, 1999), 63–66.

116. See Alfred E. Eckes, Jr., William A. Lovett, and Richard L. Brinkman, *U.S. Trade Policy: History, Theory, and the WTO* (New York: Routledge, 2015), 46.

117. "PROGRESS OF FREE TRADE," *The Economist*, August 11, 1855, 867.

118. Henry George, *Protection or Free Trade: An Examination of the Tariff Question, with especial Regard to the Interests of Free Trade* (New York: Doubleday, 1905), 32–33.

powers, and their increasing competition with states such as Britain that had previously benefited from free trade.[119] German unification also weakened the case for free trade and movement among nationalists who had viewed these as means to connect German polities. Existing commitments atrophied as a consequence of the protectionist drift; France annulled the 1860 Cobden-Chevalier free trade agreement and began collecting duties on imports from Britain in 1892.[120]

Mass migration also intensified. In the latter decades of the nineteenth century, as a consequence, European states began experimenting with increased controls on foreigners crossing their borders, while the United States and British settler states pursued them against Indian and Chinese migrants.[121] The small number of aliens subsisting on foreign territory, usually for mercantile ends, that Heffter appeared to have in mind while penning his text no longer characterized the modern migration landscape. Nonwhite migrants' naturalistic arguments for free movement increasingly fell on deaf ears in settler societies emphasizing democratic control.[122] Despite Heffter himself being a founding member, the *Institut de droit international* adopted a stricter line in favor of state freedoms of border regulation, signaling a shift in the balance of the profession's opinion.[123] While its 1892 resolution backtracked somewhat, the *Institut* nonetheless permitted restrictions in light of aliens' "difference in civilisation or morals" or their arrival "en masse."[124]

Heffter's treatise covered numerous topics, and his decline in influence cannot be attributed to dwindling support for free trade and movement alone. Still, loss of this basis for his popularity may help explain why there is no record of Heffter's work being reprinted after 1890, while the latest reprint of Wheaton's treatise appeared in 2019.[125] Heffter continued being cited into the twentieth century on other topics, but rarely free

119. See Forrest Capie, *Tariffs and Growth: Some Illustrations from the World Economy, 1850–1940* (Manchester: Manchester University Press, 1994), 9.

120. See Bertrand Russell, *Freedom and Organization, 1814–1914* (New York: Routledge, 2013), 125.

121. On European borders see Leo Lucassen, *The Immigrant Threat: The Integration of Old and New Migrants in Western Europe Since 1850* (Urbana: University of Illinois Press, 2005), 27–100; on American and British imperial contexts see Adam McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders* (New York: Columbia University Press, 2008).

122. McAdam, "Intellectual History of Freedom of Movement," 16.

123. Henri Coursier, "The Right of Asylum," *International Review of the Red Cross* 2 (1962): 500. On Heffter's membership see Fitzmaurice, *Sovereignty, Property, and Empire*, 223.

124. Mégret, "Transnational Mobility," 16.

125. Henry Wheaton, *Elements of International Law* (Miami: HardPress, 2019).

movement or trade. His approach may have also worn thin; some even castigated his work as outmoded or analytically insufficient.[126]

## IV. The Survival of Heffter-Like Thought: Twentieth-Century Afterlives and Challenges

Heffter's influence hardly vanished entirely, however, even in an interwar era when borders were more routinely closed to trade and migration, and when legal opinion swung more clearly in favor of states' ability to close them. Sovereign control was confirmed in, for example, the Organization of American States' Convention on the Status of Aliens (1928), the International Conference on the Treatment of Foreigners Draft Convention (1929), and the Permanent Court of International Justice (PCIJ) *Treatment of Polish Nationals* case (1932).[127] Lassa Oppenheim did praise Heffter, in 1920, for "excel[ling] all former" authors "[i]n exact application of the juristic method," and observed that "all the following authors are in a sense standing on his shoulders."[128] Such veneration may have said less, however, about Heffter's ongoing relevance than about his importance and influence in the past.

Still, aspects of Heffter's approach—either transmitted through authors who "stood on his shoulders" or attesting to the robustness of similar theory—persisted in treatises and decisions. Lauterpacht drew a similar distinction between "self-help" in a "primitive" international legal system and communities in which states could not engage in "anti-social" activities.[129] He did not adopt a Heffter-like argument for "freedom of intercourse" on this basis, but noted that others did.[130] A more clearly analogous version of Heffter's argument about freedom of movement appeared in the work of jurist Paul Fauchille, who in 1924 emphasized states' decisions to enter communities by writing that "unlimited exercise of [sovereign] authority would be conceivable if states existed in complete mutual isolation, but in actual fact they are quite unable to shut themselves off in ignorance and disregard of everything which exists or occurs outside. They have to take mutual account of each other's existence, and since they have to enter into mutual relations they are obliged to subject these

126. See, for example, James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), 21.

127. Plender, *International Migration Law*, 79.

128. Oppenheim, *International Law*, 115.

129. Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), 298–99.

130. Ibid., 304, 304 n. 3 (citing Stowell and Politis).

relations to rules."[131] Unlike Lauterpacht, Fauchille noted that this necessity required free movement. Fauchille also contended, like Heffter, that only necessities such as the "self-preservation" of a state could curtail this right.[132]

A version of Heffter's arguments can also be detected in the logic of the PCIJ's 1923 *S.S. Wimbledon* case. The court, deciding on Germany's right to stop ships coming to the aid of warring states through its territorial waters, pointed to obligation to permit passage as an *implication* of entry into treaties. This obligation could hardly infringe German sovereignty, the court concluded. "No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way," it found. "But the right of entering into international engagements is an attribute of State sovereignty."[133] In making such claims, the court effectively repeated Heffter's two-step logic: states were fully sovereign in terms of their decision to enter communities, communities which possessed implicit rules, in this case, mandating movement.

A more concrete still application of Heffter-like thought is evident in a 1925 edition of the jurist Franz von Liszt's treatise. The work discussed "freedom of intercourse" (*Verkehrsfreiheit*) explicitly, placing it at the beginning of one section to express the notion that it was a fundamental principle of international relations, and that the cross-border flow of people, goods, and ideas expressed membership in a "community of states." The "fundamental concept" of international law, this text attested, was states' "recognition" that they were part of communities, from which flowed the "opening" (*Eröffnung*) of all member states to those states' citizens.[134] Once states were part of a community, Liszt continued, law between them required no special treaty.[135] The treatise went on to discuss, as did Heffter, exclusion from a community as punishment.[136]

Liszt's text did demonstrate that it was more difficult to make the case for movement rights in interwar international law. It conceded that there were many exceptions—especially since the First World War—when it came to the respect for foreigners' rights in evident practice.[137] Its language

131. Paul Fauchille, "The Rights of Emigration and Immigration," *International Labour Review* 11 (1924): 318.

132. Fauchille, "Rights of Emigration and Immigration," 319.

133. *The S.S. "Wimbledon," Britain et al. v. Germany*, PCIJ Series A01 (1923), ¶35.

134. Max Fleischmann, ed. *Das Völkerrecht, systematisch dargestellt von Franz von Liszt* (Berlin: Julius Springer, 1925), 170–71.

135. Ibid., 171.

136. Ibid., 170.

137. Ibid., 172–75.

attempted to reconcile growing acceptance of these exceptions with its advocacy of free movement; increased use of passports, for example, it conceptualized as border "surveillance," rather than control.[138] Still, the text's overall orientation demonstrates how concepts remarkably similar to those pioneered by Heffter survived into an era that was seemingly more hostile to them. Liszt's text even went so far as to argue that the economic consequences of the peace and the need for so many to migrate to find work required a theory that put "the fundamental right of free circulation" (*Grundrecht des freien Verkehrs*) *back* at the center of legal debate rather than state-centric concerns about being "overtaken by foreigners" (*Überfremdung*).[139]

These texts demonstrate how Heffter's ideas could survive in an even more hostile environment for freedom of movement than the nineteenth-century tilt toward positivism. Yet as attempts continued to assert natural law in a "last great battle," alternative philosophies of freedom of movement emerged.[140] A key figure in this struggle was the Austrian jurist Verdross.[141] Like Heffter and thinkers who employed Heffter's logic, Verdross believed that foreigners' rights ultimately extended from the existence of communities between states. States, for him, still had some freedoms, but they could not contradict community-formulated international law.[142] And while their actions helped build customary law, these were in general conformity with more abstract principles over which states did not have total control.[143] This limited the ability of states to close their borders to "reasonable" grounds that could not be "arbitrary."[144]

Like Heffter, Verdross was influenced by Suarez's natural law.[145] Yet Suarez did not merely inspire *part* of Verdross's theory, as he did for Heffter, but was "virtually adopted [by Verdross]…as the Leitmotiv of his entire international legal thinking."[146] Verdross, consequently, did not employ Heffter's two-step

138. Ibid., 179.

139. Ibid., 180.

140. Bruno Simma, "The Contribution of Alfred Verdross to the Theory of International Law," *European Journal of International Law* 6 (1995): 37.

141. Aoife O'Donoghue, "Alfred Verdross and the Contemporary Constitutionalization Debate," *Oxford Journal of Legal Studies* 32 (2012): 803. Verdross's protégé notes that this naturalism was not explicit because Verdross wanted to avoid the appearance of "bias." Simma, "Contribution of Alfred Verdross," 34.

142. Ibid., 46.

143. Ibid. 48–49, 51. See also Verdross, "On the Concept of International Law," *American Journal of International Law* 43 (1949): 1–2.

144. Alfred Verdross, "Règles concernant le traitement des étrangers," *Recueil des Cours de l'Académie de Droit International de la Haye* 37 (1931): 343–44.

145. O'Donoghue, "Alfred Verdross," 803; and Simma, "Contribution of Alfred Verdross," 37.

146. Ibid., 39.

process allowing the free choice of states to enter communities. Communities and their rules, for Verdross, existed as a function of a *reasoned* need for the governance of interaction between states, rather than state choice.[147] Compared with that of Heffter, this argument was more akin to that of other nineteenth-century German liberals who grappled with ideas of "community" and preserved its justification through natural law. Verdross even quoted Heffter's injunctions against barriers to free movement as an example of the development of a *jus cogens* norm that transcended all interstate agreements, but omitted Heffter's arguments about the entry of a state into a community and how that process produced such norms.[148]

A deeper concern with the effects of intensifying sovereign border control than possessed by scholars such as Liszt may have driven some advocates of a renewed naturalism in the interwar period. Verdross's protégé, Bruno Simma, contends that Verdross was concerned with preserving freedoms (like movement) lost through the division of Austria-Hungary into new states.[149] Arguing for state freedom to enter a community squared more clearly with freedom of movement in the mid-nineteenth century, when it could be viewed as helping build a united Germany on liberal terms, or allowing states to enter into the expanding community of "European international law." Newly carved out interwar states' freedoms, by contrast, often interfered with pre-existing communities, endangering what Verdross conceptualized as "organic" bonds.[150] The conclusion of this article ponders the impact of a similar rise in sovereigntist sentiment against a more recently revived naturalism, and observes how Heffter's approach may nonetheless address this impasse more effectively than Verdross's.

## V. Conclusion: Natural Law, Human Rights, Free Trade and Movement

Natural law received a further boost in the wake of the atrocities of the Second World War, which impugned the value of state freedom.[151] And

147. Ibid.

148. Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin: Duncker & Humblot, 1984), 328–29.

149. Simma, "Contribution of Alfred Verdross," 37.

150. Antony Carty, "Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law," *European Journal of International Law* 6 (1995): 90.

151. See, for example, Stephan Kirste, "Natural Law in Germany in the 20th Century," in *A Treatise of Legal Philosophy and General Jurisprudence, eds. Enrico Pattaro and*

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despite later confronting positivism once more (including in the famous Hart-Fuller debate), natural law attracted interest yet again in the later twentieth century.[152] Simma credits Verdross's prominence in the United Nations (serving on the International Law Commission), European Court of Human Rights (serving as a judge) and in postwar international law for a reassertion of natural law in the second half of the twentieth century generally.[153] Verdross, Simma claims, "firmly anchor[ed] natural law thought in the essentially positivist, voluntarist, theory of the sources of international law" and could even be said to have delivered a "*coup mortel au positivisme*."[154] Scholars have argued that *jus cogens* or peremptory norms and general principles, as well as human rights—which have all wielded considerable influence—can be linked, via Verdross or otherwise, to natural law.[155]

A more naturalistic legal thinking had important implications for free movement. In the postwar era, naturalistic arguments for freer movement were embraced in debates over the Universal Declaration of Human Rights in and treatises such as Oppenheim's.[156] By the turn of the twenty-first century, scholars including Jacques Derrida and Seyla Benhabib began revisiting hospitality law as the predecessor of the contemporary system of migrants' and refugees' rights.[157] Scholars and international bodies also enunciated protections for migrants under the rubric of *non-refoulement*, which they pronounced a non-derogable peremptory norm.[158]

Renewed emphasis on natural law did not come without criticism. Human rights and freedom of movement once again stood accused of abetting free trade in undermining democratic control over borders and the composition of societies.[159] Scholars have consequently noted a turn

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*Corrado Roversi, Vol. 12, Tome II: Legal Philosophy in the Twentieth Century: The Civil Law World*, ed. Franceso Viola (Dordrecht: Springer, 2016), 91.

152. See, for example, ibid.; and Philip Soper, "Some Natural Confusions about Natural Law," *Michigan Law Review* 90 (1992): 2393, 2402.

153. Simma, "Contribution of Alfred Verdross," 53.

154. Ibid., 47.

155. O'Donoghue, "Alfred Verdross," 818, notes the similarity of Verdross's conceptions of peremptory norms and general principles to others' use of human rights; Jean Porter, "From Natural Law to Human Rights: Or, Why Rights Talk Matters," *Journal of Law and Religion* 14 (1999): 77–96, notes the similarity between human rights and natural law.

156. McAdam, "Intellectual History of Freedom of Movement," 20, 22.

157. Gideon Baker, "Introduction," in *Hospitality and World Politics*.

158. See, for example, Jean Allain, "The *jus cogens* Nature of *non-refoulement*," *International Journal of Refugee Law* 13 (2001): 533–58.

159. See, for example, David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 176–79.

away from natural law yet again, including in terms of freedom of movement.[160] Proponents of sovereignty's reassertion argue once again that it serves as the best means to ensure democratic oversight. The debate over whether natural law (by emphasizing universal rights) or positive law (by emphasizing sovereignty) proves best at securing liberal guarantees of personal freedom in all dimensions—economic as well as political—both parallels and contributes to what Hollifield views as an ongoing liberal paradox between universal rights and democratic control.

Could grounding free movement in justifications like Heffter's address this paradox today? One scholar cast Heffter's arguments for transnational rights as akin to latter-day human rights advocates'.[161] Yet Heffter's two-step approach, elaborated previously, admits a greater role for state freedom, with its potentially democratic basis. The naturalistic form of freedom of movement he derived, in being expressed through purpose and custom, also links back to state action rather than to overarching principles that may appear divorced from popular control.

Nonetheless, numerous problems and questions attend a grounding of freedom of movement in Heffter's philosophy in the present. Could his theory truly function as well outside of his own historical context? Freedom of movement may have appeared compatible with democratic control in nineteenth-century Germany, where liberals sought both freedoms from autocrats. Today, the contradictions between liberal free movement and democratic border control appear more clear, especially in light of the rise of mass migration and tensions that have emerged between nationalisms, among other issues addressed in this article that potentially reduced interest in Heffter's work. Still, the survival of Heffter-like ideas in later periods, which this article has also demonstrated, attest to the value of his theories beyond his milieu.

A related question, however, is whether Heffter's justification for cross-border rights would break new ground today, when many rights are already linked to positive agreements between states. Yet many peremptory norms, legal principles, and human rights remain ultimately grounded in naturalistic reasoning. Moreover, rights that are currently more concretely linked to more voluntarist associations may serve as demonstrations of Heffter's thinking. Migrants between European Union states enjoy more robust protections than non-European Union migrants in the bloc, who often rely more on norms and principles such as *non-*

160. Kirste, "Natural Law in Germany in the 20th Century," 91. Treatises like Oppenheim's moved away from natural law justifications for freedom of movement once again. McAdam, "Intellectual History of Freedom of Movement," 20.

161. Domingo, "New Global Law Paradigm," 638.

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*refoulement*.[162] Of course, this difference also overlaps with racial distinctions, which may give credence to criticisms of Heffter and the European Union alike that "communities" may not necessarily be universalizable. Yet the distinct fates of Eastern European intra-European Union migrants compared with non-European Union migrants from the same region suggest that race cannot fully account for the difference.[163]

Brexit, of course, may serve as a notable counterexample to the effectiveness of the voluntarism of European Union membership vis-à-vis support for free movement. Yet Brexit's economic and political consequences may also echo the penalties that Heffter believed would enforce international law. Other Europeans' interest in remaining in the European Union increased significantly in the wake of the decision and its seemingly negative aftermath.[164] Confirming Heffter's understanding, moreover, this outcome was enhanced by the evident balance of power arrayed against Britain in its existing negotiations with the European Union and in its new bargaining position relative to the rest of the world.

After decades of human rights activism, Heffter's jurisprudence, with its foundation of state freedom, may no longer appear as "liberal" as it was in the mid-nineteenth century. Nonetheless, addressing the increasingly salient liberal paradox of the present requires making transnational rights once again appear not to compete with liberalism's democratic promises, which remain primarily realized in states. Heffter himself rendered universalism palatable in a new epistemological setting that appeared "safer for democracy." This contribution was not just key to his influence in his lifetime but also to the persistence of similar thinking beyond the conditions that made his initial reception successful. His achievement at least makes his ideas worth considering as a basis on which to reconcile ongoing motivations to preserve freedom of movement with voices advocating for more sovereign border control again in the present.

162. Note, for example, the rights of European Union migrants in Britain before and proposed after Brexit. Alessio D'Angelo and Eleonore Kofman, "From Mobile Workers to Fellow Citizens and Back Again? The Future Status of EU Citizens in the UK," *Social Policy & Society* 17 (2018): 332.

163. Zinovijus Ciupijus, "EU Citizens or Eastern European Labour Migrants? The Peculiar Case of Central Eastern Europeans in Britain," *Politeja* 20 (2012): 43–44.

164. See, for example, Stephen D. Collins, "Europe's United Future after Brexit: Brexit Has Not Killed the European Union, Rather It Has Eliminated the Largest Obstacle to EU Consolidation," *Global Change, Peace & Security* 29 (2017): 311–12, 314–15.