PART THREE

The Construction of the United States as the Major Protagonist in Promoting Legal Revolution

AS NOTED IN PART II, the study of the role of law in change and continuity requires us to look beyond comparative national contexts and examine the more complex *interconnected* national and transnational stories that are vital to understanding legal revolutions. These stories must include colonial and imperial activities, which play key roles in processes of constructing legal capital and determining what goes into it. Imperial competition helps shape and define the values of local capital in many different settings through its links to dominant colonial or imperial powers. The dominant imperial power or powers help define what makes law legitimate and seemingly "universal."

Our theoretical approach is built around capital conversion, fluidity, and ongoing change—with changes also reflecting stories of continuity in the hierarchies of the legal field. Challenges are posed, and then absorbed so as to rebuild—at least for a time—the legitimacy of the legal field. We focus especially on challenges related to familial capital versus scholarly and meritocratic capital, and on the relationships between law and lawyers and the state. In this regard, the previous chapter was intended not to provide a unified history but rather to show the beginnings of the processes and approaches that emerged early in the history of the legal profession and became part of colonial competition. We now turn to the United States, not because any grand narrative leads us there, but rather because that nation has emerged out of these fluid and shifting processes as the main protagonist in the legal revolution that is the subject of this book.

The structure of the legal field in the United States has shifted over time. We can say, though, that the current structure has its roots in internal and international developments in the late nineteenth and early twentieth centuries. These

are discussed in Chapter 4. Central to the US transformation was a group of meritocratic newcomers associated with legal education reform at Harvard University, who formed alliances with gentlemen lawyers, corporate law firms, robber barons, and anti-corruption reformers. Elite US lawyers and academics late in the nineteenth century also borrowed from German universities, drawing on the credibility of European-based international law to create a hybrid form of legal education and a kind of US exceptionalism as an anti-colonial imperial power exporting its own universals around the world.

The second chapter in this part (Chapter 5) traces the booms and busts that have replenished and maintained the legal capital associated with the alliance of elite legal education and large corporate law firms. An enduring feature of the legal field in the United States is that its history of few barriers to entry makes it more open to legal revolution than is the case in countries with more homogeneous and closed legal professions. Legal scholarship moves more quickly to adapt to changing political and social movements. But there are still booms and busts, and we trace three major periods in US history—the New Deal, the civil rights era, and the present age of local and global neoliberalism. The rise in the importance of law professors and legal scholarship is part of that account. The ability of corporate law firms to maintain their position at the top of the legal hierarchy despite strong political change has become an enduring feature of the US legal field.

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US Legal Hybrids, Corporate Law Firms, the Langdellian Revolution in Legal Education, and the Construction of a US-Oriented International Justice through an Alliance of US Corporate Lawyers and European Professors

The United States is the most important protagonist in the legal revolution that is the subject of this book. The shifts in the US legal field over time, especially since the domestic and international developments of the late nineteenth and early twentieth centuries, are the subject of this chapter. We describe the processes that led to the rise of the corporate law firm to the top of the US legal hierarchy and the relationship between those firms and the reforms to legal education led by Harvard Law School. The process involved the same patterns of boom and bust we have seen elsewhere as lawyers broker political, social, and economic changes over time. The more specific historical transformations were from a colonial legal profession oriented toward British governance, to cosmopolitan elite lawyers as leaders of the American Revolution, to the Jacksonian period of challenge to that elite, and then, after the Civil War, to the rise of corporate law firms and partners to the top of the profession. The corporate firms, which emerged first on Wall Street, blended gentleman-lawyers with a group of meritocratic newcomers—a variation of the story of the relationship between family capital and meritocratic and scholarly capital. The corporate lawyers gained relative autonomy through public service; they represented robber barons but were also anti-corruption reformers. Then late in the nineteenth century, they borrowed the credibility of continentally based scholars and the international law they promoted to recast the United States

as an "anti-colonial" imperial power that was beginning to export its own universals around the world.

The early colonial period was characterized by strong hostility to lawyers (e.g., Henretta 2008). The colonial lawyers gradually gathered strength, however, partly as a result of their service to the British administration. Around 1700, according to Henretta, "a new legal regime staffed by lawyers was coming into existence in British North America. An important cause was the program of imperial administrative and legal reform undertaken by legal officials in the 1680s" (564–65). By 1720, there was a "nascent system of common law courts" (569) and a more English style of procedure and advocacy. As elsewhere, lawyers who settled in the colonies prospered through their service to the colonial administration.

It is unclear how many lawyers there were in the colonies prior to independence (Konefsky 2008: 71), but it can be said that "the social power and influence of colonial lawyers far exceeded their numbers" (71). Legal arguments were central to the American Revolution and to the crafting of the Constitution. Clearly, then, the position of lawyers was relatively strong at the time of independence. Not surprisingly, after the war lawyers sought to be the "American aristocracy" that Alexis de Toqueville would identify in the 1830s (74). But the prominent role of elite lawyers linked to the former colonizer did not go uncontested.

There persisted an enduring populist antipathy to legal elites. North America, as Nancy Isenberg (2016) notes, was largely populated not by industrious strivers for upward mobility celebrated in US mythology, but rather by what the English in particular saw as a population surplus of vagrants and others unable to survive in England. Many of these settlers became squatters as part of the movement west. Isenberg vividly depicts these "white trash" and shows how uneasily they coexisted with the elite leaders of the American Revolution, many of whom were lawyers. Descendants of these settlers have kept alive the anti-elitist stance of this group, with implications for the role of lawyers.

The Jacksonian revolution in the 1820s and 30s attacked legally educated leaders in the name of the more rural and uneducated group identified with the descendants of the squatters and vagrants (124). When Andrew Jackson ran against John Quincy Adams in 1824, for a notable example, Jackson's supporters praised their candidate as "self-taught" and noted his lack of diplomatic experience as meaning he was "less contaminated than the former diplomat Adams by foreign ideas or courtly pomp" (125). As Isenberg states, "the class comparison could not have been ignored. Adams had been a professor of rhetoric at Harvard," whereas Jackson sprang from a common family (125). The elite law of the period was waning in influence, anti-elite populism was on the ascendant.

This popular movement around Andrew Jackson "created a difficult environment for 'the natural aristocrat in America' with attacks on lawyers peaking in the 1830s" (Katcher 2006: 345; Stevens 1983: 5). Local bar associations declined in importance during this period, to the point of collapse (5), as did standards for

admission to the bar (Friedman 2005: 237). Oral bar examinations became relatively "casual" (Stevens 1983: 25), enough so to lead to a decline in institutionalized legal education. The requirement of study in a lawyer's office for admission to the bar became less strict. Proprietary schools that had "been absorbed by or affiliated with a college" shrank in number (Katcher 2006: 345): "Towards the middle of the nineteenth century, fewer than ten university-affiliated schools existed, with altogether only 345 students" (345). Bar associations that had existed since colonial times waned and essentially "collapsed after 1800" (345).

The rise of Jacksonian democracy, anchored in the west among a lower class of migrant squatters, meant more generally that there was little respect for law and lawyers and for lawyers as natural aristocrats. But all of this led to backlash against the Jacksonian era that opened up opportunities to relegitimate what Toqueville had celebrated, and relatively elite education began to return before the Civil War and in its aftermath. Yet even though the bar had begun to grow as restrictions on membership were lifted, by 1860 there were still "only a few cracks in its façade of social class" (Konefsky 2008: 86). Stratification within the legal profession continued to exist but began to be identified much more with clients as corporate wealth began to build. Railroad attorneys emerged as part of what Konefsky describes as "a segmented and stratified profession . . . reinforced by social kinship and family networks" (89). The profession was much larger than in England or on the Continent, but it retained an elite core traceable to before the American Revolution. As we shall see, the leading corporate lawyers in the United States naturally looked to build connections with the long-established and respected European legal elites.

The United States also began to develop a hybrid system of legal education broader than the British system of apprenticeship, which was based largely on family capital. It drew inspiration in educational matters mainly from England at the time of independence. This meant that the first law schools were largely modeled not on the universities in England, which had little to do with preparing people for admission to legal practice, but instead on the practical apprenticeship that was then the practice of the English bar. The Litchfield School in Connecticut, which operated from 1784 until 1833 (Coquilette and Kimball 2015: 33), is one famous example of this kind of education. Harvard Law School, founded in 1817, also drew inspiration from that model of apprenticeship. But the elite members of the bench and bar in the United States were also inspired through their own readings of the Corpus Juris Civilis, scholarly works on Roman and Continental law (40–41), and Blackstone's lectures at Oxford beginning in the mid-eighteenth century on the laws of England (62–63). Though immersed in the common law, they shared a scholarly interest in formal legal theory linked to Roman and canon law. They imbibed legal formalism less from schooling and more from individual study linked to European legal history. The colonial version of legal training and learned law was thus a hybrid model that very early did not fit the categories of law school versus apprenticeship or civil law versus common law.

Harvard Law School became the most important US law school soon after its founding, and a small group of aspiring elites from the North and the aristocratic slave-owning South enrolled there to build on and legitimate their family capital for careers as lawyers and politicians. The professors who taught at Harvard Law School, especially under Joseph Story in the years prior to the Civil War, focused their learned output on legal treatises: "The treatise drove the curriculum, the faculty's scholarship, and the pedagogy" (166). The treatises were the basis for teaching as well as guides to future legal practice; they simplified teaching to groups and built also on professors who were notables more generally in the legal profession (173). Treatises took advantage of established names in the profession and bolstered reputations largely made outside of the legal academy.

From its inception, various other features of US education helped distinguish US law schools from their European counterparts. The success and autonomy of the medieval university, as noted, was based to a great degree on "its ability to operate in the space between church and state" (Labaree 2017: 18). In the United States, the relationship between church and state was different. US education generally arose, as Labaree noted, "in a setting where the market was strong, the state was weak, and the church was divided" (18). Accordingly, "neither church nor state could establish dominion over this emerging institution, and the market gave it the ability to operate on its own" (18). While "European universities lost much of their autonomy in the early modern and modern period, as the authority of the church declined and they became increasingly subordinate to a state whose rational-legal authority grew beyond challenge" (18), US universities have been able to thrive in the very competitive marketplace outside the state. Private universities—or public ones that behave just like private ones—are at the top of the hierarchy in the United States, while public universities hold sway in Europe.

Competition in the United States led to a proliferation of universities and, later, law schools. There was no US national church, and as one consequence, different religious groups competed to build religion-based colleges. Furthermore, the abundant land in the United States led to the construction of schools, including many colleges, for the purpose of attracting settlers and enhancing land values. Thus, as Labaree notes, the United States had 50 colleges and universities in 1850 but 811 by 1880, compared to 10 in the United Kingdom in 1880, 22 in France, and 160 in all of Europe (27). The large number of schools and the relatively open market became a characteristic of legal education as well in the United States.

MERITOCRACY AND CORPORATE LAW AT HARVARD

The naming of Christopher Columbus Langdell as the new Dean of the Harvard Law School in 1870 was a key moment in the transformation of the legal profession and legal education in the United States. His appointment was part of Continental-inspired academic upgrading of Harvard University promoted by Charles Eliot,

the new president, inspired by two years of studying education in Europe. Langdell, a graduate of Harvard Law School, came from relatively modest means, and that background made him a passionate believer in academic merit as opposed to family capital. He would invest that belief, with mixed success, in his vision of legal education. He also brought to his deanship a particular practical experience that strongly shaped his agenda.

After graduating from Harvard Law School in 1855, he had begun to practice law on Wall Street. By 1860 his practice was thriving. Indeed, according to Coquillette and Kimball (2015), he helped establish a potential "new role in litigation," characterized by "the extensive written brief that was beginning to displace the weight of oral argument in complicated cases arising from large and intricate commercial transactions in the burgeoning economy of the growing nation" (308). These complex documents took advantage of the resources of the emerging corporate law firms, whose clients were able to pay huge legal bills. Yet Langdell grew disaffected with the New York City bench and bar, which he linked to corruption and Tammany Hall politics (Kimball and Brown 2004). His learned briefs made a stark contrast, no doubt, to the style of practice that prevailed in the New York courts.

Langdell's goal at Harvard was to "elevate and legitimate legal practice and the legal profession . . . through demanding legal education" (Coquillette and Kimball 2015: 319). That meant avoiding any talk of "fairness and policy." Such arguments played into the hands of Tammany Hall and undermined "the idea of legal science, the purpose of a university law school, and fundamentally the principle that cases are decided by law, not the whims of judges" (319). The "merchant class," whom he had represented, "demanded that cases be conducted 'by trained judges . . . and governed by known precedents rather than desire to do justice" (326), which could be used as an excuse to rule against corporations. Property and contract rights would be enforced by properly trained lawyers and judges schooled in the formal law (334). Langdell lamented that successful practice in New York did not "necessarily depend on legal expertise and that absent such dependence, the legal system and entire polity were at risk." His commitment was to "legal science," which he identified with "formal consistency" (334).

His belief in legal science was also consistent with his focus on academic merit. It is noteworthy that he refused to dine with the academic overseers as part of an interview for the deanship at Harvard. Also, he sought to hire not the notables of the law—judges and famous lawyers—who had dominated Harvard's law faculty, but rather recent graduates whose only claim was that they had excelled academically. The teaching of law was to be a career, consistent with the forefront of the "movement to professionalize faculty that emerged at universities in the United States" in the decades between the Civil War and the First World War (385). Langdell battled with faculty over hiring decisions and faced resistance from those more invested in a professional hierarchy that favored the notables. Several times,

in fact, "professional reputation trumped Langdell's principle [of merit] in hiring" (393). Nevertheless, according to Coquilette and Kimball, the principle of hiring on the basis of "academic merit" had triumphed by 1900 (401).

Also controversial was Langdell's rigor in grading. He did not want to make it easy for those with family capital to gain a law degree; they had to commit themselves to the task. It is telling that his critics complained that faculty conflict could have been avoided "if Mr. Langdell had been a gentleman" (402). In fact, Langdell fought against the system controlled by gentlemen. In addition, the casebooks that Langdell and his followers created formalized and systematized the law. The education that Harvard provided with the new case method and academic rigor was just what Wall Street wanted and, as noted earlier, what Langdell had sought to bring to New York City and elsewhere.

Langdell joined with the emerging corporate law firms to battle against the existing legal establishment, which at the time was composed of a combination of legal notables, inheritors of family names and capital, and urban power brokers. His fight on behalf of merit and neutral legal science was not entirely successful, but it still had a powerful impact on the legal profession. The corporate law firms made a place for the new and more meritocratic law graduates, building on the formula of Sullivan and Cromwell, which combined family capital, represented by Cromwell, with the more meritocratic credentials of Sullivan.

The "marketplace of legal education" (415) was transformed: "The job market began to favor the strongest students at the most demanding school. Already in the mid-1880s, the Law School was 'unable to fill all the places in lawyers' offices which have been offered" (415). Most importantly, corporate law jobs became the goal of those attending the top law schools, and "students seeking to enter leading firms began to flock to the Law School … in the 1890s . . . bolstered by the emergence of law practices serving large industrial corporations during the economic expansion." Harvard and then schools such as Columbia and Yale participated in this boom as "the corporate law firm rose to the apex of the legal profession in the late nineteenth century" (471). For elite firms, litigation skills began to take second place in their practices to skill with complicated commercial transactions.

In short, "the success of case method teaching at [Harvard] Law School was therefore associated with the shift in the nature of the legal expertise and with the hiring criteria of elite law firms" (471). Langdell had largely succeeded in his efforts to transform legal practice. The legitimacy of the law school/corporate law firm alliance was furthered by the commitment of Harvard Law School to meritocratic admission and the close attention paid by the firms to law school grades.[1] It was not that social class was irrelevant in the law firms or in the law schools. For example, there were important social clubs and activities at Harvard to which elites had privileged access (585). And the criteria for admission to Harvard Law School depended on the "quality of the college degree" (474), which actually made it very difficult for graduates of Catholic schools, for example, since very few were

on the acceptable list. There were none in 1893, and only later was Notre Dame added. Women were not admitted, minorities were very few, and the entry of Jews had a spotted history despite prominent graduates such as Louis Brandeis and Felix Frankfurter.

Langdell and allies in the corporate law firms and legal academia helped bring meritocratic scholarship and academic excellence to the elite of the legal profession, and this, combined with the rising status of corporate law firms, brought new credibility to the profession generally. In addition, as noted below, the corporate law firms that gained prominence did not neglect the importance of social capital. To be sure, they hired the meritocratic Harvard graduates, but they coupled those hires with recruits from the upper crust of New York bourgeois society (for the situation in the 1960s, see Smigel 1964).

The success of these well-trained corporate lawyers was impressive. At one level the success was in gaining credibility for a retooled elite of the legal profession. The Wall Street law firm had initially faced resistance within the bar for adopting the role of hired gun for the so-called robber barons, who included J.P. Morgan, Andrew Carnegie, and John D. Rockefeller (see, e.g., Powell 1988 on the rise of the city bar). Even so, those corporate firms were soon at the top in terms of professional prestige. They reshaped the professional elite through a combination of public service, family capital, meritocracy, and cosmopolitanism (Gordon 1984). This hybrid institution combined elements of the European-developed roles of power broker between state and private power, tribune for social causes, and upholder of state power.

By the early twentieth century, the public service activities of the Wall Street lawyers-statespersons included working with their clients to build philanthropic foundations to support moderate social reforms (thereby containing pressures for more fundamental social change). They continued to serve and profit from their corporate clients, but they also built autonomy by helping enact rules that tamed some of the excesses of competition and corporate power. The law firms prospered, and their clients in turn benefited from rules of the game that allowed them to operate more legitimately and still thrive. In the Progressive Era, these lawyers and their allies in the high courts and the government effectively absorbed, contained, and channeled external challenges to their clients and their position by steering those challenges toward moderate and relatively unthreatening legal reforms (Kolko 1965, detailing the roles of, in particular, Philander Knox and Elihu Root, two major corporate lawyer-statespersons).

The law schools modeled on Harvard late in the nineteenth century also increased the importance of academic lawyers as such in the United States. Teaching was increasingly being conducted by full-time professors charged with producing legal scholarship. The Langdellian revolution was the key to the emergence of what Thomas Grey (1983) called "classical legal orthodoxy" as well as to the beginning of "legal thought" in the United States. As Tomlins (2000) has shown,

the development of the case method, legal science, and full-time legal academics was in part a competitive response to the rise of the social sciences in the universities modeled after those of Germany. These developments helped shift the US legal field in the direction of more prestige for legal academics than was the case in the British system (which the United States had inherited). And that shift was only just starting.

US law professors with academic legal theories were not at that time highly respected members of the legal hierarchy. The corporate bar, as Langdell had hoped, took advantage of the "legal science" developed through full-time professors and the case method at Harvard to bolster their own credibility. They in effect outsourced training and sorting for selection into corporate practice to the leading law schools, beginning with Harvard. But Langdell's successful exclusion of "professional reputation" as a basis for hiring meant that professors were not the type of people the elite of the bar most respected. Also, the corresponding commitment to hiring top graduates a few years after they had finished law school and committing them to full-time teaching and scholarship limited those graduates' opportunities to build stature by combining practice with teaching.

There was therefore an unequal division of labor: a key role of law professors was, in addition to training law students in legal science, systematizing and cataloging the law as pronounced by high court judges responding to the arguments of leading practitioners (Shamir 1995). The American Law Institute, founded in 1923 with funding from the Carnegie Foundation, and spearheaded by Elihu Root, reflected this balance of power (Legemann 1989). Academics were to be "reporters" providing a systematization of an area of law; notable judges and practitioners would then examine the "restatement" and shape it to fit their perspectives. Felix Frankfurter in 1915 stated this understanding at an American Bar Association annual meeting: "What we need are doctrinal writers—men who labor steadily upon law as an organic whole, who produce tentative working hypotheses to be tested, revised and modified as the actualities of the controversy require. For the work of the law schools must meet the tests and suffer the modifications of practical experience. Bench and bar will apply such tests and make such modifications" (in Boyd 1993: 18).

The legal academic profession was at the early stage of building autonomy from and parity with practice. Academics adopted a position that was more reformist and that began to be more open to social science than that of the practitioners or the pure Langdellian formalists (Auerbach 1976: loc. 943). Auerbach observes that "law teachers were distinguished by their sensitivity to the sociolegal implications of [social problems coming with urbanization and industrialization]" (loc. 943). Roscoe Pound noted the "need . . . for teachers trained in economics, sociology, and politics, who were thereby equipped 'for new generations of lawyers to lead the people'" (loc. 996.).

Prior to the Great Depression, put more strongly, law professors "were marginal" both to the academy generally and to legal practitioners (loc. 952). Legal theory produced by academics was of relatively little importance in academic or public policy debates. The rise of legal education in the United States did not therefore mean a replication of the German model of learned professors speaking the law. The leaders of the legal field were the elite corporate practitioners and the most prominent judges, and they looked to Europe when they sought law professors with prestige. When they needed academic credibility both within and outside the United States, they used cosmopolitan connections with European law professors (see below).

After the wave of activity in the Progressive Era, these leaders of the corporate bar had become relatively complacent. By the time the Great Depression hit, they were closed off from new social movements and the increasingly important social science disciplines. They were generally quite content with legal education that emphasized only the formal law and that produced lawyers using that education to fight for corporate interests and property rights in the courts and in the legislatures. Their own reform efforts in legal education, led by Elihu Root and continuing into the 1920s, were strategies mainly to attack the proliferating night law schools that served immigrants and others who lacked the credentials to attend the elite schools (Boyd 1993; Auerbach 1976). Graduates from those schools, to return to Langdell's concerns, were more likely to be closer to urban machine politics than to the pure law taught at Harvard. The boom period had come to an end—the elite of the bar had adopted a defensive posture and begun to lose credibility.

As discussed below, the leaders of the corporate bar strongly opposed the New Deal and the reforms associated with it, and this provided an opportunity for a new and expanded academic/political alliance to reshape but also preserve the hierarchies of the legal field and the power embedded in them. Before discussing the Depression and the New Deal in Chapter 5, however, it is important to examine the interconnected rise of international law and an international legal field built out of elite cosmopolitan connections.

As noted in Chapter 3, a trans-frontier dimension played an important role in early European legal history. Lawyers constructed their autonomy and credibility in part by operating in multiple sites above but also within the city-states. They acquired a cosmopolitan capital that allowed legal elites to play in national as well as transnational fields. In particular, the descendants of aristocratic and patrician families played a key role in the construction of the modern state because they could rely on family resources that permitted them to connect themselves to trans-frontier power through networks inside and outside the city-states. We see the same mechanism operating with legal elites involved in the emergence of the field of international law late in the nineteenth century.

REMAKING CORPORATE HIRED GUNS INTO "MERCHANTS OF PEACE": NATIONAL ORIGINS OF AN INTERNATIONAL FIELD

The story of the development of an international legal field is indeed part of the interconnected histories of competing European empires and the growing power of the United States. We see the complementary forms of academic, political, and philanthropic capital, providing what we shall call "International Justice" with its initial accumulation of expertise, mixing diplomatic skills with the professional legitimacy of the key national legal fields.

The alliance that produced what became International Justice had on one side Europe, with Continental professors seeking to promote new learned disciplines marginalized within the doctrinal hierarchies that dominated their milieu (cf. Sacriste and Vauchez 2007; Sacriste 2011); and on the other side of the Atlantic, a small elite of Wall Street lawyers seeking to enhance their legitimacy as lawyers-statespersons (Dezalay and Garth 2010; 2016). The latter invested the resources of their long-standing patrons, the "robber barons," whom they had converted into philanthropists/statespersons, into learned European law idealized as an instrument of universal peace.

The individuals who engaged in the creation, institutionalization, and routinization of new legal practices and institutions had in common the accumulation of multiple expertises and resources—national and cosmopolitan; they were jurists/diplomats and lawyer/entrepreneurs (Koskenniemi 2001). This alliance emerged in part because of the multiple roles occupied by each side—professors on the European side who served also as diplomats, and US corporate practitioners with learned and cosmopolitan resources as well as close ties to economic and political power.

They also had in common—even if in varying degrees—the ability to mix their learned expertise with practice in politics, diplomacy, or business affairs. These combinations made them well-suited to take part in conflicts, negotiations, or mediations that involved an overlap between different systems of national or trans-national rules—a legal complexity of which they often were the principle architects (cf. Gordon 1984; generally, Kantorowicz 1997). They played multiple roles in the service of the increased competition between imperial societies, but they also sought to limit the risks of competition by building legal channels toward the peaceful resolution of conflicts. These masters of legal rhetoric, before and after the First World War, were at ease with a discourse characterized by oppositions. This increased the value of their skills as mediators and negotiators—between, for example, ideals such as international peacemaking and realist claims for national sovereignty or even imperialism (cf. Mazover 2012: 73 on the dubious support brought by the founding fathers of international law for the "civilizing" mission of King Leopold in the Congo).

GENESIS OF A "LEGALIST" EMPIRE

The research of Benjamin Coates into the saga of the New York & Bermudez (NY&B) Company, part of the giant US Asphalt Trust, and its contracts with the Venezuelan government to exploit and market asphalt (2015), helps illuminate the elements of the early history. The Venezuelan government seized the implicated Venezuelan property in 1904, and the company failed in its legal efforts to gain redress in Venezuela. So the NY&B turned to Washington for assistance, seeking to mobilize US power on behalf of corporate power. The company's hands were not particularly clean, however. It had engaged in some shady activities, including bankrolling an effort to overthrow the Venezuelan president, who it felt was giving it trouble. Instead of calling for gunboats, the State Department under Elihu Root requested information on the legal merits of the claim. The company then hired as its counsel America's pre-eminent international lawyer, John Bassett Moore of Columbia Law School. Moore was to make the case to James Brown Scott, the State Department solicitor, and to Root, the Secretary of State and former Secretary of War. Moore framed the issue as seeking to secure the power of the United States to, at the very least, compel the Venezuelan president, Cipriano Castro, to submit to binding arbitration.

For Root and Scott, this matter was not cut and dried. They wanted to avoid the much criticized specter of the State Department intervening—including with threats or uses of force—on behalf of US companies that did not merit that support. Consistent with the elevation of legal argument promoted by Harvard and the Wall Street law firms, these lawyers had faith in the law, and they had sought to professionalize the State Department consistent with that vision. They wanted to make an assessment on the basis of legal arguments. They valued neutral arbitration and sought to replicate it within the State Department.

Moore made his case by citing his own treatises and the European authorities, who at the time were the most prestigious internationally. He argued in a subtle way that the Venezuelan legal system was not up to "civilized standards" and therefore not to be respected, and he reminded Scott that there were occasions justified by European authorities in international law when intervention to protect private interests was permitted. Scott, who was at the same time recruiting Moore to join the newly formed American Society of International Law, considered the arguments carefully, and found for the company.

President Theodore Roosevelt then supported a convenient and timely coup in Venezuela. The new president, seeing that he would have to submit to arbitration, settled the dispute. Moore's fees for his representation amounted to $27,500. His work promoted his own interests, and those of his corporate client, as well as the interests of a cosmopolitan international law tilted toward the West. Root in fact saw this as vindicating an approach favoring law, courts, and arbitration as central to international relations. Coates (2015) writes that "Root shared his exuberance

with [Andrew] Carnegie. . . . Carnegie was also a strong critic of imperialism and an advocate for international law and peace and liked this approach. In 1910 he would donate $10 million to establish the Carnegie Endowment for International Peace. Root became the new organization's president, while James Brown Scott, the State Department solicitor, became its secretary" (405). Drawing on his own credibility and Carnegie's wealth, Root helped build international law more generally in the United States and abroad. Indeed, he received the Nobel Peace Prize in 1912 for his work on the Permanent Court of Arbitration.

Through all these activities, the US "anti-imperial" (Dezalay and Garth 2010; Coates 2016) empire expanded, enhancing corporate power abroad and legitimating corporate expansion and empire as according to the rule of law. Furthermore, and not incidentally, the elite of the US legal profession gained both prosperity and respect. The story can be seen as a relatively early episode setting the stage for the judicialization, legalization, and globalization that are now viewed as characterizing recent decades. Root and Scott worked to build international law and ultimately courts as well to bring order to fraught issues in international relations, in this case by ascertaining the legal merits of both the investing company and the host country to avoid gunboat diplomacy while protecting property and contract rights. The incident was one of many steps at the time toward the rule of law; it also precipitated greater investments in international law through philanthropy.

The corporate lawyers' international strategy was consistent with their domestic strategy, in that they helped produce rules such as antitrust that in part reined in their clients—better both to legitimate and to serve them (Dezalay and Garth 2010). The clients gained credibility at the price of submitting to rules. In the asphalt case the credibility came from submitting to international law as determined by Root and Scott. The lawyers also gained power as the experts in international law, which was deemed central to the emerging rules of the game for international relations, attested to, for example, by their positions in the American Society of International Law and their connections to European allies, who at the time possessed more authority in international law. As with respect to US domestic politics, Root understandably felt that an international regime of relatively legalistic courts and arbitration would favor the interests of his clients just as the domestic courts did at home. The same legalism taught at Harvard Law School could serve nationally and internationally (for the Latin American story of "empire and networks," see Scarfi 2017).

A legalist empire, in contrast to competition with "old Europe" empires, was consistent with an open door for US global investment and influence (Rosenberg 2003). The legalist empire was and remains part of an elite strategy in the United States. Because of the central role played in the past by law and lawyers, it seems inevitable in retrospect that law would play such a prominent role in US foreign relations, but the international field could have been ceded to the military and to

diplomacy. The late nineteenth century, however, was a propitious time for legal discourse and legitimacy in the United States and in Western Europe because, as Mazower shows, the empires of Old Europe were subject to considerable criticism, which provided an opening for lawyers to offer rules, more legitimacy, and related claims to promote a more legalized and legitimate empire as part of a "civilizing mission" (Mazower 2012).

One reason why Root and others had so much faith in international courts (and in courts generally) relates to the concept of core and periphery. Those with the most credibility in interpreting the law were those closest to the core of the legal profession, who included European and linked US law professors, such as Moore. In the United States, these were the lawyers closest to the corporate law firms. Furthermore, the law originated in and embodied the interests of Europe and the West in protecting private property. Thus, the Venezuelans had to depend on legal arguments to show that their country was "civilized," and they also were forced to rely on peripheral authorities such as scholars from Argentina to support a position closer to that of the southern states and more distant from corporate property rights.

This does not mean that the Western (or northern) position was inevitably the winning one, but it does mean that the law tilted in favor of Western interests. The law had evolved in such a way as to favor prevailing power and property while offering rules that provided legitimacy (Kantorowicz 1997). Those characteristics are embedded in the law's core. The civilized versus uncivilized distinction also merits elaboration. Again, as Mazower shows, uncivilized countries did not enjoy the protections of international law. Thus, to gain access to the group of civilized nations, they had to show that they respected the rule of law (see Flaherty 2013 on Meiji Japan as a prime example). Yet even after they had done that, they found themselves within a field that favored the interests of the West and the authorities recognized as credible in the West. Law is a field with hierarchies of authority, and a price of playing within the field is submitting to that hierarchy. As Coates specifically notes, Root and his allies could be utterly certain that an independent international court would be consistent with US imperial interests and US hegemony (Coates 2016).

Furthermore, these leaders on both sides were also directly engaged in legal learning as an instrument for progressive reform, be it as professors (cf. Sacriste and Vauchez 2007; Coates 2016) or as lawyers-statespersons mobilizing the resources of financiers-philanthropists (exemplified again by Root as a lawyer and Andrew Carnegie and John D. Rockefeller as sources of philanthropy). The new international legal practices appeared first as spaces of learned investment and academic debates that constructed an idealized representation of quasi-virtual institutions in order to indicate what they could or should produce in the future. Far from being born fully formed, however, this slow and uncertain emergence of the field of International Justice was a complex process that today can be understood by

analyzing the internal battles these new legal elites fought within national legal fields—as well as, by ricochet, the competition between national legal models as it played out in the new transnational spaces.

This analysis requires that we take into account hierarchical structures and related political alliances that are the product of very different national histories. In this regard, the differentiation between the legal models is not limited to the classic divide between common law and civil law, or the Weberian differentiation between *Professorenrecht* and practioners' law. The international competition between different national models of legal hierarchies and different divisions of labor relates also to the potentially antagonistic strategies of "clerks" of law in fields of state power. As noted in Chapter 3, there are two classic bases of political authority: royal officers and professors who place their competencies in the service of religious or royal bureaucracies (Berman 1983; 2003; see also Martines 1968; Brundage 2008); and learned gentlemen who mobilize their legal expertise in order to control royal power on behalf of the gentry and the rising merchant class.

This divide is blurred, however. The emerging hegemonic society, the United States, reinvented itself through a *de facto* hybrid of two different modes. In the United States, law professors and law schools play a large role today; in Great Britain, by contrast, the rise of the barristers led to the dismantling of law faculties for more than three centuries. The difference between the legal fields of the Continental professors and that of US practitioners was therefore somewhat more ambiguous than a simple Weberian opposition between practitioners' law and *Professorenrecht*.

In sum, the general competition—which does not preclude convergence—between the two models, differentiated by the hierarchy of professional positions and by the alliance strategies of the notables of law within national fields of power, provides the context in which transnational spaces emerged in the nineteenth century, over whose course European imperial powers battled not only for military control of overseas territories but also for control of the definition of international legal practice.

THE EXACERBATION OF IMPERIAL COMPETITION IN THE EARLY TWENTIETH CENTURY

The confrontation between hegemonic attempts to control international law in Europe was complicated by the growing role of US lawyers. Indeed, US corporate lawyers controlled considerable resources—philanthropic, political, and commercial—and they could deploy those resources to promote alternative conceptions of law and International Justice. Those conceptions conformed to their own interests as well as to those of the large corporations that were their clients and patrons. The professional and state strategy of these US practitioners led also to a position close to the Continental model—and more concretely to their investing in

the production of learned law in the service of reformist or modernizing politics. Langdell's strategy at Harvard became a pillar of this upgrading of the law. As noted earlier, in addition, the strategy was helpful as a means to disqualify and to some extent absorb—through some meritocratic opening up of law firms and elite law schools—the rising tide of lawyers from émigré backgrounds, who were moving into populist and clientelist politics after low-prestige training in night law schools.

To be sure, as with respect to all symbolic transfers (Bourdieu 2002), this importation remained very partial. Even as they invested in learned scholarship, the Wall Street practitioners made sure they maintained control over the production of law in the United States, in part through the private status of most leading law schools and their links to the corporate law firms. Indeed, it took a long time for these US professors to acquire close to the authority on stating the law that characterizes the German *Professorenrecht*. At the same time, while investing in reformist state politics, the elite corporate lawyers bolstered their position by relying on and supporting the private foundations in which they played major roles. Thanks to the US spoils system, they could avoid any competing reformist strategy that might arise through the autonomization of the state bureaucracies. The result was that they were able to preserve the profits stemming from their preeminent positions serving the world of business, while at the same time making temporary incursions into the world of state power, whether as a career strategy or as a response to times of crisis or war.

Historical and political circumstances, combined with professional dynamics, explain the relative success of these strategies of internationalization, but also their limits, as seen from the point of view of the Europeans whose work was introduced to the US market. Those successes included the creation of the Permanent Court of International Justice (see also Vauchez 2014) and the construction of the Peace Palace in The Hague funded by Carnegie. The limits, however, were especially evident with respect to the origins of International Justice. Only the US partners had the power to mobilize the substantial political and economic resources required for such a venture to succeed, and the Continental professors found themselves in an awkward position, since US law practitioners imported their work into the United States mainly for domestic purposes, to help legitimize the free trade aims of their clients as well as boost their own stature.

After the First World War, the United States generally pursued a politics of withdrawal from international alliances. The European professors were unable to rely on their own resources, which consisted mainly of still marginal academic capital and a dominated position within diplomatic arenas. The European professors as a result privileged a cautious strategy that essentially cantonized the institutions of The Hague, which they had developed with the support of US and Russian sponsors before 1914. In this way they formed a small, learned, cosmopolitan circle sustained by the support—financial and symbolic—of their US sponsors (Koskenniemi 2001).

The European professors' strategy of withdrawing into an ivory tower was also determined by the lack of opportunities for these European merchants of peace to act on the diplomatic or legal scene. These professors held dominated positions in the academic and diplomatic fields; it was the gentleman-lawyers of the United States who held the upper hand. Deteriorating political and financial conditions in Europe throughout the 1920s (as a result of hyperinflation and the rise of the Bolsheviks in Russia) accentuated the weakness—even impotence—of international forums for handling inter-state conflicts. This very weak position was exacerbated by a strategy that limited access to European positions in international law to a small group of professor-diplomats, a circle that was later expanded just enough to include a few learned practitioners who occupied diverse roles—which could be accumulated—including judge, lawyer, or producer of doctrine (Sacriste and Vauchez 2007). This peer group was able in this manner to accumulate the profits—which were essentially symbolic—of a small market while avoiding dissent, criticism, and even overinvestment that might damage the weak credibility of their offerings and underscore the impotence of what they were promoting in the face of rising political disorder. The result was the Permanent Court of International Justice as a kind of virtual forum, barely visible except for a few of the initiated, who were making every effort to believe—and foster the belief—that one day they would be able to contribute to the objectives of international peace as called for by the idealistic pronouncements of their founding fathers. The institutions of international law at The Hague also provided important symbolic capital for notables from the global South, who formed alliances with the more meritocratic but relatively marginal professionals who worked with them there (Dezalay and Dezalay 2017).