International Law and the Nineteenth Century: History of an Illusion

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1. Introducing a Memory

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

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place of the nineteenth century in the tradition of international law, and in the imaginary life of international lawyers today.

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

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

In the field of international law, it has been conventional to remember the nineteenth century in two ways: first, for the philosophical controversies between naturalism and positivism, which, after the relative triumph of positivism, gave way to the more pragmatic discipline we know in this century, and second, as a classical period, in which the most basic doctrinal and philosophical underpinnings for international law were consolidated – sovereignty, the state – only to be eroded, rejected and replaced by twentieth century inter-
national law. In both memories, the nineteenth century legal order is firmly a thing of the past – and it has been the discipline’s preoccupation from the first moments of the League of Nations to keep it that way.  

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

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

At the same time, the field has typically understood its progress from nineteenth century philosophical preoccupations and classical doctrinal formalism to twentieth century cooperative pragmatism in political terms. The deterioration of classical international law, its replacement by pragmatic institutions and functional doctrinal analysis, is told as a progressive story – a story of modernization, of internationalization, and of the left. The turn from the nineteenth century is both history in progress and progressive history. And of course, there is much to this story. As the nineteenth century ended, interna-

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

My own preliminary thinking about the legacy of the nineteenth century for international lawyers, however, leads me to stress a few counterpoints to this conventional narrative. It is important to remember, for example, that what we think of as the classical system, of both legal philosophy and doctrine, has never been as thoroughly rejected as this conventional picture suggests – it survives in the most progressive of contemporary polemics for a new international law. Sovereignty, formalism, positivism, a rule of coexistence rather than cooperation, all remain with us, not only as echoes and remnants to be excised root and branch, but as dreams, projects, goals for our work. This continuity in twentieth century disciplinary argument leaves me skeptical of the claim that a shift away from formalism or sovereignty can ensure, or even mark, an argument as progressive, or internationalist, or modern. And so I return to the nineteenth century drawn to the hypothesis that the classical synthesis I have been taught to anticipate may in fact have been generated by very twentieth century argumentative habits.

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

At the same time, I am skeptical of the political link often imputed between
the classical synthesis and the bad old nineteenth century. It may have been
that the imperial project expressed itself in the language of a classical sov-
ereignty, but I have the hunch that colonialism could also have been, and
indeed has since often been pursued in thoroughly modern terms, and not
just because elements of the classic system (the post-colonial state, for ex-
ample) have survived the onslaught of pragmatic modernization. The problem
of engaging and governing the culturally different has preoccupied the field
across a wide range of historical periods, scientific methods and doctrinal
conventions. Just as the failure of the Hague left the field with false hopes
for the League, so it seems that any hopes we now place in the peaceful
entailments of a pragmatic as opposed to a formal international legal order
are probably exaggerated. It is customary to think of the mysterious powers
of nationalism, shattering our cosmopolitan illusions, as aided and abetted by
the dark doctrines of sovereignty, the scorched earth individualism of posit-
ivist formalism, and so on. But nationalism is itself a modern, pragmatic,
anti-formal concoction, and I wonder whether the modernism of our disci-
pline's twentieth century sensibility should much reassure us. Taken together,
I have the hunch that developments within the discipline, style changes in the
practice of argument, criticism, and scholarship, fashion shifts in the intel-
lectual and cultural backdrop to international law arguments in other fields and
disciplines, may have had as much to do with the consolidation and deterio-
ration of the classical system as its political and pragmatic efficacy. Here, my
hypothesis is that the nineteenth century may teach us that the modernism,
pragmatism and progressivism of today's international law is more rhetorical

3 See Anghie, supra note 1 (The Nineteenth Century), passim.
4 See Berman, supra note 1 (But the Alternative).
5 Everything I think about nationalism I learned from Berman, see supra note 1 (both); also,
"A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar
effect and polemical claim than historical achievement, and more part of the internal dynamic of the field’s development than artifact of a distant era.

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

But if pre-modernism remains active as a set of commitments against which we must remain vigilant, acknowledged as a largely imaginary nineteenth century continually in need of repression, the origins of this practice, this narrative posture so peculiar to twentieth century international lawyers as missionaries for modernism, is much more obscure. I conclude these preliminary reflections with the hypothesis that this intellectual posture might be the most significant legacy of the break with the nineteenth century: the transformation of international lawyers into polemists for internationalism in a self-consciously evolutionary narrative, inaugurating a disciplinary practice of progress narration which continually resituates international law forward of what can then be remembered as the nineteenth century. It was late in the nineteenth century that international lawyers first became advocates for what they saw as civilization’s natural evolution, an advocacy which came to seem only more urgent after 1918. If, as I suggest, the nineteenth century’s main disciplinary contribution was turning itself into a past, a past related only obliquely to its own theoretical and doctrinal practices, this story about the nineteenth century is, in the end, a story of our own century’s originalism – and the origins of that exceptionism in the illusions of memory and the practice of progress narration.

2. A Memory Lapse

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

If the century has a direction, it is simultaneously from Europe outwards
and from politics to commerce. The move to commerce brings a move from
public to private order, and foreshadows a move from the imperial capitals of
More than any other, as we recall it, this is Britain's century, straddling empire
and finance – a century of naval power and sterling.

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

In fact, contemporary international law casebooks mention the nineteenth
century rarely. Of the more than 650 cases discussed in the 1993 edition of
Henkin, Pugh, Schachter and Smit’s “classic” casebook, I could find only
two dozen from the nineteenth century – the majority squib cites concerning
the force of treaties in American constitutional jurisprudence. In the case-
book’s short “historical introduction,” the nineteenth century fades entirely
from view, sandwiched between theorists of the seventeenth and eighteenth
centuries (Zouche 1650, Wolff 1679–1754, Vattel 1758) and the League of
Nations. The international legal order which emerged “out of” or “against

Constitution).

7 Id. at xxv–xxvi.
the backdrop” of nineteenth century diplomatic history remains present only in the odd case, treaty, institution or publicist. The Hague system of arbitration has disappeared from view – or been blended in memory with the jurisprudence of the Permanent Court of the interwar years.

Sometimes these fragments are presented as partial, immature precursors for contemporary arrangements, exceptional legal innovations, sporadic and experimental in an age of diplomacy and great power politics. This is particularly true for international institutions, a self-consciously twentieth century discipline which looks back on the nineteenth century as a diplomatic system whose failures called forth the first mature international organizations after 1918. The Universal Postal Union (1863), the International Meteorological Organization (1878), the Rhine River Commission (1868) are precursors, foreshadowing particular technologies (voting procedures, multilateral treaties of establishment, international civil servants) which would come together after 1918 in the general standing institutions of the League system, legalizing the practice of great power diplomacy as collective security and rejecting the nineteenth century system of power politics. In this view, the League promised to reverse the nineteenth century relationship of law and politics, bringing politics into law through the new discipline of political science and the technique of the standing plenary.

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

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8 Id. at xxvi–xxvii.
9 The Schooner Exchange v. McFaddon 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), id. at 1126, 1129; Church v. Hubbart, 6 U.S. (2 Cranch) 187, 2 L.Ed. 249 (1804), id. at 1266; Wildenhus' Case, 120 U.S. 1, 7 S.Ct. 385, 30 L.Ed. 565 (1887), id. at 1341; Finlay Claim, 39 Br. & For. State Papers 410 (1849), id. at 727; U.S. v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), id. at 215, 1114; Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), id. at 177, 1110; Red Rock v. Henry, 106 U.S. 596, 1 S.Ct. 434, 27 L.Ed. 251 (1883), id. at 1157.
10 Id. at 927, 260–261.
The status of these nineteenth century tidbits is unclear, as if important only as historical trivia. Thus, the 1815 Final Act of the Congress of Vienna merits mention for its recognition of riparian rights.\textsuperscript{11} We learn that there were hundreds of arbitrations in the nineteenth century, under the Jay Treaty between the U.S. and Great Britain, under the 1868 Mexican–U.S. Claims Tribunal, the 1885–6 Venezuela Claims Commission, the 1858 Chinese Claims Treaty, but none of them remain significant enough to warrant specific comment or citation.\textsuperscript{12} The 1888 Convention of Constantinople internationalized navigation in the Suez Canal, as did the Hay-Pauncefote Treaty of 1901 for the Panama Canal.\textsuperscript{13} The 1868 Declaration of St. Petersburg offers an early effort to ban inhumane weapons, and so on.\textsuperscript{14}

In short, to revisit the nineteenth century in contemporary treatments is to remember how very much international law, for all its archaic references, its penchant for Latin, its interest in custom, is a product of this century. In its own terms, international law has left the nineteenth century behind – its details rejected, revised, renewed. A thoroughly modern construction, international law takes its history light.

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

Many doctrinal fields of international law are now taught as evolutions from or rejections of a “traditional” doctrinal synthesis. It was the tradition of the Hague – stuffy, formal, legal – from which the League sought to distance itself, the twentieth century hiving off its link to the nineteenth. We study the law of war as a “classic” system of declarations, neutrality, belligerency, displaced first by the League, and then by the United Nations system, outlawing, regularizing, and relativizing war as a collective instrument and a gradation of justifiable “interventions.”\textsuperscript{15} We find that a three mile territorial sea was uniformly accepted in the nineteenth century, until extended and fragmented into

\begin{itemize}
  \item \textsuperscript{11} Id. 1353.
  \item \textsuperscript{12} Id. at 788–789, 793, 800.
  \item \textsuperscript{13} Id. at 1263–1264.
  \item \textsuperscript{14} Id. at 1020.
  \item \textsuperscript{15} Id. at 868–1019.
\end{itemize}
functional zones in the codifications of the mid and late twentieth century.\textsuperscript{16} An absolute theory of sovereign immunity has given way to a more nuanced, functional approach, just as in the law of sources a sharp distinction between law and politics has been replaced by gradations of hard and soft law and theories of relative normativity.\textsuperscript{17}

In both doctrinal and theoretical terms, the twentieth century in international law has been a story of renewal, waves of renewalist energy reacting to a discipline gone astray, the nineteenth century a sign for the classic synthesis which each generation of enthusiasts must modernize, remake, reject. It is this memory, more than a list of disparate doctrines, which hangs loosely about the nineteenth century. Flipping through the casebook, however, it is interesting how many of the doctrines, cases and publicists remembered as classics actually happened in the last moments before the First World War, or in the enthusiastic modernization of international law in the 1920's: \textit{Hilton v. Guyot} (1895); \textit{Paquete Habana} (1900); \textit{The Caroline} (1906); \textit{American Banana v. United Fruit} (1909).\textsuperscript{18} The "Hague System" of arbitration came only just before the First War, while rules on diplomatic immunities and sources of law were products of the codifications of the 1920s and the interwar jurisprudence of the Permanent Court of International Justice. The Mexican Claims we remember for their contribution to state responsibility doctrine date from the twenties, as, of course, do the great cases and arbitrations: \textit{Case of the S.S. Lotus} (1927); \textit{Island of Palmas} (1928); \textit{Aaland Islands} (1920).\textsuperscript{19} In a strange way, the doctrinal corpus of the classical system was produced in the codifications of the 1920s, understood at the time both as a project of renewal and as the systematic recording of practices and rules which had been developed in the previous century. Exactly as the institutional constructions of the twentieth century sought distance from the nineteenth, much of the doctrine – in many ways the entire project of doctrinal codification, the idea that there should be doctrine and legal reasoning and procedures and responsibility, that the existence of these things required an idea, an argument, an urgent practice of recollection and recording, like the whole doctrinal system to ascertain the "sources" of international law, all of which arose

\textsuperscript{16} Id. at 1240–1249.
\textsuperscript{17} Id. at 1126–1129, 14–19, 36, 51–54, 87–92, 126–148.
\textsuperscript{18} \textit{Hilton v. Guyot}, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), id. at 61; \textit{The Paquete Habana}, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), id. at 58; \textit{The Caroline Case}, 2 Moore, Digest of International Law 412 (1906), id. at 872; \textit{American Banana Co. v. United Fruit Co.}, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826.
in the twenties – was both an act of recollection, revisiting, rewriting the
nineteenth century and an act of innovative self-consciousness. The order
that had simply been would now have to be urgently reconstructed, precisely
that it might be rejected – or rejected that it might be rebuilt.

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

For legal thought in the nineteenth century, the Henkin, Pugh, Schachter
and Smit casebook offers us very little. Of scholarly writers, those who had
not come too early (Zouche, Vattel, Wolff) came too late (Jellinek 1905; Trie-
pel 1899; del Vecchio 1929) for the nineteenth century. From the nineteenth
century, only Wheaton remains in the canon, and he’s hanging by a thread,
unmentioned in this text. In their brief paragraphs on the nineteenth centu-
ry, Henkin, Pugh, Schachter and Smit offer only three emphatic, and quite
different, denials of international law.

First Hegel, who “constructed an elaborate dialectic system, culminating
in the glorification of the national (monarchic) state and denying the validity
of international law (for which he substituted ‘The Passing of the State into
World History’).” Then Marx, from the opposite angle, who “challenged
the national state and its legal system as an instrument of exploitation of the
working class by the capitalist bourgeoisie and called for revolution by the
working classes of the world.” For the editors, “[t]his, of course, was incompati-
ble with the structure of the law of nations, built on a system of sovereign

20 Id. at xxv–xxvi.
21 Id. at xxvii.
22 Id.
national states.” The nineteenth century, diplomatic, political, teaches us that international law can be denied by either celebrating or eliminating the state – ours will be a middle way.

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

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

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

At the end of the twentieth century we remember the nineteenth for a challenge to the possibility of legal order and for a classic doctrinal legal synthesis. In a way, we have responded to the challenge precisely by rejecting the synthesis – it was by disestablishing the state, rejecting formalism, fragmenting the absolute sovereignty of the classical period that a pragmatic discipline emerged, capable of responding to the Austinian challenge: yes,

23 Id.

24 John Austin, *The Province of Jurisprudence Determined*, 201 (Berlin, Hampshire and Wollheim, eds., 1832); see also Henkin et al., supra note 6, at 11.

25 In an astonishing transformation between the second and third edition, the editors now begin with what would have been a resounding admission against interest: “law is politics.” Henkin et al., supra note 6 at 1. The preface suggests a reason – once communism vanished, it became possible for American liberals to say what they had always been known. Id. at iii. The text nevertheless continues with the same fifty page defense of international law as *law* which had figured in the earlier edition, before the politics of law could be so boldly announced.
we have no foundation—law is as law does, tested by the behavior of nations. And we think of the challenge and the synthesis together—Austin was right about the old order, preoccupation with law’s formal purity left it open to the challenge of irrelevance.

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

3. Some International Legal Theory

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

In this story, the traditional era is remembered less as a period of diplomatic maneuver, institutional invention or doctrinal authority than as a period in which famous writers thought deeply about the fundamental questions of law in a state system, namely, how it might be possible to have a legal order among states which are sovereign, which admit no higher authority, no legislator, whose powers are equal, and hence do not overlap, each sovereign absolute within its territory. In the received history, international law, as it consolidated itself in the post-1648 period, toyed with various answers to this question, all of which have come to be thought of as “naturalism.” The story of the nineteenth century is that of the defeat of these “naturalisms” by “positivism.”

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

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

It is a paradoxical inheritance, of course. International law rid itself of faith only by enshrining the state, making the task of international public order both more realistic and more difficult. International legal philosophy in this century has been committed to explaining how, given sovereignty, international legal order is possible: it is a committed, engaged, polemical philosophy. When one sets the question “how can there be order among sovereigns” one can not answer – “Well, maybe it’s not possible.” To do so would be to deny the facts – there appear to be lots of rules and legal institutions – and, more importantly, to betray the internationalist project. In this sense, it was by eliminating religion that international lawyers became priests.

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

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

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

A second tradition of response, associated with the twentieth century tradition of international legal pragmatism (and most characteristic of international law after the Second World War), rejects the theoretical traditions of both positivism and naturalism as irreconcilable, able to speak only to one another, as extremes between which a middle way must be built, and more importantly as sterile intellectual projects, unhelpful in strengthening the actual or real international legal order. In an unfortunate terminological borrowing from political science, positivism offers no plausible “positive” account of state practice. International legal theorists now customarily present philosophical inquiry into the possibility of international legal order among sovereigns as a dead end, as the preoccupation of an earlier, philosophical age. International law students are now taught: in an earlier age, when people were infatuated with sovereignty, and thought it was absolute, there came a challenge to legal order – how order among sovereigns – and there were naturalist and positivist responses, neither very persuasive. Even today, many an international law theorist has his or her own nuanced theory, I have one, and if you want to be a theorist, you will have to have one too, but for now, let us get on to the doctrines, the institutions, the process, the practice – to something more pragmatic. And there we shall see that sovereignty is, in any event, no longer what it once was thought to be.26

26 When speaking theoretically, the vigor with which contemporary international legal scholars denounce “sovereignty” is quite breathtaking. One can get a flavor from the opening pages of
Twenty-first century international legal theory less accepts the positivist answer to the question how law might be possible among sovereigns than rejects the project of further philosophical inquiry into this question. At the same time, how international law binds, how order is possible among sovereigns, how international law distinguishes itself from politics, how international norms are enforced in the absence of a supra-sovereign, remain the central preoccupations of the field throughout the twentieth century, just as elaborating the perquisites of sovereignty remains the central doctrinal project. It is not the question which is rejected, but the project of theoretical response – the idea that such questions might yield to philosophical inquiry. They might be addressed doctrinally (through sources doctrine, fashionable in the interwar period), or procedurally (the fifties and sixties), or, more recently, institutionally, professionally, practically, ultimately by attention to the behavior of states, by pragmatic observation, but not theoretically.

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

Henkin, Pugh, Schacter and Smit, supra, note 6, at pp. 10–39. For example: Brierly denounces ... “the confusion which the doctrine of sovereignty has introduced into international legal theory,” (quoted supra note 6 at 13); Henkin (“Sovereignty is a bad word, ... a substitute for thinking and precision”) quoted id. at 15; Lillich, (“the concept of sovereignty in international law is an idea whose time has come and gone”) id. at 19.

27 It is astonishing how uniformly international legal treatises, from the mid-nineteenth century until the present day, begin their theoretical chapter by reference to the challenge of Austin or, less frequently, but to the same effect, Bentham. See, e.g., id. at 10–11; also, e.g., Friedrich K. Savigny, System des heutigen Römischen Rechtes, Band I, 32 (Berlin 1840); T. Walker, The Science of International Law, 41 (London 1893); cf. Koskenniemi, supra note 1, at xiii & passim (addressing this phenomenon).
It is interesting, in light of this memory, that nineteenth century international legal scholars and practitioners did not seem particularly preoccupied with theoretical disputation in general or with the question of law’s possibility in a world of sovereigns in particular. If anything, their theoretical chapters and arguments take up less space, and the insistent argument about the “science” of international law, the polemic in favor of international law, so characteristic of the early twentieth century, is largely absent. Broadly comparing the Austin/Bentham cite in theoretical chapters from, say 1840 through 1990, we find nineteenth century scholars relatively untroubled by Austin’s assertion that international law is not law “properly so called.” Lots of people had ideas about how international law should be described and cataloged – here were Austin’s – and now let’s proceed to the materials. In a sense, Austin had not yet become a challenge, let alone the central challenge, and international legal philosophy had not become a tradition of polemical response.

In the first half of the nineteenth century, it seemed obvious that there were restrictions on sovereignty, and natural to experience sovereigns always already enmeshed in a system of rules. We find discussions about where these rules might be located, how they are generated, and it is true these discussions lean ever more steadily away from the law of nature to the law of nations, stress increasingly the role of custom, treaty and state practice. But these discussions are not presented as theoretical responses to scepticism about the legality or existence of international law. It was only later in the century that the question of international law’s possibility in a world of sovereigns was first asked – perhaps indeed by Austin or Bentham. Even then, most of those who quote Austin or Bentham do not do so to present a central challenge to the field, or to call for an “answer,” theoretical or otherwise. The increasing preoccupation with state practice, the increasing use of an analogy to private contract, which peeks early in the twentieth century, if presented at all in the nineteenth, is offered primarily as part of a broader articulation of how, mechanically, rules are generated and identified. Wheaton first quotes Austin as part of a catalog of thought about what international law is.28 Far from seeing it as a challenge, he adopts Austin as a helpful explanation for the obvious fact of an international legal order. In a sense, those who would later be thought of as either naturalists or positivists were less seeking to respond philosophically to what would come to be seen as a fundamental theoretical conundrum, than simply trying to describe what seemed a self-evident system of rules. We find the same taken-for-granted quality in nineteenth century international law cases, from Marshall’s eloquent Schooner Exchange v. McFadden (1812) or Antelope (1825) to Justice Grey’s catalog of international practice in the

1900 *Paquete Habana.* Both justices take quite for granted the existence of an international legal system and give little thought to the executive’s ability to ignore its rules. The *Paquete Habana* is now remembered for the ringing declaration that “international law is part of our law.” The interesting point, however, is not that American courts came finally to accept the binding force of international law 124 years after independence, but that it was now necessary to state what had previously been simply accepted. In the twentieth century, American courts would have no trouble confining their jurisprudence to American law, often explicitly excluding consideration of international obligations until the *Paquete Habana* would be taught as a fond memory and utopian hope.

In fact, the question of international law’s possibility, the question which would give international legal philosophy a bad name, was much more a product of the early twentieth century, after the First World War. There you also find aggressive historical reinterpretations of the “classics” of the pre-1900 era as either “positivists” or “naturalists,” (or, for those more difficult to classify as the scheme became more insistent, “Grotians” who took an admirable, if muddled, middle way). It was only in the 1927 *Lotus* case, we should remember, that international law first asked itself whether the international legal order was fundamentally one of sovereign freedom or constraint, the Permanent Court famously concluding that “restrictions upon the independence of States cannot . . . be presumed,” inaugurating the period of what now seems extreme positivist doctrine. It is interesting, however, that the Court came to this foundational conclusion (in a sharply divided opinion) not because the international legal order inherited from the nineteenth century was well known as one of sovereign freedom, but because *whichever* way you looked at it, as freedom or as constraint, it would still be necessary to ground either the particular rule or the overall system of constraint in sovereign consent, from which permission could then be granted. In a world of sovereigns, as understood by the Court, philosophical inquiry into the nature of the legal order was unnecessary and unhelpful. Either way, restrictions on sovereignty could not be presumed. In

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29 *Schooner Exchange*, *supra* note 9; *The Antelope Case*, 23 U.S. (10 Wheaton) 66 (1825); *The Paquete Habana*, *supra* note 18.

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

31 This was, in many ways, the theory animating the great Carnegie Endowment effort to translate and republish the “classics of international law,” and defined the ambitions of scholars such as James Brown Scott who participated in the project. J.B. Scott, *The Spanish Origin of International Law* (1934). The search for a Grotian middle way continues, and indeed has recently had something of a resurgence. See, e.g., Benedict Kingsbury, Hedley Bull and Adam Roberts, *Hugo Grotius and International Relations* (Oxford, New York 1992).

32 *Lotus Case*, *supra* note 19, at 18–19.

33 Id.