

# 2008

## h-diplo

### H-Diplo Article REVIEWS

<http://www.h-net.org/~diplo/reviews/>

No. 187a

Published on 23 July 2008

H-Diplo Article Review Managing Editor: Diane N. Labrosse

H-Diplo Article Review General Editor and Web Editor: George Fujii

**John Hepp.** "James Brown Scott and the Rise of Public International Law." *Journal of the Gilded Age and Progressive Era* 7.2 (April 2008): 151-179.

URL: <http://www.h-net.org/~diplo/reviews/PDF/Coates-Hepp.pdf>

Reviewed by **Benjamin Coates**, Columbia University

*Part 1 of an Article Review Forum (for part 2, a review by Peter J. Spiro, see No. 187b)*

---

During the first third of the twentieth century, international law boasted a surprisingly high profile among the American foreign policy elite. Not only did the United States take the lead in promoting public international law—enthusiastically attending two Hague Conferences (1899 and 1907) and advocating the use of arbitration and the creation of an international court—but lawyers also occupied the highest ranks of the State Department.<sup>1</sup> Indeed, nearly every secretary of state in this era was a lawyer.<sup>2</sup> Moreover, great swaths of the American economic, intellectual, and social elite eagerly embraced internationalist goals.<sup>3</sup> Yet the topic has attracted relatively little attention from historians. As a result, we still know too little about the implications of this fascination with international law, and even less about the individual lawyers who developed its framework and advised the government on its implementation.<sup>4</sup>

John Hepp's recent article, "James Brown Scott and the Rise of Public International Law," aims to renew interest in the topic. In Scott, Hepp has found an excellent subject

---

<sup>1</sup> Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations (1898-1922)* (Durham, NC: Duke University Press, 1999).

<sup>2</sup> Richard H. Steinberg and Jonathan M. Zasloff, "Power and International Law," in Lori Fisler Damrosch and Bernard H. Oxman, eds., *A Century of International Law* (Lancaster, PA: Cadmus Communications for the American Society of International Law, 2007), 66. In fact, the only non-lawyer to serve as secretary between 1889 and 1945 was Robert Bacon, a firm supporter of international law whose tenure lasted only a few months in 1909.

<sup>3</sup> David S. Patterson, *Toward a Warless World: The Travail of the American Peace Movement, 1887-1914* (Bloomington: Indiana University Press, 1976); David Nasaw, *Andrew Carnegie* (New York: Penguin Books, 2006), chaps. 34, 36, 39.

<sup>4</sup> The best attempt to fill this gap is Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era," *New York University Law Review* 78 (April, 2003): 240-373.

through which to do so. Scott was omnipresent in the international legal community from the late nineteenth century until World War II. As professor of international law, editor of a popular casebook on the subject, and secretary of both the American Society of International Law (ASIL) and the Carnegie Endowment for International Peace (C.E.I.P.), “he knew virtually everyone in the discipline and everybody knew him” (154). At the same time, Scott kept one foot in government service, serving as solicitor of the State Department from 1906 to 1911, technical delegate to the 1907 Hague Conference and the Paris Peace Conference of 1919, and advisor to seven presidents on matters of law and international relations (165-166, 172-173). Despite this impressive résumé, Scott’s legacy has faded. In 1975, a biographer found that many officials at the C.E.I.P.—an institution which Scott had directed for nearly 30 years—had not even heard of the man.<sup>5</sup> Hepp proposes that by restoring Scott to his rightful place, we may come to better understand both the “establishment of international law as a discipline” and the “era when lawyers *qua* lawyers began to help shape American foreign policy” (151). While Hepp’s is not the last word on the subject, his article offers a smart and accessible introduction and a rationale for further research.

The article begins with a clear exposition of Scott’s beliefs. Scott consistently maintained that international law was real law, fundamentally no different from its domestic counterpart. The lack of an international sovereign to enforce the law did not trouble Scott, for, he claimed, people obeyed law because they internalized its values, not because they feared punishment. In an international context, this meant that public opinion would force governments to follow the law. Scott saw international law as an organic body of principles which evolved slowly but in a progressive direction, like the English common law. The task of the international jurist was to discover and refine the true principles of the law and to render them transparent to the educated public. To supplement public opinion, Scott promoted an international court, whose impartial judges would settle inter-state disputes. Indeed, the creation of such a court remained Scott’s *raison d’être* until his tireless advocacy helped to establish the Permanent Court of International Justice in 1921 (23-24). For Scott, law gave structure to the international community and promised a peaceful future. As he wrote to a correspondent in 1915, “I feel that peace between nations can only come by the slow and gradual development of the system of law, and by the creation of agencies for its interpretation and administration” (160).

Hepp makes clear that Scott’s advocacy for international law as a solution to global problems stemmed not from any particular analysis of international politics, but rather from the ideology of domestic law itself. In other words, “much of [Scott’s] worldview can be linked to his profession and its values” (154).<sup>6</sup> As evidence, Hepp points to Scott’s

---

<sup>5</sup> Ralph Dingman Nurnberger, “James Brown Scott: Peace Through Justice” (PhD diss., Georgetown University, 1975), iv-v.

<sup>6</sup> Hepp is not the first to emphasize the domestic origins of international law, but other analyses of this relationship have focused more on the political and social environment than the tradition of domestic law itself. See C. Roland Marchand, *The American Peace Movement and Social Reform 1898-1918* (Princeton,

embrace of the case method, an approach to the study of law that was quickly becoming dominant in law schools around the country.<sup>7</sup> Scott not only edited a casebook on international law, he became the editor for the entire American Casebook Series, issued by the West Publishing Company of Minnesota (well known to lawyers today as Westlaw) (157). “Had he not discovered international law,” Hepp asserts convincingly, “he could have joined colleagues at Columbia University Law School in penal reform or any number of fields upon which domestic lawyers focused” (154). Part of the appeal of the case method lay in its claims to scientific rigor. While most historians have dismissed these claims, Hepp contends that case method practitioners were indeed practicing science. Their categorizing of legal principles emulated the elaborate taxonomies compiled by the botanists of their youth: “If we listen to what Scott and his friends were saying and look at what they were doing, it becomes clear that they were borrowing the methodology of the nineteenth-century life sciences and applying it to the study of law” (163). Adherents believed that successive generations would continuously refine their studies until eventually, “when lawyers at last understood all the rational principles that underlay international law, order could be created throughout the world community” (164). The belief in law as a science thus underpinned Scott’s confidence in legalist prescriptions for world peace.

While this portrait of Scott’s legal thought is persuasive, one wishes that Hepp had addressed the work of another biographer who offers quite a different interpretation. Christopher Rossi’s 1998 *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law*, depicts Scott not as a man concerned with precedent and the common law, but instead as a natural law visionary. As Rossi tells it, Scott rejected the entire positivist tradition of international law and instead looked to Catholic morality as a source of legal principle.<sup>8</sup> Rossi’s work is an outlier among those who have written about Scott, perhaps because he focuses almost exclusively on Scott’s post-World War I thought.<sup>9</sup> Nonetheless, it is unclear whether this difference is merely an artifact of Rossi’s interpretive method, or if it reflects a real shift in Scott’s thinking later in life. Though Hepp claims that Scott’s views “would change very little throughout his long career,” his study emphasizes little of Scott’s post-1920 work.

If Scott’s firm legalist convictions help to explain his lifetime commitment to law, they also delimited the contours of his internationalism. Focused on legal solutions to world

---

NJ: Princeton University Press, 1972), chap. 2; Carl Landauer, “The Ambivalences of Power: Launching the *American Journal of International Law* in an Era of Empire and Globalization,” *Leiden Journal of International Law*, 20:2 (2007): 325-358.

<sup>7</sup> William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* (New York: New York University Press, 1978).

<sup>8</sup> Christopher B. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague: Kluwer Law International, 1998).

<sup>9</sup> Other interpretations which more closely resemble Hepp’s include Nurnberger; Hatsue Shinohara, “Forgotten Crusade: The Quest for a New International Law” (PhD diss., University of Chicago, 1996); and James Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, CT: Greenwood Press, 1982), chap. 5.

problems, Scott rejected the politically-oriented League of Nations (“I am not a League-ite,” he remarked in 1923).<sup>10</sup> His legal approach also placed him in a conservative position compared to those, such as Jane Addams, who recommended more thoroughgoing reforms of the international system.<sup>11</sup> C. Roland Marchand and other historians have even argued that it was precisely the right-wing politics of international law that made it so appealing: promoting law abroad enhanced the prestige of much-criticized conservative courts at home.<sup>12</sup> Though Hepp acknowledges Scott’s “conservative means,” he tends to downplay this aspect of the movement, preferring to focus on the intellectual currents that place it in the broader context of Progressivism (153). Yet this conservative social context ought not to be overlooked: to include under the umbrella of Progressivism such champions of laissez-faire as attorney Joseph Choate and Supreme Court Justice David J. Brewer (both vice presidents of the ASIL) is to stretch even that legendarily protean category to the breaking point.<sup>13</sup> Scott, it should be said, had decidedly more liberal social views, underlining the importance of not treating the international legal movement as a monolith.

By focusing primarily on the domestic setting, Hepp, like other historians, has largely overlooked key trans-Atlantic and Pan-American contexts of the American legalist project. To begin with, “domestic” thought had an international pedigree: ideas traversed the Atlantic with particular vigor during the Progressive Era.<sup>14</sup> Hepp alludes to this European influence by noting that Scott—like many of his contemporaries—studied law in France and Germany and counted among his friends many European legal scholars (155, 168). Yet Scott’s transnational convictions went further: in a very self-conscious way, Scott envisioned American international law as existing within an international community of scholars. At the center lay the European-based Institute of International Law (I.I.L.), the world’s premier society of legal scholars. As director of the C.E.I.P.’s Division of International Law, Scott funneled \$20,000 annually to the I.I.L. In exchange he convinced the Europeans to elect more American members and to appoint a

---

<sup>10</sup> Georgetown University Special Collections, James Brown Scott Papers, Box 9, Folder 1, James Brown Scott to Henry White, 11 April 1923.

<sup>11</sup> On the relationship between the internationalism of the lawyers and that of Addams, see Sondra Herman, *Eleven Against War: Studies in American Internationalist Thought, 1898-1921* (Stanford, CA: Hoover Institution Press, 1969). More adventurous international lawyers such as Charles Fenwick and Quincy Wright also diverged from Scott. For an account of the division within the international legal academy, see Shinohara.

<sup>12</sup> C. Roland Marchand, *The American Peace Movement and Social Reform 1898-1918* (Princeton, NJ: Princeton University Press, 1972), chap. 2; Michael A. Lutzker, “The ‘Practical’ Peace Advocates: An Interpretation of the American Peace Movement, 1898-1917” (PhD diss., Rutgers University, 1969); Carl Landauer, “Ambivalences of Power.”

<sup>13</sup> Arnold M Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, NY: Cornell University Press, 1960); *Proceedings of the American Society of International Law* 1 (1907): 9. On Progressivism as an expansive category, see Daniel T. Rodgers, “In Search of Progressivism,” *Reviews in American History* 10 (Dec, 1982): 113-32.

<sup>14</sup> Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998).

permanent committee to advise the American Endowment.<sup>15</sup> Scott saw the I.I.L. as a model as well as a source of expertise; in 1912 he founded the American Institute of International Law, “which will do for the countries of the Western Hemisphere what the Institute of International Law has done for the world at large.”<sup>16</sup> Yet while seeking to emulate Europeans, Scott simultaneously sought to convince them of the superiority of the American experience. He contended, for instance, that in replacing the Articles of Confederation with the Constitution, the United States had already “solved” the problem of international organization (and he maintained that the Supreme Court was really an “international” court).<sup>17</sup> This mix of exceptionalism and cosmopolitanism played an important role in Scott’s activities, and should be weighed alongside his domestic legal objectives.

What of Hepp’s suggestion that Scott and other lawyers helped to shape American foreign relations? In the course of describing Scott’s many official and unofficial government positions, Hepp shows convincingly that policymakers sought and valued Scott’s advice. Yet precisely what advice Scott provided or what effects it may have had remains murky. If Scott did shape policy, it is not clear in what direction he moved it. Ultimately, Hepp deems Scott “a frustrating person to study” because “it is difficult to judge from the surviving records his actual influence over policy” (154). Hepp does not provide any citations from the State Department collections at the National Archives; absent such a survey, this frustration with the “surviving records” may be premature. Nonetheless, there is still merit in his call for students of foreign relations to “[focus] on the people who actually did the work” of international law (179).

One way to assess lawyers’ “actual influence over policy” would be to analyze their function, as a group, inside the State Department. The Department Counselor, Solicitor, and their respective staffs had first responsibility for many issue areas, ranging from extradition and citizenship to the protection of American nationals and businesses abroad. During World War I, interpreting the complex laws of neutrality required a host of legal advisors.<sup>18</sup> If we seek to understand the role of “lawyers *qua* lawyers” in the shaping of foreign policy, it would be helpful to know how men like Scott, John Bassett Moore, and Frank Polk applied their legal knowledge to discrete problems. Evidence of

---

<sup>15</sup> See the correspondence in Columbia University Rare Book and Manuscript Library, Carnegie Endowment for International Peace collection, vol. 252. While Hepp has carefully mined Scott’s papers at Georgetown University, he does not seem to have examined the C.E.I.P. collections, which contain a great deal of Scott’s correspondence.

<sup>16</sup> C.E.I.P. papers, vol. 254, Scott to T.J. Lawrence, 5 November 1912. For more on the American Institute of International Law, see Christina Burnett, “The Monroe Doctrine Rightly Understood: Empire and International Law in the Americas on the Eve of World War I” (unpublished manuscript).

<sup>17</sup> James Brown Scott, *The United States of America: A Study in International Organization* (New York: Oxford University Press, 1920).

<sup>18</sup> For an index to some of the topics addressed by the solicitor’s office, see National Archives II, Department of State Records, RG 59, Source Card Index 1910-1944, “Solicitor’s Office.” For topics covered by the Counselor, see for example the papers of John Bassett Moore and Lester H. Woolsey held in the Library of Congress, Manuscripts Division.

discernible patterns in the way that these lawyers executed department business would do much to validate Hepp's contentions.

Alternatively, historians might examine the impact of legal concepts on the ideology of the American foreign policymaking establishment. At the end of his article, Hepp briefly offers such a hypothesis: "One possible conclusion from this effort may be that the Progressive Era legal discourse, which was heavily steeped in the language of international law, provides a unifying theme in American foreign relations during this period" (178). This is an intriguing proposition, one deserving of further development. Might legal ideas have influenced the construction of American national identity, or have shaped perceptions of the national interest?<sup>19</sup> One hopes that Hepp may find room in his future work to address this topic at length.

Finally, historians should not assume that international law is necessarily opposed to the exercise of American power. To his credit, Hepp resists adopting the "either/or" approach that contrasts a beneficent legalism of "restrained and multilateral diplomacy" with an "aggressive," bordering on cartoonish, policy of intervention and imperialism (152-3). Instead, Hepp notes that "many individuals divided their allegiance between the two camps" (153). But one could go further: rather than two opposing camps, one marked "imperialism" and the other, "international law," one might consider the two concepts as occupying the same campground, if not sharing the same tent.<sup>20</sup> Instead of antagonists, one might see international law and imperialism as manifestations of the same Western rationalizing impulse. While implying different means, each contemplated an organization of the world under Western principles. At times, such as the protection of property rights, the two overlapped.<sup>21</sup> Studying international law as a nexus of global economic, strategic, and ideological forces can thus aid historians in understanding the place of the United States in the world. For its lucid interpretation of James Brown Scott, a key interpreter of this relationship, John Hepp's article deserves wide readership.

---

<sup>19</sup> The literature on possible approaches to the intellectual and cultural history of foreign relations is vast. For a recent discussion in these (electronic) pages that cites a great deal of it, see Walter Hixson, H-Diplo review of Peter Jackson, "Pierre Bourdieu, the 'cultural turn' and the practice of international history," *Review of International Studies* 34.1 (2008): 155-81, <http://www.h-net.org/~diplo/reviews/PDF/Hixson-Jackson.pdf>, published by H-Diplo on 23 April 2008. See also the accompanying article and Jackson's response.

<sup>20</sup> Carl Landauer portrays American international lawyers as "ambivalent" about American imperialism (Landauer, "The Ambivalences of Power"). Martti Koskenniemi notes that European international lawyers did little to restrain European colonialism, and often enabled it (Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002), chap. 2). And Antony Anghie argues that "colonialism was central to the development of international law" and that the former continues to pervade the latter (Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 2).

<sup>21</sup> Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley: University of California Press, 1985), chap. 2.

## H-Diplo Article Review

**Benjamin Coates** is a PhD candidate at Columbia University. His dissertation focuses on American international lawyers and United States foreign relations between 1898 and 1919.

*--Commissioned for H-Diplo by Diane Labrosse*

---

### Copyright © 2008 H-Net: Humanities and Social Sciences Online.

H-Net permits the redistribution and reprinting of this work for non-profit, educational purposes, with full and accurate attribution to the author(s), web location, date of publication, H-Diplo, and H-Net: Humanities & Social Sciences Online. For other uses, contact the H-Diplo editorial staff at [h-diplo@h-net.msu.edu](mailto:h-diplo@h-net.msu.edu).

*Commissioned for H-Diplo by Diane Labrosse*