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SOVEREIGNTY, INTERNATIONAL LAW, AND THE TRIUMPH OF ANGLO-AMERICAN CUNNING

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> The idea of the nation-state, which reigned in Europe from the Peace of Westphalia until the first half of the twentieth century, is today reaching its end; two world wars have revealed its limits.
>
> – Alain de Benoist[1]

THE WESTPHALIAN ORDER AND INTERNATIONAL RELATIONS

The Peace of Westphalia (1648), which closed out the era of wars "of"—or allegedly "about"—religion, established what might be called a rule-bound cartel of sovereign, territorial states, conceived as externally equal to one another and internally hierarchical.[2] At that moment, we see an end to any effective claim by the Papacy and the Holy Roman (German) Emperor to universal jurisdiction. The state system that displaced those competitors thereby created a rule-following international "society" of civilized, Christian European monarchies and states. International law grew within this framework, and, in time,

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[1]Alain de Benoist, "What Is Sovereignty?" *Telos* 116 (Summer 1999), p. 115.

[2]On the "desacralizing" of politics and the "confessionalization" of the separate states after 1648, see Ian Hunter, "Westphalia and the Desacralisation of Politics," in *Thinking Peace, Making Peace*, ed. Barry Hindess and Margaret Jolly (Canberra: Academy of the Social Sciences in Australia, 2002), pp. 36–44.

came to be seen as applicable to all outwardly independent political societies in the world.[3]

Coming out of the Late Middle Ages, writers on international relations built upon, radically altered, and ultimately threw aside the Stoic and Roman notions of natural law and *jus gentium* (the law of nations). Originally, natural law, taken as a sub-field of divine law, overlapped, but did not wholly agree with, *jus gentium*, the set of general rules deducible from the actual practices of separate political societies. It was understood that "municipal" law, that is, the laws of separate states, could depart from the underlying foundations in natural law.[4]

International lawyers accepted the practical necessity of the case, but their work left municipal deviations from the general rules, such as slavery, under something of a moral cloud. Their writings also licensed the sovereigns of the world to make war on one another at their own discretion, there being no common judge or power set over them. International relations scholars refer to this right as "self-help" under conditions of systemic "anarchy." The sources of international law included customary law, the practice of states in their mutual relations, explicit engagements such as treaties, and, absent these, the general principles of law and reason themselves, as embodied in the natural law.[5]

Since the founding statements of more-or-less *modern* international law answer exactly to the period of European state building, and equally to a period of European explorations and "discovery," commercial expansion, and empire building in the extra-European world, there was naturally much slippage in how its concepts applied in practice to non-European states and peoples.[6]

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[3]See Leo Gross, "The Peace of Westphalia," *American Journal of International Law* 42, no. 1 (January 1948), pp. 20–41. The treaty's text in English is available at http://fletcher.tufts.edu/multi/texts/historical/westphalia.txt.

[4]The distinction between the universal law and local law is already found in the works of Bartolus of Sassoferrato (1314–1357). See Constantin Fasolt, "Visions of Order in the Canonists and Civilians," in *Handbook of European History, 1400–1600: Late Middle Ages, Renaissance, and Reformation*, ed. Thomas A. Brady, Heiko A. Oberman, and James D. Tracy (Leiden: E.J. Brill, 1995), pp. 45–47.

[5]See Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997), pp. 1–98.

[6]See Shaw, *International Law*, pp. 23–24.

Writers on international relations always stress that the state system is a "horizontal" one, involving relations between theoretically independent actors answering to no superior. Thus, international law cannot be legislation handed down by an overall superior with coercive powers of enforcement. There is, therefore, a fluid character to international law, depending as it does on voluntary compliance to sundry rules and practices. The system's rules are enforced, or not, by the "self-help" of each state unit.[7]

These facts have led to many theoretical disputes within the fields of Political Science and International Relations between neo-realists, liberals, and social constructivists about whether the state system determines the behavior of its units, or the units generate the system.[8] We may leave these issues to one side, although Gianfranco Poggi likely has a point when he writes that "states do not *presuppose* the system, they *generate* it."[9]

Malcolm N. Shaw, a noted authority, observes that, contrary to what might be expected, states comply with the known rules most of the time.[10] This is comforting since, in the nature of things, regulation of hostile action—war or conflicts that could lead to war—is perhaps the weightiest issue in international law. Accordingly, rules dealing with the causes and conduct of war form an important part of such law.

Sovereign States in the "State System"

For present purposes, our overriding interest in international law arises from the implications of changing doctrines for the actions of sovereign and potentially violent states. We may therefore begin the discussion with sovereignty itself. Many modern writers would ask if

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[7]See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2002), including the forewords by Stanley Hoffman (1995) and Andrew Hurrell (2002); and Brian C. Schmidt, *The Political Discourse of Anarchy: A Disciplinary History of International Relations* (Albany: State University of New York Press, 1998).

[8]See John Gerard Ruggie, "Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis," *International Organization* 35, no. 2 (January 1983), pp. 261–85; and Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics," *International Organization* 46, no. 2 (Spring 1992), pp. 391–425.

[9]Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford, Calif.: Stanford University Press, 1978), p. 88.

[10]Shaw, *International Law*, p. 6.

the concept still matters. Lately, we hear much about the weakening, modification, and "relativization" of sovereignty,[11] or even its withering-away in favor of a new secular millennium, to be led by the U.N., or—with more firepower—the United States, as final judge for All Mankind. In fact, as we shall soon see, today's debates within the "western" and U.S. elites focus almost entirely on this rather restrictive choice. Nevertheless, even if sovereignty seems to be, and to have been, nothing more than a useful legal fiction from its beginnings, it has been useful to someone.

What, after all, is the point of theories of sovereignty of the sort that sprang up in the sixteenth and seventeenth centuries (and after)? According to French jurist Léon Duguit, such notions are "a way of imposing authority by making people believe it is an authority *de jure* and not merely *de facto*."[12] Political scientist Karl Loewenstein calls sovereignty "nothing else, and nothing less, than the legal rationalization of power as the irrational element of politics."[13]

A Summary History of Claims for Sovereignty

C.H. McIlwain writes:

> In Rome, we have the first actual "sovereign." We should probably have had at the same time a definite theory of sovereignty to account for this fact if the jurists of the Empire had possessed a capacity for political speculation commensurate with their genius in formulating the specific rules of law.[14]

[11]See, for example, J. Samuel Barkin and Bruce Cronin, "The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations," *International Organization* 48, no. 1 (Winter 1994), pp. 107–30; Deon Geldenhuys, "The State Between Fission and Fusion," *Politeia* 20, no. 1 (2001), pp. 5–20; Hussein Solomon, "Reconstructing Sovereignty in an Era of Human Security and Intervention," *Politeia* 20, no. 3 (2001), pp. 22–33; and John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept," *American Journal of International Law* 97, no. 4 (October 2003), pp. 782–802.

[12]Quoted in Aldous Huxley, *Collected Essays of Aldous Huxley* (New York: Harper & Brothers, 1958), p. 253.

[13]Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1965), p. 4.

[14]C.H. McIlwain, "A Fragment on Sovereignty," *Political Science Quarterly* 48, no. 1 (March 1933), p. 96.

Relative sovereignties and jurisdictional multiplicity characterized medieval European society. At the level of ideology, the claims of the Papacy and the Holy Roman Emperor worked as practical and theoretical restraints on the power of kings, barons, and other actors in the system. This decentralization, which rested on a "non-event" —the lack of an effective empire in the West after the middle of the fifth century A.D.—made an opening for freedom and the development of market economies. The German Holy Roman Empire, effectively organized around a kind of feudal federalism, was itself no empire in the Roman sense.[15]

Quoting Marxist historian Perry Anderson, International Relations theorist John Ruggie observes that medieval Europe was a

> "patchwork of overlapping and incomplete rights of government," which were "inextricably superimposed and tangled," and in which "different juridical instances were geographically interwoven and stratified, and plural allegiances, asymmetrical suzerainties and anomalous enclaves abounded."

He adds: "The difference between the medieval and modern worlds is striking in this respect."[16]

Further, as McIlwain observes, "the main obstacle" to a theory of sovereignty

> was twofold: the prevalence in the middle ages of the theory of dominion and the absence of any clear notion of legislation. What characterizes the modern "sovereign" is supreme authority *to make law*.[17]

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[15]See John A. Hall, *Powers and Liberties* (Harmondsworth, Middlesex, England: Penguin, 1986), pp. 111–44; Ralph Raico, "Prolegomena to a History of Liberalism," *Journal des Économistes et des Études Humaines* 3, nos. 2/3 (June–September 1992), pp. 260–61; Luigi Marco Bassani and Carlo Lottieri, "The Problem of Security: Historicity of the State and 'European Realism,'" in *The Myth of National Defense: Essays on the Theory and History of Security Production*, ed. Hans-Hermann Hoppe (Auburn, Ala.: Ludwig von Mises Institute, 2003), pp. 21–64; and, on the Holy Roman Empire, see Heinz H.F. Eulau, "Theories of Federalism under the Holy Roman Empire," *American Political Science Review* 35, no. 4 (August 1941), pp. 643–64.

[16]John Gerard Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations," *International Organization* 47, no. 1 (Winter 1993), pp. 149–50.

[17]McIlwain, "Fragment on Sovereignty," p. 98.

French political theorist Bertrand de Jouvenel notes that a king enjoyed a "superiority" involving wider lands, more prestige, and so on, but was expected "to live off his own"—that is, on the production and rents of personal estates. He did not enjoy an unbounded *supremacy*,[18] as German historian Friedrich Meinecke complains: Although the "State certainly existed in the Middle Ages . . . it did not rank supreme. The Law was set above it; it was a means for enforcing the law."[19]

The downside of European pluralism was competitive warfare by aspirants to regional, or even wider, power. Charles Tilly notes that a deadly struggle began, one that entailed a cycle of extraction, aggression, conquest, and further extraction made possible by successful enlargement of the tax base.[20] Centralized territorial monarchies emerged from this strife, especially from the late fifteenth century on, and these state-building wars increased the felt need for a better, more ironclad theory of royal sovereignty.

New formulations of sovereignty, drawing on Roman law and other sources, became very important for the rising territorial monarchs, especially in France, England, and Spain.[21] There were a number of steps along the ideological way. Since Carolingian times, there had grown up the notion of the *corpus mysticum*—the mystical body

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[18]Bertrand de Jouvenel, *Sovereignty: An Inquiry into the Public Good* (Indianapolis, Ind.: Liberty Fund, 1997), pp. 201–21.

[19]Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'Etat and Its Place in Modern History* (New Haven, Conn.: Yale University Press, 1957), p. 27.

[20]Charles Tilly, "Warmaking and Statemaking as Organized Crime," in *Bringing the State Back In*, ed. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), pp. 169–91. See also Martin van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999); Bruce D. Porter, *War and the Rise of the State: The Military Foundations of Modern Politics* (New York: Free Press, 1994); and William Hardy McNeill, *The Pursuit of Power: Technology, Armed Force, and Society Since A.D. 1000* (Chicago: University of Chicago Press, 1982). On public debt, see John Brewer, *Sinews of Power: War, Money, and the English State, 1688–1783* (New York: Alfred A. Knopf, 1989). On "extraction," see also Margaret Levi, "The Predatory Theory of Rule," *Politics and Society* 10, no. 4 (1981), pp. 431–65.

[21]See Robert Nisbet, *Twilight of Authority* (New York: Oxford University Press, 1975), pp. 166–76.

of the church—a body for which it might, at times, be rightful to sacrifice one's life. The distinguished medievalist Ernst H. Kantorowicz notes that, as early as the campaign in Flanders undertaken by Philip IV (1285–1314), kings began to claim that such a duty was owed to the sovereign ruler. Thus came back to life the classical world's notion of a duty to die for the state—as a secular *corpus mysticum*.

Kings had resort, as well, to "organic"or "organological" analogies in which individuals subject to a ruler were parts of a body, whose head was the king.[22] Such analogies, as developed in detail by medieval writers, are now derided, but are somehow persuasive when deployed by moderns such as Hobbes, Hegel, or Lincoln.

The new law of corporations was also taken on board to help give King or state a real, legal "personality." Robert Eccleshall notes "the medieval assimilation of political society to a corporation in which authority was said to reside with the collectivity of the members."[23] Royalist writers readily claimed such corporate authority for the crown. The kingdom, or state, could now be seen as the most inclusive corporate body of all—and suddenly, membership in it was no longer optional.

Counter-trends to these notions were found in the writings of canonists, civilians, philosophers, and the conciliarist movement, and, as historian Ralph Raico points out, elements of these flowed into early liberalism.[24] The struggles that set royal plunder-seeking state-builders against traditionalist opponents—nobles and townsmen alike—are collectively known as the General Crisis of the Seventeenth Century.[25]

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[22]Ernst H. Kantorowicz, "*Pro Patria Mori* in Medieval Political Thought," *American Historical Review* 56, no. 3 (April 1951), pp. 472–92.

[23]Robert Eccleshall, "Richard Hooker's Synthesis and the Problem of Allegiance," *Journal of the History of Ideas* 37, no. 1 (January 1976), p. 119.

[24]Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, Mich.: William B. Eerdmans, 1997); Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979); and Antony Black, *Political Thought in Europe, 1250–1450* (Cambridge: Cambridge University Press, 1992). On the rise of liberalism as a political movement, see Raico, "Prolegomena to a History of Liberalism."

[25]See Niels Steensgaard, "The Seventeenth-century Crisis," in *The General Crisis of the Seventeenth Century*, ed. Geoffrey Parker and Lesley M. Smith (London: Routledge & Kegan Paul, 1978), pp. 26–56.

Sovereignty Fully Theorized

The partisans of Absolutism and Divine Right Monarchy assembled their case from the elements treated above. These friends of bottomless sovereignty included Bartolus of Sassaferrato, Nicoló Machiavelli, Jean Bodin, and Thomas Hobbes, among others. The general trend was as follows: for Bodin and his successors, a mere *agent* of the people would not be sovereign. But Jacques Maritain points out that if the people have "divested themselves of their total power," then the king becomes "a separate and transcendental whole," and sovereignty is, thus, a *property* held by someone, instead of a means to security provision agreed to, on the basis of individual rights, by self-owners. The whole medieval dimension of "vicariousness" or agency disappears.[26]

Working in the context of the English Civil War—part of the General Crisis of the Seventeenth Century—Hobbes adopted the language of "contract," "compact," and "covenant," so as to show original *consent*, which unites the *will* of all into the One Sovereign Will of the Leviathan, or Artificial Man, i.e., the state. This one-time-only "contract" is irrevocable unless the state collapses.[27] Hobbes's English contemporaries damned him, but quickly and thoroughly assimilated his ideas to the mainstream of English "liberalism."[28] Anticipating the Chicago School's notion of state licensing of all private property, Hobbes writes: "It is a doctrine that tends to the dissolution of a commonwealth, 'that every private man has an absolute propriety in his goods, such as excludeth the sovereign.'"[29]

Certain German writers stepped up the claims for unrelieved sovereignty, and their ideas crossed the ocean in time for the American "Civil War." Cary Nederman writes that, for G.W.F. Hegel, war is the essence of the state.

> In a time of war . . . the state comes into its own as a force. . . . The sovereignty of the state is the rallying point for

[26]Jacques Maritain, "The Concept of Sovereignty," *American Political Science Review* 44, no. 2 (June 1950), pp. 345–47.

[27]Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (Oxford: Basil Blackwell, 1957).

[28]See Richard Ashcraft, "Hobbes's Natural Man: A Study in Ideology Formation," *Journal of Politics* 33, no. 4 (November 1971), pp. 1112ff.

[29]Quoted in William A. Dunning, "Jean Bodin on Sovereignty," *Political Science Quarterly* 11, no. 1 (March 1896), p. 103.

> the common defense, which transcends all particular interests and all internal mechanisms of society, since in war the general good is incontestable and unambiguous. The state's sovereignty in its external relations is only really manifested in war. And this "outward" form of sovereignty is present not merely to a foreign state, but also to the populace of one's own state, during periods of war.[30]

Writers like Hegel and Heinrich von Treitschke ratcheted upward the pure theory by detaching it from Hobbes's utilitarian claim that having a sovereign was good for the citizens; now it turned out that the State had its own unique personality and "life," as well as a historical mission to fulfill.[31] At the same time, a peculiarly "modern" notion of individualism came into play. Bodin, for one, had "redefined 'the people' as being uniquely composed of individuals, equally alienated from sovereign power."[32] And sociologist Robert Nisbet notes how "loose individuals" appeared, historically, alongside modern, centralized states.[33]

Was There a North American Exception?

Some writers have denied that any such "sovereignty" grounded on unity of *will*, "allegiance" owed, and so on, ever existed in British North America. Yet, James Wilson, James Madison, John Marshall, Joseph Story, and others deployed the notion of unified sovereignty fairly early (*pace* Harry Jaffa[34]), even if they adopted the dodge of attributing it to an imagined singular "people" of the United States in the aggregate, in whose name all governments, federal and state alike, exercised their respective powers. Only John Taylor of Caroline, perhaps the most gifted theorist of the Virginia Republican movement, wished to sideline the whole rhetoric of sovereignty. Summing up Taylor's views, Yehoshua Arieli writes:

> The American Revolution did not . . . transfer political sovereignty from the English to the American people, but

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[30]Cary Nederman, "Sovereignty, War, and the Corporation: Hegel on the Medieval Foundations of the Modern State," *Journal of Politics* 49, no. 2 (May 1987), pp. 505–6.

[31]Meinecke, *Machiavellism*, pp. 210–16.

[32]Benoist, "What Is Sovereignty?" p. 103.

[33]See Nisbet, *Twilight of Authority*, *passim*.

[34]Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (New York: Rowman & Littlefield, 2000), pp. 205, 379.

> rather reduced the political framework to contractual forms of self-government.

Accordingly, the idea

> of the sovereignty of the state was subversive of the principles of American government, for it presupposed undefined and unlimited power.[35]

For better or worse, later Southern critics of centralized power, such as John C. Calhoun, Abel Upshur, Jefferson Davis, and Alexander H. Stephens tended to adopt the language of sovereignty in both its internal and external aspects, but attributed this vast set of claims to the several states. However posed, the Southern critique had great merit in terms of the "feudal/federal" facts of history in British North America. Relatively neglected by the imperial center, the American colonies had thrived in a rather pre-modern, quasi-medieval, federal environment.

Political scientist Daniel Deudney, developing these institutional facts, contrasts America's "Philadelphian" state system with Europe's Westphalian order. The original U.S. model rested on a geographical distribution of powers that required no absolute sovereignty in the center or the members.[36] Such an interpretation of the early republic licenses the defensive "sovereignty" of local political societies as against supposed "superiors," and does so in a way meant to keep the international lawyers off the case.

But the opposing view had been present from the start. As J. Allen Smith notes: "The apostle to America of the Hobbesian gospel of legislative sovereignty was Sir William Blackstone," one of the writers most widely read in the colonies.[37] It seems fair to add that many of

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[35]Yehoshua Arieli, *Individualism and Nationalism in American Ideology* (Cambridge, Mass.: Harvard University Press, 1964), p. 169. See also John Taylor of Caroline, *Construction Construed and Constitutions Vindicated* (New York: Da Capo Press, 1970), pp. 25–26.

[36]Daniel H. Deudney, "The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union, circa 1787–1861," *International Organization* 49, no. 2 (Spring 1995), pp. 191–228. Cf. Rousas John Rushdoony, "Feudalism and Federalism," chap. 2, and "Sovereignty," chap. 4, in *This Independent Republic* (Nutley, N.J.: Craig Press, 1964), pp. 9–22, pp. 33–40.

[37]J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York: Henry Holt, 1930), p. 53; cf. Joshua Miller, "The Ghostly Body

the American "founders" were practical Hobbesians in Lockean sheep's clothing. And it is significant that Deudney dates the Philadelphian system from 1787 to 1861, suggesting that something else[38] took its place upon the success of Mr. Lincoln's educational project.

Sovereignty Triumphant in Post-1865 U.S.

During and after the "Civil War," sundry paladins of Northern integral nationalism, including Catholic editor Orestes Brownson, legal advisor to Lincoln's War Department Francis Lieber, Senator Charles Sumner, and the subtly influential St. Louis Hegelians, proclaimed the absolute sovereignty of the union. Force of arms confirmed, for them, this dubious claim. In a forecast of things to come, Denton Snider, one of the St. Louis Hegelians, foresaw the American union, lately saved, as

> the affirmation of all particular states in a larger whole which recreates them and which they in turn continually recreate. Such a process might well end in the development of a world-state corresponding to the World Spirit. The American federal system was to point the way.[39]

There is no room here to deal with the ideas of Emerson and Walt Whitman, who demanded a colossal "whole" within which to work out their antinomian individualism.[40]

The War Against Southern Independence underscored the U.S. government's legal positivism. Frederick O. Bonkovsky writes:

> Modern, total warfare by sovereign nation-states seriously undercut proscriptions against violence. Naturalism had built its prohibitions on the foundation of noncombatant

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Politic: The Federalist Papers and Popular Sovereignty," *Political Theory* 16, no. 1 (February 1988), pp. 99–119.

[38]For a view of what that something else might be, see George P. Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (New York: Oxford University Press, 2003)—a title in which every word except "Lincoln" is contestable.

[39]Merle Curti, *The Roots of American Loyalty* (New York: Atheneum, 1968), pp. 178–79.

[40]Literary historian Quentin Anderson provides an impressive critique of Emerson, Whitman, and Henry James as inventors of the peculiarly American self. See Quentin Anderson, *The Imperial Self: An Essay in American Literary and Cultural History* (New York: Knopf, 1971).

> and civilian immunity . . . on the assumption that political man could be defined as human being apart from the state. This was an assumption that positivism could not allow. In the positivist schema people have no natural standing. . . . The state determines people's rights and obligations. The opposing nation establishes the rules of combat and civilian exemption.[41]

Whatever may have been true about a late eighteenth and early nineteenth century American exceptionalism in relation to sovereignty, J. Allen Smith concludes that Americans ended up with "governmental supremacy under the guise of popular sovereignty."[42] The federal state apparatus established, as of 1865, its sovereignty vis-à-vis its own constituent states and population, but whether the U.S. had ever been a normal member of the larger European state system is another matter. Given U.S. leaders' long-range goals, it seems safe to say that the United States always was—and remains—a revisionist power. Already with the Monroe Doctrine, the rising empire of the west had issued a challenge to the logic and rules of the state system.[43]

For some U.S. statesmen, certainly, noninterference in European affairs represented a mere "stage," pending spread of the North American system over the whole world.

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[41]Frederick O. Bonkovsky, *International Norms and National Policy* (Grand Rapids, Mich.: William B. Eerdmans, 1980), p. 89; see also pp. 81–102.

[42]Smith, *Growth and Decadence of Constitutional Government*, pp. 113–61. The attempt to substitute the sovereignty of the law or constitution does not change anything. See Heinz H.F. Eulau, "The Depersonalization of the Concept of Sovereignty," *Journal of Politics* 4, no. 1 (February 1942), pp. 9–11; and Herman Belz, "Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War," *Journal of American History* 59, no. 3 (December 1972), p. 654.

[43]This challenge became a source of inspiration to German political-legal theorist Carl Schmitt, when he sketched out a new world order based on *Grossräume*, or "spheres of influence," which might replace the weakened state system. See Paul Edward Gottfried, *Thinkers of Our Time: Carl Schmitt* (London: Claridge Press, 1990). Schmitt apparently did not comprehend that the U.S. leadership wanted *everything*, and not a mere regional preponderance. Cf. Gary Ulmen, "Toward a New World Order: Introduction to Carl Schmitt's 'The Land Appropriation of a New World,'" *Telos* 109 (Fall 1996), p. 14. For American foreign policy as "essentially extra-European," see also Charles A. Beard, *A Foreign Policy for America* (New York: Alfred A. Knopf, 1940), pp. 21–22.

SOVEREIGN, EQUAL, AND INDEPENDENT STATES IN THEIR MUTUAL RELATIONS

So much for theory. How has the European—and later global—state system operated since its inception, especially in the external realm of state activity?

International Law and Inter-State Warfare

Recall that in the age of feudal war, the king was thought to be *under* the law—divine, customary, and natural. Indeed, there was slippage, but it was usually limited to very specific royal goals. And naturally, kings wished to be out from under such a restrictive notion of law.

On the purely practical side, by the late thirteenth century, kings in France and Sicily began instituting routine taxation *pro defensione regii* ("for defense of the realm"), and other rulers followed suit. Taxation is easily the original "war power." And Georg Schwarzenberger writes that formal declarations of war were instituted precisely as claims to an extraordinary power, that of making *public war*, an enterprise into which all can and must be roped—and with "legal" consequences even for third parties.[44]

Competitive state-building—and, for the losers, state-destruction—picked up considerably with the French invasion of Italy in 1494. The development of public debt, perfected in England at the start of the eighteenth century, added to an ever-upward ratcheting of military competition.[45] As territorial monarchies triumphed over competing political forms like city-states in Italy and city-leagues in northern Europe, a systemic logic set in. Territorial states "recognized" like units, admitting them into the rising system.[46]

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[44]Kantorowicz, "*Pro Patria Mori* in Medieval Political Thought," p. 478; and Georg Schwarzenberger, "*Jus Pacis Ac Belli*: Prolegomena to a Sociology of International Law," *American Journal of International Law* 37, no. 3 (July 1943), pp. 462, 465, 473. On taxation, see Hugh Nibley, "Tenting, Toll, and Taxing," *Western Political Quarterly* 19, no. 4 (December 1966), pp. 599–630.

[45]See Porter, *War and the Rise of the State*; and, for more on the public debt, see Brewer, *Sinews of Power*.

[46]Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton, N.J.: Princeton University Press, 1994); and Thomas Baty, "Can an Anarchy Be

States carried on wars, and wars profited the successful states materially as well as in "psychic income," whence the centrality of war and the so-called "laws of war" to international law.

Thus, sovereignty—the juridical residue of the process sketched out above—is Janus-faced, looking both inward and outward at the same time. Friedrich Kratochwil writes: "It denotes internal hierarchy as well as external equality" within the state system. An *imperial* frontier, such as that of the Roman Empire, represented "a temporary stopping place," whereas in a system of theoretically equal units, boundaries were fixed demarcations between the territories of sovereigns. In recent times, "the universal recognition of territorial sovereignty as the differentiating principle in the international area" comes into conflict with "the erosion of boundaries through the increasing interdependencies of modern economic life."[47]

As modern, abstract, bureaucratic states emerged, each one undertook to map its territory and gather factual information regarding resources fit for extraction, such as properties and other economic assets, population, and the like.[48] Soon enough, they replaced the kings themselves as the real wielders of power.

The Rise and Triumph of Positive Law

We have already noted the displacement of natural law by positive law in American war-making. In the seventeenth century, the transition to a new outlook that focused on sovereign states—as sources of law and final judges in their own cause—was under way, and writers on international law reflected the shift. The trajectory Suárez-Grotius-Pufendorf-Vattel sums up this development, with each writer more tied into legal positivism than his predecessor.[49]

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a State?" *American Journal of International Law* 28, no. 2 (July 1934), pp. 444–55.

[47]Friedrich Kratochwil, "Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System," *World Politics* 39, no. 1 (October 1986), pp. 35, 42.

[48]Creveld, *Rise and Decline of the State*, pp. 144–47.

[49]See Francisco Suárez, *A Treatise on Laws and God the Lawgiver*, trans. Gwladys L. Williams (New York: Carnegie Endowment, 1944); Hugo Grotius, *The Law of War and Peace*, trans. Louise R. Loomis (Roslyn, N.Y.: Walter J. Black, 1949); Samuel Pufendorf, *The Law of Nature and of Nations*,

Schwarzenberger comments that, in their efforts to be realistic and relevant, these writers made "natural law . . . subservient to the reason of state." Thus, the natural lawyers

> conveniently lent their authority to the thesis that some rather disconcerting passages in the Gospel on war were not to be taken too literally, and that war, provided it was just, was authorized, both by divine and natural law.

Finally:

> The insistence of naturalist writers on the element of *bellum publicum* in their definitions of war corresponds to the interests of rising absolutism, as does their postulation for a declaration of war. Therefore, during the period of early absolutism, this part of their doctrine meets with the full approval of State practice.[50]

Nicholas G. Onuf believes that the state was not fully modern until the eighteenth century. While republican writers had appropriated the idea of sovereignty, there was, nonetheless, no impersonal state in republican thought. It was under liberalism and democracy that states became fully modern and sovereign.[51] Now, the territorial monarchs gave way, and were replaced by the rational central bureaucracies which they had called into being.[52]

Alain de Benoist comments: "Once the concept of 'the nation' was legitimized, the concept of 'the people' became an abstraction."[53] As popular, middle class, nationalist movements arose in the nineteenth century, state apparatuses contrived to take them over for state

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trans. C.H. Oldfather and W.A. Oldfather (Oxford: Clarendon Press, 1934); and Emerich de Vattel, *The Law of Nations, or Principles of the Law of Nature*, trans. Charles G. Fenwick (Washington, D.C.: Classics of International Law, 1916).

[50]Schwarzenberger, "*Jus Pacis Ac Belli*," pp. 464–65. Robert Kann comments that "[h]owever obvious the weaknesses in Vattel's theory are, the ideals behind his doctrine were in line with the political expansion of liberal imperialism." See Robert A. Kann, "The Law of Nations and the Conduct of War in the Early Times of the Standing Army," *Journal of Politics* 6, no. 1 (February 1944), p. 98.

[51]Nicholas Greenwood Onuf, "*Civitas Maxima*: Wolff, Vattel, and the Fate of Republicanism," *American Journal of International Law* 88, no. 2 (April 1994), pp. 281–82, 291.

[52]On this, see Creveld, *Rise and Decline of the State*, pp. 126–262.

[53]Benoist, "What Is Sovereignty?" p. 107.

purposes. By the end of the century, conservative parties everywhere were reborn as parties of integral nationalism and absolute, if allegedly popular, sovereignty, having abandoned earlier commitments to feudal legitimacy, particularism, and religion.

When more popular forms of government came on the scene, they inherited from kingly states the whole ideological apparatus of unbounded sovereignty and positive law. This inheritance duly passed from republicanism to liberalism and then to mass democracy.[54] Perhaps the last serious resistance to the ideological victory of sovereign states was found in the work of Erasmus of Rotterdam in the sixteenth century.[55]

Unfortunately, Erasmus was seriously hampered by a belief in the necessity of states. He himself saw the problem:

> Once you have granted imperial rule, you have granted at the same time the business of collecting money, the retinue of a tyrant, armed force, spies, horses, mules, trumpets, war, carnage, triumphs, insurrections, treaties, battles, in short everything without which it is not possible to manage the affairs of empire.[56]

José A. Fernández comments: "Acceptance of the state, then, is the doom of pacifism."[57]

Short of adopting the fundamentally radical posture of the near-anarchist Étienne de la Boétie, those who acknowledged the manifold evils of war were reduced to advocating practical adjustments within the prevailing system of nation-states. Boétie's path, which promised little practical influence for critics, was not taken.[58]

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[54]See Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law," *American Journal of International Law* 33, no. 4 (October 1939), pp. 665–88; Albert Salomon, "Hugo Grotius and the Social Science," *Political Science Quarterly* 62, no. 1 (March 1947), pp. 62–81; and Onuf, "*Civitas Maxima*," pp. 280–303.

[55]José A. Fernández, "Erasmus on the Just War," *Journal of the History of Ideas* 34, no. 2 (April–June 1973), pp. 209–26; cf. Philip C. Dust, *Three Renaissance Pacifists: Essays in the Theories of Erasmus, More, and Vives* (New York: Peter Lang, 1987). On p. 61, Dust writes, "Erasmus concludes that war should not even be waged against the Turks."

[56]Quoted in Fernández, "Erasmsus on the Just War," p. 221.

[57]Fernández, "Erasmsus on the Just War," p. 221.

[58]Étienne de la Boétie, *The Politics of Obedience: The Discourse of Voluntary Servitude* (Montréal: Black Rose Books, 1997).

"Civilized Warfare" within Positive Law

Some seventeenth- and eighteenth-century exponents of (a reformulated) natural law, like Pufendorf and Thomasius, adopted the language of sovereignty, and took law to be "the command of a superior."[59] Nevertheless, much practical and useful work could be done from within this modernist perspective to define laws of war and craft rules for international relations. Hence, these centuries saw the development over time of a body of customary and treaty law seen as the law of nations. In effect, rather than pursue the seemingly futile job of assessing *jus ad bellum*—the justice of a particular war on either side—the applied international jurists began focusing on *jus in bello*: the rightfulness of the *means* employed by any party, once a war had come into being.[60] Edwin M. Borchard, a protégé of noted international lawyer John Bassett Moore, noted:

> Since the Armed Neutralities of 1780 and 1800, in which neutral nations first sought armed organized protection for their rights, steady progress had been made by international agreement in limiting belligerent claims to interfere with neutral rights, and in enabling neutrals to escape ruination from wars in which they had no part or interest.[61]

According to the classic study by F.J.P. Veale, a code of civilized warfare "won general acceptance in Europe from about the beginning of the eighteenth century." Central to this code was the

> *principle . . . that hostilities between civilized peoples must be limited to the armed forces actually engaged*. In other words, it drew a distinction between combatants and non-combatants by laying down that the sole business of the combatants is to fight each other and, consequently, that

[59]See, e.g., J.B. Schneewind, "Kant and Natural Law Ethics," *Ethics* 104, no. 1 (October 1993), pp. 58–59.

[60]On this change in emphasis, see Carl Schmitt, *Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003).

[61]Edwin M. Borchard, "Restatement of the Law of Neutrality in Maritime War," *American Journal of International Law* 22, no. 3 (July 1928), p. 615. See also Guilio Marchetti Ferrante, "Private Property in Maritime War," *Political Science Quarterly* 20, no. 4 (December 1905), pp. 696–717; and Philip C. Jessup and Francis Déak, "The Early Development of the Law of Neutral Rights," *Political Science Quarterly* 46, no. 4 (December 1931), pp. 481–508.

> non-combatants must be excluded from the scope of military operations.[62]

Thus, for at least two centuries, European nations broadly accepted restrictions on the methods of war, which bettered the situations of the societies whose states were at war, as well as those of neutral powers. In 1854, Belgian economist Gustave de Molinari discussed this progress in his essay "Progress Realized in the Usages of War."[63] Economic progress, Molinari wrote, has resulted from the separation of the personnel and materials of war from those of peace, as symbolized by the contrast of open cities and fortified towns. With the growth of peaceful occupations came respect for the productive and commercial sectors and a desire to disrupt their activities as little as possible in war. The utility of this policy had been shown by practice; such practices had been codified in the law of nations.

"Unfortunately," writes Molinari,

> the new practices which the properly understood interest of the belligerents introduced into war in accord with the general interest of civilization did not prevail always during the great struggle of the Revolution and the Empire [1789–1815].

He praised Wellington, the Iron Duke, for adhering strictly to the rules of civilized warfare and treating civilians well. Wellington's forces took nothing from the people for which they did not pay. By contrast, Russian forces in Wallachia and Moldavia paid for their acquisitions in "depreciated paper money!"[64]

So far, rules protecting commerce and private property only applied on land. At sea, seizure and destruction of property were normal, and belligerents even menaced neutral shipping. Molinari mentions

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[62]F.J.P. Veale, *Advance to Barbarism* (Appleton, Wisc.: C.C. Nelson, 1953), pp. 57–58, emphasis in original. See also Gunther Rothenberg, "The Age of Napoleon," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven, Conn.: Yale University Press, 1994), pp. 86–97; and John U. Nef, *Western Civilization Since the Renaissance: Peace, War, Industry, and the Arts* (New York: Harper & Row, 1963).

[63]Gustave de Molinari, "Progrès Réalisé dans les Usages de la Guerre," in *Questions d' Économie Politique et de Droit Publique* (Paris: Guillaumin, 1861), vol. 2, pp. 277–325. Translations from this work are my own.

[64]Molinari, "Progrès Réalisé dans les Usages de la Guerre," p. 285.

a 1780 draft treaty between Sweden, Denmark, the U.S., Prussia, Austria, Portugal, and the Two Sicilies intended to rectify matters.[65]

Murray Rothbard's discussion of U.S. diplomacy under the Confederation provides interesting support for Molinari's account. Rothbard notes that in April 1783, Benjamin Franklin negotiated a treaty with Sweden "based on the Libertarian American Plan of 1776":

> freedom of trade and the safeguarding of neutrals' rights: in particular, restricting contraband that might be seized by belligerent powers; the freedom of neutral shipping between belligerent ports; and [the principle that] free ships make free goods. The Swedish treaty made the further liberal addition of agreeing to convoy each other's ships in time of war.[66]

In 1784, Congress appointed a new treaty commission, headed by Thomas Jefferson, to work toward treaties grounded on the logic already adopted. Congress sought agreements "prohibiting privateering between the parties in case of war between them; and restricting the scope of blockades." Further, a new rule should be introduced that

> now contraband was to be purchased rather than seized. (John Adams, indeed, wished to abolish the contraband category altogether, and thus preserve neutral rights totally.)[67]

A treaty negotiated with Prussia in 1785

> not only provided for neutral convoys, but also for purchase of contraband and abolition of all privateering between the two countries, even if they were at war. Jefferson explained, on behalf of the American commissioners, that these provisions were "for the interest of humanity in general, that the occasions of war, and the inducements to it, should be diminished." The ultimate goals were to be "the total emancipation of commerce and the bringing together of all nations for a free intercommunication of happiness."[68]

These attempts to protect commerce, even during war, did not prevail. Instead, as Molinari noted, the powers had gone beyond the

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[65]Molinari, "Progrès Réalisé dans les Usages de la Guerre," pp. 295–96.

[66]Murray N. Rothbard, unpublished fragment on Confederation Period, vol. 5 of *Conceived in Liberty*, p. 74 and overleaf, Rothbard Papers, Ludwig von Mises Institute, Auburn, Alabama.

[67]Rothbard, unpublished fragment, pp. 74–75.

[68]Rothbard, unpublished fragment, p. 75.

"active" pursuit of plunder at sea to the "passive" policy of injuring an enemy's productive enterprises through general blockades. Of the two, the latter might well be more damaging and counterproductive, having the opposite of the desired effect.[69]

Thus, the allied coalition (from 1793) sought to impose a starvation blockade on France. This strengthened the Revolution, delayed peace, and "exasperated national animosities." It was no accident, Molinari wrote, that the coastal regions of France showed the greatest hatred for England. One might well compare the World War I blockade of the Central Powers by the Allies.[70]

Molinari now turned to the Eastern (Crimean) War, which had begun in March of 1854. Here, too, was found counterproductive economic warfare. He remarks rather dryly that something was wrong when the Czar, hoping to punish his enemies, prohibited the export of Russian cereals and metals, while England sought to punish Russia by preventing the movement of the same exports![71]

Other misbegotten policies accompanied the Eastern War. English attacks on Finnish private property had driven the normally anti-Russian Finns into Russia's arms. Such destruction of property underlay most national hatreds. This made lasting peace more difficult —and, implicitly, set the stage for new wars.[72]

Molinari recommended a distinction between strategic and commercial blockades. It made sense to blockade an enemy port that was primarily a naval base.[73] However, general commercial blockades were an attack on prosperity and civilization. The problems arising from blockades in the War of 1812, the War for Southern Independence (1861–1865), and World War I (1914–1919) bear out Molinari's reasoning.[74]

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[69]Molinari, "Progrès Réalisé dans les Usages de la Guerre," pp. 319–20.

[70]Molinari, "Progrès Réalisé dans les Usages de la Guerre," pp. 296–98. Cf. Ralph Raico, "The Politics of Hunger: A Review," *Review of Austrian Economics* 3 (1989), pp. 253–59.

[71]Molinari, "Progrès Réalisé dans les Usages de la Guerre," pp. 309, 323–24; for the whole discussion, see pp. 304–10.

[72]Molinari, "Progrès Réalisé dans les Usages de la Guerre," pp. 313–17.

[73]Molinari, "Progrès Réalisé dans les Usages de la Guerre," pp. 320.

[74]Veale writes that the U.S. war to suppress the South proved to be the major nineteenth-century departure from the rules of civilized war, as far as contests

Molinari notes that the real interest of all in respecting commerce and property is "no less real for not being immediately obvious to the eyes."[75]

Balance of Power

Other themes ran alongside the pragmatic development of civilized warfare. One of these was the notion of the "balance of power" —a rationalization, it would appear, of British *practice* from the sixteenth century forward.[76] In 1916, German political historian Otto Hintze commented on that policy:

> England's conception of the European balance of power was to the effect that it should be the means of increasing and maintaining her maritime ascendancy. It meant that the Continental Powers should destroy each other by constant warfare, in order that England might have a free hand at sea and in the colonies. Throughout the centuries of modern history, it has been the relentless principle of British policy to fight the strongest Power of the Continent by means of the others.[77]

As we shall see shortly, Britain's posture had some bearing on the downfall of civilized warfare.

WINDS OF DOCTRINE I: THE IDEA OF A LEAGUE TO "ENFORCE" PEACE"

Veale characterized civilized warfare:

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between parties of European descent were concerned. Veale, *Advance to Barbarism*, pp. 89–95.

[75]Veale, *Advance to Barbarism*, p. 325.

[76]For critical views of the balance of power, see Isabelle Grunberg, "Exploring the 'myth' of hegemonic stability," *International Organization* 44, no. 4 (Autumn 1990), pp. 431–77; Ron Hirschbein, "The Balance of Power: A Skeptical Appraisal," in *Just War, Nonviolence, and Nuclear Deterrence*, ed. Duane L. Cady and Richard Werner (Wakefield, N.H.: Longwood Academic, 1991), pp. 233–43; and Paul W. Schroeder, "Did the Vienna Settlement Rest on a Balance of Power?" *American Historical Review* 97, no. 3 (June 1992), pp. 683–706.

[77]Otto Hintze, "Germany and the World Powers," in *Modern Germany in Relation to the Great War*, trans. William Wallace Whitelock (New York: Mitchell Kennerley, 1916), pp. 27–28.

> as the product of belated common sense. At long last, the fact dawned on the human understanding that it would be for the benefit of all in the long run if warfare could be conducted according to tacit rules, so that the sufferings, losses, and damage inevitable in warfare might be reduced, so far as possible.[78]

World War I and the Reversion to Barbarism

In the frenzy of World War I, the powers involved increasingly departed from the code of civilized warfare—with the British starvation blockade of Germany, unrestricted German submarine warfare, poison gasses, senseless mass slaughter on the Western Front, and the first experiments with air power. The war proved so destructive of life, property, and civilized values that, to many observers, it seemed that only an international system built on totally opposed principles could avert another such disaster.

Thus was hatched the notion of a League to Enforce Peace—by military means, if necessary. Of course, this was not a new idea. As far back as 1735, Jules Cardinal Alberoni proposed a league of Christian princes to adjudicate their differences, keep the peace, and make war on the Turks![79] Some contemporary writers even see in Immanuel Kant's essay *Perpetual Peace* a charter for present-day global democratic crusading.[80] (We shall return to this reading of Kant a bit later.)

Distinguished diplomatic historian Roland N. Stromberg has noted an array of problems inherent in the whole notion of a league to "enforce peace" by making war. He notes that the usual reading of the history of the League of Nations is that there were a number of suggestions from 1915 forward, all amounting to the same idealistic package to which the statesmen of the day were unable fully to commit themselves. This is said to have been tragic, but Stromberg disagrees, and writes that there were many plans precisely because the whole idea was riddled with inner contradictions.

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[78]Veale, *Advance to Barbarism*, p. 62.

[79]Mil. R. Vesnitch, "Cardinal Alberoni: An Italian Precursor of Pacifism in International Arbitration," *American Journal of International Law* 7, no. 1 (January 1913), pp. 51–82.

[80]See, e.g., Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12, no. 3 (Summer 1983), pp. 205–35; and Immanuel Kant, *Perpetual Peace*, ed. Lewis White Beck (New York: Bobbs-Merrill, 1957).

The great ideal of a league to enforce peace had grown up in reformist circles well placed at the top of the British Empire. After all, if a league could actually work, it would help preserve the British and other European Empires more cheaply than resorting to general war, as in August 1914. These reformers—among them Robert Cecil of the very important Tory Cecils—passed the idea along to their allies in Washington. Woodrow Wilson, perhaps the greatest Anglophile of all, was smitten, as were his associates, including Colonel House and a number of his partisan Republican enemies. All could agree it was a jolly good idea. Then they all drew up wildly divergent plans to be put into operation as soon as the terrible Germans were beaten.

Inner Contradictions of the League Ideal

The fundamental question was "whether the League would be in the nature of a world state, or an old-fashioned alliance, or whether there was anything in between."[81] The *New Republic* opined on March 30, 1915:

> The League of Peace would either be the old imperialistic alliance under a dishonest name, or else it would be a highly conservative federation which would keep its members in a very straight pacifist jacket. . . . There is no stopping point at a league to prevent war. Such a league would either grow to a world federalism, or it would break up in civil war.[82]

On the conservative end of the pro-league spectrum were those like Nicholas Murray Butler and Elihu Root, who "put their trust in international law and a world court as the slow but sure path toward eventual world government" by the path of "organic growth."[83] Others, less patient, demanded action and plans spelling out the brave new world in detail. In practice, their plans took shape in a kind of muddled middle ground.

The war was allegedly being fought on the part of the allies for high ideals, and after U.S. entry, even more was heard of high ideals, since that is an inseparable feature of U.S. wars. Now it was said

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[81]Roland N. Stromberg, "Uncertainties and Perplexities About the League of Nations," *Journal of the History of Ideas* 33, no. 1 (January–March 1972), p. 141.

[82]Quoted in Stromberg, "Uncertainties and Perplexities," p. 141.

[83]Quoted in Stromberg, "Uncertainties and Perplexities," pp. 141–42.

that the war was being waged for the "national self-determination" of captive peoples—specifically, those held captive by the German, Austrian, and Ottoman empires. Not so much was heard of those held captive by the British, French, Dutch, and other worthy empires.

Yet, self-determination for even this self-serving shortlist of would-be nations would create more national sovereignties in the world, while the league idea necessarily required renunciation of sovereignty to some unknown degree. How to sort that out? Was the war being fought, at the same time, *for and against* nationalism and self-determination? This was a contradiction the league planners and theorists could never overcome. Another matter of quaint dispute was whether the league should form before German defeat so as to wage the war better—the path actually taken in World War II with the "United Nations."

Once the Bolsheviks took power in Russia, late in 1917, Wilson's program of collective security, or cooperative imperialism, took on added importance as an answer to the challenge posed by Lenin's doctrine of worldwide communist revolution.[84]

The League in Practice

As things worked out, the League of Nations had to await the end of World War I. The various Anglo-American drafts of its Charter left the ambiguities in place. Article X spelled out

> collective guarantees of the independence and existing boundaries of all states. Yet Wilson himself took back this inelastic guarantee, by saying that it did not rule out boundary changes or constitute a status quo imprisonment.[85]

But existing boundaries themselves rested on earlier successful warfare, and the League looked more and more like an agreement among the victors to hold onto what they had grabbed. The Treaty of Versailles, of which the League formed a part, created enough new grievances for a series of new wars. Given all this, it was quite mad to think that the League could be a force for "peace"—even a

[84]Arno Mayer, *Wilson vs. Lenin: Political Origins of the New Diplomacy, 1917–1918* (New York: World Publishing, 1967); and N. Gordon Levin, *Woodrow Wilson and World Politics: America's Response to War and Revolution* (New York: Oxford University Press, 1968).

[85]Stromberg, "Uncertainties and Perplexities," p. 142.

peace to be enforced by "sanctions," or *a blockade*, as more honest generations put it (and itself an act of war), or full-scale war.

The most the League accomplished was to give the appearance of international cooperation—the cause of all mankind—to some policies adopted by certain powers against other powers in the aftermath of the unfinished disaster called World War I. Where the League could not be used, it was largely ignored.

League enthusiasts saw in it the germ of a new world order. But, as we previously noted, the *New Republic* warned that "*such a league would either grow to a world federalism, or it would break up in civil war*." Actually, we may remove the "or": a league, world federalism, whatever we may call it, would necessarily be oppressive *and* lead to the result mentioned. The worst part is that, under such an arrangement, enemies who would otherwise be foreign powers with some rights under the laws of war become "rebels" with no rights at all.

There were many League enthusiasts in the U.S.: Americans are often sentimental about setting up and preserving wider unions to guarantee peace. This has to do with the way they learn American history. For some, world federation would work just as well as the American confederation did after 1789, *provided you don't count that big war between 1861 and 1865* with the 620,000 military deaths on both sides and the 50,000 or so missing Southern civilians. The analogy breaks down precisely because you must count that big war. As historian William Appleman Williams writes:

> Americans remain haunted by the Civil War. . . . Underlying that persistent involvement is the realization that the war undercuts the popular mythology that America is unique. Only a nation that avoided such a conflict could make a serous claim to being fundamentally different. In accordance with the logic and psychology of myth, therefore, it has become necessary to turn the war itself into something so different, strange, and mystic that it could have happened only to the chosen people.[86]

World government or World Empire, if we should ever enjoy such, would be the material cause of world civil war.

"Leaguism"—as we might name the ideology of collective security—was meant, one supposes, to overcome what international

[86]William Appleman Williams, *The Contours of American History* (New York: New Viewpoints, 1973), p. 285.

political theorists call the "self-help" dilemma under international "anarchy." But so, too, were the big alliances at the beginning of the twentieth century, and they only succeeded in making World War I possible. Thus, the League of Nations and the later U.N. might reasonably be seen as the *Entente Cordiale* writ large.

As Murray Rothbard liked to point out, the logical outcome of collective security was to ensure that no war could remain limited—i.e., confined to two parties and fought over limited issues. Instead, the demand that the true "aggressor" be named and that all Good Powers rally to the defense of the injured party, stood guarantee that future wars would be as broad in scope as possible.[87]

WINDS OF DOCTRINE II: KELLONG-BRIAND PACT, WORLD WAR II, UNITED NATIONS, AND NUREMBERG

War "Outlawed"

The rather innocent-looking Kellogg-Briand Pact of 1928 committed the nations signing it to the assertion that war was obsolete as a positive instrument of foreign policy.[88] Since, at the same time, the contracting powers reserved the "right" to resort to self-defense when attacked, a deep contradiction arose, a contradiction that could not be papered over by rational means.

Even so, the pact stands as a landmark in the rise of the New International Law of "collective security" because so much ideological hay was made from its supposed implications. In truth, a number of sovereignties, severally and under their own power, had ratified a vague agreement, enforcement of which was left to the imagination. Shortly thereafter, advanced thinkers began proclaiming that those states had *unanimously* committed themselves to an entirely new legal order from which they might not now recede.

No less than Quincy Wright, a paladin of the new order, wrote:

> The law of the pact will not work unless the parties can agree at once on the position of the belligerents. Under the

[87]Murray N. Rothbard, "War, Peace, and the State," in *Egalitarianism As A Revolt Against Nature and Other Essays* (Auburn, Ala.: Ludwig von Mises Institute, 2000), p. 126n.

[88]See http://www.yale.edu/lawweb/avalon/imt/kbpact.htm for the text of the Kellongg-Brian pact. Schmitt criticizes the pact in *Nomos of the Earth*, pp. 279–80.

> old law of war and neutrality, the obligations of neutrals flowed from the fact of war and not from the conditions of its origin. Under the new law, the obligations of non-participants depend, not upon the fact of war, but upon the position of the belligerents as is determined by its origin. . . . It is believed that the legal case against war and armed violence in international affairs is complete. War cannot occur without violation of the Pact, and armed violence cannot be justified except within the legal concept of self-defense. Neutrality posited upon isolation and impartiality has lost its legal foundation.[89]

War, now "outlawed," was a *crime*, and the analogy with domestic jurisprudence came into full view.

In the words of old-line international lawyer Edwin M. Borchard, the new gospel took

> sustenance from the extraordinary view that the system of international relations that prevailed before 1914 was "international anarchy," and that what we now have represents "law and order." Perhaps it is not unnatural, therefore, that the evangelism of the new "new order" is directed toward a disparagement of the international law which sustained the "old order"—an attack which indiscriminately characterizes "war" as a common-law crime and would therefore deprive the laws of war of all legal standing, regards neutrality as "immoral," if not "illegal," and insists that collective intervention and force will, or should, alone assure "peace."[90]

Given the supposed "outlawry" of war, the main task now became one of stipulating Good vs. Bad nations—"aggressors" vs. defenders—and deciding the best means of bringing aggressors to heel, whether by boycott, embargo, or stronger measures. Together with the League of Nations Charter, the Kellogg Pact was taken to have overturned the Old International Law in favor of a brave new order. The sect that believed this happy doctrine was especially strong in the United States.

Acting on the newer conception of international law, U.S. Secretaries of State Henry Stimson and Cordell Hull "repeatedly talked

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[89]Quincy Wright, "The Meaning of the Pact of Paris," *American Journal of International Law* 27, no. 1 (January 1933), p. 61.

[90]Edwin M. Borchard, "The 'Enforcement' of Peace by 'Sanctions,'" *American Journal of International Law* 27, no. 3 (July 1933), p. 519.

as if the renunciation of war was one of the fundamentals—one of the 'pillars'—of American foreign policy."[91]

Outlawry of War—Followed by World War II

For the new school, neutrality had become "obsolete"—a reactionary vestige of the bad old days which, if practiced by any modern power, stood as an affront to the all-encompassing logic of the new order. Among the many spokesmen for the new outlook were such people as Quincy Wright, Denna Frank Fleming, various U.S. Secretaries of State, and Soviet foreign minister Maxim Litvinov. World War II became the proving ground of the new viewpoint via such pronouncements as the Atlantic Charter and other wartime agreements between the Allied Powers, culminating in the U.N. Charter.

Thus, a not-very-subtle "antifascist" theme resonated within the new international law. Only "fascist" disrupters were to blame for World War II, or any other disasters of the first half of the twentieth century. To prevent future outbreaks of fascism and war, an international body with power of *enforcement* was needed, and it is no accident that Franklin Roosevelt and others began referring to their war-making coalition as the "United Nations."

As Charles G. Fenwick writes:

> It was only with the adoption of the Atlantic Charter and the wider Declaration of the United Nations that it came to be realized that the hope of a new political order was dependent upon *removing the economic causes of war and setting up an ideal of social reconstruction. The barriers to the trade and raw materials of the world must be removed; labor standards must be improved, and social security assured to the people of all countries*.[92]

These conceptions, it is worth remarking, looked forward to some undefined degree of socialism and social democracy, with the principle of the Open Door thrown in for the benefit of politically well-connected American capitalists. The new order, imposed from the top down, would alleviate those "economic" conditions which had

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[91]Richard N. Current, "Consequences of the Kellogg Pact," in *Issues and Conflicts: Studies in Twentieth Century American Diplomacy*, ed. George L. Anderson (Lawrence: University of Kansas Press, 1959), p. 213.

[92]Charles G. Fenwick, "International Law: The Old and the New," *American Journal of International Law* 60, no. 3 (July 1966), p. 481, emphasis added.

uniquely *caused* fascism, thus assuring peace and preventing war via an ever-leftward drift of policy.

A New World of Institutionalized Peace

The United Nations Charter reads like a weird combination of the U.S. Constitution, an old-fashioned treaty, a utopian manifesto, and a set of rules for a private club, as distinguished jurist Hans Kelsen, a legal positivist, implied in a critical essay on the Preamble.[93] The new international law provided justification for the Nuremberg tribunal. According to the Allied prosecutors, planning, preparing, and carrying out the elements of an "illegal" war of "aggression" were separate counts, and something like an endless, upward plea-bargaining process entered the picture.[94] The Korean War, too, was claimed as an instance of international police work in the interest of collective security, although the war's actual implementation showed, if anything, that the Charter did not work as planned.

A fairly straightforward analogy, mooted earlier, construes world federalism as the cure for mankind's ills on the basis of a particular reading of U.S. history. Just as Messrs. Madison's and Hamilton's centralizing Constitution—"saved" by Lincoln in its greatest crisis—freed Americans from such perils as war (oddly enough, by having One Big War), so, too, would an increasingly sovereign world organization deliver humanity from the perils of major war between nation-states.

One of the great partisans of internationalism, Quincy Wright, in 1956, made precisely this comparison:

> It may be noted that in the theory of the United States Constitution, the military measures undertaken by the Federal Government in the South, usually designated as the Civil War, were not considered in Constitutional law action to coerce the Southern States as such, but action to stop the illegal conduct of the governments of those States in nullifying Federal legislation, preventing the functioning of Federal services, and attempting to secede from the Union. The Southern States, said the Supreme Court after the war, had never been out of the Union, and the unconstitutional acts of their governments were null and void. If this were

[93]Hans Kelsen, "The Preamble of the Charter—A Critical Analysis," *Journal of Politics* 8, no. 2 (May 1946), pp. 134–59.

[94]F.B. Schick, "The Nuremberg Trial and the International Law of the Future," *American Journal of International Law* 41, no. 4 (October 1947), pp. 782–83.

> otherwise, "the war must have become a war for conquest and subjugation."[95]

Certainly, on Lincoln's *theory* of the Union (and therefore of the war), all the above might follow, but I leave to one side whether his theory was a good one. Wright's argument by internal American historical analogy naturally turns toward the asserted need of the putatively "superior" to act directly upon *individuals* guilty of "crimes" as part of their cooperation with others in the larger "crime" of undertaking "aggressive war." As Wright expressed it:

> Crime, as indicated in the trials after World War II, is thought to be committed only by individuals. Delinquency by a state creates liabilities of civil rather than of criminal character.[96]

Referring to the U.N. Charter and the Universal Declaration of Human Rights, Charles G. Fenwick writes:

> Here, for the first time in the history of international law, was an act of the whole community of states, looking behind the formal organization of their governments to the individual human beings who constitute the legal body of the state. It creates, in a sense, a bond of unity cutting across state lines and restricting the sovereignty of the state in a vital area of its domestic life. The individual has thus been accepted as a subject as well as an object of international law.[97]

These views amount to a projection of the theoretical premises of municipal (state) law onto the world stage. The shadow of a global Social Contract theory hangs over what might otherwise be seen as mere cooperation of a number of states in pursuit of their power-political goals under cover of internationalist ideology. There is also an odd conflation of the notions of legislation, law, and jurisprudence at the level of mankind—a body that cannot actually be shown to exist.

Within certain limits, the federal-international analogy "works," as does the related federal-feudal one, but not necessarily in quite the way progressive thinkers would have us believe. Perhaps, indeed, the original political sin is that anyone ever delegated power upward at

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[95]Quincy Wright, "The Prevention of Aggression," *American Journal of International Law* 50, no. 3 (July 1956), p. 528. Wright in effect rediscovers Denton Snider's messianic version of American "federalism."

[96]Wright, "The Prevention of Aggression," pp. 528–29.

[97]Fenwick, "International Law," p. 482.

all. On second thought, the whole notion of voluntary "delegation" seems intended to obscure the actions of those at higher levels who successfully seized power from lower levels at some time in the past, or to obscure future actions of those who aspire to global "governance."

Persistence of an Older School

The intellectual victory of the new outlook on international law remained incomplete for some decades. An older school continued to set forth their ideas, albeit with a decreasing audience, into the 1950s. Thus, criticizing a peculiarly Wilsonian notion, John Bassett Moore could write in 1933:

> The President of the United States has no power, either under the Constitution or under international law, legally to decide the question whether a foreign government is *de jure*, or, in other words, established in conformity with the constitution and laws of the country over which it actually rules.[98]

Nor—in Moore's view—did the U.S. Congress or Courts have such a power under the Constitution or international law, although Congress could make specific rules about retaliation, property seizures, etc., once a state of war had come into being. Moore's critique of the collective security outlook was systematic and total, as in the following passage:

> The tendency to confuse war and peace and to magnify the part which force may play in international affairs not unnaturally followed the so-called World War. During that great conflict there developed, in the ordinary course of things, a war-madness, manifested in the exaltation of force, and the belittling of the enduring legal and moral obligations which lie at the foundation of civilized life. Peaceful processes fell into disrepute. We began to hear of the "war to end war"; and *pacifists*, enamored of this shibboleth, espoused the shallow creed that international peace could best be assured by the use of force or threats of force. We were told that preëxisting international law had suddenly become obsolete, and that the world had entered upon a new era in which the general tranquility

[98]John Bassett Moore, "The New Isolation," *American Journal of International Law* 27, no. 4 (October 1933), p. 616. For another critique, see Edwin M. Borchard, "The Multilateral Pact: 'Renunciation of War'" (speech presented at the Williamstown Institute of Politics, August 22, 1928), http://www.yale.edu./lawweb/avalon/kbpact/kbbor.htm.

> was to be maintained by "sanctions," by boycotts, and by war. But the final stage was reached in the spawning of the notion, now rampant, that peoples may with force and arms exterminate one another without breach of the peace, *so long as they do not call it war*. To this final stage belongs the supposition that the law of neutrality no longer exists, and that in future there will be no more neutrals.[99]

Edwin M. Borchard also contested the notion that neutrality was obsolete:

> The suggestion that it is not possible to remain neutral is negatived by the fact that countries much more closely affected by the late struggle than the United States, such as the Scandinavian countries and Holland, were perfectly able to maintain their neutrality. In all the wars fought since 1919, including that between Poland and Russia, Greece and Turkey, Japan and China, and those on this continent, the non-participating members of the League of Nations and the United States remained neutral. Neutrality has been stipulated in innumerable treaties since 1919, including treaties between European Powers and those concluded at Havana in 1928.[100]

Later stages of this battle were fought out, among other places, in the pages of the *American Journal of International Law*, and certainly the broad outlines can be traced there. Suffice it to say that the new school had largely triumphed by sometime in the 1950s.[101]

IDEOLOGICAL TRAJECTORY OF THE INTERNATIONALIST SCHOOL

Peace, Properly Understood, Through Armed Intervention

As indicated, the successful trajectory of the New International Law, as interpreted by (among others) friends of an activist U.S. foreign policy, can be followed in the *American Journal of International*

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[99]Moore, "The New Isolation," p. 622, emphasis added.

[100]Edwin M. Borchard, "The Arms Embargo and Neutrality," *American Journal of International Law* 27, no. 2 (April 1933), p. 297.

[101]Edwin Borchard criticized early Cold War policies on the basis of the older view of international law, in "Intervention—The Truman Doctrine and the Marshall Plan," *American Journal of International Law* 41, no. 4 (October 1947), pp. 885–88; and see Earl C. Ravenal, "An Autopsy of Collective Security," *Political Science Quarterly* 90, no. 4 (Winter 1975–76), pp. 697–714, for an echo of the older school.

Law. The writings of W. Michael Reisman, present editor of the journal, embody the transformations in question. An early piece (1968), written with then-editor Myres S. McDougal, justifying U.N. policy towards Rhodesia, is highly symptomatic of the evolving internationalist point of view. The writers argued for a kind of "loose construction" of the U.N. Charter in order to bring the Rhodesian case under the notion of "threats to the peace" warranting U.N. action including "sanctions" (blockade) and the "authorizing" of Britain to use force against the white minority government of the secessionist colony. It was good, they wrote, that the Charter's "framers, *in rejecting all proposed definitions of the key terms* 'threat to the peace,' 'breach of the peace,' and 'act of aggression,'" had left to the Security Council "a large freedom to make *ad hoc* determinations of each specific situation of threat or coercion."[102]

International "law" thus becomes *legislation* by a fleeting majority of delegates to the relevant U.N. bodies, a majority unconstrained by stable definitions of terms.

The writers deployed injured British sovereignty alongside various notions of international (U.N.) jurisdiction centering on the admittedly under-defined rubric of "threat to the peace." Anticipating later post-modernist moves, they advanced a subjective standard of harm:

> The promulgation and application of policies of racism in a context as volatile as that of Rhodesia and South Central Africa must give rise to expectations of violence and constitute, if not aggression of the classic type, at least the creation of circumstances under which states have been customarily regarded as justified in unilaterally resorting to the coercion strategies of humanitarian intervention.[103]

Thus, it followed that the events in Rhodesia were neither internal matters, nor a dispute between Britain and its former colony, as in 1776, because, under present conditions, "peoples interact . . . through shared subjectivities" and, thus, "other peoples of Africa have regarded themselves as affected by the authoritarian and racist policies of the

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[102]Myres S. McDougal and W. Michael Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern," *American Journal of International Law* 62, no. 1 (January 1968), p. 7, emphasis added.

[103]McDougal and Reisman, "Rhodesia and the United Nations," pp. 10–11.

Rhodesian elites." Even worse, the bad example of Rhodesia could "easily spread to other communities and become international."[104] We have here, on the one hand, a kind of psychic Interstate Commerce Clause modeled on the failure of the U.S. Constitution to limit central power and, on the other, a continuation of the founding antifascist theme of the United Nations.

Suppress Rhodesia, or Hitler will come back!

There is more, but we must move along. Twenty years later, we find Reisman, writing with James Silk, on the legal character of the ongoing war in Afghanistan between Soviet forces and the Mujahidin. Unsurprisingly, the "law" was found to favor the positions then taken by the U.S. government with respect to that war.[105] Some months before, Reisman had already issued a sort of Afghan Resistance Manifesto and recruiting poster, which claimed, on the basis of relevant law, that:

> (1) the Mujahidin are entitled to fight against the Soviet Union and the Soviet-supported Government in Kabul;
> (2) the Mujahidin are entitled to call upon third states for support in their struggle;
> (3) *third states are under an obligation* to provide such help to the Mujahidin in their resistance; and
> (4) neither the Soviet Union nor the Soviet-supported Government in Kabul is entitled to characterize the support that third states are obliged to and do, in fact, render to the Mujahidin as a violation of international law or in any way a violation of its own rights.[106]

Support Islamic fundamentalists, or totalitarianism will come back!

Since then, Reisman has addressed war powers under the U.S. Constitution and the sovereignty of states in relation to asserted human rights.[107] The former essay calls for better division of labor among

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[104]McDougal and Reisman, "Rhodesia and the United Nations," pp. 12–13.

[105]W. Michael Reisman and James Silk, "Which Law Applies to the Afghan Conflict?" *American Journal of International Law* 82, no. 3 (July 1988), pp. 459–86.

[106]W. Michael Reisman, "The Resistance in Afghanistan Is Engaged in a War of National Liberation," *American Journal of International Law* 81, no. 4 (October 1987), p. 909, emphasis added.

[107]W. Michael Reisman, "War Powers: The Operational Code of Competence," *American Journal of International Law* 83, no. 4 (October 1989), pp. 777–85;

the branches of U.S. government—to facilitate more effective overseas interventions—while the second discovers that all recent U.S. interventions have been on the up-and-up and fully consistent with international law. Now, in some of these cases, I suppose, it is possible that Reisman has an argument, but the extreme "fit" between positions taken and the short-term needs of U.S. foreign policy does raise a question or two.

Clearly on a roll, Reisman is next seen calling for establishment of a U.N. war college to train staff officers and organize command structures.[108] Naturally, the task will be to "wage peace" since, by ideological definition, the U.N. never makes war, just as the U.S. never does wrong. Reisman's post-9/11 statement calls on the U.S. to defend "world public order."[109]

Panamanian Interlude

While Professor Reisman was perfecting his unique style of pro-U.S. apologetics, another dispute rocked the pages of the *American Journal of International Law*. Three writers contended for the truth about George H.W. Bush's invasion of Panama. Anthony D'Amato argued that, by invading Grenada and Panama, the United States had modified international law. On the basis of two interventions, a new "rule" of customary law could be spotted just on the horizon. No longer could Third World despots hide behind "formalist" readings of the law, nor could they hide behind "texts" of existing treaties. There was far too much good to be done by ignoring rules and texts that sheltered the Bad from the wrath of the Good.[110]

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and W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84, no. 4 (October 1990), pp. 866–76.

[108]W. Michael Reisman, "Preparing to Wage Peace: Toward the Creation of an International Peacemaking Command and Staff College," *American Journal of International Law* 88, no. 1 (January 1994), pp. 76–78.

[109]W. Michael Reisman, "In Defense of World Public Order," *American Journal of International Law* 95, no. 4 (October 2001), pp. 833–35. The heroic freedom-fighters of 1987 and 1988 are not specifically mentioned in this piece.

[110]Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny," *American Journal of International Law* 84, no. 2 (April 1990), pp. 516–24.

Unfazed by these conceptual shortcuts, two writers, Ved P. Nanda and Tom J. Faarer, dissented. Nanda asserted that redefinition of key terms could not save D'Amato's argument. In any case, nonintervention in the internal affairs of other states *was* the customary rule, not lightly set aside. Farer invoked the U.N. Charter, among other considerations, as a barrier to D'Amato's new doctrine.[111]

The "Right" to Obey the Hegemonic Power

Thomas M. Franck shares some views with D'Amato and Reisman. In an essay published in 1992, he announced "the emerging right to democratic governance." On the strength of a piece of revolutionary propaganda issued in 1776, he derives in Straussian fashion a "democratic entitlement" of universal reach. Repackaging the Wilsonian claim that democracy is the only legitimate form of government, he somehow connects that form to the rule of law. The sleight of hand is dazzling.[112]

Since its feeble beginnings at Versailles, the democratic entitlement has risen above mere self-determination to become a fundamental right—a right duly severed, however, from "any entitlement to secede." It has so risen on the basis of the usual international agreements, held by Franck to apply as "customary law" even to those who have not ratified them. As he puts it:

> The Covenant thus foresees a continuing, growing body of law made by means of the interpretation and applications of its provisions by an expert, independent, quasi-judicial body.[113]

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[111]Ved P. Nanda, "The Validity of United States Intervention in Panama under International Law," *American Journal of International Law* 84, no. 2 (April 1990), pp. 494–503; and Tom J. Farer, "Panama: Beyond the Charter Paradigm," *American Journal of International Law* 84, no. 2 (April 1990), pp. 503–15.

[112]Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86, no. 1 (January 1992), pp. 46–49. For a strong argument that democracy is incompatible with the rule of law, freedom, and order alike, see Hans-Hermann Hoppe, *Democracy—The God That Failed* (New Brunswick, N.J.: Transaction, 2001). In Bruno Leoni, *Freedom and the Law* (Los Angeles: Nash Publishing, 1972), legislation—as against "discovered" law—leads to the same result.

[113]Franck, "Emerging Right to Democratic Governance," pp. 58–59.

Coupled with this universal Fourteenth Amendment comes "the right of free political expression" which "originated conceptually in the antitotalitarianism born of World War II."[114] A cynic might say that Franck's problematic is situated in the (brief) transition from War Liberalism to Cold War Liberalism, which entailed a redefinition of Soviet communism as "Red fascism" so as to preserve the continuity of "antifascism" so dear to American corporate liberals and their European social democratic allies. After some discussion of visionary schemes mooted in 1990 in Paris and Copenhagen, Franck informs us that local sovereignty is dead and buried.

There can be no legitimate objection against intervention by the powerful armed with slogans about human rights.

Having blithely noted "three generations of democratic entitlement" (which calls to mind a famous judge's remark about "three generations of imbeciles"), Franck announces that the Genocide and Racism Conventions "qualify as rules of deportment imposed on all states by the community of nations."[115] This genial conceit presupposes a world constituency—voting by states or as individuals?—that *imposes* rules on existing states, neatly recapitulating the American experience. The global Constitution awaits its John Marshall and Earl Warren.

Franck reasons that, in light of "the natural right of all people to liberty and democracy"—note the assumption that these are compatible—the older international law "principle of noninterference" has fallen by the wayside. At the same time, "established rights and duties implicitly validate a *penumbra* of unenunciated, yet legitimate, means necessary to give them effect." The evolved new order is praiseworthy because "it opens the stagnant political economies of states to economic, social and cultural, as well as political, development." Finally, an implication of these newfound rights is "that legitimate governments should be assured of protection from overthrow by totalitarian forces": a letter-perfect "antifascist" prohibition on "right-wing" political activity, including, one suspects, all strivings for local autonomy and freedom that are not of the Left.[116]

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[114]Franck, "Emerging Right to Democratic Governance," p. 61.

[115]Franck, "Emerging Right to Democratic Governance," pp. 77–78.

[116]Franck, "Emerging Right to Democratic Governance," pp. 82–83, emphasis added; also see pp. 89–91.

There is, indeed, something for everyone here: the inevitable Open Door for U.S. business, and endless social work for the reformist, bureaucratic wing of the bourgeoisie. It is a hard thing to pronounce Hans Kelsen naïve, but the readings of the Charter which I have just canvassed clearly refute his assertion that no one would ever seriously make such claims.[117]

PRESENT TRENDS (THEIR MASTER'S VOICE)

All the high-toned internationalist doctrine surveyed above tacitly depends for its fulfilment on military violence directed against designated threats to the peace. Absent any genuine world political community, the U.S. has stepped into the breach to provide an imperial substitute or equivalent.

The idea that the U.N. is, today, the *source* of such international law as exists is a delusion that has much appeal. For many people, if the U.N. "approved" a war, that would make the war "just" *ipso facto* —without further discussion. This is about as true as the related idea that a state is the *source* of law in a given territory. If the one isn't true, neither is the other. It may be that neither is true, but that discussion must wait for another time.

The rhetoric of collective security has done well, but the wielders of the notion are operationally split between those who really *believe* in it as an ideology and those who know that it operates as a good ideological cover for the U.S. *Griff nach der Weltmacht*—the present U.S. leaders' grasp at total power. For the latter, the "law" can always be reckoned on to legitimate U.S. military intervention anywhere.

In practice, the two groups are hard to tell apart. Present Court Intellectuals are more than happy to proclaim the relativization of "sovereignty" except for the sovereignty of the U.S. and its few faithful allies.[118] The obvious danger—for everyone else—is that of great power hegemony in the name of international "law."[119] And it is

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[117]Kelsen, "The Preamble," *passim*.

[118]Thus Colin Powell: "We continue to reserve our sovereign right to take military action against Iraq alone or in a coalition of the willing." "Current Quotations," Associated Press, www.boston.com (January 27, 2003).

[119]For some meditations on this problem, which show, perhaps, that the *American Journal of International Law* is not monolithic, see Detlev F. Vagts, "Hegemonic International Law," *American Journal of International Law* 95, no. 4 (October 2001), pp. 843–48.

precisely the would-be hegemon—Britain in previous centuries, and the United States at the beginning of the twenty-first—that breaks the "rules" and drives the law in its preferred direction. In 1805, James Madison protested just such encroachments on neutral rights in a state paper entitled "An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace."[120]

As Veale observes:

> So long as the British Navy commanded the sea, the British people had no reason to fear a reversion of warfare to the methods of primitive times. If defeated in a war, a continental people faced the prospect of being dealt with in accordance with the standards then prevailing. To a continental people, therefore, it was a matter of vital concern whether these standards were civilized or barbarous. The people of Britain, on the other hand, enjoyed the comforting knowledge that, so long as their Navy ruled the waves, defeat at the worst would only mean a withdrawal for the time being from the Continent. In fact, until the conquest of the air, Great Britain could hardly be regarded politically as a part of Europe.[121]

As for the United States, that power has been especially keen to find, invent, and proclaim new rules of warfare that favor air power—the field in which it is predominant. Where other powers have adopted rules to limit that military arm, as in the 1977 protocol to the Geneva Convention, the U.S. leaders stand aloof and proclaim their own peculiar doctrines. They then carry those out, and who is to say them nay?

In our time, the hegemonic power *partly* justifies its activities under a "living" U.N. Charter. This is held to be necessary lest the Bad should shelter themselves under narrow readings of settled law. At other times, the same power asserts its separate sovereignty and superpowerhood, with little apparent sense of incongruity.

Frédéric Mégret observes, in the manner of Carl Schmitt, that

> an interesting spin-off from the argument that the U.N. Charter is a global constitution, is whether the U.S. might not also portray itself as accomplishing for the rest of the world and the U.N. Charter a decentralized version of

[120]Cited in Onuf, "*Civitas Maxima*," pp. 300–1.

[121]Veale, *Advance to Barbarism*, p. 68. On related issues, cf. James P. Baxter III, "The British Government and Neutral Rights," *American Historical Review* 34, no. 1 (October 1928), pp. 9–29.

> what the executive may see itself as doing for the U.S. and the American Constitution, namely, *breaching the "constitution"* (or at least going against its spirit) in order to better defend its ordinary function.[122]

Perhaps the central fallacy has been to assume that "law"—international or otherwise—is only law when it can be equated with *force* or the "*will* of a superior." From this comes the notion that international law consists, or should consist, of current *legislation* promulgated by a world body. This approach thrives on the failure to specify levels of analysis, the nature of law, and other matters, and with that, the failure to see that an understanding of international conflict necessarily entails considerable casuistry, in the proper sense of that word.[123]

Nor should it be forgotten that the seeming rationality, whereby a club of good states formed to bash the bad states can masquerade as the parliament of all humanity, has owed much to the guile and cunning of the major English-speaking powers, who have even managed at times almost to believe their own rhetoric. Woodrow Wilson shines forth as the most self-deluded of these rhetoricians. Recent wrangles over Iraq suggest that the U.N. is best seen not as the source of law or as the genuine organ of an incipient world society, but as a *military alliance* whose operational membership may vary depending on circumstances, such as bribery and genuine underlying interests. With its verbal claims to represent all of humanity, it is an unusual military alliance, to be sure.

In 2003, the U.N.-as-military-alliance refused to yield to the wishes of its most powerful member, and that Super Power undertook a war of aggression "unilaterally"—with a few other states in tow in a "coalition of the willing."

ARMED AND DANGEROUS NEO-KANTIANS

John Hall divides power into three types—ideological, economics, and political-military.[124] It is reasonable to say that, in our time, the first of the trinity has risen in importance, although those who

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[122]Frédéric Mégret, "'War?' Legal Semantics and the Move to Violence," *European Journal of International Law* 13, no. 2 (2002), p. 15, emphasis added.

[123]Carl Watner, "International Law or International Brigandage?: A Libertarian Approach," unpublished typescript, 1980; Rothbard, "War, Peace, and the State"; and Leoni, *Freedom and the Law*, for a general critique of legislation.

[124]Hall, *Powers and Liberties*, pp. 3–17.

are concerned with the second and third forms of power have not gone missing.

Neo-mercantilist elites are as busy as ever rigging markets in favor of themselves and their friends via political-military power. This trend is widely equated with "free trade" and "free markets" under sundry neoclassical and Chicago School smokescreens. Having won most of their gambles, however, the political, military, and corporatist actors feel more need than ever for believable ideological cover. Thus, the arrival of ideological power at center-stage reflects the quickened pace of U.S. (informal) empire building.

Murray N. Rothbard gave much thought to the role of ideology and intellectuals in state-level political systems. He concluded that the state's distribution of economic benefits "only secures a minority of eager supporters" and "still does not gain the consent of the majority." Hence,

> the majority must be persuaded by *ideology* that their government is good, wise and, at least, inevitable. . . . Promoting this ideology among the people is the vital social task of the "intellectuals." For the masses of men do not create their own ideas, or indeed think through these ideas independently; they follow passively the ideas adopted and disseminated by the body of intellectuals. The intellectuals are, therefore, the "opinion-molders" in society. And since it is precisely a molding of opinion that the State most desperately needs, the basis for age-old alliance between the State and the intellectuals becomes clear.[125]

The Philosophers Intervene in Favor of Intervention

For twenty-odd years, social scientists, international lawyers, and philosophers allied to U.S. power, by employment and sentiment, have been banging together new justifications for great-power intervention. Here we may name Fernando Tesón, Michael Reisman, Thomas Franck, John Rawls, and Anne-Marie Slaughter. According to Gerry Simpson, these developments are, in the case of Rawls, linked to "liberal anti-pluralism or the liberal intolerance of intolerant governments."[126]

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[125]Murray N. Rothbard, "The Anatomy of the State," in *Egalitarianism As a Revolt Against Nature and Other Essays* (Auburn, Ala.: Ludwig von Mises Institute, 2000), pp. 62–63.

[126]Gerry Simpson, "Two Liberalisms," *European Journal of International Law* 12, no. 3 (2001), pp. 537, 540.

Regardless of whether these persons are influential individually, their works play an important role in helping along the overall imperial project by giving high-toned *reasons* why we must support, acquiesce in, or put up with the project and its costs in money, blood, moral decay, and institutional change.

Immanuel Kant (1724–1804) reasoned that, in the fullness of liberal time, more and more republics would come into being. Republics would be unlikely to wage war—the sport of kings—and *therefore* the proliferation of republican forms of government would spark a trend toward world peace. He wrote:

> If the consent of the citizens is required in order to decide that war should be declared . . . nothing is more natural than that they would be very cautious in commencing such a poor game, decreeing for themselves all the calamities of war.[127]

Even letting republicanism stand in for liberalism here—there is no need to quibble—some problems arise. First, the assumption that under republicanism/liberalism, the "people" somehow control the state seems naïve at best. It ignores the incentives presented to politicians and the ability of small cliques effectively to control policy from the top.[128] The imperialist successes of "democratic" (especially Anglophone) states are the centerpiece of twentieth-century history and folklore, and we shall consider, shortly, possible reasons for this outcome. I cannot treat here the part played by shared Anglo-American Protestantism, but the title of a book by Samuel D. Baldwin, published in 1854, summarizes some persistent U.S. themes.[129]

Some "Kantian" imperialists long to invade under the U.N. flag; others are happy to reckon on U.S. firepower. But the paradox of blessing a long series of "elective," aggressive wars to install democracies everywhere, as the precondition of later eternal peace, has not gone unnoticed. This doctrine of wars fought in the *name* of future peace, redeemable once the Good have sufficiently bombed the Bad, craftily

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[127]Quoted in Doyle, "Kant, Liberal Legacies, and Foreign Affairs," p. 229.

[128]See, generally, Hoppe, *Democracy—The God that Failed*.

[129]Samuel D. Baldwin, *Armageddon, or the Overthrow of Romanism and Monarchy; the Existence of the United States Foretold in the Bible, Its Future Greatness; Invasion by Allied Europe; Annihilation of Monarchy; Expansion into the Millennial Republic, and Its Dominion Over the Whole World* (Cincinnati: Applegate, 1854).

substitutes the question of who is good and who is bad for the old-fashioned question of war and peace.

The sheer genius of the new liberal imperialism lies in its decoupling of the asserted peacefulness of "democratic" states from any worldly pursuit of actual peace. The key is now said to be that such nice states never attack *each other*. That they have attacked and do attack non-democratic states stands forth as further proof of their moral *bona fides*.

This tendentious doctrine, raised up at just this historical moment, owes less to Immanuel Kant than to the felt need of U.S. policymakers for catchy rationalizations. Just as the twentieth- century collective security theorists undid the older international law, which focused on neutral rights and the rights of noncombatants, so, too, do the democracy gangsters outbid the security collectivists. One critic refers to the new position as "liberal millenarianism," nicely capturing the sheer scope of its claims.[130]

James Hathaway notes that the new liberal imperialism rides on the rather questionable heritage of American exceptionalism:

> The sense that the United States has a special moral status and mission has resulted in an intensive engagement by the United States in foreign affairs, predicated on a belief that America has a unique mission to lead the world. But even as it is a basis for the attribution to the United States of a special right to propose rules of international conduct, American exceptional status is also invoked to "plead the authority of its internal law to mitigate its international legal obligations." The United States thus simultaneously asserts the right to lead, but also to be exempted from the rules it promotes.[131]

This looks like nothing more or less than an imperial claim to world rule, whatever the trimmings.

Pay No Attention to That State Behind the "Democracy"

Another advantage, to those in power, of the newest doctrinal wrinkle is that we never need look into the content of democracy;

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[130]Susan Marks, "The End of History? Reflections on Some International Legal Theses," *European Journal of International Law* 8, no. 3 (1997), pp. 449–68.

[131]James C. Hathaway, "America, Defender of Democratic Legitimacy?" *European Journal of International Law* 11, no. 1 (2000), p. 132.

we never need undertake a critique of the internal realities of any conformist welfare-warfare state. Liberal corporatism and suffocating bureaucratization of the life-world get a free pass. Simpson almost sees this, when he refers, in passing, to systems having "free periodic elections in which the government is elected by the citizens of [the] state."[132]

Exactly! In the sainted democracies, the *government* is always reelected. There can be no question of reducing the scope and activities of any democratic state in the brave new world. As José E. Alvarez writes of one of the new liberals:

> Slaughter's liberal theory is millenist, triumphalist, upbeat. The examples being set by liberal nations' treaties and their transgovernmental networks in the wake of the victory over communism mark the beginnings of a global "new deal" or a "new liberal democratic order." Liberal international law promises to replicate the liberal welfare state[133]

In any case, states are states and have a lot in common on that basis alone. As G. Kitson Clark has observed, that conditions of survival "are in many ways the same for all states, totalitarian or liberal, and therefore all existing civilized states, totalitarian or liberal, share in part the same characteristics, use some of the same principles and to some extent pursue the same ends." Above all, "all modern states are *Sovereign States* or aspire to be *Sovereign States*."

This last fact is decisive:

> A Sovereign State is autonomous, it is the sole judge of its own actions, no appeal lies to anyone against it. The sovereignty of Sovereign States is most often considered in the international sphere, in connection with a State's autonomy in its relations with other Sovereign States; but it is important to remember that it exists in the domestic sphere as well. In a Sovereign State the subject has no legal right against the State at all, the power of the State is absolute. This is palpably true of the total State, but it is true of the liberal State also. It is true of Great Britain. In Great Britain the subject has important rights against

[132]Simpson, "Two Liberalisms," p. 560.

[133]José E. Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory," *European Journal of International Law* 12, no. 2 (2001), pp. 189–90.

> the executive, he can sue the policeman, the soldier, the borough official, Her Majesty's Government itself, if he believes they have infringed his rights. But he has no rights against the law. In England, a rule which is an acknowledged part of the English Common Law or the result of a statute duly passed by King, Lords and Commons, may seem to an Englishman to be absurd, unjust and generally intolerable, but he must obey it or take the consequences. There is a moral restriction on the actions which a liberal State may take against its subjects and it is very valuable, but there can be no legal restriction on those actions.[134]

What looms on the horizon is the international *Gleichschaltung* ("co-ordination") by the Great World Hegemon—aided by tractable NGOs ("nongovernmental organizations")—of those "tolerant, liberal" forms of bureaucratic rule and interest-group plunder which came to characterize certain advanced states in the twentieth century. The radiant future comes down to periodic but pointless elections, under cover of which the boot of armed bureaucratic "protectors" and well-connected, state-sponsored corporations will stamp on the face of humanity for quite a long while, helped when necessary by the "precision" weaponry made possible by subsidized Big Science.

Clearly, the idea of "liberal-democratic" world peace has already slipped its gears, and the clutch of history is about to burn itself out in conceptual futility.

Blaming the aggressive potential of powerful states on *forms* of rule, e.g., democracy vs. autocracy, skirts the need to think about states as such. But, as Bolshevik theorist Nikolai Bukharin, a bit crudely, put it in 1916 as World War I dragged on, "the power of arms and murder has thus become a brazen law . . . of *every* form of state without exception."[135] All Bolshevism aside, Murray Rothbard's analysis of states is more likely to be of help if we wish to think our way out of these corners, than is an analysis that credits "democracies" with inbuilt moral qualities readily cashable as foreign policy.[136]

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[134]G. Kitson Clark, "The Modern State and Modern Society," in *The Development of the Modern State*, ed. Heinz Lubasz (New York: Macmillan, 1964), p. 94.

[135]Nikolai Bukharin, "The Imperialist Pirate State," in *The Bolsheviks and the World War*, ed. O.H. Gankin and H.H. Fisher (Stanford, Calif.: Stanford University Press, 1940), p. 237.

[136]Rothbard, "Anatomy of the State."

AMERICAN EMPIRE AND THE TRIUMPH OF ANGLOPHONE CUNNING

As already hinted, it was the commercially oriented English-speaking elites of Britain and the United States who successfully engrossed much of the world's political economy and bent the rules of the international system. Britain combined formal and informal empire, while the U.S. preferred an informal pattern of alliances and subsidies to local strongmen, which is not less an empire for all that. Since World War II, the U.S. leadership has sought to redefine (further) the state system. As Ian Hunter puts it:

> In recent Anglophone political theory, Westphalia—or the states-system it inaugurated—has continued to undergo various kinds of assimilation, marginalisation, and repudiation.[137]

At this late date, the whole thing takes on a kind of dreary inevitability.

George Liska writes that the transition from British to U.S. hegemony has gone smoothly,

> as if the preordained end, America's imperial succession to Great Britain, was immanent in the beginnings of America's secession from the British empire; and as if the end shaped accordingly the intervening process of American expansion, while sanctioning its irregularities.

In the years between 1776 and 1971, U.S. leaders took on an "ideologically exaggerated sense of right to expand" along with "the equation of security with total immunity and of sustenance with unlimited growth."[138] Similarly, New Left historian William Appleman Williams remarked U.S. policymakers' tendency to make the rest of the world answerable for American prosperity.[139]

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[137]Hunter, "Westphalia and the Desacralisation of Politics," p. 36.

[138]George Liska, *Career of Empire: American and Imperial Expansion Over Land and Sea* (Baltimore: Johns Hopkins University Press, 1978), pp. 115–16. On the U.S. claim to total security, see Albert K. Weinberg, "Self-Defense," chap. 13 in *Manifest Destiny* (Chicago: Quadrangle Books, 1963), pp. 382–412.

[139]William Appleman Williams, "The Large Corporation and American Foreign Policy," in *Corporations and the Cold War*, ed. David Horowitz (New York: Monthly Review Press, 1969), p. 86.

Hans-Hermann Hoppe notes that it is precisely the "liberal" states —nineteenth-century Great Britain and twentieth-century United States —that rose to global dominance. Their internal policies gave rise to unparalleled productivity from which state functionaries could extract, at modest rates of taxation, revenues far beyond the capacity of their less-enlightened rivals. This allowed creation of superior military forces with which to build empires, even as their domestic institutions ossified and their tax rates gradually climbed. Both powers' imperial projects rested, in the end, on military power and monetary preeminence. The lingering connection of the pound sterling to gold limited what Britain could spend on overseas adventures. The U.S. leadership, blessed with a system of paper money, has more freedom of action. As a state, the U.S. is—in Hoppe's words—"an autonomous counterfeiter of last resort to the entire international banking system."

> [Further,] the typical Third World cycle of ruthless government oppression, revolutionary movements, civil war, renewed suppression, and prolonged economic dependency and mass poverty is to a significant extent caused and maintained by the United States-dominated international monetary system.[140]

Thus, the pool of economic resources available to U.S. leaders and the resulting military hardware seem the key to the so-called "Democratic Peace," as against any hypothetical magic qualities flowing from democracy, free elections, etc.

The American policymakers' utterly self-centered conception of security blossomed in the context of Total War, an art form in which they were the main path-breakers.[141] As a result, the U.S. now takes on the appearance of a heavily armed but mentally unstable colossus, rather than the "pitiful, helpless giant" about which Richard Nixon worried. Lessons that the U.S. rulers believe they have learned, together with certain objective realities of modern warfare, push the whole thing toward a breaking point.

Already in the mid-1960s, John H. Herz observed that air power, foretold in World War I and perfected in World War II, allowed "direct action against the 'soft' interior" of an enemy state,

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[140]Hans-Hermann Hoppe, "Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order," *Review of Austrian Economics* 4 (1990), pp. 83–84.

[141]See Russell Weigley, *The American Way of War* (Bloomington: Indiana University Press, 1977).

> by-passing outer defenses and thus foreshadowing the end of the frontier—that is, the demise of the traditional impermeability of even the militarily most powerful states. Warfare now changed "from a fight to a process of devastation."

The Anglo-American Allies' blockbusters, firebombs, and, finally, atomic bombs underlined this change in unmistakable fashion. The age of Sovereignty, national independence, and fixed boundaries seemed to be over for all—all but superpowers, that is. The logic of the classical Westphalian system came under siege. Herz comments:

> One radical conclusion to be drawn from the new condition of permeability would seem to be that nothing short of global rule can ultimately satisfy the security interest of any one power, and particularly any superpower.[142]

Thus, "security" and survival seemed to imply World Empire.

This is certainly the conclusion drawn by U.S. policymakers. Their pre-existing aspirations and mental *formation* made this answer inevitable. Of course, this makes the United States a revisionist and *not* a *status quo* power, but that, too, is not exactly new. In developing a theory of cooperative "ultra-imperialism" just before World War I, Karl Kautsky overlooked the possibility that *one power* might emerge from unprecedented carnage with the capacity to impose its will on the major powers.[143]

After recovering from their defeat in Southeast Asia, U.S. rulers reasserted their domestic ideological (and physical) dominance, and embarked on a program to insure long-run global *Überdominanz*, exploiting the applied technological lethality for which they are rightly famous—a lethality that turns enemies, soldiers and civilians alike, into "pink mist," calling to mind the crazed apocalyptic demons lodged right below the rich, if not very thoughtful, topsoil of the American official mind. Judged by their rhetoric and even more by their behavior, the U.S. resembles another empire, as described by Anthony Giddens: "The Romans . . . recognized no type of international rights or

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[142]John H. Herz, "Rise and Demise of the Territorial State," in *The Development of the Modern State*, ed. Heinz Lubasz (New York: Macmillan, 1964), pp. 143, 146.

[143]See John H. Kautsky, "J.A. Schumpeter and Karl Kautsky: Parallel Theories of Imperialism," *Midwest Journal of Political Science* 5, no. 2 (May 1961), pp. 121–22. The theory of ultra-imperialism seems especially prophetic, if one takes the monetary sphere into account.

law, treating their own institutions as in principle generalizable across the rest of the known world."[144]

U.S. apparatchiks define their imperial progress as the "expansion of the area of freedom," much as the Soviets defined their own, less successful efforts—although the phrase itself may come from Andrew Jackson.[145] Resistance to the Super Power becomes opposition to Freedom itself, since the empire presides over the only possible form of freedom.

Peter Gowan's thoughts on the twists and turns of U.S. policy may be useful here. He sees the United Nations Organization as an American project designed "as a framework for the politics of the hegemon." Coming out of World War II, the U.N.'s architects based it on "an updated variant of Wilsonian internationalism"—the only marketable collective security rubric then available.[146] As sketched out by Franklin Roosevelt and his advisors, the U.N.'s electoral machinery was rigged in favor of the U.S., working in the Security Council with three, later four, great powers as official "world policemen." The inclusion of France and Britain among the Big Five nations was a temporary necessity that delayed U.S. liquidation of those powers' overseas imperial assets.

Within a few years, the confrontation between the United States and the Soviet Union led the Americans to treat the U.N. as merely an "auxiliary instrument of American diplomacy." U.S. leaders repackaged the world order "through a series of friend-enemy alliances centered on anti-Communism." At the same time, they began "militarizing

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[144]Anthony Giddens, *The Nation-State and Violence* (Cambridge: Polity Press, 1985), p. 81; cf. the claims of the Mongol Khan, as recounted by Eric Voegelin, *The New Science of Politics* (Chicago: University of Chicago Press, 1987), pp. 56–59. On the sheer reach of U.S. leaders' pretensions to seize the One Ring, see Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (New York: Metropolitan Books, 2004); Michael Mann, *Incoherent Empire* (London: Verso, 2003); and Andrew J. Bacevich, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge, Mass.: Harvard University Press, 2002).

[145]Weinberg, *Manifest Destiny*, pp. 100–29. Jackson coined the phrase "extending the area of freedom" in 1843; see p. 109.

[146]Peter Gowan, "U.S.: U.N.," *New Left Review* 24 (November–December 2003), online edition, http://www.newleftreview.net/NLR25801.shtml. Unless otherwise noted, all Gowan quotations are from this source.

the American state on a permanent basis" to make possible the U.S. "role of guardian and manager of the entire core." Only the Old Right put up any real opposition, and its efforts failed.

By giving theoretical hostage to the sovereignty of the U.N.'s members, the Charter froze in time the collective security notions of the late nineteenth and early twentieth centuries, which had sought "to bring great-power wars amongst (capitalist) states to an end, by laying down rules for collective action to stop them." Such thinking presupposed that no single power could rule all. However, the classic collective security model became

> irrelevant under U.S. hegemony for the simple reason that America, unlike Britain, possessed the resources to impose a *unipolar* control over all the other capitalist powers, both in Western Europe and in East Asia.

As U.S. policy took its postwar form, it became clear that the old security model was lumbered with "a juridical principle which was, at best, unhelpful: absolute national sovereignty." This was, Gowan writes,

> a principle more attuned to the era of British than of American imperialism. The British never had the capacity to reshape coercively the internal arrangements of other *capitalist* societies. Their specialty was taking over and reshaping pre-capitalist societies.

The United States, Gowan continues, wanted

> first, to penetrate existing capitalist states and reorganize their internal arrangements to suit U.S. purposes; and second, to defeat any social forces there that rejected the American path to modernity in the name, not of traditionalism, but of an alternative modernity.

In 1991, the Gulf War allowed the U.S. "to exploit the U.N. to the full for a demonstration of the new reach of American hegemony." But the U.N. and its underlying legal notions remained an obstacle to U.S. aspirations. Equal state sovereignty, he argued,

> suggests that states are free to organize their domestic political economies as they wish, whereas the profit streams of U.S. (and much of the European, especially British) business depend crucially on internal arrangements in other states that provide unfettered freedom to external financial operators, unfettered rights for foreign companies to buy out domestic concerns, and unfettered protection of monopoly rents on intellectual property.

Owing to this ideological dead end, he wrote,

> during the 1990s, the U.S. and its European associates sought to rework the traditional discourse of the U.N., arguing that sovereignty was not unconditional, but should be viewed as a revocable license granted to states by the "international community," to be issued or withdrawn according to the palatability or otherwise of their internal regime. . . . The eclectic repertoire of the Charter itself . . . offered a ready antidote to any too narrow insistence on national sovereignty.

We have already reviewed these ideological innovations in the *American Journal of International Law* and need say no more about them now. As noted, "human rights" and armed intervention in their name, while looking like little more than a good excuse to attack weak states, have emerged as a *leitmotiv* of the new opera.[147] Such ventures under U.S. auspices can make use of N.A.T.O., the U.N., or new coalitions thrown together on demand.

Reviewing a recent book by post-Marxist war theorist Martin Shaw, Leo Panitch says:

> As set out in Part II of the book, he [Shaw] argues that "the hey-day of the nation state (roughly 1870–1945) was also that of modern European empire" in which the "dominant form of state was not, therefore, simply a nation-state, but *the nation-state-empire within an interimperial state system*." For him, the crucial turning point that laid the foundation for what is today called globalization was the replacement of the classic (imperial) nation-state after World War II by a new "revolutionary" international state form that represented the "unprecedented integration of many autonomous major centres of state power in the world, under U.S. leadership." The new "bloc order" of the West, whereby the American superpower reconstructed the former nation-states of Europe and oversaw the creation of "legitimate international institutions" (NATO, the U.N., the Bretton Woods financial institutions, etc.), was primarily constituted in terms of American military predominance. The nation-state lived on in the Western bloc-state, but did so in only "neutered

[147]See Marco Tarchi, "War as a Tool of Liberal Cultural Hegemony," *Telos* 121 (Fall 2001), pp. 159–73, esp. on the role of "NATO intellectuals"; and Robin Blackburn, "Kosovo: The War of NATO Expansion," *New Left Review* 235 (May–June 1999), pp. 107–23.

> form, in most cases a shadow of its former existence." The national form of the state was reinforced in the context of a cooperative international form through which "national state entities were penetrated by the international organizations of the Western state and adapted accordingly, finding new roles in pressing redefined, chiefly economic interests within their frameworks."[148]

The path along which we have come is addressed by historian Norman Etherington:

> Another possibility I would like to consider is that the great inter-systemic European wars of the period 1600–1945 *were generated by the system itself*. . . . At some point, however, new states stopped following the model.[149]

Etherington tends to blame the warrior nobility, which survived into this period, for the debacle, and plays down the decivilizing role of middle class nationalism and democratic ideology, unlike Hoppe,[150] but despite this, his point (about the system) seems well taken. His point about new states could be extended to Latin America, where states exist but seldom fight interstate wars as against internal conflicts.[151]

Thus, while the European state system *qua* system operated for several centuries as a loose imperial cartel vis-à-vis the rest of the world, it was prone to periodic bouts of struggle in its heartland. When the European states emerged, somewhat scathed, from the Napoleonic wars, they tacitly sought to displace their aggressions into regions suitable for colonization, but their ensuing rivalries in the extra-European world helped set the stage for World War I, which revealed the downside of the whole system. And by then, as noted

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[148]Leo Panitch, "Theorising the 'Global-Western State': Review of Martin Shaw, *Theory of the Global State: Globality as Unfinished Revolution*," http://www.theglobalsite.ac.uk/review/107panitch.htm, internal page references removed.

[149]Norman Etherington, "Blainey Revisited: Has Peace Broken Out in the 20th Century?" in *Thinking Peace, Making Peace*, ed. Barry Hindess and Margaret Jolly (Canberra: Academy of the Social Sciences in Australia, 2002), p. 15, emphasis in original, see also pp. 17–18.

[150]See Hoppe, "On Time Preference, Government, and the Process of Decivilization," chap. 1 of *Democracy—The God That Failed,* pp. 1–43.

[151]See Miguel Angel Centeno, *Blood and Debt: War and the Nation-State in Latin America* (University Park: Pennsylvania State University Press, 2002).

previously, the rise of the middle classes, along with republican and democratic forms of government, had raised the stakes materially and especially ideologically.

Present-day "globalization" via U.S. imperialism (with its alliances and coalitions)—competing at the margins with U.N. bureaucracies and N.G.O.s—does not appear so far to leave many interstices in which liberty could flourish. R.B.J. Walker notes an "increasing intensification of the problem of sovereignty as sources and sites of authority become increasingly inconsistent with any claim to a single authority in a specific territory." What we see now

> is both a proliferation of sovereignties and a decline in the plausibility of claims about state sovereignty. Moreover, whereas state sovereignty was conceived as a more or less unchanging spatial, territorial affair, fixed on land, modern sovereignties seem to be highly mobile.[152]

The possibility of "sovereign mobility"—not hard to link with U.S. leaders' insistence of total world surveillance, air power, and now, control of outer space itself—gives pause, and also seems to provide the only meaningful thread in the rather unreadable Hardt and Negri book. It also brings to mind the "Asiatic" pattern of empire in which formerly nomadic rulers never quite give up their roaming ways, as discussed by Hugh Nibley.[153]

WHITHER SOVEREIGNTY AND THE STATE SYSTEM?

We seem to have come full circle, from the birth of sovereign territorial states to their absorption in a phase of renewed world empire. We begin to feel the mental anguish of a Late Hellenistic age. Where does this leave "sovereignty" as a "set of practices" (to use a currently trendy phrase) or as ideology? After all is said and done, what was sovereignty, what has it been, and what is it now, as a feature of international life?

Constantin Fasolt notes that, from early modern times forward, important thinkers such as Machiavelli and Rousseau have denied that

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[152]R.B.J. Walker, "Peace in the Wake of Sovereign Subjectivities," in *Thinking Peace, Making Peace*, ed. Barry Hindess and Margaret Jolly (Canberra: Academy of the Social Sciences in Australia, 2002), pp. 30–31.

[153]Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000); and Hugh Nibley, "The Hierocentric State," *Western Political Quarterly* 4, no. 2 (June 1951), pp. 226–53.

"natural justice" has any perceptible effect in the world. This view, he says, "is an article of faith," something "better called a revelation than an assumption." From this, it is concluded that no form of order at all is natural, and justice is impossible, and therefore both must be imposed. As Fasolt puts it:

> It is only on the assumption that the laws of nature have no effect on human society that it becomes intelligible why we might need sovereigns who make purely positive laws in order to preserve human society. Sovereignty thus rests on foundations different from but no less religious than those of the medieval church.[154]

Hence, the idea and theory of sovereignty have been important legitimizing devices for state apparatuses both at home and outwardly in the state system.[155] As an accumulation of ideological power, it is simultaneously hard as iron and, under the right conditions, subject to overnight evaporation.[156]

As Walker writes:

> Sovereignty works by giving authority to definitions. . . . The whole point of modern sovereignty is that it does not exist, and yet it has tremendous effects, it does not exist and yet it is constantly enacted, it has no foundations yet it is always foundational. Whatever it is, it is perhaps the strangest beast in the modern political world.

Worse luck, the apparent fragmentation of sovereignty, these days, does not necessarily imply a rebirth in the short run of freedom and laissez faire liberalism:

> Theses about the decline of state sovereignty understood as a monopoly of authority in a specific territory are quite compatible with theses about the continuing *or even increasing scale, size, influence, and so on of statist institutions*.[157]

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[154]Constantin Fasolt, "Sovereignty and Heresy," in *Infinite Boundaries: Order, Disorder, and Reorder in Early Modern German Culture*, ed. Max Reinhart (Kirksville, Mo.: Sixteenth Century Essays & Studies, 1998), p. 388.

[155]Barkin and Cronin, "The State and the Nation," pp. 113, 115.

[156]For the limits set by public opinion to the rule of any state apparatus, see Boétie, *Politics of Obedience*, esp. Murray Rothbard's introduction, pp. 9–42.

[157]Walker, "Peace in the Wake of Sovereign Subjectivities," pp. 26, 31, emphasis added.

He does not notice, exactly, that the process takes place under the aegis of the Super Power and its allies, but one can easily imagine multiple levels of oppressive bureaucracy loosely or tightly *gleichgeschaltet* by the distracted imperial center, itself beset by interest groups with sundry economic and sentimental agendas. After all, what does internal American "federalism" amount to now, if not such a system?

The state system was problematic from the outset, precisely because it consisted of states—a fact that many commentators contrive to ignore. In the century-and-a-half during which rules of warfare were generally followed, in Europe if not overseas, there was little moralizing about the internal arrangements of states. This had the advantage of reducing the ideological stakes of wars. It was far from perfect, but did make wars more manageable.

What arose from such practical concerns was the pragmatic "right" of each state to its internal forms, whatever they might be. This at least limited the goals of warring powers and, thereby, the scope of their wars. Already the French Revolution and the American "Civil War" foretold an end to equal sovereignty, which was, in any case, something of a fiction.

In the real world, states in the system recognized and legitimated one another, but some states were "more equal" than others, and states generally declined to deal with peoples not having a proper state.[158] Nonetheless, the somewhat fictive sovereign equality of states did work, a good deal of the time, as a barrier to intervention in the internal affairs of states. The point, after all, of a rule-bound cartel of sovereign states was precisely to limit their mutual competition in the production of public "bads"—usually termed, for no obvious reason, "goods." Since their mode of competition was organized violence, *this* arrangement was perhaps the only upside in the theory and practice of Westphalian order—an upside now undergoing deconstruction in favor of empire and armed doctrines.

If nothing else, this circumstance gives us greater reason to complete the theoretical deconstruction of sovereignty from a standpoint quite opposed to the imperial one.

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[158]See Philip Marshall Brown, "The Theory of the Independence and Equality of States," *American Journal of International Law* 9, no. 2 (April 1915), pp. 305–35; and Baty, "Can an Anarchy be a State?" pp. 444–55.

Much writing on sovereignty rests on the assumption that the concept and the practices it justifies are necessary so that order may be imposed or maintained. This seems quite unlikely on the face of it, but such matters are beyond the scope of this article.

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