

# Texas Law Review

## *See Also*

Response

Legal Medievalism in *Lex Mercatoria* Scholarship

Ralf Michaels\*

*[L]ong life to the Middle Ages and to the dreaming of them, provided that it is not the dream of reason. We have already generated too many monsters.*<sup>1</sup>

Emily Kadens has written a fabulous paper—broad in its scope, meticulous in its research, provocative in its main theses, and convincing in its analysis.<sup>2</sup> She writes to disprove a myth that is told and retold, especially by proponents of a new *lex mercatoria*—the myth of a uniform customary law merchant in the middle ages. Such disproof is as difficult as the proof of any negative; Charles Donahue aptly called it a *probatio diabolica*.<sup>3</sup> She succeeds admirably, and I have neither ground nor competence to challenge her historical findings.<sup>4</sup>

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1. Umberto Eco, *Dreaming of the Middle Ages: An Unpublished Fragment*, 63 SEMIOTICA 239, 239 (1987). I borrow the quote from Helge Dedek, *The Splendour of Form: Scholastic Jurisprudence and “Irrational Formality,”* 5 LAW & HUMANITIES 349, 349 (2011).

2. Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEXAS L. REV. 1153 (2012).

3. Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21, 27 (2004).

4. I have one small quarrel, however. Much of Kadens’s argument rests on a definition of custom, borrowed from Bartolus, as sharply distinct from contract. Kadens, *supra* note 2, at 1163–67. This is not the only available definition for custom, however, and it is not necessarily the one used by modern proponents of *lex mercatoria*. Kadens justifies her choice with two arguments: first, Bartolus’s definition was widely accepted in the Middle Ages and may have been known even to the medieval merchants; second, the definition allows us to distinguish between custom and contract. *Id.* at 1166. Both justifications are doubtful.

Instead, I am interested in whether the story can be disproved through historical analysis at all. After all, although Kadens's is certainly the most comprehensive historical study refuting a medieval universal customary *lex mercatoria*, it is not at all the first one, as she readily acknowledges.<sup>5</sup> In fact, it appears that legal historians have agreed for some time now on Kadens's main finding, namely that depictions of a universal customary medieval *lex mercatoria* are historically inaccurate.<sup>6</sup> And yet, proponents of

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As to the latter point, whether custom and contract are really distinct is an open question, both in legal theory and in the *lex mercatoria* discussion, and Kadens's opponents may simply reply that their concept is different. Bruce Benson, for example, explicitly invokes Lon Fuller's idea of custom as interaction, which creates a continuum between custom and contract. Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 645 (1989). *See also* Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law*, 3 CONST. POL. ECON. 1, 2 (1992); LON L. FULLER, *THE ANATOMY OF LAW* (1968); Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 13–20 (1969), *reprinted in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L FULLER 231, 243–50 (Kenneth Winston ed., rev. ed. 2001); Ralf Michaels, *A Fuller Concept of Law Beyond the State?: Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution—A Reply to Thomas Schultz*, 2 J. INT'L DISP. RESOL. 417, 421–2 (2011); Gerald J Postema, *Implicit Law* 13 LAW & PHIL. 361, 362 (1994). Gunther Teubner, in his influential theory of the new *lex mercatoria*, elaborates on the relation between individual contracts and contract in general as the source of a *lex mercatoria*. *See generally* GUNTHER TEUBNER, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (1997) (discussing the paradox of self-validating contracts in the context of global law). In other words, although it may be useful, for analytical purposes, to distinguish custom from contract, it is not clear that the theory of a customary medieval *lex mercatoria* can be refuted merely with a redefined concept of custom.

As to Kadens's first point, I cannot see why we should not be allowed to describe what medieval merchants did as customs even if they themselves would not have done so. All that this requires is our awareness that that we are just using a different concept. From an observer's perspective, there is nothing anachronistic in using analytic descriptive terms for historical events. This must be true especially for those authors who seek lessons from the Middle Ages for our time, because they need to use concepts that transcend different times and cultures. (Whether then the historical phenomenon is in fact captured by the concept is, of course, an entirely different question.)

This point is not at all fatal to Kadens's argument, which remains, in my view, fully successful.

5. Kadens, *supra* note 2, at 1156.

6. For sources in English, see Kadens, *supra* note 2 at 1157 n.6. Numerous other sources also support this proposition. *E.g.*, Jean Bart, *La Lex Mercatoria au Moyen-Age: mythe ou réalité?*, in SOUVERAINETÉ ÉTATIQUE ET MARCHÉS INTERNATIONAUX À LA FIN DU XXE SIÈCLE—MÉLANGES EN HONNEUR DE PHILIPPE KAHN 18 (2000); Kent D. Lerch, *Vom Kerbholz zur Konzernbilanz?: Wege und Holzwege zu Einem Autonomen Recht der Global Economy*, 5 Rechtsgeschichte 107 (2004); Karl Otto Scherner, *Lex Mercatoria—Realität, Geschichtsbild oder Vision?*, 118 ZEITSCHRIFT FÜR RECHTSGESCHICHTE—GERMANISTISCHE ABTEILUNG 148 (2001). *See also* SHEILAGH OGILVIE, INSTITUTIONS AND EUROPEAN TRADE: MERCHANT GUILDS, 1000–1800, at 250 (2011); Jeremy Edwards & Sheilagh Ogilvie, *What Lessons for Economic Development Can We Draw from the Champagne Fairs?*, EXPLORATIONS ECON. HIST. (forthcoming 2012). Similar arguments have recently been made against the idea of an autonomous legal order amongst Maghribi traders, voiced most prominently by Avner Greif. *See* Jeremy Edwards & Sheilagh Ogilvie, *Contract Enforcement, Institutions, and Social Capital: The Maghribi Traders Reappraised*, 65 ECON. HIST. REV. 421 (2012) (arguing against the existence of an “exclusive coalition” of Maghribi traders with “defined membership” that used ostracism as a substitute for contract enforcement). *But see* Avner Greif, *The Maghribi Traders: A Reappraisal?*, 65 ECON.

a new *lex mercatoria* have been resilient and continue to tell stories of exactly such a law.<sup>7</sup>

How can proponents simply ignore these findings? Kadens speculates that “[t]he story simply holds too much symbolic power for modern advocates of private ordering looking to give the underpinning of historical legitimacy to their political and economic theories about how law is and should be made.”<sup>8</sup> This seems plausible. But it begs the question as to why a modern *lex mercatoria* would require historical legitimacy in the first place. And it leaves open wherein the symbolic power actually consists, and why it seems so robust towards historical evidence to the contrary. These are the questions I want to address here.

### I. A Curious Historiography

Kadens is right: proponents of a new law merchant claim, almost universally and often unsubstantiatedly, that a customary and universal *lex mercatoria* existed in the middle ages. The story is always mostly identical, often down to the details: just the level of detail is different.

In many texts, the historical antecedents are mentioned in one or a few sentences, without providing any evidence for the claim.<sup>9</sup> This is so even in works that otherwise use lots of evidence elsewhere for claims made on modern *lex mercatoria*.<sup>10</sup> These other texts contain often relatively lengthy accounts, but the evidence is used only selectively.<sup>11</sup> Often, the only authors cited for the historical evidence are not historians, but are other writers on modern *lex mercatoria*.<sup>12</sup> Where historical sources are used, they are almost always the same old sources—which does not keep authors from presenting

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HIST. REV. 445 (2012), (maintaining his assertion that a “multilateral reputational mechanism was particularly important” to Maghribi traders).

7. See Kadens, *supra* note 2, at 1156 n.5.

8. *Id.* at 1157.

9. E.g., H. Allen Blair, *Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges*, 21 DUKE J. COMP. & INT’L L. 269, 276 (2011); Isaac DiIanni, *The Role of Competition in the Market for Adjudication*, 18 SUP. CT. ECON. REV. 203, 227 (2010); Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 502 (2011).

10. E.g., DiIanni, *supra* note 9, at 227–29 (providing a very thinly sourced discussion of the “medieval Law Merchant” before discussing a modern version in the diamond industry in detail); Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y.L. SCH. J. INT’L & COMP. L. 29, 33–34 (1991) (providing again a thinly sourced and conclusory history of *lex mercatoria* in the context of an article arguing to extend the principles to current international commercial arbitration cases). *But see* Blair, *supra* note 9, at 276 & n.28 (directing the reader to a number of sources for a more detailed history of *lex mercatoria*).

11. E.g. Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627, 629–30 (2006) (citing only two sources to support several pages of discussion of medieval *lex mercatoria*).

12. See, e.g., Byran Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT’L & COMP. L. 131, 161–62 & n.116 (2009).

their view, with surprising conviction, as irrefutable truth.<sup>13</sup> Sometimes even the skeptics are cited side by side with proponents as though there were no difference.<sup>14</sup>

And even when the skepticism is acknowledged, this is often done in a curious manner. Chris Drazohal, for example, lists some critics in a footnote (without mentioning their criticism in the text) but then concludes, disarmingly, that he “take[s] no position on this historical debate.”<sup>15</sup> History seems to matter, but the realities of the past do not. Leon Trakman, once seemingly one of the most ardent proponents, takes a yet more surprising approach. In the introduction for a recent important article, he mentions the “skeptical accounts,”<sup>16</sup> and indeed much of his ensuing article is devoted to lessons from the skeptical history, on both the claim that *lex mercatoria* was universal and the one that it was autonomous.<sup>17</sup> But it is not clear to what extent the skeptics actually made him change his views. Kadens may view Trakman as emblematic of the position she criticizes;<sup>18</sup> Trakman in turn cites his earlier work as fully in line with hers and with that of other critics.<sup>19</sup>

## II. *Lex Mercatoria* as Myth and as Thought Experiment

Why do proponents of a new *lex mercatoria* refer so regularly to a medieval antecedent? And why do they present that antecedent with such little care for the research by historians? The latter question may be easier to answer: proponents of a new law merchant are commercial lawyers, comparative lawyers, libertarian economists, institutionalists, but not historians.<sup>20</sup> Therefore, they have little competence or desire to engage in

13. The crassest example of which I am aware is Peter T. Leeson, *One More Time with Feeling: The Law Merchant, Arbitration, and International Trade*, INDIAN J. ECON. & BUS. (SPECIAL ISSUE) 29 (2007). Remarkably, Leeson reports on his presence at a Chicago conference where Kadens first presented her ideas. See *id.* at 33–34 (referring to the conference including Kadens’s presentation of *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT’L L. 39). Her argument must not have left much of an impression on Leeson.

14. See, e.g., DAVID B. GOLDMAN, GLOBALISATION AND THE WESTERN LEGAL TRADITION: RECURRING PATTERNS OF LAW AND AUTHORITY 276 n.13 (2007) (citing *lex mercatoria* proponent Harold J. Berman alongside the more skeptical Albrecht Cordes); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT’L L. REV. 657, 658 n.2 (1999) (citing *lex mercatoria* proponent Leon E. Trakman alongside skeptic J.H. Baker).

15. Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031, 1038 n.32 (2009). A footnote similarly unconnected to the main text is in Christopher R. Drahozal, *Busting Arbitration Myths*, 56 KAN. L. REV. 663, 672 n.52 (2008).

16. Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775, 776 n.2 (2011).

17. *Id.* at 782–98.

18. Kadens, *supra* note 2, at 1168–70 n.45.

19. Trakman, *supra* note 16, at 776 n.4.

20. E.g., KLAUS PETER BERGER, *The New Law Merchant and the Global Market Place—A 21st Century View of Transnational Commercial Law*, in THE PRACTICE OF TRANSNATIONAL LAW 1–22

detailed primary research, or even broad surveys of the existing scholarly literature—especially if the few sources they do know already match their own theories and ideologies.<sup>21</sup> The insufficient reception of newer findings merely represents a general problem of interdisciplinary communication—one that legal historians in particular have deplored in other areas, too.<sup>22</sup>

This may explain why nonhistorians get the history wrong, but not why they care so much about the history in the first place. In light of this, Kadens's suggestion that modern theories require "historical legitimacy" must be at least incomplete.<sup>23</sup> True, the reference to the medieval antecedents of a new law merchant must evidently be considered relevant, or it would not be omnipresent. Indeed, some claim that the medieval story holds direct lessons for the present.<sup>24</sup>

But how can a false view of the Middle Ages hold lessons? It seems that, as Nikitas Hatzimihail has put it, "what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present."<sup>25</sup> Steve Sachs shows how such political use of concepts of *lex mercatoria* concept is not an invention of the twentieth century, but has existed since the fifteenth century: it can be found in the jurisdictional contests over mercantile cases between English courts, in the struggle between Romanists and Germanists in nineteenth-century Germany, and in consequence of this in twentieth-century visions in common-law countries.<sup>26</sup> I am convinced that this is correct. But it still begs the

(2001) (comparative lawyer); Michael T. Medwig, *The New Law Merchant: Legal Rhetoric and Commercial Reality*, 24 L. & POL. IN INT'L BUS. 589 (a commercial lawyer). And Kadens describes proponents Benson and Trackman as "libertarian and legal economic theorists." Kadens, *supra* note 2, at 1168.

21. Nicholas H.D. Foster, *Foundation Myth as Legal Formant: The Medieval Law Merchant and the New Lex Mercatoria*, 2005 FORUM HISTORIAE JURIS, available at <http://www.forhistiur.de/zitat/0503foster.htm> (arguing that the commercial lawyers' misguided support of new *lex mercatoria* derives from the fact that "few, in any, are legal historians," and it is "ideologically convenient" for them to hold this view).

22. See generally Laura F. Edwards, *The History in "Critical Legal Histories,"* 37 L. & SOC. INQUIRY 187 (2012) (criticizing current uses of legal history).

23. Kadens, *supra* note 2, at 1157. See generally Joanna Jemielniak, *Legitimization Arguments in the Lex Mercatoria Cases*, 18 INT'L J. SEMIOTICS L. 175 (2005).

24. See, e.g., LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 17 (1983) (claiming that *lex mercatoria*'s relevance stems from the "anthropological perspective" it provides as well as its potential usefulness as a "model for innovation"); Franz Wieacker, *Historische Voraussetzungen supranationaler Privatrechtsordnungen*, in Festschrift für Konrad Zweigert 575, 576, 585–88 (Herbert Bernstein et al. eds., 1981).

25. Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 LAW & CONTEMP. PROBS. 169, 173 (2008). This may explain how Trakman finds confirmation for his position in Kadens's and others' work. See *supra* note 16 and accompanying text.

26. Steven E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 AM.U. INT'L L. REV. 685, 794–803 (2006). For a fuller historiography, see LEX

question as to why a reference to history should play such a prominent role in these projects.

Perhaps the most convincing answer has been given by Nicholas Foster. He suggests that the medieval origins of the modern *lex mercatoria* serve as a “foundation myth.”<sup>27</sup> This explains, at the same time, the symbolic value of the history and at the same time the irrelevance of its inaccuracy. When proponents of a new *lex mercatoria* invoke the medieval *lex mercatoria*, they do so not for actual empirical accuracy, but instead to lay out a common ground. This mythical *lex mercatoria* is related to the actual medieval *lex mercatoria* in the same way in which the mythical Charlemagne is related to the historical emperor of the Franks, or the creation of the world in seven days is to the big bang. Such foundation myths are not falsifiable by new evidence because their truth lies not in empirics but in a common faith. Seen like this, the historiography of mercantile law is not “a game of ‘Telephone,’ with one generation interpreting the works of previous authors and the next interpreting the interpretations.”<sup>28</sup> Instead, it is a rite in which members of a group tell each other the same story again and again—or, in the academic equivalent, cite one another to support this story. Malynes’ seventeenth-century definition of *lex mercatoria* as “a Customary Law approued by the authoritie of all Kingdomes and Commonweales, and not a Law established by the Soueraigntie of any Prince”<sup>29</sup> is repeated again and again not because Malynes had any superior historical or even legal expertise (he was a trader), but because the quote has become a mantra.<sup>30</sup>

A foundation myth smacks of irrationality, but there is a rational counterpart: the medieval *lex mercatoria* as a thought experiment. To some extent, that seems to be what libertarians have in mind when they invoke a medieval *lex mercatoria* as a pure private governance. It is not intended as a description of how things actually were, but an imagination of how things could have been. This would be reminiscent of Richard Nozick’s rather curious speculation on how states might have been formed in his *Anarchy, State, and Utopia*.<sup>31</sup> Others more openly invoke *lex mercatoria* as an idea

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MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (Mary Elizabeth Basile et al. eds., 1998).

27. See generally Foster, *supra* note 21. The idea can also be found in Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 152 (1997).

28. Sachs, *supra* note 26, at 806.

29. GERARD MALYNES, *CONSUETUDO, VEL LEX MERCATORIA OR THE ANCIENT LAW-MERCHANT* (1622).

30. See uses of the quote in M. S. Blackman, *Mercantile Law and Mercantile Practice: Mercantile Practice as a Reviving Source of Mercantile Law*, 103 S. AFRICAN L.J. 209, 214 n.21 (1986); Noel Cox, *The Regulation of Cyberspace and the Loss of National Sovereignty*, 11 INFO. & COMM. TECH. L. 241, 241 (2002); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 137 (1934).

31. RICHARD NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

rather than reality.<sup>32</sup> Here, the medieval *lex mercatoria* is not a myth but neither is it a purported reality. Instead, it is a hypothetical history that is nonetheless used as evidence.

### III. Legal Medievalism

This leaves one question open: why is the medieval law merchant in particular such a popular model? We should note that *lex mercatoria* is not the only instance of a new development based on a comparison with the Middle Ages. Rather, the idea fits the more general theory of a new medievalism, as suggested some thirty-five years ago by Hedley Bull as an image for the overlapping power structures of globalization.<sup>33</sup> This idea has been influential also in legal studies.<sup>34</sup> The underlying idea is, presumably, one of globalization: If we want to create a law for globalization *after* the nation state, then we should look for models from the time *before* the nation state—the Middle Ages in particular.

Now, the Middle Ages are, quite obviously, a rather inadequate model for our time.<sup>35</sup> Their politics, their societies, their spirituality, and of course their laws, were so vastly different from ours that a direct comparison is almost impossible; and Kadens's article gives ample evidence of much of this.<sup>36</sup> Even the existence of overlapping power structures beyond the state, the main reason for their renaissance in globalization studies, is only an apparent similarity.<sup>37</sup> In the Middle Ages, such overlapping structures existed outside the state simply because a state, in the modern sense, did not

32. See, e.g., GRALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* 31 (2010) (referring to *lex mercatoria* as a romantic notion); Teubner, *supra* note 27, at 149–69 (mentioning that “*lex mercatoria*, no doubt, is non-law,” but arguing that *lex mercatoria* will emerge as globalization progresses); TEUBNER, *supra* note 4, at 15 (puzzling through the *lex mercatoria* “paradox”).

33. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 245–6, 254–55 (1977). See also John Rapley, *The New Middle Ages*, 85 *FOREIGN AFF.* (2006) (comparing “gang-controlled communities in Jamaica” to the “ad hoc arrangements” of tribes during the Middle Ages).

34. E.g., David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 *EMORY L.J.* 201, 213–17 (2007).

35. See Anna di Robilant, *Genealogies of Soft Law*, 54 *AM. J. COMP. L.* 499, 523–4 (2006) (arguing that “the neo-medievalist lens proves anachronistic” when used in the context of a global society where nation-states, the global business community, and international arbitrators “coexist[]”).

36. E.g., Kadens, *supra* note 2, at 1160 (explaining that, unlike merchants today, medieval traders did business face-to-face and settled disagreements by invoking principles of equity rather than by resorting to law).

37. Cf. Ralf Michaels, *The Mirage of Non-State Governance*, 2010 *UTAH L. REV.* 31, 39 (arguing that, in presence of the state, non-state governance and state governance will necessarily overlap, but that the systematic “distribution of labor” between the two reveals their dissimilarity).

yet exist.<sup>38</sup> This is quite different from a situation in which states exist, even if they are not the only sources of authority (as though they ever had been). In this sense, the Middle Ages can serve only as a metaphor, and this is indeed how Bull uses them.<sup>39</sup>

Such use of the Middle Ages can have a promising critical potential. This critical potential is aptly described by Ronald J. Deibert, following Richard Rorty, as “therapeutic redescription”: “The purpose, in other words, would be to redescribe the present in novel terms in order to shake us free of our current conceptual blinders that are holding us captive and getting in the way.”<sup>40</sup> Here, it is precisely the radical otherness of the Middle Ages that makes them generative of new ideas and conceptualizations. And yet, alas, this critical potential is not what most proponents of a new *lex mercatoria* are after. True, proponents do want to challenge a paradigm that arguably holds us captive, namely that of state centrism, or methodological nationalism. But if, as is the case, the Middle Ages are not presented as radically different, but as extremely similar to our time, the promise of the metaphor is lost. What could be therapeutic redescription instead becomes romantic nostalgia for an imagined past.

This romantic nostalgia for an imagined past is what Umberto Eco has described as neo-medievalism.<sup>41</sup> Eco’s idea is quite distinct from Hedley Bull’s, even though both are sometimes named side by side. Where Bull’s use of the Middle Ages is metaphorical,<sup>42</sup> Eco’s neo-medievalism is openly utopian.<sup>43</sup> Eco describes how our view of the Middle Ages has always been a dream of a better world.<sup>44</sup> Sometimes the Middle Ages are openly invoked as a utopian dream with direct application for our world—a famous example from the nineteenth century is William Morris’s socialist utopia “News from Nowhere.”<sup>45</sup> Other times, the Middle Ages are presented as an escapist dream.<sup>46</sup>

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38. See Leo Gross, *The Peace of Westphalia: 1648–1948*, 42 AM. J. INT’L. L. 20, 26 (1948) (acknowledging widespread recognition of the Treaty of Westphalia, signed in 1648, as the impetus of the modern state and modern international law).

39. See BULL, *supra* note 33, at 254 (arguing that if globalization leads to the disappearance of sovereign states, “a modern and secular equivalent to the kind of universal political organization that existed in Western Christendom in the Middle Ages” may emerge).

40. Ronald J. Deibert, ‘*Exorcismus Theoriae*’: Pragmatism, Metaphors and the Return of the Medieval in IR Theory, 3 EUR. J. INT’L REL. 167, 185 (1997).

41. UMBERTO ECO, *Dreaming of the Middle Ages*, in UMBERTO ECO, TRAVELS IN HYPERREALITY 61 (1986).

42. See *supra* note 39 and accompanying text.

43. Eco, *supra* note 1.

44. See *id.*

45. WILLIAM MORRIS, NEWS FROM NOWHERE (1891).

46. See generally ECO, *supra* note 41.

The image of the medieval *lex mercatoria* is a dream as well<sup>47</sup>—so much so that we can talk, in analogy to Eco, of legal (neo-)medievalism.<sup>48</sup> By this I mean a reference to the middle ages not as a historical fact but instead as a romantic idealized vision of the present. Historians may aim at describing the *actual* middle ages to show how things actually *were* in the *past*. Proponents of a new *lex mercatoria*, by contrast, aim at invoking utopias of an *imagined* middle ages to show how things actually *could and should be* in the *present*. And utopias cannot be falsified: after all, it is their main characteristic that they are *not* true in this world.

#### IV. On the Historian's Task

This has been a long argument. In the end, however, it may suggest why critics like Kadens have been so unsuccessful at refuting the stories told by proponents of a new *lex mercatoria*. Scholars of medieval law on the one hand, and legal medievalists on the other, may appear to speak of the same things. In reality, however, Kadens's Middle Ages have little to do with the Middle Ages of the new *lex mercatoria* proponents—not because she knows history and they do not (although that is true, too), but because she cares about actual facts and they care about a dream.

It may seem obvious that such an imaginary Middle Ages, and an imaginary *lex mercatoria*, need to be rejected because of their ideological potential.<sup>49</sup> I am not fully convinced. It is worth pointing out that legal positivism equally rests on mythical foundations,<sup>50</sup> as does the ideal of the state, on which so much current legal thinking rests.<sup>51</sup> The problem is not, it seems to me, dreaming per se. The problem begins, following the quote by Eco with which I began this short comment, once these dreams are taken as reason, and as direct models for our present problems.

Obviously, this does not at all mean that proponents of a new *lex mercatoria* have nothing to learn from work like Kadens's. If they rest their arguments on an alleged reality of a medieval *lex mercatoria*, they must account for how this real *lex mercatoria* looked. If they rest their argument on an imagined medieval *lex mercatoria*, it would behoove them to say so

47. Ralf Michaels, *Rollen und Rollenverständnisse im Transnationalen Privatrecht*, 45 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR INTERNATIONALES RECHT (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1938441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938441); Ralf Michaels, Address to London School of Economics and Political Science: Dreaming Transnational Law—Dream, Faith, Vision and Utopia in Current Legal Discourse (Nov. 17, 2011), available at <http://www.youtube.com/watch?v=B4-WByzfiEQ>.

48. di Robilant, *supra* note 35, at 518.

49. *Id.* at 522–27.

50. See generally PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992). For a modern application, see Ralf Michaels, *Code vs. Code—Nationalist and Internationalist Images of the Code Civil in the French Resistance to a European Codification*, in EUR. REV. CONT. L. (forthcoming 2012).

51. The classical exposition is ERNST CASSIRER, *THE MYTH OF THE STATE* (1947).

clearly, and to distinguish their own narratives from those told convincingly by historians.

But it may imply that some of Kadens's brilliance and erudition may be ill-focused if she takes on arguments with the proponents of a new *lex mercatoria*. Kadens writes, as far as I can tell, in the reputable (though not today undisputed) tradition of Leopold von Ranke's plea that historians should describe *wie es eigentlich gewesen*—what actually happened (or, perhaps more accurately, how things essentially were).<sup>52</sup> This is not what proponents of a new *lex mercatoria* are interested in. What they use is not history, and historians should point out that it is not. As concerns history itself, historians have worthier theorists amongst themselves than the legal medievalists.

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52. See LEOPOLD VON RANKE, *GESCHICHTEN DER ROMANISCHEN UND GERMANISCHEN VÖLKER VON 1494 BIS 1535*, at vi (1824). Kadens herself suggests: "I'm not a full-out Rankean. I know I can't know the *es*. Following the wise words of a college professor of mine, I don't try to be right. I try not to be wrong." E-mail from Emily Kadens to author (Feb. 24, 2012, 08:56:49 EST) (on file with author).