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Recommended Citation

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Susan D. Franck*

Foreword: A Symposium Exploring the Modern Legacy of William Jennings Bryan

William Jennings Bryan, known as “The Great Commoner,” is one of the most controversial lawyers to hail from Nebraska.¹ While he may be best-known as a failed three-time Democratic nominee for U.S. President and the legal defender of creationism at the Scopes Monkey Trial,² fundamental aspects of Bryan’s life have been overlooked.

In a new biography, *A Godly Hero: The Life of William Jennings Bryan*,³ Professor Michael Kazin re-evaluates Bryan’s legacy and charges us to consider the profound impact Bryan had upon the political, economic and legal reality of the United States. The book has been the subject of controversy. Some have called it a “revisionist portrait of Bryan (1860-1925), whom scholars have long dismissed as a rabid white supremacist, bullying fundamentalist and braying pacifist/isolationist;”⁴ while others have suggested it is a “powerful, timely reevaluation” that suggests “Bryan’s faith-based liberalism reshaped the Democratic Party and made the New Deal possible.”⁵

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1. See generally ROBERT W. CHERNY, *A RIGHTEOUS CAUSE: THE LIFE OF WILLIAM JENNINGS BRYAN* (new preface 1994) (1985); see also 1 PAOLO E. COLETTA, *WILLIAM JENNINGS BRYAN* 152 (1964).
 2. Gerard N. Magliocca, *Constitutional False Positives and the Populist Moment*, 81 NOTRE DAME L. REV. 821, 837 & n. 74 (2006); Jay D. Wexler, *The Scopes Trope Review of Where Darwin Meets The Bible: Creationists and Evolutionists in America*, 93 GEO. L.J. 1693, 1694 (2005) (book review).
 3. MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN* (2006) [hereinafter Kazin, *A Godly Hero*].
 4. Publishers Weekly, *Editorial Review*, AMAZON.COM, Feb. 10, 2006, <http://www.amazon.com/Godly-Hero-William-Jennings-Bryan/dp/0375411356>.
 5. *Briefly Noted*, 82 THE NEW YORKER 83, 83 (Feb. 27, 2006) (book review), available at http://www.newyorker.com/archive/2006/02/27/060227crbn_brieflynoted3; see also Maureen Corrigan, *William Jennings Bryan, the President Who Wasn't*,

The symposium was convened at the University of Nebraska-Lincoln Law College to consider Kazin's provocative thesis and to evaluate Bryan's modern legacy on politics, economics, history, and law.⁶

Bryan holds a special place in the history of Nebraska. Although born in Illinois, his professional and political life developed in this state. On a visit to Nebraska in 1887, Bryan "caught a vision' of future triumphs" and persuaded his wife, Mary, to move to Lincoln, which was "well suited to Will's ambitions and personality."⁷ After practicing law in Lincoln and experiencing an agrarian rebellion where corn prices were so low that it was cheaper for Nebraskans to burn corn than coal,⁸ Bryan entered political life. As the champion of the common man (and woman), Nebraskans elected Bryan to the U.S. House of Representatives in 1890, which was the only elected position he ever held.

Bryan's influence stretched beyond Nebraska. With his newspaper, *The Commoner*, and trips abroad to meet international luminaries such as Leo Tolstoy,⁹ Bryan had a national and international presence. Bryan's work with international politics and peacemaking lead him to believe that arbitration was a useful method for resolving international disputes.¹⁰ At the Mohonk Conference of International Arbitration (1910) at the Permanent Court of Arbitration in The Hague, Bryan's speech suggested that he privileged the promotion of peace through arbitration over his distrust of proponents of evolution. He commented:

I went to a meeting a few years ago and I heard a speech made by an eminent scientist of Europe. He gave an argument in favor of peace I had never heard

NPR, March 2, 2006, <http://www.npr.org/templates/story/story.php?storyId=5241771>.

6. In a speech at St. Paul's Methodist Church in Lincoln, Nebraska, Bryan stated, "Next to the ministry I know of no more noble profession than the law. The object aimed at is justice, equal and exact . . . Its principles ennoble and its practice elevates." WILLIAM J. BRYAN, *THE FIRST BATTLE: A STORY OF THE CAMPAIGN OF 1896* 48 (1896) [hereinafter *The First Battle*].
7. Kazin, *A Godly Hero*, *supra* note 3, at 17-18. Kazin describes Lincoln, Nebraska, at that time as a town with "a population of forty thousand . . . [and] the capital of a state that grew faster than any other decade—from 450,000 to over a million—but where raw prairie still dominated the landscape." *Id.* at 18.
8. *Id.* at 18-23.
9. *Id.* at 121-33.
10. There was some suggestion that Bryan's interest in international arbitration arose from his own experience with domestic labor arbitration. James B. Scott, *Introduction*, in *TREATIES FOR THE ADVANCEMENT OF PEACE BETWEEN THE UNITED STATES AND OTHER POWERS NEGOTIATED BY THE HONORABLE WILLIAM J. BRYAN, SECRETARY OF STATE OF THE UNITED STATES xxvii-xxviii* (1920) [hereinafter *Scott, Introduction*]; 2 PAOLO E. COLETTA, *WILLIAM JENNINGS BRYAN* 239-40 (1969) [hereinafter *Coletta, Volume II*]. As early as 1905, Bryan wrote in the *Commoner* that "our nation should take the initiative in promoting a system of arbitration so comprehensive that all differences will be submitted to the Arbitration Court." Scott, *Introduction*, *supra*. at xxix.

before, and I doubt if I shall ever hear it again. He said he was opposed to war because it was not in harmony with the theory of the survival of the fittest; that war killed off the strongest instead of the weakest, therefore he was opposed to it. I am glad to have anybody help in peace, no matter what his reason is, glad to have his influence on the right side, no matter upon what he bases his argument.¹¹

Bryan's commitment to international peace via arbitration continued beyond this visit to The Hague. As a result of his support during the 1912 election, President Woodrow Wilson appointed Bryan as his U.S. Secretary of State. In that capacity, Bryan promulgated a series of bilateral treaties—later known as the Bryan Treaties¹²—where governments agreed to submit disputes to formal dispute resolution.¹³ While some treaties created arbitration agreements,¹⁴ others created

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11. William J. Bryan, *The Forces that Make for Peace*, Address at the Mohonk Conference on International Arbitration, 1910, in *WORLD PEACE FOUNDATION* 7-8 (Oct. 1912, No. 7, Part II) [hereinafter Mohonk Speech].
 12. 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 288-30 (Max Planck Institute for Comparative Public Law and International Law 1981); *World Court Jurisdiction and U.S. Foreign Policy in Latin America*, 78 *AM. SOC'Y INT'L L. PROC.* 321, 334 (1984) (explaining that the Bryan Treaties "provided for compulsory arbitration or adjudication of disputes"); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 23 (1963).
 13. Kazin, *A Godly Hero*, *supra* note 3, at 217; see also Susan D. Franck, *Reconsidering Dispute Resolution Options in International Investment Agreements*, in *COHERENCE AND CONSISTENCY IN INTERNATIONAL INVESTMENT LAW* (Karl P. Sauvant ed.) (forthcoming 2007) [hereinafter Franck, *Reconsidering Dispute Resolution Options*]. Some suggest that the treaties were not formal rule of law arbitral adjudications but more akin to informal dispute resolution methods such as conciliation. DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 234 (2001); Kazin, *A Godly Hero*, *supra* note 3, at 217; but see Scott, Introduction, *supra* note 10, at xix (suggesting the object of arbitration was "the settlement of differences between States, by judges of their own choice, and on a basis of respect for law").
 14. See e.g., Arbitration Agreement, U.S.-Spain, May 29, 1913, 38 Stat. 1765 (arbitration agreement between the United States and Spain extending the duration of the convention of April 20, 1908, an additional five years); Arbitration Agreement, U.S.-Switz., Nov. 3, 1913, 38 Stat. 1773 (arbitration agreement between the United States and Switzerland extending the duration of the convention of February 29, 1908); Arbitration Agreement, U.S.-Austria-Hungary, May 6, 1914, 38 Stat. 1783 (arbitration agreement between the United States and Austria-Hungary extending the duration of the convention of January 15, 1909). The original agreement between the United States and Austria-Hungary provided that

[d]ifferences which may arise of a legal nature, or relating to the interpretation of treaties existing between the High Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration . . . provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the High Contracting Parties, and do not concern the interests of third parties.

Arbitration Convention, U.S.-Austria-Hungary, Jan. 15, 1909, 36 Stat. 2156, 1257 at art. I (arbitration convention between the United States and Austria-Hungary).

international commissions akin to arbitral bodies¹⁵ where disputes would be adjudicated after an appropriate waiting period.¹⁶ Kazin explains that Bryan believed these treaties “would be ‘my monument. It is worth being Secretary to get a chance to negotiate them.’”¹⁷ Despite some skepticism about the efficacy of the Bryan Treaties,¹⁸ one treaty was used to resolve a dispute between the United States and Chile about certain political assassinations.¹⁹

Bryan’s legacy to the treatification of international arbitration deserves renewed consideration. His faith in the utility of international arbitration was not unwarranted;²⁰ and even his contemporaries sug-

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15. Treaty for the Advancement of Peace, U.S.-Spain, Sept. 15, 1914, 36 Stat. 1862, 1862-64 at arts. I & III (providing that “[a]ny disputes arising between the [governments] . . . shall, when ordinary diplomatic proceedings have failed and the High Contracting Parties do not have recourse to arbitration, be subjected to a Permanent International Commission” to act as a standing arbitral body); Treaty for the Advancement of Peace, U.S.-Uruguay, July 20, 1914, 38 Stat. 1908, 1908-10 at arts. I & III (providing that the parties “agree that all disputes between them, of every nature whatsoever, to the settlement of which previous arbitration treaties or their agreements do not apply . . . shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a permanent International Commission” to act as a standing arbitral body).
 16. Cherny, *supra* note 1, at 137-38.
 17. Kazin, *A Godly Hero*, *supra* note 3, at 217-18, 234; *see also* Coletta, Volume II, *supra* note 10, at 242. Bryan’s speech at Mohonk suggested the importance of using arbitration to resolve disputes. Mohonk speech, *supra* note 11, at 11-13 (arguing that if a nation was willing to settle disputes by “submit[ting] to the judgment of the world . . . it would not be attacked by any other nation on the earth, but it would become the supreme power in the world”).
 18. Some expressed skepticism about the efficacy of these treaties and their capacity to resolve disputes. ALFRED ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW: 1918-1935*, at 128-31 (Russell & Russell 1969) (1936); *see also* Coletta, Volume II, *supra* note 10, at 243-44, 246. Although Bryan had hoped the treaties would prevent the escalation of conflict in Europe, the critics had a point since the treaties did not prevent World War I. *Id.* at 247-51. Others expressed less concern and more hope about the utility of the Bryan Treaties. Charles Cheney Hyde, *The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes*, reprinted in *INTERNATIONAL DISPUTE SETTLEMENT* 105, 106-08 (Mary Ellen O’Connell ed.) (2003).
 19. Agreement to Settle Dispute Concerning Compensation for the Deaths of Letelier and Moffitt, U.S.-Chile, June 11, 1990, 30 I.L.M. 421 (1991); Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 *BRIT. Y.B. INT’L L.* 97, 100 n.17 (1992).
 20. It is ironic that Bryan resigned from his position as Secretary over a conflict with Wilson about whether to condemn Germany’s sinking of the *Lusitania*. Kazin, *A Godly Hero*, *supra* note 3, at 236-38. Disputes related to that event were ultimately resolved through a Mixed Claims Commission, which functions in a manner similar to international arbitration. MIXED CLAIMS COMMISSION, *ADMINISTRATIVE DECISIONS & OPINIONS OF A GENERAL NATURE: OPINIONS IN INDIVIDUAL LUSITANIA CLAIMS AND OTHER CASES* (GPO 1925); Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 *DEPAUL L. REV.* 251 (2003).

gested the Bryan treaties were “the infancy of modern practice.”²¹

Since the 1960s, there has been an increase in the number of treaties in which governments resolve disputes through international arbitration.²² The WTO dispute resolution system—which uses arbitration in combination with other processes—functions relatively effectively.²³ There are an increasing number of investment treaties that rely on arbitration for the resolution of disputes with governments.²⁴ Arbitration may also soon be applied to the resolution of disputes related to international tax treaties.²⁵ The heirs (whether intentional or otherwise) of Bryan have effectively promoted the international dispute resolution that “judicializes”²⁶ the dispute resolution and relies on rule of law adjudication rather than the use of physical

21. Scott, Introduction, *supra* note 10, at xxiii.

22. See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 31, Annex 2, 33 I.L.M. 1226 (1994) (setting out the WTO Dispute Settlement Understanding); North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 612 (1993), available at <http://www.sice.oas.org/trade/nafta/naftace.asp> (providing a series of investment and trade rights and permitting parties to use arbitration mechanisms to resolve disputes connected with these rights); but see Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 190, 194 (2007) (examining a random sample of international agreements related to economics, environment, human rights and security and observing that only half of the treaties had dispute resolution provisions).

23. Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT’L ECON. L. 383 (June 2006); Giorgio Sacerdoti, *The WTO Dispute Settlement System: 1995-2003 (Studies In Transnational Economic Law, Volume 18)*, 9 J. INT’L ECON. L. 1025 (Dec. 2006) (book review).

24. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE ENTRY INTO FORCE OF BILATERAL INVESTMENT TREATIES, IIA Monitor No. 3 (2006), available at http://www.unctad.org/en/docs/webiteia20069_en.pdf; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING 99-129 (2007), available at http://www.unctad.org/en/docs/iteia20065_en.pdf; Susan D. Franck, *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1522-23 (2005).

25. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PROPOSALS FOR IMPROVING MECHANISMS FOR THE RESOLUTION OF TAX TREATY DISPUTES (Feb. 2006), available at <http://www.oecd.org/dataoecd/5/20/36054823.pdf>; Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 VA. TAX REV. 81, 118-19 (2006); Michael J. McIntyre, *Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes*, 7 FLA. TAX REV. 622 (2006).

26. Robert E. Hudec, *The Judicialization of GATT Dispute Settlement, in IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE* (Michael M. Hart & Debra P. Steger eds. 1992).

force or gunboat diplomacy.²⁷ This is a legacy of which Bryan would no doubt be proud.²⁸

Bryan's contribution to international dispute resolution is only one aspect of his modern influence. The three speakers at the symposium elucidated other areas where Bryan's approach to law and politics continue to resonate. The speakers emphasized themes related to: (1) Bryan's personal oratory style and approach to political campaigns, (2) his populist values and appreciation of the common person and (3) his integration of religious faith and social policy.

The first speaker, Professor Michael Kazin of Georgetown University's Department of History, discussed Bryan's legacy and its implications for modern politics. Drawing upon themes in *A Godly Hero*, Kazin describes Bryan as a progressive reformer who transformed the political platform of the Democratic Party, as a celebrity politician who knew how to mobilize and inform a political base prior to the days of modern telecommunications, and as a proponent of applying Christian principles to political issues. In his written remarks, Kazin develops these themes and provides specific examples of Bryan's politics that range from his "Cross of Gold" speech, Bryan's anti-war sentiment, and the development of progressive social policies that eventually lead to cultural milestones such as the founding of the Federal Reserve, the New Deal, and women's suffrage. Kazin suggests that one of Bryan's core hallmarks, namely his integration of liberal politics and religious faith, has been largely overlooked by modern politicians—despite the common objective of implementing progressive social policies.²⁹ Nevertheless, Kazin suggests Bryan planted seeds that create a foundation for a "religious left" to motivate and inform modern political debate and provide a counterpoint to the "religious right."

The second speaker, William G. Thomas, III, the John and Catherine Angle Professor in the Humanities at the University of Nebraska-Lincoln, puts Bryan's work as a lawyer and as a politician into a dis-

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27. Ray C. Jones, *NAFTA Chapter 11 Investor-To-State Dispute Resolution: A Shield To Be Embraced Or A Sword To Be Feared?*, 2002 *BYU L. REV.* 527, 529-31 (2002) (describing the shift from "gunboat diplomacy" to investment treaties); see also Franck, *Reconsidering Dispute Resolution Options*, *supra* note 13 (discussing the use of gunboat diplomacy, the evolution of treaties and arbitration, and how dispute resolution systems move from an exercise of power to adjudication of rights). Bryan himself advocated moving towards a position where "we will not man bat-tle-ships and kill people because they owe people in this country." Mohonk Speech, *supra* note 11, at 12.
 28. Some commentators echo Bryan's refrain and suggest that we be "more interna-tionally minded than nationalist—looking first to peacemaking and conflict resolu-tion when it come[s] to foreign policy questions." JIM WALLIS, *GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT* 74 (2005).
 29. Michael Kazin, *Bryan in History: Liberal, Celebrity, Social Gospeler*, 86 *NEB. L. REV.* ____ (2007).

tinctive historical backdrop. He explores Bryan's relationship with the political economy of the railroad, which was the modern day equivalent of a powerful political interest group with resources akin to multi-national corporations.³⁰ Thomas discusses Bryan's legal practice and his unique refusal to accept railroads—and their corporate money and influence—as clients. He then considers Bryan's failed campaign for U.S. Senate in 1894 and its intersection with railroad politics. Despite the economic development and innovations wrought by railroads, Bryan posited that the consolidation of wealth and political power prevented meaningful political change and contributed to the exploitation of the working class. Thomas suggests that despite Bryan's unease with class warfare, Bryan was committed to creating a moral political alternative based upon economic equity and the need to be attuned to the “slightest pulsation of a pocketbook” of the populace.³¹ Thomas ultimately proposes that Bryan can be usefully viewed as a politician who appreciated that large corporate entities must balance sustainable economic development with the needs of corporate and social responsibility.

The third speaker, Jim Chen, the current Dean of the University of Louisville's Louis D. Brandeis School of Law, commented on the economic, regulatory, and political implications of Bryan's policies. Suggesting that the moment may be right for the “second coming of William Jennings Bryan,” Chen observed that Bryan was a rare figure who inspired both social conservatives and economic progressives.³² In his written remarks, Professor Chen reminds us that no other three-time loser of a presidential race has had such a profound impact on the development of U.S. politics. In a *Meet the Robinsons* way that values those failures that present occasions to “keep moving forward,” Bryan's losses created opportunities for future social advancement. While Chen expresses concern about Bryan's positions on evolution, race, and international relations, he nevertheless observes that Bryan has a wider legacy that implicates modern politics and government regulation. Simply put, “[w]e ignore him at our peril.”³³

These three papers should encourage us to reconsider historical narratives and the social legacy of a Nebraskan who knew the value of creating consensus by appealing to the populace and by championing progressive social policies that promote long-term social development. On a national scale, Bryan's legacy may encourage a new generation

30. William G. Thomas, III, *William Jennings Bryan, the Railroads, and the Politics of "Workingmen"*, 86 NEB. L. REV. ____ (2007).

31. *Id.*

32. Jim Chen, *The Second Coming of William Jennings Bryan*, JURISDYNAMICS, Nov. 2, 2007, <http://jurisdynamics.blogspot.com/2006/11/second-coming-of-william-jennings.html>.

33. Jim Chen, *Vox Populi*, 86 NEB. L. REV. ____ (2007).

of “liberal” politicians to take a more faith-based approach to politics;³⁴ and voters traditionally motivated by “conservative” values may find themselves drawn to non-traditional candidates and issues. On the international scale, the seeds that Bryan planted in promoting arbitration to resolve disputes involving governments continue to flourish.

Despite the historical focus on his notable shortcomings, William Jennings Bryan is a Nebraskan who deserves renewed consideration. As Bryan himself once said, “You cannot judge a man’s life by the success of a moment, by the victory of an hour, or even by the results of a year. You must view his life as a whole.”³⁵ Ultimately, this means that a nuanced portrayal of Bryan must look beyond historical caricatures to acknowledge his various contributions to Nebraska, to the United States, and to the world.

34. Mark Preston, *Hillary Clinton Talks Religion*, CNN, June 29, 2006, <http://www.cnn.com/2006/POLITICS/06/29/mg.thy/index.html>; Barak Obama, Illinois Senator, Keynote Address at the Call to Renewal’s Building a Covenant for a New America Conference: Call to Renewal (June 28, 2006), available at http://obama.senate.gov/speech/060628-call_to_renewal_keynote_address/index.html; see also Wallis, *supra* note 28, at 67 (commenting that Jim Wallis, the founder of Sojourners, is “[a]t heart . . . a nineteenth-century evangelical; I was just born in the wrong century. Before the movement was humiliated was a result of the famous Scopes trial in 1925, fundamentalism was often socially allied with the Left in supporting the kind of economic reform that would benefit its mostly working-class constituency. As we have said, evangelical and fundamentalist reformers led battles for the abolition of slavery, for child labor laws—even for women’s suffrage.”).

35. The First Battle, *supra* note 6, at 49.