

2021

Pragmatic Legalism: Revisiting America's Order After World War II

Afroditi Giovanopoulou
Florida State University

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the Law Commons

Recommended Citation

Afroditi Giovanopoulou, *Pragmatic Legalism: Revisiting America's Order After World War II* *Harvard International Law Journal* 325 (2021),
Available at: <https://ir.law.fsu.edu/articles/728>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

Pragmatic Legalism: Revisiting America's Order after World War II

Afroditi Giovanopoulou*

In recent years, persistent questions regarding America's role in the world have prompted scholars to revisit the history of World War II and its aftermath, when the foundations of our contemporary international order were arguably laid. Scholarly accounts of the period typically assert that the United States led the way for the establishment of a legalized international order, centered around the norms of international human rights and those of the law of war, and urge that the United States remain true to the same principles in the twenty-first century. More recently, scholars mistrustful of calls for a robust, militarized humanitarian agenda have argued that a much more dismissive attitude toward international law prevailed at the time, in large part due to the reigning influence of international relations realism. Their accounts dovetail with a steadily growing skepticism toward international law in today's foreign policy establishment. This Article argues that postwar foreign policy was defined by neither an unyielding fidelity to a norms-based international order nor an enduring realist dismissal of that project. Rather, what defined the postwar period was an eclectic, variegated and situational approach to law and regulation: a mode of "pragmatic" legalism. Pragmatic legalism consciously developed as a reaction to the legal sensibilities of prewar foreign policymakers, who promoted the codification of international norms and the judicial resolution of international disputes. It also developed as a result of larger transformations in American legal thought, notably the rise of sociological jurisprudence and legal realism. The history of pragmatic legalism reveals the possibilities for renewal in contemporary foreign policy, which currently oscillates between moralizing internationalism and skeptical disengagement. A broader array of legal possibilities is imaginable, including one that evokes the pragmatic spirit. This history also calls attention to the limits of such efforts at renewal. The pragmatic style, once progressive and experimental, eventually helped fuel regressive projects internationally. As in the past, so too today, legal renewal alone can hardly resolve the pressing questions surrounding America's global presence.

INTRODUCTION

At the dawn of the twenty-first century, America's military engagements across the globe prompted scholars to revisit the twentieth-century history

* S.J.D. (Harvard Law School), Ph.D. Candidate, History (Columbia University). For helpful comments, suggestions and conversations on earlier versions of this Article, I wish to thank Richard Abel, David Armitage, Curtis Bradley, Orfeas Chasapis-Tassinis, Marwa Elshakry, Guillermo Garcia Sanchez, Hendrik Hartog, Laurence Helfer, Rebecca Ingber, David Kennedy, Duncan Kennedy, Martti Koskeniemi, Michael Klarman, Rebecca Marwege, Mark Mazower, Justine Meberg, Sean Mirski, Samuel Moyn, Dean Rosenberg, Priyasha Saksena, Rohan Shah, David Schleicher, Pavel Sturma, David Trubek, Stephen Wertheim and Conor Wilkinson. I am especially grateful to Lisa Kelly and Zinaida Miller, who read multiple drafts of this Article as it was being revised. My thanks also to the HILJ editorial team for their meticulous and dedicated work under challenging circumstances. Earlier versions of this Article were presented at the 2020 Junior International Law Scholars' Association ("JILSA") Workshop, the 2019 American Society of International Law ("ASIL") Mid-Year Research Forum and Harvard Law School's S.J.D. Colloquium. The Harvard Law School Graduate Program, the Harvard Law School Summer Academic Fellowship Program, and the Weatherhead Center for International Affairs at Harvard University generously supported archival research for this Article. Errors and omissions are mine alone.

of American foreign policy.¹ The history of the postwar period, in particular, received renewed attention because of its heavily symbolic character in American memory.² Scholars returned to the postwar period to reflect on the present-day possibilities for America's presence in the world. Two sharply contrasting narratives have since emerged. For some scholars, postwar foreign policy laid the foundations for a heavily legalized international order, centered around the norms of international human rights and those of the law of war, which, they urge, the United States should valiantly promote today.³ Others have instead uncovered a much more sobering image of the postwar world, one in which international human rights norms were marginal and early twentieth-century international law was in decline, tamed by great power politics and antagonized by the dismissive approach of international relations ("IR") "realism."⁴ The legal history of America's postwar

1. For recent works examining the role of law in the conduct of American foreign relations in the twentieth century, see, for example, PAOLO AMOROSA, *REWRITING THE HISTORY OF THE LAW OF NATIONS: HOW JAMES BROWN SCOTT MADE FRANCISCO DE VITORIA THE FOUNDER OF INTERNATIONAL LAW* (Nehal Bhuta et al. eds., 2019); JUAN PABLO SCARFI, *THE HIDDEN HISTORY OF INTERNATIONAL LAW IN THE AMERICAS: EMPIRE AND LEGAL NETWORKS* (Nehal Bhuta et al. eds., 2017); BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* (2016); HATSUE SHINOHARA, *US INTERNATIONAL LAWYERS IN THE INTERWAR YEARS: A FORGOTTEN CRUSADE* (2012); Stephen Wertheim, *The League of Nations: A Retreat from International Law?*, 7 J. GLOB. HIST. 210 (2012) [hereinafter Wertheim, *The League of Nations*]; MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776-1939* (2010); Eileen P. Scully, *The United States and International Affairs, 1789-1919*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* (Michael Grossberg & Christopher Tomlins eds., 2008); MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789-1914* (2004); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV. 583 (2004); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003) [hereinafter Zasloff, *From the Gilded Age to the New Era*].

2. The memorialization of World War II has become especially pronounced since the 1980s. See DEBRA RAMSAY, *AMERICAN MEDIA AND THE MEMORY OF WORLD WAR II* 2 (2015); ANDREAS HUYSEN, *TWILIGHT MEMORIES: MARKING TIME IN A CULTURE OF AMNESIA* 5 (1995) (characterizing the phenomenon as a "memory boom of unprecedented proportions").

3. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (2005); JOHN COOPER, *RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION* (2008); RUTI G. TEITEL, *HUMANITY'S LAW* (2011); OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017). Within the literature of IR, political scientists have developed parallel accounts suggesting that the United States pioneered the establishment of a "rules-based order" after World War II. Such accounts, however, use the concept of "rules" in much broader terms and do not necessarily refer to legalization, such as, for instance, "political and economic rules and principles of order." See G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER* 2, 11-12 (2011).

4. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001) [hereinafter GENTLE CIVILIZER]; MARK MAZOWER, *NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS* (2009) [hereinafter MAZOWER, *NO ENCHANTED PALACE*]; MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA, 1815 TO THE PRESENT* (2012) [hereinafter MAZOWER, *GOVERNING THE WORLD*]; Stephen Wertheim, *Instrumental Internationalism: The American Origins of the United Nations, 1940-3*, 54 J. CONTEMP. HIST. 265 (2019) [hereinafter Wertheim, *Instrumental Internationalism*].

order remains obscure, even while the normative stakes of the debate are as relevant as ever.⁵

This Article revisits the history of the postwar period to articulate the legal language that accompanied America's rise to international preeminence. It shares the revisionist understanding that neither the tools of early twentieth-century international law—arbitration, codification, the judicial resolution of international disputes—nor the norms of international human rights stood at the forefront of postwar foreign policy. Because of their specific preoccupations, however, the powerful accounts of international law's decline have been successful at showing that certain legal ideas were absent or marginal in the postwar period, more so than at describing the legal sensibilities that were in fact operational. These narratives do not adequately capture the legal language of America's postwar order. This is the task that this Article sets out to accomplish.

This Article argues that, after the outbreak of World War II, foreign policymakers developed an eclectic, variegated and situational approach to law and regulation. For postwar foreign policymakers, law was a flexible tool for achieving policy outcomes. Its application and interpretation, consequently, was to be decided according to the evolving needs of the day. Law was also understood as important in its legislative function, helping govern international affairs through the creation of experimental institutional structures. This particular set of legal sensibilities constitutes a distinct legal style, to which I will refer as “pragmatic” legalism.⁶ Pragmatic legalism

5. For the ways in which legal scholars have in the past analyzed the relationship between power and international law, see Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006).

6. I build on the work of David Kennedy, who uses the terminology “pragmatic legalism.” See David Kennedy, *Speaking Law to Power: International Law and Foreign Policy Closing Remarks* (Mar. 6, 2004), in 23 WIS. INT'L L.J. 173, 174 (2005) [hereinafter *Speaking Law to Power*] (discussing three ways of conceptualizing the relationship between law and American power: law as restraining power, law as managing power, and law as a vocabulary for power). Kennedy uses the term to describe the legal sensibilities of Richard Bilder and legal advisers in the Kennedy administration. He also describes the ethos of modern legal internationalism as pragmatic when discussing the sensibilities of the late twentieth-century academic field of international economic law. See David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 671 (1995). In many ways, the story that this Article uncovers, that of New Deal lawyers infusing the foreign policy establishment with the insights of pragmatic legal thought, anticipates the developments that Kennedy describes in his classic articles. As Part II shows, international law scholars had become marginal actors in the American foreign policy establishment after Woodrow Wilson, and were not the main drivers in the change of legal sensibilities that occurred in the world of American foreign policy at the outbreak of World War II. As Kennedy himself notes, American international lawyers in the interwar years were still largely operating under the sensibilities of classical legal thought and experienced “confusion and anxiety, invention and disputation” in the postwar period. See David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 23 (1999); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 341 (2000). To understand the rise of pragmatism in modern international law scholarship and in the foreign policy establishment in the 1960s, it is essential to revisit the transitional period during and after the outbreak of World War II. See *infra* Part II. Martti Koskenniemi has also described the legal ethos surrounding the drafting of the U.N. Charter as “pragmatic,” but in so doing he uses the term to connote an absence of a profound and rich set of legal sensibilities around international law. See Martti Koskenniemi, *International Law in the World of*

influenced the ways that foreign policymakers approached the reorganization of the international order after the end of the War and the ways that they engaged in the Cold War controversy with the Soviet Union. Postwar foreign policy, then, was defined by neither an unyielding fidelity to a norms-based international order nor an enduring realist dismissal of that project. Over the course of the postwar period, pragmatic legalism came to compete with IR realism over the appropriate role of law in the conduct of American foreign affairs.

I label the legal sensibilities of postwar foreign policymakers as “pragmatic” in order to distinguish them from the legal sensibilities that defined foreign policy earlier in the twentieth century. Scholars have developed the language of “legalism” to describe the particular ethos of American foreign policy during the first two decades of the twentieth century.⁷ “Legalists” promoted the codification of international legal norms and the judicial resolution of international disputes as the distinctive mark of the United States in the world.⁸ This Article suggests that this early twentieth-century emphasis on international legal norms was but *one particular* form of legalism. Developing a foreign policy agenda centered on the elaboration of legal norms was not the sole method through which legal techniques came to shape foreign policy over the course of the twentieth century. The “legalism” of the early twentieth century—to which I will refer to as “classical”—was only one form of legalism.

Pragmatic legalism developed as a result of larger jurisprudential shifts in American legal thought. In the first two decades of the twentieth century, foreign policymakers had been influenced by what legal historians have termed “classical legal thought” or “classical orthodoxy.”⁹ This was an approach to law that, among others, looked to highly abstract legal concepts

Ideas, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 47, 55 (James Crawford & Martti Koskeniemi eds., 2012) (“The Second World War did not end in a blueprint for a new international law. There was little discussion about international law ‘ideas’ – apart from dismissing them as utterly unreal or counter-productive. A pragmatic spirit accompanied the establishment of the United Nations and the outbreak of the Cold War.”). This Article instead uses the notion of pragmatism to highlight the extensive, pluralistic and experimental approach toward international law that New Dealers adopted. See *infra* Part IV. For a different use of the term “pragmatic legalism,” see Jonathan Graubart, *Rendering Global Criminal Law an Instrument of Power: Pragmatic Legalism and Global Tribunals*, 9 J. HUM. RTS. 409, 409 (2010) (using the term to denote a perspective among international lawyers in the specific context of international criminal tribunals that “adapting the legal process to the political concerns of Great Powers and influential local actors is necessary for enabling a desirable legal order to take shape.”).

7. See COATES, *supra* note 1; Stephen Wertheim, *The League that Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920*, 35 DIPLOMATIC HIST. 797 (2011) [hereinafter *The League that Wasn't*].

8. See COATES, *supra* note 1, at 71–81.

9. Classical legal thought encompassed several other elements, such as the distinction between public and private, the language of “powers absolute within their spheres” and an understanding of law as neutral and scientific. See Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3 (1980); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1860–1970: THE CRISIS OF LEGAL ORTHODOXY* (1992); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998).

and formal logic to guide legal analysis.¹⁰ Starting in the interwar period, however, lawyers in the United States increasingly became influenced by the legal philosophical tradition of pragmatism: sociological jurisprudence and legal realism. Sociological jurists and legal realists opposed the methods of classical legal thought. Rather than relying on broad and abstract legal norms, sociological jurists and legal realists advocated for interpretation to be driven by the evolving needs of the day, the methods of the social sciences, and the consequences that the interpretation of a rule produced in each concrete situation. For them, law was also important in its legislative function, helping govern domestically and internationally through the creation of experimental institutional structures. Sociological jurisprudence and legal realism infiltrated the legal culture of the New Deal administrative state and, after the outbreak of World War II, the world of foreign policy.¹¹ In this way, they helped forge the legal infrastructure for America's ascent to global superpower.¹²

In order to demonstrate how pragmatic legalism operated in shaping America's global presence, this Article looks at four significant episodes in the history of international affairs. First, it examines the ways in which pragmatic legalists navigated America's status as neutral prior to Pearl Harbor and how they relied on the language of sociological jurisprudence and legal realism in order to support the Roosevelt Administration's efforts to aid Great Britain. Their work helped strengthen executive confidence in discussing the terms of peace and war absent congressional involvement. Second, this Article looks to the history of postwar international reconstruction. It showcases how, shortly after the United States successfully detonated two atomic bombs over Japan in 1945, New Deal lawyers propounded a highly legalized, experimental regime to govern the production of nuclear energy across the globe—a regime that bore striking parallels in its underlying philosophy to legal realist administrative experiments during the New Deal. This proposal was meant to challenge the Soviet Union to assume responsibility for the Cold War, in lieu of genuine efforts at international cooperation in the crucial subject of nuclear weapons. Third, this Article revisits a controversy over the interpretation of the U.N. Charter in the late 1940s. It shows how American lawyers, again drawing directly on the language of sociological jurisprudence and legal realism, advocated for a more activist Security Council, which could operate even when some of its permanent

10. See Zasloff, *From the Gilded Age to the New Era*, *supra* note 1, at 274.

11. Historian Samuel Astorino explored the impact of sociological jurisprudence on shaping the views of international law academics in the United States, but did not investigate how this approach influenced American foreign policymakers. See Samuel J. Astorino, *The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience*, 34 DUQ. L. REV. 277 (1996).

12. Scholars who have been interested in the impact of legal realism on American foreign policy have primarily suggested that legal realism helped pave the way for the arrival of IR realism. Most notably, this is the approach of Steinberg & Zasloff, *supra* note 3. This Article takes a different approach, in that it suggests that legal realism produced a competing approach to law to that espoused by IR realism. See *infra* Part III.

members were absent. The Security Council practice that was eventually consolidated with the support of pragmatic legalists allowed for U.N. intervention, under American leadership, in the ongoing Korean conflict. Fourth, this Article turns to the history of America's engagement with the global process of decolonization. It shows how the legal theory of sociological jurisprudence offered inspiration for foreign policymakers to turn to development as a strategy for interacting with the decolonizing world. The language of sociological jurisprudence thus helped consolidate the "development state" as the normative ideal toward which the Third World should strive, which in turn reinscribed the hierarchical organization of international society.

In providing the history of pragmatic legalism, this Article builds on revisionist efforts that cast doubt on mainstream narratives of international humanitarianism and calls attention to the ambiguous legacies of postwar law and legal thought for America's global presence.¹³ The accounts associating the birth of human rights norms at the end of World War II with the noble project of atrocity prevention have provided rhetorical force to the position that postwar international law prescribes a similarly activist agenda for the United States in the present.¹⁴ By contrast, this Article suggests that international law, as articulated by pragmatic legalists, at times became enmeshed with troubling aspects of America's global power, offering a vocabulary for the hierarchical reorganization of the international society and the violence of the Cold War era. In light of its ambiguous past, international law is best seen as indeterminate in terms of mandating a particular agenda for the United States in the world. This question should properly be the subject of a broader, normative debate.

The history of pragmatic legalism also suggests that international law's capacity to bring about change should neither be under- nor overestimated. Today, the skepticism toward international law once advocated by IR realists has resurfaced, perhaps stronger than before, and is vying for prevalence against the moralizing agenda of international humanitarianism.¹⁵ In this

13. There is a recent wealth of histories casting doubt on celebratory narratives of international law. In addition to the works cited earlier, see ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011); ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–1933* (2014); UMUT ÖZSU, *FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS* (Nehal Bhuta et al. eds., 2015); ROSE PARFITT, *THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE* (2019); NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* (2020).

14. See, e.g., SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

15. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 12–13 (2005). While at first glance distancing themselves from the language of mid-century IR realism, scholars writing in this mode promote a similar view of international law as a set of legal precepts with limited reach. For this reason, they have been even labelled by some as the "New Realism." See JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 8–14 (2015) (characterizing this tendency as the New Realism). See also Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in Interna-*

regard, the history of pragmatic legalism emphasizes the breadth of alternative possibilities for those dissatisfied with these two competing modes of American foreign policy. Lawyers looking to craft a new vocabulary for America's global presence have a much broader array of legal possibilities available at their disposal. As the history of pragmatic legalism reveals, however, there are limits to such efforts at renewal. The pragmatic project, once a progressive, at times even radical, movement of renewal domestically also helped fuel regressive political projects internationally. Legal renewal alone can hardly change the terms in which the United States engages with the world absent an equally progressive political agenda.

This Article proceeds in four parts. Part I discusses the two competing historiographical narratives on the postwar relationship between law and American foreign policy in greater detail. Part II directs attention to the New Deal as the cradle for the genesis of pragmatic legalism. Part III describes the legal culture of the New Deal, providing the key elements of its two constitutive components, sociological jurisprudence and legal realism. Part IV explains how the tenets of sociological jurisprudence and legal realism translated into the mode of pragmatic legalism in the world of American foreign policy and offers four historical examples in which pragmatic legalism influenced foreign policymaking from the outbreak of World War II onwards. The Conclusion considers the significance of the history of pragmatic legalism for the past and present of foreign policy.

I. TWO VISIONS OF THE POSTWAR ORDER

Within the highly contested legal historiography of the postwar period, the traditional accounts suggest that the postwar period was a high-water mark for international law in the twentieth century, especially for international human rights norms and those of the law of war. For Paul Kennedy, the “rights regime that the United Nations then set up was qualitatively different from anything that had gone before.”¹⁶ Ruti Teitel amplifies this claim. She argues that the postwar period brought about nothing less than a “paradigm shift” in the importance of international human rights norms and international humanitarian law.¹⁷ Teitel explains that prior to World War II, international society was oriented toward the security of the state, which tended to reinforce state sovereignty.¹⁸ By contrast, the postwar inter-

tional Law, 119 HARV. L. REV. 1404, 1412 (2006) (book review) (arguing that the scholarship of New Realism is “in danger of leading international lawyers to return to the simplistic realist/idealist debate that precipitated” the schism between international law and IR in the twentieth century); James A.R. Nafziger, *The Assault on International Law*, 110 AM. J. INT'L L. 142, 148 (2016) (book review) (noting that “[t]he New Realism may . . . be seen as essentially a rational-choice extension of the Old Realism.”).

16. PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* 178 (2006).

17. See TEITEL, *supra* note 3, at 8–10.

18. See *id.* at 28–29.

national order enshrined the security of the human person as a fundamental good, sanctioned by the force of international law.¹⁹ Mary-Ann Glendon proceeds along similar lines, suggesting that the 1946 Nuremberg Principles, the 1948 Genocide Convention, and the 1948 Universal Declaration of Human Rights formed a “pillar of a new international system” committed to scrutinizing the treatment that nations accorded to their own citizens.²⁰ International law held the distinguished role of voicing the moral goals and aspirations of the international community for the postwar era.²¹

Scholars writing in this tradition routinely emphasize the leading role that the United States played in pursuing this high-minded legalist agenda. In the most iconic iteration of this narrative, Elizabeth Borgwardt hails the postwar settlement as a “New Deal for the World” and as a “bold attempt on the part of Roosevelt and his foreign policy planners to internationalize the New Deal.”²² Borgwardt contends that international human rights norms, as elaborated in the Atlantic Charter and subsequently in the Nuremberg Trials, translated key notions of Roosevelt’s Four Freedoms Speech—“freedom from fear” and “freedom from want”—to the international plane.²³ With regard to the drafting of the U.N. Charter, Stephen Schlesinger similarly understands the postwar settlement as a distinctly “American affair,” highlighting the role that American consultants or politicians played in infusing the text of the Charter with human rights language.²⁴ For writers in this tradition, the language of international law was not only firmly entrenched in the postwar settlement, but also bore a distinctly American accent.

By contrast, other scholars regard the postwar settlement as a *retrenchment* from legalism in foreign affairs, not its culmination.²⁵ These accounts draw a sharp distinction between the early twentieth century and the postwar pe-

19. See *id.* at 10, 28–29 (“It was the minority regimes that first explicitly recognized the vulnerability of certain persons and peoples. But this recognition remained within the framework of Westphalian state sovereignty . . . The turning point occurs at the postwar Nuremberg Trials, where the three strands of humanity law appear to converge for the first time.”). For arguments against the idea that the Nuremberg Trials incorporated the language of human rights, see Samuel Moyn, *From Aggression to Atrocity: Rethinking the History of International Criminal Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW* (Kevin Jon Heller et al. eds., 2020).

20. See GLENDON, *supra* note 3, at xvi.

21. See HATHAWAY & SHAPIRO, *supra* note 3, xvii–xviii.

22. BORGWARDT, *supra* note 3, at 3 (arguing that the language of international human rights was a translation of core New Deal principles in international law).

23. *Id.* at 5, 10–11.

24. See STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS: A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD* xvi–xvii (2003) (“I reconstructed the tale mainly from the U.S. point of view, which, without putting too much of a gloss on it, was the most important. For it was the Americans who designed the body . . . What shines through today for Americans in our more cynical age is the unusual intellect and honest idealism of these founding fathers and mothers of the U.N.”).

25. Cf. Mira L. Siegelberg, *Unofficial Men, Efficient Civil Servants: Raphael Lemkin in the History of International Law*, 15 J. GENOCIDE RES. 297, 300 (2013) (noting that “the idea that the postwar era was a high point for international law has undergone much revision by historians who have shown that the legalist vision of international affairs was widely perceived as out of date by 1945.”).

riod. In the early twentieth century, the United States rigorously pursued the codification of international norms and the judicial resolution of international disputes as the distinctive mark of American foreign policy.²⁶ These distinctive features of early twentieth-century American foreign policy became obsolete in the postwar era. According to Martti Koskenniemi, the “idealism” of international lawyers who had been active in the State Department up until the 1930s, was “completely discredited after the war.”²⁷ Mark Mazower similarly writes that, while in the early twentieth century law had enjoyed an “empire,” whose “heartland was in America,” by 1945 “international law as a credo was a shadow of its former self.”²⁸ When viewed in relation to the early twentieth century, the postwar settlement hardly epitomized a progressive move toward global law.

Scholars writing in this tradition describe the animus with which postwar planners approached international law as one of skepticism and disenchantment. For Mazower, one of the key new elements in the order organized around the United Nations was precisely the “waning confidence in international law as an impartial expression of civilization.”²⁹ He adds that “[h]ardly anyone believed that in the era of total war and nuclear power international arbitration could solve the world’s problems.”³⁰ For Stephen Wertheim, the State Department planners were not simply disappointed in the traditional tools of international law; they were, in fact, rather mistrustful of them. During the drafting of the U.N. Charter, the planners “rather than attempt to strengthen international law and the juridical settlement of disputes, sought to subordinate them to great power politics.”³¹ Most notably, the intellectual James Shotwell, was “ready to undo the attempts of liberal internationalists . . . to judicialize international politics by setting up a permanent court and promoting or requiring its use in settling disputes.”³² In retrospect, the judicial function of the United Nations was more a remnant of a legalized past than a forward-looking institutional innovation.

Scholars who share this approach have extensively questioned the role and significance of human rights norms for the postwar order. Samuel Moyn has shown how the 1948 Universal Declaration of Human Rights “remained . . . peripheral in its time, in its American birthplace . . . to say nothing of the world as a whole.”³³ Moyn emphasizes that human rights language signaled a retreat from earlier more ambitious internationalist ideas, most nota-

26. See generally Zasloff, *From the Gilded Age to the New Era*, *supra* note 1; COATES, *supra* note 1.

27. KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 466.

28. MAZOWER, *GOVERNING THE WORLD*, *supra* note 4, at 93.

29. MAZOWER, *NO ENCHANTED PALACE*, *supra* note 4, at 16.

30. MAZOWER, *GOVERNING THE WORLD*, *supra* note 4, at 93.

31. Wertheim, *Instrumental Internationalism*, *supra* note 4, at 280; STEPHEN WERTHEIM, *TOMORROW, THE WORLD: THE BIRTH OF U.S. GLOBAL SUPREMACY*, 139–40 (2020).

32. Wertheim, *Instrumental Internationalism*, *supra* note 4, at 280; STEPHEN WERTHEIM, *TOMORROW, THE WORLD: THE BIRTH OF U.S. GLOBAL SUPREMACY*, 139–40 (2020).

33. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 68 (2010).

bly the notion of collective self-determination as outlined in the Atlantic Charter.³⁴ Mazower similarly views the use of human rights language by the Great Powers as regressive. The use of human rights talk was a way for them “of doing nothing and *avoiding* a serious commitment to intervene.”³⁵ Rather than marking the birth of a robust internationalized legal regime, human rights language in fact signified a “deliberate abandonment by the Big Three powers of serious and substantive earlier commitments to very different kinds of rights regimes,” and specifically the interwar protection of minorities.³⁶ “Rights could mean many things to many people,” Mazower soberingly observes.³⁷

In contrast to the traditional accounts that identify the postwar order with the birth of international humanitarianism, in these revisionist accounts, an entirely different vocabulary defined America’s postwar order: national sovereignty, power politics, IR realism, and faith in expertise and social science.³⁸ The United Nations Charter enshrined the principles of “national sovereignty and great power balance” at the heart of the postwar order.³⁹ “American social science” became the “handmaiden to enlightened statesmanship” in resolving Europe’s problems.⁴⁰ Compared to the “idealism” of prewar international lawyers, IR realism “provided a much more credible basis for understanding the violence and irrationality of the international world, as well as a more effective guide for foreign policy.”⁴¹ As the foremost expression of all these tendencies, the United Nations “combined the scientific technocracy of the New Deal with the flexibility and power-political reach of the nineteenth-century European alliance system.”⁴²

These revisionist accounts have performed a great service to the study of the legal history of American foreign affairs. By highlighting the central role of international law in American foreign policy in the early twentieth cen-

34. See *id.* at 67–68.

35. MAZOWER, *NO ENCHANTED PALACE*, *supra* note 4, at 8 (emphasis in the original).

36. See *id.*

37. See *id.* at 8–9.

38. See KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 465–94. For a discussion on the culture of political realism in the postwar foreign policy establishment, see generally NICOLAS GUILHOT, *AFTER THE ENLIGHTENMENT: POLITICAL REALISM AND INTERNATIONAL RELATIONS IN THE MID-TWENTIETH CENTURY* (2017); DANIEL BESSNER AND NICOLAS GUILHOT, *THE DECISIONIST IMAGINATION: SOVEREIGNTY, SOCIAL SCIENCE, AND DEMOCRACY IN THE TWENTIETH CENTURY* (2019).

39. MOYN, *THE LAST UTOPIA*, *supra* note 33, at 59. Moyn instead traces the birth of a strong human rights movement to the 1970s, after the failures of American foreign policy in Vietnam. For a fuller elaboration of the relationship between the Vietnam War and the espousal of human rights as central for American foreign policy, see BARBARA J. KEYS, *RECLAIMING AMERICAN VIRTUE: THE HUMAN RIGHTS REVOLUTION OF THE 1970S* (2014).

40. MAZOWER, *NO ENCHANTED PALACE*, *supra* note 4, at 111. On the importance of social science for the making of postwar American foreign policy see also DANIEL BESSNER, *DEMOCRACY IN EXILE: HANS SPEIER AND THE RISE OF THE DEFENSE INTELLECTUAL* 8 (Mark Philip Bradley et al. eds., 2018) (suggesting that “the midcentury United States was home to several powerful constituencies, including government officials, military officers, and foundation administrators, who believed social science could improve U.S. foreign and military policy.”).

41. KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 466.

42. MAZOWER, *GOVERNING THE WORLD*, *supra* note 4, at 213.

ture, they have provided a new historical context through which to reflect on the postwar period. By showcasing the marginal and oftentimes regressive role of international human rights norms after World War II, they push scholars to explore other forms and shapes through which law and regulation came to play a role in America's postwar order. By drawing attention to the variety of social, political and intellectual factors at play at mid-century—IR theory, power politics, the social sciences—they have revealed new historical material with which to write the legal history of postwar foreign policy.

While offering valuable insights, however, the revisionist accounts are also conditioned by the context in which they arose and the vocabulary that they employ; they cannot be separated from the twenty-first century normative debates in which they arose. Some have been overwhelmingly preoccupied with contesting the history of the norms of international humanitarianism, with proving the absence or marginality of certain legal ideas, and are consequently largely driven by this agenda.⁴³ Others employ the highly specific vocabulary of early twentieth-century international law when looking to describe the legal ethos of the postwar period.⁴⁴ As a result, they miss out on the ways in which some of the important developments they track, such as for instance the rise of international institutions and the promotion of the social sciences, were also connected with larger developments in the history of legal thought. Neither a claim that postwar foreign policy was no longer guided by the precepts of traditional international law nor one that international human rights norms did not enjoy the prominent place that we have thus far assumed comprehensively answers the question of how law shaped America's postwar order.

Significantly, some of these powerful accounts also reflect their own normative aspirations about international law's potential to challenge the exercise of great power politics. Written to mobilize international lawyers against present-day global hierarchies, they describe the operation of a "heroic" international law in the early twentieth century, able to guide and inspire the conduct of international politics.⁴⁵ By contrast, they decry international law as a "shadow of its former self" in the postwar period, because, rather than functioning as a "credo" for foreign policy, international law

43. This is especially true of MOYN, *THE LAST UTOPIA*, *supra* note 33, and MAZOWER, *NO ENCHANTED PALACE*, *supra* note 4.

44. This is especially the case with Wertheim, *Instrumental Internationalism*, *supra* note 4, and MAZOWER, *GOVERNING THE WORLD*, *supra* note 4. The question of whether the move to institutions was a "legal" or "political" development is a perennial problem in the literature of international law and international institutions, and largely sustains it. See David Kennedy, *The Move to Institutions*, 8 *CARDOZO L. REV.* 841, 868–69 (1987) ("The literature of international institutions uses the language of law and politics in two ways when describing the events of 1918. Sometimes the establishment of the League is treated as a moment of legislation—a movement from politics to law . . . Sometimes, by contrast, the literature treats the 1918 transition as a movement from law to politics. In this vision, emphasis is placed upon the movement from a written treaty which expressed the consequences of war in legal terms to the establishment of an institution which could provide the fluid forum of its revision and application.").

45. KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 511.

became subservient to great power politics.⁴⁶ In a similar vein to the celebratory accounts that they critique, these revisionist accounts share a historiographical interest in law as a repository for robust normative ideals and as an agent of change, which, unlike the celebratory accounts, they find to be woefully absent in the postwar period.⁴⁷ As a result of their noble aspirations for international law's ability to pacify international politics, however, these powerful accounts are at risk of producing a false dichotomy between an idealist prewar legalism and a realist postwar anti-legalism that flattens the history of both.

Crucially, these powerful revisionist accounts risk diverting attention from the important question of how legal techniques produced America's postwar global power. In maintaining a highly specific historiographical interest in law as a normative *guide* for foreign policy, they are less attentive to the ways in which law provided the *vocabulary* to advance the project of American power at mid-century.⁴⁸ Their interest in law as an agent for change risks deflecting attention away from the history of how legal language structured and defined postwar global hierarchies, reduced the possibilities for democratic deliberation in the conduct of foreign policy, and became a productive force for the violence of the Cold War era. The task is for scholars to recover law's role, over and beyond the idealist invocations of the norms of international humanitarianism and over and beyond our noble aspirations about international law's ability to prevail over international politics, while paying due regard to the crucial role of legal ideology in "governing the world." *This* is the story of pragmatic legalism.

II. RECASTING THE "LEGALIST EMPIRE"

Rather than the high tide of "legalism," the early twentieth century should be understood as the high tide of "classical legalism" in American foreign policy. Early twentieth-century foreign policymakers looked to abstract legal conceptions to derive answers to international disputes.⁴⁹ They

46. This is primarily the case with KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4. It is also true of MAZOWER, *GOVERNING THE WORLD*, *supra* note 4, not because Mazower wrote his work as a disciplinary call to action, like Koskenniemi, but largely because Mazower incorporates Koskenniemi's narrative. See Samuel Moyn, *Martti Koskenniemi and the Historiography of International Law in the Age of the War on Terror*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI* 340, 351 (Wouter Werner et al. eds., 2017).

47. See Samuel Moyn, *The International Law that is America: Reflections on the Last Chapter of The Gentle Civilizer of Nations*, 27 *TEMP. INT'L & COMP. L.J.* 399, 413 (2013) (arguing that "everybody claims the universal in a war over its true representation, no less Koskenniemi than American liberals. They differ not in the room they make for norms or forms, but in the content of the former and in the deployment of the latter.").

48. On law as offering a "vocabulary" for power, see Kennedy, *Speaking Law to Power*, *supra* note 6, at 173.

49. See Zasloff, *From the Gilded Age to the New Era*, *supra* note 1, at 274 (suggesting that, according to classical legal orthodoxy, "[l]egal science's key task lay in the discovery of legal *principles*, which could apply uncontroversially to every case presented.") (emphasis in the original); COATES, *supra* note 1, at 6

believed that abstract legal norms could provide definitive answers to every dispute, when coupled with the “scientific” methods of formal logic—primarily inductive and deductive reasoning.⁵⁰ They, therefore, worked to codify and systematize these norms, both in international and domestic law.⁵¹ Lawyers like Elihu Root, for example, contributed to the American Law Institute’s Restatements Project at the domestic level while also supporting the 1907 Hague Peace Conference, which aimed to spell out international legislation on matters of war and peace.⁵² Because of their faith in the certainty of legal reasoning, they also promoted the judicial resolution of international disputes and the creation of international adjudicative mechanisms.⁵³ In these respects, lawyers like Root were transplanting into the world of foreign policy a broader set of beliefs about law that had become influential in the United States during the second half of the nineteenth century.⁵⁴ This set of ideas came to be known in legal historical scholarship as “classical legal thought” or “classical orthodoxy.”⁵⁵

The *Lotus* case of the Permanent Court of International Justice (“PCIJ”) offers an iconic example of early twentieth-century classical legal reasoning.⁵⁶ There, the Court was required to decide if the right to exercise criminal jurisdiction for crimes occurring upon a vessel was exclusive to the state whose flag the vessel was flying.⁵⁷ No solidified international legal regime existed at the time to guide the resolution of the dispute.⁵⁸ The judges of the PCIJ turned to the legal concept of sovereignty, a broad, foundational concept of international law, to aid them in resolving the dispute.⁵⁹ They

(suggesting that “international law . . . served as a means of expanding power, in part by exploiting the hegemonic potential of international norms.”).

50. See Zasloff, *From the Gilded Age to the New Era*, *supra* note 1, at 274, 277. But see COATES, *supra* note 1, at 71 (noting that inductive and deductive reasoning seemed to be less central to the method of the legalists, absent a world court which could provide guiding judgments).

51. See COATES, *supra* note 1, at 71.

52. See *id.*; Zasloff, *From the Gilded Age to the New Era*, *supra* note 1, at 277, 306–07.

53. See COATES, *supra* note 1, at 68–81. In a similar vein, historian Stephen Wertheim chronicles American plans for international organization during World War I. He terms these plans “legalist-sanctionist,” for their dedication to developing international law, and for being based on state consent and the judicial resolution of disputes. Wertheim contrasts these plans with plans that he labels “Wilsonian” (meaning organicist and evolutionary, and promoting the creation of an “anti-institutional institution.”). See Wertheim, *The League that Wasn’t*, *supra* note 7, at 798. But either confining historical narratives to tracing the history of the legalists, or creating a dichotomy between legalist and political plans is recasting a doubtful distinction between law and politics.

54. On Root as embodying the spirit of classical legal thought, see Zasloff, *From the Gilded Age to the New Era*, *supra* note 1, at 286–368.

55. On the history of classical legal thought, see DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT WITH A NEW PREFACE BY THE AUTHOR*, “THIRTY YEARS LATER” (2006); Grey, *supra* note 9.

56. S.S. ‘Lotus’ (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) [hereinafter *Lotus*].

57. See *id.* § 2.

58. See *id.* § 46.

59. See *id.* § 64–65. Specifically, the Court invoked a principle of the freedom of the seas as equivalent to the “absence of territorial sovereignty upon the high seas.” The *Lotus* case has been interpreted since as espousing an especially robust view of state sovereignty, which remains unfettered in all circumstances absent an expressly prohibitive rule of international law. See Photini Pazartzis, *Judicial Activism and*

determined that the nature of sovereignty logically implied a right to exercise criminal jurisdiction for crimes occurring upon a vessel, but it did not necessitate an exclusive right for the state whose flag the vessel was flying.⁶⁰ The judges looked to a higher-order international legal norm in order to derive a more concrete rule. They engaged in conceptual analysis, as they based their decision on what the concept of sovereignty permitted and what it required. Finally, they enunciated a universal rule applicable in all cases.

After Woodrow Wilson's rise to power, however, legal actors became marginal within the foreign policy establishment and the classical legalist ethos became eclipsed within American halls of power.⁶¹ Wilson was famously mistrustful of international law. The professional status of international lawyers within the foreign policy establishment declined under his administration, especially after World War I.⁶² Then, the views of international lawyers and the administration—primarily Wilson himself—sharply diverged with regard to the question of postwar international organization.⁶³ During the 1919 Paris Peace Conference, Wilson famously complained that “international law has . . . been handled too exclusively by lawyers.”⁶⁴ In no uncertain terms, Wilson made evident his discontent with the ways that international lawyers handled and advised on foreign affairs. Classical legalists' attachment to formal logic and neatly organized classifications especially concerned Wilson: “Lawyers like definite lines. They like systematic arrangements. They are uneasy if they depart from what was done yesterday. They dread experiments. They like chartered waters and, if they have no charts, hardly venture to undertake the voyage,” he quipped.⁶⁵ As a result, the international legal profession's influence within the American state waned considerably and the classical legalism that it promoted also declined in significance.

And yet, Franklin D. Roosevelt's New Deal subsequently reinvented the declining “legalist empire.” Starting in 1933, the New Deal brought about the entrance of a considerable number of lawyers into all aspects of govern-

Judicial Self-Restraint: The PCIJ's Lotus Case, in LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 319, 324 (Christian J. Tams & Malgosia Fitzmaurice eds., 2013). For the way that commentators viewed *Lotus* at the time, see, for example, James Brierly, *The 'Lotus' Case*, 44 L. Q. REV. 154 (1928).

60. *Lotus*, 1927 P.C.I.J. §§ 64–65 (“[B]y virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights when it exercises within its territory properly so called.”).

61. On the divergence between Wilson and Secretary of State and international lawyer Elihu Root as to the desirable form of the postwar settlement, see, for example, Wertheim, *The League of Nations*, *supra* note 1.

62. See Astorino, *supra* note 11, at 283 (noting that this “idealistic vision” of international law was “badly shaken by World War I”).

63. See Wertheim, *The League that Wasn't*, *supra* note 1, at 798.

64. *President Wilson on International Law: Steadiness of Purpose in Embarking on Unchartered Seas*, 108 COM. & FIN. CHRON. 2598 (1919).

65. See *id.*

ment.⁶⁶ As established in the legal literature of the New Deal, in early February 1936, Roosevelt surprised lawyer Charles C. Burlingham, who came to be known as New York City's "first citizen," with his peculiar request: "Dig me up fifteen or twenty youthful Abraham Lincolns from Manhattan and the Bronx to choose from . . . They must be liberal from belief and not by lip service . . . They must have no social ambition," wrote Roosevelt.⁶⁷ Roosevelt's quest for "youthful Abraham Lincolns" could be interpreted to signify many of the qualities that have since come to be identified with "honest Abe": his integrity, passion for noble causes, and perseverance in the face of adversity.⁶⁸ In this case, however, Roosevelt was more interested in an altogether different set of skills that defined Lincoln: his creative lawyering.⁶⁹ With the dawn of the New Deal, an unparalleled number of lawyers, many of whom were talented and trained in elite educational institutions but lacking in social standing, came to inhabit the world of the federal government.⁷⁰

The involvement of these lawyers in public service came with a discrete political agenda. In the wake of the Great Depression, the main goal of the New Deal was to resurrect the American economy. This project entailed a drastic reshaping of the face of the federal state. The whole gamut of the economy, areas as diverse as "agriculture, industry, labor conditions, taxation, corporate reorganization, municipal finance, unemployment relief" offered opportunities for administrative experimentation.⁷¹ Lawyers provided legal expertise to the newly founded administrative agencies, such as the Agricultural Adjustment Administration and the National Recovery Administration, advising policymakers, drafting briefs, and writing legislation.⁷² Furthermore, they navigated tensions with other branches of the administrative state, most notably the Justice Department, and the bar, defending the agenda of the New Deal both in public and in private.⁷³ New Deal lawyers also combated the recalcitrance of the Supreme Court concern-

66. See BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 15 (1988) ("A plague of young lawyers settled on Washington.")

67. See JOSEPH P. LASH, *DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL* 388 (1988); G. Edward White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 489, 511 (1988) (book review). On the life of Charles C. Burlingham, see GEORGE MARTIN, *CCB: THE LIFE AND CENTURY OF CHARLES C. BURLINGHAM, NEW YORK'S FIRST CITIZEN, 1858-1959* (2005).

68. For modern-day images of Abraham Lincoln see, for example, MERRIL D. PETERSON, *LINCOLN IN AMERICAN MEMORY* (1994). On Lincoln as an "imperial president," however, see David K. Nichols, *Lincoln: An Imperial President?*, in *THE IMPERIAL PRESIDENCY AND THE CONSTITUTION* 5 (Gary J. Schmitt et al. eds., 2017).

69. See LASH, *supra* note 67, at 388.

70. For a comprehensive history of New Deal lawyers see LASH, *supra* note 67; PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995). These accounts, however, have largely neglected the international history of New Deal lawyering.

71. See *Minutes of the Thirty-First Annual Meeting*, AM. ASS'N. L. SCH. 5, 105 (1933).

72. See IRONS, *supra* note 70, at 10-14.

73. For a vocal defense of New Deal administrative agencies, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

ing federal measures taken for the purposes of reorganizing the economy.⁷⁴ Government lawyers in the New Deal administration became actively involved in the founding of the American welfare state.⁷⁵

The foreign policy establishment at first remained unaffected by the swarming presence of New Deal lawyers, but the outbreak of World War II soon changed the situation. Formally, the State Department was very much the domain of Cordell Hull, an old-school lawyer from Tennessee.⁷⁶ Once the outbreak of World War II moved the focus of the Roosevelt administration to international affairs, however, the exercise of foreign policy largely became the product of a loosely organized, informal network of characters centered around Roosevelt himself.⁷⁷ Some of the most capable lawyers in the administration, who had originally entered government service in order to effectuate the New Deal economic program, became heavily involved in the conduct of American foreign policy. They sometimes occupied formal positions in the foreign policy establishment—as was the case with lawyers like Dean Acheson, Adolf Berle, Alger Hiss and Francis Sayre—while at other times they worked through informal avenues—as was the case with lawyers like Benjamin Cohen and David Lilienthal.⁷⁸ They helped navigate America's delicate international position in the first stages of the war, during which the United States was at once a neutral and also openly in favor of Great Britain.⁷⁹ Subsequently, after the United States entered the war in 1941, they took up the task of planning for postwar reconstruction.⁸⁰

A distinct legal ethos also characterized the New Deal. The New Deal regulatory state was imbued with the influences of sociological jurispru-

74. See SHAMIR, *supra* note 70, at 152–53.

75. See, e.g., IRONS, *supra* note 70.

76. As historian David Reynolds explains, Roosevelt remained largely uninvolved in foreign policy during his first term and for a large part of the second, in part because he concentrated on passing the New Deal reform programs and subsequently packing the Supreme Court. The most important exception was the Good Neighbor Policy with Latin America. Otherwise, during this period, “the leading foreign policy theme of the administration . . . was Secretary of State Cordell Hull’s drive for Reciprocal Trade Agreements (“RTA”).” DAVID REYNOLDS, FROM MUNICH TO PEARL HARBOR: ROOSEVELT’S AMERICA AND THE ORIGINS OF THE SECOND WORLD WAR 36 (2001).

77. See, e.g., ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945 (1979); MARTIN WEIL, A PRETTY GOOD CLUB: THE FOUNDING FATHERS OF THE U.S. FOREIGN SERVICE (1978).

78. In light of his prominent position in public life, Acheson has been a popular biographical subject; See, e.g., ROBERT L. BEISNER, DEAN ACHESON: A LIFE IN THE COLD WAR (2006); GADDIS SMITH, DEAN ACHESON (Robert H. Ferrell & Samuel Flagg Bemis, eds., 1972). On Adolf Berle, see JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA (1987). On Benjamin Cohen, see WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL (2002). On David Lilienthal, see STEVEN M. NEUSE, DAVID E. LILIENTHAL: THE JOURNEY OF AN AMERICAN LIBERAL (1996). The subject of an infamous investigation during the McCarthy years, Alger Hiss has garnered significant historiographical attention. See, e.g., SUSAN JACOBY, ALGER HISS AND THE BATTLE FOR HISTORY (2009); G. EDWARD WHITE, ALGER HISS’S LOOKING-GLASS WARS: THE COVERT LIFE OF A SOVIET SPY (2004). Despite having had a remarkable career in both law and politics, Francis Bowes Sayre has received less attention. For his public life activities, see FRANCIS BOWES SAYRE, GLAD ADVENTURE (1957).

79. See *infra* Part IV.A.

80. See *infra* Part IV.C.

dence and legal realism.⁸¹ During the early twentieth century, sociological jurists trained many of the young “Abraham Lincolns” that Roosevelt came to employ in his administration. This was especially true of Felix Frankfurter, who became known for his practice of grooming students for government service.⁸² Legal education consciously became an important means through which the legal sensibilities of sociological jurisprudence were transmitted. Likewise, several legal realists abandoned their academic careers and entered into government service for the duration of the New Deal, waging the battle for the founding of the first American welfare state.⁸³ As historians of the New Deal observe, the legal realist approach to law was especially well-suited to the “experimental and flexible nature of the New Deal.”⁸⁴ Because they identified with the New Deal reform project and offered inspired ways to pursue it, legal realists “gained entry to the halls of power.”⁸⁵

Techt v. Hughes offers a lucid example of sociological reasoning applied in international law.⁸⁶ There, Judge Benjamin Cardozo, a leading sociological jurist, confronted the same problem that the PCIJ faced in *Lotus*: The absence of a clearly defined applicable legal regime. Cardozo, however, approached the problem in a radically different way. In *Techt*, the Court of Appeals for the state of New York responded to the question of whether the outbreak of World War I terminated a treaty of friendship between the United States and Austria.⁸⁷ As in the *Lotus* case, no positively enacted international legal regime existed stipulating the effect of war upon treaties. Scholars continuously debated the question.⁸⁸ Unlike in *Lotus*, however, Cardozo did not attempt a philosophical investigation into the nature of higher-order international legal norms. He was explicit that no “general formula” could provide a universally applicable rule.⁸⁹ Instead, he determined that international law dealt with the question “pragmatically.”⁹⁰ Sometimes treaties needed to be annulled and sometimes not. Whether war had termi-

81. See IRONS, *supra* note 70, at 6–8.

82. See NELSON LLOYD DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL 47–60 (1980) (suggesting that “Frankfurter, operating from Harvard, combined with Brandeis in Washington to form a New Deal recruiting agency.”).

83. See, e.g., Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES 75, 103–16 (Anthony T. Kronman, ed., 2004) (noting that “The New Deal swept through the Yale Law School faculty like a cyclone” and that “Yale Law School became thoroughly identified in the public mind with the New Deal” because of the numerous Yale legal realists who were employed in the administration).

84. ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW 84 (1985); SHAMIR, *supra* note 70, at 134.

85. SHAMIR, *supra* note 70, at 156.

86. See *Techt v. Hughes*, 128 N.E. 185 (N.Y. 1920).

87. See *id.* at 185.

88. On the status of the question in the early twentieth century, see Lester Bernhardt Orfield, *The Effect of War on Treaties*, 11 NEB. L. BULL. 276, 276 (1933) (suggesting that the effect of war on treaties was “one of the most obscure and controversial subjects of international law.”).

89. See *Techt*, 128 N.E. at 192.

90. *Id.* at 191.

nated a treaty or not was to be decided on an *ad hoc* basis, “as the necessities of war exact.”⁹¹ In deciding this question, courts needed to factor in concrete, empirical considerations, based on the individual circumstances of each case. Specifically, the overriding consideration for Cardozo was whether the treaty in question was “consistent with the policy or the safety of the nation in the emergency of war.”⁹² Rather than attempt to understand what abstract concepts like sovereignty demanded, Cardozo instead ascertained what the safety of the United States concretely required. And he declined to announce a broad-based and general rule, instead pointing to the importance of approaching the problem with flexibility.⁹³

As lawyers who had originally served in the New Deal regulatory state moved to the world of foreign affairs, they carried with them the insights of legal realism and sociological jurisprudence as crucial elements of their professional toolbox. Sociological jurisprudence and legal realism offered the mold for the development of a pragmatic form of legalism in the world of American foreign policy, recasting the declining “legalist empire.” In order to properly identify the attributes of pragmatic legalism in American foreign affairs, this Article will first turn to the program advocated by sociological jurisprudence and legal realism at the domestic level. A deeper engagement with the program of these two theoretical schools is essential to recovering the legal language of America’s postwar order.

III. THE RISE OF PRAGMATISM IN AMERICAN LEGAL THOUGHT

Sociological jurisprudence and legal realism, the constitutive components of the legal culture of the New Deal that gave rise to pragmatic legalism, developed in the first decades of the twentieth century in response to the uncontrolled growth of capitalism in the United States.⁹⁴ The term “socio-

91. *Id.*

92. *Id.* at 192.

93. Many thanks to David Kennedy for providing this and the previous example of classical legal and legal pragmatic reasoning.

94. The turn of the century saw massive labor unrest and industrial conflict arrive on the American continent, a situation of domestic turmoil that gave rise to state intervention through legal regulation during the Progressive Era. On the history of social and economic unrest during the Progressive Era, see, for example, RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1961); *THE PROGRESSIVE MOVEMENT, 1900–1915* (Richard Hofstadter ed., 1963); *THE PROGRESSIVE ERA* (Lewis L. Gould ed., 1974); Daniel T. Rodgers, *In Search of Progressivism*, 10 *REVIEWS AM. HIST.* 113 (1982); MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933* (1990); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998); LEWIS L. GOULD, *AMERICA IN THE PROGRESSIVE ERA, 1890–1914* (2001). On the relationship between sociological jurisprudence and the project of social and economic reform see, for instance, the remarks of notable British (later Australian) jurist and international lawyer Julius Stone, who was a student of Pound at Harvard: Julius Stone, *Roscoe Pound and Sociological Jurisprudence*, 78 *HARV. L. REV.* 1578, 1581 (1965) (“Sociological jurisprudence, like any other outcropping of human thought, was a creature of a time and place. Before World War I, when it was formulated in the United States, the exponents of social legislation and of a positive federal attitude towards economic institutions were still struggling for intellectual legitimacy in the face of various social and economic ideologies, traditional

logical jurisprudence” was first devised by legal theorist, and subsequently Harvard Law School Dean, Roscoe Pound, at the turn of the twentieth century. It came to define a broader circle of Progressive-Era academics centered around Harvard Law School, including Oliver Wendell Holmes Jr., Felix Frankfurter, Benjamin Cardozo and Louis Brandeis.⁹⁵ Legal realism primarily developed at Columbia and Yale Law Schools in the 1920s and subsequently flourished in its practical application in the context of the New Deal.⁹⁶ While developing in conversation with and, at times, as a critique of sociological jurisprudence, legal realism is best understood as a continuation

common law hostility to statutes, jealousy for states’ rights, and the conceptualism and logicism shared by the followers of Austin in England and the Pandectists on the European continent. The social evils, to which statutes held unconstitutional were often a response, accelerated with accelerating industrial and economic change; so did the invocations of the federal commerce power against economic ills and abuses. The maladjustment and inadequacies of the law for its contemporary tasks gave to early sociological jurisprudence an intensely activist drive which, even when expressed in general terms, was in fact directed to ad hoc remedies for each of the particular defaults of the legal order.”)

95. The definitive articles appeared in the *Harvard Law Review* in 1911 and 1912 in three parts: Roscoe Pound, *The Scope and Purpose of a Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1910–1911); Roscoe Pound, *The Scope and Purpose of a Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1911–1912); Roscoe Pound, *The Scope and Purpose of a Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1911–1912) [hereinafter *Sociological Jurisprudence III*]. Among other works by Pound, see Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

96. Legal historians have made various attempts to define the ideas that became associated with legal realism, but the precise contours of the term remain vague. This is largely because, unlike sociological jurisprudence, legal realism did not consciously develop as an academic theoretical school. For some attempts to describe the definitive elements of legal realism, see, among others, HORWITZ, *supra* note 9, at 169–92; LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 471 (1988) (book review); WILLIAM W. FISHER III ET AL., *Introduction*, in *AMERICAN LEGAL REALISM* (William W. Fisher III et al. eds., 1993). Precisely because of the multiplicity of approaches that legal realists represented, the ways in which legal realists diverged from sociological jurisprudence also vary. According to legal historian Morton Horwitz, two important distinguishing ideas are that legal realists, many of whom had come of age during the tumultuous era of the World War I, were generally characterized by a greater loss of faith in the certainty of legal reasoning, and were more “self-conscious” in their efforts to pursue social engineering during the New Deal. See HORWITZ, *supra* note 9, at 170. The realists’ loss of faith in legal reasoning, however, what Horwitz brands their “cognitive relativism,” should not be confused for moral relativism. For instance, Felix Cohen, the author of the archetypical realist *Transcendental Legal Nonsense*, was also invested in the study of moral and ethical philosophy, following the work of his father, Morris Cohen. See Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* (1933). See also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 150 (1976) (noting that “disenchantment with received dogma had increased after World War I.”). In addition, realists—and, most notably, Karl Llewellyn—challenged sociological jurisprudes for failing to uphold in practice some of the tenets of their own work, and especially their critique of conceptualism. Through their efforts to align law and society, argued legal realists, sociological jurisprudes produced a reified conception of society upon which they would rely to determine desirable legal outcomes. The most notorious exchange which has led some historians to understand sociological jurisprudence and legal realism as sharply antagonistic currents of legal thought took place between Roscoe Pound and Karl Llewellyn from within the pages of the *Columbia and Harvard Law Reviews*. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

of the progressive jurists' project of bringing about social and economic change through legal reform.⁹⁷

In their efforts to bring about social and economic reform, both legal theoretical projects took aim at the judicial philosophy of classical legal thought. Classical legal thought became the target of sociological jurisprudence and legal realism, as its judicial doctrines had become associated with reactionary resistance to the enactment of protective labor legislation.⁹⁸ This was especially true of classical legal thought's reliance on abstract legal conceptions as a way to deduce more concrete rights and obligations, as exemplified in *Lotus*.⁹⁹ In response to this important methodological element of classical legal thought, Oliver Wendell Holmes famously argued in critique of this key methodological element of classical legal thought that "general propositions do not decide concrete cases."¹⁰⁰ Pound likewise resisted the tendency of classical jurists to investigate "metaphysical" concepts, such as sovereignty (as in *Lotus*), in order to resolve more concrete legal problems.¹⁰¹ According to Pound, classical legal thought was the main cause for "the backwardness of law in meeting social ends" and created a "gulf between legal thought and popular thought on matters of social reform."¹⁰² It was

97. There is a significant debate in the historiography of American legal thought as to whether sociological jurisprudence and legal realism should be understood as complementary projects or as hostile to one another. This Article espouses the view that they should be both understood as an expression of socially oriented legal thought, as suggested by legal theorist Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006), 19, 37–46 and is also the position of HORWITZ, *supra* note 9, at 169–71 (describing legal realism as a "continuation of the Progressive attack on the attempt of late-nineteenth-century Classical Legal Thought to create a sharp distinction between law and politics and to portray law as neutral, natural and apolitical"). Several works, either biographical or collective, draw portraits of the proponents of sociological jurisprudence and legal realism. See HORWITZ, *supra* note 9; KALMAN, *supra* note 96; G. EDWARD WHITE, OLIVER WENDELL HOLMES, JR. (2006); LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM (2007).

98. The United States Supreme Court challenged efforts to enact protective labor legislation in its infamous *Lochner* case using the methods of classical legal thought. The Court resolved the question of whether labor legislation regulating working hours within the state of New York violated the United States Constitution. The Court based its decision on an abstract conception of freedom of contract, which, it argued, prohibited the state from imposing a maximum number of working hours. See *Lochner v. New York*, 198 U.S. 45 (1905).

99. In addition to critiquing the practice of deductive and inductive reasoning from abstract conceptions, both schools also vociferously critiqued the public/private distinction, through which the realms of the "market" and of "civil society" were constituted entirely separately from the realm of the "state." In this tradition, see Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894–1895); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1908–1909); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1917–1918); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). Joseph Singer considers the attack against the public/private distinction as a definitive element of the realist critique. See Singer, *Legal Realism Now*, *supra* note 96, at 471.

100. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). While Oliver Wendell Holmes, Jr. was not particularly committed to the agenda of social and economic reform, his dissent in *Lochner* became the epitome of the critique of reasoning from abstract conceptions and became intimately tied to this agenda.

101. See Roscoe Pound, *The Idea of Law in International Relations*, 33 AM. SOC'Y INT'L L. PROC. 10, 23 (1939).

102. Pound, *Sociological Jurisprudence III*, *supra* note 95, at 510.

clear that, in the modernizing world of the early twentieth century, theory could not serve as an “answer . . . to enigmas.”¹⁰³ Pound argued that law should be adjusted to the “human conditions” it was supposed to address, and not to imagined higher Platonic principles.¹⁰⁴

In addition to this critical dimension, both sociological jurisprudence and legal realism also encompassed a reconstructive vision for the role of law in human society.¹⁰⁵ The goal for twentieth-century jurisprudence was to develop an understanding of law as a “pragmatic” “sociological legal science.”¹⁰⁶ While not always in agreement regarding the precise contours of their reform projects, sociological jurisprudence and legal realism shared several common components.¹⁰⁷ The two schools understood it as their task to better align law with society, to uncover the “facts of social life” and often advocated for using the social sciences as a means of judging the efficacy of legal rules.¹⁰⁸ Both tendencies privileged an interest-based analysis and, to varying degrees, or at least in theory, argued for a balancing of interests as the appropriate means of resolving a dispute.¹⁰⁹ Realists and sociological jurists alike increasingly spoke of the idea of “interdependence” as the definitive element of the social and economic reality of their times.¹¹⁰ Finally, both schools privileged the creation of institutional structures as the appropriate way to pursue the agenda of social and economic reform, even though they frequently disagreed on the appropriate nature and character of the requisite institutional arrangements.¹¹¹

While legal pragmatists viewed law from an instrumentalist perspective, in which law was to be harnessed to the project of social and economic reform, their instrumentalism should not be necessarily read as cynicism. Law was indeed to be understood as an “instrument” for social reform, as a

103. Pound, *Mechanical Jurisprudence*, *supra* note 95, at 608. Pound’s influences were especially the philosopher William James and German jurist Rudolph von Jhering. Cf. WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING: POPULAR LECTURES ON PHILOSOPHY (1907); RUDOLPH VON JHERING, DER ZWECK IM RECHT [LAW AS A MEANS TO AN END](1877).

104. See Pound, *Mechanical Jurisprudence*, *supra* note 95, at 608–09.

105. See HORWITZ, *supra* note 9, at 209 (“Two different faces of Realism—one critical, another reformist and constructive—emerged from these contradictory critiques of the old order.”).

106. Pound, *Mechanical Jurisprudence*, *supra* note 95, at 608.

107. I borrow the list of attributes from Kennedy, *Three Globalizations of Law and Legal Thought*, *supra* note 97, at 37–46.

108. See, e.g., *Lowden v. Nw. Nat’l Bank & Tr. Co.*, 298 U.S. 160, 165–66 (1936) (Cardozo, J.) (“To know ‘the justice of the particular case,’ one must know the case in its particulars . . . A decision balancing the equities must await the exposure of a concrete situation with all its qualifying incidents.”) (quoting *Scott v. Armstrong*, 146 U.S. 499, 507 (1892)); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960) (“What is of interest, what is crucial in this regard, is that such words and the idea they carry can hardly reach and register unless they come all impregnated with a relatively concrete going life-situation seen as a *type*.”); Singer, *supra* note 96, at 501.

109. See ROSCOE POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 96 (5th ed. 1943).

110. See, e.g., Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292, 298–99 (1954).

111. Most notably, the reform program of sociological jurisprudence was much more court-centered, with the exception of workmen’s compensation, while realists primarily emphasized administrative and statutory reform. See HORWITZ, *supra* note 9, at 170, 213–46.

“means to an end,” and not as a value in and of itself.¹¹² But law was valuable precisely *because* it could serve the end goal of rearranging human affairs. Felix Frankfurter, the prime recruiter of young lawyers for the New Deal, vividly encapsulated the appreciation of legal pragmatists for the promising potential of legal regulation. In a speech before the American Bar Association in 1915, discussing the education of young lawyers, Frankfurter emphasized that:

It is not enough that young men should come from our schools equipped to become skillful practitioners, armed with precedent and ready in argument. We fail in our important office if they do not feel that society has breathed into law the breath of life and made it a *living, serving soul*. We must show them the law as *an instrument* and not *an end of organized humanity*. We make of them clever pleaders but not lawyers if they fail to catch the *glorious vision of the law*, not as a harsh Procrustean bed into which all persons and all societies must inexorably be fitted, but as a *vital agency for human betterment*.¹¹³

This vision of the law as a valuable instrument for reform soon became relevant in the world of international affairs. From the outbreak of World War II onwards, the U.S. government became heavily invested in a different “reform” project: reorganizing the collapsing international order in order to police and regulate global warfare.¹¹⁴ As the hopeful Lincolns of the New Deal turned their attention from pursuing the project of social reform to the project of pursuing international reform, they carried with them these fundamental insights about the instrumental role of law in governing human affairs. And while pragmatic legal thought, and especially legal realism, was confronted with severe criticism after the end of World War II, in the world of international affairs these sensibilities continued to inform the making of American foreign policy well into the postwar era, as we are about to see.¹¹⁵

112. This was the iconic title of the English translation of VON JHERING, *supra* note 103.

113. James Walsh, *The Political Ideas of Felix Frankfurter, 1911–1939*, at 42–43 (July 19, 1976) (Ph.D. dissertation, The American University) (ProQuest) (quoting Felix Frankfurter, *The Law and the Law Schools*, REPS. A.B.A. XL (1915) and referring to Box 194, Felix Frankfurter Papers, Library of Congress, *The Writings of Felix Frankfurter, 1913–1924*, at 366–71) (emphasis added).

114. On the extent to which concern about global warfare became a preoccupation for Americans at the time, see IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 13 (2013).

115. On the postwar retreat of legal realism as a result of its identification with Nazi moral relativism, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 176–77, 218–21 (1973) (arguing that during World War II “the widespread agreement on the need for faith and commitment . . . encouraged the attack on pragmatism and relativism. More and more, [intellectuals] accepted the apparent *prima facie* logic that philosophical relativism led to moral relativism, which led to cynicism and nihilism.”); HORWITZ, *supra* note 9, at 247–49.

IV. TRANSLATING PRAGMATISM FOR POSTWAR RECONSTRUCTION

In the revisionist historical accounts of the postwar period discussed above, scholars overwhelmingly suggest that, after World War II, IR “realism” defined the role of law in American foreign policy.¹¹⁶ IR realism was a strand of IR theory that entertained a dismissive attitude toward international law as “formalistic, moralistic, and unable to influence the realities of international life.”¹¹⁷ For instance, Hans Morgenthau, often hailed as the founder of the discipline of IR, referred to international law as a “primitive” system and cast doubt on modernist ideas about sovereignty as divisible and pluralistic.¹¹⁸ Furthermore, realists saw a limited role for law in international affairs. As historian Nicholas Guilhot describes it, the program of IR realism was a “more or less deliberate attempt at limiting mass democracy’s political reach and divesting it from some forms of authority.”¹¹⁹ Realists argued for authoritative decisionmaking in critical times, when “established rules and rational frameworks no longer provide a guide for action.”¹²⁰ Realists were consequently also skeptical of legal regulation, since “the notions that law and democracy were the foundations of governments appeared to them extremely dangerous in dangerous times.”¹²¹ For IR realists, the making of foreign policy “revolved around the political, understood as a phenomenon that could displace the orders of morality and law.”¹²²

Legal scholars frequently associate this move toward IR realism with the influence of legal realism. For instance, in his groundbreaking *Gentle Civilizer of Nations*, international law scholar Martti Koskenniemi attributes the

116. See KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 465–67 (“Before the war, the study of international relations in the United States had been dominated by Wilsonian legalism . . . Their idealism—whether in a formalist or natural law version—was completely discredited after the war. Morgenthau’s arguments provided a much more credible basis for understanding the violence and irrationality of the international world, as well as a more effective guide for foreign policy.”); Steinberg & Zasloff, *supra* note 5, at 72 (“In contrast to the prewar dominance of classical legal thought in U.S. foreign policy, realism became the modal position among U.S. foreign policy officials in the postwar period.”). See also JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR* (2005); MAZOWER, *NO ENCHANTED PALACE*, *supra* note 4, at 9–10 (“[T]he professional discipline of international relations—in the shape of the doctrine known as realism—emerged in the 1940s *against* the pretensions of idealistic internationalists . . .”).

117. KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 471; see also Oliver Jütersonke, *The Image of Law in Politics Among Nations*, in *REALISM RECONSIDERED: THE LEGACY OF HANS MORGENTHAU IN INTERNATIONAL RELATIONS* 93, 109 (Michael C. Williams ed., 2007) (suggesting that in the last chapter of his seminal work Morgenthau “debunks international law as simply fulfilling the ideological function for policies of the status quo”). For a reappraisal of the figure of John Herz, however, see Casper Sylvest, *Realism and International Law: The Challenge of John H. Herz*, 2 *INT’L THEORY* 410 (2010).

118. See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 265, 307 (4th ed. 1967) (suggesting that “[i]nternational law is a primitive type of law resembling the kind of law that prevails in certain preliterate societies . . .” and that “[s]overeignty over the same territory cannot reside simultaneously in two different authorities; that is, sovereignty is indivisible.”); KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 465.

119. GUILHOT, *AFTER THE ENLIGHTENMENT*, *supra* note 38, at 15.

120. *Id.* at 20.

121. *Id.* at 15.

122. *Id.* at 41.

foreign policy establishment's shift toward IR realism primarily to an intellectual "sea change" that occurred during World War II: the advent of European jurists who fled Nazism and, upon their arrival in the United States, brought with them the ethos of interwar European legal thought.¹²³ Prominent among them was Hans Morgenthau, who, as we already saw, is typically portrayed as the founder of the discipline.¹²⁴ Crucially, Koskenniemi argues that the influence of sociological jurisprudence and legal realism paved the way for Morgenthau to become influential in the foreign policy world.¹²⁵ In addition to Koskenniemi, legal scholars Richard Steinberg and Jonathan Zasloff also point to Morgenthau's work as decisive for the prevalence of the IR realist legal approach among foreign policymakers.¹²⁶ They also point to legal realism as having paved the way for Morgenthau's development as a political realist.¹²⁷ Even lawyers writing about the present tend to draw similar connections between the work of figures like Karl Lewellyn and the foundations of IR theory.¹²⁸ Both in law and in history scholars unproblematically draw a straight line especially between legal realism, on the one hand, and IR realism, on the other.¹²⁹

123. See KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 465–67, 474 (“Before the war, the study of international relations in the United States was dominated by Wilsonian legalism . . . Their idealism—whether in a formalist or natural law version—was completely discredited after the war. Morgenthau’s arguments provided a much more credible basis for understanding the violence and irrationality of the international world, as well as a more effective guide for foreign policy.”). I use the term “sea change” after H. Stuart Hughes’s classic study on émigré intellectuals. See H. STUART HUGHES, *THE SEA CHANGE: THE MIGRATION OF SOCIAL THOUGHT, 1930–1965* (1975). On the emigration of lawyers in the context of World War II, see JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN (Jack Beatson & Reinhard Zimmermann eds., 2004); Mira L. Siegelberg, *Scholarly Exiles*, 74 *HIST. WORKSHOP* J. 283 (2012) (reviewing *IN DEFENSE OF LEARNING: THE PLIGHT, PERSECUTION, AND PLACEMENT OF ACADEMIC REFUGEES 1933–1980S* (Shula Marks et al. eds., 2011); *THE LAW OF STRANGERS: JEWISH LAWYERS AND INTERNATIONAL LAW IN THE TWENTIETH CENTURY* (James Loeffler & Moria Paz eds., 2019)).

124. See STANLEY HOFFMANN, *An American Social Science: International Relations*, in JANUS AND MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 6 (1987) (calling Morgenthau the “founder” of the discipline of IR).

125. See KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 475–76.

126. See Steinberg & Zasloff, *supra* note 5, at 73 (noting that “[f]or forty years after the publication of Morgenthau’s *AJIL* article, traditional realism dominated political scientists’ and diplomats’ understandings of international law, and infused much international legal scholarship.”).

127. See *id.* at 64, 71–72 (“It certainly came as no coincidence that realism’s appearance in international legal discourse occurred shortly after the emergence of legal realism, for the connections between the two were deep.”).

128. See, e.g., Jonathan D. Greenberg, *Does Power Trump Law?*, 55 *STAN. L. REV.* 1789, 1805 (2003) (arguing that “the ‘core ideas’ of Lewellyn’s version of realism, and its approach to the study of law, are remarkably similar to the analytical tools and legal analysis of IR realists today . . .”).

129. See Steinberg & Zasloff, *supra* note 3, at 72. While pointing out the importance of legal realism for shaping the making of American foreign policy, the authors only provide a brief analysis of the ways the two connect and subsequently analyze ‘realism’ purely from within the vantage point of IR theory. Significantly, Zasloff also reads Dean Acheson’s background as a legal realist as also turning him into an IR realist. See Jonathan Zasloff, *More Realism about Realism: Dean Acheson and the Jurisprudence of Cold War Diplomacy* 10 (UCLA Sch. of L. Pub. L. & Rsch. Paper No. 07-01, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=955353 [<https://perma.cc/W9JQ-FT4F>].

This historiographical association between legal realism and IR realism risks minimizing the significant conceptual distinctions between the two. On the one hand, sociological jurisprudence and legal realism argued that engaging in legal analysis according to the methods of classical legal thought was problematic.¹³⁰ In this regard, they shared many parallels with IR realists. As early as 1940, for instance, Hans Morgenthau launched a critique of classical legalism for its antiquated character.¹³¹ On the other hand, sociological jurisprudence and legal realism entertained a program for engaging in more effective legal regulation of human society that was not shared by IR realists.¹³² IR realists saw law primarily as a constraint upon foreign policymakers.¹³³ By contrast, as we saw earlier, sociological jurists and legal realists appreciated law for its potential to organize human affairs. Their skeptical attitude toward classical legal thought did not imply that pragmatic legal thought was hostile to legal regulation altogether. Legal realists' iconic assertion that "all law was politics" did not signify that law had *no* role to play in politics.¹³⁴ While originally acting more as "disinterested critics," legal realists increasingly gravitated toward the position of the "responsible social-legal planner."¹³⁵ It is no coincidence that self-proclaimed legal realists, like Jerome Frank and Myres McDougal, were critical of Morgenthau's work, even while noting its similarities with their own thought.¹³⁶

Sociological jurisprudence and legal realism should be more properly understood to have spawned a competing approach to law to that of IR realism: pragmatic legalism. Pragmatic legalism, as exercised in the foreign policy

130. See *supra* Part II.

131. See Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940); Steinberg & Zasloff, *supra* note 3, at 71.

132. See SHAMIR, *supra* note 70, at 153 (describing how "legal realists . . . assertively argued that they were the ones best equipped to coordinate the multiple sources of law and to scientifically 'manage' the legal system.").

133. See MORGENTHAU, *supra* note 118, at 265; Guilhot, AFTER THE ENLIGHTENMENT, *supra* note 38, at 41.

134. As legal historian Robert Gordon notes, the legal realists have more broadly come to be remembered mostly for these skeptical aspects of their jurisprudence, even while their scholarship was more "substantial." Scholars who conflate legal and IR realism likely also engage with legal realism through the way that it has been remembered, more so than the way it operated at the time. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. UNIV. L. REV. 195, 197 (1987).

135. SHAMIR, *supra* note 70, at 156.

136. See Jerome Frank, *Morgenthau: Scientific Man vs. Power Politics*, 15 U. CHI. L. REV. 462, 462 (1947) (book review) (noting that "with much in this book I agree, because some ideas previously expressed in my own writings resemble some of Morgenthau's . . . however, just because I agree with Morgenthau to a considerable extent, I regret, and urgently warn against his (almost) wholesale rejection of the possibility of deliberately extending the power of human reason."); Myres S. McDougal, *Law and Power*, 46 AM. J. INT'L L. 102, 111 (1952) (book review) ("From this perspective, the detailed arguments of Professor Morgenthau and Mr. Kennan become irrelevant and unpersuasive. Law is neither a frozen cake of doctrine designed only to protect interests in *status quo*, nor an artificial judicial proceeding, isolated from power processes, as Professor Morgenthau suggests."). Koskeniemi also notes McDougal's critical attitude toward Morgenthau. See KOSKENIEMI, GENTLE CIVILIZER, *supra* note 4, at 476.

establishment from the onset of World War II, represented an eclectic mix of legal ideas. Pragmatic legalists shared a belief with their classical predecessors that law had a role to play in the making of American foreign policy. They embraced, however, very different legal techniques than their early twentieth century counterparts. Unlike their predecessors, and in keeping with the critical dimension of sociological jurisprudence and legal realism, pragmatic legalists were mistrustful of excessive reliance on abstract legal conceptions as a means of bringing about world order.¹³⁷ Instead, they translated the reconstructive dimensions of sociological jurisprudence and legal realism, discussed above, to the international plane.¹³⁸ They were therefore much more attuned to a legal vocabulary foregrounding institutional experimentation and the methods of the social sciences.¹³⁹ Pragmatic legalists privileged an instrumental understanding of law as a potentially helpful tool in reconfiguring IR.¹⁴⁰ They downplayed, at the same time, the classical legalists' overly zealous agenda of replacing strife with order and power with rules.¹⁴¹ Their inclination was "to view law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging solutions to real problems of the international order."¹⁴² Very much like Cardozo in *Techt*, they shared an *ad hoc* attitude toward the solution of international problems over the enunciation of "broad principles."¹⁴³

The similarities and differences between "pragmatic" legalism and IR realism largely track those between legal realism and IR realism. Just like sociological jurisprudence and legal realism, pragmatic legalism and IR realism shared a critical attitude toward early twentieth-century classical legalism. Both shared a common mistrust toward the conduct of international affairs through the judicial resolution of international disputes and the elaboration of international legal norms. However, pragmatic legalism and IR realism espoused different attitudes toward the role of law in the conduct of international affairs. For example, prominent lawyer and American foreign policymaker, Adolf Berle, warned against the "realist" voices who argued

137. See *infra* Parts IV.A.; IV.C.

138. See *supra* Part III.

139. See *infra* Part IV.D.

140. See *infra* note 149.

141. See *infra* Parts IV.A.; IV.C.

142. Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 680 (1962). On the domestic front, another helpful paradigm that has been used to describe the legal sensibility of the New Deal has been that of 'social conceptualism.' Discussing the legal reasoning style of the New Deal Supreme Court after 1937, legal scholar Karl Klare has suggested that it was defined by a 'hybrid' consciousness, "more attentive to social and political realities and more self-conscious and candid about the political character of adjudication than its conceptualist predecessor," yet also "premised on the notion that a disjunction between law and politics is necessary to legitimate the judicial role, and it sought in the reasoned elaboration of neutral principles a method for upholding the law/politics distinction." Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 280 (1978).

143. See Bilder, *supra* note 142, at 680.

that international law is “mere sentiment.”¹⁴⁴ This belief, he contended, was “mistaken”: “[T]he results of flouting international law . . . can be disastrous.”¹⁴⁵ In contrast to the mistrustful attitude of IR realists, pragmatic legalists welcomed law’s capacity to govern. For instance, speaking in front of the American Society of International Law in his capacity as Secretary of State, Dean Acheson emphasized the importance of the “legislative function” in helping forge solutions to the problems of international affairs.¹⁴⁶ Acheson argued that legislating was the “dominant task . . . to be performed in the international . . . community” at mid-century, as it was “addressed to bringing about progress and change.”¹⁴⁷ While IR realists saw law primarily as a means of imposing restraints upon the exercise of governmental conduct, as Dean Acheson’s words reveal, pragmatic legalists like Acheson appreciated law for offering a medium *through which* to govern.

This is not to suggest that pragmatic legalists entertained these views about law’s capacity to govern independently of the unique position of global power and prestige that the United States enjoyed at the conclusion of World War II. No doubt, lawyers like Adolf Berle, Dean Acheson, and Benjamin Cohen were proponents of that position and were very much committed to advancing the agenda of American foreign policy at mid-century. Compared to IR realists, however, they understood that law and regulation could be mobilized in new and experimental ways toward advancing these goals, precisely given the position that the United States enjoyed at the time.¹⁴⁸ Like their predecessors, the classical legalists, pragmatic legalists shared a belief in the ability of law to advance the agenda of American foreign policy. They entertained, however, different understandings both of the activities in which lawyers should be engaging, and of the appropriate methods of engaging in legal analysis than their predecessors. It was not necessarily productive to codify international legal norms as a way to respond to the pressing needs of the postwar world. Drafting legal rules for the creation of international administrative structures, by contrast, just as the New Dealers had done in the context of the federal administrative state, was a much more productive use of their skills.¹⁴⁹

144. ADOLF A. BERLE, *TIDES OF CRISIS: A PRIMER OF FOREIGN RELATIONS* 254 (1957).

145. *Id.*

146. See Dean Acheson, *The Development of the International Community*, 46 AM. SOC’Y INT’L L. PROC. 18 (1952).

147. *Id.* at 18–19.

148. That pragmatic legalists’ approach to law was not divorced from America’s unique position of power at mid-century can be seen from the evolution of their thought over time. For instance, while in the 1950s Acheson proclaimed the importance of legislating in the international community, he subsequently changed his views about the role of law in international affairs, when the global process of decolonization drastically altered the shape of the international order. See Dean Acheson, *The Lawyer’s Path to Peace*, 42 VA. Q. REV. 337, 346–48 (1966) (arguing that, because “little agreement exist[ed] on values, . . . objectives, standards of conduct, the meaning of words, or the relation of means to ends” as decolonization was unfolding, lawyers needed to remain cautious about the “limits of an effective international order.”).

149. See *infra* Part IV.A.

In addition to helping cement mistrust toward the techniques of classical legalism, pragmatic legal thought also inspired the turn to development as a foreign policy technique through which to engage with the decolonizing world. As we saw earlier, sociological jurisprudence and legal realism emphasized the role of the social sciences in analyzing legal problems and evaluating legal rules, as well as the role of the jurist in promoting “social engineering.” In so doing, they supported the orientation of American foreign policy toward the language of development and modernization.¹⁵⁰ Examples of such development policies range from the design of the Marshall Plan to Vietnam projects reminiscent of Tennessee Valley Authority (“TVA”) development plans.¹⁵¹ Foreign policymakers’ reliance on social science expertise in the second half of the twentieth century should not be seen, then, as a development antagonistic to the place of law in American foreign policy. Instead, it was at the *invitation* of pragmatic legalists that social sciences entered the domain of foreign policymaking. This was entirely in line with the emphasis that sociological jurisprudence and legal realism placed on using the social sciences for the purpose of “social engineering.”

This idea of scientific expertise as a mode of projecting American power came to compete with political realism for domination within the postwar foreign policy establishment.¹⁵² As historian Nicholas Guilhot notes, IR realists were “united by their negative view of the social sciences,” precisely because “they saw in scientific rationalism the same utopian drive that characterized the legalist vision of international affairs in the interwar years.”¹⁵³ This was an essential point of disagreement for Morgenthau with the proponents of sociological jurisprudence. He attributed his disagreement with sociological jurisprudence precisely to “social engineering,” which he understood to be “a very premature proposition.”¹⁵⁴ IR realism, then, differed substantially from pragmatic legalism, not only in its view of the role of law for governing international affairs, but also in its opposition to the use of the social sciences as a foreign policy technique.

The following discussion will provide examples of these distinct features of the pragmatic legalist approach by examining four case studies. They have been selected with the goal of demonstrating the diverse ways in which pragmatic legalism operated as the distinct legal style of the American foreign policy establishment. As the case studies demonstrate, pragmatic legal-

150. See *infra* Part IV.D.

151. On the ways in which the TVA project “globalized,” see DAVID EKBLADH, *THE GREAT AMERICAN MISSION: MODERNIZATION AND THE CONSTRUCTION OF AN AMERICAN WORLD ORDER* (Sven Beckert & Jeremi Suri eds., 2011).

152. See KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 468; GUILHOT, *AFTER THE ENLIGHTENMENT*, *supra* note 38, at 63.

153. GUILHOT, *AFTER THE ENLIGHTENMENT*, *supra* note 38, at 63.

154. Morgenthau, *Positivism, Functionalism, and International Law*, *supra* note 131, at 274 n.42. See also KOSKENNIEMI, *GENTLE CIVILIZER*, *supra* note 4, at 468 (suggesting that Morgenthau was a “determined opponent” of scholars who “aimed to establish a behavioralist study of society that would employ quantitative measurements and hypothetical laws to be tested by methods of falsification.”).

ism influenced the way that foreign policymakers approached legal interpretation. The pragmatic approach to legal interpretation concerned both domestic statutes, such as the domestic legislation on neutrality, and international legal instruments, such as the U.N. Charter. Beyond the realm of legal interpretation, the case studies also examine how legal pragmatism provided inspiration for new forms of institutional design and, third, helped shape the goals of foreign policy. An eclectic mix of a variety of legal ideas advocated by sociological jurisprudence and legal realism, pragmatic legalism influenced America's global presence in diverse ways.

Significantly, the case studies also demonstrate that pragmatic legalism operated in areas of foundational concern for mid-century foreign policy, producing ambiguous results. New Deal lawyers relied on pragmatic insights when navigating the question of whether the United States should intervene in World War II; how to control the use of nuclear weapons shortly after the first atomic detonations; how to relate to the newly-founded international institutions at a time of increased tensions with the Soviet Union; and how to relate to the decolonizing world as it was becoming increasingly apparent that Cold War competition would soon become entangled with the global process of decolonization. The work of pragmatic legalists in these domains helped strengthen executive reach in matters of war and peace, reinstate the hierarchical organization of international society, and legitimate the violence of the Cold War era. Not only did pragmatic legalism shape foreign policy in multifaceted ways, it also became implicated in significant debates over mid-century American foreign affairs with lasting repercussions.

A. *Abrogating Neutrality*

Pragmatic legalists were actively involved in navigating America's status as a neutral in the first stages of World War II. Under customary international law, neutral states were expected to abstain from engaging in hostilities in support of one of the belligerent parties, a position that in turn allowed them to claim a right to not be targeted by the belligerents.¹⁵⁵ Understood as the legal expression of the policy of isolationism, neutrality toward European affairs featured in the discourse of American foreign policy from its early beginnings.¹⁵⁶ Prior to Pearl Harbor, however, America's as-

155. See Detlev F. Vagts, *Neutrality Law in World War II*, 20 *CARDOZO L. REV.* 459, 460–61, 463 (1998).

156. The occasion was the 1789 French Revolution, and the question of how the United States should act in the context of revolutionary France's war against Britain, Spain and Holland. See CURTIS BRADLEY & JACK GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 12–25 (2003). Detailed accounts of the controversy with regard to its constitutional aspects include DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* at 174–82 (1997); STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800* at 330–54 (1993). On the history of eighteenth century American foreign policy more broadly, see FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* (1961). Since 1917 and

sumed position of neutrality posed a serious quandary to the plans of the Roosevelt Administration, which was openly opposed to Nazi Germany. Pragmatic legalists came to the aid of efforts to bypass America's status as a neutral, in the process helping strengthen executive confidence in discussing questions of war and peace absent congressional involvement.

Lawyers continuously puzzled over the question of how to best defend America's open assumption of a role against Nazi Germany. The 1935, 1936, and 1937 Neutrality Acts passed by Congress had restricted the permissible actions in which the United States could engage as a neutral.¹⁵⁷ In the two years that elapsed between Germany's invasion of Poland and the Japanese attack on Pearl Harbor, obligations flowing from neutrality were invoked to prevent, in particular, efforts to provide military, financial, and other forms of material aid to Britain.¹⁵⁸ Prominent American international lawyers, such as Edwin Borchard, expressed doubts about the legality of American aid to Britain under both international law and domestic legislation implementing neutrality.¹⁵⁹

Lawyers like Frederic Courget and Quincy Wright, who supported American intervention in World War II, justified the aid to Britain in ways that were reminiscent of early twentieth-century classical legalism.¹⁶⁰ They suggested that the United States should not be classified as a neutral country because it had clearly assumed a position in favor of Great Britain. They invoked a vague concept of international law—"non-belligerency"—and argued that it more accurately described the United States' role in the emerging conflict.¹⁶¹ In invoking the concept of non-belligerency, these lawyers

America's entry into World War I the character of the United States as a traditional neutral came under serious pressure. See CHARLES G. FENWICK, *AMERICAN NEUTRALITY: TRIAL AND FAILURE* 4–5 (1940) (suggesting that "neutrality broke down in 1917 from its own inherent weaknesses and self-contradictions.").

157. See REYNOLDS, *supra* note 76, at 32 (noting however that, in reality, this Neutrality legislation had a "hybrid" character because the President was authorized to decide that non-arms trade with belligerents could be conducted on a "cash-and-carry" basis).

158. See, e.g., Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569 (1940); Edwin Borchard, *War, Neutrality and Non-Belligerency*, 35 AM. J. INT'L L. 618 (1941).

159. See EDWIN BORCHARD & WILLIAM POTTER LAGE, *NEUTRALITY FOR THE UNITED STATES* (2d ed. 1940). As regards the public debate on whether Lend-Lease effectively repealed American neutrality, see especially WARREN KIMBALL, *THE MOST UNSORDID ACT: LEND-LEASE, 1939–1941*, at 153–56 (1969).

160. In other accounts, and especially in that of Hatsue Shinohara, Wright appears as one of the international lawyers to consciously promote renewal in American legal thought. Yet in this case, his sensibilities evince a tendency toward legal classicism, which is consistent with David Kennedy's view of the interwar American legal profession as primarily oriented toward classical legal thought. See SHINOHARA, *supra* note 1, at 206 (including Wright in the group of "reformers" who she juxtaposes to the group of "traditionalists" like John Bassett Moore and Edwin Borchard). See also David Kennedy, *The Disciplines of International Law and Policy*, *supra* note 6, at 23. Seen in this combined light, Wright appears much more of a transitional figure in the history of international legal thought than a clear representative of either tendency.

161. See, e.g., Frederic R. Coudert, *Non-Belligerency in International Law*, 29 VA. L. REV. 143 (1942); Letter from Quincy Wright to Charles C. Burlingham (Aug. 21, 1940) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 7).

drew on political and legal ideas that had been circulating since the outbreak of World War II, first used to describe the status of Italy before directly engaging in hostilities, and subsequently that of Turkey, Egypt and Spain.¹⁶² Along similar lines to the PCIJ in *Lotus*, their preferred method in defending the acts of the Roosevelt Administration was to investigate the nature of two highly abstract international legal norms, and to infer America's rights and obligations based on the distinction between the two. Just as early twentieth century foreign policymakers had coalesced behind the codification of the norms of international law as a method to establish America's global position, so did these lawyers pin their hopes for the defense of the United States on a norm of international law.

The proponents of the view that the United States was a "non-belligerent" presented non-belligerency as an intermediate status between neutrality and belligerency. It was appropriate for states that had not directly taken part in the conduct of hostilities, and were therefore not belligerents, but who also did not qualify for the status of neutrality, because they had adopted a clear position in the War in favor of one of the belligerent parties.¹⁶³ The United States maintained a clear position in favor of aiding Great Britain, they argued, while stopping short of directly participating in warfare.¹⁶⁴ Because the United States was a non-belligerent, it was not required to observe an obligation of impartiality between Great Britain and Nazi Germany. The fact that its involvement was short of open warfare, however, also implied that it could invoke the right to be protected from aggression.¹⁶⁵ A highly delicate exercise in conceptual gymnastics, non-belligerency was meant to provide the best of both worlds to the states that espoused it: both a right to provide material aid to one of the warring parties, and a right to not be directly targeted by the favored party's opponent.

Adolf Berle, a disciple of sociological jurists and a legal realist thinker in his own right, who at the time was serving as Assistant Secretary of State, voiced his concern about such efforts to organize American foreign policy around the conceptual distinction between "neutrality" and "non-belligerency."¹⁶⁶ He protested that, in the midst of World War II, "the

162. See Robert R. Wilson, "Non-Belligerency" in Relation to the Terminology of Neutrality, 35 AM. J. INT'L L. 121, 121–22 (1941).

163. See Coudert, *supra* note 161, at 151.

164. See Letter from Quincy Wright to Charles C. Burlingham, *supra* note 161.

165. See KENTAROI WANI, NEUTRALITY IN INTERNATIONAL LAW: FROM THE 16TH CENTURY TO 1945, at 3–5, 163–65 (2017), who nonetheless argues that in World War II the term non-belligerency was used as a "political" and not as a "legal" term. This position seems hard to maintain in view of the protracted discussions of American international lawyers as to whether non-belligerency was a cognizable status under international law. See, e.g., Borchard, *War, Neutrality and Non-Belligerency*, *supra* note 158, at 624.

166. Berle was specifically reacting to the suggestions put forward by the Argentinian minister of foreign affairs José María Cantilo that, rather than espousing a policy of neutrality, American states move to adopt a uniform policy of non-belligerency. See DAVID M. K. SHEININ, ARGENTINA AND THE UNITED STATES: AN ALLIANCE CONTAINED 75–76 (2006). Argentina eventually remained neutral even after most Latin American states had declared war on the eve of the Pearl Harbor attack, and only declared war

solid necessity” was “not one of setting up new legal and diplomatic conceptions.”¹⁶⁷ Calling the status of the United States “non-belligerency” over “neutrality” was not likely to guarantee peace in the Americas and made little difference. In this regard, Berle was building directly on the legacies of sociological jurisprudence and legal realism, as they had consolidated after *Lochner*. He cast serious doubt on the possibility that a series of abstract legal concepts, such as neutrality and non-belligerency, could provide meaningful answers for American foreign policy in the turbulent period of World War II. Given the importance of the critique of conceptualism for the birth of sociological approaches to law, it is hardly surprising that pragmatic legalists applied the same critique to the case of non-belligerency.

In keeping with the teachings of sociological jurisprudence and legal realism, Berle argued that setting up new avenues of institutional cooperation was much more likely to guarantee America’s safety than invoking the concept of “non-belligerency.” He pointed to the necessity of turning “some of the more or less legalistic suggestions into more practical channels,” namely institutional arrangements geared toward defending the hemisphere.¹⁶⁸ Convening conferences, for instance, relating to military, naval and staff cooperation would be far more helpful than arguing over whether non-belligerency was preferable to neutrality.¹⁶⁹ In his unequivocal dismissal of crafting foreign policy on a conceptual basis, and in his privileging of institutional arrangements instead, Berle acted as a prototypical pragmatic legalist. World War II was not the time or place to invent new international legal norms. Just as sociological jurisprudence and legal realism had emphasized institutional design over abstract legal principles, so did Berle suggest that foreign policymakers concentrate their efforts on providing the requisite institutional arrangements for the defense of the United States.

Rather than pursue the agenda of American foreign policy through questionable conceptual distinctions, American government lawyers instead implemented two of the main insights of sociological jurisprudence and legal realism in challenging the primacy of neutrality. They read the domestic legislation implementing the status of neutrality teleologically, that is, according to its object and purpose, and consistently with the interests of the United States. These two methods of legal analysis became a pillar for advancing arguments in favor of the 1940 Destroyers-for-Bases deal with Great Britain, a deal that paved the way for even greater involvement in the

in the very last days of World War II. See PETER SMITH, *TALONS OF THE EAGLE: DYNAMICS OF U.S.-LATIN AMERICAN RELATIONS* 84–85 (2d ed. 2000). On Berle’s life and ideological background, see SCHWARZ, *supra* note 78.

167. Letter from Adolf Berle to Cordell Hull and Sumner Welles (May 14, 1940) (on file with the Franklin D. Roosevelt Presidential Library and Archives, Adolf A. Berle Papers, Box 57).

168. *See id.*

169. *See id.*

war under the Lend-Lease program.¹⁷⁰ The sway that teleological reasoning and the language of national interest held for lawyers advancing the cause of American foreign policy can be seen already from these early stages of America's involvement in World War II.

In the winter of 1940, Franklin D. Roosevelt was hesitant to satisfy Winston Churchill's fervent request that fifty or sixty old American destroyers be sent to Britain for defense purposes.¹⁷¹ The ongoing presidential campaign and Roosevelt's plan for a dramatic buildup of American army expenditures, combined with a series of legal considerations, made the request a controversial one.¹⁷² Roosevelt seemed to be constrained by two domestic statutes: the 1917 Espionage Act, which made it unlawful for the United States as a neutral party at the time to "send out of the jurisdiction any vessel built, armed, and equipped as a vessel of war," and by a 1794 statute that threatened fines and imprisonment for those "concerned in the furnishing, fitting out, or arming of any vessel with intent that such vessel shall be employed in the service of any foreign . . . state."¹⁷³ While then Attorney General Robert Jackson had earlier conceded that generally the transfer of vessels to Great Britain "would seem to be prohibited" by the 1917 Espionage Act, the creative reliance on the language of sociological jurisprudence and legal realism decidedly reversed the course of the entire affair.¹⁷⁴

In a private memorandum submitted to Roosevelt, and in subsequent public and private exchanges, lawyer Benjamin Cohen, a student of Roscoe Pound and Felix Frankfurter, defended the legality of the transfer.¹⁷⁵ For this purpose, he cooperated with a number of lawyers who had served or were serving in the Roosevelt Administration, such as Dean Acheson, Oscar

170. Under the Lend-Lease program the United States provided nearly \$50 billion worth of material aid to Great Britain, the Soviet Union and other allied states. On its history, and especially the public debate as to whether Lend-Lease violated American neutrality, see especially KIMBALL, *THE MOST UNSORDID ACT*, *supra* note 159, at 153–56. On the role of legal advisors in the Destroyers-for-Bases deals, see most recently, Robert F. Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 *GEO. J. LEGAL ETHICS* 175, 204–29 (2018).

171. See LASSER, *supra* note 78 at 219–220, 358 n.8; Espionage Act, Pub. L. No. 65-24, ch. 30 tit. 5 § 3, 40 Stat. 222 (1917); Act of June 5, 1 Stat. 383 (1794). On Cohen's and Acheson's efforts to circumvent America's status as a neutral, see also DAVID BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* 229–55 (2016).

172. See BARRON, *supra* note 171, at 240.

173. LASSER, *supra* 78, at 220; *Torpedo Boat sale to British Halted: President Acts on Jackson's Opinion That 1917 Law Would Be Violated*, N.Y. TIMES, June 25, 1940, at 10.

174. See Letter from Benjamin Cohen to Alger Hiss (July 22, 1940) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 7); Letter from Benjamin Cohen to Oscar Cox (July 22, 1940) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 7). On the effect of pragmatic legalists' involvement in the Destroyers-for-Bases deal, see WILLIAM LANGER & S. EVERETT GLEASON, *THE WORLD CRISIS AND AMERICAN FOREIGN POLICY: THE CHALLENGE TO ISOLATION, 1937–1940* at 757 (1952) ("This highly competent legal opinion evidently clinched the matter."); BARRON, *supra* note 171, at 243 ("Cohen's memo changed the terms of the debate.")

175. See Memorandum Re: Sending Effective Material Aid to Great Britain with Particular References to the Sending of Destroyers from Benjamin V. Cohen to Franklin D. Roosevelt (July 19, 1940) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 7) [hereinafter *Sending Effective Material Aid*].

Cox, and Alger Hiss, but also with prominent lawyers in private practice, such as Charles C. Burlingham, Thomas D. Thacher, and George Rublee.¹⁷⁶ Among other arguments, Cohen suggested that the potential transfer of the destroyers to Great Britain was premised upon “the real and material interests” of the United States.¹⁷⁷ Preserving British strength at sea immediately served these interests, because it would help avert or delay German aggression against the United States. Aid to Great Britain was connected to and furthered the national defense of the United States. Just as sociological jurisprudence and legal realism advocated for lawyers to consider the interests involved in each case when resolving a dispute, so did Cohen foreground the interests of the United States as dictating the appropriate course of action for the Administration.

Cohen’s was not an argument that the national interests of the United States overrode the applicable domestic legislation or international law, in the way that postwar IR realists would have perhaps framed it. Specifically, Cohen did not suggest that the national interest of the United States commanded that the Roosevelt administration be freed from all legal restraints, and that therefore the statutes in question remained inapplicable. Rather, he engaged in legal analysis and advanced his position through legal interpretation. He used the concept of national interest as a guide to interpret the relevant provisions. He factored the national interests of the United States as a decisive criterion in *interpreting* the letter of the statutes in question, not as an argument to ignore it.

Specifically, Cohen identified an interpretive ambiguity: the statutes did not explicitly prohibit the transfer of naval vessels.¹⁷⁸ Absent direct textual prohibition, they could be interpreted to either prohibit or allow such transfers. According to Cohen, however, the concept of the national interest decidedly determined this interpretive ambiguity in favor of the legality of the transaction.¹⁷⁹ The statutes were “designed to safeguard” the defense of the United States, he argued.¹⁸⁰ Likewise, the transfer of the vessels was “dictated by a realistic appreciation of the interests of national self-defense.”¹⁸¹ Because the purpose of the statutes was aligned with the purpose of the transaction, he argued that the statutes should not be construed to prohibit it. “There is no reason for us to put a strained or unnecessary interpretation on our own statutes contrary to our national interests,” he explained.¹⁸² Cohen’s analysis was largely reminiscent of Cardozo’s in *Techt*, discussed in Part I. Just as Cardozo in *Techt* had foregrounded the safety of the United States

176. See Letter from Benjamin Cohen to Alger Hiss, *supra* note 174; Letter from Benjamin Cohen to Oscar Cox, *supra* note 174. See also LASSER, *supra* note 78, at 222, 226–27.

177. See Cohen, *Sending Effective Material Aid*, *supra* note 175, at 1.

178. See *id.* at 8–10; BARRON, *supra* note 171, at 242–43.

179. See Cohen, *Sending Effective Material Aid*, *supra* note 175, at 12.

180. See *id.* at 1.

181. *Id.*

182. See *id.* at 12.

as a concrete consideration meant to lift interpretive ambiguity, so did Cohen structure his arguments around the concrete, practical defense concerns of the United States.

Acheson followed a similar line of reasoning when defending the transfer. He responded to the concerns of international lawyer Quincy Wright, who was in favor of the transaction, but disapproved of the reasoning that Acheson, Cohen, and their colleagues had pursued.¹⁸³ Acheson openly admitted that the lawyers' construction of the statutes at hand was not "free from all doubt."¹⁸⁴ Close cases of interpretation, however, "have always been and should [be] resolved in consonance with the vital public interests of the sovereign whose laws are construed," he argued.¹⁸⁵ The international legal status of neutrality, which the 1917 Neutrality Act was specifying for the United States, was amenable to interpretation based on the state's own defense interests.¹⁸⁶ The idea of national interest, then, not only held a comfortable place in legal analysis (rather than having a purely "political" character), but could also be used to interpret and direct the development of international law.¹⁸⁷ Combining the critique of abstract legal conceptions, teleological reasoning, and an interest-oriented analysis, pragmatic legalists offered a framework of legal analysis that helped the Roosevelt Administration cement America's alliance with Great Britain and, consequently, its international position.¹⁸⁸

Whether, of course, in invoking the American "national interest," pragmatic legalists were not offering their own reified version of it, is open to question. Just as sociological jurists habitually identified a broader "societal" interest when engaging in legal analysis, so did pragmatic legalists in their effort to normalize the idea of a collective interest along nationalist lines. Other societal interests could be perceived to exist in the case of the Destroyers-for-Bases Deal, such as the interest of engaging in a broader political deliberation as to the terms of America's stance in World War II. This, in turn, would have necessitated congressional action to approve the deal. Instead, Cohen and his collaborators argued for the existence of a monolithic national interest, that of securing American defense, and opted for executive action.¹⁸⁹ Just as sociological jurists saw one larger societal

183. See Letter from Quincy Wright to Charles C. Burlingham, *supra* note 161.

184. Draft Letter from Dean Acheson to Quincy Wright 3 (undated) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 7).

185. See *id.*

186. See *id.*

187. See BEISNER, *supra* note 78, at 99.

188. The Destroyers Deal was subjected to significant criticism by international lawyers in the United States. See Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690 (1940); Briggs, *supra* note 158; Quincy Wright, *The Transfer of Destroyers to Great Britain* 34 AM. J. INT'L L. 680 (1940).

189. In justifying executive action, Cohen argued that the statutes in question already provided congressional authority to Roosevelt or, at the very least, that Congress did not mean to constrain his actions in this regard. See BARRON, *supra* note 171, at 242–43. Then Attorney General Robert Jackson subsequently issued a legal opinion confirming the authority of the President to transfer the title to the

interest as worthy of pursuit, which subjected them to the criticism of legal realists, so were their disciples open to critique for producing a unified national interest that commanded material aid to Britain even absent broader democratic deliberation.¹⁹⁰ Unsurprisingly, the Destroyers Deal, secured under the aegis of pragmatic legalists, has since been perceived as paving the way for the coming of the Cold War “Imperial Presidency.”¹⁹¹

B. Advocating for Institutional Experimentalism in Postwar Reconstruction

Institutional experimentalism, a backbone of both sociological jurisprudence and legal realism, found concrete expression during the New Deal, as a result of the reigning influence of legal realists within the Administration. The most notable example was the TVA, which created a large-scale development project under the aegis of the federal government that spanned the territorial jurisdictions of several American states and blurred the boundaries between local and national in novel ways. This innovative program of regional planning was also intended to enhance the South’s electric power and, consequently, boost economic development.¹⁹² On the eve of World War II, the highly regarded lawyer who had envisioned the TVA project, David Lilienthal, advocated for administrative experimentation in a critical project for postwar peace: the control of nuclear weapons. This program became known as the Acheson-Lilienthal plan.¹⁹³ Rather than offering a peaceful solution to comprehensively govern nuclear weapons, however, the Acheson-Lilienthal plan instead was meant to challenge the Soviet Union to assume responsibility for the conduct of the Cold War and thus functioned as one of the first acts of Cold War diplomacy.

The Acheson-Lilienthal plan was an illustrious example of institutional experimentation. The United States had already committed to a system of

destroyers to Great Britain and that the transaction could be achieved through an “executive agreement,” which, unlike treaties that fall under Art. II, §2 of the U.S. Constitution, did not require ratification by the Senate. See Robert H. Jackson, *Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases*, 34 AM. J. INT’L L. 728 (1940). An “executive agreement” refers to agreements concluded by members of the executive branch that are not being put through a process of ratification by the national legislature. They are often concluded in implementation of prior national legislation. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 175–230 (1996). Scholars have exercised criticism on the executive’s rising tendency to conclude such executive agreements, arguing that it represents a power grab by the “imperial presidency.” *But see* GLENN S. KRUTZ & JEFFREY S. PEAKE, *TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS* 9–10 (2009) (challenging this position).

190. For the legal realist critique of sociological jurisprudents’ tendency to deduce a single societal interest, see Llewellyn, *A Realistic Jurisprudence*, *supra* note 96, at 449.

191. LASSER, *supra* note 78, at 229–31 (characterizing Cohen as the “principal architect of the Imperial Presidency.”).

192. See Carl Kitchens, *The Role of Publicly Provided Electricity in Economic Development: The Experience of the Tennessee Valley Authority, 1929–1955*, 74 J. ECON. HIST. 389, 389–91 (2014) (casting doubt on the program’s success at promoting electrification and boosting economic development).

193. See U.S. DEP’T OF STATE, *A REPORT ON THE INTERNATIONAL CONTROL OF ATOMIC ENERGY* (1946) (commonly known as the “Acheson-Lilienthal report”). For a biography of Lilienthal, see NEUSE, *supra* note 78.

internationalized control as early as 1945.¹⁹⁴ The authors of the Acheson-Lilienthal plan fleshed out this idea of internationalization as a series of rather innovative and interventionist institutional measures. From the outset, the authors rejected plans to outlaw the use of nuclear weapons by means of an international convention. In their view, the outlawing of nuclear weapons was unlikely to achieve the desired goal of preventing nuclear warfare. Observing that developing atomic energy for peaceful purposes and for warfare was greatly “interchangeable” and “interdependent,” they suggested that a mere pledge to forego the production of atomic weapons was unlikely to inspire much confidence.¹⁹⁵ In fact, they pointed out, “the very existence of [a] prohibition” against the use of raw materials for the making of nuclear weapons was likely to “stimulate and encourage surreptitious activities,” such as, for instance, illicit trade in raw materials.¹⁹⁶ The authors of the report were vocal about their misgivings toward the traditional techniques of international law, namely creating new rules and prohibitions sanctioned by treaty. In their mind, these were not only ineffectual, but also potentially averse to the cause of nuclear safety.

The authors of the Acheson-Lilienthal report were also not satisfied with a loose system of institutional control. They argued that international inspections and other “police methods” would prove inadequate, when combined with a system of free production of atomic energy for peaceful purposes.¹⁹⁷ The reasons for their skepticism toward institutional methods that relied purely on policing were not “merely technical.”¹⁹⁸ They were the outcome of the “inseparable political, social and organizational problems” that confronted states at the end of World War II.¹⁹⁹ When each nation was permitted to produce its own atomic energy, “national rivalries” in the production of atomic energy were inevitable, given that it was “readily convertible” into nuclear weapons.²⁰⁰ The anxiety around nuclear warfare would place “so great a pressure upon a system of international enforcement by police methods,” cautioned the authors, “that no degree of ingenuity or technical competence could possibly hope to cope with them.”²⁰¹ Inspections and other policing methods were likely to collapse in light of the growing competition in the production of atomic energy that would occur, should states be free to handle these issues as a matter of domestic jurisdiction.

The solution, then, was not to organize an internationalized system of inspection. Rather, it lay in a much more radical institutional intervention

194. See Atomic Energy Agreed Declaration by the President of the United States of America, the Prime Minister of the United Kingdom, and the Prime Minister of Canada, Nov. 15, 1945, T.I.A.S. No. 2520.

195. See U.S. DEP’T OF STATE, *supra* note 193, at 10–11.

196. See *id.* at 26.

197. See *id.* at 11.

198. *Id.*

199. See *id.*

200. See *id.*

201. *Id.*

that would strike at the heart of the atomic energy regime. The authors of the Acheson-Lilienthal report proposed the establishment of an international authority with exclusive jurisdiction over its members concerning the control of uranium and thorium, two of the most dangerous raw materials for the production of nuclear weapons.²⁰² The authors went so far as to propose that legal ownership of these raw materials be solely vested with the international agency to be created.²⁰³ Furthermore, individuals and nation-states alike were to be deprived of a right to engage in certain “intrinsically dangerous” activities in the development of atomic energy.²⁰⁴ Assigning these activities to the exclusive responsibility of an international organization “responsible to all peoples” would remove “the element of rivalry” between nations, and would make a system of inspections much more workable.²⁰⁵ The international agency would not simply be entrusted with a negative function of restraint, but also with an “affirmative . . . responsibility” to promote the development of atomic energy for beneficial purposes.²⁰⁶ The Acheson-Lilienthal plan represented an effort to comprehensively *govern* the production of atomic energy on a global scale.

The Acheson-Lilienthal plan bore striking resemblance in terms of its legal assumptions and sensibilities to the TVA, Lilienthal’s domestic brainchild. Both featured innovative institutional design and experimentation, reimagining the permissible boundaries of interference with traditional rights over property and sovereignty. Just as the legal realist Lilienthal designed, on the domestic level, a federal institution that grouped together the sovereignty of American states for the purpose of large-scale development, so in the case of the control of nuclear weapons, Lilienthal and his colleagues imagined an institutional arrangement in which nations would renounce their local sovereignty over dangerous nuclear resources in favor of large-scale internationalized sovereignty.

The Acheson-Lilienthal plan stands as one of the many examples of the proliferation of international institutions at the end of World War II. While historians have provided ample evidence for the influence of New Deal thought in their creation, there has been little connection to the contribution of American pragmatic legal thought to this development.²⁰⁷ The judicial function, a hallmark of classical legalism and early twentieth-century international law, was relatively peripheral in the establishment of these new

202. *See id.* at 27.

203. *See id.*

204. *See id.* at 26.

205. *See id.*

206. *See id.* at 33.

207. For instance, while Elizabeth Borgwardt notes that the legal realist ethos was definitive for New Dealers involved in postwar reconstruction, she then identifies the contributions of legal realism in postwar reconstruction with the establishment of human rights norms. Not only does this conclusion appear dubious given legal realists’ hostility to the language of abstract norms, it also misidentifies the most important contribution of pragmatic legal thought, its emphasis on the creation of experimental institutional structures. *See* BORGWARDT, *supra* note 3, at 74–5.

institutional structures compared to the creation of much more flexible administrative arrangements.²⁰⁸ Among them, the Acheson-Lilienthal plan was one of the most innovative.

At the same time, however, the Acheson-Lilienthal plan formed one of the first acts of Cold War diplomacy by the United States. The plan, somewhat altered, was presented before the United Nations on June 14, 1946 by U.S. representative Bernard Baruch (and eventually came to be remembered as the Baruch plan).²⁰⁹ It was drafted in the short period after World War II, when the United States was the sole producer of atomic energy. The plan was presented before the world public as an American act of self-restraint, in the sense that the United States was ready to forego its unique strategic privilege vis-à-vis the Soviet Union in return for a centralized regime of nuclear control.²¹⁰ The plan's radical nature put pressure on the Soviet Union, which at the time was frantically preparing its own nuclear arsenal, to reject it, and in this way publicly assume responsibility for the beginnings of the Cold War.²¹¹ The institutionalist, experimentalist attitude of the Acheson-Lilienthal plan, a hallmark especially of legal realism, came to the aid of American policymaking both at home and abroad, and offered one of the first examples of the Cold War being fought through legal means. Others were soon to follow, as we are about to see.

C. *Fighting the Cold War Through Legal Means*

With Cold War tensions rising, American government lawyers continued to employ the language of sociological jurisprudence to interpret the U.N. Charter. From its immediate postwar establishment, the U.N. Charter became an object of fascination, with international law scholars publishing extended legal commentaries akin to those prepared as aids for civil law codes in Europe.²¹² Much of this work provided strict textual analysis, reading the Charter article by article and chapter by chapter, in an effort to identify and spell out interpretive problems that legal practitioners would be likely to encounter in the future. Pragmatic legalists challenged these analyses and provided an alternative interpretive approach to the Charter, meant to allow the Security Council to proceed despite growing tensions among its members. The Security Council practice that eventually consoli-

208. See MAZOWER, *GOVERNING THE WORLD*, *supra* note 4, at 212 ("More negatively, there was a new draft statute for the International Court of Justice . . . time would show that it even had less to do.")

209. See C. Paul Robinson, *Revisiting the Baruch Plan*, 432 *NATURE* 441 (2004).

210. See *id.*

211. See CRAIG CABELL AND SERGEY RADCHENKO, *THE ATOMIC BOMB AND THE ORIGINS OF THE COLD WAR*, 129–30 (2008).

212. See, e.g., LELAND M. GOODRICH AND EDUARD HAMBRO, *THE CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* (2d ed. 1949); SIR NORMAN BENTWICH AND ANDREW MARTIN, *A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS* (1950); FELIX MORLEY, *THE CHARTER OF THE UNITED NATIONS: AN ANALYSIS* (1946).

dated enabled the United States to claim a right of intervention in the violent Korean War.

One example of such technical, textualist work, with important practical implications, was that of the world-renowned international lawyer Hans Kelsen. The drafter of the 1920 Austrian Constitution and the expounder of the groundbreaking “pure theory of law,” Kelsen had been exiled from Central Europe as a result of World War II and spent the remainder of his life in the United States, where he closely followed the developments in postwar planning.²¹³ Shortly after the adoption of the U.N. Charter, Kelsen published an article in the *Harvard Law Review* discussing interpretive questions with regard to the function of the U.N. Security Council.²¹⁴ The U.N. Charter famously provided the five “permanent members” of the Security Council—the United States, the Soviet Union, France, Great Britain and China—with veto-holding power. Among other topics, Kelsen was especially interested in the question of how the Security Council ought to proceed when one of these permanent members was absent from a session. Was it possible for the Security Council to make a decision then?

The relevant provisions of the Charter did not explicitly resolve this question. They only stipulated that procedural decisions were to be made “by an affirmative vote of seven members” whereas decisions on “all other matters” required the “affirmative vote of seven members including the concurring votes of the permanent members.”²¹⁵ Kelsen analyzed the letter of these two provisions together and provided an argument based on their combined reading. He concluded that, when one of the five permanent members was absent or declared an intention to abstain from voting, the Council was not able to reach any decisions other than those pertaining to procedure.²¹⁶ The wording of these provisions “hardly allow[ed]” any other interpretation, argued Kelsen.²¹⁷ Kelsen observed that, as per the letter of the Charter, only seven affirmative votes were necessary for procedural decisions to be made. By contrast, for non-procedural decisions, the Charter explicitly required those of the five permanent members to be among the seven affirmative votes, which was not required in the case of procedural decisions.²¹⁸ Relying on a primarily textual interpretation of the Charter, Kelsen was unequivocal as to the outcome that the Charter mandated.

213. On the life and work of Hans Kelsen, see RUDOLF ALADÁR MÉTALL, HANS KELSEN: LEBEN UND WERK [LIFE AND WORK] (1968); ROBERT WALTER, HANS KELSEN ALS VERFASSUNGSRICHTER [HANS KELSEN AS CONSTITUTIONAL JUDGE] (2005); LARS VINX, HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY (2007). On Kelsen's years in the United States, see HANS KELSEN IN AMERICA: SELECTIVE AFFINITIES AND THE MYSTERIES OF ACADEMIC INFLUENCE (D.A. Jeremy Telman ed., 2016).

214. See Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087 (1946).

215. U.N. Charter art. 27, ¶ 2–3.

216. See Kelsen, *supra* note 214, at 1098–99.

217. See *id.*

218. See *id.*

Benjamin Cohen, whom we encountered earlier defending the Roosevelt Administration's neutrality policies, challenged such narrow, textual interpretations of the Charter. Kelsen's "strict constructionist" approach to the Charter, which he applied to draw inferences based on the Charter's "bare words," was especially problematic, he argued.²¹⁹ Kelsen's methodology befitted, perhaps, a civil procedure code, open to change by a simple majority vote. It was not appropriate, however, for the U.N. Charter.²²⁰ The United Nations Charter needed to be approached in the spirit of "an organic instrument of living law."²²¹ Kelsen needed to inform himself on American constitutional law and history "as a guide to the principles which should govern the construction of the Charter."²²² These were none other than the principles of sociological jurisprudence and legal realism, upon which American liberals had drawn in order to promote a different interpretation of the American Constitution after *Lochner*.

American liberals had developed a constitutional jurisprudence of judicial restraint in response to the Supreme Court's blocking of legislative measures promoting social and economic reform during the early twentieth century. They argued that the Constitution empowered and obligated Congress, not the Court, to find answers to the crises of economic and social life.²²³ While the Constitution offered Congress sufficient methods to meet the problems of modern society, the Supreme Court was not always capable of such a broad application of the Constitution. Congressional legislation was always an effort to solve problems of modern society, but the complexities of modern economic life in the twentieth century required that courts give greater deference to the legislature than was ever the case before.²²⁴ There was not "a simple world," where the lag between the legislature and the courts

219. See Letter from Benjamin Cohen to Cairns Huntington (October 26, 1946) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 6).

220. Cohen was likely referencing Chief Justice Marshall's historic opinion in *McCulloch v. Maryland*, in which Marshall distinguished the attributes of the Constitution from those of a legal code. In contrast to a legal code, the Constitution's very "nature," argued Marshall, required "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1816).

221. Letter from Benjamin Cohen to Cairns Huntington, *supra* note 219.

222. *Id.*

223. See, e.g., the work of Harvard Law School Professor James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Felix Frankfurter was also a major proponent of judicial restraint, following Thayer. See MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991); Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L. J. 23 (2007). The Supreme Court eventually espoused this jurisprudence of judicial restraint in matters of economic regulation in 1937. See, for example, the opinion of Chief Justice Hughes in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (suggesting that in the case at hand, "even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature [was] entitled to its judgment.").

224. *Cf. Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 422 (1934) (Hughes, C.J.) (arguing that the Court should give deference to the legislative decision to enact an emergency, because "[t]he members of the legislature come from every community of the state and from all the walks of life. They are familiar with conditions generally in every calling, occupation, profession and business in the state.").

could easily be ignored.²²⁵ Rather, as “social relationships grow more complex and the speed and breadth with which government must adjust to them proportionately increases,” the relative provisions of the Constitution ought to be interpreted “in light of the time and the circumstance.”²²⁶ The broad, flexible principles established by the Constitution were to be interpreted in accordance with the pressing needs of the modern day, privileging Congress over the Court.²²⁷

Cohen supported a similar reading of the U.N. Charter as an open-ended, flexible instrument meant to adapt to the changing circumstances of international affairs and the realities of his time. Like the Constitution, the Charter could not be amended easily; as a result, it should be the subject of “liberal interpretation.”²²⁸ For the United Nations to function within the framework envisioned in the Charter, legal interpreters needed to “allow room for life and growth,” because the Charter was “an organic instrument of living law.”²²⁹ The language of organicism, upon which arguments in favor of judicial constraint had largely been based, became unproblematically—“organically”—transplanted in the international setting.

This constitutional analogy was not motivated by an idealist desire to constrain the exercise of great power politics, but instead to legally facilitate it. Rather than suggesting that the Charter was analogous to the Constitution because it offered rigorous normative protections, the comparison was motivated by a desire to offer greater latitude to the permanent members of the Security Council when navigating the turbulent waters of international politics. On “occasions when a permanent member is not in a position, for political or other reasons, to support affirmatively a proposition, but when that member . . . does not desire to exercise its veto,” explained Cohen, it was important that the Security Council still be able to make decisions while leaving room for the Great Powers to maintain some distance.²³⁰ Recognizing the primacy of the balance of power within the United Nations, the constitutionalism of pragmatic legalism was meant to facilitate rather than constrain the workings of Great Powers within the United Nations system. Just as the Constitution needed to be approached from a modern-day perspective that commanded a particular balance of power between Congress and the Court in the 1930s, so the U.N. Charter needed to be interpreted as a “living instrument,” adaptable to the political realities of the postwar period, when discord and suspicion were continuously growing between the United States and the Soviet Union. “The successful functioning

225. See Benjamin Cohen & Thomas Corcoran, Memorandum (July 21, 1955) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 16).

226. *Id.* at 11.

227. *See id.* at 13.

228. Letter from Benjamin Cohen to Francis Wilcox (Oct. 25, 1946) (on file with the Library of Congress, Benjamin V. Cohen Papers, Box 6).

229. *Id.*

230. *See id.* at 2.

of the Charter,” respectful of great power politics, needed to prevail as a consideration over the ambiguous letter of its text.²³¹

Cohen’s protest was not a purely theoretical intervention divorced from ongoing international developments. Since April 1946, in a climate of growing tensions, the Security Council had been confronted with the question of whether abstentions—and subsequently, absences—of permanent members should be considered to bar the Council from making decisions unrelated to process.²³² A practice allowing the Council to proceed in such instances was in its infancy at the time, and the opinion of an eminent international legal scholar like Kelsen could exercise considerable influence on the way that member states treated the issue. It was this very practice that the United States officials invoked just a few years later, when, taking advantage of the Soviet representative’s absence, they pushed for the United Nations’ involvement in the Korean conflict.²³³ The legality of the resolutions adopted by the Council was hotly contested by the Soviet Union on the basis of this procedural irregularity, but international lawyers in the United States defended their legality again based on the practice of the Security Council.²³⁴ Among them, Kelsen, too, eventually revisited his position.²³⁵ The practical

231. *See id.*

232. The Security Council had to interpret the legal effects of abstention for the first time on April 29, 1946, when a draft resolution was introduced with regard to the Franco regime in Spain. *See* S.C. Res. 4 (April 29, 1946); *see also* Yuen-Li Liang, *Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council*, 44 AM. J. INT’L L. 694 (1950).

233. *See Statement of the Department of State*, June 30, 1950 in UNITED STATES POLICY IN THE KOREAN CRISIS 61 (1950). The two critical Security Council Resolutions were S.C. Res. 82 (June 25, 1950), and S.C. Res. 83 (June 27, 1950). The Soviet Union representative was absent in protest against the exclusion of the Chinese Communist representative from the Security Council. For a historical account of the Korean War, *see*, among others, BRUCE CUMINGS, *THE ORIGINS OF THE KOREAN WAR* (1981); WILLIAM STUECK, JR., *THE ROAD TO CONFRONTATION: AMERICAN POLICY TOWARD CHINA AND KOREA, 1947–1950* (1981); JAMES IRVING MATRAY, *THE RELUCTANT CRUSADE: AMERICAN FOREIGN POLICY IN KOREA, 1941–1950* (1985).

234. *See, e.g.*, Pittman B. Potter, *Legal Aspects of the Situation in Korea*, 44 AM. J. INT’L L. 709, 712 (1950) (“The denial of validity to the Security Council resolutions could be argued at great length, but prior to June 25, 1950, abstention had not been treated as a veto and we must probably for the moment be content with the finding on this point of the Members of the United Nations themselves.”); Josef L. Kunz, *Legality of the Security Council Resolutions of June 25 and 27, 1950*, 45 AM. J. INT’L L. 137, 142 (1951) (“The resolutions taken by the Security Council on June 25 and June 27, 1950, were legal and valid, weighed, from a strictly legal point of view, in the light of the corresponding rules of the United Nations Charter and of the practice of the Security Council”); Liang, *supra* note 232, at 708 (“Despite challenges subsequently made to the legality of the several substantive resolutions of an important character recently adopted by the Security Council in the absence of a permanent member, the support of the decisions contained in these resolutions by a large number of Member States, and the action taken by many of them in pursuance of the decisions, warrant the conclusion that the practice of the Security Council in this respect has been generally accepted.”).

235. *See* HANS KELSEN, *LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS*, 241–42, 244–45 (1950) (“Since Article 27, paragraph 3, does not require the concurring votes of ‘all’ permanent members but only ‘the concurring votes of the permanent members,’ a valid decision of the Council in a non-procedural matter can be reached even in case one permanent member abstains from voting. This interpretation prevails in the practice of the Security Council.”).

results of approaching the Charter as a flexible instrument meant to facilitate international power politics became visible in a most violent fashion.²³⁶

D. Pragmatism as Applied in Decolonization: "Social Engineering"

The language of sociological jurisprudence and legal realism also helped establish the ideological framework through which the United States related to the decolonizing world after World War II. Pragmatic legalists were inspired by the sociological language of "social engineering" in portraying development efforts as a key task for American relations with the Third World, which in turn helped consolidate the notion of the "development state" as a *desideratum* for the decolonizing world.

As we saw, the term "social engineering" was a key element of pragmatic legal thought. Roscoe Pound had introduced the language of "social engineering" into legal theory in his attempt to describe the lawyer's proper role in society, in which the lawyer, rather than expounding higher Platonic principles, functioned more as a technician providing the infrastructure for desirable social outcomes. In an effort to satisfy "as much of the whole scheme of human demands or desires . . . with the least friction and waste," lawyers were to be the engineers who were responsible for "mak[ing] a social process or activity achieve its purpose," while minimizing social costs.²³⁷ The purpose of lawyering lay in a Benthamite effort of welfare maximization in society; law offered a privileged means to achieve progress while reducing conflict and friction.

Building directly on Pound's image of the lawyer as a social engineer, lawyer Adolf Berle, in his capacity as U.S. ambassador to Brazil, applied this perspective in the context of the international society. Pound had resisted an image of the law as meant to restrain human freedom, instead believing in the possibility that law might be used to effectively construct it. So, too, diplomacy, argued Berle, rather than purely serving to restrain war and violence, also had a "constructive" side, which might properly be called "international social engineering."²³⁸ Rather than "merely keeping [humans] from making themselves worse off" through regulating and constraining violent activity, diplomats were now beginning to "try to make people better off."²³⁹ "Good foreign affairs work," then, as well as "good diplomacy" translated into the practice of "social engineering."²⁴⁰ While formerly understood as institutions meant to preserve negative freedom, both law and

236. The Korean War had a toll of over three million deaths, counting as the third costliest war in terms of human lives claimed in American foreign relations, lagging only behind the two world wars. See Allan R. Millet, *Introduction to the Korean War*, 65 J. MIL. HIST. 921, 924 (2001).

237. See Adolf Berle, *Social Engineering: The New Diplomacy* (May 6, 1946) (on file with the Franklin D. Roosevelt Presidential Library and Archives, Adolf A. Berle Papers, Box 166).

238. *Id.* at 1.

239. *Id.*

240. *Id.* at 3.

diplomacy were now reconceived by the pragmatists as techniques for promoting human freedom through regulation.

Social engineering, at its core, entailed an idea that diplomats ought to pay attention to and busy themselves with what traditionally might have been seen as minute handiwork. The felt “physical necessities” should be at the frontline of good diplomacy; scientific and technical expertise—“scientists and construction workers”—could solve “more troubles . . . than one would guess.”²⁴¹ The standard image of the diplomat as a well-bred, aristocratic, tough-minded negotiator no longer represented the desirable, modern-day ideal, argued Berle. American diplomacy would be most effective “when the American stereotype of a diplomat looks . . . more like David Lilienthal,” the industrious lawyer, discussed earlier, who emerged as one of the masterminds behind American plans for international control of nuclear weapons.²⁴² “Social engineering” was a means of exerting power not through formal political arrangements and the use of force, but rather through the subtler avenues of exporting science, promoting technology, and expertise.

Rather than signaling a turn away from law, then, the introduction of the discourse of development in the conduct of foreign policy was, to the contrary, intimately connected with pragmatist legal thought. The turn to development had intellectual roots in the legal pragmatist vision, which saw social scientific expertise as a valuable aid in sound law and policymaking and welcomed the marrying of legal and social scientific expertise. The legal theory of social engineering served as the legal expression and critical intellectual component of growing campaigns in postwar foreign policy circles to “win the hearts and minds” of the decolonizing world, and dovetailed with the rise of modernization theory, positing the need to lift “backward” societies up through industrialization and social and economic development as a critical intellectual component of these efforts.²⁴³

The bond between legal pragmatism and development became especially manifest in the initiation of legal reform projects as a component of development assistance, especially during the 1960s.²⁴⁴ As we saw, in his Brazil speech, Berle had chosen David Lilienthal, the New Deal lawyer whose instrumentalist outlook shaped the TVA, as the archetype of the successful

241. *Id.* at 2–3.

242. *Id.* at 15.

243. On the history of modernization and development as crucial components of Cold War foreign policy, see, among others, NATHAN CITINO, *ENVISIONING THE ARAB FUTURE: MODERNIZATION IN U.S.-ARAB RELATIONS, 1945–1967* (2017); EKBLADH, *supra* note 151; MICHAEL E. LATHAM, *MODERNIZATION AS IDEOLOGY: AMERICAN SOCIAL SCIENCE AND “NATION BUILDING” IN THE KENNEDY ERA* (2000); MICHAEL E. LATHAM, *THE RIGHT KIND OF REVOLUTION: MODERNIZATION, DEVELOPMENT, AND U.S. FOREIGN POLICY FROM THE COLD WAR TO THE PRESENT* (2011).

244. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *WIS. L. REV.* 1062, 1065–66 (1974). As Trubek and Galanter note, such legal development programs, especially aimed at the reform of legal education, were initiated as early as the 1950s, but were slow to take off.

diplomat-qua-social engineer. In issuing a call for American lawyers to join in development efforts, Supreme Court Justice William O. Douglas, a notable legal realist, likewise underlined the critical role of lawyers in effectuating the goals of development assistance. Lawyers involved in development assistance projects would serve as “architects of free societies in lands that have known little freedom,” working to adapt the “ideals of liberty and freedom” to local conditions.²⁴⁵ In this spirit, the partnership of government agencies, most notably the Agency for International Development (“USAID”), with policy foundations and educational institutions initiated a series of “legal development” programs.²⁴⁶ Revealing the pragmatist belief in the connection between law and social science, such programs were designed as interdisciplinary in nature, bridging the disciplines of economics, political science and law while bringing together legal anthropologists, comparative lawyers, social theorists of law and area specialists focusing on the Third World.²⁴⁷ “Legal missionaries” were sent to Africa, Asia, and Latin America for the purposes of enacting “modern law,” understood to be “pragmatic” and “secular” and meant to induce “practical effects” in society.²⁴⁸ Through the language of social engineering, then, the legal theory of sociological jurisprudence helped inspire the turn to development in foreign policy, which, unsurprisingly, eventually incorporated legal reform as a significant strategy in “winning the hearts and minds” of the Third World.

Not only was the legal theory of sociological jurisprudence implicated in the rise of development as a priority in American foreign policy, it also offered a lens through which to analyze the effects of decolonization on the postwar international order. Pragmatic legalists emphasized the attainment of a sufficient level of economic and social well-being as an essential component for the decolonizing world’s substantive admission to international society. Their concern for labor and economic reform domestically, as we saw it, transformed social and economic development into a substantive criterion through which to hierarchically organize international society.

As early as 1952, lawyer Francis Sayre, once a disciple of Pound at Harvard, a former High Representative of the United States in the Philippines and presently the American representative to the U.N. Trusteeship Council, warned that the granting of political independence to the Third World was not sufficient to achieve “genuine freedom.”²⁴⁹ Echoing Franklin

245. See William O. Douglas, *Lawyers of the Peace Corps*, 48 A.B.A. J. 909, 913 (1962); Trubek & Galanter, *supra* note 244, at 1068.

246. Trubek & Galanter, *supra* note 244, at 1066.

247. This was the case with the Yale Law School Program in Law and Modernization, a hallmark of law and development efforts, which received a—then astronomical—grant of \$1,000,000 from USAID in 1969. *Id.* at 1067 n.14.

248. See Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 33 (1969).

249. Memorandum on The Shaping of U.S. Policy on the Problem of Underdeveloped Areas from Francis Bowes Sayre to the U.S. Department of State 19 (undated) (on file with the Library of Congress, Francis Bowes Sayre Papers, Box 12) [hereinafter *The Shaping of U.S. Policy*]. Sayre also published an academic article based on the memorandum that he submitted to the State Department in 1952. See

D. Roosevelt's language in the historic Four Freedoms speech, Sayre argued that it was only as "adequate foundations — political, economic, social and educational" were being established, that human freedom could eventually be achieved.²⁵⁰ While political independence was a "notable step" toward accomplishing this goal, Sayre warned that the decolonizing world should not confuse it "for the goal itself."²⁵¹ Problems in the "primitive parts of Asia or Africa . . . go far deeper than political status."²⁵² In these cases, in fact, "premature independence" was likely to bring "untold harm" to the decolonizing world.²⁵³ Mistrustful of the Third World's ability to rule itself, Sayre warned that "indigenous leaders . . . can exploit their compatriots as ruthlessly as aliens" and that states "unable to defend themselves" in the face of external threat endangered the project of international peace.²⁵⁴

The troubles that parts of the Third World were about to enter became transparent when paying heed to the sufferings of recently decolonized states, observed Sayre. The example of Libya, which in 1949 had been declared a "united, independent and sovereign state," proved that the granting of independence alone was not sufficient and, that, in some cases, it was also inadvisable.²⁵⁵ Libya was soon to face the "inescapable responsibilities" that came with independence: defense, adequate education, infrastructure, including hospitals and schools, all required sufficient resources.²⁵⁶ These, until then, for the most part had come from the budgets of Libya's administering powers, namely France and Great Britain.²⁵⁷ It was clear that Libya did not maintain sufficient funds for such expenditures, were these administering powers to depart.²⁵⁸ Similarly poorly situated for independence was the former Italian colony of Somaliland, which had been placed under Italian administration, and was generating less revenue than it cost its administrators.²⁵⁹ It was doubtful whether Somaliland could become a "viable state, with a high or even moderate level of government services" including "sufficient natural resources or possibility of industrial development."²⁶⁰ For statehood to be considered "viable," the exercise of

Francis Bowes Sayre, *The Problem of Underdeveloped Areas in Asia and Africa*, 81 PROC. AM. ACAD. ARTS & SCI. 284, 286–87 (1952).

250. See Sayre, *The Problem of Underdeveloped Areas in Asia and Africa*, *supra* note 249, at 291; cf. Franklin Roosevelt's language in the Four Freedoms speech: "[t]here is nothing mysterious about the foundations of a healthy and strong democracy . . . [t]hey are: equality of opportunity for youth and for others. Jobs for those who can work. Security for those who need it . . ." Franklin D. Roosevelt, *The Four Freedoms, Address Before the Congress of the United States*, 66–69 (Jan. 6, 1941).

251. Sayre, *The Shaping of U.S. Policy*, *supra* note 249, at 20.

252. *Id.*

253. See *id.*

254. See *id.*

255. See *id.* at 9–10.

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.* at 10.

260. *Id.*

formal political authority needed to be coupled with the attainment of a sufficient degree of economic development.

By presenting a new *desideratum* toward which the Third World needed to strive, Sayre hailed the arrival of the Third World “development state” through which relationships of subordination between the West and the Third World were reenacted in the postcolonial era.²⁶¹ Legal development efforts drew on the mid-century understanding that a strong state was needed for social and economic transformation that invited the involvement of the West in building state capacity in developing nations.²⁶² The discourse of development reinscribed the age old “standard of civilization” into the heart of the process of decolonization, transforming the nineteenth century discourse of civilizational superiority into one of economic difference.²⁶³ The spirit of development became understood as a necessary prerequisite for the decolonizing world’s substantive admission into international society. In this way, the project of social engineering, which had been originally associated with the progressive agenda of social and economic reform, subsequently paved the way for a much more dubious program, in which the logic of modernization continuously undermined the sovereignty of the Third World.

CONCLUSION: PRAGMATIC LEGALISM AND THE PAST AND PRESENT OF AMERICAN FOREIGN POLICY

This Article has explored how the methods of sociological jurisprudence and legal realism deeply influenced the making of American foreign policy at mid-century. In areas of crucial concern for the United States, such as the question of neutrality during World War II, the international control of nuclear weapons, the role of the U.N. Security Council in the Cold War era, and the global process of decolonization, New Deal lawyers trained in sociological jurisprudence actively applied the teachings of pragmatic legal thought. “Classical” legalism remained in abeyance at mid-century, while the norms of international humanitarianism offered more of a pretext for inaction. By contrast, pragmatic legal thought shaped the ways in which American foreign policymakers responded to the challenges of the postwar world.

The history of pragmatic legalism offers a much more cautious tale about postwar international law than that espoused by the proponents of international humanitarianism. Postwar international law and legal thought, as expounded by American pragmatic legalists, became a constitutive component

261. I borrow the terminology of the “development state” from ANGHIE, *supra* note 13, at 205–06.

262. See David M. Trubek, *Law and Development: Forty-Years after ‘Scholars in Self-Estrangement’*, 66 U. TORONTO L.J. 301, 303–04 (2016).

263. See ANGHIE, *supra* note 13, at 203–04; SUNDHYA PAHUJA, *DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH, AND THE POLITICS OF UNIVERSALITY* 46–47 (2011).

in the hierarchical reorganization of the international society and the violence of the Cold War era. Pragmatic legal thought helped consolidate the Great Alliance over the course of World War II by rationalizing a uniform national interest in material aid to Great Britain absent democratic deliberation; helped challenge the Soviet Union to assume responsibility for the Cold War in lieu of meaningful exchange over the crucial question of controlling nuclear weapons; allowed for a more activist Security Council that became enmeshed in violent Cold War controversy; and inspired new policies through which colonial hierarchies were reinscribed in the heart of the postcolonial international order. Given its ambiguous role in shaping America's global presence—sometimes as a valiant force for good, and at others as constitutive of violence—international law at best offers inconclusive answers to the pressing normative questions surrounding America's role in the world.

For revisionists, the history of pragmatic legalism can serve as an invitation to more persistently explore the legal history of international politics. Revisionists should not too readily dismiss the important function of legal ideology in “governing the world.” As this Article has shown, legal ideology in fact structured the worldview of the foreign policy establishment in important respects, privileging certain policy techniques over others—such as institutional design over a norms-infused stance in the case of neutrality. Likewise, foreign policymakers relied on central insights of pragmatic legal thought when pursuing the project of American power, as for instance when arguing over the function of the Security Council or designing the American proposal for the global control of nuclear weapons. Much more than a pretext or an afterthought, pragmatic legal thought offered foreign policymakers a vocabulary through which to advance the project of American power at mid-century.

The postwar experience should likewise prompt both groups of scholars to expand their conceptual apparatus when setting out to write the international legal history of the twentieth century. Even approaches that, at first glance, would appear to be a rejection of legalism—such as for instance, Adolf Berle's bias against “legalistic conceptions”—provide evidence for the presence and influence of legal sensibilities in and on the foreign policy establishment when properly read in their legal historical context. Similarly, while some postwar policy techniques, and most notably the use of the social sciences, might on their face appear as entirely antagonistic to legal reasoning, when placed in the context of pragmatic legal thought, they turn out to be intimately connected with changing conceptions of legal reasoning over the course of the twentieth century. Pragmatic legal thought shaped responses to the emerging international order in ways that might appear counter-intuitive and unexpected to scholars who only operate with the vocabulary of “classical” legalism or that of international humanitarianism.

The history of pragmatic legalism also suggests that lawyers anxious for ways forward today need not embrace either of the two main modes of American foreign policy: moralizing humanitarianism or skeptical disengagement in the guise of IR neo-realism. At mid-century, lawyers' disenchantment with the methods of classical legalism spawned a variety of new legal approaches in the realm of international affairs. The rather limited intellectual viewpoint of IR realism, which saw international law as "primitive," was but one of them. While pragmatic legalists also rejected a norms-based approach to international law, they developed a sophisticated and experimental mode of engagement, both with international and with domestic law, in response. Against these two competing narratives, there is plentiful room for alternative possibilities, including approaches inspired by the legal realist spirit.²⁶⁴

At the same time, however, the mid-century history of pragmatic legalism should also serve as a warning for lawyers keen on reimagining the role of law in foreign policy. As we saw, pragmatic legalism stemmed from the progressive urge for social and economic reform, a radical program which "planted the seeds of [its own] deradicalization" after it became attached to the American government.²⁶⁵ Despite its progressive origins, this sophisticated and experimental legal mode became associated with troubling aspects of America's global power. The history of pragmatic legalism suggests, then, that legal renewal alone does not bring about moral progress, absent an equally progressive political agenda. In the present crisis of foreign policy, an uncompromising search for better politics is, in the end, the sole hope for producing better politics.

264. For such efforts to revive legal realism at least at the level of international legal scholarship, see, for example, the calls for a "New Legal Realism" in the 2015 Edition of the *Leiden Journal of International Law*. See Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189 (2015). See also Alexandra Huneus, *Human Rights between Jurisprudence and Social Science*, 28 LEIDEN J. INT'L L. 255 (2015); Jacob Holtermann & Mikael Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. INT'L L. 211 (2015); Daniel Bodansky, *Legal Realism and its Discontents*, 28 LEIDEN J. INT'L L. 267 (2015); Andrew Lang, *New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science*, 28 LEIDEN J. INT'L L. 231 (2015). See also Sylvest, *supra* note 117, at 439 (suggesting that "realism need not issue in legal nihilism. Instead of returning us to the debates of 70 years ago, realism should engage the real processes of legalization and fragmentation that have taken place in the meantime.").

265. See SHAMIR, *supra* note 70, at 156 (discussing the deradicalization of the legal realist program on the domestic level).