# A New Stream of International Law Scholarship

# A NEW STREAM OF INTERNATIONAL LAW SCHOLARSHIP

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## I. DISCIPLINE AND METHOD

### *A. Introduction*

Over the past nine years, I have pursued a number of criticisms of public international law as it is understood in the United States. I am grateful to the Institute of International Public Law and International

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Relations, not only for the invitation to deliver these lectures, but also for the opportunity to reflect on this collection of critical projects. Although I am glad for the encouragement to speak of my own work, I should say at the outset that this has hardly been a solitary effort. Indeed, my international law work has been supported and influenced by much recent critical legal scholarship in the United States, as well as by the variety of critical projects being pursued in the field of international law by scholars such as David Bederman, Nathaniel Berman, Jamie Boyle, Tony Carty, Paula Escarameia, Gter Frankenberg, Veijo Heiskanen, Martti Koskenniemi, Matt Kramer, Mohammed Lalia, Ed Morgan, Joel Paul, Manuel Rodriguez-Orellana, Phillipe Sands, Surakiart Sathirathai, Leo Specht, and Dan Tarullo.

Taken together, my own projects have been animated by a single interlocutory — the tragic voice of post-war public law liberalism. By the end of the Vietnam War, this voice exercised a stranglehold over the discipline of public international law in the United States as practiced by lawyers and scholars of most every political conviction. In this lecture series, I will explore the voice of contemporary public international law along four dimensions. Today, I will quite briefly sketch the recent history of the field of public international law in the United States and outline the ideas, methods and images of legal and political culture which are now coming to the field. Over the coming days, I will speak about the historiography of public international law, about doctrinal analysis in the field, and about the discipline of international institutions.

Let me say something about my argument's thesis and structure at the outset. Much of my work has been directed to demonstrating and criticizing international public law's obsessive repetition of a rather simple narrative structure. Succinctly stated, the discipline of international public law, narratives of public law history and public law doctrine, and even international institutions, seem structured as movements from imagined origins through an expansive process towards a desired substantive goal. My claim is that international public law exists uneasily in the relations among these imagined points — constantly remembering a stable origin, foreshadowing a substantive resolution, but living in an interminable procedural present.

Moreover, the single most important aspect of contemporary public international law seems to be its preoccupation — doctrinally, institutionally and methodologically — with process, and in particular with a process which might convince us of international law's *being* by imagining it in relationship to something else — often thought of as "political authority." My contention is that this relationship to history or politics, far from being some pre-existing chasm international law must bridge, is produced by relations among pieces of the discipline's own self-image. Given this thesis about international law scholarship as a whole, it is perhaps appropriate

that I have structured these lectures to illustrate and propose a move to process — to the process of rhetoric — in three major steps: by thinking about international law's disciplinary and historical origins, the rhetorical fabric of doctrinal elaboration, and the promise of international institutions.

Let me begin today with a brief look at the academic discipline of public international law in the United States, and at the influence of tragic liberalism over the work of the last generation. In a way, taking on public international law after the Vietnam War was kicking a discipline while it was down. The conceptual, even theoretical, self-confidence which had animated the field before the Second World War had long since been eroded by post-war "pragmatism." And the enthusiastic world-building ethos of the immediate post-war era — in both its economic functionalist and ideological idealist modes — had long since floundered on the limits of the American empire.

### *B. Public International Law — Some Generations*

American public international lawyers active between the two world wars defined the field in the United States, produced the first comprehensive modern treatises of a distinct public international law in the United States, founded many of what were to become the large international law practices and fueled the two great waves of international institution building in this century. They were public lawyers with an independent intellectual vision and an effective international practice. Indeed, for these men it was possible to aspire to an individual practice of international public law, even if this ambition was often simply an international extension of the elite bar's traditional "public service" orientation. Imperialists and humanitarians, these men developed the private practice of statecraft and set in motion the international bureaucracy. They were largely establishment figures, usually Republicans, who had rebuilt the field after the debacle of America's absence from that quintessentially progressive institution, the League of Nations.

Intellectually, they consummated the nineteenth century struggle between naturalism and positivism in an uneasy positivist truce. These were the years of the Harvard Research Project, a massive effort of intellectual systematization. The field was largely untouched by the scholarly revolution wrought in American jurisprudence by the realist critique of private law doctrine. And it participated only vaguely in the transformation of public law thought brought about by New Deal federalism. Instead, public international law scholars in the United States before the Second World War reinforced what was taken to be the high road of European doctrinal formalism, insisting that only a carefully delimited and predictable doctrinal corpus could sustain the positivist image of international compliance

with law. This strong resistance to any blurring of doctrinal categories fit with these scholars resistance to the developing administrative state — and seemed confirmed by the increasingly apparent failure of the League.

The post World War II generation was different. Public law, and perhaps particularly international public law, came to be dominated — intellectually and politically — by Democrats eager to rebuild in the name of democracy and decolonization. The Republicans migrated into private law and practice. Many in this next generation received their first professional experience in the post-war reconstruction effort or in the United States business and investment boom in Europe that followed. These men increased the scope of doctrinal systematization and expanded the international bureaucracy. If their predecessors had laid down the doctrinal contours of the field, these men gave it institutional shape, not only in the United Nations system and in the new international economic institutions, but also in the United States State Department, in the law firms and in the multinational corporations.

Although these men were enthusiasts about international law and institutions, they slowly abandoned the doctrinal purity and institutional isolation characteristic of the pre-war generation. Self-described pragmatists and functionalists, sneaking up on sovereignty in numerous ingenious ways, they self-consciously blurred the boundaries between national and international, public and private law. They imported into public international law precisely the realist attack on doctrinal formalism which the pre-war generation has resisted. They rejoiced as the discipline lost its coherence -- renaming it "transnational" law. These men were also successors to the progressive faith in international administration — and they brought to the United Nations their faith in New Deal federal reform.

In short, the post-war generation expanded the practice of international law by sacrificing its distinctive intellectual self-image and coherence. Not surprisingly, these changes reopened the philosophical debate about international law's distinctiveness and binding force. Consequently, this generation resurrected the intellectual struggle between norm and deed which had been settled before the War in a timid doctrinal positivism. At first, they pursued their idealism in the language of valuative sociology or administrative gamesmenship. By the end of the Kennedy administration, their scholarship grew timid. Eventually, they responded to the question "why international law?" with a simple anecdotal description of its apparent presence and a confusion of partial explanations among which the student was invited to choose like a debutante at a smorgasbord.

By the end, as their shiny new bureaucracies failed to produce the reform which they had prophecied, this generation's erosion of doctrinal and intellectual purity overwhelmed their enthusiasm. Although they had expanded the international bureaucracy and increased the scope of doctrinal systematization — developing a distinct international administrative

law and fleshing out the constitutional processes of the post-war institutions — their scholarship became increasingly uncertain and fragmented. Their intellectual problem was to account for the simultaneous distinctiveness of public international law and its now quite strongly asserted connection to private national economic structures and political processes.

On the one hand, the doctrinal and theoretical world of the pre-war generation had not been abandoned. Quite the contrary, the post-war cohort had self-consciously engaged in its "reconstruction." On the other hand, however, public international law scholars of the fifties and sixties had devoted their careers to escaping the confines of those earlier doctrinal categories — subverting them at every turn with qualification and interdisciplinary reflection in a tragically incomplete Oedipal challenge. This dilemma produced a proliferation of interdisciplinary musings about the neo-positivism and neo-naturalism of their immediate predecessors — a proliferation which took on a manic tone during the Vietnam War as one scholar after another sought to weave the political and social anguish of that struggle into their image of public lawfulness. Either they needed a new theory of law which could account for its violation or a new theory of violation which could account for America's activity. Neither was forthcoming.

Coming to the academy after the Vietnam War, I found a rather large group of imaginative and renowned scholars reaching retirement. Rarely does the generation that defines a field depart from the scene as gracefully — even sheepishly — or with so few successors as has the generation that reached its apogee directly after the Second World War. As they did so, the elaborate edifice they had honored was succumbing to the erosion and fragmentation they had encouraged. Attacked from the left and right, theoretically weak, jurisprudentially behind the times, the old edifice they had so lovingly sheltered seemed hopelessly ill-equipped to the broad functions they had encouraged us to think it might perform.

As a result, public international law was characterized by a defensive enthusiasm and a corrosive scepticism. Despite the "special dignity" public international law still claimed — tracing its origins to the interwar public statecraft of a Republican establishment — no one seemed to "specialize" in public international law anymore. Indeed, most courses "in the field" presented international law as either the specialized continuation of some domestic subject such as taxation or investment, or as an esoteric, quasi-historical or philosophical by-way. This classroom marginalization of public law, when coupled with the municipal focus of private law specialties, reflected America's foreign policy determination to remake international society as a democratic market. In a way, it is not too much to say that international law in the United States simply disappeared during this period, as *public* became marginal and private became *municipal* legal study.

Intellectually, there were more rules, more often observed, covering a wider variety of subjects than ever before. But this optimistic façade was a delicate one. We were given too many reasons to believe in international law — as our teachers struggled to make good their enthusiasm after having pawned their idealism. Public international law was to be viewed alternatively as an infant industry and a frail dowager, too weak to withstand sustained criticism, in need of enrichment, protection, and an observant fealty. If there were weaknesses in the international legal system, scholars and practitioners should tolerate and explain them. If international law seemed rather simple, it was, of course, still primitive. If it seemed unenforceable, it was simply a different *sort* of law ("horizontal" perhaps), like some eccentric cousin who still belonged at family celebrations.

The origins and goals of international law's optimistic façade seemed to have been taken out of discussion — displaced by an endless intellectual and bureaucratic process. Neither the elite confidence of the pre-war establishment nor the enthusiastic optimism of the post-war reformers had survived. The vision associated with the large-scale post-war reordering projects had disappeared — transformed into the details of bureaucratic pragmatism and policy formulation familiar from American public law.

By 1970, it was just no longer possible to speak of an American inspired world democracy, or to view decolonization as an administrative matter of peaceful adjustment. When public international lawyers addressed substantive issues, they presented their work as marginal theoretical or utopian speculation. At best they produced hortatory denunciations of state policy in a "letters to the editor" format. The American Society of International Law had become simply one more pretentious and disaffected intellectual lobby — precisely the sort of folk former Vice President Agnew would attack as "nattering nabobs of negativism."

In short, when I entered the field in the late seventies, it was clear I was being asked to be a bureaucrat, a laborer in an institutional plant that no one believed was able to respond to international racism, inequality or violence. No one seemed to think that international law was intellectually rich. No one seemed to think that international institutional structures looked forward or provided socially and culturally engaged lives for their inhabitants. No one seemed to think international legal theory could offer more than an easy patois of lazy justification and arrogance for a discipline which had lost its way and kept its jobs.

My own rather idiosyncratic doctrinal and historical projects fit together as an effort to dislodge the discipline of international law from its stagnation in post-war realism. I have sought to dislodge this resignation and rejuvenate the field as an arena of meaningful intellectual inquiry in part by recapturing its history and substantive aspiration, and in part by heightening the move to process — by reimagining the field rhetorically.

Before going on to that work, we need to look for a moment at a few ideas, images, and constellations of belief which needed to be set aside, or questioned, or supplemented by recent theoretical work from other disciplines, in order that the project of the discipline of public international law as it existed in the seventies and eighties might be drawn into question. We need, in other words, to develop some account, some common story or stories about a field which presents itself in hopeless fragmentation.

### *C. Public International Law — Some Ideas*

Let me begin with ideas about the relationship between public international law on the one hand, and something called "society" or "political economy" or "state behavior" on the other. Images of such a relationship have preoccupied public international law scholarship. Everyone has seemed convinced that these two things were, or should be, or purported to be, or struggled to be, different from one another. Indeed, they seemed to feel public international law could only *be* law if it were independent and "normative," a word which, somewhat oddly, has been read to mean "against the state." At the same time, and equally fervently, everyone has seemed convinced that the goal, or achievement, or aspiration or project of public international law is to link law with international "society." This could be done descriptively, or theoretically, or by enacting resolutions, or signing treaties or allocating rights — but it had to be done. Otherwise public international law would seem hopelessly irrelevant to what really mattered, out of touch with the sovereign, in danger of losing touch with the source of power, glory and employment.

This conviction — that international law was not politics but struggled to be politics — has accounted for much of the discipline's eclectic insecurity. It explains the pressure to regularize international law institutionally, and to analogize international law to more familiar domestic constitutional configurations. It explains the historic preoccupation with the relationship between norm and deed, and the mountain of theory — be it naturalist or positivist — explaining how law might both emanate from and control the state. It undergirds the oscillation between Republican formalism and Democratic enthusiasm and explains the doctrinal preoccupation with rights — be they rights to food, to self-determination or to asylum — which could link legislative determination to political enactment and ensure respect for public law.

Displacing — and I mean "displacing," setting aside, neither proving nor disproving but simply avoiding — such an entrenched constellation of imagery has been difficult. Doing so has meant borrowing from recent linguistic and literary theory and from the work of contemporary critical legal scholarship — which has itself drawn on the European philosophical traditions or structuralism and post-structuralism — in order to reformulate the relationship between law and politics in *rhetorical* terms.

Rather than concentrating on the relationship between a law and a society which actually *are* separate, joined or related only through the prism of the state or sovereign, I have tried to extend what has been the single most telling and controversial insight of much recent critical legal scholarship in the United States: namely, that law is nothing but a repetition of the relationship it posits between law and society. Rather than a stable domain which *relates* in some complicated way *to* society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society.

Mine is a relational and rhetorical image of a "law" and a "society" — invoked by a language which establishes them by positing their originality, their priority, their presence. My sense is that this rhetorical project — in many ways *the* rhetorical project of public international law scholarship — accounts for the doctrinal structures of "public" and "private" or "objective" and "subjective" which we find recurring throughout international public law doctrine and for the recurrent scholarly contrasts we find between theory and practice.

In this alternative picture, law is nothing but an attempt to project a stable relationship between spheres it creates to divide. As a result, the relationship between these zones is much looser than we usually think. This has led much recent critical scholarship to flaunt both an anti-Marxist tone and a certain opposition to rights. And my own work has shared these tendencies. Indeed, my own position often seems to fade quite easily into neo-conservatism.

Let me go on, then, to a set of ideas about politics or about the relationship between the intellectual and the state which seem equally imbedded in public international law scholarship. The mainstream legal academic in the United States has an ambivalent relationship to politics. Law purports to be *both* above, removed, or neutral with respect to political life *and* the procedural rules, the instrumental expression, the forum and historical embodiment of political culture. The mainstream legal academic — and the public international legal scholar is no exception — has a similar ambition. He wants to retain his distance and independence from the state, to retain his status as an intellectual, for this independence underwrites the value of his wisdom and gives him confidence in his class position.

At the same time, he wants to deploy the state, guide it, instruct it, manage it, work for it. He wants his opinions to be transformed into state policy, and for this they must be redolent with political savvy. In short, if the public international law scholar wanted his scholarship to separate and then join "law" with "society" through the mechanism of the state, he also wants both to separate and join himself as a citizen, as an intellectual, to the state through the medium of the law.

A common fantasy about "politics" sustains this double image. Public international legal scholars generally equate politics with the state. It is the state which provides the arena for political action and makes political choices. It is the state which recognizes people as citizens and employs people as politicians. In this arena, in the struggle of interests and commitments, the political remains resolutely a matter of the conscious, of the public, the visible, the overt. For all the legal academic might consume his politics in private, he does so as a matter of conscious decision. For the state, there is nothing beneath the surface, just as the legal academic knows no unconscious.

Political commitment, whether by the state or citizen, is known publicly, in writing, in action. We know a person's politics by his statements and his associations. We might ask a lawyer whom he represents. And we know the politics of the state by its statements, by whom it recognizes and represents. And the most central vocabulary of mutual recognition is that of rights. Within the discipline of public international law, it is a commonplace, for example, that individuals are known to the legal system as subjects only to the extent it can be said that they have rights.

My own work, like that of many other contemporary legal scholars, aims to displace this set of ideas about politics and the state. Doing so has meant borrowing a bit from the traditions of contemporary philosophy and social theory critical of a state-centered image of political culture. The fragmentation of political culture and the turn inward, to the self, even to the unconscious self, has also been supported by interdisciplinary borrowings from the literatures of psychiatry and feminism. And I have relied upon popular images from the sixties — the state displaced by meditation, alienated citizenship by direct political engagement, representational efforts for the client by pedagogic encouragements of self help, disempowerment by empowerment, the surface style of interest group pluralism by the psychobabble of encounter group analysis. Of course, such an approach retains the image of the intellectual as custodian of correct theory for a political culture.

At their best, these literatures have heightened criticism of the vision of the state as a "center of power" or a "sovereignty" which actually exists, is factual and is the site of either law or politics or both, which is developed independent of the narrative of law's history, alongside it, before or ancillary to law's image of sovereignty. The goal seems an image of the state as an imaginary relationship between law and politics, as a site for their rhetorical awareness of one another. And this image, in turn, of a more rhetorical, interactive, dispersed sense of power and thought, has suggested an alternative *topos* for political engagement.

Gone is the privileged realm of the clientele, and the privileged zone of their "representation." The fantasy that one might someday serve the state gives way to a turn inward, to the local, private, even unconscious

politics riddling civil society. This shifted sense of the state is thus accompanied by scepticism about both the discourse of "rights" and the practice of representation — by lawyers of clients and the government of constituents or interests — which supports it.

### *D. Some Preliminary Methodological Notes*

My project over the next few days will be, quite literally, to redraw some rather familiar territory, returning to some of the most basic materials of public international law to describe them in a somewhat novel way. Overall, my aspiration is to begin releasing the discipline of public international law from a constellation of images of law, politics and the state which seemed characteristic of the field as late as 1980.

My sense is that some aspects of my method may seem strange at first. Let me finish today with a few precautions and clarifications which may be helpful as we go along. Think of a traditional piece of contemporary international law scholarship. It might contain one or more of three types of argument: theoretical or historical justification, doctrinal description or elaboration, and programmatic or institutional recommendations.

The theoretical and historical work, whether developed to support or criticize particular doctrinal and institutional analyses, works to support the project of the field as a whole — indeed, takes that project for granted to resolve the problems it sets forth for the scholar. In seeking to displace this set of problems, I have taken a somewhat different approach to questions in history and theory. I have not looked to them as sources for the authority or wisdom or content for international law doctrine. Rather, I have looked at the discipline's history, and its sense of history, for clues to its general argumentative practice. In other words, I have treated stories about history and theories about "international law" and "sovereignty" as if they were simply doctrines.

Doctrinal work, moreover, whether supportive or critical of particular doctrinal interpretations, generally begins with a sense both of doctrine's independent coherence and of doctrine's authoritative origin in history or theory and normative bite in the culture of sovereign behavior. Doctrine, as normally considered in international law scholarship, gets its energy and motivation from its origin in sovereign accord, in history, or in theory. And it has its effects outside the realm of law, in practice or thought. I have not considered doctrine in this way. I do not analyze the relationship between international legal materials and their political and interprative milieu. I am not concerned about the context within which arguments are made and doctrines developed.

I focus rather upon the relationships among doctrines and arguments and upon their recurring rhetorical structure. I trace the references which one doctrine makes to another and the repetitions which characterize

doctrinal materials widely dispersed through the field as a whole. Setting aside issues of origin and meaning to discuss international law internally, as a self-sufficient rhetoric, encourages an often implausible attribution of moods, desires and affect to the rhetoric of law. I often will speak as if one doctrine "sought independence" from another or "seemed uneasy" about its coherence. It might be useful to think of this project as a look at public international law from the *inside.*

Programmatic and institutional scholarship in the international field is generally preoccupied either with establishing an institutional form — with the doctrinal pragmatics of constitutional structure — or with implementing the resolution of doctrine and the wisdom of theory in the terrain of inter-sovereign activity. Scholars worry about capturing the functional relationship between institutions and states and the details of institutional design on paper. The discipline considers problems of situated and practical management rather than normative authority and application. But I do not follow this invitation to harness modernity's tone to the realm of institutional life. My work on international institutions treats the patterns of constitutional establishment and implementation as histories and doctrines. I am concerned to understand institutional life, even the professional life of the international legal scholar, as the enactment of a set of rhetorical maneuvers, as the living forth of doctrine and historiography.

Taken together, this methodological reformulation seeks to unify the historical, theoretical, doctrinal and institutional projects of the discipline. My method is to begin by focusing on argumentative patterns — patterns of contradiction and resolution, of difference and homology — which are reasserted in the materials of international law history, doctrine, and institutional structure. The project thus begins with a certain unsettling of the stability of differences both within and among the materials about international legal history, doctrine and institutions. Within the legal world I describe, stability — between what are now simply terms in a debate — needs to be explained solely *within* the debate itself.

This means, for example, that sociological explanations of doctrine will be set aside in favor of accounts anchored solely within the materials of doctrine. It also means that the sociological contexts of international law — its institutions and history — need be reconceptualized in rhetorical terms. To do so, I have sought to develop close, anthropology-like accounts of the relations in particular bureaucratic settings of doctrine and institutional structure.

Over the next days, I will seek a single optic — a single structural pattern which could be followed throughout the discipline. In this sense perhaps my effort will be too linear, too logical, and indeed, I am somewhat dissatisfied with the structural repetitiveness, the flat logical demeanor of my results. Perhaps it is only a way to begin the project of redrawing the discipline.

Later in the week, it may be useful to think more systematically about ways to reinvigorate the project's specificity — by discussing its relationship to the margins of legal culture, to women, to the religious, to the impoverished, to the violent, to the sexual. One way of understanding this critical move to substance is as an attempt to reawaken — or capture, or, less kindly, exploit — the exotic margins of establishment culture. Indeed, the central contemporary reorientation of the relationship between law and politics — the claim that law is a restatement of its imaginary relationship to society — has been developed by bringing the margin (society) into the core of law, rather than trying to stabilize and relate one to the other.

I want to question the stability of both, and I think this desire might be responsible for political difficulties much contemporary critical legal scholarship has encountered with the left, the right and the center of legal academia. Without anchor, my vision might be pursued equally well by pushing law to the limit ("completing" the project of liberalism, finally enforcing rights, etc.) or by pushing society to the limit ("deconstructing" and historicizing liberalism, disaggregating rights, completing the project of the market). In this, of course, it refers us back to our image of law's origin and to the procedures of social transaction.

Nevertheless, most recently, I have been working to anchor this effort in a broader margin, for it seems that the entire rhetorical apparatus I have been contemplating — all of law and society — however fuzzy and uncertain, exists within and against another set of margins — a margin composed of things thought of as perversion, faith, eros, terror, chaos, tyranny, war, etc. These things are excluded from, distanced from international public culture exactly as society or political economy seemed to be distanced from law. They are treated as at once frightening and fascinating. And most importantly, they are treated as *real* things, capable of signification within public culture. If time permits, I will reach out to these margins along what might be thought of as a rhetorical final frontier.

## II. Origins: International Law's History and Historiography

### *A. Introduction: The Process of History*

The discipline of public international law has a keenly developed sense of its history. Indeed, much of the field's theoretical and doctrinal debate is conducted as a debate about history: what role did international law play in which political events; which precedents can be thought dispositive, how has legal theory itself progressed? Most of these histories work in three stages: a "pre-modern" era of political struggle (usually prior to 1648), followed by a period of "traditional" philosophical and doctrinal development (roughly 1648-1900) which saw the slow displacement of naturalism by positivism, and finally by a modern era of institutionalized pragmatism in the years since the First World War.

In today's lecture, I will quickly revisit each of these periods, examining both the effort to render them distinctive and the effort to connect them in a single story of international law's progressive development. My general sense is that historical narratives about the development of public international law, both in their constant reach back to an origin which can be recollected, honored and improved upon, and in their image of the discipline's historical developement, reinforce and express the discipline's preoccupation with the relationship between law and state power.

At a preliminary level, this is evident in the most immediate relations among the three periods. Histories of public international law are quite uniform in this respect. The first period is presented as an era of political turmoil out of which a series of doctrines emerged — foreshadowed in the works of such early scholars as Grotius, Vitoria, Gentili or Suarez. The second period is presented as an era of philosophy, which began with an imperfect naturalism, developed into a struggle between naturalism and positivism and culminated in the triumph of positivism. The third period is presented as the era of institutions, of pragmatism, and of doctrinal proliferation.

The initial break, between a political era and an era of philosophy, suggests the importance of the distinction between state sovereignty and law — law emerges as idea, independent of and responsive to sovereign will. The 1648-1900 oscillation between naturalism and positivism confirms the distinction — now a matter of philosophy — between the priority of sovereign will and a normative law. Exactly as politics becomes a relationship among sovereigns, law emerges as a relationship among ideas, ideas which emanate from and must respond to sovereignty. The final break, from philosophy to pragmatics, reiterates this distinction as the displacement of philosophical controversy by institutional structure.

Of course each of these historical maneuvers is more complicated than this. We need think only of the term "sovereignty" to confirm a deeper set of relations between law and state power. From the viewpoint of law, "sovereignty" signifies the will of the state, while from the viewpoint of politics, "sovereignty" names the state's legal authority. As we revisit each of these basic phases, the distinction between law and the state will be repeated and made complex in numerous ways. At this early stage, however, it is important only to notice the odd way in which this distinction marks the transition and difference between eras in the development of public international law.

In this lecture, I will focus on three historical investigations. First, I will revisit the discipline's sense of the originality of 1648 by looking at the works of scholars who have been regarded as "precursors" to the traditional field of public international law. My sense is that traditional histories of the field must work hard to make the work of people like Vitoria, Suarez, Gentili and Grotius seem that of their "precursors," and

to make the period in which they wrote seem a political precursor to the more stable era of law. A more satisfactory reading of pre-1648 scholarship would situate it in a sharply different system, to be sure, but one which was no less coherent and complete, nor any less "legal" than that which followed.

Second, I will take a look at some stories commonly told about the 1648-1900 period. The classic story of naturalism's slow displacement by positivism has been told often enough — as has the story of European diplomatic history which accompanies it. I will look at the discipline's sense of its progress through this period by focusing on stories about the history of international law's relationship to religion. Third and finally, I will look at the transition from the traditional era of philosophy to the modern era of institutions in 1918 — foreshadowing some of the material I will take up more explicitly in the final lecture on international institutions.

### *B. Images of the Precursor*

International legal scholars are particularly insistent that their discipline began in 1648 with the Treaty of Westphalia closing the Thirty Years' War. The originality of 1648 is important to the discipline, for it situates public international law as rational philosophy, handmaiden of statehood, the cultural heir to religious principle. As part of the effort to sustain this image, public international law historians have consistently treated earlier work as immature and incomplete — significant only as a precursor for what followed. Before 1648 were facts, politics, religion, in some tellings a "chaotic void" slowly filled by sovereign states. Thereafter, after the establishment of peace, after the "rise of states," after the collapse of "religious universalism," after the chaos of war, came law — as philosophy, as idea, as word.

This narrative strategy sustains its image of pre-1648 work as precursor in several distinct ways. In their more generous moods, historians find analogies in pre-1648 works for contemporary doctrines or theoretical positions. We are asked to see the complicated relations established among missionaries, soldier/conquerors and heathens as early versions of what we know as the doctrines of self-determination, just war, and so on. We find pre-1700 anticipations of the League of Nations, of the debate between naturalism and positivism — even of the modern "eclectic" solution to what now seems the choice between naturalist and positivist explanations of law's authority.

Of course, these anticipations must remain simply that — anticipations. For if the early writers were a bit too muddled to see the distinction between natural and positive law clearly, it would clearly be too much to accredit them with an eclectic solution. And indeed, it turns out that early writers were confused about many things. International legal historians

have castigated the early writers for "failing" adequately to distinguish public and private, municipal and international, natural and positive law. Methodologically the early writers also had a long way to go. Their approach to what we think of as the sources of doctrinal authority was helter-skelter indeed.

Each of these readings reaffirms the centrality, even the inevitability of the project and method of later international legal scholarship. The search for an historical origin — and precursor — turns out to be a strong tonic for disciplinary doubts. That which has been anticipated has now been achieved. That which could only be partially glimpsed we now can see clearly. Boundaries and distinctions which were only barely visible — between municipal and international, subject and object, norm and deed — we now pursue systematically, even off-handedly.

On the one hand, thinking pre-1648 scholars inadequate to the task of squaring norm with deed — the task addressed by their successors, whether naturalists or positivists — reaffirms the modern philosophic project, a project of reason and analytic rigor, while reinforcing our sense that public international law came to us as philosophy into a void. On the other, insisting on the methodological primitivism of our founding fathers reaffirms the nostalgic fascination with non-rational, mystical origins so familiar to philosophies preoccupied with reconnecting what our fall has rent asunder: will and act.

The traditional public international law historian is thus of two minds about the religious context of early public international law scholarship. On the one hand, our discipline has typically devalued these early texts as the products of arcane religious or medieval ideologies. Religion is where they went wrong, the ideology which clouded their vision, impeding systematic rational analysis. On the other hand, the religious tone of this work is recalled as a quaint historical accent for contemporary moral principle — for those were noble times, times of belief and commitment. Here we need only think of the work of just war sentiment in contemporary debates about strategic policy.

Histories that handle the coherent structuring motivation for these early texts as either an archaieism or a mistake are quite likely to miss their coherence and reduce their "contribution" to random, fragmented strands of doctrine, neither related to one another nor imbedded in any particular social context. But this tendency is also quite useful, for it reaffirms public international law's paradigmatic historical narrative. We have progressed, so the story goes, from a few original truths scattered in a void, through the rationalization of philosophy, to the development of modern institutional machinery. We can see here our first glimpse of the basic dynamic narrative of public international law — a narrative as familiar to lawyers (who know it as the movement from jurisdiction through the merits to

remedies) as to Christians (who know it as the movement from fall — through covenant — to salvation and redemption).

But these are themes more appropriate for my final lecture on institutional structure and narration. At this point, let me simply report that my investigations of pre-1648 scholarship suggest the tendentiousness of a historiography which termed these men "precursors." The tone, method and doctrinal argument of these texts suggest that early scholars addressed international legal problems similar to those treated by later scholars, but in a fashion so dissimilar from later work that historians who focus on the role as "founders" of modern international law distort their texts' opposition to modernity.

Take style and method. Early scholarship connects legal authority and doctrinal result in a direct and unproblematic fashion — rendering their texts more self-assured and less self-consciously analytical or argumentative than traditional scholarship. The resulting scheme or authority seems diverse, incoherent and analytically unsatisfying to the modern reader. The traditional scholar, by contrast, is much more likely to imagine and even specify some general conceptual system of authority which is meant to be internally coherent and unified — even if his vision of the system is idiosyncratic. Indeed, the unselfconscious tone and apparently unsystematic methodology of early texts appears quaint when compared to the rigorous analytic debate which divided the discipline for two centuries after the Westphalian settlement.

We find the early scholar's evident faith in a universal moral order hopelessly dated — even our nostalgia is unable to recapture a universalism which is not defined by its opposition to the realms of national law and politics. At best we seem able to assimilate the primitive mind to our naturalist and positivist predecessors, for we take the distinctions of legal and moral, natural and positive, municipal and international norms for granted as surely as our precursors did their conflation. At the same time, however, these traditional positions seem hopelessly inadequate to solve the riddle of law's uneasy independence and force. Early texts suggest a more uniform faith in universal principles. If modern texts share the diversity of early texts, this eclecticism results from a loss of faith.

Similarly, unlike traditional scholars, early scholars do not make doctrinal distinctions between legal and moral authority, national and international law, or the public and private capacities of sovereigns. The modern considers both groups naive. The traditional scholar seems to assert these distinctions a bit too aggressively, while the early text seems blithely unaware of their importance. To the modern eye, both early and traditional doctrinal distinctions seem arcane. The early notion that communal acts of sovereigns are automatically legitimate both overestimates the power of the legal order to confer legitimacy and ignores the difficulty of disentangling public and private motives. Similarly, the traditional notion that

a public sovereign declaration marks the boundary between war and peace seems unduly formal and remarkably out of touch with the play of forces within and without sovereign territories which generate interstate violence.

Treating the method and doctrine of both early and traditional writers as naive is, at least in part, a comfortable position. The modern is able to understand the importance of doctrinal distinctions and methodological clarity without losing himself in philosophy. He can be, above all, a realist master of a complex heritage. At the same time, however, this position is distressing. Modernists have abandoned the traditional scholar's focus on the sovereign without recovering the early faith in social order. Having invalidated the doctrinal distinctions upon which traditional scholars relied to construct their formal legal order, the modernists have been unable to return to the pre-1648 world of clear distinctions in a single fabric of morality and law.

Rereading early texts — situating them in their own self-confident lexicon — challenges our self-assurance and our claim to have progressively identified a disciplinary problem of transcendent historical importance. Their very methodological complacency mocks our more ponderous eclecticism. Here are scholars who simply do not make the sorts of distinctions which the modern feels compelled to disown and deny. At the very least, reading these early texts into our tradition tempts us to misunderstand them and leaves us surprised by their coherence.

More importantly, however, the relations among these scholars challenges the basic organizing narrative of our discipline — the sense that traditional international law responded to social chaos as philosophy into a void. As the coherence of the pre-1648 lexicon parodies our eclectic confidence, so the diversity of these texts mocks the pretenses of our progress. The early scholars elaborated a coherent vision of authority in radically diverse theoretical and doctrinal texts. Some defined the consequences of justice for sovereignty. Others described the problems of sovereignty in a world of justice and injustice. Pre-1648 international law texts were as inconsistent — as incoherent — as they were coherent. Traditional public law scholarship, then, responded as much to a crisis in philosophy as to the collapse of statecraft.

### *C. The Traditional Period: Law and Religion*

Let us turn now to the traditional period of public international legal scholarship — roughly from 1700-1900. The history of scholarship in this period has been written and rewritten. We know it as a set of haphazard doctrinal inventions, classic cases and primitive institutional forms — precursors for the systematizations of the modern period — and as a two hundred year struggle to formulate a philosophical justification for the binding force of law on the sovereign. In this struggle, we begin with a

vague naturalism, which slowly gave way to a stiff positivist or consensual vision by the late nineteenth century period of classic public international law.

This story offers a number of promising avenues for investigation. It would be curious to determine the extent to which the rather detailed doctrinal systems produced during this period could in fact be subordinated to this narrative of the slow but determined rise of a particular classic philosophical or methodological position. My suspicion is that our image of both the early naturalist muddle and the clear late positivism is simply incorrect as an account of the doctrinal materials. But to now, my own work has taken another direction.

I have been more interested in exploring the dynamics of this period — the mechanisms by which the narrative comes to seem to progress from 1700 to 1900. My sense is that the central tension between law and state — the tension whose gradual amelioration we see as a measure of our dicipline's progress — is at the root of our sense of narrative development and disciplinary progress. To illustrate this point, let me dwell for a moment on the role of religion in our customary disciplinary histories. We have already seen the sense in which the traditional period understood itself as a procedural displacement of religion by philosophy. But the story is a bit more complex.

Our discipline tells a very specific story about its historic relationship to religion. Perhaps it would make sense to read one text slowly together. Allow me to focus, for purposes of illustration, on the short "historical introduction" to the leading basic public international law text used in American law schools, the 1987 edition of a casebook by Professors Henkin, Pugh, Schachter and Smit.[1] We find here, conveniently recapitulated, almost every move in the classic narrative of the discipline's history.

Nevertheless, the history is indeed short — 11 pages at the very start (*before* the Table of Contents) of a 1500 page textbook. And religion appears more in these pages than elsewhere in the book, seems inseparable from international law's history, indeed, seems essentially an *historical* phenomenon. What do these brief pages tell us about the relationship between international law and its history? That history is over, short, early, preliminary, severable from the "cases and materials" of international law. And so also religion — we know already what is most important — something we used to have.

This classic history is written in the collective voice of the editors, guiding us in unison to the present, where the voice fragments, explodes into a dizzy confusion of cases, notes, commentaries and questions. And religion belongs to that earlier, more comprehensible period, belongs to

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[1] L. HENKIN, C. PUGH, O. SCHACHTER, & W. SMIT, CASES AND MATERIALS ON INTERNATIONAL LAW (3d ed. 1987).

the era of a unison from which we have fallen into ecumenical dispersion — itself a quintessentially *religious* narrative. Things in the past make sense, had a coherent pattern which brings us sadly, inexorably, with resolve and also with aspiration to the pedagogic challenge of the materials — can the reader bring them together, resolve contemporary doctrinal, theoretical, even political disarray as successfully as have the editors our history? And what is this but the ambition — the resolve and aspiration — the very project of the religious?

This text, *the* text most overt about religion, develops the story of international law's history in eight weird stages. The first four take up the period before what is termed the "foundation" of international law in 1648, and foreground political or social change.[2] The next two (covering the period from 1648 until 1918) shift dramatically to philosophy, documenting the displacement of the relationship between principles of international and natural law philosophy by the turn to positivism.[3] The last two consider modern institutional developments following each of the two world wars.[4]

Already we find an interesting structure — political and social roots transformed by philosophy into institutional modernity. Religion begins as a social force, is transformed into a "philosophy" and survives only as a set of "principles," guiding the practice of institutions. So far, a standard bit of enlightenment ideology. International law inherits principles from religion, is born of chaos, is refined by philosophy, tried by war and confirmed as an institutional response to military sacrifice. And what is this but the most familiar religious narrative?

The first section, introduction to the introduction, repeats the 1648 origination. "In a strict sense, therefore, the history of the modern law of nations begins with the emergence of independent nation-states from the ruins of the medieval Holy Roman Empire, and is commonly dated from the Peace of Westphalia (1648)."[5] Choosing the end of the Thirty Years' War, rather than, say, the beginning, implicates international law in the conflict itself not at all. States emerge naturally from "ruins." Indeed, later we will read "as the medieval Holy Roman Empire disintegrated, the void was filled by a growing number of separate states."[6] International law is the response of philosophy, of reason, to this emerging fact, and shares nothing with the messy collapse itself.

Coming after the religious wars, international law responds to the inadequacies of religion. In this first section, these, the failures of religion,

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[2]*Id.* at xxxiv.

[3]*Id.* at xxxv-xxxvi.

[4]*Id.* at xxxvii-xxxviii.

[5]*Id.* at xxxiv.

[6]*Id.* at xxxv.

are styled the inadequacies of "universal political ideologies." The text begins by distinguishing the eternal situation to which international law responds from pre-1648 religious resolutions. Here is the opening:

> Human history has long known tribes and peoples [which we also know, which international law knows, knows as history knew them, namely], inhabiting defined territories, governed by chiefs or princes, and interacting with each other in a manner requiring primitive forms of diplomatic relations and convenants of peace or alliances for war. These relations between peoples or princes, however, were not governed by any agreed, authoritative principles or rules.[7]

So far, the text is familiar: in the beginning, man lacked law, for this, — agreed/authoritative principles/rules — not primitive alliances or princely authority, is law. But now comes a strange turn, a turn to empire and religion.

> At various times, moreover, most of the peoples of the known world were part of large empires and relations between them were subject to an imperial, "domestic" government and law. Empire, actual or potential, was also sometimes supported by an ideology that claimed universal authority over all people, or otherwise rejected the independence and equality of nations or any principles governing relations between them other than imperial law.[8]

The text then illustrates by comparing "classical Chinese philosophy," Islam, Christianity (at least "in its formative phase") and Judaism as ideologies which "legitimate . . . conquest and subjugation of others."[9] Judaism's failure to develop a "universalist political ideology" is attributed to the fact that Judaism "has not been the ideology of a politically independent people for 2000 years."[10]

These are powerful associations — religion/empire/ideology. International law stands forward of subjugation, in "independence and equality," if only the independence and equality of "nations." Can we read this passage without thinking about communism, without prefiguring the post 1918 institutional structure of decolonization, self-determination and international administration? Without reaffirming international law as having done with all that, with empire, with universalism, with ideology, with war? The enlightenment attack on religion ends here, in the institutional, democratic West, with an intellectual McCarthyism. Challenges to international

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[7] *Id.* at xxxiii.

[8] *Id.*

[9] *Id.*

[10] *Id.* at xxxiii-xxxiv.

legal order are now to be expected from modern primitives, imperial ideologies.

And yet we find an immediate doubt. The second section, telling us about the "origins of international law" takes us back, back to Greece and Rome. Greece, we learn, "never achieved unity" before the Macedonian conquest and therefore alternated between peace and war.[11] Given the earlier emphasis on the "void" of inter-sovereign conflict calling forth law, we might think that the Greeks therefore lacked international law. But no, we read, "as a result, [precisely 'as a result'] the Greeks . . . developed rules governing relations between the various Greek states, rules that more closely parallel the modern system of international law then those of any other early civilization."[12] Perhaps this startling claim seems plausible because they avoided universalist ideologies. Here we find international law grounded in the oscillation between war and peace, distinguished from the religious wars of "ruin" precisely in their secularity. Religion marks the difference between the passions of imperial ruin and the merely remedial inadequacies of an early, partial accommodation of international conflict.

And the Roman Empire, we read "at its height comprised hundreds of different races, tribes and religions."[13] Following the logic of part one, you might think it therefore lacked international law "in the strict sense," possessing only a "domestic" imperial order. So we also are told, but now "the significance of the Roman contribution to international law" is foregrounded; namely the *jus gentium*, "a system of legal rules governing the relations between Roman citizens and foreigners."[14] This might have seemed the very stuff of empire, of subjugation rather than civilization, but is it instead "one of the sources of contemporary international law."[15] Apparently because its rules are thought — in a remarkable secular rendering of Rome — not to have been tainted by "ideology," indeed, by religion. Religion thus marks the difference between acceptable and unacceptable empire, exactly as it marked the difference between acceptable and unacceptable international conflict. The 1648 date situates international law forward of *both* empire and conflict by situating itself forward of religion, while tracing its roots proudly to Greece and Rome.

Parts three and four confirm this development. After the 1648 void is filled by law (and however secular the presentation, this narrative of law's arrival from the void as *word*, is a familiar one from religion), activities, commerce, "improvements in navigation and military techniques" all "give

[11] *Id.* at xxxiv.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

rise" to concepts and principles which, when unified, recorded and rationalized, comprise the first works of the discipline.[16] And our story moves now to the priesthood of believers, for the chaotic facts have done their work, have "called forth" a law.

> By the beginning of the 17th century, the growing complexity of international customs and treaties had given rise to a need for compilation and systematization. At the same time, the growing disorders and sufferings of war, especially of the Thirty Years' War, which laid waste hundreds of towns and villages and inflicted great suffering and privation on peasants and city dwellers, urgently called for some further rules governing the conduct of war.[17]

Although the emphasis shifts now to the work of systematization and compilation, we learn that the "details of their systems are not of much contemporary importance."[18] And indeed, we find little study of the particular relations among the practices "calling forth" doctrine and the doctrines called forth. Instead, we follow what "is of interest and not without importance:"[19] namely, "the basic ideas underlying the evolution of international law and . . . the principal phases of development from the time of Grotius to the present."[20] Ironically, at the very moment of religion's disappearance, international law appears as a universalist ideology of its own — temporally freed from its origin and context.

But it will not present itself so. Indeed, the story of idea's triumph is told as the triumph of the will. The traditional intellectual story of international law's evolution from 1648 to 1918 is familiar. Begun as a series of disassociated doctrines about navigation, war and relations with aborigines within a "natural law" philosophy, international law slowly matured as a comprehensive doctrinal fabric rendered coherent by a set of "general principles" and authoritative by its "positivist" link to sovereign consent. The shift from fragmentation to coherence is accompanied, then, by a shift from "natural law" to a combination of "principles" and "positivism." Eventually, even the "principles" became subordinated to the "positivism," and subject to codification — exactly at the moment political conflict again breaks the narrative surface — after 1918. This narrative of authority's triumph over principle is repeated — in the shift from natural law to principle, from naturalism to positivism, and finally from law to institutions in the post World War I era.

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[16] *Id.* at xxxvi.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

The move is paradoxical. We need to read it very slowly. On the one hand, international law is a matter of ideas, born in the move from state to law, instantiating law to facilitate the state. On the other, maturity is achieved at each stage through a double reversal of this order — first by a movement from thought to action, from belief to practice, from law to state, and second, exactly at the moment of law's movement from principle toward practice, law is set up *against* the state, separated from the sovereign it facilitates and mirrors.

This double movement is sustained by law's relationship to religion. First, by repressing religion back to origins, law achieves a space to operate against the state — to inherit the critique. Second, by allowing a continuing extra-legal field for religion — as principle, and eventually ideology — law seems entwined with sovereignty, inseparable in its origin and practice from authoritative will.

One result of this paradox is a scholarly obsession with the relationship, the line, the distinction, between international law and sovereignty, between the ideas that comprise our discipline and various historical practices of willed authority. It seems almost a repetition compulsion: we theorize about little except the normative/descriptive relationship between law and state behavior, exactly as our doctrines repeatedly trace the line between law and politics — to differentiate custom from treaty, substance from procedure, and so on.

These are the preoccupations of a discipline which locates its origins in the word. Both sides of this dialectic — as indeed their temporal relationship — is set in motion by a single cleavage — between law and religion. And law presents itself as that which has been able to differentiate and defeat religion, by inheritance and banishment. Yet, we must smile at law here, repeating in a secular key a practice of distinction which, recast as the separation of the sacred and the profane, seems the most central concern of religion itself.

So far, I have told the traditional story of international law's relationship to religion. Religion belongs to our past, surviving in the present only as origin and principle. International law, although threatened by contemporary ideologies, is essentially ecumenical and anti-imperial. However universal, indeed proud of its universality, international law confirms, even institutionalizes, the enlightenment struggle for an international order of respected will.

The center of our modern concern is here — in the effort to square will with order. The solution must be some accommodation of law and state, of positivism and principle, of institutional democracy and administrative or judicial restraint. Religion in international law must remain trivial, arcane, and historical. Indeed, doctrines and institutions will be structured to insure religion's continuing marginality. The modern secular order offers outsiders the rights and institutions of "self-determination,"

not conversion. So long as religion can be kept marginal, the offer will be all one can accept.

But however often we interrogate and reconfirm religion's arcane historicity, we find ourselves redoubled in doubt, cynical about our normative aspiration, threatened by faith. For now the entire terrain outside the struggle between state and law, whether presented as ideology, fanaticism, or terrorism, challenges the complacent security of our doubts, recalling an authenticity we believe ourselves to have lost.

These threats seem powerful because they remind us of the history we have repressed — a history which would recast relations between law and state and among our doctrines and theories as repetitions of the work of faith, distinguishing the sacred and the profane. Yet we insist we are not faithful, being all reasonable men. We see here, for the first time, the work of the margin — first of religion's marginality, but also the marginality of the religious, the archaic, the fanatic, the faithful. It is the margin which sustains the story's narrative plausibility, whose exclusion the story is understood to secure. This is a theme we will see more prominently in the last lecture concerning institutional structure.

Beyond shedding light upon this central narative dynamic, the classic story of our discipline's relationship to religion raises a number of possible avenues for research. At the very least, this story of religion's disappearance presents a strangely mythologic face — recapitulating the motive, origin and plot of the religion it escapes. More simply perhaps, this narrative seems simply incorrect as to both law and religion. Far from a series of random historiographic errors, however, we find a structured blindness, a blindness which goes to the heart of our traditional image of law's relationship to the state and to the political.

Without pursuing the specific difficulties in any systematic way, I would like to spend at least a few minutes unsettling this traditional story somewhat — tracing a different story about religion, a story which rethinks our origins to permit a continuing relationship between international law and religion — as doctrine, ritual and narrative.

We might begin such a story with a second look at origins. After all, why commence the discipline in 1648 — why not 1618, or 1518, or 1220? Were we to focus on the evolution of a culturally independent, self confident legal culture — professionally, doctrinally, institutionally — we would surely need to begin with religion, seeing the roots of law's arrogance, universality, indeed univocality, in the project of canon law and the development of catholicity. Catholicity not as we now regard it, as a virtual synonym for "general, universal," but as it developed from the Greek *kata* and *holon* — as the ecclesiastic equivalent of the ancient *maior et sanior pars* — meaning the opinion of the greater, wiser, older, healthier part, in short, the orthodoxy established by council as arbiters of the public good. And we would see in the catholic not merely a precursor but an origin, a

companion for international law's generalizing pretense, and an early echo of the relationship between its doctrine, its institutions and the margin.

Once launched back into the interplay of religion and law — to a time when the "two swords" mingled, indeed established themselves as two swords precisely because of their intermingled bureaucratic and territorial involvements — we would think again about the collaborative project of division, exclusion and repression. Not simply the division of sacred and profane — a division as marked by law as by religion — or the division of true and false, the legislation of common judgment into orthodoxy, although these were collective, interactive projects of law and religion. But not these — more crucially, more critically, the exclusion and suppression of actual social difference.

And we would find in the origins of international law not a moment of tolerant generality, of liberality, but a well articulated practice of social intolerance. For it was the law of peoples which worked to exclude the Jew, the homosexual, the heretic, and perhaps most crucially, worked to suppress the exuberance of spiritual fervor, displacing it with bureaucracy. The suppression of witchcraft, sorcery, but also of ecstatic millenarianism, and their displacement by the logic of state orthodoxy, was a collaborative practice of religious inter-sovereign action.

Telling this story would return us to the development of interrogations, common rituals, taxations, citizenships and exiles, to the recognition and enforcement of papal enunciations and imperial denunciations, rooting the doctrines of international law in the earliest consolidation of authority in the West, and the first turn from enthusiastic to bureaucratic power. Doctrinally, the development of a territorial jurisdiction, so crucial to the image of a disembodied state, was first and foremost a religious notion — replacing and instantiating a disembodied deity as state. We would need to recapture the trace of Judaism — and I think here most readily of Gentili's obsession with Judaism — a Judaism which seems at once the law which revelation and redemption replace and the mysticism which law and state refuse. Such a story would return us also to the Reformation, not as the divisive precursor to the collapse of religion and the rise of statehood, not even as fact, but as law. We would need to see the Reformation as a set of political and religious accommodations and suppressions.

At this point, it is impossible to do more than sketch the possibilities opened up by such an interrogation of our discipline's traditional story of its relationship to religion. Once our enlightenment narrative has been jostled, the deep and abiding interaction of international law and religion seems unavoidable. We might trace images of personal redemption by acceptance through to international positivism's preoccupation with consent. Indeed, it seems impossible to think of contemporary debates about state succession (with all their rhetoric of reciprocal participation and

consent) without recalling the history of organized intolerance which hit upon the idea that the excluded *chose* to remain Jewish, or aboriginal, or homosexual or heretical at a particular historical moment — when the state needed to implement the exclusion through objective procedures.

But let me get on with the story. Public international legal histories present the traditional period as a self-contained philosophical development. My investigation of religion's place in that narrative developed two strategies. First, a strategy of narrative homology, tracing structural similarities among the stories told by law and religion — about themselves, about each other, and about the "other." Second, a strategy of historical recovery — recovery of the mutual participations of religious and legal in the construction of the state, the sovereign and his law. The result was to unsettle the image of a heretic international law philosophy and to suggest the mechanisms of exclusion which animate our discipline's sense of its progress. But now let me turn to the final, the modern period — to the move from principle to practice — and explore our modern institutions and doctrines as defenses against a return of the repressed.

### *D. The Modern Era: Institutional Pragmatism*

In this century, American public international law scholarship has focused on the international institution. The literature of "international institutions," unlike public international law more broadly conceived, locates its origins in a set of historical developments — World War I, Versailles and the League of Nations. This is not an idealist or normative discipline and is not preoccupied with making the word manifest in the world. Instead, scholars trace the movement from the War, through the Peace Settlement to the League institution in order to capture both the functional relationship between institutions and their states-members and the details of institutional design. In its practice, this modern public law discipline considers problems of situated and pragmatic management rather than normative authority and application. If the mystery of public international law's origin, and the puzzle of the traditional period, lay in the autonomy of its ideas, the mystery of international institutions is the transformation of word into *process* — a move punctuated by war, but consummated in the endless procedural interaction of word and deed.

Consequently, ruminating about this latest stage of public law scholarship raises questions about the displacement of theory by practice, and about what might be thought of as the textualization of social life. By what mechanism does the discipline encompass its historical situation in a legal process? How did international life come to be institutionalized? My own exploration of the answers given by our discipline to these questions has focused on stories told about the movement from the First World War to the League of Nations. It is a story which can be quickly told, for we will

return to it in the last lecture, when I take up the structure and development of the discipline of international institutions.

In a nutshell, however, it seems that far from transcending the difficulties of philosophy or inaugurating a pragmatic field of principled statecraft, the move to international institutions has recapitulated not only the origin, but also the preoccupations of the public law history it followed. In fact, the very desire to escape the preoccupations of norm and deed, to *reverse* the originality of the word, recapitulated and reinforced the line between them, transformed now into the internal boundaries and dogmas of the bureaucratic process. Where we had seen philosophical debate and development, we now see institutional structure. As a result, these researches suggest a link between the structure of modern doctrine and the narratives of legal history.

Four aspects of international institutional life seem to repeat and reinforce this pattern: their originating narratives, constituting texts, constitutional structure and historical development. Narratives about the origin of international institutional life, for example, emphasize their *break* with tradition, their triumph over both the chaos of war and the utopian idealism of philosophy. Think of literature about the League of Nations. The League is thought to have placed both the anarchy of conflict and the irrelevance of the Hague legal arbitration system behind in a move to ennobled pragmatism. Indeed, the originating narratives systematically exclude utopias, radicals, socialists, even, and perhaps especially, women — exactly as religion had been excluded by philosophy. All are projected back — repressed — into the past or forward into the future. The present is devoted to instrumental management — exactly as the traditional period had been devoted to pure philosophical speculation and analysis.

I have been particularly interested in the work performed by the establishing text in this originating narrative of exclusion. Think about the League Covenant. The text executes a break between war and institutional life by structured oscillation between reference to sovereign will and collective implementation. Indeed, the originating text sheds light on the textual style of modern international law discourse — for the work of establishment is accomplished less in an assertive rejection of sovereignty or proclamation of cooperation than in a shrewd equivocation — exactly as traditional literature, taken as a whole, presented an equivocation between naturalism and positivism. Of course, it is hardly surprising that the discipline should rely on the tools and distinctions of philosophy even as it struggles to displace philosophy with history. But this tense relationship to the exclusions of vision and fear set the discipline up for the return of intellectual contradiction once pragmatism began to falter over the past twenty years.

The constitutional structure established by the discipline of international institutions — and repeated from the League to the most technical

contemporary United Nations agency — repeats in its constitutional structure and plenary practice the momentum of the originating move into institutionalization. We are all familiar with the basic pattern, moving from membership to decision-making procedures to implementation powers. My own interest in this structure has been its institutional echo of the historical displacements of fact by philosophy by practice: a practice which repeats the separation of word and deed as departmental specialization.

And it is a narrative which is repeated in the historiography of the discipline of international institutions. If the move to institutions recapitulated an historical transformation as a text, or a structure, a procedure, a practice — the history of those structures returns us to the narrative of international law itself. If we were to trace the literature about international institutions from 1918 to 1981, we would find a steadily shifting preoccupation — roughly from the politics of membership through the procedures of constitutional structure or decision making to the substantive programs of administration — in short, from politics, through discussion, to action.

Let me conclude. My goal in this historical work has been to unsettle the confidence of twentieth century international law in its ability to transcend and supplant the difficulties and contradictions of philosophy through pragmatic or functional structures. In doing so, I have sought out the strange insecurity of institutional discourse about both faith and power — reminiscent of traditional international law's uneasiness about sovereign will and religion — and the equivocal, repetitive patterns of discourse which structure modern institutional life. In doing so, I have tried to uncover the institutional face of the tragic liberal, seeking through procedures and structures to escape the difficulties of moral justification and the decisiveness of political will.

Taken together, these historical projects have a common aim: to situate contemporary international law as a quintessentially *modern* phenomenon. As such, it seems fascinated by power, fearful of commitment and insecure about its origins, justification, and ambition. The institutional voice, for all its insistence on the clarity of history, is equivocal and modest about its own status. My historical research has sought the origin of this modesty in an equivocal or doubled relationship to power and faith — both presumptively excluded, projected beyond or before us — and in an inescapable preoccupation with the discursive struggle between norm and deed, an endless repetition of the very opposition the modern is insistent on transcending.

## III. Doctrine: The Rhetoric of International Law

The strange voice of the tragic modern scholar appears as vividly in contemporary international law doctrine as it did in the theory and his-

toriography of the discipline. In today's lecture, I will trace patterns and strategies of rhetoric which recur in different doctrinal areas of public international law, seeking a sense for the mechanisms of their coherence. As I indicated in the first lecture, I have not analyzed the relationship between international legal materials and their political and interpretive milieu, nor am I concerned about the context within which arguments are made and doctrines developed. I have focused on the relationships among doctrines and arguments and upon their recurring rhetorical structure. I have been particularly keen to trace the references one doctrine makes to another and the repetitions which characterize doctrinal materials widely dispersed through the field as a whole — to look at the doctrinal corpus our discipline nourishes from the inside out.

In a way, thinking of things this way reflects the discipline's self image. When it thinks historically, modern public international law locates its origin in a series of ideas and texts about sovereignty and law — and in their movement away from historical or political constellation. Although these ideas are thought particularly to characterize modern western European statecraft, they are treated as if they remained somewhat — and one must stress this quite complex "somewhat" — independent of the particular facts of Western European diplomatic history.

Although public international law presents itself as concerned with issues of politics and statecraft, it seeks to transcend particular political alignments. It moves away from its political origins and towards its substantive — even aspirational — achievement, but remains itself firmly in the procedural between. It participates in war and peace but is itself neither war nor peace. Public international law presents itself much more as the language in which international affairs is written. I have tried to follow the logic of this presentation, emphasizing the veil which separates the discursive materials of the field from their origins and referents to understand public international law precisely *as* a language.

I will take up public international legal materials in three familiar categories — which I have labeled "sources," "process" and "substance." To a certain extent, this organizational structure follows that of more traditional casebooks and treatises, and indeed, these three doctrinal areas seem anxious to differentiate themselves from one another. Sources doctrine is concerned with the origin and authority of international law — a concern it resolves by referring the reader to authorities constituted elsewhere. Process doctrine — the bulk of modern international public law — considers the participants and jurisdictional framework for international law independent of both the process by which international law is generated and the substance of its normative order. Substance doctrine seems to address issues of sovereign cooperation and conflict more directly. Like sources doctrine, it does so largely by referring to the boundaries and authorities established in other doctrinal fields. After reviewing briefly

some of the rhetorical strategies characteristic of doctrines of each sort, I will reflect on the doctrinal system as a whole.

### *A. Sources of International Law*

International legal scholars have produced a large body of work about the conditions under which treaties, custom or general principles of law bind actors and the hierarchy among the various doctrinal forms which might apply in a given instance. This body of doctrine provides a good introduction to the rhetorical patterns of public international law as a whole. Contemporary analyses generally work from the sources enumerated in Article 38 of the Statute of the International Court of Justice, proceeding to examine the conditions under which norms of these types will be binding, the hierarchical relationships among them, and the extent to which potential sources not included in the list (such as U.N. resolutions) might be assimilated to one of these classic forms.

Several aspects of this literature might seem odd to a man from the moon. For one thing, the literature proceeds quite abstractly, attempting to delimit boundary conditions for each category independent of the particular content of the norms whose source is being considered. There seems a shared sense that the abstract categories will control the content of the norms, rather than merely register them. Argument about sources doctrine is similarly abstracted from the content of the norm under consideration.

Much of this argument, moreover, seems to repeat a rather simple and familiar debate between the authoritative power of sovereign consent on the one hand, and some extraconsensual norm on the other. Argument about the relative authority of various sources, about their boundaries and effects, seems to be carried out as a debate about sovereign consent. It is an odd debate. At one level, it seems that the choice between a preference for consensual and non-consensual norms will answer all questions. Either a consensual treaty beats a non-consensual custom or it does not. But somehow this question is never squarely faced in doctrinal argument — somebody always seems to muddy the waters.

The bindingness of treaties, after all, seems more than consent, prior to consent, the very condition for a consensual system. And custom might also be the product of consent. Although arguments about the authority of international norms appeal either to consent or to some norm beyond consent as if these were exclusive and definitive possibilities, in the end, each always seems to invoke the other somehow — in a subordinate interpretation, or secondary doctrine.

The basic debate about consent suggests that the discourse of sources will address a basic theoretical dilemma for international law: how can it be simultaneously independent of and enmeshed with sovereign will? The autonomy of sovereigns ensures the attractiveness of consensual sources,

while their participation in a pre-existing normative order encourages a non-consensual rhetorical line. In order to fulfill the desire for an autonomous system of normative law, argument about the sources of international law simply included strands associated with both visions. Sources rhetoric is interesting not because it resolves the issue, but because it transforms it into a debate between abstract legal forms — a debate which can manage the conflict between them interminably.

For all its abstraction, sources rhetoric is a distinctly doctrinal affair, neither theoretical nor political. Norms are legally binding which fit within one of a series of doctrinally elaborated categories, not when a persuasive argument about political interest or theoretical coherence can be made for their observance. The distinction between consensual and non-consensual sources — used to distinguish treaties from custom, to contrast various schools of thought about the nature of custom, to divide arguments for and against the application of specific norms in various situations, and in dozens of other ways throughout the materials on sources — opposes themes whose fluidity encourages a proliferation of rhetorical possibilities and strategies more than decisive identifications and differentiations.

The play between these themes gives sources discourse a doctrinal feel without ever presenting the clash between two norms — or two sovereigns — in substantive or political terms. A sources discourse which operated completely within the rhetoric of either consent or systemic considerations would seem doctrinal, but it would not be able to avoid a more substantive face. A consensual rhetoric could certainly differentiate and prioritize norms in an abstract way, but in choosing among two norms, one would need to choose between the claims of two sovereigns about their autonomous consents. A purely extra-consensual rhetoric, while it would obviously avoid this problem, would have a difficult time avoiding a more substantive choice among various systemically grounded norms. By combining these two rhetorics, sources discourse can defend its independence from sovereign autonomy and from substantive legal regulation.

The question, obviously, is how do they do it? My own examination of various sources doctrines and cases suggested a number of rather obvious rhetorical strategies. The most obvious is simply repetition: differentiating various doctrines from one another as consensual and non-consensual and then repeating the distinction in distinguishing each doctrine from its exception or interpreting doctrinal strands which have once been characterized and perhaps adopted as consensual in non-consensual terms. Thus, custom might seem non-consensual when contrasted with treaty, but be measured in consensual terms, or subjected to a consent based exception — say, for persistent opposers.

Taken as a whole, however, sources doctrine seems tilted in favor a consensual rhetoric. Consensual doctrines seem to dominate and consen-

sual interpretations of non-consensual doctrines seem most compelling. The doctrinal hierarchy seems to favor the rhetoric of consent. At the same time, however, sources discourse seems tilted towards the systemic authority of legal norms — towards the normative force of the legal order and away from sovereign autonomy. A certain systemic authority seems to be taken for granted in the rhetoric which is most emphatic about its consensual foundation.

This combination suggests something about the project of sources doctrine as a whole. Sources discourse, so long as it seems consensual, guarantees that the legal order will not derogate from — will indeed express — sovereign authority and autonomy. So long as it seems extra-consensual, sources rhetoric guarantees that the international legal order will not be hostage to sovereign whim. The important thing is the co-existence of these two rhetorics — and the relationship between them. Each must temper the other and the discourse as a whole must seem to move forward from autonomy to community. The hesitancy to adopt either extreme position, and the continual oscillation between them, prevents sources doctrine from disappearing into a theory of state power or a catalog of substantive norms — and, most significantly, transforms a variety of theoretical concerns into a doctrinal proliferation.

### *B. The International Legal Process*

However central theoretically, however paradigmatic of public international law rhetoric, however crucial as secondary — even last resort — persuasive strategies in doctrinal argument, sources doctrines are of only marginal importance. Were it not for their central and exemplary theoretical function, it would be hard to understand why scholars would waste any energy on their elaboration. Discourse about process, by contrast, dominates the field of public international law. If process rules supreme, moreover, it also rules alone. Doctrines about problems of participation and authority in international legal life — doctrines which address actors and their jurisdictions — proceed relatively free of consideration of either substantive standards of behavior or sources of law.

This independence and domination are hard won. After all, determining the source of law to be applied by a court often seems indistinguishable from establishing the court's jurisdiction, and a "process" rule about the jurisdictional limits of sovereign power may not seem any more different from a "substance" rule about the prohibited acts of sovereign power than a jurisdictional authorization would feel different from a substantive empowerment. One way of understanding process doctrine is to think of its central mission as the struggle to maintain this independent centrality to public international law as a whole.

Take the two great areas of process doctrine: doctrines which abstractly delimit the actors whose interests and nature will be constitutive

of international law and whose substantive behavior will be controlled by international law on the one hand, and doctrines which abstractly delimit the avenues of legitimate interchange out of which authoritative norms grow and the spheres of activity which will be governed by substantive law. We might term these doctrines of participation and jurisdiction. Between them, they divide the role of establishing and limiting sovereign identity without reference to sources or substance.

The aim of participation doctrines — of statehood, recognition, etc. — is to open the system to qualified actors and ratify their powers. The aim of jurisdiction doctrines, by contrast, is to structure international life by defining the boundaries of various authorities. Where participation is open ended, ratifying, registering sovereign authority, jurisdiction is closed, delimiting sovereign powers. Between them they respond to the modern scholar's sense that the international legal process must be elaborated so as to remain simultaneously independent of and engaged with sovereignty. Between them, precisely in the relation between them, there is nothing they cannot do.

But there is more. Participation doctrine must do its job without reference to legal sources. If the job of sources had been to establish law, the job of participation doctrines is to establish sovereignty. Just as sources needed to do so without reference to the substance of the law, by thinking only of consent, so participation doctrine must refer only to facts and practices, precisely not to the consensual authority of legal sources. That which poses as open must remain closed to the whims of consent — must preexist the canvassing of consent.

Similarly, jurisdiction doctrine must limit sovereign authority without reference to substantive law — must remain procedural. That which poses as closed must do so without abridging the sovereign's ability to act — must indeed be the ground, the basis, the preexisting supposition of sovereign autonomy. In short, to be open-ended is to remain free of substance while complementing sources, while to be regulatory is to remain free of sources while complementing substance.

To retain their collective independence from both sources and substance, process doctrines treat issues of participation and jurisdiction in a number of familiar ways. Again we find abstraction — typical treaties consider the "subjectivity" of individuals, trust territories, colonies, multinationals so as neither simply to register their essence nor to elaborate the substantive doctrines which implicate them. And again we find repetition: the division of responsibility between participation and jurisdiction for open and closed responses to sovereign power is replayed in the relationship between formal (recognition) and material (territory) bases for participation. Again we find argumentative equivocation, managing the tension between rhetorical invocations — of substantive and formal bases

for participation and jurisdictional authority — which seem incompatible and unworkable when considered separately.

The dominance of process doctrine is a strange one, its mastery achieved through elision, hyperbole and equivocation. But if process doctrines work hard at their independence, they also rely heavily on sources and substance doctrine to succeed — or at least upon an image of sources and substance. In the rhetorical division of labor between participation and jurisdiction, much depends on a stable image of substance and sources. Jurisdiction doctrine, seeking independence from substance, asserts its objectivity and elides reliance upon substantive notions of territory and statehood. Participation doctrine, seeking independence from sources, asserts its subjectivity, and understates its reliance upon formal or consensual criteria.

By seeming objective, jurisdiction doctrine, the doctrine responsible for limiting sovereign authority, can seem differential to state power. It is not, after all substantive. By seeming subjective, participation doctrine, the doctrine responsible for registering and recognizing sovereign authority can appear to establish a communal, legal control over the membership process. It is not, after all, a consensual source. In this way, process establishes itself, sustains its independence, by projecting that which it would achieve elsewhere — back to sources or onward towards substance. As a result, process is able to refer to, even subtly determine, both sources and substance by a continual reference towards them — a reference which leaves them always at a distance. In this sense, the domination of process might be understood as a self-effacement.

But these ideas, these arguments, these images of jurisdiction and participation doctrine, depend upon extremely monochromatic images of sources and substance. Sources doctrine, after all, is hardly consensual. Indeed, when looked at directly its most striking feature is its equivocal oscillation between consensual and non-consensual rhetorics. Substance, as we shall see, is hardly communal — indeed, its most salient feature is its equivocation and reference back to sources and process for the resolution of difficult questions.

### *C. The Memory and Dream of Substance*

Unlike the international legal process, the regime of substantive public international norms is fragmented and incomplete. Although process and sources doctrine seem more doctrinally complete, they present themselves as the servants of a substantive order which will be achieved and protected. We expect little of process — and less of sources — because we expect so much of substance. Here, in the laws of war and peace, we hope to find a social fabric, the wise constraints which keep us free. Yet these expectations are quickly disappointed, for the substantive doctrines of inter-

national law remain largely promises — promises that eventually, in a world of good states, or enlightened statesmen, or after the next codification, we might achieve world peace through world law. Process we might have today — it seems real, enmeshed in the conflicted world of contemporary international life. For substance we will need to wait.

And this double presentation — partial and yet completing, extending the international legal order forward into the future — is repeated in the rhetoric of substantive doctrine and argument. Take the two large categories of substantive doctrine: the law of peace and the law of force. Between them, they share the labor of completing the entire substantive agenda for international law — to address the conflicts of sovereign autonomy and the cooperation of sovereign equality. Either alone seems impossible. A fully integrated international order seems impossible, naive, utopian or quaint. An order responsive only to state interests seems dangerously anarchistic. Like the demands for a process which is both open and closed — or for a legal regime which is both normative and independent of social life — these narrative constraints shape the rhetoric of substantive doctrine.

Again we find the rhetorical management of alternative images — of interventionist regulation and simple, almost architectural, communal structures. The rhetoric of the law of peace stresses the necessity or inevitability of cooperation while preserving national autonomy. The rhetoric of force law stresses the inevitability of sovereign autonomy while struggling to accommodate cooperation. Again we find repetition: the distinction between cooperative regulation and deferential proceduralism which distinguished peace law from the law of force is responsible as well for the division within the law of force between the laws of war and the law in war. And again we find the reference elsewhere — to sources for consensual authority to ground images of peace, to process for boundaries to the use of force which do not impinge on sovereign freedom to act.

In its strange comprehensivity, then, substantive doctrines seem, for all their fragmentation, to fulfill the ambition for a law which grapples directly with both sovereign autonomy and community. But not quite. The law of peace shrinks back from substantive enactment to a process of regulation, a reference to institutions, or a reliance upon a set of procedurally established boundaries. Close examination of even so substantive appearing a regime as the Law of the Sea Treaty reveals a series of rhetorical references and uncertainties — references forward to future process and back to an earlier sovereign agreement. We seem unable to locate the moment of law's substance. Similarly, the law of force shrinks back from enforcement to a rhetoric of procedurally established jurisdictional boundaries and a reference to the violence at the core of sovereign authority.

And indeed, violence comes to seem ever more central to the project of substantive legal doctrine. Together, the law in war and the law of war

are situated between a promise and a fear — the promise that violence will be displaced by law and the fear that it will not. Beneath, around the rhetorical maneuvers of substantive doctrine, floats the memory and practice of violence — in the constitution of the state, the definition of autonomy. Rather than a regulation we find a vocabulary of force. Whether we think of substantive international law as the establishment of an institutional system — as a return to process — or as a ratification of force, the law seems to have devoured its other — to have ingested the politics of sovereign force and become a language, a grammar, a logic, for violence.

### *D. Reflections on a Doctrinal System*

I have looked at these doctrinal materials in this way in order to think about the overall coherence of public international law as a set of relationships among the discursive fields of sources, process and substance. It is striking how effectively these distinctive fields, each with its own characteristic doctrinal structure and argumentative style, work with and against one another to generate and sustain an international legal system. Moreover, the rhetorical practices of contemporary doctrinal discussion in each area — practices of elision, avoidance, deferral and projection — are remarkably similar.

Each group of doctrines seems to invoke — and promises to resolve — a particular set of social or historical problems. Sources discourse seems to consider law's origin and authority — and hence its distinctiveness — in a social order of which it is a part. Sources doctrine thus seems closest to the concerns of international public law theory. Substantive discourse, by contrast, seems to consider law's participation in formulating a social order between freedom and coercion. It thus seems closest to institutional life and political implementation. Process discourse seems to consider international law's ability both to remain distinct from the social order as demanded by sources and to relate to it as demanded by substance.

Several interesting points emerge from exploration of this classification. To begin with, none of these doctrinal areas actually do what they say — or rather they do so only obliquely. Sources discourse, for example, transforms an aspiration to consider origins and authority into a rhetoric of deference to or departure from already constituted authority; speaking of overriding or deferring to the *consent* of sovereigns. Thus it recapitulates the philosophical debate between norm and deed while deferring either to politics or to process for the very authority it purports to establish.

Process discourse transforms its aspiration for a simultaneously open and closed legal system into a rhetorical fabric of objective and subjective doctrine and argument. It talks about the neutrality of formal standards and the reality in immersion of the facts. Thus it also recapitulates the forgotten struggle between positive and natural law, while referring either

to a formality of sources or the content of substance for the structure it purports to establish.

Finally, substance pulls back from its claim to order freedom and coercion to develop a system of rhetorical references to the constraints and deferences of process and sources. It develops schemes of architecture which reinforce the boundaries established by process and of regulation which refer to the process of dispute resolution and to the codification of regulatory purpose through the mechanisms of sources.

In pursuing their varied projects, these three doctrinal practices echo themes and references familiar to one another. The return of the law of force to doctrines about sources demonstrates this quite strikingly. Although these two fields seemed very distinct — sources a very doctrinal, logical field, the law of force a very substantively engaged field — both seem to be concerned with invoking and then muffling the sovereign authority behind its most basic principles.

Moreover, in many cases, the same issue arose for consideration in one area after another, each time taking on a slightly different tone. Take the constitution of the sovereign subject for example. Although sources seemed to rely upon a category of sovereign subjects whose consent might be canvassed — seemed indeed to depend upon process definitions of statehood — it also traced patterns of legitimate authority in its catalogs of authoritative norms. Statehood doctrine seemed able to determine participation, but depended upon both authoritative sources and legitimate monopolies of force to do so. The law of peace and war harnessed their prohibitions to the boundaries established by statehood while seeming to regulate the construction of sovereign authority.

All of these similarities and repetitions seemed interesting in part because they seemed likely to provide a way of understanding the practice of international legal argumentation. If, as it seems, a rather small set of argumentative maneuvers and doctrinal distinctions repeat themselves in a wide variety of different contexts throughout public international law, it might be possible to unite the field around these patterns rather than to be forced to think of them each time anew in response to different situations or in different doctrinal areas. Further study might indeed substantiate such a claim.

The most interesting result of this effort to identify repeating rhetorical technique, however, was a new sense of the relationship among the three doctrinal areas which I had chosen for examination. For all their structural similarity, the discourses of source, process and substance seemed both to distinguish themselves and to relate to their brother discourses in a series of quite distinctive rhetorical maneuvers. Quite paradoxically, each discourse seemed to distinguish itself by referring to its brothers for the completion and continuation of its project.

This was most apparent in the projections of process onto both source and substance of authority and order. Process seemed to sustain its self-image as open to authority and productive of order by alternating in its references to the authority of consensual sources which it implemented and the order of an international substantive regime which it facilitated. It also seemed that process led us to substance with a promise of some resolution to the problem of sovereign autonomy and cooperation — which the law of peace repeated and which the laws of force only fulfilled by grounding us in violence while referring us back to the boundaries of process and the authority of sources.

Despite the difficulty of saying with any certainty that references from any one of these areas generates doctrine in any other, it does seem that these various projections and references as a whole constitute public international law as a single rhetorical fabric. These rhetorical areas work together to sustain the independent purport of each — and to reinforce the general purport of public international law as a whole to be a system of normative authority and practice among sovereigns.

The general purport of public international law is reinforced in three ways. First, it seems that the rhetorical system is able to assert itself quite firmly as an international regime while sustaining a very humble and deferential tone. Public international law seems a quite well articulated and complete legal order even though it is difficult to locate the authoritative origin or substantive voice of the system in any particular area. Each doctrine seems to free ride somewhat on this overall systemic image — an image which is sustained by a continual reference elsewhere for authority or decisiveness.

Sources refers us to the states constituted by process and grounded in the violence defined and limited by substance. Process refers us to its origin in sources and its determination in substance. Substance refers us to the boundaries of process, its origins in sources and its resolution in an institutional system of application and interpretation. Thus, the variety of references among these discursive areas always shrewdly locates the moment of authority and of application in practice elsewhere — perhaps behind us in process or before us in the institutions of dispute resolution.

Second, this system of references among discursive areas seems to substantiate the overall claims of public international law by generating a sense of progress or momentum. The momentum developed through reference from sources to process and substance reinforces the image of public international law on the move from theory to practice, from differentiation to regulation, and, consequently, from the deference to state autonomy characteristic of sources to the constitution of an international cooperative regime characteristic of substance.

The momentum is generated through a series of promises and repetitions. Individual doctrines position themselves between an openness past

and a closure future — exactly as the Covenant of the League situated us between war and parliament. By situating themselves between stasis and motion in this way — by relying upon an image of the determination of discourses past and the indeterminacy of discourses future — the rhetorical system is able both to claim to be becoming an international order and to be experienced as fulfilling that promise.

Yet these various rhetorics are not logically either indeterminate or determinate. I began my investigation interested in the structural contradictions of doctrine — hoping to dislodge the arrogance of modernity by uncovering its loose and contradictory logic. But this is only half the story. Indeed, every story about indeterminacy only works by a projection elsewhere — onto the facts or wherever — of an equally determinate image. These rhetorics only seem closed when the possibilities for association are not fully utilized. They only seem open and indeterminate when their object is thought to be closure. In fact, they are most interesting when they are neither — when the pattern of repetition, association and referral produces a practice of interminable discourse.

Indeed, modern public international law discourse is significant, in my view because it subtly transforms social difficulties into rhetorical alternatives which invoke social choices and fears in only the most hyperbolic fashion. The resulting field of rhetorical maneuver can extend itself virtually to infinity, so long as the specters of social power and aspiration can be kept safely, tamely, at bay. In short, my doctrinal investigations have convinced me that the interminability of international law is the subtle secret of its success.

## IV. Institutions: International Legal Modernism

### *A. Introduction*

The discipline of international institutions has slowly displaced public international law. The history of public international law traces a move toward an era of pragmatic management — in which doctrine will be the product and context of an institutional process. In the second lecture, I described the work of international law historiography, moving from an era of political chaos into philosophy, and then returning to inter-sovereign life as institutional pragmatics. And few areas of public international law doctrine today remain free of the network of institutions understood to have been set in motion in 1918. The corpus of modern doctrine, as I suggested in the third lecture, is relentlessly procedural, harnessing each substantive aspiration into the policy objective of some institutional regime. Seen either from history or doctrine, then, the move to institutions is the key to modern international law.

From this perspective, institutions — and the discipline of international institutions — are different from doctrines. . Public international

law turns to institutions, turns into institutions, as a turn to practice, to engagement with sovereign society, as a move to realism and the politics of regime management. We see then, in the relationship between our two disciplines — public international law and international institutions — a familiar division of labor. The one handles issues of independent legal judgment, the other problems of sovereign engagement. Of course this image is an oversimplification — we saw the repetition throughout public international law of a shrewd equivocation about the independence and normative nature of international law doctrine, and we are likely to find the discipline of international institutions riddled with doctrinal independence, procedural channels, consensual covenants, and the like.

But still, between them they handle international law's more general aspiration to both remain independent and connect with sovereign power. Perhaps this can be done ever so much better the more the division is blurred, or the division of labor proliferated throughout both disciplines. At least we never need face either sovereign autonomy or legal dominion in their pure form. They exist only as rather unstable and hesitant invocations and reference points. Given this division, however, it is at least worth asking about the rather elaborate rhetorical structures which seemed so to dominate public international law doctrine and history. It might seem, to the extent we have moved from word to deed in our journey from doctrine to institution, that we would leave such purely rhetorical gestures behind — this, after all, is a world conditioned more by political interest and power than by argument and persuasion.

It turns out, however, that the institutional achievements of contemporary international law remind us constantly of their doctrinal affinities and their position as historical narratives. We find echoes of the relations among source, process and substance doctrine and repetitions of the narrative move from political origins through conversation to pragmatics which I explored in the last two lectures throughout the institutional regime. In this lecture, I will sketch the discipline of international institutions along two dimensions, dimensions which echo my consideration of public international law history and doctrine. First, I consider static images of institutional structure — questions about constitutional form, voting patterns and so forth. Second, I consider the development of the modern international institution over time — focusing on the generational breakthroughs represented by the League of Nations, the United Nations and the Law of the Sea Conference.

Before doing so, however, I should speak for a moment from the point of view of the discipline of international institutions, looking back on public international law and history. In large part, the discipline sees itself as it is perceived — as a move away from doctrine and history to pragmatic management. If you look carefully at the literature of the field in its early decades, the references to the 1918 origin are telling. Inter-

national institutions saw themselves — or better, as a discipline they saw their object — to have been born of war — to have broken forward from an era of dangerous chaos. The war marks their maturation — before 1918 we find only precursors, early administrations, early plenaries, early judiciaries. Thereafter we find a complete institutional regime.

Significantly, moreover, the modern institutional regime differs from its pre-war public international law ancestor in a number of ways. Where the pre-war system was a rigid and formal affair of alliances, the institutional system will be flexible and open to accommodate changing state interests. Where the pre-war system was softly substantive and utopian, the institutional regime provides a set of firm procedures for interstate action — a renunciation of war which will work. By now this self image should sound familiar. Again we see the double move from politics to philosophy and from law to the state. Again we see the abstract image of a complete regime and of the double life it will lead expressing and controlling sovereign will. My concern today is to explore these echoes through the literature about international institutions.

### *B. The Structure of Institutional Doctrines*

Questions of constitutional structure are normally considered in relationship to a constituting text — be it the League Covenant, the U.N. Charter or the U.N. Convention of the Law of the Sea. The texts establishing international institutions are remarkably similar in basic structure. In broad outline, all set out the membership, decisionmaking procedures, and respective competences of legislative and administrative organs. Sometimes provisions for reference to an independently established or integrated dispute settlement procedure is added. Already we see a familiar pattern — the move to institutions includes a return to law as a safeguard clause exactly as substantive legal doctrine often finished with a reference to institutions for revision or completion.

Leaving dispute resolution aside for a moment, no document seems complete, seems fully to have established a plenary, if it does not indicate who will participate, how they will decide and how their collective being will be known. This pattern repeats the temporal logic of establishment: signatories are transformed into members, the interactions of members are structured, and the organ which they constitute is named. Membership marks a break between life within and without the institution. The organ is the name given the object established. Voting inserts a text between these two moments — both reminiscent of the particularity of members and generative of the constituted organ. The basic historical narrative could hardly be more familiar — a move from politics through text to institutional action.

Upon reflection, this structure is difficult to understand. The first and last terms seem strangely redundant. The naming of organs seems simply

to recapitulate the terms of membership and the conditions established by voting. Likewise, naming the members seems either to echo the signatories or foreshadow the competences of organs concerned with membership, withdrawal, and so forth. It is hard to understand why law establishing text might not get by with a set of substantive empowerments referring to the plenary for implementation and a set of decisionmaking procedures. Or simply with a voting mechanism which specified who might vote about what. In another way, however, voting seems the most redundant of all — a minor procedural detail, easily attached to categories of membership or appended to a description of an organ's composition and competence.

Perhaps there is simply a great deal of redundance built into the system. But the repetition seems intentional. For one thing, it recollects the doctrinal system of sources, process and substance. In considering the relations among these doctrinal categories in the last lecture, it seemed that it was precisely their struggle for independence from one another — their resistance to redundancy — which accounted for the overall coherence of the doctrinal system.

For another, the relentless internal focus — membership looks forward to voting, organs look back to voting and membership, and so forth — operates here as it does in the doctrinal system: as a mechanism of exclusion and marginalization. The institutional regime's internal struggles sustain it as a break forward from the chaos and rigidity of the pre-modern doctrinal structure exactly as the doctrinal system's internal struggles sustained its difference from the images of sovereign anarchy and fusion which it remembered and invoked.

Like the doctrinal system, moreover, these internal machinations operate by shrewd equivocation. Focus for a moment on voting. People writing about institutional design in our discipline have devoted a great deal of energy to voting structure — the allocation of votes among members or the voting configurations required for action. On the one hand, the voting mechanism seems completely internal to the organization, a mere procedure for translating membership into organ activity. Such a sense focuses reformist energy on a technical procedure which might easily be changed, even if it seems too removed from context to provide a fully convincing account of the institution's practices. On the other hand, the voting mechanism draws a connection between the original members and the activities of their institution — connecting the preinstitutional context to the actions of the organization. The result is a double position — within and without the institution.

As such, voting exists uneasily between membership — itself the break between the institution and its creators — and organs — themselves the link between the institution and its context and object. Voting reaches back to members, defining them, and forward to organs, reminding them

of their past. The problem of voting is to translate membership into action, orchestrating a smooth movement from constitution as members (frozen in the intentions of the establishing document) to institutional action within the competences of the organ in question. Voting thus both marks the inside of the plenary and asserts a relationship with both a preinstitutional constituency and an implementing organization, thereby linking two constituted beings — states as members with institutions as actors. As a result, voting leads a double life, looking to the institution like a static power distribution and to the members like a fluid process of decisionmaking. This double movement recapitulates the Covenant's reference back to a political arrangement and forward to an institutional behavior.

This central relationship demands much of voting. It must accommodate both the authority of sovereign members and the cooperative activity of the institution. It cannot veer too close to the extremes of either sovereign anarchy or international totalitarianism without jeopardizing the balance between members and organs. But the institutional problem faced by voting is not simply one of balance — neither too much nor too little agreement. A properly designed plenary also gives a sense of movement from members to organs, or from stasis to action — in some fundamental way a movement into organization. Voting must move from sovereign autonomy to cooperation. In this, voting is harnessed to the same project as each doctrinal discourse I discussed in the last lecture — sources moved into law as process transformed sources into substantive achievement as substance moved from process to a call for institutional implementation.

To an extent, this sense of balance between sovereign authority and cooperation can be achieved by relying upon the literatures of membership and organs. Membership is responsible for transforming autonomous sovereigns into responsible citizens. The organs of an international institution act in accordance with limited substantive powers as the instrumental expression of their constituents. Voting is thus always already insulated from both the politics of autonomy (by membership) and from institutional cooperation (by organs). But voting literature is also careful to exclude mechanisms which seem too associated with either the promotion or suppression of sovereign autonomy. The sense of movement is achieved by equivocating about the vote's independent substantive status, treating it as a simple procedural translation of membership into action.

If the established institution must be both closed — reinforcing a particular peace, ending a particular war, and open — adjusting the peace and managing ongoing intersovereign conflict, voting faces a similar dilemma. It must both ratify and express a particular distribution of power merely promised states by membership and be the mechanism by which the community makes up its collective mind and expresses itself vis-a-vis specific state powers — a relationship posited by the instrumental posture of organs. If the institution must be open and closed, voting must be

deferential to and expressive of state power and yet also control, channel and ultimately reapportion that power as the voice and mind of the international institution. The importance of voting — its resistance to redundancy — lies in this equivocation, precisely in its repetition of the dilemmas of its sister constitutional arrangements.

The discipline's synchronic concerns thus recapitulate much that was familiar from the field of public international law it displaces and supplements. The move to practice, far from escaping the rhetorical structures of philosophy and doctrine, has simply created a practice in the image of those languages. Let me turn now to a more dynamic image of the discipline of international institutions.

### *C. The Doctrines of Institutional History*

The story of international institutional development in this century is well known. The First World War ushered in the first comprehensive institutional "system" — complete with legislature, administration and judiciary. Of these, the most complete was the legislature. The administration only really got going after the central plenary mission began to fail — and the judiciary, added somewhat later, was never fully integrated into the system. After the Second World War, the new system improved the plenary, integrated the judiciary, and focused its attention on expansion of the administration. In the latest grand round, the Law of the Sea Conference, the plenary was reformed again, the administration was spruced up, and attention focused on the substantive authorities and dispute resolution mechanisms of the system as a whole. We see, then, a movement from the legislative plenary, first to the administration and then to the judiciary. The generations were marked exactly as the establishment text marked the institution — by a move from politics to pragmatics and then a return to law.

But each branch also had a history. I would like to tell two stories about the development of the literature. First, a story about a shift in focus — in both the literature of the discipline and in efforts for institutional reform — from membership to voting to organs. Second, a story about a shifting image of the appropriate voting mechanism — from unanimity to majority voting to consensus.

Voting was hardly discussed by League planners and those responsible for drafting the Covenant. Many League plans had simply been silent on the subject and most seemed simply to presume that one state, one vote unanimity would prevail in whatever organs were established. Instead, League architects and commentators and critics focused on membership. Although attributing the League's failure to a problem of "membership" rather than, say, the Depression or fascism, seems, at first glance odd, it runs throughout the literature of international institutions.

After the Second World War, membership was discussed — we find a shrinking literature about the microstate problem, the problem of China, the problem of the PLO, etc. But universal membership seems simply to have been presumed — as unanimity had been presumed in 1918. The literature on voting during this period is enormous by comparison. In scholarship on the Law of the Sea Conference, we find a small literature on voting (focusing on the move to consensus), an even smaller literature about membership, and an enormous literature about substantive authorities, resource allocations and dispute resolution mechanisms.

Although the changing enthusiasms might simply have reflected diverse historical situations — the League's peculiar membership problem, the United Nations' peculiar veto structure in the Cold War context and the Law of the Sea Conference's substantive relationship to the New International Economic Order — we might also read these changes as turns in a well scripted historical narrative. Institutional energy, political energy, literary energy, could simply not be mobilized in 1918 for issues of voting procedure or substantive administration power. As the institutional system matured, membership became boring. Politics took place through voting — and then through dispute about administrative competence. Such a reading suggests a strong link between this discipline of practice, this deference to diplomacy, and the doctrines of public international law.

Or take voting itself. Over the past sixty-five years, scholars considering voting in international institutions have advocated plenary decisionmaking by unanimity, majority vote and consensus. They have expressed their enthusiasm for and disillusionment with each scheme in remarkably similar terms. Each, in turn, has been credited with an ability simultaneously to defer to sovereign authority and express sovereign cooperation. As each decisionmaking scheme fell out of favor, it was criticized for permitting or encouraging either the anarchy of organizational collapse or the tyranny of institutional capture.

During the Hague period, and into the first days of the League, scholars defended unanimity voting as a move from sovereign decentralization, in which international law could grow only through the relatively cumbersome mechanism of treaty drafting or the quite lengthy process of customary accretion, to institutionalization. At the turn of the century, unanimity symbolized the achievement of an institutional life among states, for it permitted autonomous sovereigns to sit in standing plenaries without forswearing their sovereign prerogative.

By the mid-1930's, unanimity no longer seemed so attractive. Scholars began to suggest that the League either need not, as a matter of law, or did not, as a matter of practice, continue to abide by a rigid unanimity rule. These texts advanced arguments against unanimity and in favor of some alternative voting scheme (usually majority voting) to those which had been advanced in support of unanimity during the preceding period.

Unanimity, as a matter of theory and practice, could neither respect sovereign autonomy nor generate sovereign cooperation. It permits states to be held hostage by one bad actor, both preventing international action and centralizing international authority so as to override sovereign authority. By reducing international cooperation to the lowest common denominator of sovereign accord, unanimity emasculates the institution and sabatoges cooperation. In short, unanimity slows the momentum of institutional life and permits backsliding to anarchy.

Majority voting seemed much better. It would decentralize international authority, allowing states to defend their interests without waiting for the go ahead from one recalcitrant sovereign. At the same time, majority voting allows for more powerful and decisive institutional action, rendering the international institution persuasive by keeping it in touch with the greater part of the community. A strong international institution, in turn, fosters community. These arguments prevailed in 1945, and the post-war institutions exhibit a veritable cornucopia of majoritarian and weighted voting formulas.

By the mid-1960's, however, the luster was off majoritarianism. Weighted and majority voting — and particularly the veto — seemed a step backward, away from organization toward anarchy or irrelevance. On the one hand, majority voting produces a tyranny of the majority, allowing international organizations to be far too assertive, thereby threatening the sovereign authority of the minority. On the other hand, majority voting is the enemy of international cooperation. By encouraging rash decisions which reflect passing fads, majority voting leaves the institution powerless in the face of sovereign autonomy. By ignoring the interests of the minority, it debases the currency of international institutional outputs and causes the institution to lose respect. Majority voting fails the cooperative sovereign as much as the autonomous one.

By 1975, the fashionable international institution made up its mind by concensus. By exactly translating political reality into institutional action, concensus keeps the institution in step with all states. The minority feels attended to, included, respected: neither the big powers nor the blocs are able to control the majority anymore. Consensus is the perfect form of institutional deference. Moreover, consensus permits the institution to make powerful decisions and ensures compliance with such decisions as are taken. The very experience of coming to consensus builds community. Finally, as we might expect, by 1980, the bloom was beginning to be off consensus — and the reasons were familiar. The institution was hostage to one hold out autonomous state — and the individual sovereign felt bullied into agreement by a powerful consensus building plenary practice.

This rather fickle rotation among voting procedures repeats the same arguments in each generation. Good procedures instantiate both autonomy and cooperation among sovereigns. Bad procedures fail to banish the

threats of anarchy and tyranny. The move from one to another — from unanimity to majoritarianism to consensus — also marks a certain maturity. Although the arguments for and against consensus sound similar to those advanced for and against unanimity, these procedures are quite dissimilar. In many ways, consensus is the very opposite of a voting mechanism, producing no actual record of inter-sovereign accord, it seems to presume the accord behind the institutional output.

We might say that unanimity positions voting close to membership, consensus close to organs. Seen this way, the move among voting mechanisms is simply a repetition of the more general institutionalizing move from membership through voting to organs. Unanimity suggests an immature plenary, constantly recapitulating the moment of establishment. Consensus suggests a mature organizational voice finally released from its members. Majority voting seems a middle ground, a half-way house of trust, in which formalization of minority rights is still necessary to shackle the organ to members.

Each of these maturation narratives suggests strong links between institutional and doctrinal practices — between the historical narratives of international institutions and international law. We see again the role of equivocation in response to a common dilemma — the desire to appease both sovereign autonomy and international community, to square law with freedom, order with liberty. We see again the double exclusion of anarchy with its anarchists and tyranny with its believers. And again we see the strength of the overall regime in the relationship among its parts despite the instability and uncertainty of those parts.

### *D. Reflections on a Style of Inquiry*

In these lectures, I have sketched the historical and doctrinal scholarship of the disciplines of international law and international institutions. I have retold some of the most basic narratives from these disciplines so as to highlight their rhetorical fluidity and structure, and the double position vis-a-vis both society and the state which historical, doctrinal and institutional discourses struggle to maintain. All proceed as if law were somehow different from, separated from the hurly burly of international political relations, and needed to work to maintain its connection to sovereign will and behavior.

As I have told it, however, the project of international law's relation to practice, to state behavior, to politics, is simply the project of law's internal structure — is simply a rhetoric of separation and reconnection. One way to see this is simply to contrast international law with international institutions — what looks at first like a difference between doctrine and practice turns out to be a continuous rhetorical narrative and frame.

Thinking about things this way suggests that we approach international law, institutions and even the state somewhat differently. When thinking

about international law, we can set aside the obsession with its authority and independence. We can ease off the desire to demonstrate and enhance international law's normative drive and enforceability. To the extent "rights" — more rights, new rights, rights enforcement — has been the mechanism by which we imagine international law able to touch sovereign power, they might come to seem less central, less compelling, simply less interesting. The law of force would not be interesting as a system of weaponry rights, but as a vocabulary for state violence. The law of asylum would not be interesting as a struggle for the rights of refugees, but as a language of exclusion and difference.

When thinking about institutions, we might set aside questions about their legal legitimacy and pragmatic effectiveness. The United Nations would not be interesting as a source of law or as a functional welfare bureaucracy, but as a doctrinal environment. We might look at institutions — and here my only experience has been with the EEC, UNHCR and certain NGOs — as sites in which experiences are structured and expressed as doctrines. Even a cursory glance at the refugee protection business reveals the extent to which international administrative life experience and professional identities are structured in the same vocabulary as refugee law and the law of asylum.

Seeing institutions and legal materials in this way — as unified languages — highlights the exclusionary practices of these disciplines in a more comprehensive fashion. So long as international law and sovereign practice are thought different, the international lawyer has his or her hands full just trying to make international law effective and respond to sovereign interests. It seems enough — more than enough — to hope for a somewhat more full bodied system of rights or a more complete institutional welfare system at the international level. More than that seems hopelessly utopian — for substantive projects of this sort are already more than can be sustained in the equivocal linguistics of international law and institutions.

If we changed our optic to see the entire struggle for inclusion as simply part of the rhetorical fabric — as itself structured like an international institution — we might be able to imagine a more thorough turn to the margins. In the past three lectures, I have flagged a number of ways in which the struggle between law and politics — whether the struggle for rights or for institutional establishment — works in part by exclusion — of religion, of anarchy, of tyranny, of women, and so on. These are exclusions which no legal right to "religious freedom," no matter how responsive to sovereign interests or effective against sovereign autonomy, can overcome. Thinking about international law and institutions as a common language suggests a more expansive approach to the politics of inclusion and privilege, one which challenges the common lexicon of law and the state rather than relying upon the struggle between law and state.

So finally, this set of disciplinary revisitations suggests a somewhat different image of the state — not as sovereign, generative of and generated by law; not as politics, shunned and courted by law. My suggestion is that we rethink our image of the state as a "center of power" which actually exists, is factual or practical, is the site of either law or politics or both, which is developed independent of the narrative of law's history, alongside it, before or ancillary to law's image of sovereignty. Perhaps we might come to see the state as a linguistic relationship between law and politics, as a site for their rhetorical awareness of one another. This image — of a more rhetorical, interactive, dispersed sense of power and thought — might suggest an alternative image of political engagement, in which the relations among institutions, individuals and doctrines are understood similarly.

Were we to break the sovereign's monopoly on politics, spreading political struggle throughout the institutions and personal relations of civil society, we would remove the audience we generally imagine before us when we speak as legal scholars, end the fantasy that by maintaining one's legitimacy, a legal scholar might one day serve the state, as either an official or a persuasive advocate of the public interest. Perhaps by doing so, we would sidestep the conflict between preserving the independence of the international law intellectual and securing his political engagement which has all along been the inner mirror of our discipline's preoccupation with the relationship between legal autonomy and effectiveness, between thought and action.

If thinking about international law and institutions in linguistic terms seeks to dislodge the basic problematic holding these disciplines together, opening up new possibilities for political struggle, it also generates a new sense of the coherence and power of international law. Pursuing this inquiry suggests that we abandon our efforts to score the battle between sovereign autonomy and community. The power and coherence of the language common to law and the state lies in its systematic equivocation, hesitation and fluidity. Indeed, it is the very interminability of the conversation which sustains international law's astounding success.