Introduction

In July 1934, American ambassador to Japan Joseph C. Grew wrote to James Brown Scott, “The Journal [the American Journal of International Law] is to me invaluable, and always has been since it started in 1907.” Scott was president of the American Society of International Law (hereafter ASIL) and was widely accepted as the dean of international law. This letter was written upon the suggestion of Stanley K. Hornbeck, chief of the Division of Far Eastern Affairs at the State Department. Grew explained, “Having recently had occasion to send to Dr. Hornbeck some pages of my diary, he particularly noticed in them a reference to the American Journal of International Law [hereafter AJIL], and he has suggested that the paragraph mentioned would be of interest to you.” Grew went on to say that the journal “took up some three or four shelves in my library,” and that he looked on them “with great pride, having had the annual issues handsomely bound in black leather.” He then mentioned how helpful the journal was to his diplomatic service.¹

The letter and Hornbeck’s advice indicated that there existed a link between scholars of international law and policy makers, a relationship that may have been enhanced by the close proximity of their offices. At the time the ASIL was located across the street from the State Department. Officials of the State Department and members of the ASIL used to lend documents to each other and occasionally had lunch together.² Scott had once worked for the State Department as a solicitor. For experts in international law, it was not unusual to pursue careers both in academia and government.

¹ Joseph Grew to James Brown Scott, July 27, 1934, Papers of the American Society of International Law (hereafter ASIL Papers), American Society of International Law, Washington, DC.
² Interview with Eleanor H. Finch, July 13, 1991. She is a daughter of George A. Finch, who had worked for the ASIL from its foundation as Scott’s indispensable assistant. Eleanor Finch also worked for the ASIL from 1929 to 1972. See R. R. Baxter, “The Retirement of Miss Eleanor H. Finch as an Assistant Editor of the Journal,” American Journal of International Law (hereafter AJIL) 66 (1972), 815–816.
In 1951, George F. Kennan’s famous book, *American Diplomacy 1900–1950*, contended that the moralistic and legalistic approach had failed American foreign policy, and in the years since, that approach has often been labeled negative, dogmatic and futile. Because of Kennan’s criticism of what he perceived to be the unrealistic and illusory bases of legalism, later works tended to downplay and neglect the judicial aspects of international relations. A typical example of this neglect can be seen in Robert Ferrel’s account of the Kellogg–Briand Pact (the Pact of Paris). His *Peace in Their Time* argues that the Kellogg Pact was an illusion and that policy makers were taken in by a mistaken notion of peace.

General disregard for the legalistic approach in the study of American foreign relations can be attributed not only to the emergence of realism that claimed the notion of power and interests should be primary to study international relations (IR), but also to a change in the position that the study of international law occupied in American academia before and after World War II. The establishment of international relations as an independent academic discipline and its separation from the discipline of international law (IL) is important in explaining the declining interest in the legal aspects of American foreign policy. Before World War II, the distinction between international law and international relations was not clearly established both institutionally and intellectually. In the postwar years, however, international relations – particularly in the United States – integrated more fully with political science, while international law was dropped from the curriculum of many colleges and universities and came to be taught primarily at law schools. Hence, with a decrease in knowledge of international law among diplomatic historians, historical investigation in foreign affairs became less associated with legal approaches.

The time is ripe for reconsidering and reevaluating “legalism” in American foreign policy. More than sixty years have passed since Kennan’s book was published in 1951, at a time when Cold War thinking began to...
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Overshadow the historiography of American foreign relations. Under the dominant current of realism, scholars have taken it for granted that such notions as power, interest and military strategy are the most appropriate concepts for discussing international affairs, and dependence on law and organization has been seen as naive. It is hard, however, to imagine that international society could exist without common rules or institutions. It is true that the Kellogg–Briand Pact could not prevent World War II, but by making war illegal it took away the legitimacy of waging war. It would be possible to assume that if it had not been for the Pact there would have been more wars, because the waging of war would have remained legal. In fact, contemporary academics who focus on the compound field between international relations and international law argue that the Pact “carries considerable normative weight” even though aggressive wars by fascist states violated it. Hence, the legalistic approach should be given a more positive evaluation in the longer historical perspective. International law during that period played an important role in the formation of foreign policy and it was held to have more relevance than how it is viewed today. Kennan himself wrote about the preponderance of some “of the more ambitious American concepts of the role of international law,” indicating that there indeed existed such a strong current.

What influence did international law have on its contemporaries? What made international law more influential then? Was the dominance of international law evident in other countries as well? In answering these questions, I propose to address the ideas of international lawyers’ and their activities by examining them historically. I will highlight the doctrine, theory, aspiration and effort of international lawyers. More specifically, the narrative is underpinned by three analytical themes. Firstly, it carefully and elaborately examines the discussions and activities of important international lawyers. Secondly, it scrutinizes the implications of their doctrinal arguments for foreign policy and state practices that formed an important basis for the establishment of international law, illuminating the role of international lawyers as social engineers. And finally,

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8 Kennan, American Diplomacy, p. 95.
9 A brief explanation of the term “international lawyer” might be necessary. Most of the international lawyers in my study were professors and not practicing lawyers. But, following the usage in previous historical works, I use the term broadly to include those who were engaged in the discussion of international law. Other descriptions such as “theorists,” “scholars,” “experts” and “professors of international law” are also used as synonymous with “international lawyers.”
it will take a comparative perspective that contrasts American, European and Japanese discussions, and will examine whether the differences in academic discussions among countries had an impact on diplomatic relations. Each chapter will follow events and topics in a chronological order, covering the period roughly from the establishment of the ASIL in 1906 and the Second Hague Conference in 1907 to the immediate post-World War II period, and the three themes will serve as the framework through which the investigation is organized.

In tracing the development of these themes, I focus on the debates and exchanges of opinion that took place at the meetings of the ASIL,\(^\text{10}\) at the Conference of Teachers of International Law and Related Subjects\(^\text{11}\) and at the International Law Association as well as on books and articles published in academic journals and non-academic magazines. Additionally, unpublished materials – correspondences, memoirs and official documents – will help to reconstruct the time and space in which the international lawyers carried out their mission.

This book demonstrates that there was a group of international lawyers, mostly American but also some European and Japanese scholars, who worked to reform international law. This group began advocating a change in the focus of international law in the early 1910s, and their ideas began to gain currency after the experience of World War I. Progressive scholars, most notably Quincy Wright of the University of Chicago and Manley O. Hudson of Harvard Law School, regarded themselves as reformers and took a leading role in this movement by publishing their views, engaging in debates, writing letters to policy makers and major newspapers, and giving lectures to the public. These reformers attempted to establish a “new” international law, because they saw the traditional one, based on the premises of the nineteenth century, as irrelevant to the twentieth century. On the other hand, traditionalists found no fault with the old legal framework and instead noted the danger of carelessly transforming international law. This split emerged around World War I and continued to grow afterwards. Insofar as this study attempts to delineate their doctrinal discussions, it also provides an intellectual history of the ideas of war and peace, as epitomized in the discourse of one academic discipline.


\(^{11}\) This conference was held in 1914, 1925, 1928, 1929, 1933, 1938, 1941 and 1946.
These ideas, however, did not remain closeted in academia, for the international lawyers discussed in this work were not content to merely analyze legal cases. They sought to mold their views into actual policies, for their theories, they thought, could contribute to establishing a peaceful world order. The ASIL was a good channel for that purpose since eminent public figures served as its presidents. Elihu Root (1906–24), Charles Evans Hughes (1924–9), James Brown Scott (1929–39) and Cordell Hull (1939–42) successively occupied the post of president. While this study concentrates on the initiatives of the scholars toward policy making, a further investigation of how policy makers appreciated and accepted the theories may also be necessary to judge the actual influence. In particular, Henry L. Stimson and Hull were supporters of new international law, and their foreign policies occasionally utilized extracts of theoretical arguments.

The lawyers’ intellectual engagement in the work in turn will shed light on theoretical discussions concerning the role of lawyers and their scholarship in presenting and disseminating a new norm in international law. This work will suggest that international lawyers can function as social agents, as demonstrated by the fact that they successfully promoted the Kellogg–Briand Pact, although that is not its primary and explicit theme.

Nor is it possible to assess the role of international lawyers properly without a comparative perspective, because international law does not exist in a single national context. The term comparative international law may sound contradictory, because “international” connotes a sense of universality and the establishment of universal principles in the relations among nations. However, I think a comparative perspective is necessary to analyze the real meaning of the term “international.” If the attitude toward law in one country is different from that in another country, the understanding of international law becomes problematic. As Guillaume Sacriste and Antonie Vauchez maintained that international lawyers in the 1920s formed an “epistemic community,” transnational understanding would be important for developing its normative basis.13 The

12 The American Society of International Law also had the offices of honorary president and honorary vice-president. Almost all ex-secretaries of state became either president, honorary president or honorary vice-president in prewar years. For the year 1928–9, the honorary president was Elihu Root, the president was Charles Evans Hughes, and the vice-presidents were William Taft, Frank Kellogg and Robert Lansing.

relevance and feasibility of academic discussions on the establishment of rules among nations must be tested by determining whether other countries accept them.

In essence, this work narrates the story of a group of international lawyers who sought to reorient international law and ultimately reconstruct a new international order. A successful academic inquiry on this theme necessarily requires a multi- and inter-disciplinary approach that encompasses such academic fields as legal theory and history, diplomatic history, and law and politics in international relations. Accordingly, it would be appropriate to divide the review of major previous works into four categories: works on respective lawyers, legalism and American foreign policy, intellectual-legal history, and lawyers as social engineers.

Although international lawyers seem to have been assigned a marginal position in postwar historiography on American foreign relations, there are several good works concerning them and the study of international law in the early twentieth century, particularly with regard to the implications of international law for American foreign policy and the American peace movement. Warren Kuehl’s authoritative account of the development of internationalism up to the end of World War I touches upon the ideals of international law at the time, while Roland Marchand describes the role of lawyers in the peace movement. Calvin DeArmond Davis’ books on the Hague Peace Conferences of 1899 and 1907 demonstrate clearly that the study of international law served as the theoretical underpinning of the two conferences. Sondra Herman discusses the views of Elihu Root and Nicholas Butler.

There is, however, a dearth of historical works dealing with a younger generation of international lawyers who were emerging at the time. This group included Wright, Hudson, Charles G. Fenwick and Edwin M. Borchard. They were not only professors of international law, but also

activists who gave lectures before the public, testified before congressional hearings, and cultivated relationships with those in government. Their works and activities have cursorily been mentioned in some studies dealing with that era,19 but in other studies they have been rather neglected.20

Significantly though, more works on the main figure of this study, Quincy Wright, have appeared. The Journal of Conflict Resolution, on his passing in 1970, dedicated a whole issue to Wright and his works, discussing a wide range of issues from his contribution to international law to his theory in international relations.21 However, as the journal frankly acknowledged, this memorial issue handled the legal side of his contribution in a light fashion, presumably because the AJIL was reportedly planning a similar volume with more attention on the legal side. Yet, the AJIL never published that volume, while an obituary section in the AJIL was nothing more than normal coverage.22 This may reflect how legal scholars in the 1970s evaluated his scholarship and contribution. Interestingly, recent scholars have rediscovered him as a source of academic inspiration and some works on Wright have been published. But in doing so, they have highlighted Wright’s later scholarship with particular focus on his


20 For example, Justus D. Doenecke’s work on American opinion-makers and the Manchurian Incident, which covers such intellectuals as John Dewey and Walter Lippmann as well as religious and labor groups, hardly mentions international lawyers. Justus D. Doenecke, When the Wicked Rise: American Opinion-Makers and the Manchurian Crisis of 1931–33 (Lewisburg: Bucknell University Press, 1984).


accomplishment in postwar international relations. His thoughts and activities in the prewar period have yet to be fully investigated.  

Concerning the importance of legal thinking and legalism for American foreign policy, Jonathan Zasloff’s recent works share the basic premise that my work originates from. Zasloff was essentially right in pointing out that postwar historiography in diplomatic history has neglected the legal approach and that this was mostly due to the fact that diplomatic historians were rarely trained in legal history.

Fortunately, I had had academic training in jurisprudence when I embarked upon this project in 1990, holding LLB and LLM. In Japan in general, and particularly so at the university I graduated from, diplomatic history was taught in the law schools. My favorite subjects as an undergraduate were such subjects as Rechtsphilosophie or Roman Law rather than positive law. As far as the legal training prerequisite for this subject is concerned, it is possible to claim that I have fulfilled the condition set by Zasloff.

Turning to Zasloff’s main argument that classical legal thought influenced those “lawyer-diplomats” – Elihu Root, Charles Evans Hughes and Francis Kellogg, the major figures of my study – younger scholars – do not seem to easily fit into this school of thought. Rather, as will unfold in the following pages, they were determined to challenge their peers’ legal theory and authority.

Scholars in the field of legal history, international relations and American diplomatic history have noted the existence of different schools among American international lawyers during the interwar years. David J. Bederman’s work in the centennial volume of the AJIL argued that the


interwar period enjoyed an “intense intellectual ferment in international law.” He took an intellectual history approach to cover the main legal discussions held in the journal. The topics, legal arguments and personalities in his work in part overlap with the important lawyers and debates in my project. That in turn demonstrates that the leading actors in my work – Wright, Fenwick and Hudson – were neither insignificant nor obscure figures. For instance, he argued the Kellogg–Briand Pact and the Stimson Doctrine (Non-Recognition Doctrine) aroused debates among lawyers. However, Bederman does not distinguish these reformers from the earlier generation, either, and seems to argue that Scott and Wright belonged to the same school of thought.26

David Kennedy also traced the scholarly discourse among international lawyers in the United States, examining the significance of scholarly debates in the study of international law. He maintained that there were debates between different groups of scholars, and that some leading scholars emerged as central figures in presenting new ideas and principles. But his passages regarding the interwar years were short and general, and he did not discuss specific projects such as the Pact or the outlawry of war. He argued that there existed two schools in the interwar period – “positivists” as the mainstream and “naturalists” as their counterpoint. Yet, since he did not name any particular scholars, it is not clear that Kennedy’s categories match the traditionalist–reformer dichotomy presented in this book. His argument that naturalists faded away after disappointment with the League of Nations and the Permanent Court of International Justice (PCIJ) does not seem to apply to Wright and his colleagues.27 Mark Weston Janis’ book also traces the American experience in international law, referring to Root, Scott and Woodrow Wilson and covering the topics on the League, but it does not give any particular mention to reformers.28

A diplomatic historian, David Schulzinger, also refers to the division among lawyers. James W. Garner and Hudson are described as idealists who argued for ethical international law, while John Bassett Moore

and Ellery Stowell are described as realists. I believe, however, that these descriptions do not express the full content of these international lawyers’ arguments. On the other hand, Hidemi Suganami, a UK-based scholar of international relations, examined thinkers of international relations from the perspective of “domestic analogy.” Although he did not specifically deal with American lawyers, Suganami touched upon figures such as Lassa Oppenheim, Thomas Baty and Borchard. In Japanese academia, Yasuaki Onuma traced the gradual formation of the legal concept of Senso Sekinin [war responsibility] by examining the official state practices and academic discussions of the time and argued that the development itself was the manifestation of ideology supported by the Western powers.

In short, this work will describe interwar American international lawyers in a somewhat different and more meticulous constellation of personalities, classifying and sorting out the debates and scholarship in the discipline. The reformer-traditionalist framework, which is in fact based upon the groups’ self-identifications, will add a new dimension to the previously mentioned classifications of interwar lawyers’ scholarship.

The final category of previous literature is concerned with the role of lawyers in developing international law, or in other words lawyers as social engineers in facilitating causes and norms for international law. In this vein, my work follows the tradition of Martti Koskenniemi’s widely acclaimed work, Gentle Civilizer of Nations. In part, my work shares his interest in probing the ideas of modern legal thinkers. However, American scholars of the interwar period are not fully covered in the volume, while Koskenniemi deals with their contemporaries such as Hersch Lauterpacht, Karl Schmitt and Hans Morgenthau. It should also be noted that the international lawyers in my book are more than “gentle civilizers” because they were consciously and willfully committed to reform international law. They did not constitute an “invisible college” as Oscar Schulzinger, Making...

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