CARDOZO

LAW REVIEW

THE MOVE TO INSTITUTIONS

David Kennedy

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I. INTRODUCTION

The discipline of "international institutions" has made much of 1918.[1] Although most histories of the field stress the importance of

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[1] W. Kuehl, Seeking World Order—The United States and International Organization to 1920 (1969), illustrates the tendency to locate the origin of modern international institutions in 1918, and retains an extremely idealist orientation. The first chapter is entitled "An Idea Evolves," id. at 3 (covering the period from 1306 to 1850), and the last, "An Idea Grows," id. at 232 (the years surrounding 1917).

On the discipline of international institutions, see Sohn, The Growth of the Science of

various nineteenth-century European institutional innovations, they express little doubt that the modern international institution was born with the League of Nations in the aftermath of the First World War. This article examines the transformation of these historical developments, and in particular of war, into the origin of an institutional and academic practice.

By locating its origins in a set of historical developments, the discipline of international institutions distinguishes itself from public international law, which generally traces its origin to the texts and ideas of a few Europeans who wrote about international law and statecraft prior to the 1648 Peace of Westphalia.[2] Modern scholars of public international law write about the relationship between the ideas that comprise their discipline and various historical practices.[3] They consider the historical connections between the development of the

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International Organizations, in The Relevance of International Law 251-69 (K. Deutsch ed. 1968) [hereinafter Relevance]. On the diversity of institutional practices and approaches taken by the discipline, see 1 H. Schermers, International Institutional Law 1-25 (1972); Judge, International Institutions: Diversity, Borderline Cases, Functional Substitutes and Possible Alternatives, in International Organisation—A Conceptual Approach 28-83 (P. Taylor & A.J.R. Groom eds. 1978) [hereinafter Taylor & Groom]; Taylor, A Conceptual Typology of International Organisation, in id. at 118-36. For a compendium of these organizations, see 1A-2K International Organization and Integration (P.J. Kapteyn ed. 1981); 1-3 Yearbook of International Organizations (Union Int'l Ass'ns 21st ed. 1984-1985). An extensive bibliography of international organizations from early ideas in ancient Persia, China, and Greece, to the present, with emphasis on 1814 to modern times, is International Organization (M. Haas ed. 1971).

International institutions, like public international law, has been approached from both political science and law. A good introduction to the legal approach is F. Kirgis, International Organizations in their Legal Setting (1977). Standard legal works include D.W. Bowett, The Law of International Institutions (3d ed. 1975); H. Schermers, International Institutional Law (1980); L. Sohn, Cases on United Nations Law (rev. 2d ed. 1967) [hereinafter Cases]. For a classic "Historical Introduction," see D.W. Bowett, supra, at 1-12.

A contemporary exemplar of political science writing about international institutions is R. Keohane, After Hegemony—Cooperation and Discord in the World Political Economy (1984). A sense for the literature can be had by browsing in recent issues of Int'l Org. Other good introductions include A.L. Bennett, International Organizations: Principles and Issues 1-64 (1977) (standard history of international institutions); S. Goodspeed, The Nature and Function of International Organization 1-102 (2d ed. 1967) (concerning institutional history); W. Tung, International Organization Under the United Nations System 1-39 (1969). The classic source for the eclecticism of the contemporary discipline remains D. Mitrany, The Progress of International Government (1933).

[2] See Kennedy, Primitive Legal Scholarship, 27 Harv. Int'l L.J. 1, 1-2 (1986).

[3] This is evident not only in the prefaces to various standard treatises, see, e.g., J.L. Brierly, The Law of Nations—An Introduction to the International Law of Peace (2d ed. 1936); I. Brownlie, Principles of Public International Law at v-vi (2d ed. 1973), but also in the topics regarded as of theoretical interest, see, e.g., R. Falk, The Status of Law in International Society (1970); L. Henkin, How Nations Behave—Law and Foreign Policy (2d ed. 1979); see also Relevance, supra note 1 (debates about the relevance of international law), and in the doctrinal efforts to ground the authority of public international legal norms while retaining their independence, see D. Kennedy, International Legal Structures (1987) (considering "sources" of international law in chapter II).

national state or the Reformation and doctrines about sovereign autonomy or the separation of municipal and international law.[4] They theorize about the influence of state practice on legal norms and vice versa.[5] These are the preoccupations of a discipline which begins with the word.

Scholars writing about international institutions do not worry about the normative or historical relationship between their doctrinal or theoretical work and the practice of the institutions they study.[6] Theirs is not, in this sense, a normative or an idealist discipline. They worry, rather, about capturing the functional relationship between institutions and states and the details of institutional design on paper. In its practice, the discipline considers problems of situated and pragmatic management rather than normative authority and application.[7] These are the preoccupations of a discipline which begins with the deed. If the mystery of international law's origin lies in the autonomy of its ideas, the mystery of international institutions is the transformation of deed into word.

Because it self-consciously originates in a relationship *between* deed and word, the discipline of international institutions seems more

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[4] This can be seen in basic histories of international law, see, e.g., A. Nussbaum, A Concise History of the Law of Nations (rev. ed. 1954); Schiffer, The Legal Community of Mankind (1954), as well as in the histories of the field presented in contemporary teaching materials, see, e.g., L. Henkin, R. Pugh, O. Schacter & H. Smit, International Law—Cases and Materials 1-9 (1980) [hereinafter International Law Cases].

[5] Theoretically, this is illustrated by the great debate between naturalism and positivism, see R. Falk, supra note 3, at ii-52; Kennedy, Theses About International Law Discourse, 23 Ger. Y.B. Int'l L. 353, 377-84 (1980); doctrinally, it is illustrated by tenets concerning custom and treaty as well as by the relations between them, see, e.g., A. D'Amato, The Concept of Custom in International Law (1971); Virally, The Sources of International Law, in Manual of Public International Law 116 (M. Sørensen ed. 1968).

[6] Although this theme neither dominates theoretical work in the field nor structures its doctrines, one finds the occasional rumination on the importance of systematic understanding. See, e.g., Sohn, The Growth of the Science of International Organizations, in Relevance, supra note 1, at 251.

[7] This is particularly apparent in literature approaching international institutions from the field of political science. See, e.g., Taylor & Groom, supra note 1. A number of legal doctrines about international institutions are classically idealist in inspiration, and are more at home in a public international law treatise considering the special problems raised by institutions than in an institutions text. The most important doctrines consider the "personality" of international institutions—an application of statehood doctrine—and the bindingness of institutional outputs—a special case of sources. See, e.g., H. Schermers, supra note 1, §§ 1052-1071, 1377-1406 (separating legal status and decisions of the organization within the "legal order" from both participants and powers). Some historians of international institutions adopt an idealist posture, particularly with respect to disciplinary origins safely in the past—that is, prior to the move into institutions. See, e.g., W. Kuehl, supra note 1 (taking an idealist attitude towards the pre-League origins of international institutions in his 1969 book). See also infra notes 99-100 and accompanying text (concerning backward projection of idealism as a rhetorical mechanism to develop momentum forward from word to deed).

modern than public international law. Yet both the academic discipline of international institutions and the establishment of the institutions themselves are textual practices. Thus, Inis Claude begins his classic American college text *Swords Into Plowshares* by asserting that:

> It is useful to consider the nineteenth century as the era of *preparation for* international organization, and, for this purpose, to treat 1815, the year of the Congress of Vienna, and 1914, the year of the outbreak of World War I, as its chronological boundaries. Starting thus, we establish the years which have passed since the momentous events of 1914 as the era of *establishment of* international organization, which, in these terms, comes to be regarded as a phenomenon of the twentieth century.[8]

That Claude uses the word "establish" twice in this paragraph, once to refer to "our" own historical periodization and again, this time with emphasis, to refer to history's production of an institutional regime is revealing, for indeed, both were products of a similar imagination.[9] Ruminating about the origin of international institutions as a discipline no less than as a practice raises issues about what might be thought of as the textualization of social life rather than about the development, originality, and integrity of the word. By what mechanism does the discipline encompass its historical situation in a legal process? How did international life come to be "institutionalized"?

As comprehended by the discipline, the year 1918 originates the international institution in three ways. First, it executes a break between a preinstitutional and an institutionalized moment. Second, it establishes a progressive movement across that break into the League of Nations. Third, it inaugurates an institutional practice of repetition and exclusion which sustains the momentum of that movement into the institution.

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[8] I. Claude, Swords Into Plowshares—The Problems and Progress of International Organization 41 (4th ed. 1971) (emphasis in original).

[9] Claude goes on to acknowledge that "[t]here is an element of artificiality in this scheme, as in all efforts to divide history into distinct periods." Id. He then defends his effort in two ways: first on utilitarian grounds, and then by invoking a naturalist metaphor:

> [B]ut it is nevertheless a serviceable device for the study of the process of organizing international relations.
>
> Clearly, the establishment of the League of Nations was an event of fundamental importance, worthy of being considered a decisive forward step in that evolutionary process. To change the figure, nineteenth-century institutions provided the ancestry, but the League of Nations provided the parentage, of international organization as we know it today.

Id. The interesting point is that Claude refers to the factual development itself ("Clearly . . . .")—the very development whose importance Claude's categorization scheme is meant to establish—to shift from instrumental to naturalistic defense gambits.

The break in history's narrative providing the opportunity for the institution's birth is most apparent in the treatment accorded the year 1918 by the literature about international institutions. I consider these writings in Section I. The texts of establishment, particularly the Covenant of the League, transform that break into an institution. I take up this theme most directly in Section II. The analysis of voting in the plenary illustrates the recapitulative institutional practice which has been established, and is considered in Section III.

I begin exploration of these three themes of origination—break, movement, and repetition—by examining the discipline's sense that international institutions were necessary and desirable reactions to a disorganized world, distinguishing a preinstitutional from an institutionalized international order.[10] Thinking about the origins of international institutions seems to demand a vision of war, of peace, and of the process by which war gives way to peace. The sense that international institutions respond to war is common to literature about the institutional efforts which followed the First World War, the Second World War, and the wars of decolonization.[11]

The men who developed international institutions in this century experienced the wars to which institutions responded as temporary,

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[10] L. Oppenheim, First Lecture—The Aims of the League of Nations, in The League of Nations and its Problems—Three Lectures 1, (1919) [hereinafter League Problems] (emphasis omitted), represents these sentiments most adequately when he says: "Any kind of an International Law and some kind or other of a League of Nations are interdependent and correlative," id. at 6, "where there is a community of interests there must be law," id. at 8, and "no highly developed Community can exist for long without Courts of Justice," L. Oppenheim, Third Lecture—Administration of Justice and Mediation Within the League of Nations, in id. at 57, 61. From his point of view, organization arises of necessity from its antithesis—disorganization. Others elevate the process of institution-building to mythic proportions. See, e.g., 1 F.P. Walters, A History of the League of Nations 3 (1952) (The League was "the embodiment in constitutional form of mankind's aspirations towards peace and towards a rationally organized world."); see also F. Pollock, The League of Nations 89 (2d ed. 1922) ("[I]f no one had thought of a League of Nations before, it would none the less have been needful, about the end of 1918, to invent something of the kind.").

> Had it not existed, these problems would have necessitated some form of international co-operation, and who can doubt that the system of permanent conference, with its subsidiary conferences, committees, and councils all linked together by the permanent secretariat and scientific documentation, is by far the best method by which they could be tackled?

C.K. Webster & S. Herbert, The League of Nations in Theory and Practice 301 (1933); see also I. Claude, supra note 8, at 215 (International organizations "would be necessary even if the possibility of armed hostilities should somehow permanently disappear from the modern international scene.").

[11] Indeed, some scholars have located precursors to this tendency in European statecraft following the Napoleonic wars and the Thirty Years War, among others. For an elaboration of the joint birth of international law and the modern state system, see Gross, The Peace of Westphalia, 1648-1948, 42 Am. J. Int'l L. 20 (1948).

disruptive, out of the ordinary, chaos.[12] In Section I of this article, I explore the interpretive mechanisms deployed within the discipline— among them notions borrowed from diplomatic history—to sustain this image of a discrete break against which to construct an enduring peace. Some of these mechanisms are purely discursive, for example, the characterization of the 1918 break as a movement across the boundary between politics and law, or passion and reason, or reality and utopia. Others are exclusionary, writing the history of the break as the successful transcendence of extreme positions and politics thought typical of chaos. In 1918 this was most pronounced in the exclusion of feminists and radical reformists from the Peace Conferences and in the temporary exclusion of utopian lawyers by realist politicians.

These images of the relationship between war and peace were associated with an image of the institution as the opposite of the social breakdown of war.[13] The literature has contrasted organized life with

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[12] See, e.g., G. Mangone, A Short History of International Organization 167 (1954) ("Three monstrous wars [Napoleonic, World War I, World War II] have led to three sane attempts to institutionalize peace by international organization."); see also H. Brailsford, A League of Nations 1-2 (1917) (The war "struck us with surprise as the thing it is, an anachronism, an obsolete barbarity, a blot on civilization."). These men see war as the impetus driving humankind towards organization. See G. Mangone, supra, at 34 ("The havoc of international war has compelled statesmen to turn their attention to the positive construction of peace by international organization."). But war has also been seen as an organized activity designed by monarchs and aristocrats who "could make war without personal hatred, and knew well enough that war must be carried on with some restraint, if only for the practical reason that the enemy of the day might be the friend of the morrow." J. Williams, Chapters on Current International Law and the League of Nations 67 (1929). Even today there are many statesmen who see war, or the threat of war, as a tool of diplomacy or a cool reaction to an impassioned situation. See, e.g., R. Nixon, The Real War 293-95 (1980) (suggestions for negotiating with Soviet leaders).

[13] According to Claude, the "total collapse of world order [following World War II] produced not so much a sense of the futility and hopelessness of international organization as a vivid awareness of the need for and a resolute determination to achieve an improved system of international organization." I. Claude, supra note 8, at 57. Law is often seen as the harbinger of order. Thus, Williams states: "The alternative to war is law . . . ." J. Williams, supra note 12, at 67. Disorganization is viewed as either the result of war (as Williams suggests) which law must rectify, the producer of war, see I. Claude, supra note 8, at 57 ("[I]nternational disorganization . . . produced the greatest and most disastrous of conflicts—World War II."), or simply a natural state necessarily counterposed by law, see S. Williams & A. de Mestral, An Introduction to International Law 3 (1979) ("Chaos is inimical to any group of people and law has been and still is the method by which a community, whether it be made up of individual people or of states, has been brought and bound together by a set of recognized standards."). In any case, war, whether it produces, results from, or exemplifies disorganization (or any combination of the three), can only be tamed by organization as represented by law or legal institutions. This notion is, of course, hardly restricted to the discipline of international law, which shares much, including an increasing interest in institutional and bureaucratic issues, with the literatures of political science, organizational theory, and sociology of institutions. See, e.g., W. Zwerman, New Perspectives on Organization Theory (1970); Gordenker & Saun-

chaos in two major ways. First, the institution opposes a social situation which it organizes and into which it, or perhaps we, would sink should the institution's cohesion lapse.[14] This disorganized scene might seem either violent, chaotic, and passionate, or rigid and boring.[15] In either case, to be organized is to be lifted above its mire,

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ders, Organisation Theory and International Organisation, in Taylor & Groom, supra note 1, at 84-107; Sohn, The Growth of the Science of International Organizations, in Relevance, supra note 1, at 251. Compare Berteling, Inter-Secretariat Co-Ordination in the United Nations System, 24 Neth. Int'l L. Rev. 21-42 (1977) ("[A]n increasing number of states are not really interested in inter-secretariat co-ordination. . . . [T]here is a stronger tendency towards centralization, rather than functional decentralization.") with Sloan, The Management of General Motors, in Organization Theory 182 (D.S. Pugh ed. 1971) ("[G]ood management rests on a reconciliation of . . . 'decentralization with coordinated control.' ").

[14] The image of lapse is perhaps best demonstrated by the literature's progressive, evolutionary sense of advancement towards institutionalization. The Hague system, for example, is seen as a first step towards organization and away from the chaos of war. See G. Mangone, supra note 12, at 60 ("The rudimentary mechanism of the *ad hoc* conference was only a beginning to more apt international organization . . . ."), or I. Claude, supra note 8, at 29 ("A leading feature of the Hague System was its approach toward universality."). But it was only a first step and doomed to fail: "The age of consultation ended as it had begun—with an earthshattering war which tore at the roots of civilization." G. Mangone, supra note 12, at 61. Even so, the Hague system is seen (as the League later is) as laying the groundwork for a newer, better system:

> The Hague Conferences were notable events in the history of international organization not so much because of their actual accomplishments as because of the conceptions to which they gave expression, the hopes which they dramatized, the proposals which they largely failed to put into effect, and the problems which they failed to solve but succeeded in exposing.

I. Claude, supra note 8, at 32. The League then inherits the ideals of the Hague Conferences: opposing the chaos of World War I and providing hope for international organization. Oppenheim, calling for the League's establishment, writes: "[I]nternational institutions must be established which will make the outbreak of war, if not impossible, at any rate only an exceptional possibility." L. Oppenheim, First Lecture—The Aims of the League of Nations, in League Problems, supra note 10, at 13. After the failure of the League to prevent the chaos of World War II, Henig writes that "the allies in that war were determined to lay the foundations for a successor organisation to the League which would help to re-establish international harmony after the conclusion of the war." R. Henig, The League of Nations 161 (1973). See S. Marks, The Illusion of Peace—International Relations in Europe 1918-1933, at 144-46 (1976). For further examples of the interplay of war and international institutions in their varied and often interchangeable roles of chaos and organization, see supra notes 12-13 and accompanying text.

[15] War, embodying disorganization, is often identified with violence and passion. See, e.g., H. Brailsford, supra note 12, at 324 ("the noise and passion of war"). Peace, the antithesis of war, is seen to embody organization. According to many, peace treaties failed—failed to maintain the order they promised—because they "have been the outcome of a political vision obscured by the passions of victory, or fear, or historical resentment." Angell, Introduction to E. Krehbiel, Nationalism, War and Society at xiv (1916). Others, however, object to the vision of peace as solely organization: "There has been grave misconception of the nature of peace. Peace has been identified with the *status quo*, stability with rigidity." J. Dulles, War, Peace and Change at ix (1939). Peace, for Dulles, is dynamic—its terms must change with the changing needs of the world. Ultimately, however, despite the rigidity of peace treaties and other attempts at organization, Dulles insists that we need organization—but one that will be more responsive to change.

from passion into reason, from mechanical stasis into inspired social progress.[16] Second, and more importantly for the discipline, the institution is a continual transcendence of chaos, a continual movement forward from its origin and differentiation from its own history.[17] The current form of the institution responds to its preparation, reminds us of the moment at which war was set aside, and promises the institution's withering away and the arrival of its successor—a peace which could finally leave the threat of war behind.

The second and third Sections of this article explore this institutionalization practice. Section II analyzes the textual mechanism which establishes the institution: the Covenant of the League of Nations. The use of a text to signal the move, and indeed to move, from chaos to order is part of the genius of modern institutional practice. This section considers the relationship between the peace negotiations and the drafting of the League Covenant, the international dynamics of the Covenant itself, and the relationship envisioned by the Covenant between the moment of textual establishment and the plenary of the institution being established.

The system of textual establishment illustrated by the League Covenant set in motion an institutional and disciplinary practice quite different from the political practice it sought to leave behind.[18] Sec-

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[16] While war itself might be full of "noise and passion," H. Brailsford, supra note 12, at 324, it has been seen as the result of a static social order helpless to make the dynamic changes necessary to prevent it. War arises in this view because of "the inertia, the impotence, the suspicion, the lack of social sense which [stand] in the way of these necessary changes." Id. at 326. Only through an organization of nations which regulates and orders change can the evil of war be avoided. See id. at 326-27. Claude, on the other hand, sees the awakened rationality of the 19th century toward warfare through negotiation and compromise as the beginning of the victory of reason over passion. I. Claude, supra note 8, at 32-33. Nationalism is equated with reckless passions, and only through effective organization can this irresponsible tendency be subdued. Id. Both writers, then, see organization as the means to end war. However, while Brailsford asserts that this organization will inspire us toward social progress, ending the rigidity and inflexibility that causes war, Claude holds that organization, rather than directing passions, will triumph over them, leaving us with a stable and ordered world.

[17] For example, Claude, speaking of the history of the United Nations, says:

As in the case of the League, the United Nations reflected the influence of a variety of formative factors. It was not simply a brainchild of idealists, a contrivance of nationally oriented statesmen, a flowering of historically planted seeds, or an excrescence upon the surface of contemporary world politics. It was all these things and more.

. . . The United Nations could be described, with considerable justification, as a revised version of the League.

I. Claude, supra note 8, at 60.

[18] The notion that the League would inaugurate a "new order" of diplomacy was held by many. Harold Nicolson, a British diplomat and scholar whose professional coming of age occurred at the Paris Peace Conference, wrote one book prior to the War criticizing the "old diplomacy" practiced by his father. H. Nicolson, Portrait of a Diplomatist (1930). A confirmed Wilsonian whose ideals found expression in notions of an open, institutionalized diplo-

tion III considers this continuing process of institutionalization in the analysis and reform of plenary voting schemes as institutional embodiments of the replacement of war by peace through organization. This literature captures changes in the discipline's image of institutionalization as it breaks forward from its own history, and illustrates the continued practice of exclusion and redefinition which sustains the institutional regime and transforms the chaos of war into the rhetorical practice of "dispute resolution."

Before examining these three practices of the discipline—its origin in the break between peace and war, its textual movement to establish the institution, and its recapitulative efforts at institutional continuation and reform—I should stress that this is neither a history of the League of Nations nor an account of changes in the discipline of international institutions. Those stories have been ably told elsewhere.[19] This article considers only a set of ideas about institutionalization illustrated by some narratives told by the discipline of international institutions about its origin and practice.

II. THE ORIGIN OF THE LEAGUE OF NATIONS

In this Section of the article, I examine several basic ideas about the League's origin that recur in the international institutional literature. Many of these ideas are shared with or borrowed from the literature of diplomatic history. Perhaps unsurprisingly, contemporaneous plans and proposals for a League participate in the same narrative. Of the three establishment themes explored in this arti-

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macy, Nicolson describes the shattering of these ideals in 1919 at the Paris Conference as they took institutional form. In an introduction written years later, Nicolson equivocates on his earlier loss of innocence. Late in his career, this equivocation became a conviction that there was much useful continuity between the "old" and the "new" diplomacy, and that the institutionalization—as a result of the process of democratization—of certain diplomatic functions was the distinctive contribution of the new diplomacy.

> I have for long wished to paint a picture of the new diplomacy as a sequel, or counterpart, to that sketch of the old diplomacy which I essayed in the biography of my father. The more I have considered the subject the less have I come to believe in any real opposition between the two. Diplomacy essentially is the organised system of negotiation between sovereign states.

H. Nicolson, Peacemaking 1919, at 4 (1933) [hereinafter Peacemaking 1919]. Nevertheless, Nicolson then continues to distinguish two generations of diplomacy by using the War as a break between pre-War and post-War diplomacy.

[19] On international institutions, see supra note 1. A good basic history of international institutions is G. Mangone, supra note 12. An extremely useful bibliography is International Organizations 1918-1945—A Guide to Research and Research Materials (G. Baer ed. 1981). Reliable general studies include C. Howard-Ellis, The Origin Structure & Working of the League of Nations 20 (1928) ("conceived as an essay in applied sociology, as a monograph on the obstetrics of the womb of time"); 1-2 F.P. Walters, supra note 10; A. Zimmern, The League of Nations and the Rule of Law 1918-1935 (rev. 2d ed. 1939).

cle—break, movement, and repetition—the first is best illustrated by these texts about the League's origin. All are concerned to establish a rupture in the narrative of history which could accommodate something as original as the institutionalization of international relations. In these materials, this break is most commonly articulated as part of the relationship between war and peace. As they enforce a break between war and peace, these materials also illustrate the transformation of that difference into both a forward momentum for the establishment of institutions and an institutional style which can sustain that momentum.

A. *Diplomatic History and the Break of War*

For three generations, students of international relations and diplomatic history have been taught to treat the First World War as a watershed.[20] In much of this literature, the War is treated as the

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[20] E.g., B. Schmitt & H. Vedeler, The World in the Crucible 1914-1919, at 27 (1984), provides a classic example of this vision:

> From the perspective of nearly seven decades, the shaping influence of this complex of events on our century still looms large. The world came through the crucible of change from 1914 to 1919 refashioned. More than anything else, the war separated the world of the nineteenth century from that of the twentieth. The wide range of its impact is still very much a part of our life.

The literature of European diplomatic history has devoted a disproportionate number of pages to this five-year period. See, e.g., E.H. Carr, International Relations Between the Two World Wars 1919-1939 (1947) [hereinafter International Relations]; E. Carr, The Twenty Years' Crisis 1919-1939—An Introduction to the Study of International Relations (1939) [hereinafter Crisis]; G. Craig, Europe Since 1914 (3d ed. 1971); A.J.P. Taylor, The Struggle for Mastery in Europe 1848-1918 (1954). Often, the titles of diplomatic histories themselves emphasize the idea of a break. See C.R.M.F. Cruttwell, A History of the Great War 1914-1918 (2d ed. 1936); B.H.L. Hart, The Real War 1914-1918 (1930); Peacemaking 1919, supra note 18; R. Sontag, A Broken World 1919-1939 (1971) [hereinafter Broken World]. For diplomatic-history treatises which treat the 1914-1919 period as a "break" in a longer (100 year) context, see H. Barnes, World Politics in Modern Civilization (1930); G. Bruun, The World in the Twentieth Century (3d ed. 1957) [hereinafter Twentieth Century]; C. Hayes, Contemporary Europe Since 1870 (rev. ed. 1958); W. Langsam, The World Since 1914 (4th ed. 1940); A. Mayer, Political Origins of the New Diplomacy, 1917-1918 (1959); A. Mayer, Politics and Diplomacy of Peacemaking—Containment and Counterrevolution at Versailles, 1918-1919 (1967); R.B. Mowat, A History of European Diplomacy, 1914-1925 (1927); R.B. Mowat, Diplomacy and Power (1936) [hereinafter Power].

> The further the Great War of 1914-1918 recedes into the past, the more clearly we see how great a turning-point it was in human affairs. We have passed into a new historical era, and all our problems, political, social and economic, are profoundly different from what they were in that remote time which we call "prewar."

R. Muir, Political Consequences of the Great War 9 (1930). See F.L. Benns, Europe Since 1914 (rev. 2d ed. 1936); F.L. Benns, European History Since 1870 (1938); H. Holborn, The Political Collapse of Europe (1951); H. Nicolson, The Evolution of Diplomatic Method 184-93 (1954); C. Petrie, Diplomatic History 1713-1933 (1946); R. Sontag, European Diplomatic History 1871-1932 (1933) [hereinafter Diplomatic History]; see also V. Wellesley, Diplomacy in

quintessential mark of historical change.[21] It is in this spirit that people writing about public international law and international organizations treat 1918 as a break in the evolutionary development of

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Fetters 43 (1944) (modern foreign policy subject to the scrutiny of an increasingly aware electorate).

G. Craig, supra, at 454-60, supports his dramatic sense of the 1914 break by reference to its importance for the arts. After elaborate discussion of cultural changes brought about by the War, he quotes Paul Valery:

> All the fundamentals of our life have been affected by the war and something deeper has been worn away than the renewable parts of the machine. You know how greatly the general economic situation has been disturbed, and the polity of states and the very life of the individual; you are familiar with the universal discomfort, hesitation, apprehension. But among these injured things is the Mind. The Mind has indeed been cruelly wounded; its complaint is heard in the hearts of intellectual man; it passes a mournful judgment on itself. It doubts itself profoundly.

Id. at 459. See also B. Schmitt & H. Vedeler, supra, at 480-82 (influence of War on German artists); id. at 517 (providing a good bibliography). The most interesting accounts of this period which I have run across are S. Kern, The Culture of Time and Space 1880-1918 (1983), and P. Fussell, The Great War and Modern Memory (1975). For a popular and readable account, see B. Tuchman, The Proud Tower—A Portrait of the World Before the War 1890-1914 (1966). Schmitt and Vedeler consider other works participating in this view:

> Certain books deal directly in a generic sense with the impact of the war on attitudes and consciousness. Eric J. Leeds, *No Man's Land: Combat and Identity in World War I* (Cambridge, England, 1979), is a psychological and anthropological study, rather abstract, of how the war shaped the mental character of an age. Robert Wohl, *The Generation of 1914* (Cambridge, Mass., 1979), portrays the European intellectuals of the war period as a generation "wandering between two worlds." Eckart Koester, *Literatur und Weltkriegsideologie* (Kronberg/Ts., 1977), is informative on reigning ideas and ideological currents in Germany during the war.
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> Of general importance is I. F. Clarke, *Voices Prophesying War, 1763-1984* (London, 1966), which demonstrates how the First World War cut a deep chasm in western thought that resulted in an entirely changed view of war.

B. Schmitt & H. Vedeler, supra, at 516-17.

[21] See B. Schmitt & H. Vedeler, supra note 20, at 1 ("Not since the beginning of modern times had the forces of accelerating change been acting on Europe so deeply and disturbingly as in the years before the First World War."). They conclude: "Of all the convulsive transformations of the European system, the Great War and the peace settlement brought about the sharpest break with the past, economically and socially no less than politically." Id. at 455.

Comparisons with other "breaks" suggest that 1914-1919 was a "break to end all breaks." See R. Albrecht-Carrié, A Diplomatic History of Europe Since the Congress of Vienna 300 (rev. ed. 1973) ("[T]he circumstances of 1919 were vastly different from those of, say, 1814.").

> It should be said at the outset that these effects were without precedent, so cataclysmic and far-reaching that the search for a new equilibrium is still proceeding unresolved after the lapse of nearly half a century; by comparison, the immediate effects of the quarter-century disturbance initiated in 1789 were relatively minor.

Id. See also S. Marks, supra note 14, at 1 ("[I]t was clear that the forthcoming settlement must far exceed in geographic scope and complexity those other periodic realignments of the power balance, the 1648 Treaty of Westphalia and the 1815 Final Act of Vienna, to which it is often compared.").

contemporary international institutions.[22]

Although texts which treat 1918 as a sharp historical break in both the development of international institutions and in the analytic tradition spawned by that development rely upon the common image of the War as an interruption in the historical narrative, they also depart from it in important ways. It seems obvious that speaking of the War as a "break" oversimplifies what were complex changes, not only in the international political order, but in cultural assumptions, legal theory, and much, much more. At best, "the First World War" seems useful shorthand for a variety of quite different changes. Allowing the War to signal a variety of historical changes is different from situating a single change—a move into institutions—in the peace which resulted from that War.[23] Moreover, we find in 1918 not merely a restoration of peace following the rupture of war, but a second break, a break in the pattern of international interaction.

Literature about the origin of the League thus relates two different breaks—one which it borrows from diplomatic history and one which it creates in 1918. The first of the two ruptures relies comfortably on common images of the difference between war and peace. In general parlance, the First World War is treated as a disruption, an intrusion into the affairs of men which dramatically altered their "flow." The War was a "catalyst," a "crucible," a "sudden storm sweeping away the old order."[24] In this vision, war is as fundamen-

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[22] See, e.g., I. Claude, supra note 8, at 41-55; F. Kirgis, supra note 1, at 6. Schmitt and Vedeler, in their chapter entitled "The World Reshaped," subtitle the second section, "The New International Order" and suggest that: "The new international order was fashioned not simply by the peace settlement at the end of the war but by the peace settlement and the war." B. Schmitt & H. Vedeler, supra note 20, at 462.

On the League's emergence from the War, see 1 F.P. Walters, supra note 10; see also C. Archer, International Organizations 20 (1983) ("If the institutions of the League were fashioned by the immediate experience of wartime co-operation rather than by seventeenth-century writers, the activities pressed by the members through these institutions were also more determined by memories of 1914-18 than by abstract concepts."). However, Harold Nicolson, who embraces the new/old rhetoric in his biography of his father, later retracts his earlier views. See Peacemaking 1919, supra note 18.

[23] A number of these differences are articulated by the use of "1914," "1918," or "1919" when speaking of the break. "1914" might be used to distinguish the world of pre-War "illusion" from the "reality" of the War. See R. Albrecht-Carrié, supra note 21, at 299; G.L. Dickinson, The International Anarchy, 1904-1914 (1926); O. Hale, The Great Illusion 1900-1914 (1971); B. Tuchman, supra note 20. "1918" might represent the end of European world dominance. See B. Schmitt & H. Vedeler, supra note 20, at xv. "1919" could suggest the beginnings of a new international order. See Peacemaking 1919, supra note 18.

[24] Schmitt and Vedeler devote the longest volume in The Rise of Modern Europe series to the shortest period because "the upheaval [was] . . . one of the three great revolutionary crises in modern history." B. Schmitt & H. Vedeler, supra note 20, at 27. See also A. Zimmern, supra note 19, at 93:

[The War] was a break-through, in the grand style, of the forces of disruption,

tally different from peace as is nature from the affairs of man.[25]

The general sense of the War as a break in the flow of peace suggests a second difference, one between the peace which preceded and that which followed. The First World War seems a crucial historical juncture because of its position between two different cultural, political, and social orders. When historical changes are organized around the breaks provided by war, the peaceful "systems" of both the pre- and postwar eras seem relatively continuous and stable, despite being subject to periodic radical disruption.[26] So long as war organizes and punctuates the progress of peace, the "break" between two orders seems less a rupture than a movement forward.

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carrying away in their path barriers that had held for a hundred years. Could peace be established on an equally world-wide basis, with a sweep as majestic and all-embracing? That was the problem set for statesmanship by the events of 1914.

Tuchman writes:

The Great War of 1914-18 lies like a band of scorched earth dividing that time from ours. In wiping out so many lives which would have been operative on the years that followed, in destroying beliefs, changing ideas, and leaving incurable wounds of disillusion, it created a physical as well as psychological gulf between two epochs.

B. Tuchman, supra note 20, at xiii.

[25] "War as nature" imagery abounds:

[T]he havoc wrought by war, which one compares with the havoc wrought by nature, is not an unavoidable fate before which man stands helpless. The natural forces that are the cause of war are human passions which it lies in our power to change. What are culture and civilization if not the taming of blind forces within us as well as in nature?

E. Key, War, Peace, and the Future 3-4 (1916).

[26] Much of this disruption is seen as shifts in the balance of power. See D. Dallin, The Big Three—The United States, Britain, Russia (1945); J.J. Saunders, The Age of Revolution—A Survey of European History Since 1815, at 170 (n.d.); F.H. Soward, Twenty-Five Troubled Years 1918-1943 (1944). The approximate equality of the five Great Powers—Britain, France, Prussia-Germany, Austria-Hungary, and Russia—is treated as having been responsible for stability and as having given way under the progress of industrialization. "This shift in the distribution of power had a direct relation to the origins of the war." B. Schmitt & H. Vedeler, supra note 20, at 2. The power balance also seemed to have been threatened by non-European forces, most notably the United States and Japan. See id. at 3-4. In this vision, periods of peace exist when sovereign states are roughly equal in power. See A.J.P. Taylor, supra note 20, at xix ("Europe has known almost as much peace as war; and it has owed these periods of peace to the Balance of Power."). War arises when one state seeks to upset this balance or other states fear that it will do so. See, e.g., id. at xx ("The First World war was, on the part of Germany's enemies, a war to preserve or to restore the Balance of Power."). But out of war, a new balance of power arises—a bipolar arrangement with the United States squared off against the Soviet Union. See K.J. Holsti, International Politics—A Framework for Analysis 79 (2d ed. 1972) ("Since 1947, the United States and the Soviet Union have not only originated and defined most international issues but have also taken the diplomatic and military leadership in dealing with them.). See also R. Aron, Peace and War—A Theory of International Relations 374 (R. Howard & A. Fox trans. 1966) ("Once the Soviet Union and the United States assumed the leading roles on the international stage, they extended that stage to the limits of the planet."). The new balance is once again threatened by the Soviet Union's attempt at world domination. See, e.g., R. Nixon, supra note 12, at 1.

In diplomatic history, particularly as rendered by literature about the origin of international institutions, the First World War punctuates an ambiguous difference between an "old" and a "new" order. On the one hand, the nineteenth century is described as the era of unbridled sovereign autonomy, a Hobbesian world of independent and all-too-often capricious princes competing for colonies, respect, and power.[27] Such stability as seemed possible was generated by the fortuitous balance of five relatively equal Great Powers—a decentralized, but effective, Leviathan.[28] The War, by crippling these powers, introducing a few new ones, and generally forcing acknowledgment of interdependence, created the conditions under which a social order among sovereigns could be achieved. This change was epitomized, or perhaps symbolized, by the dramatic growth of international law, commerce, and organization in the immediate post-War period.[29] In

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[27] See, e.g., A.J.P. Taylor, supra note 20, at xix ("In the state of nature which Hobbes imagined, violence was the only law, and life was 'nasty, brutish and short'. Though individuals never lived in this state of nature, the Great Powers of Europe have always done so."); see also J. Dulles, supra note 15, at 134 (totalitarian warfare as an act of mass sacrifice); 1 F.P. Walters, supra note 10, at 1-2 (Before the League, states owed "no allegiance to any higher authority.").

[28] Thus, Holsti states:

A significant feature of eighteenth-century European international politics was the relatively even distribution of diplomatic influence and military capabilities among the major states . . . . This relatively equal distribution of power and influence made it possible for the dynastic states to shift alliance partners without radically upsetting the structure of the whole system.

K.J. Holsti, supra note 26, at 64; see B. Schmitt & H. Vedeler, supra note 20, at 1 ("For two and a half centuries the European political order was based on the classical balance of power, or the system of relations associated with the five Great Powers of the Pentarchy. Historically, the five states had been more or less equal in power, reflecting a more static society."); see also R. Albrecht-Carrié, supra note 21, at 5-6 ("A community of sovereign entities must of necessity exist in a state of anarchy, the denial of the subjection to law."). European stability throughout the 19th century is attributed to the balance of power which decentralized power through alliances between two or more sovereign states. See A.J.P. Taylor, supra note 20, at xix ("No one state has ever been strong enough to eat up all the rest; and the mutual jealousy of the Great Powers has preserved even the small states, which could not have preserved themselves."). Elsewhere this balance of power is itself seen as law:

Power is the great regulator of the relations among states. But in a situation where a number of Powers existed, roughly of a comparable order of magnitude, it came to be an accepted convention that all, great and small alike, had an equal right to this existence; the balance of power may be regarded as a theory, or law, that none could break with impunity.

R. Albrecht-Carrié, supra note 21, at 6.

[29] In short, World War I influenced the creation of the League by stimulating efforts of the victorious powers to do in peacetime the things that should have been done before the war in order to prevent it, and to continue doing the things which they had found it possible to do during the war in order to win it.

I. Claude, supra note 8, at 48; see R. Muir, The Interdependent World and its Problems 1-28 (1932); O. Newfang, The Road to World Peace, 133-51 (1924); B. Schmitt & H. Vedeler, supra note 20, at 462; P. Slosson, Twentieth Century Europe (1927).

this view, the movement from the old to the new order brought about by the War was a movement from chaos to order.

On the other hand, nineteenth-century diplomatic history also presents a tale of secret intrigues, entangling alliances, and monarchial imaginations frozen by rigid military plans, inflexible commitments, and ossified notions of national honor and sovereign prerogative.[30] The War, by demonstrating the bankruptcy of these arrangements, created the conditions for an international liberal order of democratic nations and open covenants. Somewhat ironically perhaps, this change was also symbolized by the dramatic growth of international law and organization in the immediate post-War period.[31] In this view, the movement from the old to the new order brought about by war was a movement from order to liberty.

If the break between war and peace is unambiguous, the difference marked by war between the two peaces is uncertain. The post-War order of international law and institutions inherits both a move-

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[30] "It is plain that this war could have come only as it did, suddenly and out of secret counsels, without warning to the world, without discussion, without any of the deliberate movements of counsel with which it would seem natural to approach so stupendous a contest." 1 W. Wilson, The Messages and Papers of Woodrow Wilson 272 (1924). "[T]he doctrine of absolute sovereignty set up to guard the State itself against interference by other States must ultimately give way before the conception of a society of nations." 1 T. Marburg, League of Nations 58 (1919). See B.H.L. Hart, supra note 20, at 3-5; G. Schwarzenberger, The League of Nations and World Order—A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations 175 (1936); A. Zimmern, Nationality & Government 37 (1918). For some general discussion, see G.L. Dickinson, supra note 23; 1-2 S. Fay, The Origins of the World War (1929); 1 G.P. Gooch, Before the War—Studies in Diplomacy (1936); 2 id. (1938); G.P. Gooch, History of Modern Europe 1878-1919 (n.d.); O. Hale, supra note 23; W. Langer, The Diplomacy of Imperialism 1890-1902 (2d ed. 1951); W. Langer, European Alliances and Alignments 1871-1890 (2d ed. 1950); D. Lee, Europe's Crucial Years—The Diplomatic Background of World War I, 1902-1914 (1974); R.B. Mowat, The Concert of Europe (1930); R.B. Mowat, A History of European Diplomacy 1815-1914 (1923); A.J.P. Taylor, supra note 20; K. Zilliacus, Mirror of the Past—A History of Secret Diplomacy (1946).

[31] Whatever else may be thought about the war, it cannot be denied that it involved a failure of the older methods, of what is often comprehensively called 'the old diplomacy'. The men who, in 1919, brought the League of Nations into existence aimed at providing machinery which would, so far as is humanly possible, prevent the recurrence of such a catastrophe.

A. Zimmern, supra note 19, at 1. Elsewhere he writes:

In 1919 the British and other governments adopted a plan, in the shape of the League of Nations, which was an improved Concert of Europe and very much more besides. The reason for this remarkable change of outlook, this rapid stride forward in political thinking, this revolution in the estimate of what was both practicable and desirable, is to be found in the war.

. . . By [the War's] destructiveness, by its overthrow of all that had hitherto been regarded as stable in international politics, it compelled men to seek for new and surer forms of organisation.

Id. at 137. See R. Muir, supra note 20, at 98-130, 178-213; O. Newfang, supra note 29, at 133-51, 173-223; B. Schmitt & H. Vedeler, supra note 20, at 455-62.

ment from chaos to order and a shift from order to liberty. The juxta-
position of two differences—between war and peace and between
peaceful orders—thus creates a sense of forward movement which
shapes the order it enables. The "liberal" post-War institutional or-
der is different because it avoids, and so long as it continues to avoid,
both the anarchy and the rigidity of nineteenth-century international
society.[32] If the War placed the evils of anarchy and totalitarianism
in the past, the new order must keep them at bay.[33] For the institu-
tional regime actively to exclude what had been left behind by the
break of war, the new order must repeat the movement by which it
was established.

B. *International Institutions and the Move to Peace*

When the literature about international institutions contemplates
its origin, it usually shares in the image of war as a rupture in a con-
tinuing civilization, an intrusion into the social order which hardens
and tempers it, baptizes it perhaps, but is not itself a part of the insti-
tutional regime. For some writers, World War One was the first such
war, the first which seemed more than the continuation of policy by
other means.[34] The literature associates this rupture with motion for-

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[32] Claude points to the movement, through international organization, from anarchy to
order:

> In functional terms, the process of international organization has brought
> greater progress toward a governed world than has been generally recognized, and
> certainly more than is acknowledged by those who adhere to the doctrinaire view
> that government and anarchy are the two halves of an absolute either-or formula.
>
> The last century, and particularly the last generation, has been an era of
> continuous development of patterns and techniques for managing the business of
> the international community.

I. Claude, supra note 8, at 435. He then delineates the institutions which have arisen since the
War and that hold the possibility for continual advancement into order. Id.

[33] Mangone, while commending the world on its progress, warns of the dangers of too little
law.

> The history of international organization indicates a slow but reasonable way
> to a respectable world society. Screaming headlines of the latest catastrophe, the
> latest revolution, the latest aggression emphasize the unhappy plight of the twenti-
> eth century. That the world, lashed by so many misfortunes, manages to keep its
> head up and its feet forward is a wonder. But attention ought not to be diverted
> from the work of international organization, so courageously wrought, so intri-
> cately patterned, for here is a plan for universal progress and peace with justice in
> this time of troubles. Man in his tortured endeavors to bring law and order to his
> society is not beyond smashing such a design.

G. Mangone, supra note 12, at 303. This double orientation is often associated with a balance
between too much and too little law. See, e.g., L. Henkin, supra note 3, at 3-7 ("Realists" who
do not recognize the uses and force of law are not realistic. "Idealists" who do not recognize
the law's limitations are largely irrelevant to the world that is.).

[34] In the intervals between these explosions of maximum violence, war was consid-
ered an extension of policy. Between the Congress of Vienna in 1815 and the

ward into the institution by personification and idealization.

Sometimes the War is treated as a break between what are re-garded as immature nineteenth-century "experiences" with interna-tional institutions and the "mature" modern international institutional regime.[35] The use of war or violence as a maturing nar-rative intrusion is, of course, quite familiar from numerous other reli-gious, literary, and artistic traditions. Sometimes the War is thought to separate scattered, almost haphazard, nineteenth-century precur-sors from the "complete" or "integrated" modern institutional re-gime. Whether the personified image is one of maturity or of an achieved comprehensivity, the post-War system is understood as an advance upon its predecessor even if it shares with the pre-War order a continuity of difference from war's intrusive violence.

Progressive narratives of this sort generally treat as significant those nineteenth-century institutions which foreshadowed one or an-

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> outbreak of World War I, wars were limited by the political objectives of the oppo-nents. Because they were fought for specific goals which did not threaten the sur-vival of any of the powers, a reasonable relationship existed between the force employed and the objective to be achieved. But with the outbreak of World War I, war suddenly seemed to become an end in itself.

H. Kissinger, Nuclear Weapons and Foreign Policy 105 (abr. ed. 1958).

[35] 1 F.P. Walters, supra note 10, at 2, insists that the War gave a new conception to the international order. "The difference between the conception of international order before 1914 and the conception of international order after the creation of the League was even greater than this, since the Covenant went further in constructive planning than even the most hopeful advocates of internationalism had dared to anticipate." Id. Claude implies that it was a more mature world that came out of the War and made possible an international organization like the League:

> The League was also the product of nineteenth-century beginnings in the sense that it picked up the ideas, adopted the assumptions, and reacted to the awarenesses which had been emergent in that earlier period. It was a more mature response to the recognition of the need for, and the challenge of the possibilities, of international organization.

I. Claude, supra note 8, at 44. In general, the League is seen as the flowering of adolescent 19th-century institutional experiences:

> The formation of the League was in part a process of imitation of the organiza-tional forms and types of the nineteenth century. But strict imitation was not so much in evidence as completion, elaboration, and progressive adaptation of the primitive prototypes of international organization. The Council of the League was a new edition of the Concert of Europe; but it was a significantly *revised* edition, incorporating the principles of legal definition of authority and terms of reference, institutional continuity, regularity of session, and balanced composition of great and small power representatives. The Assembly represented the realization of the hopes and plans of the Hague statesmen for a general conference of the nations, meeting periodically without dependence upon the initiative of a single state and equipped to develop standing rules of procedure. The Secretariat was an institu-tional flowering of the seminal concept of the international bureau which had been found in the earlier unions.

Id. at 43 (emphasis in original).

other of the elements of what is now imagined to be a complete institutional regime. Typically, these texts mention the public international unions and river commissions as incipient administrations (although limited in the scope of their portfolio),[36] the "concert system" as a protoparliament[37] (partial because still in periodic rather than "standing" session),[38] and the Permanent Court of Arbitration at the Hague as a judicial forerunner.[39] Post-1918 international organization, by contrast, is seen as an integrated system.[40] Although the League system would develop after 1918, this image emphasizes that all crucial institutional organs were in place by 1925.[41] Thereafter, progress or maturation would be measured by the expansion and

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[36] Both Bowett and Claude, for example, after mentioning the Concert of Europe and the Hague System, enumerate the development of public and private international unions. See D.W. Bowett, supra note 1, at 4; I. Claude, supra note 8, at 34-38.

[37] Frequently, the Concert system (or "Conference system") is mentioned as forerunner to more mature international organization:

> The machinery of the Great Power Conference was executive, legislative, and mediatory. It took executive action in the sense of ordering sometimes armed forces to produce certain results. It was legislative by reason of its pronouncements on general questions of international law, and it was sometimes a judge between the conflicting interests of its own members or of other Powers. In all these functions it anticipated part of the machinery of the League of Nations.

C.K. Webster & S. Herbert, supra note 10, at 20.

[38] To Mangone, the League of Nations differentiated itself as a legal forum, G. Mangone, *supra note 12, at 129, and as a comprehensive political forum, id. at 128.* "A salient difference between international organization before and after the League of Nations lies in the achievement of a permanent agency through which states can collaborate continuously on the grave problems which affect the peace of the world." Id.

[39] The Permanent Court of International Justice, which was anticipated in Article 14 of the Covenant but not definitively established until its Statute received ratification by a majority of the members of the League on August 20, 1921, constituted the full-fledged international judicial organ which the Hague Conferences, dissatisfied with the primitive Permanent Court of Arbitration, had vainly tried to create.

I. Claude, supra note 8, at 43 (footnote omitted).

[40] The fragments of international organization that existed before 1918 only came together as an integrated whole with the founding of the League. See, e.g., id. at 41 ("[N]ineteenth-century institutions provided the ancestry, but the League of Nations provided the parentage, of international organization as we know it today.").

[41] Zimmern, for example, divides his book into three sections: "The Pre-War System," "The Elements of the Covenant," and "The Working of the League." A. Zimmern, supra note 19. He implies that there are two systems: the before-League and the after-League. Id. at 1-9; see also 1 F.P. Walters, supra note 10, at 1-2:

> Before the League, it was held both in theory and practice that every State was the sole and sovereign judge of its own acts, owing no allegiance to any higher authority, entitled to resent criticism or even questioning by other States. Such conceptions have disappeared for ever: it is not doubted, and can never again be doubted, that the community of nations has the moral and legal right to discuss and judge the international conduct of each of its members.

integration of parliament, administration, and judiciary.[42]

These narratives of movement confirm that the War marked a break between different, but similarly peaceful, international systems. The continuity of social life on both sides of the 1914-1918 gap—its peacefulness—sets the institutional regime against a repetition of war.[43] The transformation of international social life into an institutional process sets the regime against a repetition of history. In this, the break and movement which conspire to signal the arrival of a modern international institutional system reinforce one another. But if the peaceful comprehensiveness of the institutional regime situates it forward of both war and history, this motion must be sustained by a vigilant exclusion of deviations from this peaceful comprehensiveness—by what might be thought of as a repetition of its originality.

That the institutional regime should be conditioned by the differences which signaled its origin is unsurprising. Most obviously, the institutional regime must be a regime of peace.[44] By associating war with chaos and peace with the organization of a "system," the institutionalization of international life can seem the very essence of peace. As a result, it comes to appear almost axiomatic that staying organized should mean staying peaceful.[45] It comes as no surprise that the Second World War is thought to prove the "failure" of the League rather than to epitomize its success.

The association of "peace" with "institutionalization" is reinforced by the relationship between the literatures of diplomatic and institutional history. The institutional developments are seen to substantiate accounts of the progressive development of diplomatic his-

[42] See, e.g., G. Mangone, supra note 12, at 294-303 (attributing rise of international organizations to progress in developing and integrating these three functions).

[43] See W. Kuehl, supra note 1, at 170-71 (describing continuity of the League idea across the break of War).

[44] Mangone maintains that "[t]he remedy for many world-wide ills in the mid-twentieth century seems so obviously to be international organization that one may take its hard, patient, perservering history for granted." G. Mangone, supra note 12, at 295. Although peace does not follow unproblematically from institutionalization—"[a] grievous error would be the supposition that the pyramid of international organizations necessarily soars to the perfect apex of peace," id. at 296—"[w]hat international organization offers is a way of channeling the egocentric drives of a sovereign state into world cooperation," id.

[45] Writing during the War, Oppenheim asserts that organization is the solution to the War, and in a series of lectures, supports the League of Nations idea as a more mature expression of internationalism. See League Problems, supra note 10. Many extend this relationship between peace and organization in their vision of the relationship between organization and law, law representing the epitome of organization. Thus, Henkin states: "In relations between nations, the progress of civilization may been seen as movement from force to diplomacy, from diplomacy to law." L. Henkin, supra note 3, at 1.

tory.[46] Similarly, but in a far less overt way, institutional development is seen to have been possible in part because of the diplomatic movement from an old to a new system.[47] As a result, these two sets of stories reinforce one another through their distance from one another. The movement from old to new diplomacy can be seen as the movement from chaos to order and from order to liberty because it is accompanied by an institutional transformation. Simultaneously, it is the institutional and diplomatic continuity across the War which makes the War the repository of the phantoms of both chaos and tyranny against which both systemic evolutions are to be understood. This displacement between diplomatic history and the history of international institutions continually restates the League's originating situation.

By displacing institutional literature and diplomatic history from one another, treating institutions first as both the symbol and the by-

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[46] Meanwhile, the continued existence of the League since 1920 has modified in some important respects the older practices of diplomacy. Apart from the fundamental conception of an organization of mutual insurance against war; apart from the surrender of national sovereignty which a strict adherence to the Covenant would imply; the League represents an innovation in all previous attempts at international co-operation, and for three main reasons. In the first place it is based upon a covenant or body of rules and principles. In the second place it holds annual meetings in a definite locality and at a definite time. And in the third place it possesses a permanent secretariat of trained international experts.

H. Nicolson, Diplomacy 174 (1939); see Diplomatic History, supra note 20, at 271-92. But cf. V. Wellesley, supra note 20, at 61-76 (removal of causes of war, not the inviolability of the League Covenant, paves the way for cooperation).

[47] See L. Henkin, supra note 3, at 317 ("If diplomacy can maintain a climate of order and provide lawful means for achieving change, these will induce the acceptance of law and the development of institutions for its observance."). Nicolson suggests that the movement towards greater democratic control in diplomatic practice which characterizes the "new" diplomacy led to the development of many modern institutions:

[I]t was hoped by many of us that this new experiment in conducting diplomacy from below upwards might in fact prove a valuable innovation in international practice.

To a certain extent these hopes were realized in the Secretariat of the League of Nations, a body which acquired and still maintains the highest standards of efficiency and co-operation.

H. Nicolson, supra note 46, at 158. Despite his misgivings, Nicolson asserts that the movement is still one of progression rather than regression:

If, therefore, one concentrates upon the continuity of diplomatic theory rather than upon its discontinuity, one is impressed by the fact that, in spite of the several different shapes which it assumed, and in spite of dramatic periods when violence momentarily became more authoritative than reason, it is possible to recognize a distinct upward curve of progress. What is the nature of that progress? I should define it as follows: "The progress of diplomatic theory has been from the narrow conception of exclusive tribal rights to the wider conception of inclusive common interests."

Id. at 37.

product of diplomatic history and second as the mechanism by which diplomacy creates its history, these literatures manage a place for liberty and order in a peaceful international regime.[48] If the diplomacy is too chaotic, it can be organized. If the organization is too rigid, it is available to, and indeed constituted by, diplomatic maneuver. Should diplomacy seem too rigid, it can be remade in an institutional process. Should the institution seem too open-ended, too procedurally neutral, it will be given content by a constellation of diplomatic initiatives and limited by the contours of the diplomatic system.

But the difference between these two literatures, like that between organized social life and just plain old, ordinary social life, is not always easily sustained. It seems, at times, difficult to distinguish a literature about the mechanisms of unanimity voting from a literature about diplomatic autonomy, an article about Great Power hegemony from one about the Security Council veto problem.[49] This rudimentary mechanism seems too transparent a repetition of the League's origin.

The international regime is conditioned by its origin in somewhat less obvious ways. Establishing the regime's origin as a forward movement to "completion" or "maturity" generates an image of systemic integration and comprehensiveness which the institution must sustain. The institution must nourish its maturity, actively excluding tendencies towards either fragmentation or departure from the ideal institutional form which certified its coming of age. Thus, we are gratified to discover that the League system (in which, for these purposes, the International Labor Organization is treated as an integral part) had an "international civil service," and generated administrative programs. The programmatic expansion of the United Nations, moreover, is understood to have built on this foundation.[50] Similarly, although the International Court of Justice set up after the Second

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[48] One way to sense the difference between these disciplines is in their respective terminologies for the entity under scrutiny. The literatures of political science and diplomatic history discuss "systems" of international order—balance of power, bipolar, and so forth—while the literature of international law tends to discuss "institutions." Standing between these terms is "organization," linking the two disciplines in its equivocal reference both to social order and institutional life.

[49] For several perspectives on how international organization only "works" with the consent of the Great Powers, see S. Bailey, Voting in the Security Council (1969); K.J. Holsti, supra note 26, at 79-81; A.J.P. Taylor, supra note 20.

[50] This "experience of the League" is seen by many to have laid the groundwork for the success of the United Nations:

> The organisation and scope of the United Nations' political activities were based on what were perceived to be both the strong points and shortcomings of League experience, and were cast in the same mould. The necessity for inter-state co-operation to power the new international organisation was a basic characteristic

World War is thought to have progressed beyond the inter-War Permanent Court of International Justice ("PCIJ") in its jurisdictional innovations and integration into the United Nations structure, it is still thought of as the PCIJ's successor.[51] The PCIJ, by contrast, is thought to be related to the Hague system, but neither to have replaced nor succeeded it.[52]

To remain comprehensively ordered is a difficult assignment. Often in international society, war has been the instrument of comprehensive order and peace has been associated with the fragmentation of unimpeded sovereign autonomy. The League is often portrayed as a practice of perpetual resistance to violence and disintegration. In such portrayals, violence and fragmentation are externalized either by projection onto actors beyond the membrane of social life (such as the "terrorist" or "aggressor")[53] or by confinement to moments of sys-

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> inherited from the League. In most respects, indeed, the United Nations was the recognisable offspring of League experience.

R. Henig, supra note 14, at 161. See also D.W. Bowett, supra note 1, at 336-39 (dissolution of the League and problems of United Nations succession); I. Claude, supra note 8, at 223-27 (development of "pacific settlement approach" to peace culminated in United Nations charter); 2 F.P. Walters, supra note 10, at 812 ("[T]he United Nations bears at every point the mark of the experience of the League.").

[51] For an account of discussion as to whether the court should begin anew or continue where the PCIJ left off, see L. Dolivet, The United Nations—A Handbook on the New World Organization 79 (1946) ("[T]he solution was finally reached of building the new International Court of Justice on the foundations of the old Permanent Court of International Justice."); see also 1 F.P. Walters, supra note 10, at 170-71 ("[T]he new International Court set up by the United Nations is almost an exact reproduction of the Permanent Court set up by the League.").

[52] > Like the Court of Arbitral Justice proposed at The Hague in 1907, the new Court is not intended to replace the Permanent Court of Arbitration. . . . No attempt has been made to circumscribe the usefulness of the work of the Hague Conferences. The Permanent Court of Arbitration may still have some functions to perform, even though the new Court beings its work immediately. . . .
>
> The differences are very marked between the old Hague Court of Arbitration and the new Court of Justice. Being only a panel, of course the members of the former never met as a body; the judges of the latter will come together at least once a year.

M. Hudson, The Permanent Court of International Justice—And the Question of American Participation 10-11 (1925); see also A. Fachiri, The Permanent Court of International Justice 4-7 (2d ed. 1932) (discussing how the new court is related to the old court).

[53] Terrorism is viewed as violent, disruptive, sporadic, the very antithesis of order and stability.

> If symbolic violence appertains to the nineteenth century, sporadic or clandestine violence belongs to the twentieth. Clandestine violence—attacks in the shadows—is always sporadic; the sporadic violence of partisans is often committed out in the open. Terrorist networks in cities are clandestine, partisan forces are scattered, but they eventually wear uniforms and live openly in the *djebels* or *maquis* (underbrush). Some states not at war with each other fight, in peacetime, by means of terrorists and partisans.

R. Aron, supra note 26, at 60.

temic, almost apocalyptic, breakdown (such as "war").[54] By projecting onto "war" or "aggression" the evils of extreme order and chaos, the literature relocates within the social world of the institutional regime the differences that animated a sense of progress forward from the old to the new regime.

Like the juxtaposition of diplomatic and institutional history, however, the externalization of chaos and social rigidity is difficult to sustain, for the institutional regime will often seem implicated in violence and rigidity. Portraying the institutional regime against these evils is also a rather flimsy repetition of the claims made about the League's origin. As it turns out, the discipline of international institutions responds to these narrative demands in far more sophisticated ways.

C. *Institutional Practice as Transformation and Repetition*

To sustain the League's simultaneous difference from both the War and the pre-War order, the international institutional literature confirms and repeats its narrative about the League's origin in its rep-

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> Terrorism during the seventh and eighth decades of the twentieth century has become a way of life and a way of death. The two assassination attempts made upon President Ronald Reagan and Pope John Paul II during the spring of 1981, and the October assassination of Anwar Sadat, serve to dramatically illustrate the cruel modern reality that no one—whether pope, president, or private person—is safe from the terorrist assault on international law and stability.

R. Friedlander, Terror-Violence—Aspects of Social Control at vii (1983). Others see a method and an order in international terrorism:

> Many of those who romanticize revolution prefer to view terrorism merely as one of the ills of modern society, or as an outraged response to intolerable social conditions. But "senseless" terrorism is often not as senseless as it may seem. To the Soviets and their allies, it is a calculated instrument of national policy.

R. Nixon, supra note 12, at 37. A fine collection of essays dealing with terrorism is Terrorism, Political Violence and World Order (H. Han ed. 1984). On aggression and collective security in the 1920's and '30's, see M. Beer, The League on Trial (W.H. Johnston trans. 1933); L. Davies, Nearing the Abyss—The Lesson of Ethiopia (1936); J. Shotwell, On the Rim of the Abyss (1936); H.M. Swanwick, Collective Insecurity (1937).

[54] This apocalyptic sense, according to Schmitt and Vedeler, pervaded the pre-1914 world:

> Far beneath the surface of the actions of statesmen and governments, seismic political and social forces were rumbling in 1914, giving premonitory warnings of a vast eruption. The crust of European institutions was not adjusted to the deep political and social realities inherent in the shifts of power relations between states and between classes caused by the accelerating change incident to advancing industrialization and the technological revolution. Europe faced the critical question whether the institutional structure could be accommodated, without war or revolution, to the disruptive shifts in position from state to state, from continent to continent, from class to class, and from one ethnic group to another. The rigidities and contradictions within the old empires and the backward-looking standpoint of their ruling oligarchies raised doubts whether this was possible.

B. Schmitt & H. Vedeler, supra note 20, at 20.

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resentation of the institution's practice. Doing so often transforms the differences between the war and peace which establish the break and movement into institutions. Recast as "law" and "politics," or "utopia" and "reality," the exclusions against which the institution established itself can be managed within the institutional fabric. In the originating practices of the institution, the same difficulties are managed by a set of characterizations and exclusions of women and men, radicals and moderates, lawyers and politicians.

An important component, even precondition, for these more sophisticated narratives is a more integrated and continuous sense of the relationship between war and peace. Sometimes, for example, the First World War seems to epitomize the system of bombastic nineteenth-century nationalism.[55] By juxtaposing a stalemated trench life with homefront jingoism, the War symbolizes the worst of nineteenth-century statecraft—a rigid and decentralized political program of unchecked national passions. In this view, 1919 brought a new order of organization, peace, and progress.[56]

Sometimes, by contrast, the War is seen as the first experience of universal international cooperation, the first collective realization of an interdependence beyond nationally competitive imperialisms.[57]

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[55] Albrecht-Carrié uses the "nineteenth century" to refer to the period from 1815 to 1914: "If we apply the label 'nineteenth century' to the hundred-year span enclosed between the dates 1815 and 1914, then the date 1870 may properly be taken as midpoint in the course of that century." R. Albrecht-Carrié, supra note 21, at 145; see B.H.L. Hart, supra note 20; J.J. Saunders, supra note 26, at 161-71; B. Tuchman, The Guns of August (1962).

[56] This view appears both in military histories of the War written in the 1930's (which often exclude consideration of the peace settlement) and in diplomatic histories of the "inter-War" period written after the Second World War (which often exclude consideration of the labor). E.g., International Relations, supra note 20; Crisis, supra note 20; C.R.M.F. Cruttwell, supra note 20; B.H.L. Hart, supra note 20; A. Wolfers, Britain and France Between Two Wars (1966); see, e.g., G.M. Gathorne-Hardy, A Short History of International Affairs 1920-1939 (4th ed. 1950); J. Mackintosh, The Paths that Led to War—Europe 1919-1939 (1940); H. Macmillan, Winds of Change 1914-1939 (1966); Broken World, supra note 20.

[57] Nicolson states that wartime necessities forced the allies to cooperate. This led to a realization that organization was essential to survival:

> In the place of a national policy expressing itself by competitive and conflicting diplomacy, you had a common international interest imposing the need of international co-operation. Nor was this the only difference. Instead of national policy trying to impose itself from above upon the facts of a situation you had a system by which the facts imposed themselves upon a policy.

H. Nicolson, supra note 46, at 157. This approach is widespread in the international institutional literature. See, e.g., I. Claude, supra note 8, at 47.

> The Great War was itself the final proof that the whole world had been brought within a single political system, for every people on the face of the earth was directly or indirectly involved in it—even the Lamas of Tibet and the Samoyedes of Kamschatka. Amid all its horrors, the war had this august and tremendous aspect, that it was the first event in human history in which all the peoples of the earth were not only involved, but knew that they were involved.

Rather than focusing upon the First World War as the first "total" war (a distinction which literature of this type often awards the distinctly national American Civil War), this approach emphasizes that the First World War was, after all, the first *world* war.[58] The sharp break was 1914, in which empires, power balances, war plans, Eurocentrism, and the false security of intertangled alliances collapsed.[59] The League system merely ratified the new diplomatic real-

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R. Muir, supra note 29, at 10; see also O. Newfang, supra note 29, at 146-51 ("co-operation by many nations is perfectly feasible"); Cotton & Morrow, The Machinery of International Cooperation During the Great War, in The League of Nations—The Principle and the Practice 50 (S. Duggan ed. 1919) (cooperation in systems of transport and supply necessary to allied War effort).

> This small body [the Allied Maritime Transport Executive] was the hub of the Allied war-machine. From it went forth, daily and hourly, decisions which closely affected the interests, the needs and, above all, the daily habits of individuals over a large part of the world. And here too, under the impact of experience, were being hammered out conclusions as to the possibilities and limits of interstate cooperation which could have been arrived at in no other way. It was no accident that, when . . . the Secretariat of the League of Nations came to be formed, three out of the four members of the Transport Executive . . . transferred their experience and driving power to its service.

A. Zimmern, supra note 19, at 147.

[58] Although H. Kissinger, supra note 34, at 105 n.1, writes that the American Civil War "approached the status of a total war precisely because it was a revolutionary struggle," European authors often viewed it as an "amateurish affair." See, e.g., F. Pollock, supra note 10, at 88 ("[A]ll European wars had been so [short] since the downfall of Napoleon, and the confidence of military experts was not shaken by the length of the American Civil War, which the Prussian General Staff regarded as an amateurish and uninstructive affair."). See also R. Albrecht-Carrié, supra note 21, at 302:

> It has been pointed out that the period that preceded the outbreak of the war of 1914 is one that truly marks the apogee of Europe. That war is called the First World War and the description is quite apt; for if it was primarily European in origin and if the theater of its decision was Europe, the effects of it were indeed world-wide.

For Aron, the First World War exemplifies modern war:

> Perhaps major wars are precisely those which, by reason of the passions they release, ultimately escape the men who have the illusion of controlling them. Retrospectively, the observer does not always perceive the conflict of interests that would have justified the passions and excluded the compromise. Perhaps, as I am tempted to believe, it is the very nature of industrialized warfare which ends by communicating hatred and fury to the masses and inspiring statesmen with the desire to disrupt the map of the old continent. The fact is that the first war of the century illustrates the transition toward the absolute form of a war whose political stake the belligerents are incapable of specifying.

R. Aron, supra note 26, at 26; cf. G. Wright, The Ordeal of Total War 1939-1945 (1968) (World War II as modern war).

[59] The Great War itself was a conflict of massive forces in four dimensions—military, political, economic, and ideological. Its scope, intensity, duration, and consequences were quite beyond the expectations of contemporaries. In the end the European empires dissolved in the furnace of war, a body of new states emerged, the map of Europe was remade essentially in its present form, and a world organization of supranational functions was created. The colonial era came to a close,

ity of broader participation (Latin American and Indian presence at the Paris Conference might be emphasized as an institutional symbol of the new reality),[60] underscored the newly universal nature of peace, and created new boundaries.[61] The First World War was the sine qua non of the international organization, and the U.K.-U.S. Allied Maritime Transport Council, Blockade Council, Revictualling Commission, and Supreme War Council were the progenitors of modern international organization.[62]

Thinking of the War as the last gasp of the old system or the first breath of the new poses problems. Far from being the opposite of

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and the Third World dawned in the Arab revolt and the conversion of the German colonies into mandates of the League of Nations. Monarchy as an institution of real authority received a death blow while democracy and socialism made giant advances.

B. Schmitt & H. Vedeler, supra note 20, at xv; see R. Albrecht-Carrié, supra note 21, at 299-308 (post-War realignment of power); G. Craig, supra note 20; Twentieth Century, supra note 20; B.H.L. Hart, supra note 20, at 3 ("Fifty years were spent in the process of making Europe. Five days were enough to detonate it.").

[60] See G. Mangone, supra note 12, at 153 ("Not only were responsible ministers represented in the Council, but distant states, notably Brazil and Argentina, appointed special representatives to Geneva with ambassadorial status to sit with the Council instead of utilizing on a part-time basis one of their envoys to a European state."); see also 3 The Strategy of World Order 7 (R. Falk & S. Mendlovitz eds. 1966) ("The League represented the establishment of an international organization that was potentially universal; membership was open to all states, rather than limited exclusively to Western states."). For various international perspectives, see J. Cortina, Cuba y la Liga de las Naciones (1928); W. Kelchner, Latin American Relations with the League of Nations 10-54 (1930); M. Perez-Guerrero, Les Relations des États de l'Amérique Latine avec la Société des Nations (1936); V. Ram & B. Sharma, India & the League of Nations 135-60 (1932); Hudson, Comment—The Argentine Republic and the League of Nations, 28 Am. J. Int'l L., 125 (1934).

[61] On the universality of peace, see League of Nations Covenant art. 11, para. 1. For commentary, see F. Pollock, supra note 10, at 231. See generally W. Rappard, The Quest for Peace (1940) (asserting that the double task of the Peace Conference was to settle national claims and establish international order—the former achieved by essentially redrawing the map of Europe). But see G. Mangone, supra note 12, at 136 (asserting that the experiment in international administration was "an experiment clothed in idealism, fed by philanthropy, but put to sleep by political cupidity").

[62] [T]he conduct of the war had made a tangible contribution to the body of experience in creation and operation of multilateral agencies which was available to the founders of the League. Great Britain, France, and Italy, ultimately joined by the United States, had improvised an impressive network of joint bodies, including a Supreme War Council, a Revictualling Commission, an Allied Maritime Transport Council, and a Blockade Council. These agencies had proved invaluable in facilitating the complicated task of fighting together. They had seemed to prove that effective international cooperation could be achieved, without the necessity of creating an authoritative decision-making body to issue orders to national governments, by bringing together responsible officials of governments to get to know and trust each other, to confront the full and true facts of the situation together, and to harmonize their national policies on the basis of respect for the facts, and appreciation of the positions of the various governments.

I. Claude, supra note 8, at 47.

violence, organization in some sense poses as its continuation.[63] Rather than operating as a stasis against violence, institutional energy must be harnessed to do the work of war without violence, or to deploy violence on behalf of peace. Organization must produce change and reinforce the results of war rather than merely provide international social and institutional continuity across a violent gap.[64] At first, it seems difficult to accommodate this continuous image of the relationship between war and peace with the radically discontinuous relationship initially invoked to suggest a break between the institutional regime, its predecessor regime, and the War which gave it birth. The new system must now present itself as a replacement and a continuation of war and the prewar order. Yet on reflection, this double demand is hardly novel. It seems the task set for any liberal political system—to provide ordered liberty.[65]

If a rather rigid sense of difference between war and peace was useful to create the break necessary to initiate the League system, these more continuous images are important in presenting the League as able to continue the struggle against tyranny and chaos. Both "war" and "peace" can now play the parts of order and freedom, organization and violence.[66] Just as peace must provide both order and

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[63] Consequently, the League continues the old system of interaction between states.
> However this may be, the League of Nations was never intended to be, nor is it, a revolutionary organisation. On the contrary, it accepts the world of states as it finds it and merely seeks to provide a more satisfactory means for carrying on some of the business which these states transact between one another. It is not even revolutionary in the more limited sense of revolutionising the methods for carrying on interstate business. It does not supersede the older methods. It merely supplements them.

A. Zimmern, supra note 19, at 4-5.

[64] The League is seen as providing the machinery for change, while at the same time reinforcing the War settlement. See, e.g., F. Pollock, supra note 10, at 135 ("[T]he Covenant is not intended to stamp the new territorial settlement as sacred and unalterable for all time, but, on the contrary, to provide machinery for the progressive regulation of international affairs in accordance with the needs of the future.") (quoting Agreement for a League of Nations commentary (Draft presented to Plenary Inter-Allied Conference, Feb. 14, 1919)).

> See Crisis, supra note 20, at 39 n.1 (" 'The great strength of the Covenant', said the British Government some years later, 'lies in the measure of discretion which it allows to the Council and Assembly in dealing with future contingencies which may have no parallel in history and which therefore cannot all of them be foreseen in advance.' ") (quoting League of Nations Official J., May 1928, at 703). Compare League of Nations Covenant art. 11 (providing for guarantees of security) with id. art. 19 (providing for peaceful change).

[65] See generally I. Claude, supra note 8, at 52-54, 78-79 (discussing international organizations and their connection with liberalism).

[66] The treatment of international relations here presented is focused in terms of three such broad conceptual principles. The first of these is the ever-present *tension between the struggle for power and the struggle for order.* Throughout the book, care is taken to emphasize that these two processes of international intercourse are always closely interrelated, that every form of relationship, even war itself, in-

liberty, so war must be both radically different from organized life—factual, natural, cataclysmic—and the continuation of politics by other means. By standing as both an ordered continuity and a chaotic alternative to peace, war sustains the image of an overall historical progression into ordered liberty.

Of course, the case for the League's continued opposition to chaos and tyranny cannot simply be made by suggesting that it is "fighting the good fight rather than the bad war" or that it is a regime of "order not tyranny." These slogans must be grounded in historical accounts which will pitch the League against the remnants of the tyranny and chaos which its establishment promises to have left behind. To do so, the literature often characterizes those dimensions of "war" and "peace" which the League will set aside or continue in somewhat less charged terms. In order to exploit the shifting significations of both "war" and "peace," the literature often differentiates institutional social life from the old diplomacy by associating one with "law" and the other with "politics," or one with extremist "utopian" speculation and the other with "pragmatic realism." These associations permit a more dynamic account of the League's continued practice of resistance to the forces of chaos and tyranny against which it was established.

The literature of international institutions uses the language of law and politics in two ways when describing the events of 1918. Sometimes the establishment of the League is treated as a moment of legislation—a movement from politics to law.[67] The movement from

cludes elements of cooperation, while every form of order, even the most tranquil condition of peace, bears within it seeds of conflict.

J. Stoessinger, The Might of Nations—World Politics in Our Time 5 (3d ed. 1969) (emphasis in original).

[67] The pre-League period is often referred to as the age of "international anarchy" primarily because of the absence of law in international disputes. Peaceful settlements, such as those facilitated by the Concert of Europe, came about as a result of political maneuvering.

No international legal sanctions troubled the age of international anarchy. The doctrine that "international war is an international crime" was true only in a moral, and not in a legal, sense. Legally, States had a practically unlimited "right of private war". The Covenant has greatly altered this situation. All members of the Legaue have now agreed to legal limitations on their right to make war.

H. Dalton, Towards the Peace of Nations 119 (1928). The establishment of the U.N. is also seen as a movement from politics to law. See, e.g., L. Henkin, supra note 3, at 137 ("For the first time, nations tried to bring within the realm of law those ultimate political tensions and interests that had long been deemed beyond control by law."). For characterizations of the movement from politics to law, see J. Harley, The League of Nations and the New International Law 42-43 (1921); C. Howard-Ellis, supra note 19, at 343-64; 1 C. Hyde, International Law—Chiefly as Interpreted and Applied by the United States 11 (rev. 2d ed. 1945); F.N. Keen, Towards International Justice 140-50 (1923); J. Knudson, A History of the League of Nations 193-205 (1938).

war to peace is seen as the capture of an unruly politics by law. Descriptions of this sort often treat the moment of institutional constitution as decisive.[68] The Peace Conference provides an analogy for the historical transition from war to peace, for it moves from the adduction of political positions to signature of a treaty.[69] Sometimes, by contrast, the literature treats the 1918 transition as a movement from law to politics. In this vision, emphasis is placed upon the movement from a written treaty which expressed the consequences of war in legal terms to the establishment of an institution which could provide the fluid forum of its revision and application.[70] In this second approach, the institution promises a reawakened and peaceful politics.

These two characterizations might well be accommodated in a dynamic account of the League's establishment as the movement from politics to law and from law to politics. Such an account would spread the changes which took place in 1919 into a series of transitions. The agenda of the Peace Conference, for example, seems to

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[68]   Since the making of the Constitution of the United States there has been no undertaking of equal or greater importance until the drafting of the Covenant of the League of Nations in 1919, to be incorporated in the text of the Treaty of Versailles. By this Covenant there was brought into existence a formal association of nations to fulfill the dreams of prophets and seers for hundreds of years.

Butler, Introduction to 1 D. Miller, The Drafting of the Covenant at viii (1928); see H. Dalton, supra note 67, at 117.

[69] After stating that the Versailles Peace Conference in 1919 is a good place to start a history of the rise of international organizations, Archer writes:

The gathering at Versailles in 1919 was primarily an intergovernmental meeting of heads of state and government, foreign ministers and their advisers. It was mostly concerned with the question of international peace and security while economic and social questions were given only perfunctory consideration. The Conference was faced with the task of writing a peace treaty and organizing relations between states after the most momentous breakdown in interstate relationships in history—the First World War.

C. Archer, supra note 22, at 3.

[70] The League was from the first something more than the moral and political beliefs which the Covenant professed; something more, also, than the great political and legal institutions which the Covenant established. Its purposes and its organs were combined into a living whole by the creative effort of human will.

1 F.P. Walters, supra note 10, at 1; cf. P. Potter, This World of Nations 290 (1929):

Two radically different views are held, by two different circles of students of the problem of government, concerning the nature of a Constitution. To some it is obvious that the Constitution of a country consists of the fundamental social elements and political practices and principles which have historically come to make up the nation,—such is the British view of the Constitution. To others it is natural to think of the Constitution as a plan of government deliberately worked out in advance and adopted for application in the future; such is the American view and that of by far the majority of the peoples of the world today. The framers of the Covenant of the League of Nations, led by an American President, proceeded upon the American theory. Ever since the League was established it has been running under British leadership and on the British theory.

move from politics to law and then back to politics, with the moment
of Treaty signature as the legal hinge between a politics debased and
redeemed. By organizing itself as the movement first toward and then
away from a legal text, the Peace Conference establishing the League
seems able to break sharply with war and the old regime while contin-
uing the fluid practice of politics.

     Literature about the League has also used the relationship be-
tween law and politics to interpret the institution's historical practice
of continued struggle against the forces of tyranny and chaos it was
established to exclude. Early histories and commentaries on the
League tended to treat the League as a politically accomplished fact
which needed to be accommodated to the legal literature.[71] Were
1918 thought the triumph of law over politics, we might expect legal
scholars to have written about the mechanisms by which politics
would be legally conducted. Indeed, later literature discussed the in-
troduction of unanimity voting as a mechanism to accommodate the
formal equality required by sovereign protocol to institutionalized
decisionmaking—giving the insights of nineteenth-century interna-
tional positivism institutional form.[72] But legal writers did not take
up the problem of voting until the early 1920's.[73] Early writing about
the League, perhaps most significantly beginning with one of Oppen-
heim's last works,[74] was predominantly concerned with the League's
international legal personality. These scholars sought to render a

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[71] See F. Boeckel, The Turn Toward Peace (1930); League Problems, supra note 10; The
Covenanter (1919).

[72]   Voting is a concept alien to the traditional system for the management of
     international relations, imported into this sphere as a result of the development of
     international organization. This importation is but one of several manifestations of
     the tendency of international agencies to promote the domestication of interna-
     tional relations—to bring about the progressive assimilation of international
     processes to those characteristic of national societies in their domestic political
     operations.

I. Claude, supra note 8, at 118. Unanimity voting, in his view, is the starting point of this
attempt:

     Traditional international law contributed the rule which served as the historic
     starting point for international voting, and still serves as its basis: the rule that
     every state has an equal voice in international proceedings, and that no state can be
     bound without its consent. The ingredients of sovereign equality and sovereign
     immunity from externally imposed legislation were combined in the rule of
     unanimity.

Id. at 119. For a general discussion of positivism at that time, see J. Williams, supra note 12,
at 1-5.

[73] For an interesting early article, see Heinberg, History of the Majority Principle, 20 Am.
Pol. Sci. Rev. 52 (1926).

[74] See League Problems, supra note 10.

political achievement in the language of law.[75]

Later works about the League, particularly histories written since the Second World War, have treated the League experience as a movement from a moment of law to politics.[76] The League is thought to have begun with a resounding legal bang which sought, more or less successfully, to transform politics into law.[77] The "failure" of the League is explained as the progressive capture or debasement of the legal institutional scheme by absent members, nonparticipants, intrusive ideologies and bad guys, and in part by reference to what are thought of as congenital flaws in legal powers, voting procedures, jurisdictions, and mandate.[78]

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[75] The object of the present article is to consider the League of Nations, not merely as
    it is established and defined by the Treaties of Peace, but as a living organism with
    a character formed partly by its origin and partly by life, and to attempt to deter-
    mine in what class of legal phenomena that character places it.

P.E. Corbett, What is the League of Nations? 1 (1919). See Oppenheim, Le Caractère Essen-
tiel de la Société des Nations, 26 Revue Générale de Droit International Public 234 (1919)
(viewing the League as a legal personality).

[76] Books that make this point include R. Albrecht-Carrié, supra note 21; C. Archer, supra
note 22; I. Claude, supra note 8; B. Dexter, The Years of Opportunity: The League of Nations,
1920-1926, at 51-81, 205-12 (1967); G. Mangone, supra note 12; B. Schmitt & H. Vedeler,
supra note 20; G. Scott, The Rise and Fall of the League of Nations 369-98 (1973); cf. E.
Bendiner, A Time for Angels—The Tragicomic History of the League of Nations (1975) ("The
League's birth arose out of a series of political fantasies. The League idea withered and died
when each nation remembered that its holy mission was to serve itself . . . ."); A. Zimmern,
supra note 19, at 467 (Assembly "is not a parliament," but a "visible manifestation of the
authority of the Rule of Law in the world.").

[77] In this view, the League is treated as having grappled with politics and emerged
triumphant:

    The greatest problems have been gradually brought into its machinery. It is super-
    imposed on the old diplomatic system which at first sought to insulate it, but grad-
    ually paid to it increasing attention and began to use it for its own purposes. This
    process has both increased the reality and revealed the limitations of the sys-
    tem. . . . Statesmen of all countries have looked to it at moments of crisis, and
    public opinion has been enlightened and concentrated by the process of scientific
    inquiry and open discussion in a manner unknown at any other period of the
    world's history.

C.K. Webster & S. Herbert, supra note 10, at 302.

[78] Rather than an organization helping to achieve collective security, disarmament,
    the peaceful settlement of disputes and respect for international law, the League
    eventually became an empty shell abandoned by countries unwilling to involve
    themselves outside their domain or give teeth to the League's Covenant. The
    United States' failure to join the League undermined its claim to universality and
    its hopes of taking effective action in areas outside Europe—in Manchuria, Ethio-
    pia and Latin America. French policy was aimed at securing their country against
    future German attack, by a system of alliances if need be, and France attempted to
    make the League more of a collective security organization which would serve its
    own interests in Europe. British leaders in the interwar period showed themselves
    unwilling either within the League or outside it to commit themselves to the auto-
    matic defence of other countries: the logic of the alliance and of collective security.

C. Archer, supra note 22, at 21; see also D.W. Bowett, supra note 1, at 18-19 (constitutional

This ambivalence in the historical literature about the League suggests a dynamic process of reinterpretation in which the forward progress of the League is marked, for good or ill, in the language of law and politics. Just as the League's originating moment was understood as a dynamic motion from politics through law to a renewed politics, so the development of the League is understood as a struggle against the reemergence of that which had been banished.

As with the rhetoric of "law and politics," the literature about the League's establishment uses the language of "utopia and reality" in several ways to describe the changes which took place in 1918.[79] Sometimes the establishment of the League is treated as a utopian moment, as a movement from the reality of the political and martial horror marked by the First World War to a saner world.[80] However briefly, the League signals an appearance of our dreams in the world. Other times, by contrast, the move to establish the League, to give dreams concrete form, is treated as a moment of dashed hopes.[81] The Peace Conference at which the League Covenant was drafted has come to symbolize the confrontation of utopian aspirations and political realities, and the transformation of the former by the latter into a legal triviality—the international institution.[82]

These two characterizations are most often accommodated in a

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failure); G. Mangone, supra note 12, at 142 (failure of unanimity voting); Peacemaking 1919, *supra note 18, at 189 (unanimity voting as deathly compromise);* see generally G. Schwarzenberger, supra note 30, at 175-81 (inability of League to achieve even relative universality).

[79] See International Relations, supra note 20, at 5 (describing the Treaty of Versailles as "founded on a substructure of genuine idealism" and the League as the maintainer of peace).

[80] As G. Lowes Dickinson phrases it, only the League can save us from the horrors of political reality:

> I am aware that to many readers the solution here suggested will seem Utopian. I do not know whether it be or no, for that depends upon the temper of nations and of their Governments. But I do know that, if this be Utopia, then Reality will be hell. For the alternative to a League of Nations is universal militarism, as outlined in the first chapter of this book.

G.L. Dickinson, The Choice Before Us 262 (1918); see C.E. Fayle, The Fourteenth Point (1919); I. Fisher, League or War? (1923); A. Sweetser, The League of Nations at Work 1-15 (1920).

[81] E.g., Peacemaking 1919, supra note 18, at 187 ("We came to Paris confident that the new order was about to be established; we left it convinced that the new order had merely fouled the old."); see D. Jerrold, They That Take the Sword—The Future of the League of Nations (1936); R.B. McCallum, Public Opinion and the Last Peace 4-12 (1944); V. Margueritte, The League Fiasco (1920-1936) (N. MacFarlane trans. 1936); G. Slocombe, A Mirror to Geneva (1938).

[82] Falk and Mendlovitz suggest that the League could not transform the utopian aspirations of its authors. 3 The Strategy of World Order, supra note 60, at 5 ("[T]he League in practice, as distinct from the League in theory, proved unable to transform politics in international society.").

dynamic account of the League's establishment as a movement from reality to utopia and from utopia to reality.[83] The agenda of the Peace Conference, for example, seems initially to capture the political realities left by the War in the language of utopian speculation and then to return those speculations to political reality in the negotiations which followed. In this vision, the plenary session of the 1919 Conference stands as a brief utopian hinge between two realities which folds utopianism into politics to establish a redeemed political process.[84]

Literature about the League has also used the relationship between utopia and reality to interpret the institution's history. Histories of the League typically treat the League's establishment as the instantiation of an idea.[85] Those who approve of the venture treat the moment as the shrewd realization of humanity's dreams. Those who do not focus instead on the power of the Wilsonian ideal to cloud the minds of otherwise shrewd realists. Either way, the League's origins are utopian, in the best and worst sense of the word.

In locating the League's roots in an *idea*, most League histories, whether critical or laudatory of the League venture, mention propagandists, pacifists, and progressives who lobbied the democracies for an international institutional order during the First World War.[86] During the War, these people were typically characterized, at least in belligerent nations, as marginal, if not unpatriotic, utopian agitators.[87]

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[83] See G. Scott, supra note 76, at 16 ("The Covenant was not a blueprint for Utopia; although it was certainly and consciously idealistic, it offered a framework for practical and effective co-operation between nations for their common good.").

[84] See R. Albrecht-Carrié, supra note 21, at 362-71, 379-84; Peacemaking 1919, supra note 18; G. Scott, supra note 76, at 11-13.

[85] Perhaps the best example of this is W. Kuehl, supra note 1.

[86] It is true, of course, that the League of Nations concept had been widely discussed. Without doubt many of these plans served to crystallize the ideas in the minds of the framers of the Covenant, and some of them probably supplied articles which found their way more or less directly into the draft conventions which served for the interchange of views among those later to be charged with the preparation of the Covenant.

C. Riches, The Unanimity Rule and the League of Nations 1-2 (1933); see C.K. Webster & S. Herbert, supra note 10, at 30 ("Meanwhile, the world had been full of schemes for a new international organization which should prevent the recurrence of the catastrophe under which it was suffering."); see also A. Zimmern, supra note 19, at 160-73 (describing unofficial British and American proposals for a worldwide league).

[87] John Bigelow, writing in 1916, accuses the pacifists of being deluded utopians:
The signal failure of the pacifists to end war is due principally to their being under the guidance and influence of two classes of persons, of peace fanatics and international lawyers, each building on an imaginary or impossible foundation: the peace people, on the despicable dogma of peace-at-any-price; the international lawyers, on the fetish of national sovereignty.

J. Bigelow, World Peace—How War Cannot Be Abolished—How It May Be Abolished at iii (1916). See also Chatfield, Introduction to Peace Movements in America at xiv-xvii (C. Chat-

After referring to these people, however, the literature almost uniformly dismisses or ignores them.[88] The League idea is located in earlier speculative works—by the Abbe de St. Pierre, Kant, and Rousseau, among others;[89] a small pamphlet written in 1918 by General Smuts entitled *The League of Nations: A Practical Suggestion* is usually treated as exemplary of the plans for an institutionalized peace which gave flesh to Wilson's fourteenth point;[90] and most League histories narrate the transformation of a pre-War idea into practice by political realists such as Wilson, Smuts, Lord Cecil, House, and others.[91]

Although this interpretation makes sense—Smuts was a powerful figure at the Conference and there is every reason to believe that his

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field ed. 1973) (suggesting that the War split pacifist groups into pro-War and anti-War camps, resulting in the persecution of the latter and their subsequent harder-lined philosophy).

[88] Pollock dismisses these people out of hand:

> Now it is quite true that some pacifists both in belligerent and in neutral countries dreamt of a league after their own fashion which would disclaim coercive power and trust to organizing moral opinion. Incredible as it may seem that in 1916, 1917, and 1918 these people still believed that war could be done away with by shouting "no more war" and framing pious resolutions, it is a fact we have witnessed.

F. Pollock, supra note 10, at 72. Walters, however, suggests that the unofficial plans influenced government leaders and led to the growth of official plans for the League:

> The general public, however warmly it might have adopted the essential idea of the League, had neither the inclination nor the competence to form opinions on the details of its constitution. All such labours, therefore, could be effective only in so far as they influenced the decisions of those governments which were, in due course, to be responsible for writing the terms of peace.

1 F.P. Walters, supra note 10, at 22; see Crisis, supra note 20, at 7-13, 16-80. But see C.K. Webster & S. Herbert, supra note 10, at 30 ("So insistent was the pressure from below that the statesmen of the warring countries were gradually forced to take notice of it.").

[89] See, e.g., W. Kuehl, supra note 1, at 3-21.

[90] See 1 F.P. Walters, supra note 10, at 27 ("Smuts's work was from every point of view the climax of all the thought and labour expended on the League idea before the Paris Conference."); C.K. Webster & S. Herbert, supra note 10, at 37 (commenting on Smuts' pamphlet: "This great paper, expressed in cogent and moving language, immediately had a profound effect[; i]t crystallized ideas and aspirations which had been held in many quarters, and made deep impression on both Lord Cecil and President Wilson"); see also C. Riches, supra note 86, at 7-10 ("the Smuts plan"); A. Zimmern, supra note 19, at 209-14 (same).

[91] Webster and Herbert state that after listening to many unofficial schemes for the League, the men sat down and put practical bite in a theoretical idea:

> On February began the meetings of the League of Nations Commission of which President Wilson was inevitably the leader, with Lord Cecil acting as his brilliant second and Colonel House and General Smuts in attendance ready to support their leaders. They had a draft prepared. With such a team and such preparation it was inevitable that the Covenant of the League should be mainly an Anglo-Saxon document.

C.K. Webster & S. Herbert, supra note 10, at 39; see also C. Riches, supra note 86, at 7 (Upon arrival in Europe, Wilson was confronted with drafts by Smuts and Cecil.); 1 F.P. Walters, supra note 10, at 32-38 (intensive consultation between American and British delegations in

pamphlet was an important lobbying tool in Paris—it also raises diffi-
culties. In fact, the Smuts plan differed dramatically from the League
established by the Covenant, not least in the ambitious political role
which it foresaw for the League. Other plans, particularly those pub-
lished by the Fabian Society, were much more "realistic" in their pre-
dictions about what could and would be established at Paris.[92]
Moreover, other lobbyists dismissed by the literature were actually
powerful and prestigious people who had been in contact with politi-
cians at the Conference.[93]

The persistence of this interpretation is suggestive. To a certain
extent, of course, stressing Smuts' overtly political plan in contrast to
the more legalistic plans of the wartime agitators reinforces the
League's origin as a redemption of politics rather than as a political
debasement of a legal ideal. It is the early (and largely enthusiastic)
accounts of the League which seem particularly anxious to differenti-
ate the "realistic" Smuts plan from those of wartime "utopians," and
to trace the League idea deep into the European philosophic tradi-
tion.[94] Seeking to demonstrate that the League is, or might become, a
workable system, these raconteurs ground the League in sound polit-
ical judgment, excluding at its origin those who might tarnish the in-
stitution's image with utopian dreams.[95] The establishment of the

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refining the many plans into a single instrument); A. Zimmern, supra note 19, at 194-95 (syn-
thesis of official and unofficial proposals forming the "Cecil draft").

W. Kuehl, supra note 1, at 96-97, distinguishes the work of pre-War idealists from the
realism of institution building.

[92] For Fabian proposals, see, e.g., A Fabian Committee, Cent. Org. Durable Peace, Int'l
Congress Study Principles Durable Peace—Berne 1916, The Supernational Authority That
Will Prevent War (1917) [hereinafter Fabian Committee]. For other "peace party" programs,
see, e.g., H. Brailsford, supra note 12, at 320; Degen, The History of the Woman's Peace Party,
57 J. Hopkins U. Stud. Hist. & Pol. Sci. 303, 342-48 (1939); Peace Proposals and Programs—
United States, in Towards an Enduring Peace—A Symposium of Peace Proposals and Pro-
grams 1914-1916 app. (1916) [hereinafter Enduring Peace].

[93] See Patterson, An Interpretation of the American Peace Movement, 1898-1914, in Peace
Movements in America, supra note 87, at 20; see also 1-3 Notable American Women 1607-
1950—A Biographical Dictionary (E. James ed. 1971) [hereinafter Notable American Wo-
men] (leading female pacifists of the time—including Jane Addams, Fannie Fern Andrews,
and Lucia Ames Mead—and their social connections). For a description of the contact wo-
men at the Hague Conference had with prominent politicians, see Degen, supra note 92, at
394-428.

[94] This is true of most League histories written before 1930. See, e.g., R.B. Mowat, supra
note 20, at v.

[95] Irving Fisher, for example, although enthusiastic about the League, mentions only
prominent male jurists and politicians such as Taft and Roosevelt among its ancestors. I.
Fisher, supra note 80, at 3-14. Wilson is treated ambiguously by Fisher and other historians of
this period. In some respects, America's failure to join the League is seen as the fault of
Wilson's utopian idealism or his political ineptitude. In other respects, he is seen as the first to
give utopian aspirations real form. Id. at 15-18; see P.J.N. Baker, The League of Nations at

League seemed a move from utopianism to pragmatic politics, from theory into practice because and to the extent it excluded utopians from the narration of its establishment.[96]

By contrast, histories of the League written in the late 1930's tend to differentiate the early League from the late League, seeing the League as successful until emasculated by power politics or the recalcitrant or absent member.[97] For these historians, the utopian period did not end until the late 1920's. Although these authors tend not to differentiate the plans for a League from the League's early programs, seeing both as illustrative of a single utopian imagination, they are much less likely to dwell upon the "extremists" among the wartime pro-League agitators. Instead, they mention lawyers and philanthropists active in the Hague system before the War (Root, Carnegie, etc.) as well as the Paris Conference statesmen.[98]

Told this way, the early "successful" League, while utopian (and of legal inspiration), successfully excluded extreme ideologies, thus recapitulating the break forward from chaos and tyranny which sig-

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Work (1926); M. Fanshawe, Reconstruction—Five Years of Work by the League of Nations (1925).

[96] William Rappard sees this as a movement from charter to actual workings, implying that while the plans may have been utopian, the League itself has moved into the realm of practical politics:

> The League of Nations, as a whole, is but the response to the needs of a war-sick humanity whose various national elements have become more and more conscious of their essential interdependence. Gropingly they have set up an international institution for the discussion of their common interests, the chief of which is peace. This institution, like most other constitutional creations of history, has not developed along the lines of its fundamental charter, but has nevertheless tended by other, rather simpler processes towards its natural goal, the pacific organization of international relations.

Rappard, The League of Nations as an Historical Fact, in Division Intercourse & Education, Carnegie Endowment for Int'l Peace, Int'l Conciliation—Documents for the Year 279, 293 (1927).

[97] Most early historians suggest that the League failed because its members lacked the willpower to enforce its decisions:

> In the first place, it did not possess armed forces such as could enable it to impose its own decisions upon a recalcitrant member. In the second place, none of the member States made any sacrifice of their national sovereignty. But for these two defects (and they were fundamental) the League might well have achieved the pacification of the world.

H. Nicolson, Why Britain Is at War 156 (1939); see also 1 F.P. Walters, supra note 10, at 440-42 (failure of Preparatory Commission to agree upon limitations on rearmament of member nations). Schwarzenberger sees the failure of the League as a result of the absent or the non-member, specifically the United States, and later, Italy, Japan, and Germany. G. Schwarzenberger, supra note 30.

[98] In 1934, Nicolson wrote that the League "is based upon a conception of international unselfishness which, were it a true conception, would render any league unnecessary." H. Nicolson, supra note 46, at 173. See C.K. Webster & S. Herbert, supra note 10; A. Zimmern, supra note 19, at 277-85.

naled the League's birth. In the late 1930's, most accounts of the League located its downfall in the failure to remain vigilant against the intrusion of ideology and politics, a failure rooted in its utopian Wilsonian origin.[99] League histories written after the Second World War extend this approach, generally condemning the entire League as a utopian failure. At the same time, however, they honor it as the source of utopian inspiration for the more "realistic" United Nations system.[100]

This continual historical relocation of the boundary between utopian aspiration and pragmatic realism, and the resulting ambivalence in the historical literature about the League's originators, suggests a dynamic process of reinterpretation in which the forward progress of the League is marked, for good or ill, in the language of utopia and reality. Just as the League's originating moment was understood as a

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[99] Unsurprisingly, these historians almost uniformly condemn Wilson as a utopian. Nicolson is exceedingly harsh in his treatment of Wilson. See Peacemaking 1919, supra note 18, at 195 ("The collapse of President Wilson at the Paris Peace Conference is one of the major tragedies of modern history. To a very large extent that collapse can be attributed to the defects of his own intelligence and character.").

> The League, however valuable it has been, and will be, as the clearing-house of
> international disagreements, could never have become, even had America adhered
> to it, a super-state directing all international activity. Mr. Wilson, having surren-
> dered so much in the realm of fact, tried to recoup himself for these defeats in the
> realm of theory. Here again he was lacking in realism.

Id. at 204; see id. at 199 ("His spiritual arrogance, the hard but narrow texture of his mind, is well illustrated by his apparent unawareness of political reality coupled with his distressing awareness of party reality."); see generally id. at 194-210 (Nicolson's impressions of Conference participants).

[100] Though the League is treated as having failed, its ideals are considered to have lived on in, and been vindicated by, the United Nations:

> Whatever the fortunes of the United Nations may be, the fact that, at the close of
> the Second World War, its establishment was desired and approved by the whole
> community of civilized peoples, must stand to future generations as a vindication
> of the men who planned the League, of the thousands who worked for it, of the
> many millions who placed in it their hopes of a peaceful and prosperous world.

2 F.P. Walters, supra note 10, at 812.

Others combine this assessment with a grant of partial success to the League, particularly concerning institutional developments. See, e.g., R. Henig, supra note 14, at 170 ("As an international body meeting at regular intervals, with its own permanent secretariat and headquarters, the League was a qualified success.").

Still others attribute the failure to specific League programs. See, e.g., D.W. Bowett, supra note 1, at 15 ("The League's disarmament programme failed dismally."). Some, paradoxically, treat the League as an *institutional* success while attributing its "failure" to the membership:

> "To mourn the League immoderately would be to fall into the very fallacy that
> was responsible for most of the disappointments of its later years, that of attribut-
> ing to the League a will and a power of its own, distinguishable from the collective
> will and collective power of the States that fashioned it as an instrument for pre-
> serving the peace of the world.

G. Scott, supra note 76, at 401 (quoting The Times (London) (n.d.)).

dynamic motion from the harsh reality of War through utopian plan-
ning to a renewed realism, so the development of the League is under-
stood as a struggle against the reemergence of that which had been
banished. What began as a break forward has become a practice of
exclusion.

Unlike war and peace, the rhetorics of law and politics or ideal-
ism and realism seem to contrast idea and deed in various ways. By
continually reinterpreting the break between war and peace in these
terms, the move between them can be made to seem a transformation
of thought, intention, or desire into practice. In this way, the move to
institutions seems pragmatic and progressive. By repeating these
characterizations as exclusions, the institutional regime is able to sus-
tain its momentum by reference forward to the reappearance of the
idea in its implementation.

D. *Establishment by Association and Exclusion*

These historical accounts, despite their diversity, were largely
correct. A large number of people in the United States and the
United Kingdom lobbied, rallied, wrote, and spoke for peace and for
the institutionalization of international society before and during the
First World War.[101] Participation in the movement changed in the
decades surrounding the Peace Conference, as did the plans for inter-
national organization which acccompanied the peace movement.[102]
The League was established when the initiative passed from feminists
and socialists to sensible politicians, and succeeded so long as it was
able to exclude extreme ideologies from the arena of international

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101 For biographies of many peace leaders and pro-League activists, see Biographical Dic-
tionary of Modern Peace Leaders (H. Josephson ed. 1985) [hereinafter Peace Leaders], and
Biographical Dictionary of Internationalists (W. Kuehl ed. 1983) [hereinafter International-
ists]. On pro-League agitators before and during the War, see R. Bartlett, The League to
Enforce Peace (1944); C. DeBenedetti, Origins of the Modern American Peace Movement,
1915-1929 (1978); S. Herman, Eleven Against War—Studies in American Internationalist
Thought, 1898-1921 (1969); W. Kuehl, supra note 1; C.R. Marchand, The American Peace
Movement and Social Reform, 1898-1918 (1972).

M. Lutzker, The "Practical" Peace Advocates: An Interpretation of the American Peace
Movement, 1898-1917 (1969) (unpublished Ph.D. thesis on file at Rutgers University), lists 53
leaders of the American peace movement. Patterson lists 36—only 16 of whom appear on
Lutzker's list. Patterson, An Interpretation of the American Peace Movement, 1898-1914, in
Peace Movements in America, supra note 87, at 20, 34 n.2. Patterson acknowledges the some-
what arbitrary listing and attributes it to differing definitions of "peace worker." Id. Lutzker,
he claims, focuses more on the so-called practical peace workers, most of whom were late
entrants into the peace movement and managed wealthier organizations such as the Carnegie
Endowment for International Peace. Id.

102 Many of these plans may be found in E. Balch, Approaches to the Great Settlement
(1918); Degen, supra note 92; The Overthrow of the War System (1915) [hereinafter The Over-
throw]; Women At the Hague (1915) [hereinafter Hague Women].

institutional life. It seems that participants in the League's establishment organized their participation to accord with the characterizations and exclusions of narratives which would become their efforts' histories.

Prior to the outbreak of war, the American peace movement was dominated by prominent establishment jurists and industrialists such as Elihu Root, James Brown Scott, William Howard Taft, Theodore Marburg, and Andrew Carnegie, who focused their attention on the Hague Conferences and the concomitant growth of public international law and arbitration.[103] These pre-War leaders of the peace

[103] The American peace movement enjoyed a renaissance in the late 19th century, sparked by several prominent and successful international arbitrations. Great Britain and the United States resolved their Civil War differences in the Alabama Claims Settlement of 1872, the Institute for International Law was founded at Ghent in 1873, and by 1914, more than 200 treaties of arbitration had been ratified. See R. Bartlett, supra note 101, at 6; S. Herman, supra note 101, at 16-17; F.H. Hinsley, Power and the Pursuit of Peace—Theory and Practice in the History of Relations Between States 266-67 (1963).

On Elihu Root and the legalists, see S. Herman, supra note 101, at 22-54; P. Jessup, 1-2 Elihu Root (1938); R. Leopold, Elihu Root and the Conservative Tradition (1954). Scott was a Root protégé, and like him worked with Carnegie's Endowment for International Peace and helped establish the American Society of International Law. See R.D. Nurnberger, James Brown Scott: Peace Through Justice (1975) (unpublished Ph. D. thesis on file at Georgetown University).

Taft, as President of the United States (1909-1913) encouraged an international world order through law, and encouraged Secretary of State Philander Knox to arrange arbitration treaties, few of which were ratified. See R. Minger, William Howard Taft and United States Foreign Policy: The Apprenticeship Years 1900-1908 (1975); W. Scholes & M. Scholes, The Foreign Policies of the Taft Administration (1970).

Marburg was a close Taft associate and promoter of the American Society for the Judicial Settlement of Disputes. He founded the Maryland Peace Society and was Chairman of the Third American Peace Congress, held in Baltimore in 1911. See H. Atkinson, Theodore Marburg—The Man and His Work (1951); 1-2 Development of the League of Nations Idea—Documents and Correspondence of Theodore Marburg (J. Latané ed. 1932) [hereinafter Correspondence].

Carnegie financed many pre-War peace organizations, and funded two major peace foundations: The Carnegie Endowment for International Peace ($10 million, 1910) and the Church Peace Union ($2 million, 1914). Most of his money was distributed as suggested by legalist peace leaders, like Root (who directed the C.E.I.P.O.). See C. DeBenedetti, supra note 101, at 45-49; S. Herman, supra note 101, at 27-28; see also W. Kuehl, supra note 1, at 89 (Carnegie's proposals for international organization). The growth of the peace movement in the decades before World War I, and its new political influence, coincided with the capture of the old organizational hierarchy from Quakers and Churchmen by lawyers and internationalists like Root, Taft, and the others. See C. DeBenedetti, The Peace Reform in American History 65-67 (1980) [hereinafter C. DeBenedetti, Peace]; S. Herman, supra note 101, at 16-19. In his Introduction, Chatfield writes of the work done by these men prior to 1914: "Eminent jurists, including especially James Brown Scott, Theodore Marburg, and Elihu Root, led an American Society for the Judicial Settlement of International Disputes in an attempt to follow up the Permanent Court with a truly international court of justice." Chatfield, Introduction to Peace Movements in America, supra note 87, at xiv. Of other organizations that grew out of the financial commitment of others, he writes:

The established peace societies—the American Peace Society and the Universal

movement shared much socially, politically, and culturally with those who would take up the project in 1919. They remained the most active proponents of a league before and during the War.[104] Most were members of the east coast Republican foreign policy establishment.[105] Influenced by the Hague experience, however, the approach of these pre-War jurists differed from that of both wartime peace activists and post-War politicians.[106] Unlike the pacifists and social reformers, their early plans emphasized world peace under law rather than political reform.[107] Unlike the political architects of the League, they

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Peace Union—grew in strength, if not influence; and they were supplemented by new organizations with permanent endowments: the World Peace Foundation (1910), handsomely provided for by publisher Edwin Ginn, and the Carnegie Endowment for International Peace (1910) and the Church Peace Union (1914), both endowed by Andrew Carnegie.

Id. For the writings of these men, see 1-2 P. Jessup, supra; 1-2 Correspondence, supra. For the writings of other prominent peace leaders, see H. Lodge & A.L. Lowell, The Lodge-Lowell Debate—On the Proposed League of Nations (1919).

[104] Their vehicle was the League to Enforce Peace ("L.E.P."), formed in the summer of 1915 to promote the idea of a post-War international league which would enforce peace through collective military action. See R. Bartlett, supra note 101, at 27-47; C. DeBenedetti, supra note 101, at 4-6; W. Short, Program and Policies of the League of Enforce Peace (1916). Taft was the first President of the L.E.P.; the Executive Chairman was Abbott Lawrence Lowell, President of Harvard University. See H. Yeomans, Abbott Lawrence Lowell 1856-1943 (1948); Bartlett, Lowell, in Internationalists, supra note 101, at 453.

[105] M. Lutzker, supra note 101, at 351-55, suggests that these men shared many characteristics, among them being their middle or upper middle-class backgrounds, their educations, and the social strata within which they moved. An important element in the League to Enforce Peace thought world peace could only be preserved through the triumph of the Anglo-Saxon race and its values. Irving Fisher of Yale University, and David Starr Jordan, President of Stanford, were among the organizers of the L.E.P. who propounded Anglo-Saxon supremacy. See R. Bartlett, supra note 101, at 29-30, 65; E. Burns, David Starr Jordan: Prophet of Freedom (1953); C. DeBenedetti, supra note 101, at 4; C. DeBenedetti, Peace, supra note 103, at 66-69; Lutzker, Jordan, in Peace Leaders, supra note 101, at 478. Taft, Lowell, and Marburg were all Republicans; so was Hamilton Holt, Editor of the N.Y. Independent and the other major L.E.P. founder. R. Bartlett, supra note 101, at 55-56; S. Herman, supra note 101, at 58; W. Kuehl, Hamilton Holt—Journalist, Internationalist, Educator (1960); Kuehl, Holt, in Internationalists, supra note 101, at 345-48.

Many leading intellectuals and wartime pacifists were also part of the same class as the post-War leaders. See M. Lutzker, supra note 101, at 353 ("One is impressed by the ease with which [liberals] could gain access to the topmost leaders of government. When traveling abroad, as they often did, there seems to have been no problem in meeting European leaders as well.").

[106] Conservative legalists hoped to create a global "empire of law" through the extension of the American court system and legal codes. See C. DeBenedetti, supra note 101, at 164; S. Herman, supra note 101, at 42-44; Editorial, The Case for Another Hague Conference, 88 Advoc. Peace 453 (1926).

[107] A partial list of early plans that emphasize world peace under law can be found in Peace Proposals and Programs, in Enduring Peace, supra note 92, at 243 app. Some of these are: Central Organization for a Durable Peace—The Hague, in id. at 243 app. at 247; Union of International Associations, Brussels, in id. at 243 app. at 248; International Bureau of Peace, in id. at 243 app. at 249; International Congress of Women, in id. at 243 app. at 250; Confer-

sought to extend the Hague system of arbitration legally, characteristically by establishing a judicial body.[108] To the extent they focused on a parliament at all, their institutional plans treated it as a legislative servant of the judiciary, filling in the gaps in the corpus of substantive international legal norms.[109] Finally, these pre-War plans

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ence of Socialists of the Allied Nations, in id. at 243 app. at 259; League to Enforce Peace, in id. at 243 app. at 264; National Peace Convention, in id.; Program of Women's Peace Party, in id. at 243 app. at 269; New York Peace Society, in id. at 243 app. at 270; Fabian Committee, supra note 92; see E. Balch, supra note 102, at 248 (International Committee of Women for Permanent Peace); id. at 251 (League of Nations Society); 2 Correspondence, supra note 103, at 816-17 (International Organization for World Peace); 2 id. at 818 (League of Free Nations Association).

    Liberal internationalists did not simply want peace, but peace acccompanied by a just social order. Such reformers were unhappy with L.E.P. conservatism, but they had no separate proleague organization until October 1918 when Progressives such as J.P. Chamberlain (of Columbia University), Herbert Croly (the journalist), Lillian Wald (a social worker), and particularly James T. Shotwell and Charles Beard (both of Columbia University) helped create the League of Free Nations Association. See C. DeBenedetti, supra note 101, at 7-10; C. DeBenedetti, Peace, supra note 103, at 99-100; C. Howlett, Troubled Philosopher—John Dewey and the Struggle for World Peace 27-34 (1977); Helbich, American Liberals in the League of Nations Controversy, 31 Pub. Opinion Q. 568 (Winter 1967-1968).

[108] See C. DeBenedetti, Peace, supra note 103, at 81-82; S. Herman, supra note 101, at 52-53; C.R. Marchand, supra note 101, at 39-73; Patterson, The United States and the Origins of the World Court, 91 Pol. Sci. Q. 279 (1976); Root, Nobel Peace Prize Address 1914, Addresses on International Subjects by Elihu Root 153 (R. Scott & J. Brown eds. 1916), reprinted in The Eagle and the Dove—The American Peace Movement and United States Foreign Policy, 1900-1922, at 209 (J. Chambers ed. 1976) [hereinafter The Eagle and the Dove].

    Quite apart from the statistics of cases actually heard or pending, it is impossible to estimate the effect produced by the existence of this court, for the fact that there is a court to which appeal may be made always leads to the settlement of far more controversies than are brought to judgment. Nor can we estimate the value of having this system a part of the common stock of knowledge of civilized men, so that, when an international controversy arises, the first reaction is, not to consider war but to consider peaceful litigation.

Id. at 216. The Central Organization for a Durable Peace, for example, calls for arbitration of all disputes: "The States shall agree to submit all their disputes to peaceful settlement. For this purpose there shall be created, in addition to the existent Hague Court of Arbitration (a) a permanent Court of International Justice; (b) a permanent international Council of Investigation and Conciliation." Peace Proposals and Programs—International, in Enduring Peace, supra note 92, at 243 app. at 248.

[109] For some of these plans, see supra note 107. See also F. Hicks, The New World Order 76 (1920) (an international legislature will fill in the judicial gaps for the international judiciary). For Root's support of a world court *rather* than a world league, see S. Herman, supra note 101, at 42-44; cf. W. Kuehl, supra note 105, at 72 (parliament as an international congress through which peace could enter the world by vote).

    The world is not ready for [a Parliament of man], and it cannot be made ready except by the practical surrender of the independence of nations, which lies at the basis of . . . the civilized world. . . . Human nature must have come much nearer perfection than it is now, or will be in many generations, to exclude from such [a Parliament] prejudice, selfishness, ambition and injustice. An attempt to prevent war in this way would breed war, for it would destroy local self-government and drive nations to war for liberty.

Root, Nobel Peace Prize Address 1914, Addresses on International Subjects by Elihu Root

were quite comprehensive, proposing international authorities which would resolve disputes in the context of an internationalized community possessing higher norms.[110] Although not generally formulated to "outlaw" war, it was clear that these plans sought to eliminate war as a means for settling international disputes.[111]

With the outbreak of war in 1914, the establishment peace movement either pulled back from active pacifism or supported the Allied cause.[112] Taft, Root, Filene, Lowell, and their associates continued to

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153 (R. Scott & J. Brown eds. 1916), reprinted in the Eagle and the Dove, supra note 108, at 213. Peace is to be obtained instead by "the development and understanding of international law and the habit of submitting international controversies to judicial decision." Id. at 223.

[110] See supra note 107. Lowell, like many of the early planners, envisaged disputes being resolved under the aegis of international law. See 2 T. Marburg, supra note 30, at 12 ("The central idea of the project is that wars are the result of the condition of international anarchy out of which the world has never yet risen, that they will not cease until justice prevails, and that justice cannot triumph until the world organizes for justice."). For a comparison with later plans, see infra notes 137-42 and accompanying text.

[111] Perhaps Norman Angell comes closest to the notion that war will be outlawed with his suggestion that a nation which engages in aggression be outlawed: "The outlaw nation could neither receive from nor send to the outside world material or communication of any kind— neither food nor raw material of manufacture, nor letters, nor cables." Angell, Economic Coercion, in Enduring Peace, supra note 92, at 184, 185; see infra notes 240-57 and accompanying text. Wars were still possible, but only as instruments of international justice. League members would be bound to wage a punitive war against nations that did not abide by international judicial decisions. Aggressor states were to be punished by armed intervention. See C. DeBenedetti, supra note 101, at 5; S. Herman, supra note 101, at 55-61; W. Short, supra note 104, at 3, 31-32.

Conservative attempts to outlaw unilateral aggression are to be distinguished from later liberal attempts to outlaw war—even "just" war—altogether. See C. DeBenedetti, supra note 101, at 64, 58-68. The Outlawry of War movement, for example, decided by the end of 1922 to dismiss any hint of enforcement from their plans. Salmon Levinson, the major figure in the Outlawry of War movement said of the war systems: "[Y]ou cannot control it, you cannot regulate it, you cannot do anything with it, therefore, you have got to outlaw it." Letter from Salmon Levinson to Raymond Robins (Dec. 28, 1922), quoted in C. DeBenedetti, supra note 101, at 64, 79 n.45; see J. Stoner, S.O. Levinson and the Pact of Paris—A Study in the Techniques of Influence (1943); J. Vinson, William E. Borah and the Outlawry of War 66-73 (1957).

[112] Then, in August, 1914, a shot fired in Sarajevo cracked the dikes of complacency.
    War engulfed much of the world, peace movements and all. American leaders
    reacted predictably at first, expressing shock and abhorrence. But as outstanding
    peace advocates of all classes came to the defence of one warring power or another,
    the established peace societies wavered or (like the Carnegie Endowment) actually
    supported the Allied cause.

Chatfield, Introduction to Peace Movements in America, supra note 87, at xiv. Marburg, a leading peace advocate, became a bombastic nationalist upon the advent of War. See 2 T. Marburg, supra note 30, at 56 ("[t]horough, overwhelming, disastrous defeat of Germany, resulting in a chastened Germany, is the only hope for the world"). Furthermore, "[t]o crush Prussianism is therefore essential if we are to have peace under a league or under any international institutions whatsoever." Id. at 93.

Most of the pre-War leaders of the peace movement had never advocated outright pacifism, but rather, the peaceful resolution of disputes, backed by a coalition of civilized nations. See M. Curti, Peace or War—The American Struggle 1636-1936, at 134-35, 170-71 (1936); C.

promote a post-War league, viewing it more as an alliance to enforce peace than as an alternative to war.[113] Pacifists in the peace movement, along with progressives, isolationists, antimilitarists, religious groups, and perhaps most importantly, women, became more influential.[114]

Nevertheless, intellectuals, socialists, and other wartime pacifists

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DeBenedetti, Peace, supra note 103, at 59, 77-78; S. Herman, supra note 101, at 16-17. Suffragists and the labor movement also generally supported the War effort. See C. DeBenedetti, Peace, supra note 103, at 93, 101. Carrie Chapman Catt, the head of the National American Women's Suffrage Association gave her organization's full support to the war effort. See M. Peck, Carrie Chapman Catt—A Biography (1944).

[113] For sources on the contributions of Taft, Root, and Lowell, see supra note 103. Edward A. Filene, a department store magnate who funded the L.E.P., attended the Peace Conference in Paris. See R. Bartlett, supra note 101, at 46-47, 61, 94. Filene supported Wilson's League of Nations too, although most old L.E.P. activists did not. See Bartlett, Filene, in Internationalists, supra note 101, at 256.

[114] Women did not turn to peace activism in large numbers until 1920, when the War was over and the suffrage cause secure. Carrie Chapman Catt, the leader of the National American Women's Suffrage Association, and founder of the Women's Peace Party (1915), supported the War. See M. Peck, supra note 112. Jane Addams, cofounder of the Women's Peace Party, did not. With Emily Greene Balch, she founded the U.S. Section of the Women's International League for Peace and Freedom in 1919. See C. DeBenedetti, supra note 101, at 90-93; A. Davis, American Heroine—The Life and Legend of Jane Addams (1973); J. Farrell, Beloved Lady: A History of Jane Addams' Ideas on Reform and Peace (1967); S. Herman, supra note 101, at 114-49; Beyond Nationalism: The Social Thought of Emily Greene Balch 204-12 (M. Randall ed. 1972). The Church Peace Union blessed America's war effort, and church leaders formed a National Committee on the Churches and the Moral Aims of the War to promote pro-War sentiment, see C. DeBenedetti, Peace, supra note 103, at 98, but after the War, Protestant leaders took the initiative in the disarmament movement, see C. DeBenedetti, supra note 101, at 85-86, 98-106. The Commission on International Justice and Goodwill (founded 1911) helped organize the National Committee on the Churches and the Moral Aims of the War, but when the League movement failed, it took the lead in the post-War disarmament drive. Id. at 99-100. Protestant post-War pacifism grew rapidly in the 1920's under leaders such as Kirby Page. See K. Page, Imperialism and Nationalism (1925); K. Page, War—Its Causes, Consequences and Cure (1923); Kirby Page and the Social Gospel: An Anthology (C. Chatfield & C. DeBenedetti eds. 1976). Some of the organizations that remained anti-War were the Fellowship of Reconciliation, the American Civil Liberties Bureau, and the American Friends Service Committee. See Chatfield, Introduction to Peace Movements in America, supra note 87, at xv. Women were organized in the Women's Peace Party and worked in, among others, the American School Peace League and the L.E.P. Jane Addams, one of the leading figures of that time and 1931 winner of the Nobel Peace Prize, fought vehemently against the War. A biographer writes:

> When the United States entered the conflict in 1917, Jane Addams found herself, in company with others who had held out against the war, vilified on all sides. The Daughters of the American Revolution expelled her (she remarked that she had supposed herself to be a life member, but had discovered that it was only during good behavior). Few social workers, even among those at Hull House, shared her point of view; even John Dewey supported the war. Nevertheless, and although she valued the good opinion of her fellow citizens, on this issue no compromise was possible.

1 Notable American Women, supra note 93, at 20.

utterly rejected the political compromises of Wilson's League.[115] It was perhaps to be expected that their peace plans would have little in common with something so practical and politically feasible as a Wilsonian League of Nations. As it turned out, however, even conservative Republicans, despite the similarities between the League Covenant and the proposals of the League to Enforce Peace, hesitated to commit Americans to the European settlement.[116]

After Wilson broke diplomatic relations with Germany in 1917 and the United States entered the War, the ranks of the peace movement shrank even further. Although some women joined antimilitarists[117] and pacifist intellectuals, only Jane Addams seemed interested in a post-War league.[118] Although League histories often give women credit for inspiring the League, American pacifist, social-

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[115] Even most liberals rejected Wilson's Covenant. They particularly objected to an American commitment (as required by article 10) to overseas military action to preserve the inequitable post-War boundaries established by the Versailles Treaty. See C. DeBenedetti, supra note 101, at 15. To socialists and progressive post-War pacifists, social justice was the sine qua non of any lasting peace. Id. at 106-13.

[116] See C. DeBenedetti, supra note 101, at 22; S. Herman, supra note 101, at 47-51.
> [N]o agreement in the way of a league of peace or under whatever name should be contemplated which will probably not be kept when the time comes for acting under it. . . . I think that observation applies to making a hard and fast agreement to go to war upon the happening of some future international event beyond the control of the United States.

2 P. Jessup, supra note 103, at 378 (quoting Letter from Edward House to Elihu Root (n.d.)); see also S. Herman, supra note 101, at 79-83 (tension between Wilsonians and conservatives over territorial guarantees).

[117] In the United States the AUAM was led by prominent reformers who worked closely with Jane Addams and Lillian Wald: Crystal Eastman, an attorney and pioneer in labor relations and fair housing legislation; her brother, Max Eastman, the editor of an exuberant magazine of protest, *The Masses*; Oswald Garrison Villard, who owned and edited *The Nation*; and Paul Kellogg, the editor of *Survey*, an important journal which focused on social problems and was directed to social workers.

Cook, Democracy in Wartime: Antimilitarism in England and the United States, 1914-1918, in Peace Movements in America, supra note 87, at 39, 41.

[118] Most women supported the War as heartily as men:
> I am just a plain English working woman, but I represent millions of women who favor the present just war as much as do the men. One hundred and eighty women are said to be waiting at Tilbury to come to this congress to talk peace. For every one of those, a thousand English women are willing to accompany their sons and husbands to fight. We are tired of such century-old silly platitudes as are uttered here.

J. Bigelow, supra note 87, at 61-62 (quoting Anonymous speaker at Hague Conference). Even Jane Addams' interest in an international league lapsed with the outbreak of the World War:
> On the other hand, quite as an artist in an artillery corps commanded to fire upon a beautiful building like the *duomo* at Florence would be deterred by a compunction unknown to the man who had never given himself to creating beauty and did not know the intimate cost of it, so women, who have brought men into the world and nurtured them until they reach the age for fighting, must experience a peculiar

ist, and feminist support for the League only developed after it was already a lost cause in the United States.[119] Liberals such as Kellogg, Beard, Chamberlain, and Dewey saw an international league as no more than the by-product or expression of a more thoroughgoing reform effort.[120] The few peace plans put forward by these groups during the War differed in tone and emphasis from both those of the Republican peace establishment and those of the men who were to be responsible for building the League system at Paris and thereafter. Socialists, progressives, and liberal intellectuals wove their proposals for an international post-War system into a critique of the capitalist state which was quite different from what either Taft and Root or Wilson and Smuts had in mind.[121] For them, the League was to

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revulsion when they see them destroyed, irrespective of the country in which these men may have been born.

Addams, Women and Internationalism, in Hague Women, supra note 102, at 124, 128. Addams concentrated instead on providing food for the starving victims of war and took no part in the L.E.P. See S. Herman, supra note 101, at 145-49; supra note 114.

The Women's International League for Peace and Freedom did not endorse the League of Nations concept until 1926, and then, with reservations. Church peace leaders were even later converts. See C. DeBenedetti, supra note 101, at 174.

[119] The U.S. section of the Women's International League for Peace and Freedom was not established until 1919. See supra note 114.

[120] Paul Underwood Kellogg was cofounder with Lillian Wald, Jane Addams, Oswald Garrison Villard, and others of the American Union Against Militarism (1915)—on these peace leaders, see supra note 101—and helped organize the League of Free Nations Association, see supra note 107, to inject the liberal notions of equal economic opportunity and self-determinism into the pro-League agenda, see C. Chambers, Paul U. Kellogg and the Survey—Voices for Social Welfare and Social Justice (1971); Chambers, Kellogg, in Peace Leaders, supra note 101, at 499.

Charles Austin Beard, professor of politics at Columbia University, on the basis of his economic interpretation of history—see 1-2 C. Beard & M. Beard, The Rise of American Civilization (4th ed. 1927)—saw social reform as the road to lasting peace. See Charles A. Beard (H. Beale ed. 1954); T. Kennedy, Charles A. Beard and American Foreign Policy (1975); Letter from Charles Beard to Raymond B. Fosdick (May 20, 1922), quoted in C. DeBenedetti, supra note 101, at 36, 43 n.62 ("The social engineer is the fellow. The old talk about sovereignty [and] rights of man . . . is pure bunk. It will not run trains or weave cloth or hold society together.").

Joseph P. Chamberlain was a Columbia University professor who helped organize the League of Free Nations Association. See id. at 7. He also helped draft the Kellogg-Briand Pact. See J. Shotwell, War as an Instrument of National Policy—And Its Renunciation in the Pact of Paris 162 (1929).

John Dewey was also a Columbia professor. He opposed the League of Nations as "a league of governments pure and simple," and sought to replace it by outlawing war. See J. Dewey, Outlawry of War: What It Is and Is Not (1923); C. Howlett, supra note 107; Howlett, Dewey, in Peace Leaders, supra note 101, at 212.

[121] See E. Balch, supra note 102, at 51 ("The Socialist diagnosis of the causes of modern wars may thus be summed up in one sentence: The basic cause is capitalism; the contributory causes are imperialism, militarism, social unrest, international grudges, and pseudo-patriotism.") (quoting Socialist Morris Hillquit). Or, as the Socialist Standard writes:

achieve peace by expressing international social reform, self-determination, and free trade.

Women also tended to see the War as a continuation of the old system of peace, as reason and calculation run amok.[122] The internationalism they advocated consequently differed from both the legalism of the pre-War planners and the political settlement envisioned by the architects of the League.[123] Where pre-War peace activists had relied

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> Many reasons for the war have been given, but only the Socialists have given the true reason. It is this:
>
> In every advanced country the improvements in machinery and methods enable the workers to produce far more wealth than is needed to maintain them in working efficiency. Of this wealth all beyond what is essential for the upkeep of the workers' efficiency is retained by the masters.
>
> As machinery improves, this surplus grows greater, and presents to the masters this ever-increasing problem: Where can they find a market for it?
>
> Here we have the cause of the present struggle. It is commercial rivalry and nothing else.
>
> . . . .
>
> The remedy is for the WORKING CLASS to take over the whole of the means of production and distribution, in order that what they produce may belong to them. They will then have control of the product of their hands and brains, and will use it for its logical purpose—to satisfy the needs of those who produce it.

Peace—In the Hands of the Workers, 11 Socialist Standard (London) 17 (Nov. 1914). On Republican leaders of the L.E.P., see supra note 105.

[122] The piling up of armaments was seen by many women as a very organized type of madness:

> Just because they knew that under the present conditions of anarchy between nations treaties would be considered mere scraps of paper, they have tried to do away with anarchy by organizing, by perfecting a peace-technique in preference to—or at least parallel with—war-technique.
>
> . . . .
>
> . . .[T]he excellent preparation for war made an organization for peace unnecessary—in the opinion of the leaders.

E. Key, supra note 25, at 20-23. The disarmament movement was the particular preserve of women and church leaders. See C. DeBenedetti, supra note 101, at 85-87. Emma Wold founded the Women's Committee on World Disarmament in 1921. See Mitchell, Wold, in Internationalists, supra note 101, at 791.

[123] Jane Addams' internationalism rejects the strict rationality of other appeals for world organization:

> Reason is only a part of the human endowment; emotion and deep-set racial impulses must be utilized as well—those primitive human urgings to foster life and to protect the helpless, of which women were the earliest custodians, and even the social and gregarious instincts that we share with the animals themselves. These universal desires must be given opportunities to expand and to have a recognized place in the formal organization of international relations which, up to this moment, have rested so exclusively upon purely legal foundations in spite of the fact that international law is comparatively undeveloped.

Addams, Women and Internationalism, in Hague Women, supra note 102, at 124, 129-30. Internationalism, as Addams sees it, is just one of many fundamental changes occurring at this time:

> The recent entrance of women into citizenship coming on so rapidly not only in the nations of Europe and America, but discernible in certain Asiatic nations as

on law to confront war, these writers emphasized popular moral opprobrium mobilized through international democratic reform.[124] The decade following the outbreak of War thus saw public advocacy of the League shift from conservative establishment lawyers to radical feminists, and from Republicans to Progressives and liberals.[125] In the same period, the proposals for a new world order shifted from the institutionalization of legal arbitration to international social and moral reform.

Wilson appears to have lost touch with the peace movement early in the War.[126] In announcing American war aims, however, he included a proposal that "a general association of nations must be

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well, is doubtless one manifestation of this change, and the so-called radical or progressive element in each nation, whether they like it or not, recognize it as such.

Id. at 136.

Does the common man distrust the League because it is slow to relieve the widespread misery in Europe; because it so cautiously refuses to become the tentative instrument of a longed for new era; because it threatens to become one more of those abortive efforts "to end war" which fail because they have nothing tangible and human upon which to focus scattered moral energies and no popular drive with which to make effective moral ideas upon a more extended scale than that to which the time has become accustomed?

Addams, Feed the World and Save the League, The New Republic, Nov. 24, 1920, reprinted in The Eagle and the Dove, supra note 108, at 507. On Progressive activists, see C. DeBenedetti, supra note 101, at 82-98, 106-13; C. DeBenedetti, Peace, supra note 103, at 106-07.

124 There can be no complete security for peace until the causes of war are eliminated and a new political organization established. Peace will come only when the peoples of the world recognize the fallacy of the prevailing ideas concerning the relations of governments, and when, with the acquirement of right ideas, the peoples demand a political machinery to make them effective.

Andrews, The Education of the World for a Permanent Peace, in The Overthrow, supra note 102, at 19, 27; see Letter from John Haynes Holmes to Felix Frankfurter (Feb. 15, 1926), quoted in C. DeBenedetti, supra note 101, at 84, 114 n.4 ("I start from the world view of humanity, . . . from the idea that our problems today are one, that our battle is a single battle the world round."). On liberal pacifists, see supra notes 107, 111, and accompanying text.

125 C. DeBenedetti, supra note 101, at 171-79; see Spencer, Woman and the Peace Treaty, 81 Advoc. Peace 359 (1919), reprinted in The Eagle and The Dove, supra note 108, at 451, 455 ("I hope that every woman . . . will disassociate herself from . . . opposition [to] the League . . . . [W]e must work with all our might . . . for some effective organization . . . to substitute law for war and to build good-will into the fabric of the common life.").

126 On Wilson's relationship to the League cause during the War, see J. Addams, Peace and Bread 65 (anniversary ed. 1945) ("What was this curious break between speech and deed, how could [Wilson] expect to know the doctrine [of democracy] if he refused to do the will?"); C. DeBenedetti, supra note 101, at 6-7, 13, 15; W. Kuehl, supra note 1, at 254-57. The pre-War peace leaders nearly universally supported the War, but Wilson's partisan animosity kept them out of positions of influence. Democratic peace leaders split over the War. Those who supported it had Wilson's ear, but he disillusioned them at Paris. See C. DeBenedetti, Peace, supra note 103, at 97-99; Nearing the League of Nations As Seen by an Economist (1919), Leaflet in the Swarthmore College Peace Collection, reprinted in The Eagle and the Dove, supra note 108, at 456, 457 ("The League plan is political treaty of the old variety, providing for a continuation of the alliance among the victorious Allies. . . . [T]he world will be arrayed

formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[127] Taft and his League to Enforce Peace seem to have been the major source of inspiration for Wilson's inclusion of a league among his fourteen War aims.[128] Thereafter, and in the closing period of the War, advocacy of an international organization passed from the peace movement to those who were planning the peace.[129] Although this group included conservative lawyers and others associated with the pre-War efforts (among them Filene, Lowell, and Root), the initiative seems to have passed to a group of young, liberal lawyers, including James T. Shotwell, Manley O. Hudson, Raymond B. Fosdick, and David Miller.[130]

Like the liberal intellectuals associated with the League of Free Nations Association (including Kellog, Beard, Chamberlain, and

in two camps—capitalist nations against socialist nations. It is . . . class conflict alone that will hold the League together.").

[127] All of Wilson's fourteen points can be found in W. Wilson, Address to Congress, Stating the War Aims and Peace Terms of the United States (Jan. 8, 1919), in President Wilson's State Papers and Addresses 464, 468-70 (A. Shaw ed. 1918).

[128] The direct influence for Wilson's fourteenth point is seen by many to have been the L.E.P. led by ex-President Taft:

> The program of the League to Enforce Peace influenced the British advocates of a
> league of nations and later helped to form the basis of official discussion in the
> framing of the Covenant.
>
> . . . .
>
> President Wilson was not at first actively interested in the program of the
> League to Enforce Peace, but came out strongly in favor of it on May 27, 1916.

J. Knudson, supra note 67, at 24-25; see W. Wilson, Address Before the League to Enforce Peace (May 27, 1916), in President Wilson's State Papers and Addresses, supra note 127, at 271.

[129] C. DeBenedetti, supra note 101, at 25-26; C. DeBenedetti, Peace, supra note 103, at 100. For pacifist objections to the League, see supra note 115.

[130] On the exclusion of the old internationalists at Paris, see W. Kuehl, supra note 1, at 267-70. On Filene, Lowell, and Root, see supra notes 103 & 113. James T. Shotwell, professor of history at Columbia University, took leave in 1917 to organize the National Board for Historical Service, and with Walter Lippman and Edward House, helped plan the Peace Conference, accompanying Wilson to Paris in 1919. He helped organize the International Labor Organization, and after the War, worked with the Carnegie Endowment for International Peace. It was Shotwell who suggested to Briand the treaty overture which led to the Kellogg-Briand Pact. See H. Josephson, James T. Shotwell and the Rise of Internationalism in America (1975); J. Shotwell, At the Paris Peace Conference (1937); DeBenedetti, Peace Was His Profession: James T. Shotwell and American Internationalism, in Makers of American Diplomacy 385 (F. Merli & T. Wilson eds. 1974).

Manley O. Hudson, professor at Harvard Law School, worked with House and Wilson to help draft the covenants of both the League and the PCIJ. He was legal advisor to the American delegation in Paris and fought for many years in America on behalf of the League and the court. Eventually, Hudson became a judge on the PCIJ. See J. Kenny, The Contributions of Manley O. Hudson to Modern International Law and Organization (1976) (unpublished Ph.D. thesis on file at University of Denver); D. Revoldt, Raymond B. Fosdick: Reform, Internationalism, and the Rockefeller Foundation (1981) (unpublished Ph.D. thesis on file at University of

Dewey), these young men saw the League as an opportunity for international social reform.[131] They did not share enthusiasm for a renewed Hague system, nor did they share with the League to Enforce Peace conservatives a desire to institutionalize an international deterrent force.[132] These were the men, together with Harold Nicolson, who would experience the Paris Conference as a loss of innocence.[133] Progressive in spirit, these democrats were cut off from the social movements which had agitated for pacifism and social reform during the War, and sought to use the Paris Conference as an opportunity to enforce self-determination for Eastern Europe.[134] During this period, socialists and feminists came to oppose any post-War League which would institutionalize the Versailles settlements.[135]

As the progressive initiative moved closer to power, the decisive political decisions about the League were made by a group of politicians (Smuts, House, and Root, among others) who did not share the progressive sentiments of these young lawyers. These were the men who held the balance of power at Paris. Despite their connections to the pre-War jurists and philanthropists, their plans for a League were

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Akron); Kenny, Hudson, in Internationalists, supra note 101, at 361; Revoldt, Fosdick, in Internationalists, supra note 101, at 265.

David Miller was legal advisor to the American Commission to Negotiate Peace. With the British legal advisor C.J.B. Hurst, he prepared both the working and final drafts of the League Covenant. With Shotwell and Lasker, H. Bliss Miller prepared a draft of the Mutual Guarantee Treaty that became the Geneva Protocol. D. Miller, The Geneva Protocol (1925); D. Miller, The Peace Pact of Paris—A Study of the Briand-Kellogg Treaty (1928); J. Posey, David Hunter Miller at the Paris Peace Conference, November 1918-May 1919 (1962) (unpublished Ph.D. thesis on file at University of Georgia); Kuehl, Miller, in Internationalists, supra note 101, at 499. Raymond B. Fosdick was a lawyer who studied at Princeton under Wilson. He worked for the war department in France and was Under Secretary General of the League until it became evident that the United States would not join. He helped found the League of Nations Non-Partisan Association and campaigned for American membership in the World Court.

131 E.g., J. Shotwell, supra note 130, at 54-63. See supra note 130.

132 C. DeBenedetti, supra note 101, at 27-29.

133 Harold Nicolson's best-selling Peacemaking 1919, supra note 18, ridiculed Wilson and his principles. See also J. Combs, American Diplomatic History—Two Centuries of Changing Interpretations 129-31 (1983) (discussing impact of id.).

134 See J. Combs, supra note 133, at 127-29; C. DeBenedetti, supra note 101, at 10-13.

135 Despite this distance, after the War, many women were associated, and indeed, associated themselves with wartime advocacy of what had come to seem the noble, if unrealistic, ideal of a just peace. This is unsurprising considering that these women circulated in the same social milieu as the pre-War philanthropists and post-War politicians who established the League. Many of them, for example Lucia Ames Mead, did so circulate, as the wives of prominent men. See 2 Notable American Women, supra note 93, at 20-22. In M. Lutzker's biographical sketch, supra note 101, at 351-55, not a single woman is mentioned. See also Address by Justice David Brewer, Mission of the United States in the Cause of Peace (Jun. 12, 1919), in D. Brewer, Woman Against War (1919) (available in Widener Library, Harvard Univ.) (in which women are idealized but not taken seriously as the political equals of men).

far more closely associated with the post-War political settlement than with faith in international legal arbitration on the Hague model.[136]

The plans produced by Wilson's men hardly mentioned the judiciary.[137] Instead, they typically emphasized the role of a parliamentary plenary in international dispute resolution, relying on law only to create the conditions within which such a political solution could be secured.[138] If they drew on the notions of pre-War League enthusiasts, they extended the idea of arbitration politically rather than legally.[139] More often, they denied any interest in resurrecting the Hague system. They sought rather to universalize the nineteenth-century system of interlocking treaties of security, grounding the international institution in national sovereign interest and prerogative.[140]

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[136] For example, it was Root's support of Lodge's reservations that swung Taft and the L.E.P. away from Wilson's League, and doomed the unadulterated League to failure. See C. DeBenedetti, supra note 101, at 22, 50; S. Herman, supra note 101, at 48-49.

[137] Later plans can be found in 2 D. Miller, supra note 68. Some of them are: the Phillimore plan, id. at 3; Colonel House's draft, id. at 7; Wilson's first draft, id. at 12; the Smuts plan, id. at 23; the Cecil plan, id. at 61; Hurst's revision, id. at 142; the Hurst-Miller text, id. at 658. While some of these plans do provide for a judiciary, such provisions are given a secondary place in the drafts, usually following provisions recognizing the territorial integrity and political independence of signatories and the construction of the League itself. The Phillimore plan does not propose a court of justice and does not make arbitration obligatory. 2 D. Miller, supra note 68, at 10. The House plan, which Wilson commissioned, made arbitration obligatory. In a transmittal letter accompanying the draft, House states that the International Court "might well prove the strongest part of" the League. 1 id. at 13.

[138] With the emphasis on dispute resolution by the Council or the delegates, see infra note 139, law is subsumed by politics. Rather than applying law to resolve disputes as would a court, later plans used legal apparatus to construct dispute-resolution proceedings, but expected those proceedings to be resolved in the political arena.

[139] For these plans, see supra note 137. Article III of the Cecil-Miller draft, for example, gives much more emphasis to the executive council:

> The Executive Council may appoint joint committees, chosen from the Body of Delegates or consisting of specially qualified persons outside of that Body, for the study and systematic consideration of the international questions with which the Council may have to deal, or of questions likely to lead to international complications or disputes.

2 D. Miller, supra note 68, at 132-33.

Disputes can be resolved by either arbitration or by submitting questions to the Council or the Body of Delegates, which now resembles a debating forum:

> The Contracting Powers jointly and severally agree that should disputes or difficulties arise between or among them which cannot be satisfactorily settled or adjusted by the ordinary processes of diplomacy, they will in no case resort to armed force without previously submitting the questions and matters involved either to arbitration or to inquiry by the Executive Council [of] *or* the Body of Delegates or until three months after the award by the arbitrators or a [decision] *recommendation* by the Executive Council . . . .

Id. at 135 (emphasis in original).

[140] The language of Wilson's fourteenth point—"mutual guarantees of political independence and territorial integrity to great and small states alike," W. Wilson, Fourteen Points

Their plans sought to bring war into the framework of institutional sanctions and collective security. In their view, the War had been a colossal error, a passionate departure from political reason.[141] Theirs were proposals for reform of the diplomatic process and reconstruction of the political order, so that aggression might be confronted more predictably by force.[142]

As the League took textual form in Paris, the approaches of the pre-War lawyers as well as that of wartime League advocates were set aside. Perhaps the last to be disillusioned with the League were the young Wilsonian lawyers and diplomats who accompanied the American and British negotiators to Paris.[143] The liberals associated with the League of Free Nations movement, although nominally continu-

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Address, Final Draft (Jan. 7, 1918), in 45 The Papers of Woodrow Wilson 519, 529-30 (A. Link ed. 1984), is evidence of his concern for national sovereign interest. Later plans were also much more concerned with sanctions. House's draft, for example, calls for:

> If any Power shall declare war or begin hostilities before submitting a dispute with another Power as the case may be, either to the International Court or to Arbitrators, as herein provided, or shall declare war or begin hostilities in regard to any dispute which has been decided adversely to it by said Court or by Arbitrators or pursuant to Article 12 hereof, as the case may be, the Contracting Powers shall not only cease all commerce and intercourse with that Power as in Article 14 provided, but shall also arrange to blockade and close the frontiers of that power to commerce and intercourse with the world.

2 D. Miller, supra note 68, at 9. But see N. Angell, The Great Illusion—A Study of the Relation of Military Power in Nations to their Economic and Social Advantage 358-61 (rev. 3d ed. 1911) (advocating economic, and if necessary, military sanctions against an aggressor).

[141] In his famous pamphlet, Smuts writes: "War is a symptom of deep-seated evils: it is a disease or growth out of social and political conditions." J.C. Smuts, The League of Nations— A Practical Suggestion 46 (1918).

Marburg sees the German people as overborne by a passionate hate:

> If people so gifted and endowed as the Germans can be tricked by a ruling class into acts so unworthy, if the native virtues and humane qualities which undoubtedly characterize them can be overborne in passionate hate and turned in a single hour into folly and flaming madness, can we count upon any people to hold true to the ideals of our day?

2 T. Marburg, supra note 30, at 29.

[142] The new institution of peace must not be something additional, something external, superimposed on the pre-existing structure. It must be an organic change; it must be woven into the very texture of our political system. The new *motif* of peace must in future operate internally, constantly, inevitably from the very heart of our political organisation, and must, so to speak, flow from the nature of things political.

J.C. Smuts, supra note 141, at 47.

[143] See supra note 130 and accompanying text.

> [F]uture generations will never be able to know what Woodrow Wilson meant to the world throughout the year 1918. At a time when the moral forces of humanity were surrendering to bleak despair, he summoned them again to action. . . . Never before had any single individual in secular history been able to exert an influence like this.

J. Shotwell, The Autobiography of James T. Shotwell 82 (1961).

ing to support what became Wilson's League, lost enthusiasm after much internal wrangling about the Covenant's provisions for automatic sanctions against aggression and universal guarantee of the geopolitical status quo.[144] Progressives and feminists distanced themselves more fully from the League movement. Wilson's attempts to ratify the Covenant collapsed when the Republican establishment, led by Root and Lodge, joined utopians and socialists in turning against the League.

Interestingly, however, a second wave of international enthusiasm began to build as the League Covenant was being defeated in the Senate. A new group of women, veterans of the successful suffrage campaign and somewhat distanced from the wartime pacifists (Carrie Chapman Catt, an important leader of this movement, had actually supported the American war effort) began to agitate for peace.[145] Some of this energy was harnessed to the pro-League movement, but much of it went instead into plans for disarmament and the outlawry of war.[146] At the same time, lawyers associated with the League effort, including Hudson and Miller, turned their attention to the establishment of a World Court—rehabilitating proposals originally associated with the Hague, brushed aside at Paris, but perhaps realiz-

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[144] The Covenant was "drawn according to old-fashioned diplomatic formulae and [was] deficient in economic feeling." Letter from James G. McDonald to Salmon Levinson (June 9, 1919), quoted in C. DeBenedetti, supra note 101, at 19, 40 n.42; id. at 201. Raymond Fosdick, who served with the American delegation at Versailles, conceded that the Treaty was illiberal "from every standpoint, and there [could] be no hope of permanent peace under its auspices." Letter from Raymond Fosdick to Manley O. Hudson (July 14, 1919), quoted in id. at 110-11, 216 n.1. John Dewey saw the League as a product of "old world politics." Howlett, John Dewey and the Crusade to Outlaw War, 138 World Aff. 336, 341 (1976). Pacifists were even more outspoken about the League as an unholy alliance of victor states. Oswald Garrison Villard, grandson of the abolitionist, and Editor of The Nation, called it a "covenant with death." See D.J. Humes, Oswald Garrison Villard, Liberal of the 1920's (1960); M. Wreszin, Oswald Garrison Villard—Pacifist at War (1965); Thernstrom, Oswald Garrison Villard and the Politics of Pacifism, 14 Harv. Libr. Bull. 126 (1960); Wreszin, Villard, in Peace Leaders, supra note 101, at 991, 992. John Hayes Holmes, a founder of both the NAACP and the American Civil Liberties Union, characterized the Versailles Treaty as an unjust instrument of Great Power imperialism. See DeBenedetti, Holmes, in Peace Leaders, supra note 101, at 422.

[145] Thomas Lamont and Bernard Baruch financed the new women's peace committees on the theory that the organization that won the suffrage battle could be successfully redirected at a new target. See C. DeBenedetti, supra note 101, at 25. On Carrie Chapman Catt, see supra notes 112 & 114.

[146] Emma Wold, lawyer and women's suffrage activist, founded the Women's Committee on World Disarmament in 1921. Her committee sought an international conference on disarmament as a step toward the abolition of war. See C. DeBenedetti, supra note 101, at 86; M. Peck, supra note 112; Mitchell, Wold, in Internationalists, supra note 101, at 79; Why Wars Must Cease (1935). The Outlawry of War movement, see supra note 111, was the major pacifist enthusiasm between the wars. It did much to undermine the League of Nations' ratification and the movement for the United States' recognition of the Hague Court, since neither institution actually outlawed war. See C. DeBenedetti, supra note 101, at 59-75.

able in the post-War era.[147] To an extent, the original alliance between feminists and the east coast foreign policy establishment reasserted itself.[148] Despite Coolidge and Harding's lack of interest, and the disinclination of liberals to associate themselves with the "Versailles" system, this second wave culminated in the establishment of the PCIJ and the Kellogg-Briand Pact in the 1920's.[149]

Each wave of enthusiasm for international institution-building thus crested with the disillusionment and exclusion of the utopians, lawyers, agitators, and reformers who initially advocated the move to an international institution, and their replacement by realist politicians who inscribed the institution in a continuation of the diplomatic order.[150] The actual patterns of participation in the movement to a League and the historical accounts of that establishment share a common narrative structure. Both situate the League as a break forward after the War from the utopias of lawyers and ideological reformers to the realism of a renewed political system.

Such a narrative must have made great sense to those who participated in the League's establishment. Just as the historians could trace the idea given form in Paris to respectable pre-War philosophers, so those negotiating in Paris could trace Wilson's League to the prestige and clairvoyance of eminent pre-War men of affairs. Just as the historians could situate the League as a movement to a political

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[147] Both before and after the War, the major enthusiast for the World Court was Root, who helped frame its statute C. DeBenedetti, supra note 101, at 47-54; C. DeBenedetti, Peace, supra note 103, at 81-87; S. Herman, supra note 101, at 22-54; see Leopold, Root, in Internationalists, supra note 101, at 634-35; supra note 103. Hudson, Miller, and Wilson's lawyers turned to the World Court after the League had failed in the U.S. Senate, hoping it would be a first step to League ratification. See C. DeBenedetti, Peace, supra note 103, at 113-14; M. Hudson, supra note 52; M. Hudson, The Permanent Court of International Justice 1920-1942—A Treatise (1943); M. Hudson, The World Court 1921-1931—A Handbook of the Permanent Court of International Justice (3d ed. 1931).

[148] For example, The Women's Pro-League Council was initially funded by Lamont and Baruch. On Baruch, Lamont, Addams, Catt, et al., see supra note 114.

[149] The Kellogg-Briand pact was largely orchestrated by Shotwell, see supra note 130. The World Court was approved by the U.S. Senate with only five reservations in 1917, see C. DeBenedetti, Peace, supra note 103, at 117, but was rejected under a democratic presidency in 1935, id. at 129. See C. DeBenedetti, supra note 101, at 154-58; S. Herman, supra note 101, at 53; Leopold, Root, in Internationalists, supra note 101, at 634, 636.

[150] An interesting example of this process is provided by the movement for a "federation" of democracies founded immediately prior to the Second World War by New York Times correspondent Clarence Streit. His utopian vision was by-passed by the United Nations movement and inherited by a shrill cold war group during the McCarthy period. This marginal group, in turn, provided an enthusiastic analog to the utopian "world peace through world law" movement. See C. Streit, Union Now—A Proposal for a Federal Union of the Democracies of the North Atlantic (1938). To follow this next wave into the cold war, examine G. Clark & L. Sohn, World Peace Through World Law—Two Alternative Plans (3d ed. 1966), and C. Streit, Freedom's Frontier—Atlantic Union Now (1961).

process of adjustment from the harsh legal terms of the Versailles settlement, so those at the Conference could situate their political sagacity forward of the pre-War fascination for arbitration and law. These pre-War dreams had been tempered by the War and could be redeemed by politicians like Smuts, Wilson, and House. On the other hand, just as the historians could set the League against the intrusion of dangerous ideologies, so those who would put the peace together could be clearly distinguished from the various fanatics, be they religious objectors or socialist agitators, who had opposed the War.[151] The efforts of both historians and Paris politicians were ennobled by the torch of peace preserved during the War by women, upon whose enthusiasm these men could now rely and whose participation they could displace.[152] In 1919, the architects of the peace were able to feel they were riding the wave of coherent and progressive history. Even

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[151] In fact, David Miller refers only to the plans of Smuts, Cecil, Phillimore, et al. 1-2 D. Miller, supra note 68. He never refers to the "fringe" elements. Oppenheim refers to all the plans prior to the League (and certain aspects of the Concert of Europe and the Hague Conferences) as utopian. Since Grotius, "many other schemes of similar kind have made their appearance, the enumeration and discussion of which is outside our present purpose. So much is certain that all these schemes were Utopian." L. Oppenheim, First Lecture—The Aims of the League of Nations, in League Problems, supra note 10, at 9.

[152] Zimmern "thanks" Jane Addams for her noble vision while distinguishing the practical work done by statesmen and diplomats:

> Men like M. Romain Rolland and women like Miss Jane Addams are the salt of the earth; if everybody were like Miss Addams the evil manifestations of internationalism would disappear for want of a public, and world-government itself—the inter-State problem—would be greatly simplified. . . . All power to their elbow! Only let us whisper one caution in their ear as they go on their errand of mercy— the famous caution of George Washington: "Influence is not government." However good and reasonable you may make people, there still remains over, for all of us who are not theoretical anarchists, the technical political question of the adjustment of the relations between the different Sovereign States.

A. Zimmern, supra note 30, at 38. Pollock does not specifically refer to women, but to all the "fringe" pre-League plans:

> Some of these plans, aiming at a complete federal constitution with a super-national government, were altogether extravagant; one or two of their authors offered a complete new code of international law ready made. Others of more moderate ambition were overweighted by an excess of premature detail; nevertheless the ventilation of the subject was useful and many of the suggestions profitable.

F. Pollock, supra note 10, at 70. The first practical movement, he claims, was the foundation of the American League to Enforce Peace. Id. Justice Brewer, writing before the War, ennobles the women's peace movement:

> Among the great forces in our civilization working for peace, more potent here in America than elsewhere in the world, is woman. . . . Nowhere in the world is she so potent a force in public life as in this country, and you may be sure that that force will be erelong concentrated in steadfast opposition to war and in favor of the settlement of international disputes by arbitration.

Address by Justice David Brewer, supra note 135.

as historians reevaluated their self-image, they retained the narrative structure animating their enthusiasm.

This narrative poses some difficulties. As the various reinterpretations provided in League histories indicate, those who seemed pragmatic politicians came to seem wildly out of touch with political realities only a few months after the Treaty of Versailles was signed. Although this narrative was grounded in real differences among the peace plans and social status of the various participants, it seems to exaggerate those differences, particularly as defined by the boundaries of law and politics or of pragmatic reason and utopian desire. The differences among groups are by no means great enough to sustain the mythic exclusion of pre-War progenitors and wartime agitators from participation in the construction of and credit for the League itself.

To take only a few examples, the Smuts plan was far more comprehensive and internationally ambitious than the proposals of most wartime socialists or women, despite its subtitle *A Practical Suggestion*.[153] The proposals of the Fabians and of some female activists foreshadowed the details of political calculation which would go into the League Covenant more presciently than did Wilson, House, and Smuts put together.[154] Indeed, Fabian "gas and water" internationalism was far more realistically small scale than Wilson's grandiloquent rhetoric about a democratization of international politics. Jane Addams reads like a shrewd and able politician compared both to Lowell and Wilson.[155] Finally, the plans of the most ardent political realist relied in myriad ways upon the fabric of public international law.

Strangely enough, the differences among groups and plans seem to have been heightened by the rhetoric of both participants and historians. Many participants seemed anxious to demonstrate the particularities of his or her proposals, and often did so by emphasizing their moral significance or practical wisdom.[156] To take one example, Ber-

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[153] Smuts, at his most exuberant, saw the League inheriting the crushed European empires and becoming, itself, a type of supernation. See J.C. Smuts, supra note 141, at 11 ("Europe is being liquidated, and the League of Nations must be the heir to this great estate.").

[154] The Fabians, for example, propose an international council which is very similar to the council adopted by the League: "The International Council shall be a continuously existing deliberative and legislative body composed of representatives of the Constituent States, to be appointed in such manner, for such periods and under such conditions as may in each case from time to time be determined by the several States." See Fabian Committee, supra note 92, at 9.

[155] In her autobiography, Jane Addams writes of her realism: "The advocates of peace in those pre-war days were not so foolish as to believe that war had been abolished because a World Court of Conciliation and Arbitration had been established at the Hague in 1899 . . . ." J. Addams, The Second Twenty Years at Hull-House—September 1909 to September 1929, at 116 (1930).

[156] Shaw, Introduction to L.S. Woolf, International Government at xiv-xv (1916), writes:

nard Shaw situates his proposal for "organization" as opposed to "arbitration" in the following terms:

> Besides these more definite schemes, there is a vast mass of opinion which can be compared only to that of the elder Weller in Pickwick. It will be remembered by good Dickensians that when the case of Bardell *v.* Pickwick was entered, Mr. Weller recommended Mr. Pickwick to plead an *alibi*; and when Mr. Pickwick lost his case, his humble counsellor uttered the famous lamentation, "Why wornt there an alleybi?" Substitute the word Arbitration for Alibi, and you have the state of mind of ninety-nine Pacifists out of every hundred now living. They know that a war between England and the United States over the *Alabama* was averted by arbitration, and they have ever since regarded arbitration as a simple and sufficient alternative to war. Since 1899 they have attached a peculiar sanctity to the soil of The Hague, owing to the establishment there of the Hague Conference as a permanent arbitrating body. But it is just this limitation of the Hague Conference to arbitration, and to quite unauthoritative attempts to codify and establish such rules of the ring as war admits of, that makes it practically negligible as a pacific agency.
>
> The present volume will, it is hoped, help to clear away this benevolent vagueness and to explain what is needed as an alternative to war. . . .
>
> . . . It is the peculiar business of The Fabian Society to supply progressive aspirations with practical methods.[157]

Although the historical literature was not able to agree on the

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"Let us therefore not deceive ourselves with good-natured dreams. Unless and until Europe is provided with a new organ for supernational action, provided with an effective police, all talk of making an end of war is mere waste of breath."

J. Addams, supra note 155, at 125, asserts that Wilson was directly influenced by the International Congress of Women at the Hague: "The congress at The Hague drew up resolutions which embodied many of the propositions afterwards included by President Wilson in his Fourteen Points."

Lucia Mead writes:

> As, however, there are still many visionaries with facile pens, practical pacifists must patiently unravel the intellectual tangle in which vague definitions, half truths, guesses at history and ignorance of the new organic unity of economic interests have left many persons, despite their diplomas, degrees, and cleverness in mathematics, languages, and physics

L. Mead, Swords and Ploughshares—Or the Supplanting of the System of War by the System of Law 2 (1912).

Lodge asserts the need to make a "practical" assessment of the League:

> The question before us, the only question of a practical nature, is whether the League that has been drafted by the Commission of the Peace Conference and laid before it will tend to secure the peace of the world as it stands, and whether it is just and fair to the United States of America.

H. Lodge & A.L. Lowell, supra note 103, at 12.

157 Shaw, Introduction to L.S. Woolf, supra note 156, at xvi-xviii.

relative "utopianism" of various approaches to international organization, most scholars of international institutions follow Carr in treating the distinction between "realism" and "idealism" as the key organizing concept in their account of the League's establishment.[158] For example, as the literature moved from approving to disapproving of the theory of "collective security," it did so in part by treating it first as a "realist" advance on the legalistic Hague and then as an example of typically "utopian" Wilsonian faith in legal covenant.[159]

By mobilizing the rhetorics of war and peace, law and politics, or utopianism and realism, participants and historians have characterized the establishment of the international institutional regime as the crest of a progressive wave breaking forward from extremes which an institutionalized and redeemed international process must continually exclude. The architects of the new order both situated themselves at the cutting edge of a tradition and sought to continue and displace the

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[158] See Crisis, supra note 20.

[159] For an excellent article on this reinterpretation, see Egerton, Great Britain and the League of Nations: Collective Security as Myth and History, in The League of Nations in Retrospect—Proceedings of the Symposium 95 (U.N. Libr. & Graduate Inst. Int'l Stud. 1983) [hereinafter League in Retrospect].

> The myth of collective security, as it evolved in the wartime league of nations movement, at the Peace Conference, and during the inter-war period, integrated and extended the fundamental themes and internationalist aspects of ninteenth [sic] century and pre-war liberalism —, i. e. the belief in the essential harmony of interests and desire for cooperation underlying the relations of nation states and peoples (rightly organized and properly educated); the hopes for peace through the progressive extension of world political and legal structures; and the critique of the balance of power, the arms race, secrecy, and imperialism attributed to the old diplomacy. The myth was sometimes structured as an international analogue to the classic liberal myth of the social contract, with the League of Nations Covenant and its system of collective security ending the pre-war Hobbesean state of latent war or "international anarchy."

Id. at 98 (footnote omitted).

In more recent literature in the field, a reverse trend can be seen in the passing in and out of fashion of the "world peace through world law" movement. See G. Clark & L. Sohn, supra note 13. Claude critiques the Clark/Sohn scheme as being unrealistic:

> The most impressive scheme for world federation yet developed, that fashioned by Grenville Clark and Louis B. Sohn, envisages individual citizenship of the global state but is permeated by the assumption that national states will collaborate or can be required to collaborate in making the federal system work . . . .
>
> However deeply one might wish that the world could be governed by policemen wielding night sticks, the realities are such that a valid concept of world government must define the problem as it has been defined by international organization: how to cope with a multiplicity of national states. Once this is accepted, it becomes evident that there is no magic in the formal supplantation of international organization by world government, but that proposed methods of managing a pluralistic society must be judged on their merits, rather than on the basis of their being labeled "organizational" or "governmental."

I. Claude, supra note 8, at 431-32.

work of earlier peace advocates.[160] By contrast to wartime resisters and agitators, the institution builders styled their work a return to order from chaos and to reason from religious or ideological passion.[161] Sane hands were again at the helm. At the same time, these men represented the wordly embodiment of a human ideal. The torch of idealism had been passed to an institutionalized generation, inheriting as it excluded the vision of women and wartime radicals.[162]

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[160] The movement to the L.E.P., for example, is seen—in this history of the League—as continuous with the old system but providing a link to the new League of Nations:

> The movement, as had been noted, was not altogether new, as numerous peace organizations had been formed earlier. But this was unique in that definite plans were formulated for the creation of an organized international society not far different from that now attempted by the League and the World Court.

J. Knudson, supra note 67, at 24.

[161] The National Peace and Arbitration Congress held in New York in 1907 is seen as a movement toward reason:

> The work of the Congress here will not be directed by dreamers or idealists who have schemed out romantic and impracticable peace plans, but by statesmen, jurists, educators, publicists and hard-headed business men who have taken hold of the problem with the idea of solving it along lines which will be practical and which in the end will reach the same goal the idealists expect to obtain by one rush.

N.Y. World, Apr. 14, 1907, at E1, col. 1. Later, movements such as these are seen as illusion, with the War acting as the break point: "The striking growth of public international unions in the late nineteenth century aroused the optimistic hopes of many citizens and statesmen for world peace. . . . Sarajevo clouded that illusion." G. Mangone, supra note 12, at 89. After that, the provisions of the Covenant for international commissions of inquiry into disputes are viewed as another advance towards rationalism: "Such a commission lent itself to reason rather than passion by its impartial fact gathering and its real presence as an international agency at the scene of action, a device gradually wedded to international organization." Id. at 145. But this whole period is then viewed as an era of illusion, as suggested by Albrecht-Carrié's title to chapter XI: "The False Recovery and the Era of Illusions 1920-1930. R. Albrecht-Carrié, supra note 21, at 385. Realism, however, returned with the Depression, as the title to chapter XII indicates: "The Return to Reality, 1930-1936." Id. at 448.

[162] It is perhaps not surprising that both men and women would associate women with the ideals of peace and men with the practice of war:

> Men endure great physical hardships in camp and on the battlefield. In our Civil War the death-roll in the Union army alone reached the appalling aggregate of 359,000. But the suffering and peril of the men in the field, distressing as they are to contemplate, are slight in comparison with the woes and anguish of the women who are left behind. The hope that husband, brother, father, son, may be spared the tragic end which all soldiers risk, when they respond to their country's call, buoys them up in their privations and heart-breaking loneliness. But theirs is the deepest pain, for the most poignant suffering is mental rather than physical. No pension compensates for the loss of husband, son, or father. The glory of death in battle does not feed the orphaned children nor does the pomp and circumstance of war clothe them. The voice of the women of America should speak for peace.

J. Bigelow, supra note 87, at 59-60 (quoting Taft, in Woman's Home Companion, Aug. 29, 1911).

The wartime popular press often depicted peace as a woman. Unlike the association of one or another proposal with pragmatism, the association of women with idealism seemed secure. See S. de Beauvoir, The Second Sex (H.M. Parshley trans. 1953).

By repeatedly working against law, politics, reason, and passion, pushing the alternatives of both "utopian triviality" and "savage realism" into the past, the programs which were implemented and the work of those who implemented them came to seem both touched by noble aspirations (valorized as the excluded woman) and destined for pragmatic success (epitomized by the denigrated intellectual radical).[163] This suggests that the move into organization was less the move from law to politics, or from idealism to realism, than a continual process of exclusion of extreme idealism and radical programmatic thought. The "War" was rhetorically transformed from an intrusive error into an avoidable and continually threatening extremism—an extremism against which the institution must remain vigilant. At the same time, the "peace" was transformed from a noble female or a lack of patriotism into a process of institutional management.

E.   *Organizing a Break*

Texts about the League's establishment narrate international society's move to institutionalization by combining a difference with a process of differentiation. An initial break provides the opportunity for institutional innovation. The new order retains its institutional character by extending this break in a repeated process of differentiation and exclusion. Examining some of the techniques by which these differences are established has suggested the variety of rhetorics which come together in the Paris Peace Conference. The Conference operated first as a legal instant, a high-water mark of formalism, the moment of signature acting as a hinge between a debased and a redeemed politics. At the same time, the Conference established a movement between utopian theory and political practice, the Conference plenary acting as a substantive hinge—a moment of political constitution—between phases of idealist preparation and reasoned follow-through. In this vision, the Conference is more significant as a process of exclusion and adjustment than as an instant of legal accord.

The key to narratives about the League's establishment is the dynamic relationship between these two visions—one of momentary dis-

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[163]   Shortly after the war was declared it became impossible for the antimilitarists to get an honest hearing in any newspaper anywhere in the country. Jane Addams wrote that after America "entered the war, the press throughout the country systematically undertook to misrepresent and malign pacifists as . . . a patriotic duty." Most of the small magazines which reserved space for the views of the antimilitarists were either suppressed or denied access to the mails.
Cook, Democracy in Wartime: Antimilitarism in England and the United States, 1914-1918, in Peace Movements in America, supra note 87, at 39, 45-46 (footnote omitted).

juncture from and the other of continuous resistance to the chaos and tyranny of the preinstitutional international system. In this part of the article, I have examined one mechanism by which this double movement can be managed: by a continual characterization and exclusion of positions and interpretations associable with that against which the institution is thought to have been established. In particular, I was interested in the characterization of women, immoderates, lawyers, and programmatic reformers as other to the realist demands of institutional life—reminiscent, in an odd way, of the natural anarchy and violent totalitarianism of the War and the old regime.

Managing this double differentiation, even against the mirror of an externalized utopian theory or violent practice, is a difficult task. The institution must create a sense of movement against both war and peace which can seem both an expansive substantive social process and a formal moment of rigidity. Keeping the wolves of chaos and tyranny at bay means, in institutional terms, managing a relationship between the text marking the institution's establishment and the process by which that establishment is continued and ratified. The institution must encode its establishing differentiation into its practice. In a way, of course, every public-law scholar knows this as the problem of interpreting or expounding a "living" constitution. In the next two parts of this article, I explore the mechanisms by which institutions fulfill this mission by examining the moment of the League's establishment by Covenant and the ensuing development of plenary decisionmaking procedures.

At this point, however, it is possible to speculate about the institutional strain of meeting these conflicting narrative demands. To those most immediately involved, the League's establishment might actually have been experienced as a break with violence and tyranny and as a redemption of international politics. For those in the institution and the literature who continually relocated the threat and the redeemer over the next several decades, however, this belief might have been somewhat more difficult to sustain. Acknowledging this process of reinterpretation makes the breaks and exclusions it establishes seem contingent and rhetorical—nurturing cynicism rather than sincerity about the institution's rhetorical claims. The transformation executed by each reinterpretation seems less definitive than that suggested by the originating enthusiasm, encouraging nostalgia for a more utopian inspiration. And yet, although it may be pursued with a certain jaded realism, the institutional process continues to seem necessary to distance international social life from the dangers of chaos and tyranny. In short, it is easy to imagine how repeating the

moment of establishment in an ongoing institutional process might generate a troubled consciousness.

For all this, however, an institutional process which manages the relationship between the break and continuation of its birth by repeating them as practices of rhetorical and social exclusion might actually suppress awareness of these difficulties. To the extent the institutional practice re-presents the moment of establishment in the relationship between its text and history, the practice might come to seem urgent and meaningful by association with a moment of historical progress whose importance and meaning it simultaneously confirms. People involved in the institution might experience the meaningfulness of their work "interpreting a living constitution" as well as a certain cynical nostalgia.

It is perhaps fitting that the Great War should have brought this institutional practice to international life. Managing the relationship between an institutional purport—a claim about the meaningfulness of its activities—and an institution's roots in a set of relations which that purport merely imitates might have come more easily to diplomats and scholars after the First World War. In a variety of ways, the War brought the irony and cynicism characteristic of cultural modernity to international relations.[164] The War came as a great collective and international shock, overturning complacency about the divisibility of peace and the inevitability of progress. As nineteenth-century national exuberance became mired in the standoff of trench warfare, the innocence of an instrumental, formal, and national diplomatic consciousness collapsed.[165]

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[164] "The western vision of man and his world suffered irremediable damage, and the somber, ironic cast emerging still endures." B. Schmitt & H. Vedeler, supra note 20, at xv.

[165] War is seen as "bursting" onto Europe:

> When war burst upon the world in August 1914, a great number of people in every country of Europe comforted themselves with two thoughts. The first was that their country would be victorious in very short order and at very little cost and that life would return to normal very soon. The second was that, by some magic process, the war would solve all outstanding political, economic, social, and even moral problems and purge Europe of its accumulated ills. . . .
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> . . . Some such rude awakening awaited all the participants in World War I. For that conflict was not short, as we shall see in the next chapter; the enemy was not beaten easily and cheaply; and, after five years of desperate fighting in which a generation of young men was destroyed, it was very difficult to differentiate in any meaningful way between the condition of the victors and that of the vanquished.

G. Craig, supra note 20, at 451.

> The onset of hostilities in August 1914 was greeted in many of the cities of the larger countries with an almost carnival gaiety. In London, the mood was one of excitement and enthusiasm; in German towns, reservists on their way to mustering centers were pelted with flowers; in Vienna, crowds promenaded along the Ringstrasse, shouting "Down with Serbia!" with every evidence of happiness. These

Paul Fussell has termed the First World War an "ironic situation," and one experienced as such by participants in trenches and government bureaus.[166] Fussell argues that participants often remember the War first for the ironic gap between its rhetorical purposes and physical particularity, focusing on the absurd relation between the home front and the trench, the officer's order and soldier's performance, or the image of the enemy as foe and a shared experience of combat.[167] The Great War seemed a rite of passage rather than simply a violent and intense experience precisely because it generated responses to such ironic or absurd gaps.[168]

By calling into question claims about national interest, war aims, and strategy, the War transformed international relations into a rhetorical field. Fussell reports that participants in the War characteristically internalized the gap between their experience of the War and the claims made about it by resorting to euphemism or by developing a sense of living simultaneously as participant and spectator in the war "theater."[169] The War was understood and experienced in terms of mythical and literary narratives.[170] In doing so, those who experienced the War treated both the tragedy and nobility of the War as rhetorical devices.

International institutions accommodate rhetorics of exactly this sort, actively forgetting their rhetorical status. Within international institutions, images and reminders of war and peace are often treated like war and peace themselves. An institutional process suited the new international order because it accommodated the jaded maturity of those, like the poet Siegfried Sassoon or diplomat Harold Nicolson, who had experienced the War.[171] Rather than conducting war for

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raptures were of course, the result of ignorance. No one in 1914 had the slightest idea of what the war was to be like; on this score, the generals and the statesmen were no wiser than those who bawled out their enthusiasm in the streets.

Id. at 461. See also R. Albrecht-Carrié, supra note 21, at 299-301 (suggesting that the War ended the innocence of 19th-century Europe).

[166] See P. Fussell, supra note 20, at 7-8 ("Every war is ironic because every war is worse than expected. Every war constitutes an irony of situation because its means are so melodramatically disproportionate to its presumed ends. . . . But the Great War was more ironic than any before or since.").

[167] See id. at 114-54 ("Myth, Ritual, and Romance"). ·

[168] For example, the title of B. Schmitt & H. Vedeler's book, The World in the Crucible, supra note 20, suggests that the War was a maturation point. See also P. Fussell, supra note 20, at 18 ("Never Such Innocence Again").

[169] See P. Fussell, supra note 20, at 191-230 ("Theater of War").

[170] See id. at 155-90 ("Oh What a Literary War").

[171] For Nicolson, 1919 and the Peace Conference mark the beginning of his jadedness, or perhaps, the end of his naïveté.

The memory of those congested days is very vivid to me. It has been fortified by reading the diary which I kept at the time. I have decided to print, as the

renewal or victory, they would manage a continual re-presentation of war. The extreme social polarization which they had experienced would now be present only rhetorically—its symbols excluded from the arena of institutional management. These speculations about the institutional practice generated by repeating the juxtaposition of an historical and textual establishment set the frame for my own juxtaposition of the League Covenant and the literature about decisionmaking in the League plenary in the next two sections of this article.

III. The Covenant of the League of Nations

The Covenant of the League transformed the opportunity provided by the War's end into an institution. Of the three establishment themes examined in this article—break, movement, and repetition—the second is most clearly the Covenant's concern. Generating momentum forward into an institutional process demands a sharp break with the past and a recapitulation of the institution's originating situation. It also requires a certain foreshadowing—a promise of the process for which this origin is being left behind. Managing the relations among these various suggestions and references requires sophisticated drafting, clarity of expression, and perhaps most importantly, a shrewd capacity for equivocation. As the institution develops, the Covenant will lean on other texts about the League's origin for support in maintaining the momentum of establishment. The Covenant will be read in the context of narratives about the League's establishment and debate about the ongoing institutional process. The peculiar genius of an establishing text, however, lies in the endogenous generation of institutional momentum.

A. *The Status of the Covenant*

The League began with a text. As the War was ending, Oppenheim published a series of lectures advocating a League of Nations. He argued that international law "could not have come into existence without at the same time calling into existence a League of Nations"[172] or "community"[173] because "[a]ny kind of an International

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second half of this volume, the major portions of that diary, feeling convinced that in its chirpy triviality it reflects better than any comments of a disillusioned middle age the very atmosphere which it is my desire to convey. My criticisms of my own diary are however implicit rather than explicit. I was, at the time, young and pardonably excited. No special self-excuse is needed for such faults.

Peacemaking 1919, supra note 18, at 6; see also P. Fussell, supra note 20 passim (the coming of age of poet Siegfried Sassoon).

[172] L. Oppenheim, First Lecture—The Aims of the League of Nations, in League Problems, supra note 10, at 6.

Law and some kind or other of a League of Nations are interdependent and correlative."[174] The post-War League he proposed, however, "would be compelled to create some kind of organization for itself, because otherwise it could not realise its purpose to make war rarer or abolish it altogether."[175] To do so, "this new League would be founded upon a solemn treaty, whereas the League of Nations hitherto was only based upon custom."[176] Oppenheim was right. The modern international institution would be established by written word.

The Covenant of the League of Nations was signed on January 10, 1920, eight months and thirteen days after the text was unanimously approved by the Plenary Session of the Peace Conference.[177] Upon completion of the Covenant text, Wilson, speaking at the February 14, 1919 Plenary Session of the Peace Conference said: "I should say of this document that it is not a straightjacket, but a vehicle of life. A living thing is born, and we must see to it that the clothes we put upon it do not hamper it . . . ."[178] For others, the textual birth was a more formal affair. Francis Walters tells us that although the Secretary General appointed in April of 1919 had been busy in London and Geneva throughout the intervening months, January 10, 1920 is the "official birthday" of the League because "the League could not begin to function, formally and officially, until that Treaty came into effect."[179]

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[173] Id. at 7, 8.

[174] Id. at 6 (emphasis omitted).

[175] Id. at 11.

[176] Id.

[177] On the signature and subsequent ratification of the Covenant, see C.K. Webster & S. Herbert, supra note 10, at 51-55.

[178] 2 D. Miller, supra note 68, at 563.

> [T]he Covenant of the League of Nations must be considered as the most important international treaty ever made. . . . [H]istorians of the future will find . . . the first constitutional foundation there has ever been for the permanent political organization of the international society of States. . . . They will find, in short, that the Covenant was the "Social Contract" by which the civilized nations of the world passed from the "state of nature" in which they previously lived into a Society in which true international government could rapidly evolve.

Baker, Foreword to F. Wilson, The Origins of the League Covenant—Documentary History of its Drafting at v (1928).

[179] 1 F.P. Walters, supra note 10, at 38. This formal approach comports with a positivist approach to the law of treaties generally. Classic positivist accounts of treaty law include C. Bergbohm, Staatsverträege und Gesetze als Quellen des Vöelkerrechts (1876); G. Jellinek, Die Rechtliche Natur der Staatenverträge—Ein Beitrag zur Juristischen Construction des Völkerrechts (1880); G.F. Martens, The Law of Nations: Being the Science of National Law, Covenants, Power, &c. (W. Cobbett trans. 4th ed. London 1829). One American approach to this positivist dilemma of sovereign consent is S. Crandall, Treaties, Their Making and Enforcement (1904). Lord Cecil turns this argument around in discussing the Phillimore committee

Whether formal or substantive, the written word established its priority by sweeping aside all that came before. In 1928, Howard-Ellis wrote:

> The Covenant or Constitution of the League that emerged as the distilled essence of this vast cloud of discussion, debate, drafts and counter-drafts, based on such a mass of political, economic and social antecedents going far back into history, the resultant of so many hopes, endeavours, achievements, failures, efforts and conflicts, seems at first sight a disappointingly short and vague document, consisting as it does of only a few lines of preamble, twenty-six articles and a brief annex.[180]

It is precisely this brevity, however, that permits the Covenant to supplant its authors. Wilson said of the Covenant: "The simplicity of the document seems to me to be one of its chief virtues, because, speaking for myself, I was unable to foresee the variety of circumstances with which this League would have to deal."[181]

Because it summarizes the speech which preceded it, the establishing text is able to harness all that follows to its terms. And indeed, the Covenant would be busy. According to Walters:

> No one can follow, or understand, the history of the League without constant reference to the provisions of the Covenant. . . . It was at the same time the law of its action and the very source of its existence. It established the organs of the League, dictated their composition, defined their competence, and guided their decisions.[182]

Confronting the priority of the text cost one young British diplo-

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report (itself containing a remarkable brief history of international anarchy and the move to institutions) that:

> It will be noticed that the Phillimore Committee say that any attempt to build an organization for peace "Must be limited to a policy upon which there is a substantial measure of agreement among the Powers". That is no doubt true. In one sense, it is obvious. Such a system can only be set up by a Treaty, and a Treaty involves the agreement of its signatories. But it must be more than a formal assent if the peace machinery is to be effective.

R. Cecil, A Great Experiment 58 (1941).

[180] C. Howard-Ellis, supra note 19, at 99.

[181] See 2 D. Miller, supra note 68, at 562-63.

[182] 1 F.P. Walters, supra note 10, at 40.

> It is hardly necessary to insist on the importance of the Covenant, either in the world of political thought, or in the world of political action. The Covenant has for the first time in human history brought into being a permanent international organization extended, or, rather, extensible, to the whole world and affecting all international contacts.

J. Williams, Some Aspects of the Covenant of the League of Nations 2 (1934).

mat at the Paris conference his innocence.[183] Harold Nicolson came to Paris to negotiate a "Wilsonian" peace. As the text of the Peace Treaty was prepared for signature, the contrast between public rhetoric at the Conference and the "Carthaginian" compromises of the draft articles convinced Nicolson of the "hypocrisy" of diplomatic speech. As the text swept away the Conference which generated it, Nicolson became convinced that the Conference had been a failure.[184] He concluded that diplomatic "conversation" should give way to documentation:

> Locarno, not to mention Thoiry, should have convinced us of the desirability of keeping our statesmen segregated, immune and mutually detached. This is no mere paradox. Diplomacy is the art of negotiating *documents* in a ratifiable and therefore dependable form. It is by no means the art of conversation. The affability inseparable from any conversation between Foreign Ministers produces allusiveness, compromises, and high intentions. Diplomacy, if it is ever to be effective, should be a disagreeable business. And one recorded in hard print.[185]

But the written word did not replace speech in inter-state affairs. Quite the contrary, by giving birth to the League plenary, the establishing text called forth the very "diplomacy by conference" it seemed to sweep aside. Far from resolving the relationship between diplomatic speech and writing, the Covenant mandated its repetition. If the Covenant succeeded, the movement from speech to writing would henceforth occur inside the League, in the relationship between debate and resolution, punctuated by votes rather than signatures. Although an upcoming text animates speech in both the Conference and the plenary, the Conference responds to war while the plenary looks to the Covenant for meaning and structure. The Covenant will replace war by standing in for the War. It thus establishes its authority not simply by encapsulating its authors, but more importantly by

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[183] Peacemaking 1919, supra note 18, at 6-7, 215-371 (particularly telling are Nicolson's comparisons of his contemporaneous diary and memoir account of the same events).

[184] He wrote, in a memoir which has become a standard text for aspiring diplomats and diplomatic historians:

> What, in the first place, was the nature of this moral and intellectual deterioration? . . . We came to Paris confident that the new order was about to be established; we left it convinced that the new order had merely fouled the old. . . .
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> . . . [T]he Paris Peace Conference was guilty of disguising an Imperialistic peace under the surplice of Wilsonism, that seldom in the history of man has such vindictiveness cloaked itself in such unctuous sophistry. . . . I certainly agree that the sanctimonious pharisaism of the Treaties is their gravest fault.

Peacemaking 1919, supra note 18, at 186-87.

[185] Id. at 208-09 (emphasis in original).

generating a readership which will enact its repetition within an institution.

The Covenant's genius—the genius of establishment—is this equivocal position between the Conference and the plenary. On the one hand, the text establishes its priority by surrender—first to the Conference in whose name it speaks and then to the plenary which it establishes. On the other, it is the priority of the Covenant—a priority asserted formally and substantively against all that precedes and all that follows—which generates the momentum essential for this establishment.

B.   *The Covenant and the Peace Treaties*

The Covenant did not stand alone between Conference and plenary. David Miller, a legal adviser with the American negotiating team in Paris, asserted that "[t]he wisest of Wilson's many wise decisions was to put and keep the League in the Treaty of Peace."[186] The League was considered an "integral" part of the Paris settlement and its Covenant an integral part of the Versailles Treaty.[187] For Wilson,

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[186] 1 D. Miller, supra note 68, at 549. Miller concludes his analysis of the Covenant drafting process eight years after the signature of the Covenant, as follows:

> Most striking and to my mind equally obvious is the fact that if not written in 1919 as a part of the Treaty of Versailles, no Covenant would have been written at all, no League of Nations would have existed. . . .
>
> Of all the silly comments about the Conference of Paris and its times, the most inane is that it would have been better to write the agreement about a League later, when there would have been more time for calm reflection and when the war feelings had passed and so on; all of which is the quintessence of stupidity, for there has been no moment since 1919 when either that agreement or any other agreement whatever could have been reached.

Id.; cf. J. Williams, supra note 182, at 27 (Fifteen years after signature, Williams asserts that the association of the Covenant with the Peace Treaties was merely "an event in the history of the Covenant, a circumstance, perhaps a condition, of its birth, but it is an error to regard it as a continuing and perpetual association. If the Treaties were revised out of existence to-morrow, not a line of the Covenant would necessarily be altered.").

[187] On the "integral" relationship between the Covenant and the Treaty of Versailles, see C.A. Kluyver, Documents on the League of Nations 116 (1920) (discussing the relationship between the Covenant and the Peace Treaties, paying particular attention to the "indissoluble union of the League of Nations and the Peace Treaty," which "Wilson constantly supported at Paris, and from which he did not deviate for an instant in his controversy with the American Senate"); id. at 118-39 (German aspirations for a peace which included the League); id. at 155-67 (detailing clauses in the Peace Treaties dealing with the League); 1 F.P. Walters, supra note 10, at 38 ("Since the Covenant was an integral part of the Treaty of Versailles, the League could not begin to function, formally and officially, until that Treaty came into effect."); C.K. Webster & S. Herbert, supra note 10, at 41 ("President Wilson was from the first determined to make the League an integral part of the Treaty of Peace"); id. at 40-46 (discussing reasons for this determination and opposition to it in Britain and elsewhere); id. at 51-53 (on the anomaly of forcing Germany to sign a treaty including the Covenant for a League they were not to join, and the difficulty of having made "the League's main duty to act as an instrument

it could not have been otherwise. On September 27, 1918, Wilson opened the New York Campaign for the Fourth Liberty Loan by noting that

> the constitution of that League of Nations and the clear definition of its objects must be a part, is in a sense the most essential part, of the peace settlement itself. It cannot be formed now. If formed now it would be merely a new alliance confined to the nations associated against a common enemy. It is not likely that it could be formed after the settlement.[188]

However essential their integration, the Covenant and the Peace Treaties differed significantly. Indeed, although both were drafted at Paris, they were the products of separate working groups. A procedural wrangle on the opening day of the Conference frustrated Wilson's determination to make the League " 'the framework into which the detailed arrangements of the settlement' would 'be required to fit,' " and to discuss the League first and in the same forum as other aspects of the settlement.[189] Instead, a separate committee was established to draft the Covenant which would meet at the same time as the Council of Ten responsible for the overall peace negotiations. Although Wilson sat in both bodies and acted as Chairman of the

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for enforcing the Treaty of Versailles [by making] the supervision of parts of the treaties . . . one of its functions"); id. at 53 (noting that this intimate relationship "did, however, make the League at once a body with definite duties which could not be postponed and was one of the causes why it survived the difficulties of its early years").

> Accordingly the Peace Conference . . . doubly deserved its name. Its task was, on the one hand, by the settlement of certain specific national claims, to substitute a state of immediate peace for the state of war . . . . But on the other hand, it had also, by the establishment of a new international order, to substitute a state of permanent peace for the anarchy which had prevailed over the whole world during the preceding centuries.
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> . . . .
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> Moreover, there were at least two other close ties [besides ideological considerations] between the national and the international elements of the peace settlement. On the one hand, the League of Nations, by far the most important of the international agencies set up, was called upon to cooperate in the solution of various territorial, that is primarily national questions . . . . And on the other hand, although there was not much enthusiasm for this agency among the heads of the principal European delegations at the Conference, Mr. Ray Stannard Baker is truly right in remarking "Everyone wanted a good strong league of nations to guarantee a treaty in which each first got all he wanted!"

W. Rappard, supra note 61, at 61-62. The most fascinating account of Wilson's struggle to integrate the Covenant into the Peace Treaty, from a legal as well as political perspective, is found in 1 D. Miller, supra note 68, at 76-100; see also C. Howard-Ellis, supra note 19, at 117, 109-19 (discussing the "necessity" and the "nature" of the connection between the Covenant and the Peace Treaties at length, concluding with a marvelous section: "The Distinctness and Complementary Nature of the Two Tasks").

188 1 W. Wilson, supra note 30, at 523.

189 A. Zimmern, supra note 19, at 237.

League Committee, the personnel, compositions, and working methods of the two groups were otherwise distinct.[190]

This procedural separation heightened the sense that drafting a League Covenant and negotiating a Peace Settlement are different tasks to which different talents, timetables, and ideological perspectives are appropriate.[191] The League was much more the project of the Americans, or at least the Anglo-Saxons, than of Continental participants, and was associated with the rhetorics and ideology of self-determination and democracy rather than those of reparations and territorial reallocation.[192] To an extent, it seemed that establishing a League was a legal matter, more suitable for jurists than the politics of negotiating a peace settlement.[193] The politics of establishment, moreover, were forward-looking and speculative rather than rooted in the retributive allocation of the spoils of war.[194] Establishment was an ephemeral business, quite unlike the nitty-gritty of boundary drawing.

These differences suggest a relationship between the documents produced by this two-track procedure. Although Wilson insisted that

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[190] Id. at 237-39; see C. Howard-Ellis, supra note 19, at 87-99; see also C.K. Webster & S. Herbert, supra note 10, at 41-43 (contrasting participation of smaller states in the two processes).

[191] On the consequent expectation that smaller powers would be permitted to participate in Covenant drafting, if not in peace negotiation, see C.K. Webster & S. Herbert, supra note 10, at 42; cf. C. Howard-Ellis, supra note 19, at 87-88 (struggle between Wilson and other delegations over composition of Peace Conference).

[192] See C. Howard-Ellis, supra note 19, at 89; W. Rappard, supra note 61, at 79-81, 99-102.

[193] Cecil, in his autobiography, described the League Committee's reliance upon their legal draftsmen. R. Cecil, supra note 179, at 69.

> The treaty-makers were subjected to a continuous stream of harsh and passionate pleading, of claim and counter-claim, of historical, statistical, military, economic, and geographic argument. They had to work fast, knowing that any prolongation of uncertainty as to the future of each disputed area caused untold loss and inconvenience to its inhabitants. And with all these inescapable problems on their hands, they were also responsible for guiding the policies of their own countries in a time of unprecedented difficulty.
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> In these circumstances it might well have been expected that the work of drafting the Covenant and setting the League in motion would be left on one side at least until the territorial questions had been decided.

1 F.P. Walters, supra note 10, at 30-31.

[194] The relationship between the League and the territorial settlement at the Paris Conference as to both European boundary drawing (particularly the Saar) and the colonial settlement, is well told by W. Rappard, supra note 61, at 60-103 (contrasting what he terms "national" and "international" orientations at Paris, and concluding that the attempt to involve the League in territorial issues reflected the positive willingness of participants to think of even national issues in international ways). J. Williams, supra note 182, at 20-26, compares the Covenant drafting process to that of a British Act of Parliament. To him, the crucial difference lies in the international nature of the Paris plenary and the link between the Peace Treaties and the Covenant—a link which seems temporally and logically necessary.

the League be discussed first, it was taken up only long enough to be separated from the rest of the work of the Conference. The priority of the peace negotiation seemed a matter of both political and procedural logic.[195] Writing in 1932, as Versailles took the blame for many of the League's difficulties, even Williams, a strong advocate of the Covenant's independent importance, acknowledged that the Covenant was initially both inseparable from and secondary to the Peace Settlement. However important the Covenant would become, a peace conference must simply give priority to the settlement of war:

> [T]he Covenant and the Treaties in their original presentation formed a whole. . . .
>
> To have taken the Covenant out of the Treaty would have altered the character of the settlement. If the Treaty had not been linked with the Covenant, it would have had to have been quite a different treaty. And *some* treaty was a necessity. A state of war still existed technically, the blockade of Germany in far more than a merely legal or technical shape continued even after the conclusion of the armistice, and some sort of treaty *had* to be made. If there was a question which of the two had to come first, the Treaty or the Covenant, the Treaty must have had precedence.[196]

The Treaty preceded the Covenant as war precedes peace, as politics precedes law, and as substance precedes procedure.[197]

But if the Treaty expressed the substantive politics of war, it did

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[195] This logical approach seemed consistent with the fourteen points, for however crucial the League may have been to Wilson, he listed it as his final point. See J. Williams, supra note 182, at 25-27; see also 1 F.P. Walters, supra note 10, at 33-34 (describing the "business-like," "informal, and friendly" nature of the League Committee's work by contrast to the hustle-bustle of the Conference as a whole). R. Cecil, supra note 179, at 65-73, also treats the two-track procedure as completely unproblematic.

> On the first day of the Conference the French, with their usual clearness and precision, put forward a list of agenda. The League of Nations figured in it—how, in all honesty, could it be left out?—but, as logic would have it, it was placed at the bottom of the list.

A. Zimmern, supra note 19, at 238. "Thus, by the play of procedure and of circumstance, a gap was opened, both in British and in French governing circles, between the League and the other issues of the Peace Conference and indeed the whole of the rest of international politics." Id. at 240.

[196] J. Williams, supra note 182, at 25-26 (emphasis in original).

[197] On the privileging of politics over law at Paris, see, e.g., W. Rappard, supra note 61. See also C. Howard-Ellis, supra note 19, at 88, commenting on the League Commission's terms of reference:

> The terms of reference show how essentially political was the conception of the Peace Conference regarding the League. There was indeed a strong and conscious reaction against the "legalistic" conceptions that had inspired the peace work at The Hague, for it was felt that The Hague Arbitral Tribunal and the whole movement behind it had proved futile at the crisis of the world war, and it was desired to make it as clear as possible that this was a new start, not to be confused with the discredited older attempt.

so textually, "settling" issues left open by war with the technical precision of a lengthy legal document. The Covenant, by contrast, expressed a political aspiration: to complete and ensure the settlement.[198] For some, the League would guarantee the details of the Treaty.[199] For others it would provide a framework for their revision.[200] Upon signing the Peace Treaty for South Africa on June 28, 1919, Smuts declared:

> I have signed the Peace Treaty, not because I consider it a satisfactory document, but because it is imperatively necessary to close the war . . . . I look upon the Peace Treaty as the close of those two chapters of war and armistice, and only on that ground do I agree to it.
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> I say this now . . . because I feel that in the Treaty we have not yet achieved the real peace to which our peoples were looking, and because I feel that the real work of making peace will only begin after this Treaty has been signed . . . . This Treaty is simply the liquidation of the war situation in the world.
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> The promise of the new life, the victory of the great human ideals, . . . the fulfillment of their aspirations towards a new inter-

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[198] Although W. Rappard, supra note 61, at 62-99, sees this positively, he emphasizes the involvement of the League in negotiations about territorial issues. J. Williams, supra note 182, at 1-2, treats the Covenant as primarily a political rather than legal document:

> The Covenant is not expressed in technical legal language; no British parliamentary draftsman would own it as his child; it is a sketch, or perhaps it is better to say, an impressionist picture on the lines of what not many years ago was the most modern of schools . . . .
> . . . It therefore would be a mistake to examine the Covenant with a legal microscope; it must be looked at with the naked and human eye of the student of politics, or, perhaps better, of the practitioner of that art.

[199] To Smuts, the League would legitimate the international "reversion" of the central European territories:

> As a programme for the forthcoming Peace Conference I would therefore begin by making two recommendations:
> (1) That in the vast multiplicity of territorial, economic and other problems with which the Conference will find itself confronted it should look upon the setting up of a League of Nations as its primary and basic task, and as supplying the necessary organ by means of which most of those problems can find their only stable solution. . . .
> (2) . . . Reversion to the League of Nations should be substituted for any policy of national annexation.

J.C. Smuts, supra note 141, at 12. See I. Fisher, supra note 80; R. Jones & S.S. Sherman, The League of Nations—From Idea to Reality (2d ed. 1929); see also A.J. Balfour, The League of Nations—Statement in the House of Commons (June 17, 1920), in 3 League of Nations Pamphlets (1919-1920) (emphasizing the importance of the League for fulfillment of the Versailles arrangement).

[200] See 1 F.P. Walters, supra note 10, at 31 (comparing motivations of various statesmen for linking League to peace settlement, particularly Wilson, who, according to Walters, "counted on the League to correct the inevitable imperfections of the Peace Treaties and to facilitate the solution of questions on which agreed decisions proved impossible").

national order and a fairer, better world, are not written in this Treaty, and will not be written in treaties. . . . A new heart must be given, . . . [a] new spirit of generosity and humanity, . . . can alone heal the wounds . . . .

. . . There are territorial settlements which will need revision. . . . There are punishments foreshadowed, . . . [t]here are indemnities stipulated, which cannot be exacted without grave injury . . . .

. . . The real peace of the peoples ought to follow, complete, and amend the peace of the statesmen.

In this Treaty, however, two achievements of far-reaching importance for the world are definitely recorded. The one is the destruction of Prussian militarism, the other is the institution of the League of Nations. I am confident the League of Nations will yet prove the path of escape for Europe out of the ruin brought about by this war.[201]

The Treaty retained its priority only at the Conference. As it was signed, priority passed to the Covenant.

Many commentators have emphasized the priority of either the Versailles Treaty or the Covenant,[202] but this commentary might more readily be addressed to the League practice, which often seemed tilted towards either guaranteeing or eroding the settlement. The establishing text itself equivocates about its priority. On the one hand, the Covenant defers to the Treaty. At Paris, the settlement was an elaborate negotiation conducted on the basis of prior secret treaties among the victors concerning the disposition of spoils and directed towards a set of treaties in which the League, as established by the League Committee, would be reintegrated. The League, by contrast, was a Covenant, a moment of formal and consensual coming together—a promise rather than a process. That the Covenant drafting committee's work was less politically contentious or exhausting than that of the Council of Ten is unsurprising.

On the other hand, the Covenant honors the Treaty without yielding to it. The peace settlement is an extravagant ratification of victory, an elaborate celebration of the stability which has emerged from the chaos of war. The Treaty sutures civilization's wounds and

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[201] C.A. Kluyver, supra note 187, at 139-42 (quoting J. Smuts (S. Afr.) Remarks at the signing of the Treaty of Versailles (June 21, 1919)).

[202] See, e.g., 1 F.P. Walters, supra note 10, at 30-39; C.K. Webster & S. Herbert, supra note 10, at 41; A. Zimmern, supra note 19, at 239; cf. W. Rappard, supra note 61, at 60-62 (emphasizing interdependence of League and territorial issues at Paris, but seeing this positively). Critics of the League, including American isolationists, cited this relationship between the League and the Versailles settlement as evidence that the delegates of the Conference were hopelessly unrealistic and wedded to the old diplomacy.

signals the reestablishment of peace. The institution established by
the Covenant will be an ongoing political process, separated from war
by the Treaty. It will experience only the memory or specter of war
as it busies itself with what the Covenant terms "disputes" that must
be quelled, settled, arbitrated, adjudicated, discussed, avoided—in
short, managed. The Covenant inaugurates a politics of the future
rather than ratifying a politics of the past.

The zenith of this equivocation is reached as the Covenant and
Treaty are signed. At the moment of signature, what had been a
political process became a formal textual promise and what had been
merely a text became a political institution. In both of these roles, the
exquisite ambiguity of the text is achieved by surrender to the political
process. Whether as the procedural and legal remnant of the Paris
negotiations or the initiator of their institutional completion, whether
referring back to the Treaty for authority and separation from war or
forward to the politics of the settlement's guarantee, the Covenant
supplements the Treaty.

This supplemental relationship encourages a somewhat exagger-
ated sense of the difference between the Covenant and the Treaty.
The Covenant seems procedural when the Peace Treaties are substan-
tive, formal when they are informal, legal when they are political, as-
pirational when they are pragmatic. And yet, the Peace Treaties set
up numerous institutional arrangements for implementation of the
settlement, and the Covenant is as much a document of political set-
tlement as of institutional establishment.[203] The sense of difference
and movement from Treaty to Covenant is achieved by treating each
in turn as relatively more formal, substantive, or politically fluid. The
exquisite supplementarity of the Covenant is not achieved by differ-
ence, it is the product of an elaborate equivocation within the docu-
ments themselves.

C. *Substance and Process in The League Covenant*

Interpreting the Covenant as a formal and procedural document
concerned primarily with a peaceful institutional process is tempting.
An establishing text should be brief and concerned primarily with the
details of institutional process; indeed, the Covenant is a short and
readable document.[204] Much of its text concerns issues normally as-

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[203] See C.A. Kluyver, supra note 187, at 155-67 (detailing clauses in the Peace Treaties
dealing with the League of Nations); W. Rappard, supra note 61, at 60-129.

[204] Its 26 articles seem downright sparse when compared with the U.N. Charter (111 arti-
cles) or the U.N. Convention on the Law of the Sea, Oct. 7, 1982 (320 articles and 9 annexes
containing an additional 125 articles).

sociated with institution building: membership, representation, organs, voting, secretariat, seat, etc.[205] Its substantive context should be provided by the political settlement of which it is a part. Attributing the politics of war to the Versailles settlement preserves the Covenant's innocence. Were the League given a substantive mind of its own, it might threaten the settlement and corrupt the League's own political process.

But the Covenant is neither free of substance nor concerned primarily with the processes of peace. Although the body of the Covenant leads off with seven articles devoted to institutional matters, of the remaining nineteen, all but three detailing the status of and procedure for amending the Covenant (articles 20, 21, and 26) and one relating the League to other international bureaus (article 24), seem quite substantive. Although three articles detail specific arrangements and obligations with respect to certain colonial territories, the Red Cross, and other humanitarian matters (articles 22, 23, and 25), twelve articles concern the problem of war.[206] Along with an institutional process, the Covenant establishes international systems for war and peace.[207]

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[205] I term these institution building-blocks "procedure" in only the most speculative sense. Others have classified them differently, although I think with similar effect. See, e.g., 1 F.P. Walters, supra note 10, at 41 (terming the first seven articles the "constitutional framework of the new international system"); J. Williams, supra note 182, at 36 (Articles 1-7 "contain the constitution of the League as the international organism by which it is intended to realize the purposes of the Preamble."); A. Zimmern, supra note 19, at 271, 272-73 (distinguishing articles 1-7, 18-20, and 26 as relating to establishment of "[a]n improved and enlarged Concert of the Powers, using the method of regular conference" from those associated with various approaches to war and peace).

[206] League of Nations Covenant arts. 8-19. Cf. A. Zimmern, supra note 19, at 272 (breaking the war system into five categories). Williams differentiates articles 10 to 21 which

> may properly be called the Substantive Articles for the execution of the main purpose of the Preamble, the achievement of international peace by the means which the Preamble specially mentions. They fall into two divisions: first, Articles 10 to 17, which prescribe the main duties of Members of the League for the preservation of peace and the settlement of international disputes, and, second, Articles 18 to 21, which deal with the subject of treaties . . . and indicate the relation of the Covenant to the problem of international change.

J. Williams, supra note 182, at 37. "Articles 22 to 25 regulate the general activities of the League as an international body apart from its main task of the preservation of peace." Id. (emphasis omitted); see C.B. Fry, Key-Book of the League of Nations 139-41 (n.d.) (Fry has usefully "Re-arranged in Homogenous Groups of Provisions, Presented in Logical Succession" the articles of the Covenant, beginning with those associated with "Purpose and Membership," "Executive Machinery," and "Working of Executive Machinery," followed by "Settlement of Disputes" and "Suppression of War," and then "International Co-Operation in Peace Activities" and "International Law.").

[207] This approach to the Covenant mirrors a British proposal that was before the drafting committee that the Covenant be broken into "chapters" on "the Constitution of the League," "the Avoidance of War," "the Special Functions of the League," and "Concluding Provi-

The substantive provisions of the Covenant, moreover, are independent of the Versailles Treaty. Institutional provisions typically empower an organ to "deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world."[208] Despite its ambivalent relationship to the Peace Treaties, the Covenant is self-contained. A preamble announces the terms of reference for the institutional regime it establishes, setting it off from the Peace Treaties of which it is an integral part:

The High Contracting Parties

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments,

and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, Agree to this Covenant of the League of Nations.[209]

The Covenant grounds itself directly in the intentions of the "High Contracting Parties" without reference to either the War or the Versailles Settlement.[210] On February 13, 1918, Mr. Larnaude of

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sions." 1 D. Miller, *supra* note 68, at 218. The motivation for thinking of a "war" and a "peace" system is discussed in D. Kennedy, *supra* note 3, ch. 3, §§ 1, 3a. This distinction is more familiar perhaps from modern international institutional literature which harks back to what it takes to be the classic distinction between a law of "war" and a law of "peace" by differentiating an institutional practice of administration, development, and "cooperation" from one of legislation, security, and "peace-keeping." See, e.g., F. Kirgis, *supra* note 1; Cases, *supra* note 1.

[208] League of Nations Covenant art. 3, para. 3; see, e.g., id. art. 4, para. 4.

[209] Id. preamble. Useful commentaries on the Covenant include J. Ray, Commentaire du Pacte de la Société des Nations Selon la Politique et la Jurisprudence des Organes de la Société (1930); 1 F.P. Walters, *supra* note 10, at 40-64; J. Williams, *supra* note 182, at 35-36; F. Wilson, *supra* note 178 (compiling excerpts of debates and plans relevant to each article of the Covenant as adopted); A. Zimmern, *supra* note 19, at 270-80. The most comprehensive is 1-2 D. Miller, *supra* note 68 (compilation of his notes of committee sessions, and various plans and proposals submitted in Paris, indexed by Covenant article).

[210] The preamble is treated in J. Williams, *supra* note 182, at 35. The preamble
 gives a general statement of the purposes of the League . . . and of the means by
 which those purposes are to be fulfilled . . . . The Preamble serves also as a guide
 to the interpretation of any passages that may be obscure or even conflicting; it
 indicates . . . the general scope of the text.
A. Zimmern, *supra* note 19, at 274-78 (contrasting the "stiffer" French text with the Anglo-American text).

Miller records how the attempt to include language establishing responsibility for the War in the preamble was opposed and defeated because, as was stated in the Ninth Meeting of the Commission:

the French delegation proposed mention in the preamble of the League's roots in the War and in the pre-War Hague experience. With respect to the Hague, his amendment was defeated. After discussion, Mr. Larnaude withdrew reference to the War, stating: "I should not wish to introduce into the League any element of hatred for the future."[211] Miller concluded his notes of the meeting with the comment: "It was understood that this vote in no way indicated that the Commission condemned the ideas embodied in the amendment of M. Larnaude but that the Commission considered merely that it was inadvisable to introduce them into the text."[212]

Although the preamble asserts the League's teleological indepen-

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> We are now making a covenant of union and fraternity for the present and for the future. I do not wish to see in this covenant any words which recall the terrible conditions of the war.... I should not like to see at the beginning of this covenant words which would recall our hatreds.

1 D. Miller, supra note 68, at 230 (quoting J. Reis (Port.) Remarks at the Ninth Meeting of the Commission on the League of Nations (Feb. 13, 1919)). Apparently, in their desire to indicate preambulatory movement forward, the Covenant drafters were as anxious to forget the Hague as they were the War. Miller reports the unsuccessful effort by the French to amend the preamble so as not to "ignore completely, as if nothing had ever been done up to the present time for the organization of international law, what has been done and elaborated at The Hague in 1899 and 1907." Id. at 261 (quoting L. Bourgeois (Fr.) Remarks at the Tenth Meeting of the Commission on the League of Nations (Feb. 13, 1919)). Miller saw this attempt as merely an effort "to test the patience of the other members of the Commission." Id. at 260. Cecil, as Chairman, responded by suggesting first that "[n]obody thinks of forgetting the work of The Hague Conference, it is a simple question of form, not an important matter," id. at 262, and then by referring to article 14 calling for the formulation of plans for the establishment of a permanent court. Id. The forgetful exchange which followed deserves record:

> M. Léon Bourgeois: I am referring to the idea of creating a permanent court of justice, which seems to imply the idea of abolishing the existing court of Arbitration.
>
> M. Venizelos[:] Is there really a permanent court of justice at The Hague? I was told there was none.
>
> M. Léon Bourgeois: I have the honor of being one of the members.
>
> . . . .
>
> Chairman: So far as English and American opinion is concerned, there is no intention to discredit the work of The Hague, and no reflection upon its achievements intended to be carried by our unwillingness to include reference to it in the Covenant.

Id. at 262-63 (quoting Remarks at the Tenth Meeting of the Commisssion on the League of Nations (Feb. 13, 1919)).

Miller describes the decision at the Eleventh Meeting of the Commission to substitute the words "States Members of the League" for the more usual treaty locution "High Contracting Parties" throughout the draft after the preamble—indicating the movement from signatories to members accomplished by the movement from the preamble to the text, and lifting the League out of the Peace Treaties. Id. at 311. Cecil's proposed change was intended to distinguish signatories of the Treaty (which would include Germany) from members. Id. at 317-18.

211 1 D. Miller, supra note 68, at 230 (quoting Mr. Larnaude (Fr.) Remarks at the Ninth Meeting of the Commission on the League of Nations (Feb. 13, 1919)).

212 Id.

dence—setting forth the goals which will constrain the powers of organs and inform decisions about membership—Mr. Larnaude's remark introduces a doubt. A teleology without history, without the capacity to "introduce into the League any element of hatred," might almost be thought to restate the aspiration for a Covenant free of substance, a Covenant which would need to rely upon the Peace Treaties for context and authority.

The substantive provisions of the preamble are quite unassuming. We are reminded of aspirations to "promote international co-operation and to achieve international peace and security," but these aspirations are purely motivational, given content only by the institution being established. We are referred to "obligations not to resort to war," to "undertakings of international law," and to "treaty obligations," presumably including the Peace Treaties; yet these references are simply reiterations of substance established elsewhere. Even the obligation not to resort to war is elaborated upon only in the body of the text, a deferral made more explicit in the French draft, which refers to "certain" obligations.[213] At best, the preamble "prescribes" the redemption of politics which the League is to execute: "open, just and honourable relations between nations."[214]

The preamble thus asserts its substantive authority as a modesty about substance which makes us curious about the text and the institution which will fulfill these references and reminders. Indeed, the Covenant as a whole is able to assert a substantive independence without jeopardizing its equivocal subservience to both the peace settlement and the League precisely because substance appears either as an intention still to be fulfilled or as a reminder of obligations detailed elsewhere. The bulk of the Covenant, establishing an international system for war and peace, continues this textual practice.

D. *The Covenant: A System for Peace*

There seems no more natural association than that of the Covenant with peace. During the War, the yearning for peace was often expressed as the aspiration for a covenanted league. As the Versailles Treaty ended the War, the Covenant began the peace. After the League's establishment, moreover, the Covenant seemed rooted in the peace which was made at Paris. From the perspective of both the War which it replaced and the process which it established, the Covenant epitomizes the arrival of peace—tainted neither by the War nor

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[213] On the difference between the French and English drafts, see 1 D. Miller, supra note 68, at 505-36; A. Zimmern, supra note 19, at 274-78.

[214] League of Nations Covenant preamble.

by the politics of the institutional process. Indeed, the Covenant's independent and prospective language separates it from the War just as its temporal and substantive components distinguish it from the institutional process which it establishes.

But the Covenant's double commitment to peace is threatened from two sides. On the one hand, should the Covenant seek to commit the League substantively in any but the most vague and general terms, the flexibility of the institutional process, and hence, its ability to fulfill the promise of a redeemed international politics would be curtailed. As a result, the Covenant's commitment to the post-War institutionalization of peace is expressed primarily in procedural terms, as the definition of the institution which will fulfill wartime aspirations. On the other hand, should the Covenant express its commitment to the peace settlement in any but institutional terms, the League's independence from the War would be unconvincing. As a result, the Covenant's commitment to the substantive peace which settled the War is expressed primarily in the guaranteeing language of the Treaty—as the system for war which will ensure the peace established there.

To avoid these two drafting dangers, substantive policies and purposes were actively excluded from the Covenant. The vast majority of the Covenant's provisions (twenty-three of twenty-six articles) deal either with institutional matters (eleven articles) or with the system of war (twelve articles). The few remaining substantive provisions not directly concerned with war, provisions which have come to symbolize the League's most important contributions to the history of international institutions, are drafted so as to avoid both substantive association with the Versailles settlement and meaningful institutional commitment.[215]

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[215] Read chronologically, histories of the League show an increasing interest in humanitarian and social issues, from A. Sweetser, supra note 80, at 175-86, whose chapter on "Economic Cooperation" discusses only the application of economic sanctions under article 16, to League in Retrospect, supra note 159, in which 7 of 21 papers consider issues of peaceful cooperation (the majority of the remainder being studies of the League's relations with individual countries), and only 3 relating to "security problems." These provisions, considered peripheral when written, have been seen as crucial to the League's identity since being classified as issues of "peaceful cooperation." There is some evidence that the League itself focused its attention increasingly on these topics as the 1930's wore on. See The Development of International Cooperation in Economic and Social Affairs (Bruce Report), League of Nations Doc. A.23.1939 (1939), discussed in L. Goodrich, E. Hambro & A. Simons, Charter of the United Nations—Commentary and Documents 10 (rev. 3d ed. 1969) [hereinafter Commentary]; see also D.W. Bowett, supra note 1, at 51-53 (The League's economic and social activities became far more impressive than its political ones.); V. Ghebali, La Société des Nations et la Réforme Bruce, 1939-1940 (1970); 2 F.P. Walters, supra note 10, at 749-62 ("The Renaissance of the Economic and Social Agencies (1935-1939)").

Against opposition from both the British and American delegations, the French, Italian, and Japanese members of the Paris drafting committee sought to include various substantive policies in the Covenant.[216] All these proposals—by the Japanese to include a provision banning racial discrimination, by the Italians to include a system of food and wealth rationing and redistribution, by the French for an international military staff, and of several delegates to follow Smuts' proposal that there be "exacted" as a condition of membership a requirement that national minorities be treated with respect—were rejected.[217] This exclusion expressed the dominance of both the Anglo-American powers and of a particular philosophy of establishment.

The British and American delegations generally did not express opposition to the *content* of these proposals (although the French seemed anxious to produce institutionally the substantive territorial guarantees they had failed to achieve in the settlement negotiations). After deftly ensuring the defeat of the Japanese proposal through a technical ruling as Chairman, Wilson said that no one could dream of

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[216] Reading Miller's account of the Paris Conference negotiations creates an odd impression of Continental participants, whose points in each session seem either humble and tedious or completely beside the point. 1-2 D. Miller, supra note 68. This may have resulted from the decision at the First Meeting of the Commission to proceed upon the basis of a joint American-British draft, brushing aside rather elaborate French and Italian contributions, despite the fact that no French translation of the so called Hurst-Miller draft was available. See 1 D. Miller, supra note 68, at 130-36; see also A. Zimmern, supra note 19, at 242-43 ("Thus this initial decision made the Covenant what it is—a British-American document with here and there an addition or amendment to meet the wishes of others."); cf. W. Rappard, supra note 61, at 99-103 (grounding the difference between Anglo-American and Continental perspectives on the League and Covenant in analyses of their respective "national interests").

[217] On the Japanese proposal, see 1 F.P. Walters, supra note 10, at 63; see also 2 D. Miller, supra note 68, at 387-88 (notes of the Fifteenth Meeting of the Commission, including text of Japanese representative Makino's speech and ensuing debate). When Makino demanded a vote, his proposal was carried by a majority of 11 of 17, posing a procedural dilemma for Wilson. Id. at 391-92. A majority vote had been ruled to prevail on the question of the seat of the League—Brussels or Geneva—Geneva being chosen to distance the League from the War and the Versailles settlement. Id. at 392. Nevertheless, Wilson "stated that decisions of the Commission were not valid unless unanimous," id., distinguishing the Geneva vote by indicating that:

> [I]t had been necessary to accept the opinion of the majority inasmuch as no other procedure was possible if the question was to be decided at all. In the present instance there was, certainly, a majority, but strong opposition had manifested itself against the amendment and under these circumstances the resolution could not be considered as adopted.

Id. On the other proposals, see 1 F.P. Walters, supra note 10, at 61-64.

The difference between the Anglo-American and Continental approaches to the League has been discussed in terms paralleling those used to discuss the approaches to the relationship between the League and the peace settlement generally. Thus, the proceduralized League has been seen as the program of those with faith in law rather than politics, of those who are willing to trust a redeemed politics rather than a formal legalism for their security, of the Anglo-American "mind" or "spirit," and so forth.

interpreting the vote which had just been taken as condemnation of the principle proposed by the Japanese delegation.[218] Rather, the opposition seemed to express a sense that an establishment text should avoid overt substantive commitment.

Mr. Butler, Lord Cecil's secretary at the Conference, summarized the philosophical differences between the Anglo-Saxons and other powers in these terms:

> The real divergence lay between the adherents of the rigid, the definite, the logical, in other words, the juridical point of view, and those who preferred the flexible, the indefinite, the experimental, the diplomatic; between those who feared human nature and wished to bind the future, and those who believed in human nature and were content to trust the future; between those who desired written guarantees and those who desired moral obligations only; to be cynical, between those who expected to receive under the Covenant, and those who expected to give; in a word, between the continental point of view and the Anglo-Saxon.[219]

The exclusion of substance from the opening lines of the Covenant seems an opening to the future, an unfettering of the politically generous—Butler writes of the "desires" and "beliefs" of the negotiating parties. The Anglo-Saxons look forward in generosity while the Continentals remain preoccupied with the War. The British and Americans do not oppose codifying the Versailles settlement in the Covenant out of any lack of commitment to these principles. On the contrary, it is precisely to express an active commitment to their fulfillment—a promise to enact them—that their textualization is to be avoided. Rejecting the rigidity of law at the very moment of textual formality exposes no lack or deficiency, but rather a confidence. Only those unsure of the future inscribe their commitment—those who will promise are careful to promise nothing.

That the text should promise a momentum forward from the War precisely by refusing to specify the terms of its peace seems reasonable so long as the "desires" of the High Contracting Parties remain prospective and aspirational. From this perspective, Butler's recharacterization of the difference in the language of political gains and losses does seem "cynical." Prospectively, while desiring a tranformative institution, it does seem that the Covenant's promise will only be realized if never uttered. The desire renders the promise redundant, or worse, corrupting of the intention.

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[218] 2 D. Miller, supra note 68, at 392.

[219] Remarks of Mr. Butler, Secretary to Lord Cecil, quoted in D. Kennedy, An Institutional Myth 7 (1986) (unpublished manuscript available in Harvard Law School Library).

But in the final lines, Butler writes of the parties' "expectations" rather than of their "desires," and after the desire has been textually instantiated one can only expect what has been established. Once one comes to *expect* the institution as a regime it seems foolish to imagine that promises never uttered will be realized. What had seemed cynical seems realistic while what had seemed a laudable establishment philosophy seems naïve. If the Anglo-Saxons *had* desired to give generously, one seems compelled to ask: Why the relentless refusal to specify the desire?

The forward momentum generated for the Covenant's promise by its substantive silence is only part of the story; it situates the Covenant forward of the War, but cannot sustain the momentum into the Peace. However, the Covenant does not simply exclude substantive commitment. Although most of their time and attention was devoted to construction of the League's systematic response to war, the League Committee, sitting in the winter and early spring of 1918, struggled with a number of humanitarian issues and problems raised by the decolonization of the Central Powers which eventually found their way into the Covenant.[220] The Covenant's peace system thus complements its unspoken promises with substantive provisions—each shrewdly drafted to avoid dampening Butler's confidence. These provisions are well-crafted deferrals and references away from substantive codification. As a result, the Covenant stands boldly between the exclusion of substantive commitment and any substantive specification which might undo the forward momentum generated by this aspirational silence.

The bold equivocation of the articles dealing with issues of humanitarianism and decolonization resulted from a productive difference within the Anglo-Saxon camp, despite a close working relationship and shared commitment to the Hurst-Miller working draft.[221]

> [O]n the British side the chief object in view was the establishment of a framework ensuring continuous co-operation between the Great Powers. President Wilson's mind, on the other hand, was concentrated on certain particular policies. He did not care so much about the framework so long as the picture inside it was to

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[220] On the humanitarian and decolonization work of the Covenant and League, see R. Henig, supra note 14, at 153-60; C.K. Webster & S. Herbert, supra note 10, at 223-97; League in Retrospect, supra note 159, at 295-403.

[221] R. Cecil, supra note 179, at 70 ("Throughout, the British and American delegations worked in complete harmony."); see also W. Rappard, supra note 61, at 114 (The British and Americans were in agreement on all essentials, as they were more interested in the idea of the League than were the other delegations.).

his taste. Or, to change the metaphor, he was not interested in the design of the envelope so long as he could slip his own missive inside it. He was passionately excited about political ideas but more or less indifferent about political machinery.[222]

By dissociating "policies" from their institutional "framework," the Anglo-Saxons repeated within their camp the struggle which had separated them from the Asian and Continental powers. Although the message might have seemed more important than the medium at Paris, this relationship was bound to be reversed after the establishment. Zimmern argues that "[t]here emerged a British framework together with a number of Wilsonian policies," each of which had been transformed into a procedure for its eventual implementation.[223] Zimmern is correct, writing in 1939, to characterize this result as "a British victory." He errs, however, when he suggests that "[t]he upshot of the discussions was therefore as might have been anticipated."[224] Quite the contrary, this was the result only because it could not have been anticipated. Had the result been anticipated— the establishment actually expected—the deferral would not have been necessary, nor the promise left unspoken. The momentum towards the institution generated by the dissociation of procedures and politics was sustained by, and was indeed necessary to overcome, the incapacity of the text to anticipate its institutional defeat.

The humanitarian and decolonization provisions resolved this drafting challenge somewhat differently. The humanitarian provisions of the Covenant seem most peripheral to the document's establishment work and were least on the minds of those who had proposed a League during the War.[225] Article 25, "included at the request of the International Committee of Red Cross Societies"[226]

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[222] A. Zimmern, supra note 19, at 243.

[223] Id. at 244 (emphasis omitted).

[224] Id.

[225] [W]hereas the League Committee occupied a central place in the functioning of the Conference, the Committee which was drafting Section XIII attracted little attention or interest. . . . [It] was made up mainly of civil servants and trade union representatives; nor was it entirely clear that the result of its proceedings should properly be included in the Treaty at all.

1 F.P. Walters, supra note 10, at 59; see W. Rappard, supra note 61, at 61-115; C.K. Webster & S. Herbert, supra note 10, at 53 (The authors of the Covenant "began with the idea of erecting machinery to prevent war as the main purpose of their minds."); infra notes 137-42 and accompanying text (discussion of League plans).

[226] 1 F.P. Walters, supra note 10, at 60. A number of other organizations lobbied for inclusion of additional humanitarian proposals, but without success. See C.A. Kluyver, supra note 187, at 308-38 (collecting resolutions of organizations commenting on the Covenant). It is interesting that the only such proposal to be adopted concerns an area in which there is already another organization which will do the work—linking this article to the approach of League of Nations Covenant article 24, which places "under the direction of the League all

provides: "Members of the League agree to encourage and promote
the establishment and co-operation of duly authorised voluntary na-
tional Red Cross organisations having as purposes the improvement
of health, the prevention of disease and the mitigation of suffering
throughout the world."[227]

The League remains distanced from the "mitigation of suffer-
ing," appearing only as a nexus among "members" who agree to act.
The Covenant evidences the moment of their agreement, at best fore-
shadowing or promising their action. When they act, the members
will encourage and promote the establishment of *other* organiza-
tions—perhaps through other covenants—which have, in some proce-
dure and by some subject to be determined, been "authorized" and
whose "purpose," though perhaps not yet practice, is humanitarian.
Perhaps the League will compare the preambles of various volunteer
Red Cross societies to determine comparability with the League's own
preamble and issue "authorizations." More likely, this will be done
by the Red Cross. In any case, humanitarian work is left to members
and volunteers.[228]

By contrast, article 23 seems to provide the foundation for hu-
manitarian work by the League itself, or at least by members in the
context of the League and related international administrative
machinery:

> Subject to and in accordance with the provisions of interna-
> tional Conventions existing or hereafter to be agreed upon, the
> Members of the League:
> (a) will endeavour to secure and maintain fair and humane condi-
> tions of labour for men, women and children, both in their own
> countries and in all countries to which their commercial and indus-

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international bureaux already established by general treaties if the parties to such treaties con-
sent." Indeed, "[t]he French Delegation thought it a mistake to give an exclusive position to
the Red Cross without reference to like associations." F. Wilson, supra note 178, at 100. The
British responded by referring to article 23. Id. Miller reports that despite his sense that the
shorter the Covenant the better, and that he "did not believe in loading down the Covenant
with extraneous things," 1 D. Miller, supra note 68, at 401, he responded favorably when
House showed him a letter from the Committee of Red Cross Societies proposing article 25
because "the Red Cross was rather in a class by itself as an international organization. For 50
years and more it had worked with extraordinary success and the beneficience of its purposes
had met with world-wide recognition," id.

[227] League of Nations Covenant art. 25.

[228] Indeed, this rhetorical distance has been accompanied by a practice of distance. The
tradition of "encouraging" "cooperation" by "authorized" voluntary organizations whose
"purpose" is humanitarian has been continued by the United Nations with a vengeance. On
private international organizations, see L. White, International Non-Governmental Organiza-
tions—Their Purposes, Methods, and Accomplishments (1951). On the continuing practice of
"associating" with the United Nations, see 1 H. Schermers, supra note 1, at 77-80.

trial relations extend, and for that purpose will establish and maintain the necessary international organisations;

(b)   undertake to secure just treatment of the native inhabitants of territories under their control;

(c)   will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d)   will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e)   will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League.   In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(f)   will endeavour to take steps in matters of international concern for the prevention and control of disease.[229]

Coming at the end of the Covenant, article 23 makes a somewhat haphazard or incongruous impression. It seems an afterthought in a document overwhelmingly concerned with issues of institutional establishment, war, and peace. The text of article 23 is equivocal about its commitment to the concerns to which it makes reference. Indeed, the text is written both retrospectively and prospectively—less establishing a tradition than referring to one or indicating its potential. In this it seems redundant. Article 23 contains no new obligation respecting "prevention and control of disease," but only an agreement to take steps, draft new treaties, undertake new obligations, and to honor the provisions of "conventions existing." Members will "establish and maintain the necessary international organisations" or "entrust the League" with "supervision" of "agreements" other than the Covenant which concern "traffic in women and children," etc. Most significantly, paragraph (a), suggesting that the members "will endeavour to secure and maintain fair and humane conditions of labour" indicates that "for that purpose" they "will establish and

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[229] League of Nations Covenant art. 23. For commentary, see A. Károlyi, Article 23 of the Covenant of the League (1938) (unpublished manuscript on file at Harvard Law School Library); 1 F.P. Walters, supra note 10, at 58-59 (describing roots of article 23 in the proposal for associating the League with the International Labor Organization ("I.L.O.") rather than in proposals for inclusion of substantive humanitarian provisions—the article itself having been inserted at the request of delegates drafting the constitution of the I.L.O.); F. Wilson, supra note 178, at 95-98 (demonstrating that the article is the sole product of Anglo-American proposals, all French and Belgian proposals having been "withdrawn" after discussion). In this context, a good description of the development of the I.L.O. at Paris can be found in C. Howard-Ellis, supra note 19, at 206-65.

maintain the necessary international organisations."[230] The reference is always away from the Covenant, to other agreements or to institutional establishment and practice.

This equivocal reference away from the Covenant at the moment of substantive commitment might be interpreted expansively as a grant of jurisdictional competence to the League to consider certain humanitarian issues.[231] From the perspective of the dramatic growth of international administration which ensued, article 23 symbolizes the tradition of international institutional work in the fields of economic cooperation and development and seems to empower the League to act in these diverse fields. As the League found itself acting in these areas, it quite naturally located the textual origin for its activities in article 23. But such an expansive prospective interpretation seems to deny the text's equivocation, and it is difficult to see why the League's competence would be limited absent such a provision, or how this article might translate into an item for discussion and action in the Assembly or Council in the absence of some further implementing resolutions. Perhaps necessary once an institution begins to live against its constituting text, such an interpretation suppresses the Covenant's unwillingness to commit the institution to such practices.

On the other hand, article 23 might be interpreted simply as a reminder of other arrangements and institutions, in particular of the International Labor Organization. Such an interpretation would situate article 23 with article 24, integrating other international bureaus under the aegis of the League, seeing both primarily as elaborations of the institutional context within which the League would operate. Such a restrictive interpretation of article 23 gives voice to the Covenant's desires without enacting them as expectations for the League. But this approach seems to deny that the article is fit within the Covenant of the League and speaks to and about the institution it is establishing—denies, in other words, the substantive direction of the Covenant even as it fulfills its procedural ambitions. The text of article 23 seems to stand between these two interpretations, refusing to be

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[230] The reference is to the I.L.O.; see supra note 229. See also 1 D. Miller, supra note 68, at 417 ("This article has been redrafted so as . . . to make it plain that the States of the League are only bound to the extent of such conventions as they may have agreed to with regard to the matters mentioned.").

[231] This interpretation seems consistent with the "functional" approach to international institutions, which dominated the literature after D. Mitrany's, A Working Peace System (1966), and was influential in the period of skepticism about the "war" work of international institutions, at least along the model of collective security. By then, the League had been retrospectively interpreted as a success insofar as it operated with what seemed in 1945 to have been article 23's implicit authorization to become engaged in "peace" work. In 1919, we see the desubstantiation required to translate this sentiment into (or out of) a Covenant.

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fully captured by either, allowing both denials, and thereby producing a momentum forward from the tradition to which it refers toward the tradition which will come to refer to it.

This textual equivocation is carried further in provisions establishing a League role in the decolonization of the Central Powers. Those who argued most assertively that the League should be more than a set of diplomatic procedures, that it should indeed be a substantive system of peace, focused upon the reallocation of territories which comprised or were colonies of the Central Powers. Smuts made the strongest plea that the League be primarily about peace rather than war:

> It is not sufficient for the League merely to be a sort of *deus ex machina*, called in in very grave emergencies when the spectre of war appears; if it is to last, it must be much more. . . . It must function so strongly in the ordinary peaceful intercourse of States that it becomes irresistible in their disputes; its peace activity must be the foundation and guarantee of its war power.[232]

To the extent Smuts imagined states undertaking new obligations, in particular that of respecting the self-determination of national minorities, his concerns were, as Zimmern tells us regarding the proposal that states seeking admission be required to promise "equal treatment 'to all.racial or national minorities' within their jurisdiction," taken out of the draft Covenant and provided for in the individual treaties with the states concerned.[233]

But Smuts also emphasized the League's "reversionary" interest in dissolving empires: "Europe is being liquidated, and the League of Nations must be the heir to this great estate."[234] The League, in his view, would provide the framework within which the Great Powers could dispose of the empires of central Europe and Turkey without violating the principle of self-determination. The League could be an international meddler in the newly decentralized state system. To a certain extent, particularly if one took Wilsonian rhetoric seriously, the Paris Conference had played this role—disposing of the spoils without allocating them to the victors.[235] The League was to play a

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[232] J.C. Smuts, supra note 141, at 8.

[233] A. Zimmern, supra note 19, at 241-42. 1 D. Miller, supra note 68, at 40, suggests that Wilson's original notion that the League should provide for equality of treatment of " 'racial or national minorities' " was "a forecast of the subsequent Minorities Treaties framed by the Committee on New States." On the initial scope of the mandates system, see id. at 102. Zimmern presents this change unproblematically, as if to add "where they belonged" by logic, convenience, and good sense. Drafting a covenant is not the place for issues like that.

[234] J.C. Smuts, supra note 141, at 11.

[235] Of course, the Conference fell far short of this aim, but the League was not, as it turned out, to be the format for the attempt. A very good treatment of the relationships among the

role as well, but it would not be the peaceful role suggested by Smuts. Rather, the League would be the forum for enforcement of the peace, the institutional guarantor of the settlement rather than its architect. This "peace" function of the League (League as property holder) was transformed into a "war" function (League as guarantor) for which the League was established, but which did not itself require substantive establishment.

What did remain of Smuts' proposal for a substantive League role in the liquidation of empires was article 22, establishing a system of "mandates" for colonies of the defeated central European empires and Turkey.[236] The article opens with a statement of principle:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.[237]

The locution is odd. "Well-being and development" are not mandated. They "form a trust" for the performance of which "securities" "should" be embodied in the Covenant. The Covenant itself seems prospectively referred to: *Are* the securities embodied or not, as it turned out? Again the provision seems either redundant or prospective.

Turning to the next paragraph, we find not securities, but an institutional "method of giving practical effect to this principle." These territories are "entrusted" to the "tutelage" of "advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."[238]

League, the territorial settlement, and the Peace Treaties, which details the internationalization of self-determination, is W. Rappard, supra note 61; see also N. Berman, Sovereignty in Abeyance (1985) (unpublished manuscript on file at Harvard Law School Library) (developing a post-structuralist account of self-determination rhetoric).

[236] League of Nations Covenant art. 22. For commentary, see 1-2 D. Miller, supra note 68; 1 F.P. Walters, supra note 10, at 56-58 (describing the article's origin in a Council of Ten compromise between powers (particularly British dominions) seeking annexation of German colonies and those advocating some form of self-determination—resolved by agreeing to appoint potential annexationists "mandatories," rather than by immediate resolution at the League meetings).

[237] League of Nations Covenant art. 22.

[238] Id., para 2.

Again the Covenant turns our attention from itself, towards the members, here acting as the League's agents, who in their implementation will give the principle meaning, will "embody" the principle alluded to in the first paragraph. The final three subparagraphs of article 22 complete the institutional reference.

> [The] Mandatory shall render to the Council an annual report . . . .
>
> . . . The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.
>
> . . . A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.[239]

We find no substantive guidelines for mandatories, only the promise of guidelines to follow, identification of those who will prepare guidelines, and mechanisms of reportage and review. The initiative opened by Butler's faith and by the accompanying exclusion of substantive commitments from the Covenant is thus continued by those substantive provisions which are written into the Covenant. By referring back to a preambulatory and historical intention, forward to an institutional contest, and out to members and other organizations, the Covenant establishes a system of peace without embodying any particular substantive commitment which could subvert its independence *from both the Versailles settlement and the ongoing political process it sets in motion.* This equivocation about peace in the textual epitomization of the peace moves us forward to the institution by relying upon the Peace Treaties, the preamble, the procedural provisions of the Covenant, and perhaps most importantly, upon the Covenant's war system, each of which repeats the intention and instantiates the promise.

E. The Covenant: A War System

1. Plans for a War System

That the Covenant's substantive provisions should overwhelmingly concern war is not surprising given the preoccupations of those who advocated and planned for a League. With the possible exception of Smuts, League advocates and planners were more eager to contain and avoid war than to establish a particular system for peace.[240] This eagerness generally supported two ideas. First, that

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239 Id., paras. 7-9.
240 See G. Mangone, supra note 12, at 129-30; C.K. Webster & S. Herbert, supra note 10, at

the League should ratify and enforce the peace by which the War was concluded. Second, that the League should be a mechanism for generating political adjustment without violence.[241]

Each of these aspirations threatens the League's carefully defended association with peace. Should the League become too strongly associated with enforcement of the peace of 1918, its institutional flexibility and independence from the Versailles arrangement would be undermined. Should the League become too powerful a mechanism of international political adjustment, the League would not so much have redeemed and pacified the processes of international relations as replaced them, undermining the sovereign prerogatives defended during the War. The League planners responded to these dangers by embracing both aspirations, allowing each to temper the other. But the aspiration to enforce the peace sits uneasily with the aspiration to adjust the settlement peacefully. The League planners generally resolved this difficulty by differentiating two institutional dimensions, each responsive to one of these twin desires. The key to this complex strategy of combination and differentiation was the establishment of an institution which could provide the terrain for their continued accommodation.

The aspiration to replace war was to be the object of an obligatory system of "dispute resolution" which could, if utilized, substitute for war, resolving disputes without violence.[242] The aspiration to enforce the War's conclusion was consigned to a covenanted universalization of nineteenth-century defense agreements which would automatically transform war against any member into war against all members.[243] Once institutionalized in this way, these aspirations were

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53. Even those, such as the Fabians, who emphasized "gas and water" internationalism, did so as a response to war. Fabian Committee, supra note 92. Zimmern notes of Wartime propagandists (other than the Fabians) that:

> The term League of Nations did not bear for them the meaning to which we have become accustomed, that of an *everyday institution*, part of the working machinery of the world. They thought of it as a sort of fire brigade, an emergency arrangement to be prepared beforehand in view of the next crisis.

A. Zimmern, supra note 19, at 162 (emphasis in original).

[241] See W. Rappard, supra note 61, at 6-59 ("Peace as a War Aim During the World War").

[242] See, e.g., 2 D. Miller, supra note 68, at 13 (article V of Wilson's first draft providing mechanism for disputes to be settled by arbitration).

[243] Lowell epitomizes both tendencies perfectly. On the one hand he says: "Obviously, the submission to arbitration must be compulsory," H. Lodge & A.L. Lowell, supra note 103, at 22, while on the other hand:

> The country that goes to war before submitting its case to arbitration must be regarded as a criminal against mankind, and treated instantly as an outlaw and a common enemy by the rest of the world, or by those nations which bind themselves together for the maintenance of order. . . . In this way the members would stand together, and an attack on one would be *ipso facto* an attack on all . . . .

less threatening to the League's association with the peace. A system of dispute resolution, however obligatory, seems quite different from an institutionalization of sovereign authority. The universalization of guarantees seems less associated with the Versailles settlement than a direct commitment to enforce the 1918 status quo. Much more importantly, the two components will temper one another. The guarantee ensures the maintenance of sovereign autonomy while the dispute resolution system provides for adjustment in the peace that will be guaranteed.

Institutionalized in this way, moreover, these two aspirations seemed to reinforce one another. If the alternative dispute resolution system did not succeed, the system of guarantees would prevent a return to war; the only available politics would be the redeemed and alternative politics of the institution itself. Moreover, if the guarantees did not prevent a dispute from arising, it would be peacefully settled. These institutional features seem compatible in a way the aspirations were not. This apparent compatibility results from the difference between the two institutional elements.

The system of dispute resolution is a dynamic process, which might rely upon some procedural framework provided by the law, but which continues on its own, open to political participation. The system of guarantees is a static legal commitment, reinforced by a procedure for applying sanctions, but hoping never to deploy that procedure. The first is a political process of adjustment which operates against the invisible backdrop of legal commitment. The second is a legal commitment which depends upon a political system to which it will never resort. This displacement between the two systems renders them compatible. One does not commit oneself both to guarantee and to adjust the peace. Neither does one participate politically in both the enforcement and the adjustment.

The terrain on which this displacement will be reconciled, coordinated, and integrated is institutional. The League will accommodate the force of guarantee to the politics of adjustment. Transforming the aspirations for a response to war into displaced political and legal systems itself creates a motive for, and a momentum towards, the institutional setting for their accommodation. But the terrain which can accommodate two such disparate systems must be very carefully constructed. It cannot commit itself too firmly to either the politics of adjustment or the law of guarantee. Plans for the

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Id.

League war system, like the Covenant, balanced between these two institutional planes.

The equivocating genius of plans for the League is most striking in their exclusion of extreme institutional formulations. Indeed, the first thing to be said about plans, planners, and for that matter, Covenant, is that none sought to abolish war.[244] From our own perspective, after the dramatic irrelevance of the Kellogg-Briand pact, the absence of such proposals seems understandably realist. Abolishing war demands too much of law in the face of a rapacious politics. In sharp contrast, Zimmern, writing after Kellogg-Briand but prior to the Second World War, suggests that the League planners were "unable to shake themselves free from the powerful tradition of international 'law,'" with its attachment to the unfettered sovereign authority to propose more than institutional "safeguards" against

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[244] See W. Rappard, supra note 61, at 115 ("Thus the authors of the Covenant, while offering the contestants every inducement to settle their disputes peacefully and every judicial and political facility therefor, stopped short of an absolute prohibition of war."); Lowell, Object to Be Attained, in The Covenanter, supra note 71, at 35 ("No serious person believes that it is possible in the present state of the world to prevent wars altogether . . . .").

All the planners made provisions for war. Smuts, who is almost poetic in his hatred of war, includes provisions for armies and armaments in his plans:

> (15) That all the States represented at the Peace Conference shall agree to the abolition of Conscription or compulsory military service; and that their future defence forces shall consist of militia or volunteers, whose numbers and training shall, after expert inquiry, be fixed by the Council of the League.

> (16) That while the limitation of armaments in the general sense is impracticable, the Council of the League shall determine what direct military equipment and armament is fair and reasonable in respect of the scale of forces laid down under paragraph (15), and that the limits fixed by the Council shall not be exceeded without its permission.

J.C. Smuts, supra note 141, at 56-57. Later, however, this "right to go to war" was seen as a "gap in the Covenant":

> If in 1919 and 1920 the obligation to submit disputes to arbitration had been made universal, there would be no "gap in the Covenant". . . . The gap in the Covenant exists, just in so far as the right of private war has not been renounced, just in so far as the obligation to submit disputes to arbitration is incomplete.

H. Dalton, supra note 67, at 120.

Peace planners who were less in the mainstream often simply ignored war, but even they did not suggest that it be legally prohibited. See, e.g., Resolutions Adopted by the International Congress of Women at the Hague, May 1, 1915, in Hague Women, supra note 102, at 150 app. at 153 (urging that economic pressures be brought to bear on warring aggressors); see also A. Zimmern, supra note 19, at 162-63 (emphasis in original):

> [C]uriously enough, as it seems to us in retrospect, obsessed though the framers of these various schemes were with the horror of war, none of them provided for its *abolition*. None of them proposed that war, following the slave trade, should cease to be a recognised and legitimate practice in international relations. None of them *prohibited* recourse to war, still less treated it as a crime or a common nuisance, to be visited with appropriate penalties.

war.[245] Abolishing war would allow a political aspiration to displace law itself.

Neither interpretation for this absence seems fully satisfactory. If Zimmern's suggestion that League planners were too enamored of international law to suggest that war be abolished seems counterintuitive, it also seems unlikely that League planners were too skeptical about international law's effectiveness to think prohibition worth the effort. All of their proposals for an institutional response to war relied heavily upon international law. The peace was to be universalized by legal guarantee rendering war against one a war against all. Aggression would be deterred because the aggressor would find itself at war with all other powers automatically, ipso facto, and without a declaration—if treaty obligations were translated unproblematically into political action.[246] Although alternative dispute resolution might occur in differentially legal forums—some proposed extending the Hague arbitration scheme, others advocated a complete judicial appa-

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[245] A. Zimmern, supra note 19, at 163 (emphasis omitted).

[246] The breaker of the *moratorium* and generally of the Covenant in paragraph (18) should therefore become *ipso facto* at war with all the other members of the League, great and small alike, which will sever all relations of trade and finance with the law-breaker, and prohibit all intercourse with its subjects, and also prevent as far as possible all commercial and financial intercourse between the subjects of the law-breaker and those of any other State, whether a member of the League or not. No declaration of war should be necessary, as the state of war arises automatically on the law-breaker proceeding to hostilities, and the boycott follows automatically from the obligation of the League without further resolutions or formalities on the part of the League.

J.C. Smuts, supra note 141, at 60-61. The Cecil-Miller draft provides: "Should any contracting power break or disregard its covenants under Article V, it shall thereby *ipso facto* be deemed to have committed an act of war against all the members of the League, which shall immediately subject it to a complete economic and financial boycott . . . ." 2 D. Miller, supra note 68, at 137. The Phillimore plan provides:

If, which may God avert, one of the Allied States should break the covenant contained in the preceding Article, this State will become *ipso facto* at war with all the other Allied States, and the latter agree to take and to support each other in taking jointly and severally all such measures—military, naval, financial, and economic—as will best avail for restraining the breach of covenant.

2 D. Miller, supra note 68, at 3. Article X of the Cecil-Miller draft insists on economic and military sanctions against an aggressor:

If hostilities should be begun or any hostile action taken against the Contracting Power by the Power not a party to this Covenant before a decision of the dispute by arbitrators or before investigation, report and recommendation by the Executive Council in regard to the dispute, or contrary to such decision or recommendation, the Contracting Powers engage thereupon to cease all commerce and communication with that Power and also to unite in blockading and closing the frontiers of that Power to all commerce or intercourse with any part of the world, and to employ jointly any force which may be agreed upon in accordance with Article VI to accomplish that object.

Id. at 139.

ratus for "justiciable" disputes and a political conciliation body for other disputes—all envisioned a legally constituted body whose competence would be delimited by international law, if only in the definition of "justiciable."[247] More importantly perhaps, these proposals uniformly suggested that submission of disputes to this body be compulsory—and by that they meant legally compelled by a treaty of establishment.

Standing alone, this willingness to rely upon international law makes it difficult to explain why no one simply suggested that war be outlawed. Yet if each component of the proposed system relied on law, the proposals as a whole were much more equivocal about international law. By separating the guarantee from the process of its adjustment, League planners balanced this reliance on international law against a set of political calculations—or better, imbedded it in an institution which might reconcile law with political claims. The two legs of the war system were to be related temporally: An aggressor state which violated the first obligation, to resolve peacefully, would find itself confronted with the fulfillment of the second by the rest of the world. The state which failed to fulfill its commitments under the second would find itself isolated and unprotected—returned to a world in which others would not honor the first. In this, what might alone have been two legal obligations whose fulfillment might be thought to depend upon the abstract power of norms over social life reinforce one another in an institutional relationship between aggressors and the rest of the world.[248]

The second thing to be said about League schemes and schemers is that despite this movement from legal obligation to a political and institutional scheme, no one wanted to unify and internationalize

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[247] For these plans, see supra notes 107 & 137. The Women's International Congress, for example, calls for a justiciable peace, laying down principles for its implementation: "The Congress therefore urges the Governments of the world to put an end to this bloodshed, and to begin peace negotiations. It demands that the peace which follows shall be permanent and therefore based on principles of justice, including those laid down in the resolutions adopted by this Congress . . . ." Resolutions Adopted by the International Congress of Women at the Hague, May 1, 1915, in Hague Women, supra note 102, at 150 app. at 151. Or, as Brailsford states:

> There is also agreement in dividing disputes into two categories, (1) those which
> are justiciable, and can be decided by legal process before such an arbitral tribunal
> as the Permanent Court of Arbitration at The Hague, and (2) those which involve
> broader questions of policy and are unsuitable for legal settlement.

H. Brailsford, supra note 12, at 289.

[248] This approach was also used to blend rhetoric about the political pragmatism and idealism of various plans. As George Scott says of Lord Robert Cecil: "Cecil was always an idealist, but he was a politician, too, who wanted to see the scheme for a League, presented by the Phillimore Committee, make progress quickly." G. Scott, supra note 76, at 20.

war.[249] At the Conference, the French presented a number of proposals which went in this direction, calling for an international military staff and set of plans to defend the peace settlement, but these proposals were rejected by the others, and found little foundation in wartime peace plans.[250] This absence is also difficult to interpret.

On the one hand, in the light of experience with international empires, this absence seems a sensible legal decentralization—an international Leviathan would threaten to displace the peaceful international legal order. On the other hand, opposition to French proposals at the Conference was cast more often as a defense of the international political process against the rigidity of the legal guarantees such a Leviathan might enforce. By retaining national authority over war, League planners sought to retain their capacity to participate in a peaceful international order. Plans to internationalize war, like plans to outlaw war, seem to threaten both the law and the political order. They might each be opposed on both realist and idealist grounds.

And yet, League planners were not adverse to internationalizing the political system. Indeed, the key to the system of guarantees was the *universalization* of war; the framework for peaceful settlement was to be an international institution. Standing alone, this willingness to institutionalize international politics makes it difficult to explain why no one simply suggested that war be internationalized. Yet if each

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[249] See, e.g., Oppenheim's response to ideas for an international army:

> The old question therefore arises: *Quis custodiet ipsos custodes?* which I should like here to translate freely by: Who will keep in order those who are to keep the world in order? A League of Nations which can only be kept together by a powerful International Army and Navy, is a contradiction in itself; for the independence and equality of the member States of the League would soon disappear.

L. Oppenheim, First Lecture—The Aims of the League of Nations, in League Problems, supra note 10, at 21.

> [A]re we prepared to give the central committee the power to declare war in the name of the League and to command the obedience of its members? That surely would be the effective method. Some of us believed, in the initial stages of our investigation, that it should be adopted. But maturer thought has caused us to recede a step, to realize the practical and constitutional difficulties of it and to fall back on the expedient of empowering a central committee to declare simply that the conditions have arisen which call for the use of force under the agreement, leaving it to each signatory to decide whether or not it will live up to its obligations and make war on the rebel.

2 T. Marburg, supra note 30, at 39-40. But Nicolson, writing in 1939, sees the failure of the League in part because it could not internationalize the military. He suggests that "[i]t could be laid down that no country in Europe should be allowed to possess any aeroplanes at all, whether civil or military. The only institution permitted to possess aeroplanes would be the League of Nations." H. Nicolson, supra note 97, at 157.

[250] But Shaw, writing for the Fabians, asserts the need for an international sheriff to keep the peace in the world community. See Shaw, Introduction to L.S. Woolf, supra note 156, at xv-xvi.

component of the League war system would internationalize politics, the proposals as a whole imbedded international authority in a decentralized legal system. The international guarantee would be sanctioned by sovereign force just as the procedures of the obligatory dispute settlement scheme would open an adjustment of intersovereign disputes.

The League proposals thus embraced the ambitions that war be either outlawed or internationalized. There would be both legal obligations not to use force and an international political regime. But proposals for the League drew back somewhat from the extremes of outlawry and internationalization. The obligation was to use the political process. The political process was to adjust the peace which had been guaranteed. Each of these schemes equivocated in both its reliance on international law and its commitment to an internationalized politics.

More importantly, when taken together, the proposals situated themselves elegantly between the tyranny of an international authority and the chaos of national prerogative, as well as between the authorities of law and politics. The institution which they proposed to establish, which indeed would be needed to manage the relationship between these two schemes, would be situated between two images of the relationship between law and war: law against war and war as law. Although these hybrid proposals thus avoided the dilemmas associated with the extremes of outlawry and internationalization, the juxtaposition of universal guarantees and compulsory dispute resolution posed difficulties for both the establishing text and the institution which would resolve their relations.

Although proposals for compulsory peaceful dispute resolution and automatically sanctioned guarantees accommodated a commitment to both international law and politics by avoiding the enthusiastic extremes of internationalization and outlawry, these two approaches to peace coexist uneasily. An imposed "cooling off period" while a dispute is processed to resolution envisions a particular relationship between rationality and force—that violence results from the emotional overheating of disputes which, when cooled, can be settled satisfactorily. Reason follows fighting, intervening to slow things down until legitimate grievances can be redressed by other means. Any state might find itself involved in a dispute and need resort to the international institutional apparatus. The commitment is thus universal among League members, who might picture the international institution as their servant.

Automatic and overwhelming sanctions, by contrast, imagine

war as the product of a calculation. In this picture, some states are aggressors. They tote up the costs of doing business and will refrain from using force if ensured that they would have to fight the entire world for the smallest gain. Other, nonaggressive, states must be willing to fulfill their obligations without calculation; otherwise the institution would be threatened by a series of separate peaces and a return to the pre-War alliance system. Although reason precedes a fight, it must be replaced by commitment once war breaks out. The obligation is universal among peaceloving members, who might think of the institution as a reminder of their collective commitment to a decentralized international force.[251]

The drafting challenge of rendering these two images compatible can be partially resolved by adopting a confident tone. Both dimensions of the system rely upon both the predictable fulfillment of treaty commitments and a decentralized system of calculating sovereigns. Both rely, in other words, upon the international law whose efficacy was problematic enough to exclude the outlawry and internationalization of war, and upon the decentralized political culture whose violence called forth the proposals for a new regime of peace. These reliances are assumed rather than asserted. Indeed, although central to the organizational proposals, international law was generally cordoned off in a "judiciary" responsible for the settling of "justiciable" disputes—allowable into the scheme only *after* the guarantee has been effective and the peaceful dispute resolution system has been proposed. The Paris negotiators would go one step further, excoriating the Hague system at every opportunity, confining mention of international law to the preamble, and refusing to establish a judiciary of any sort.

More importantly, however, proposals for a League rendered these two conflicting schemes compatible by setting them off against one another. Since both were already equivocal combinations of legal and political commitment, emphasizing the political dimension of dispute resolution and the legal dimension of universal guarantees made them seem mutually reinforcing. This remained true as long as the proposals avoided the extremes of both anarchy and international totalitarianism. It would not be sufficient merely to exclude internationalization and outlawry of force from the text; a mechanism must be established to continue resistance to these extremes.

Claude makes this point quite clearly, remarking that "collective security is associated with international organization as ham is with

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[251] League of Nations Covenant art. 16 provides that aggressors "may be declared to be no longer a Member of the League."

eggs."[252] Despite opposition from

> serious advocates of world government, who regard collective security as an inadequate substitute for the more fundamental transformation of the international system that they propose, and [from] analysts who are committed, usually in the name of "political realism," to the position that the nature of international politics cannot effectively be altered and who therefore consider the effort to create a collective security system a useless and perhaps even a mischievous tampering with a system that reasonable men should simply accept. . . .
>
> All concerned have tended to regard collective security as a halfway house between the terminal points of international anarchy and world government.[253]

If an institution can be established which will exclude these extremes, the guarantees will deter while disputes will be peacefully resolved. The difficulty, of course, is that these are precisely the mechanisms which are proposed to comprise that institution. Consequently, the war system proposed for the League seems to require precisely the institution it seeks to establish. There is no problem as long as a momentum forward into the new order can be generated and the terms can continue to be managed so as to exclude any final resolution of the tension between international law and politics. As a result, the institution must be more than a *position* between these laws and politics or anarchy and totalitarianism. Its establishing text must do more than record a stable compromise between them which can then be honored in practice. The establishment text must generate a momentum forward into a practice which can repeat this exclusion.

Without some sense of this active play, the relationship between the institutional forum proposed by these League advocates and their double system for avoiding war is difficult to grasp. If the provisions for universal guarantees and peaceful settlement were independently workable and able simply to be added to one another, no institution would seem necessary. There would need to be an arbitrator, or a court, or a peaceful settler of some sort, to be sure, but that could well exist independently of the treaty embodying the double commitment to rational cooling-off and passionately immediate response.

Proposals for a League emphasized different parts of a complicated institutional whole. Some felt that a more general League was necessary as a mediator, that if the institution were not politically well-balanced and respected, the first obligation would not be heeded,

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[252] I. Claude, supra note 8, at 246.

[253] Id.

and as a consequence, neither would the second. To these planners, a certain political realism, expressed in the elaborate detail of their plans for an institution (membership, voting, etc.) supplemented the underlying faith in law exhibited in their double system of collective security.[254] For others, the League would be a sort of super-legislature, ancillary to the war system, filling in the lacunae in international law so that a larger number of disputes might be "justiciable." For these planners, the double commitment itself was an expression of political realism, whose legal efficacy needed reinforcement.[255]

All of these proposals, however, shared a sense of the League as more than the sum of these functions. To wartime peace advocates, the League expressed a common esprit, their collective resolve that the world should be ordered differently, that the peace, if managed properly, would not be squandered again.[256] The League, the "spirit of Geneva," would provide a context for that management, a format for the rational articulation of just grievances. In this broader vision, the League was somewhat dissociated from the specific peace which would follow the War, as well as from the commitments and mechanisms which might then be established. As the symbol and reformer of peace, the League would undo continuing injustice without resort to war. This image of the League brought proposals for obligatory responses to war into an institutional relationship with proposals for

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[254] Smuts spends almost one-third of his pamphlet on the constitution of the League. J.C Smuts, supra note 141, at 30-46. Oppenheim devotes one of his three lectures to the organization of the League. L. Oppenheim, Second Lecture—Organisation and Legislation of the League of Nations, in League Problems, supra note 10, at 28. See the Cecil plan in 2 D. Miller, supra note 68, at 61-64. Wilson's first two articles deal with the setting up of the institution. See id. at 12.

[255] Hicks states that one of the goals of the L.E.P. was to fill in the "gaps" in international law by legislation and conference which would then make more disputes justiciable. F. Hicks, supra note 109, at 76 ("To hold conferences between the signatory powers to formulate and codify rules of international law, which shall govern the decisions of the Judicial Tribunal.").

> Wars arise mainly from divergencies of national interests and policy which may often be reconciled, adjusted, compromised or suppressed by a process of mediation or arbitration, but not by judicial decision on strictly legal grounds. These dissensions, being political in their nature, must be dealt with on grounds of international fair dealing and expediency, and appropriate bodies for the purpose must be provided.

Lowell, Object to be Attained, in The Covenanter, supra note 71, at 33.

[256] I look forward with quickened pulse to the days that lie ahead of us as a member of the League of Nations, for we shall be a member of the League of Nations! I believe in Divine Providence. If I did not, I would go crazy. If I thought the direction of the disordered affairs of this world depended upon our finite intelligence, I should not . . . believe that there is any body of men, however they concert their power or their influence, that can defeat this great enterprise which is the enterprise of Divine mercy and peace and goodwill.

Woodrow Wilson's Case for the League of Nations 206 (H. Foley ed. 1923).

adjusting the peace, and most wartime proposals described the League as a system for peaceful change.[257] The League planners thus demand more of the Covenant they propose and of the institution it would establish than they can articulate. The Covenant will have to do more than simply restate their proposals—it will need to give them life.

2. Textual Establishment of a War System

The Covenant generates momentum into the system it establishes by repeating the hesitation of League planners to adopt extreme positions. The Covenant, like most proposals for a League, makes provision for obligatory peaceful settlement of disputes, universal guarantees backed by automatic sanctions, and peaceful change, rather than for war's abolition or internationalization. Moreover, each detail of the Covenant war system is equivocal in its commitment and balanced against other provisions which promise to support and complete it. Sometimes the document refers to the break between states and members—to the moment of its own signature—for completion. The members will implement what the document can only promise. Sometimes the text refers forward to the institution it establishes for clarification and resolution of its equivocation. Most often, it refers us elsewhere in the text itself, setting one provision off against another in an elaborate referential cycle only an institutional practice could resolve.

The first half of the Covenant war system—compulsory alternative dispute resolution—is established by articles 12 through 15. In article 12, members "agree" to submit "dispute[s] likely to lead to a rupture" (one must presume a rupture of the peace) to "arbitration or to enquiry by the Council" ("judicial settlement" was added some years later) and "in no case to resort to war until three months after the award by the arbitrators or the report by the Council."[258] Rather than prohibiting war, article 12 specifies procedures which members

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257 See J.C. Smuts, supra note 141; see also 2 D. Miller, supra note 68, at 3, 7, 61 (preambles to Phillimore plan, House plan, and Cecil plan).

258 League of Nations Covenant art. 12. For commentary, see 1 F.P. Walters, supra note 10, at 52 (terming articles 12-15 the "hard core" of the Covenant "[i]nasmuch as the prevention of war was the primary purpose of the League"); F. Wilson, supra note 178, at 52-53 (detailing Japanese attempt to strengthen the waiting period by requiring that no state engage in military preparations during its run—rejected by other delegations after "vigorous discussion" as likely to weaken the League by giving an "advantage to such States as maintained their military establishment in a highly developed state" (with a note of deferral to League supervision of eventual disarmament planning)). On the League practice regarding compulsory dispute settlement, see 1 F.P. Walters, supra note 10, at 52; C.K. Webster & S. Herbert, supra note 10, at 119-41, 159-79.

agree to use prior to conducting war—providing for an intercession by reason into war, but not for war's elimination.

Article 12 is somewhat more equivocal than the proposals it implements. Rather than an obligation to submit disputes to arbitration, we find "agreement" to follow procedures in cases of disputes "recognised" as appropriate for the procedures. The burden is thrown back on the disputants to choose their forum and give shape to their commitments. Rather than article 12, we must trust the transformation from "High Contracting Parties" to "Members," their own progress from war to peace, for redemption of their politics. This reference rather brilliantly situates the institution always already forward of the transformation it was proposed to achieve. The organization, rather than the embodiment or realization of the aspiration for alternative methods of dispute resolution, is merely the forum, the arbitrator, an available ground for resolution.

Moreover, disputes are divided into two categories: those "recognised to be suitable for submission to arbitration" (or, as later amended, to "judicial settlement") and other disputes. Members agree to submit the first category for settlement and to carry out the award or decision of the arbitrators in good faith. The second category is to be submitted to the Council which shall "investigate," "endeavor to settle," and "produce a report.[259] Rather than providing mechanisms, much less principles, for the resolution of disputes, the Covenant simply categorizes disputes, reminding us of its commit-

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[259] These institutional mechanisms are detailed in League of Nations Covenant arts. 13-15. The procedures for generation and implementation of these reports are detailed at length in id. art. 15. See W. Rappard, supra note 61, at 114-18; id. at 156-62 (the Geneva Protocol); id. at 162-64 (detailing Locarno's procedural refinements, particularly in the definitions of "peaceful means" and "justiciable"). On the voluntary nature of alternative dispute resolution under the Covenant, see 1-2 D. Miller, supra note 68. Despite being the most institutionally precise portion of the Covenant, as well as the portion detailing League functions most explicitly, Rappard concludes:

> The procedure provided by the Covenant for the pacific settlement of international disputes thus represented no real challenge to the principle of national sovereignty. On this point, as on many others, the main task of the authors of that document had been to appraise the rival claims of the mutually exclusive principles of national sovereignty and of international solidarity. And on this point, as on most others, they had clearly decided in favor of the former.

W. Rappard, supra note 61, at 116. Similarly, of these provisions for the pacific settlement of disputes—the most legally explicit portion of the Covenant, the source from which the court would eventually appear, and the source of the obligation to resort to law—Rappard chronicles the movement of the drafters, particularly Wilson, away from earlier images of a legal League, perhaps as a result of "his instinctive fear of becoming involved in the entanglement of international conferences and from his personal prejudices against lawyers, legalism, and what may be called the Hague tradition of international arbitration," id. at 108, until he concludes that "[t]hus the Covenant became a political rather than a legal document," id. at 114.

ment to the division between law and politics. By encoding a set of categories, the Covenant places the burden of application on the disputants. More importantly, it presumes a well articulated institutional scheme (of arbitrators and Council) which will receive disputes which have been categorized. In this, the institution being established is situated to receive the results of a repetition by the parties of the differentiation to which they will have agreed in the Covenant.

The second half of the Covenant war system, mutual guarantees and sanctions, became articles 10, 11, and 16. Articles 10 and 11 universalize the peace settlement in the following terms:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.
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> . . . .
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> ... Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall, on the request of any member of the League, forthwith summon a meeting of the Council.[260]

As we would expect from plans for the League, these articles, far from internationalizing war, indicated situations in which war would be reasonable, appealing to the reason in war, without establishing war as the instrument of the institution. Yet the Covenant draws back from the planners' aspirations on this point. As Wilson originally formulated article 10, the members "guaranteed" one another's territorial integrity. This earlier, almost eighteenth-century formulation was abandoned by the Committee in favor of a less active, but more forward-looking locution.[261] Rather than guaranteeing in the present something established in the past, members agree to preserve in the future a set of integrities and independences which might be altered.

This reference forward gives extra significance to the second half of article 10. Should aggression occur, the Council shall advise and

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[260] League of Nations Covenant arts. 10 & 11, para. 1. For commentary, see 1-2 D. Miller, supra note 68; 1 F.P. Walters, supra note 10, at 48-49; F. Wilson, supra note 178, at 49-51.

[261] See W. Rappard, supra note 61, at 118-29; 1 F.P. Walters, supra note 10, at 48-49; C.K. Webster & S. Herbert, supra note 10, at 142-48 (detailing the watering-down of Wilson's original formulations for articles 10 and 11); J. Williams, supra note 182, at 103-35.

the League will act through the decisionmaking procedures of its plenary. The move from the promise to its execution shifts our attention from the members to the institution. An implementation clause, specifying the who and how, might strengthen the obligation, indicating that the resolve expressed in the first clause will in fact be realized; but this forward motion is purchased by an increasing equivocation.

After the Committee agreed to eliminate "guarantee" in favor of "undertake," Lord Robert Cecil proposed that the phrase "and preserve as against external aggression" be struck as well.[262] As Miller's contemporaneous notes record the exchange which followed, the discussion pitted Wilsonian idealism against British realism. In the first round, Wilson downplayed the importance of the disputed term. In the second, their positions reversed.

> Cecil suggests as to the extent of the obligation which means war if it means anything.
>
> Wilson thinks the words add little to the implied obligation of the whole Covenant.
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> . . . .
>
> Larnaude thinks it imports only a principle.
>
> Wilson thinks the obligation is central but recognises its serious character.
>
> Smuts thinks it goes further than anything else in the document.
>
> Wilson thinks . . . there must be a provision that we mean business and not discussion. This idea, not necessarily these words, is the key to the whole Covenant. . . .
>
> Cecil thinks that things are being put in which cannot be carried out literally and in all respects.[263]

Zimmern found the outcome of this disagreement, the second sentence of article 10, "surprising." He reports that Larnaude,

> a veteran jurist, allowed his taste for precision to lead him along a dangerous path. He proposed that there should be an addition to the article specifying the ways and means of its execution. This idea was accepted and put into shape by the Chairman. . . .
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> . . . .
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> Thus the meeting ended with a British victory. For the insertion of the new words made it clear that without them, as M. Larnaude had argued, the first part of the clause was "only a

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[262] See W. Rappard, supra note 61, at 123; A. Zimmern, supra note 19, at 187, 245; see also 1 D. Miller, supra note 68, at 168-78 (recounting the Fourth Meeting of the Commission, at which objections to article 10 were considered).

[263] A. Zimmern, supra note 19, at 246 (quoting D. Miller, Notes taken at Fourth Meeting of the Commission—debate on article 10).

principle."[264]

Thus, in article 10, the institutionalization of the promise and the specification of its implementation, the very establishment of the League as actor, drains the promise and "threw the whole responsibility back from the League upon the individual states, who could justly argue that, in its final form, the article was a mere expression of moral obligation and did not 'mean business'."[265] The momentum generated by this reference to institutional procedure, like that generated by reference back to the break between parties and members, thus increased the text's equivocation about the obligation itself, an equivocation the institution would need to stabilize and complete.

Article 11 situates us forward of article 10—inside the institution. It universalizes the peace, rendering war anywhere a concern not of the members, but of the community. Violence, whether or not "affecting" a member of the League, "is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise."[266] In article 10, members "undertake"; in article 11, the "League shall take . . . action." Just as article 10 referred us to the relationship between parties and members, so article 11 is ambiguous in its reference to the League. The operative verb is passive: "is hereby declared." The declaration might be the work of the members, perhaps as signatories, or the agent might be the text itself, declaring the universality of peace, describing a situation in which the League will operate, and conditioning its product on the accuracy of that description. Although equivocal about the origin of the universalization, article 11 refers us further into the institution, for it is not the Council decisionmaking procedure that will implement the guarantee, but the Secretary General who "on the request of any Member [shall] forthwith summon a meeting of the Council."[267]

Taken together, articles 10 and 11 complement each other by referring both back to the establishment break and forward to the institutional process. This balance is grounded by article 16, just as articles 10, 11, and 16 together ground (and textually surround) the legal obligations of articles 12 through 15. Commentators who imagined that the League, in a recurring anthropomorphism, would

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[264] Id. at 246. See also 1 D. Miller, supra note 68, at 282 (Miller recounts his response to Canadian fears that article 10 would drag Canada into a European war: "I pointed out that the French would feel that the whole life of the League was taken out by a change in Article 10 such as the Canadians had suggested, and that in reality the second sentence of Article 10 softened the effect of the first sentence considerably.").

[265] A. Zimmern, supra note 19, at 246-47.

[266] League of Nations Covenant art. 11, para. 1.

[267] Id.

have "teeth," placed their faith in article 16:[268]

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall, *ipso facto*, be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse . . . .
>
> . . . It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.[269]

Article 16 thus provided the "sanction," the automatic response which would buttress not just the obligations of articles 10 and 11, but more importantly the requirements of peaceful settlement of articles 12 through 15. Wilson was emphatic:

> Suppose somebody does not abide by these engagements, then what happens? An absolute isolation, a boycott! The boycott is automatic. There is no "but" or "if" about that in the Covenant. . . . No goods can be shipped in or out, no telegraphic messages can be exchanged, except through the elusive wireless perhaps; there should be no communication of any kind between the people of the other nations and the people of that nation. . . . It is the most complete boycott ever conceived in a public document.[270]

The intricate equivocation of article 16 is revealed by Wilson's

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[268] On the mutually reinforcing nature of these articles, see C.K. Webster & S. Herbert, supra note 10, at 54:

> Nevertheless, the authors of the Covenant, even though they sometimes, as was only natural, were not aware of all they were doing, had made a wonderful structure. They had interwoven the various ideas of world organization into one strand and each could strengthen the others. Above all, they had avoided too much definition and left for the future the development of their institutions.

On the League's "teeth," see W. Rappard, supra note 61, at 127; 1 F.P. Walters, supra note 10, at 377-87 (later attempts to give the League more bite); C.K. Webster & S. Herbert, supra note 10, at 142-58.

[269] League of Nations Covenant art. 16, paras. 1, 2. For commentary, see 1-2 D. Miller, supra note 68; W. Rappard, supra note 61, at 126; 1 F.P. Walters, supra note 10, at 53 (relating change in public attitude about article 16 after 1919, and the process of accommodating the text to notions of American constitutionalism by avoiding declaration of an automatic state of war in cases of aggression; rather, indicating only that an act of war would be declared to have been committed, each nation then able to "declare the existence of a state of war, or not, as they chose"); F. Wilson, supra note 178, at 67-70; see also Williams, Sanctions Under the Covenant, 1936 Brit. Y.B. Int'l L. 130 (excellent review of the drafting and practice of article 16).

[270] I. Claude, supra note 8, at 262 (quoting Royal Inst. of Int'l Affairs, International Sanctions 2 (1938)) (emphasis omitted).

commentary. Like article 16, this exuberant statement *responds* to a breakdown of other obligations. Wilson begins: "suppose somebody does not abide" by the covenanted engagements. Thereafter, however, his statement is ambivalent about the relationship between law and reality. The boycott *is*, he declares, automatic (*is* in reality, in law, or in the text?). The *Covenant* doesn't hedge (in fact or law?). No goods *can* be shipped, no messages *can* be exchanged "except through the elusive wireless." He moves subtly from the formal and normative world of legal obligations through the Covenant to the world of actual occurrence, in which the automatic has actually to happen and only the wireless can get through. This oscillation is reflected in the double meaning of his conclusion: "there *should* be no communication"—but is he predicting or prescribing? What does it mean that the boycott has been "conceived in a public document"? Has the document rendered it real, or merely "conceived" of it for the first time, existing in writing to remind us of that idea, that plan, as an instantiation of a possibility rather than a prediction? The strength of this final line trumpeting the "public document" coexists uneasily with his opening hypothetical: suppose no one abides by engagements. The response to breakdown is ambivalent, and itself relies upon the written engagement.

So also article 16. The Member who disregards covenants "shall, *ipso facto*, be deemed" to have gone to war against all members. This might be a reference forward to an institutional process—the League might do the deeming—but the "ipso facto" belies this reference and seems to suggest that the Covenant hereby deems, in prospecto. The boycott is "conceived" by the document, but it must be conducted by the members, and the members "undertake" (in the language of article 10) to sever, prohibit, and prevent what would have been peaceful intercourse. Military sanctions are subject to a different regime—the Council will "recommend" their contribution by members. Here, in the war system, the League acts, and the members can await the plenary deliberation. In the end they will receive only a recommendation as to the means by which they will conduct their war of all against one. The automatic sanction has been transformed into a Council "duty"—legalized as a procedure of implementation. In this, article 16 recapitulates precisely the articles to whose disregard it seeks to respond.

The Covenant thus constructs its war system through an elaborate series of references back and forth across the Covenant between members and League. This textual proliferation generates a sense of momentum forward from a set of principles situated in the break be-

tween parties and members, in the moment to which the text refers as history, toward a set of implementations. In this sense, the boycott could only be conceived in a public document—conceived as an equivocation, a reminder of an intention, rather than as an obligation or an institution. This reminder would need to be given life by the institution to which it made such constant reference.

This was recognized, not only by League plans, but also by the Covenant itself. The Covenant instantiates this forward motion, rendering explicit what was elsewhere an implicit reference, in article 19. "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."[271] Here we find the aspiration of the plans and planners restated—moved forward from the Covenant of establishment to the plenary. The League will provide the context for the adjustment of situations likely to lead to disputes.

In the Hurst-Miller and other draft covenants a provision on peaceful change had figured prominently.[272] Many of the League proposals had included a provision on peaceful change as an integral part of the territorial guarantees.[273] As drafted, article 19 drew back from

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[271] League of Nations Covenant art. 19. See Wright, *Article 19 of the League Covenant and the Doctrine of Rebus Sic Stantibus*, 30 Proceedings Am. Soc'y Int'l L. 55-72 (1936) (situating article 19 in general legal theory about peaceful doctrinal change, and relating some League practice under article 19). For commentary, see 1-2 D. Miller, supra note 68; F. Wilson, supra note 178, at 74-75; Peaceful Change—An International Problem 135-65 (C.A.W. Manning ed. 1937) (chapter by H. Lauterpacht).

[272] 1 D. Miller, supra note 68, at 70-71 (originally part of what later became article 10). On the connection between articles 10 and 19, see R. Cecil, supra note 179, at 77 (commentary on article 10).

> I, for one, objected to it on the ground that it seemed to crystallize for all time the actual position which then existed. Eventually it was agreed to, subject to a provision for the pacific modification of the *status quo*, which became Article 19 of the Covenant. It is right that if resort to war is forbidden, other means should be provided for correcting international injustice.

Id.; see G. Mangone, supra note 12, at 133-34; W. Rappard, supra note 61, at 118-24.

[273] Colonel House proposed the following wording:

> The Contracting Powers unite in several guarantees to each other of their territorial integrity and political independence subject, however, to such territorial modifications, if any, as may become necessary in the future by reason of changes in present racial conditions and aspirations, pursuant to the principle of self-determination, and as shall also be regarded by three-fourths of the Delegates as necessary and proper for the welfare of the peoples concerned; recognising also that all territorial changes involve equitable compensation and that the peace of the world is superior in importance and interest to questions of boundary.

A. Zimmern, supra note 19, at 227. To Zimmern, this formulation "is not a form of wording which could pass the muster of the lawyers. . . . *Who* has the right of determining *what*? Here is a feast for legal wits, foreshadowing, not the conclusion of controversy but its reawakening." Id. (emphasis in original). See also 2 D. Miller, supra note 68, at 118-19 (quoting a proposal

such substantive commitments.[274] Like other provisions of the war system, article 19 was drafted to refer back to the members or forward to the institution for interpretation.

Nicolson reports hopes at the Paris Conference that the institution might correct mistakes made in the peace:

> The leading statesmen in Paris, not excluding President Wilson, were vividly aware that the Treaty which was being drafted would require revision at a more distant epoch when the hysteria of the war had subsided. They provided for that revision. They inserted into the Covenant of the League of Nations an article which is too little quoted and too often forgotten. . . .
>
> The cynic, on reading this article [19] to-day, on reflecting how the rule of "unanimity" has in the past blocked all such daring gestures of initiative at Geneva, may smile sourly and condemn this article as merely one more of those threads of "Jesuitical exegesis" with which the Paris Conference draped the failure of their own Treaty. I am not certain that he would be correct either historically or actually . . . . From the historical point of view, from the point of view of how decisions came to be taken in Paris, the Article was all-important. By the end of February we were abandoning any hope of making a Wilsonian peace in that year of anguish 1919. It is impossible to estimate how many decisions were accepted, how often obstruction was relinquished, how frequently errors were passed over, under the aegis of that blessed Article XIX. "Well," we were apt to think, "this decision seems foolish and unjust. Yet I shall agree to it rather than delay the Treaty for a few days further. Its unwisdom will very shortly become apparent even to those who are now its advocates. When that day comes, we can resort to Article XIX." I am convinced that practically all of President Wilson's own backslidings were justified in his own conscience by the thought that "The Covenant will put that right."[275]

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which would have strengthened the peaceful change provision by keeping it out of the League's competence altogether, by providing that if a League recommendation for the modification of "any feature of the settlement guaranteed by this Covenant [has been rejected by the parties affected,] the States members of the League shall, in the case of territorial questions, cease to be under the obligation to protect the territory in question from forcible aggression by other States"). The Covenant drafters rejected this version, eliminating the difficulty by severing the article from the guarantees themselves and transforming it into a grant of competence to the League, to be exercised through the decisionmaking procedures of the institution.

[274] See 1 F.P. Walters, supra note 10, at 55 (dismissing article 19 in his otherwise extensive commentary by noting that "[t]his Article is the emasculated version of Cecil's proposal to balance the guarantee given in Article 10 by effective provision for peaceful change, where change was shown to be necessary").

[275] Peacemaking 1919, supra note 18, at 91-92. This institutional and political deferral, mirrored in the textual deferral of article 10 to article 19, has been remarked upon by others:

> We met under the shadow of the Great War. We had all been through it in one

The odd thing is that Nicolson, in his overwhelmingly cynical treatment of the Conference, retains hope about Article 19: "Even to-day this Article XIX has, or will have, its applicability. Even those who have no further hope . . . must agree that it is convenient to possess in this Article an instrument for Treaty revision when once that revision has been accepted by the interested Powers themselves."[276] The possibility of deferring forward—of seeing the institution still in the future even after it has been "conceived in a public document"—is indeed convenient.[277] The substantive promise of the League works so long as it remains that, a promise, a reference to voting and discussing and deciding which might someday take place. The utopian hope can be sustained, included now in the Covenant itself, in the play between the war system of articles 10 through 16 and article 19.

The peaceful change provision seeks to stabilize the two halves of the Covenant war system—guarantees and automatic sanction—by inserting the League into the process by which wars are generated before the tension between these two aspects of the war system can be tested. This move to a future institutional procedure, a potentiality, eased discomfort about the equivocation of both the guaranteed settlement and the automaticity of sanctions. But in another way, article 19 simply restates the equivocation, now in a larger institutional or perhaps textual economy. Prior dimensions of the Covenant war system had been transformed into institutional processes and references back to members. To suggest that these doubts might be resolved by reference to an institutional procedure for settlement revision simply poses the question in a new form.

F. *A Text About War and Peace*

Although the war and peace provisions of the Covenant outnumber those laying out the League's institutional form, these provisions

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way or another. We knew the waste and destruction it had caused, the suffering of the men and the anguish of the women. While we were sitting there, something like chaos was reigning in Austria, in Hungary, in Germany and in Poland. Revolutions had taken place in many countries and were threatened in others. The chances that the Peace Treaties would be far-seeing and merciful were remote. To create some barrier against future war rightly seemed the most important work for the Conference and that work the President and some others of us believed could only be accomplished by the creation of an effective League of Nations.

R. Cecil, supra note 179, at 73; see also 1 F.P. Walters, supra note 10, at 31 ("[A]s the work of peace-making continued, one deadlock after another was resolved by reference to the League.").

[276] Peacemaking 1919, supra note 18, at 92.

[277] See P. de Man, Allegories of Reading—Figural Language in Rousseau, Nietzsche, Rilke, and Proust 57 (1979).

express a certain doubt about the appropriateness of their substantive commitment. This doubt is expressed in a constant reference away from the Covenant, first to the Peace Treaties or perhaps to the members, and then forward to the League, which will reintegrate the Covenant with its substantive commitments in its practice.

By expressing its substantive commitment in this equivocal way—each commitment undertaken elsewhere and fulfilled by an appropriate institutional competence—the Covenant completes the Peace Treaty. The text sustains faith that the politics of the moment will be both respected and transcended or replaced. This double movement establishes the text as a moment of solidity between a fluid political negotiation and an open institutional practice. But it does so by exploiting its own textual fluidity between secure political moments to which it can refer. Indeed, it is precisely by referring backwards and forwards, constantly looking away from itself and directing us back to its signatories or forward to the institution which it conceives, that the Covenant sustains itself as a moment of formality, a high-water mark of legalism—the constitutive moment for a new system of war and peace.

As a result, it seems that the paradoxical relationship which the Covenant bears to the Peace Treaties and the concomitant aspiration for a substance-free institutional regime can be handled in a static text of establishment by a series of careful drafting maneuvers—a constant coupling of each intention (referring to the members) with a prescribed implementation (referring to the institution). This constant oscillation between form and substance and the careful association of appropriate forms with appropriate substances might be thought of as the art of drafting, the peculiar nature of the work of establishment which distinguishes it from the negotiation of a peace settlement.

The result is a Covenant which reminds us of our commitment to a new order and situates us in that order by constantly referring us elsewhere. The image of the written document as instrument of a social order—as itself a source of power which can take us beyond the speech which gave rise to it and then enable and transcend the speech to which it gives rise—is sustained by its careful balance in every particular of form and substance, law and politics, indeed, of peace and war.

But the document is not simply balanced, simply in contradiction, simply the equipoise of principles and procedures. It has direction. Indeed, without a sense of movement—from the peace to the League, from the old to the new, from the Conference to the League—we would not think of the document as constitutive at all.

This movement in stasis is difficult to understand and even more difficult to produce. If the Covenant opened the way for a modern system of international organization, it did so perhaps by modeling the text as motion, collecting within itself the entire system of war and peace which preceded it, and moving us forward into an institution.

The text generates this motion in three ways. First, we have seen the relationship between the preamble, with its references to intention, and the text itself, now a product. Through this device the Covenant encapsulates within itself its own creation—recapitulates the Conference which spawned it. Second, we have seen the constant reference back to the signatories, transformed forward into members, back to members, transformed forward into institutional organs. This reference back to members and forward to organs reaches a fever pitch in the war system and situates the text between two eras. The relationship between the war system and the peace system is similar: The war system stands between the system of peace which it guarantees and the provision for its peaceful change through institutional action provided for in article 19. Similarly, the motion from a peace settlement to a peace regime which can execute the mandates and humanitarian endeavors.

Finally, and most important, the text creates this sense of motion by situating itself between stasis and motion. We have seen that the text can be seen either as a moment of legal fluidity between the stasis of two political realities, or as a frozen moment of intention between fluid processes of political negotiation and institutional life. The Covenant organizes this double self-image so as to appear situated between stasis and motion. The peace which it ratifies, the signatories of whose intention it reminds us, are frozen. By contrast, the peace to which it directs our attention is an institutional process. The war which it replaces becomes a momentary outburst of passion. The war to which it directs our attention is a fluid set of "disputes," some of which "lead to" rupture.

This textual situation requires artful equivocation about the Covenant's own status. This is achieved by the constant deferral of substantive decisionmaking to the procedures of the institution, thereby referring to the working-out of the Covenant's own provisions regarding the institutional framework of the League. In this sense, the text establishes the League by presuming it—the motion forward only works if there is, out there, the institutional framework to receive the reference, to implement the provisions about war and peace. In this way, the text works by asserting the institution as a continuing process. The relationship between war and peace which the text sets up

requires its implementation. Both war and peace are now proceduralized and stand in tension with one another—a tension which only the institution can resolve.· In short, the text works as a covenant of establishment by a daring assertiveness. It is an assertion which the institutional process established by the Covenant will repeat.

IV. THE LEAGUE PLENARY

The Covenant establishes the League by an assertive reference forward to an ongoing plenary. If the League will adjust the peace, arbitrate the disputes, supervise the mandates, and execute the systems of war and peace established by the Covenant, the institutional embodiment of these references is a legislative plenary composed of the Council and Assembly.[278] The plenary will accept the references of the Covenant, breaking forward from the static moment of establishment and replacing the unredeemed politics of the War and the Paris Conference. More importantly, however, the institutional plenary recapitulates the moment of its establishment. Indeed, the secret of a successful plenary lies precisely in this repetition. The plenary works as an organization because it transforms the singular momentum and exclusion of the Covenant into a continuing practice of political management. This is visible both in the structure of the plenary as a whole and in changing literature about decisionmaking within the plenary.[279]

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[278] League of Nations Covenant arts. 2-5. For commentary, see 1-2 D. Miller, supra note 68. For general discussions of the Assembly and Council, see J. Bassett, The League of Nations—A Chapter in World Politics (1928); 1-2 F.P. Walters, supra note 10; A. Zimmern, supra note 19. On the notions of a "plenary" session, see 1 H. Schermers, supra note 1, at 158-67; id at 222-41 (contrasting "parliamentary" organs). Often, commentators differentiate a form of plenary which is constituted by members (termed variously "parliament" or "congress" or "assembly") and in which voting seems naturally at home, from a form which is constituted by states (often termed "conference") and in which voting seems out of place. See W. Koo, Voting Procedures in International Political Organizations 14 n.24 (1947); C. Riches, Majority Rule in International Organization (1940). But see F. Dunn, The Practice and Procedure of International Conferences (1929) (treating the League experience as a special form of international conference); N. Hill, The Public International Conference 110, 110-18 (1929) (treating the League of Nations Assembly "as an international conference," in a useful although unannotated bibliography of Conference literature).

[279] Although a fully articulated international institution shares this recapitulative work among plenary, administration, and judiciary, the original Covenant contained no reference to a judiciary except the promise that the "Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice." League of Nations Covenant art. 14. For an account of the development of the PCIJ and of the amendment to the Covenant, see A. Fachiri, supra note 52; M. Hudson, supra note 52. This is in sharp contrast to the U.N. Charter, which included a separate "Statute" for the International Court of Justice and referred to it in numerous places. On the relationship between the I.C.J. and the U.N. Charter, see Commentary, supra note 215, at 544-71. The Law of the Sea Treaty gives the judiciary even more prominent play. U.N. Convention on the Law

A.   *The Plenary Structure: Membership, Voting, and Organs*

The Covenant sets out the membership, decisionmaking procedures, and respective competences of its legislative organs, establishing the plenary in three phases: membership, voting, and organs.[280] This pattern has been followed in documents of international institutional constitution since 1918. No document seems complete, seems fully to have established a plenary, if it does not indicate who will participate, how they will decide, and how their collective being will be known.[281] This pattern expresses the same temporal logic as the movement into the institution which the document accomplishes: signatories are transformed into members, the interactions of members are structured, and the organ which they constitute is named.

In an odd way, this pattern also recapitulates the moment of the plenary's establishment, reminding us of the relationship between the Paris Conference, the Covenant, and the League itself. Membership,

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of the Sea, Oct. 7, 1982, arts. 279-299 & Annex VI; see Adede, The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention, 11 Ocean Dev. & Int'l L. 125 (1982); Adede, Settlement of Disputes Arising Under the Law of the Sea Convention, 69 Am. J. Int'l L. 798 (1975); Sohn, Settlement of Disputes Arising Out of the Law of the Sea Convention, 12 San Diego L. Rev. 495-517 (1975). Moreover, the Secretariat was to follow the League into being; League of Nations Covenant art. 6 provided that the Secretariat "shall be established at the Seat of the League." These elaborations and extensions will be more comprehensible once the particular work of the plenary has been explored. On the League Secretariat, see E. Ranshofen-Wertheimer, The International Secretariat—A Great Experiment in International Administration (1945). As people lost confidence in the ability of the plenary to carry forward the program of the Covenant, the "technical" functions carried out by the Secretariat came to be seen as important aspects of the League's work. By the time the United Nations was established, the vision of an administrative international institution was well developed. See U.N. Charter arts. 97-101; S. Bailey, The Secretariat of the United Nations (rev. ed. 1964). The history of the League has been rewritten to emphasize administrative achievements, culminating in the famous "Bruce Report" on League activities in the economic and social fields. The Development of International Cooperation in Economic and Social Affairs (Bruce Report), League of Nations Doc. A.23.1939 (1939), discussed in Commentary, supra note 215, at 10; see D.W. Bowett, supra note 1, at 52; V. Ghebali, supra note 215. This development continued until, by the time the Law of the Sea Treaty was drafted, the administration was well integrated in a more present form. See U.N. Convention on the Law of the Sea, Oct. 7, 1982, arts. 156-183.

280 League of Nations Covenant art. 1 (membership); id. arts. 2-6 (organs—voting being treated as a procedural subprovision). For a study of voting which is attentive to the relationships among membership, organs, and voting mechanisms, see W. Koo, infra note 298.

281 See Commentary, supra note 215. Basic works about international institutions are often organized around organs, treating membership, voting, and competence as aspects defining an organ's particularity. See H.G. Nicholas, The United Nations as a Political Institution (4th ed. 1971); The United Nations—Past, Present, and Future (J. Barros ed. 1972). The membership-voting-organs pattern is more typical of teaching materials which organize "issues" around "constitutional" questions which are raised. See, e.g., I. Claude, supra note 8; F. Kirgis, supra note 1 (moving from "Personality" to "Membership and Participation" and "Rule Making and Dispute Settlement" issues which are treated organization by organization, to areas such as "Human Rights," which are treated institution by institution).

like the Conference, marks a break between life within and without the institution. The organ, like the League, is the referent of textual establishment—the name given the institutional process. Voting, like the Covenant, inserts a text between these two moments and is both reminiscent of the particularity of members and generative of the constituted organ.

Upon reflection, however, this structure is hard to understand. The first and last terms seem strangely redundant. On the one hand, the naming of "organs" seems simply to recapitulate the terms of membership and the conditions of voting. On the other, establishing the "organ" foreshadows the description of competences and powers which will be elaborated in the substantive portions of the Covenant detailing the systems for war and peace. Likewise, the naming of "members" seems either to echo the signatories of the preamble or to foreshadow the decisionmaking procedures of the organs charged with admission, expulsion, and withdrawal. It is hard to understand why a covenant could not get by with a preamble listing signatories, a set of substantive empowerments referring to the plenary for implementation, and a set of decisionmaking procedures. Voting, as plenary decisionmaking procedure, would be the only important component of the institutional portion of the Covenant. Claude captures this sentiment:

> Constitutional issues of the first importance for international organization are posed by the problem of voting. . . . Given the probability of disagreement within international agencies, the determination of the manner in which the international mind shall be made up and words put in the international mouth is clearly a matter of utmost significance.[282]

Voting, a textual climax, both instantiates the intentions of the constituents and generates institutional speech.

In another way, however, voting seems the most redundant of all. If membership is a meaningful status, able to distinguish states and members, the textual explication of membership status (who is how much of a member, the categories of membership, etc.) should determine the relationship of members to the international mouth and mind. Likewise, if the substantive provisions empowering organs are meaningful, they should provide for action by members, fashioning the activities of members to produce results in areas of established competence. In this vision, voting seems a minor procedural detail, easily attached to categories of membership or appended to a description of an organ's composition and competence.

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[282] I. Claude, supra note 8, at 118.

Those writing about the successes and failures of international institutions consider each of these structural components. Focusing on membership when discussing the League is appealing because the League's failure can be grounded in its history and political context without abandoning the notion that the problem can be ameliorated, if never fully resolved, by constitutional reform. Focusing on organs and competences is appealing because it blames the League for its own failure without abandoning the notion that a similar institution might succeed in different circumstances. Compared to these two focal points, voting seems to place the responsibility on the institution itself; on its constitutional design and on the political practices of states within it.

Nevertheless, those writing about institutional design often focus on the voting structure—the allocation of votes among members or the voting configurations required for action—to characterize and evaluate the success of international institutions. On the one hand, the voting mechanism seems completely internal to the organization, a mere procedure for translating membership into organ activity. Such a sense focuses reformist energy on a technical procedure which might easily be changed, even if it seems too removed from context to provide a fully convincing account of the institution's practices. On the other hand, the voting mechanism draws a connection between the original members and the activities of their institution—connecting the preinstitutional context to the League's actions. As a result of this double position within and without the institution, voting literature is particularly revealing of both the structure of the plenary and its relationship to the establishment of the institution.

To appreciate the importance of voting literature, it is important to grasp the central role played by the vote in the plenary. Voting exists uneasily between membership, itself the break between the institution and its creators, and organs, the wall between the members and their acts. Voting reaches back to members, defining them, and forward to organs, reminding them of their past. The problem of voting is to translate membership into action, orchestrating a smooth movement from constitution as members (frozen in the intentions of the Covenant) to institutional action within the competence of the organ in question. Voting thus both marks the inside of the plenary and asserts a relationship with both a preinstitutional constituency and an implementing organization, thereby linking two constituted beings— states as members with institutions as actors. As a result, voting leads a double life, looking to the institution like a static power distribution and to the members like a fluid process of decisionmaking. This

double movement recapitulates the Covenant's reference back to a political arrangement and forward to an institutional behavior.

This central relationship demands much of voting. It must accommodate both the authority of sovereign members and the cooperative activity of the institution. Like the Covenant, it cannot veer too close to the extremes of either sovereign anarchy or international totalitarianism without jeopardizing the institutional balance between members and organs. But the institutional problem of accommodating sovereign autonomy and cooperation is not simply a static problem of balance. A properly designed plenary must also give a sense of movement—from members to organs, from stasis to action—in some fundamental way a movement into organization. Voting must therefore express both sovereign autonomy and sovereign cooperation while providing a sense of movement from one to the other.

To an extent, this sense of balance between sovereign authority and cooperation can be achieved by relying upon the literatures of membership and organs. Membership is responsible for transforming autonomous sovereigns into reponsible citizens. The organs of an international institution act in accordance with limited substantive powers as the instrumental expression of their constituents. Voting is thus always already insulated both from the politics of autonomy (by membership) and from institutional cooperation (by organs). But voting literature is also careful to exclude mechanisms which seem too associated with either the promotion or suppression of sovereign autonomy. The sense of movement is achieved as it was achieved in the Covenant—by equivocating about the vote's independent substantive status, treating it as a simple procedural translation of membership into action.

Voting reminds us of the Covenant in another way. The Covenant's substantive provisions sought to render a break between war and peace as well as between two systems of war and two systems of peace. This double relationship to a distribution of state power required that the Covenant seem both closed, reinforcing of a particular peace, closing out a particular war, and open, adjusting the peace and managing ongoing intersovereign conflict. Voting faces a similar dilemma, it must both ratify and express a particular distribution of power merely promised states by membership and be the mechanism by which the community makes up its collective mind and expresses itself vis-a-vis specific state powers—a relationship posited by the instrumental posture of organs. If the covenanted institution must be both open and closed, voting, the central hinge of its plenary existence, must be deferential to and expressive of state power, and yet also

control, channel, and ultimately reapportion that power as the international "mind" and "mouth."

Voting is important, then, not simply because it provides a context to discuss political history and organizational possibility in a procedural rhetoric (although it often seems useful to discuss the cold war as a veto problem and the new international economic order as the tyranny of the majority). Membership and organs might as easily serve this function. The importance of voting lies in its equivocation, both between sovereign autonomy and institutional cooperation and between the stability of a political decision and the fluidity of its implementation. In this way voting repeats the establishment motion of the Covenant. This is apparent both in the historical development of argument about voting in international institutions and in the changing level of enthusiasm among scholars in the field about voting.

B. *Plenary Decisionmaking: Voting*

Over the last sixty-five years, scholars considering voting in international institutions have advocated plenary decisionmaking by unanimity, majority vote, and consensus. They have expressed their enthusiasm for and disillusionment with each scheme in remarkably similar terms. Each, in turn, has been credited with an ability simultaneously to defer to sovereign authority and express sovereign cooperation. As each decisionmaking scheme fell out of favor, it was criticized for permitting or encouraging either the anarchy of organizational collapse or the tyranny of institutional capture.

During the Hague period, and into the first days of the League, scholars defended unanimity voting as a move from sovereign decentralization, in which international law could grow only through the relatively cumbersome mechanism of treaty drafting or the quite lengthy process of customary accretion, to institutionalization. At the turn of the century, unanimity voting symbolized the achievement of an institutional life among states, for it permitted autonomous sovereigns to sit in standing plenaries without forswearing their sovereign prerogative.[283]

Unanimity was defended on several grounds. First, it respected sovereignty, giving sovereign authority an institutional form and en-

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[283] *See* Baker, The Doctrine of Legal Equality of States, 1923-1924 Brit. Y.B. Int'l L. 1; Hicks, *The Equality of States and the Hague Conferences*, 2 Am. J. Int'l L. 530 (1908); Stone, *The Rule of Unanimity: The Practice of the Council and Assembly of the League of Nations*, 1933 Brit. Y.B. Int'l L. 18; *see, e.g.,* F. Dunn, *supra* note 278, at 20-21 (concluding that after 1918, customary law no longer required unanimity voting at international conferences, although it continued to be the preferred voting arrangement).

suring a connection beween the institution and its political context. Second, because unanimity was both theoretically and practically grounded in sovereign autonomy, it could ensure the effectiveness of the plenary's decisions by guaranteeing that such action as the institution took would be backed by the membership.[284] Third, unanimity seemed likely to foster institutional community by forcing the collectivity to involve potential dissenters in all collective action, ensuring communal diversity. Unanimity seemed both theoretically and practically grounded in sovereign cooperation.[285]

By the mid-1930's, unanimity no longer seemed so attractive.[286]

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[284] See, e.g., Hicks, supra note 283, at 530 ("In the eyes of weaker states equal voting power for all sovereign states and equal representation on all international tribunals could not be withheld without discrediting the principle of the legal equality of states."). This position was stated, though with qualifications, as late as 1946, by F. Castberg & E. Dons, The Voting Procedure in the League of Nations and the United Nations 1 (1949) ("The rule of unanimity—the principle that only unanimous resolutions are binding—is thus an immediate consequence of the principle of the sovereignty of the state.").

[285] See, e.g., 1929 P.C.I.J. (ser. B) No. 12, at 29, quoted in Stone, supra note 283, at 18, speaking of the League Council:

> In a body constituted in this way, whose mission is to deal with any matter "within the sphere of action of the League or affecting the peace of the world", observance of the rule of unanimity is naturally and even necessarily indicated. Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have; the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority. Moreover, it is hardly conceivable that resolutions on questions affecting the peace of the world could be adopted against the will of those amongst the members of the Council, who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom.

[286] See, e.g., F. Castberg & E. Dons, supra note 284, at 6 (describing efforts in the League in the late 1930's to abandon or formally modify the unanimity principle despite the existence of numerous exceptions); G. Éles, Le Principe de l'Unanimité dans la Société des Nations et les Exceptions à ce Principe—1935 (1935) (good chapter on League practice and useful treatments of the pre-League experience and the Paris Conference); W. Koo, supra note 278, at 8 (beginning his analysis of voting by reference to the principle of sovereign equality, but concluding that the equation of equality and unanimity "frequently serve[s] to becloud the functional role of voting"); id. at 8-25 (distinguishing international conferences, at which unanimity may be required by the disorganized nature of such groups, from international institutions, which represent a degree of social organization incompatible with unanimity).

> They exercise their independence in choosing to attend, or not to attend, such a conference, and so long as no other state or group of states can compel them to do so in the first place, their legal independence and equality are amply preserved. As a matter of fact, the inference that sovereign states cannot submit themselves to majority rule without compromising their independence seems to carry within itself a logical contradiction of the premise of complete freedom of action from which it is deduced.

F. Dunn, supra note 278, at 126-27; see Stone, supra note 283, at 18-19 (evaluating League practice with unanimity as a "less advanced" state of institutionalization than that represented by the PCIJ which was able to act by majority vote, and remarking on the paradox that Coun-

Scholars began to suggest that the League either need not, as a matter of law, or did not, as a matter of practice, continue to abide by a rigid unanimity rule.[287] Some texts credited the Covenant drafters with the flexibility and foresight to have left some loopholes for majoritarianism.[288] Others rebuked the drafters for the naive notion that unanim-

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cil decisions were governed by both the rule that one could not be judge in one's own case and the principle of unanimity).

[287] See G. Éles, supra note 286; C. Riches, supra note 278. Jenks saw the move away from unanimity as a process of institutional maturation. Jenks, Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisations, in Cambridge Essays in International Law—Essays in Honor of Lord McNair 48, 49 (1965); see Heinberg, supra note 73; Hill, Unanimous Consent in International Organization, 22 Am. J. Int'l L. 319 (1928); Monaco, Les Systèmes de Vote dans les Organisations Internationales, in Mélanges en l'Honneur de Gilbert Gidel 469, 471 (n.d.) (explaining that unanimity has only been workable for the League because exceptions had been developed); Williams, The League of Nations and Unanimity, 19 Am. J. Int'l L. 475 (1925); see also J. Ray, supra note 209, at 221-36 (commenting on article 5). This treatment is extended and documented in J. Ray, La Politique et la Jurisprudence de la Société des Nations (1930-1934).

[288] See H. Alexander, The Revival of Europe—Can the League of Nations Help? 24-27 (1924) (arguing that "various exceptions" to the rule of unanimity allow the League to act effectively in numerous situations without infringing on the sovereign authority of states in a minority).

> [U]nanimity is the necessary rule for international matters in this sense that no independent state can be compelled without its own consent to accept obligations; the existing society of states has no legislature. States members of the League of Nations have, however, created in the League a *persona* of international law analogous to a body corporate in private law, but with a strictly limited sphere of action or "decision." In so doing they have departed from the theory of the absolute equality of states which is closely allied to the theory of unanimity. For the internal management of the collectivity so created, unanimity is not requisite, and as a result of the express or implied obligation of the Covenant of the League, or of the accepted practice of the conduct of its affairs, unanimity is not needed for the expression of opinions, wishes, and recommendations (*voeux*) of the collectivity, nor for its action in a semi-judicial capacity; equally unanimity is not needed for certain acts relating to the League, such as the admission or expulsion of members, the amendment of the Covenant, and the increase of membership of the Council. Most important of all, the Covenant of the League can be amended without unanimity. In some of these cases a bare majority can decide; in others a certain fractional majority or unanimity minus one is required. Further there is at work the very human desire not to be isolated which prevents a real insistence on the principle of unanimity by small minorities on ordinary occasions.
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> So the League, following in matters international developments which have already taken place in national history, has in its own limited sphere broken with and passed beyond the principle of unanimity.

Williams, supra note 287, at 488. See J. Brierly, supra note 3, at 80-81 (The "rigidity" of the unanimity rule may be alleviated by "the immense force of international public opinion" and by the use of majority methods in committees.); H. Laski, A Grammar of Politics 627-28, 631-33 (4th ed. 1981) (Although noting that "[i]t is elementary in the history of States that a demand for unanimous consent is fatal to effective government," he suggests that there are numerous devices available to the League to overcome the handicaps of the unanimity rule.); E. Mower, International Government 376-77 (1931) (The Covenant made significant inroads upon the traditional rule of unanimity in international bodies without depriving states of essential features of their sovereignty.); J. Stone, International Guarantees of Minority Rights 184-

ity might be effective in "the real world" and credited politicians with
generating a more realistic, if deviationist, practice.[289] Those who

93 (1932) (In addition to provisions in the Covenant allowing for majority decisions in various
situations, the moral pressure felt by dissenters and the effects of public opinion brought about
by the publicity given to League debates serve to limit the significance of the unanimity rule.);
J. Williams, supra note 182, at 58-59 (The unanimity "rule does not prevent the full play of the
moral force which must result from open discussion and from an informal conclusion—a 'gen-
eral sense of the meeting.' "); Brierly, The Legislative Function in International Relations, in
Problems of Peace—Lectures Delivered at the Geneva Institute of International Relations 205,
209-12, 218-25 (5th ser. 1931) [hereinafter Problems of Peace] (In actual operation, the una-
nimity rule may not be significantly different from the rule of majority vote in a constitutional
government.); Stone, supra note 283, at 42 (arguing that if the League Covenant is "wisely
interpreted," the unanimity rule is not unduly prejudicial to the activities of the Council and
the Assembly); cf. J. Brierly, The Covenant and the Charter, in The Basis of Obligation in
International Law and Other Papers 314, 319-20 (H. Lauterpacht ed. 1958) (argument that the
unanimity rule did not paralyze the League, in part because there were "important exceptions
to [the rule's] operation").

[289] E.g., Hill, supra note 287, at 326-28 (The League of Nations is "illustrative of the some-
what opportunist attitude of international organizations to use whatever basis of consent may
be best suited to the occasion without too much quibbling over theoretical questions."); see
T.P. Conwell-Evans, The League Council in Action 54-58 (1929) (The League's handling of
the Greco-Bulgarian dispute of 1925 demonstrated that the unanimity rule would not prevent
the League from acting effectively.); F.N. Keen, A Better League of Nations 31, 30-33, 66-71
(1934) (arguing that the use of majority methods in committees increases the likelihood of
unanimous decisions later; however, the "absurdity of requiring unanimity as a general condi-
tion of the taking of action by the Council" should be remedied, preferably by adopting a
scheme of weighted majority voting); F. Morley, The Society of Nations 591, 590-94 (1932)
(The potentially debilitating effects of the unanimity rule were "steadily whittled away" by not
interpreting the relevant provisions of the League Covenant in a "rigid" way.); C. Riches,
supra note 278 (concise summary of the ways in which the Council and the Assembly of the
League deviated from the unanimity rule, emphasizing the method of liberal interpretation of
the League Covenant); C. Riches, supra note 86 (detailed study of the "Modifications of Una-
nimity Achieved Through Practice" based on a thorough examination of official records of the
League and its organs, and other primary sources); W. Schücking & H. Wehberg, Die Satzung
des Völkerbundes 507-22 (1931) (reviewing the ways in which the Council and the Assembly
of the League circumvented or departed from the unanimity rule); F. Schuman, International
Politics 206 (2d ed. 1937) (Although "the Council and the Assembly [of the League were] both
in theory, expected to reach decisions only by unanimity, many practical departures from this
rule have taken place." The methods used to circumvent the rule included creatively distin-
guishing between questions of "procedure" which could be decided by majority vote, and
substantive "decisions" which required unanimity, classifying a resolution as a "recommenda-
tion" (majority vote) rather than as a "decision" (unanimity), and invoking the general rule
that no one should be the judge in his own case, so that in the consideration of international
disputes the litigating parties would not be permitted to vote.); cf. B. Broms, The Doctrine of
Equality of States as Applied in International Organizations 108-09, 136-37 (1959) (After the
League decided that abstentions by delegates from formal voting did not prevent an otherwise
unanimous decision, the limitations of the unanimity rule could on occasion be overcome by
strongly encouraging small dissenting states to abstain from voting.); P. Jessup, The Interna-
tional Problem of Governing Mankind 21-26 (1947) (pointing out problems with the unanim-
ity rule, but arguing that practical deviations from it provided examples that were useful in
establishing voting and decisionmaking procedures in the United Nations); W. Koo, supra
note 278, at 96-114 (reviewing the limitations of the unanimity rule and the ways in which
these limitations were overcome or sidestepped in practice); H. Lauterpacht, The Development

worried that the League could not cope with the disputes that broke out often blamed the unanimity rule and suggested that even practical departures from it could not overcome the obstacle unanimity posed to community action.[290] Late in the 1930's, texts that were even more

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of International Law by the Permanent Court of International Justice 46-50 (1934) (It would be appropriate for the Council of the League to invoke the principle that no "state is judge in its own cause" in order to override the unanimity rule when considering action under article 11 of the Covenant because ambiguous language in a covenant should be interpreted so as to fulfill the covenant's larger purpose.); Hostie, Revision of the Covenant of the League: I, in World Organization—A Balance Sheet of the First Great Experiment 345, 384 (1942) [hereinafter A Balance Sheet] (arguing that "in disputes, unanimity has not been a stumbling-block in practice," and that the rule should be retained with minor modifications).

[290] See H.N. Brailsford, Towards a New League 56-59, 63 (1936) (outline of the League's failures to act effectively in international politics, along with a plea that the League be reformulated along the lines of a federal government that can enact its measures by majority vote); L. Davies, supra note 53, at 137 (insisting that the Council of the League had been "hampered by the rule of unanimity which prevents it from reaching rapid decisions and from becoming an effective executive organ of the international authority"); id. at 146 (The Covenant should be extensively amended, "including the abolition of the rule of unanimity, which has never yet worked in any constitution."); O. Newfang, The United States of the World—A Comparison Between the League of Nations and the United States of America 46, 45-48 (1930) (largely as a result of the rule of unanimity, the League was essentially paralyzed and "contributed practically nothing to the law of nations"); Kayser, French Policy and the Reconstruction of the League, in Problems of Peace, supra note 288, at 161, 167-69 (12th ser. 1938) (argument that the unanimity rule should be abolished and that the League should be reformulated on a regional basis); J. Greene, The League: Its Weakness and a Possible Remedy—Address Delivered at the Fletcher School of Law and Diplomacy (Jan. 9, 1935), in 5 League of Nations Pamphlets 10-11, 14-15 (1929-1939) (calling for the reorganization of the League along regional lines with greater possibilities for majority decisionmaking). Cf. F. Dunn, supra note 278, at 123-34 (general argument that the unanimity rule is a "serious obstacle" to the work of international conferences); W. Elliott, The Pragmatic Revolt in Politics—Syndicalism, Fascism, and the Constitutional State 482-83 (1928) (The limitations of the unanimity rule meant that the primary value of the League was in being a "settled method of conference on international problems" and in doing "cooperative welfare work."); Heinberg, supra note 73, at 65-67 (example of the failure of the unanimity rule in Poland, resulting in a stagnation that was finally overcome by "violent revolution"); Rolin, The Peaceful Settlement of All Disputes, in Problems of Peace, supra note 288, at 22, 27 (4th ser. 1930) (The unanimity rule is a grave defect of the League Covenant; nevertheless, the Council of the League "rendered services the importance of which it is difficult to exaggerate."). Further, cf. S.S. Jones, The Scandinavian States and the League of Nations 103-05 (1939) (Although the Scandinavian states generally thought the unanimity rule was a serious stumbling block to a politically effective League, they favored gradual modifications of the rule of unanimity rather than its complete replacement.); N. Politis, The New Aspects of International Law 10 (Carnegie Endowment for Int'l Peace No. 49, 1928), quoted in I. Claude, supra note 8, at 120 ("[T]o lay down the principle that in an international organization every important decision must be adopted unanimously . . . is to admit that among nations no real organization is possible, for the rule of unanimity may lead to paralysis and anarchy."); H. Rowan-Robinson, Sanctions Begone!—A Plea and a Plan for the Reform of the League 19 (1936) ("Without the unanimity rule the League in its present form would expire. Exercising the unanimity rule it loses the power of remedying grievances or of inflicting just punishment. The unanimity rule is, in fact, the unforgivable sin of the Covenant."); Eagleton, Reform of the Covenant of the League of Nations, 31 Am. Pol. Sci. Rev. 455, 463-69 (1937) (discussing proposals to reform the League Covenant, including proposals to replace the unanimity rule with some form of majority voting when considering

pessimistic appeared, suggesting that although unanimity may have been essential to international organization, it presumed the very community of interests it was meant to bring about and was inherently unworkable in a world of good guys and bad guys. The only hope was to abandon organization and return to war.[291]

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whether to submit a dispute to the PCIJ or to take collective action under article 11 or 16); Salter, Practical Suggestions for Reform, in The Future of the League of Nations 64, 66-67, 70-71 (1936) (calling for gradual replacement of the unanimity rule with majority voting in "special conditions").

[291] The fact that the League was based on the absolute sovereignty of the States made it necessary that its decisions should be unanimous except in a few specified cases. This rule of unanimity has been one of the greatest hindrances to the efficient working of the League—indeed it is hardly too much to say that it has often paralysed it. Its result has been that the decisions of the League have usually been unsatisfactory compromises. It is absurd that one State, however small, should be able to prevent the League from arriving at a decision. It is also undemocratic. It would be about as reasonable to give the same representation in a national parliament to the smallest village as to a city with a million inhabitants. Yet, if the principle of national sovereignty is accepted with its necessary corollary that no State must ever be compelled to do anything against its will, the rule of unanimity is inevitable.

R. Dell, The Geneva Racket—1920-1939, at 29 (1941).

[T]here are two conclusions arising out of . . . [the dominance of the Great Powers in the League] which are not so universally recognized.

One is that nothing is to be gained by trying to amend the unanimity rule. It is tempting to argue that a body of nearly sixty members cannot be expected to be unanimous and that, therefore, some method for arriving at a decision without unanimity ought to be introduced. But, in point of fact, the unanimity rule has hardly ever, if at all, proved a real obstacle at Geneva. The Smaller States are always ready to give way in the last resort. They are never desirous of pushing things to extremes and impairing the life of the League, where they fare better than they would under any practicable alternative system. As for the Great Powers, when there is a serious disagreement between them, it is idle to imagine that it can be overcome by a majority vote. The result would most probably be to drive the Power in the minority out of the League. It is not by mechanical devices of this sort that wide differences of opinion and divergences of interest can be overcome.

The second practical conclusion is that, when the Great Powers are in disagreement on a particular subject, it is of no use to expect it to be solved by "referring it to the League". Some such problems are best discussed at Geneva: others are best discussed between the capitals concerned by the ordinary means of diplomacy; both methods have their advantages, and there is no peculiar merit in either.

Zimmern, The Great Powers in the League of Nations, in Problems of Peace, supra note 288, at 55, 55-56 (9th ser. 1935). For general accounts of the decay or fundamental ineffectiveness of the League that indirectly implicate the unanimity rule, see D. Jerrold, supra note 81; V. Margueritte, supra note 81; G. Slocombe, A Mirror to Geneva (1936); Streit, Reform of the Covenant is Not Enough, in Problems of Peace, supra note 288, at 213 (11th ser. 1937). Jenks, interestingly enough, suggested that unanimity might work only

within a relatively homogeneous organisation with a highly developed sense of common purpose; within such an organisation it may still be regarded by the weak as a protection against excessive influence by the strong and by the strong as a protection against irresponsibility on the part of the weak. In any wider forum the principle of unanimity represents a liberum veto which involves the paralysis of effective action.

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These texts advanced similar arguments against unanimity and in favor of some alternative voting scheme (usually majority voting) to those which had been advanced in support of unanimity during the preceding period. Unanimity, as a matter of theory and practice, these writers argued, could neither respect sovereign autonomy nor generate sovereign cooperation. It permits states to be held hostage by one bad actor, both preventing international action and centralizing international authority so as to override sovereign authority.[292] By reducing international cooperation to the lowest common denominator of sovereign accord, unanimity emasculates the institution and sabotages sovereign cooperation.[293] In short, unanimity slows the momentum of institutional life and permits backsliding towards anarchy.[294]

During this period, majority voting of one sort or another

Jenks, supra note 287, at 50 (emphasis omitted).

[292]   In the case of the so-called Geneva Protocol, intended to remedy some of the most serious defects of the Covenant, the Assembly tried, not once, but several times to obtain the necessary unanimity of the states members of the League, but without success. In the case of the important interpretation of Article 10, by which it was hoped to induce the United States to enter the League, the single vote of one of the smaller members of the League (Persia) completely paralyzed the League.

O. Newfang, supra note 290, at 46-47; see H.N. Brailsford, supra note 290, at 56-58 (League of Nations dominated by the "Haves"); F.N. Keen, supra note 289, at 31-32 (example of the Japanese invasion of Manchuria); F. Schuman, supra note 289, at 95 (theoretical equality of states as represented in the unanimity rule is illusory); Address by R. Borden, In the Kindergarten of Peace, The League of Nations Society in Canada Baquet 12-13 (Nov. 17, 1930) (The sole opposition of Cuba prevented an important amendment to the statute of the PCIJ.).

[293] See D. Jerrold, supra note 81, at 97 (Efforts by the authors of the League Covenant to promote the equality of nations and to protect sovereign authority resulted in an organization devoted to upholding the "lowest common denominator of the moralities of the world.").

    [J]uridical reasoning arrived at the absurd conclusion that the League could take no action to "preserve the territorial integrity" of any of its members except with the agreement of the member who was engaged in violating it. Such doctrines, of course, brought the League to a condition of complete impotence: for they reduced the pace of its movement not to that of the slowest—already a sufficiently serious difficulty—but to that of the worst intentioned.

A. Zimmern, supra note 19, at 431-32.

[294] This view was firmly entrenched by the post-War period. See, e.g., Jenks, supra note 287, at 49 ("Unanimity as a mode of taking international decisions accordingly became, and remains, a discredited principle."); Monaco, supra note 287, at 469, 471 (arguing that unanimity is not workable once a group of autonomous entities find themselves "in society").

    It ought . . . to be recognized without further hesitation that majority rule in a world organization is just as much of the essence as in a local or national authority. The lack of it was a fatal defect in the League of Nations, in which any important and prompt action to prevent aggression was precluded by the requirement of unanimity except in relatively unimportant matters. Hamstrung with this impossible handicap, the wonder is not that the League proved impotent to prevent major war. In retrospect the wonder is that anyone could have expected it even to give pause to a determined aggressor.

seemed the way to move forward from anarchic state interests into an organized world. Texts which treated the international institution as the sum of its sovereign members defended majority or weighted majority voting because it would decentralize international authority,[295] allowing states to defend their interests without waiting for the go-ahead from one recalcitrant sovereign. At the same time, majority voting allows for more powerful and decisive institutional action, rendering the international mouth persuasive rather than mealy. A strong institutional mouth, in turn, fosters community. In this vision, the institution is more than the sum of its parts; it is the expression of

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Clark, A New World Order—The American Lawyer's Role, 19 Ind. L.J. 289, 294 (1944) (footnote omitted).

> As far as the governmental functions of the future international community are concerned, we can hardly expect a more efficient competence than that which the Covenant of the League of Nations conferred upon the Council and the Assembly. Both were hampered by the principle of sovereign equality carefully maintained by the Covenant—the principle that no State can be bound without or against its will. Consequently, both agencies were able to adopt decisions binding upon the members only by unanimous vote and with the consent of the members not represented in the body. It is superfluous to remind that these agencies did not and could not fulfill their task of guaranteeing the collective security, the peace of the world, the task for which the League was erected. If this end is to be pursued more successfully, but within the narrow limits of the principle of "sovereign equality," the center of the international organization must, then, not be placed in an agency which presents itself as its government and which can be, in reality, only a sham government. The center of gravity must be shifted to an agency whose functions are not paralyzed by the principle of sovereign equality.

Kelsen, The Principle of Sovereign Equality of States as a Basis for International Organization, 53 Yale L.J. 207, 212-13 (1944).

> It might have been foreseen from the very beginning that a world government will not succeed if its decisions have to be taken unanimously, binding no member against his will, and if there is no centralized power to execute them. It is not to be wondered at that a world parliament, or however the Assembly of the League of Nations may be characterized, can be of only nominal value if the principle of majority be almost completely excluded from its procedure.

Kelsen, Revision of the Covenant of the League: II, in A Balance Sheet, supra note 289, at 392, 396.

[295] See, e.g., F. Dunn, supra note 278, at 126 (an early view that compulsory unanimity constrained sovereign freedom); P. Potter, An Introduction to the Study of International Organization 391 (rev. ed. 1925) (arguing that the move to international organization must be made by unanimity, but that the subsequent decisions of the organization may be taken by a majority vote without derogating from sovereign autonomy, as an expression of it); C. Riches, supra note 278, at 245 ("Moreover, although the rule of unanimity can not be said to be a consequence of the doctrine of state equality, its maintenance has been supported frequently as the best assurance of the maintenance of that equality."); Jenks, supra note 287, at 49, 51 (arguing that "the League grew primarily by outgrowing the principle of unanimity" and that "[t]he voting provisions of the Charter represented a revolutionary advance upon the provisions of the Covenant" in their move to majoritarianism); Monaco, supra note 287, at 473-74 (arguing that the move to the U.N. represented progress over the League because it transformed what had been exceptional voting practice into the norm).

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sovereign cooperation.[296] This phase was ascendent by 1945, and the institutions spawned after the Second World War exhibit a veritable cornucopia of majoritarian and weighted-voting formulas, ranging from the Great Power veto in the United Nations Security Council to the delicately balanced voting schedule of the International Monetary Fund.[297]

By the mid-1960's, however, the luster was off majoritarianism.[298] As the United Nations seemed ever less likely to live up to its

[296] See, e.g., I. Claude, supra note 8 at 125; W. Koo, supra note 278, at 285, 285-92 (arguing that the U.N.'s combination of majority voting and veto corresponds to the real "relative interests and responsibilities of the members," associating compulsory unanimity with pre-World War I powers, and hence, with the preorganizational period of international life); C. Riches, supra note 278, at 291-306 (arguing that majority voting is possible in "organs" which have been constituted unanimously).

[297] E.g., Zamora, Voting in International Economic Organizations, 74 Am. J. Int'l L. 566 (1980); see 2 H. Schermers, supra note 1, at 327-64. Justification for the U.N. majority/Great Power veto scheme is found in Weinschel, The Doctrine of the Equality of States and Its Recent Modifications, 45 Am. J. Int'l L. 417 (1951) (tracing the history of deviations from unanimity in the context of respect for the principle of sovereign equality). See also Vallat, Voting in the General Assembly of the United Nations, 1954 Brit. Y.B. Int'l L. 273 (good analysis of U.N. Charter provisions and negotiating history written when the choice of voting mechanism was uncontroversial). Interestingly, the veto was attacked and defended as unanimity voting had been attacked and defended—as necessary to the institution's function and as utopian in its reliance on Great Power unanimity. On the veto, see W. Arnold-Forster, The Veto (1947); S. Bailey, supra note 49, at 26-77; I. Claude, supra note 8; Goodrich, The UN Security Council, in The United Nations—Past, Present, and Future, supra note 281, at 33-39; Gross, The Charter of the United Nations and the Lodge Reservations, 41 Am. J. Int'l L. 531 (1947); Schluter, Die Realität des Vetos, 17 Vereinte Nationen 37, 37-40 (1969). For a balanced treatment of veto practice, written after the veto came to be seen as the natural voting mechanism for the Security Council, and before the move to consensus, see S. Bailey, supra note 49. For a more sophisticated "process" account which does not rely so heavily upon the procedural devices to explain the changes in the General Assembly, see Keohane, The Study of Political Influence in the General Assembly, in The Process of International Organization 159 (R. Wood ed. 1971).

[298] E.g., Ogley, Voting and Politics in the General Assembly, 2 Int'l Rels. 156 (1961) (an early stirring against General Assembly majoritarianism in U.S. literature, beginning to develop the criticisms of "bloc" voting and majority "tyranny" which would later become more popular). See T. Hovet, Bloc Politics in the United Nations (1960); Bremen, The Problem of Majority Rule in the General Assembly, 12 Towson St. J. Int'l Aff. 99, 110 (1978) ("Tyranny of the majority, any majority, will ruin the purpose of the United Nations."). Jenks, in writing at what he thought to be the moment of transition from majoritarian to consensus decision-making in international institutions, quotes himself on majority voting 14 years earlier:

> [T]he voting procedures of the United Nations, which are based on the majority principle qualified by the requirement of special majorities for certain purposes and by the operation of a veto, have in present political circumstances produced a situation in which power is frequently divorced from responsibility, voting tends to become a substitute for negotiation rather than a measure of the amount of agreement reached or a final resort when negotiation fails, and the art of parliamentary manipulation is replacing that of diplomacy as a method of handling international problems for which diplomacy alone can produce an agreed solution.

Jenks, supra note 287, at 56 (quoting C.W. Jenks, The Common Law of Mankind 174 (1958)); see also Manno, Majority Decisions and Minority Responses in The UN General Assembly, in

promise, the literature often blamed its voting structure: first the So-
viet veto and then, when the United States started vetoing the odd
resolution after the arrival in the U.N. of so many prior colonies, the
majority voting scheme itself. The move to majority voting was
treated as a mistake, a step backward, away from organization toward
anarchy or irrelevance. On the one hand, majority voting produces a
tyranny of the majority, allowing international organizations to be far
too assertive, thereby threatening the sovereign authority of the mi-
nority.[299] Given the great diversity of states, a one-state, one-vote sys-
tem does not reflect the real configuration of power in international
society.[300] Sovereign equality is itself the enemy of sovereign auton-

The Process of International Organization, supra note 297, at 177 (analyzing majority voting
in an era of lopsided majorities, and concluding that the phenomenon of lopsided majorities
does not pose an insurmountable problem for the General Assembly, although the introduc-
tion of some weighted voting or dual voting scheme might improve the organization).

[299] See Tomuschat, Tyrannei der Minderheit? Betrachtungen zur Verfassungsstruktur der
Vereinten Nationen, 19 Ger. Y.B. Int'l L. 278 (1976). To a certain extent, the Anglo-Ameri-
can literature sought to play a holding action by disputing the legal validity of the outputs of
international plenaries—a far cry from its 1914 aspiration for an international legislature. See
Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 Am. J.
Int'l L. 444 (1969); Falk, On the Quasi-Legislative Competence of the General Assembly, 60
Am. J. Int'l L. 782 (1966); Gross, The Development of International Law Through the United
Nations, in The United Nations—Past, Present, and Future, supra note 281, at 171; Lande,
The Effect of the Resolutions of the United Nations General Assembly, 19 World Pol. 83
(1966).

[300]   It was apparent when the present Charter was adopted in 1945 that under a
        voting arrangement of this sort substantial powers could not be given to the Gen-
        eral Assembly, since it was not reasonable that the large nations should be bound
        in any important matter by the decisions of a body in which their votes had no
        more weight than those of nations with perhaps one hundredth of their population
        and power. This remains a fundamental defect in the present Charter which needs
        correction before the Assembly can be given even the minimum powers necessary
        to prevent war.

G. Clark & L. Sohn, supra note 150, at 25. Many of the early proponents of majority voting in
the United Nations had, in fact, qualified their support by further asserting that the voting
scheme should be weighted to take account of differences in power or world standing. See G.
Clark, Memorandum as to Weighted Representation in the General Assembly of the Proposed
United Nations 6 (1945) (acceptance of weighted voting scheme is "essential to a really worka-
ble and effective world organization"); Association Urges Strengthening of Dumbarton Oaks
Proposals, 31 A.B.A. J. 226, 226 (1945) (advising that "consideration should be given to
weighted representation of the Nations in the Assembly of the Organization, rather than equal-
ity of voting rights for the very small Nations along with the largest"); Clark, The Dumbarton
Oaks Proposals—An Analysis, 30 A.B.A. J. 669, 672 (1944) (calling for a majority voting
scheme in which votes would be assigned to countries "in full proportion to their place in the
world"); Sohn, Weighting of Votes in an International Assembly, 38 Am. Pol. Sci. Rev. 1192
(1944) (discussing the problems of international organizations based on the principles of equal-
ity of representation and unanimity, and evaluating weighted voting schemes based on factors
such as population, production, and trade); cf. C. Riches, supra note 278, at 245-90 (discussing
weighted voting procedures that actually had been adopted by various international organiza-
tions, including the procedure of basing voting power on a country's financial contribution to
the budget of the organization); Salter, Practical Suggestions for Reform, in The Future of the

omy and the mechanism of institutional domination.[301] On the other hand, majority voting is the enemy of international cooperation. By encouraging rash decisions which reflect passing majoritarian fads that are unwise and will not be complied with, this voting procedure leaves the institution powerless in the face of sovereign autonomy.[302]

League of Nations, supra note 290, at 70-71 ("Any procedure based on a majority vote would have to be bounded on some allocation of voting strength, with all that that implies in the way of classifying the states composing the League, putting them into different categories based on intricate calculations as to population, economic resources, and so on."); Wehberg, Die Organisation der Staatengemeinschaft nach dem Kriege—Das Problem Einer Wahren Repräsentation der Völker, 44 Die Friedens-Warte 49 (1944) (argument that the League was seriously flawed by incorporating the principle of equality of representation, and that international government after the War should adopt a system of representation that more accurately reflects the relative strength or power of member nations).

[301] See T. Hovet, supra note 298, at 112-20 (summarizing advantages and difficulties raised for states and international institutions by bloc voting); McIntyre, Weighted Voting in International Organizations, 8 Int'l Org. 484, 497 (1954) (advocating the "special majority" as a "middle way" between Great Power dominance and equality of voting). In Newcombe, Wert & Newcombe, Comparison of Weighted Voting Formulas for the United Nations, 23 World Pol. 452 (1971), the authors see voting reform as the potential "key" to other United Nations reforms, arguing that the principle of one-state, one-vote in the General Assembly has led to an erosion of member confidence, debilitating both members and the institution, and summarizing the literature conducting factor analyses of the U.N. voting blocs and analyses of the impact of various weighted voting schemes on those bloc configurations). See also M. Brinkmann, Majoritätsprinzip und Einstimmigkeit in den Vereinten Nationen (1978) (a late arrival to bloc/weighted voting analysis of the General Assembly); C. Manno, Weighted Voting in the United Nations General Assembly: A Study of Feasibility and Methods (1964) (unpublished Ph.D. thesis on file at American University) (analyzing the effectiveness of various General Assembly resolutions from both an institutional and national standpoint, depending in part upon how the resolution was voted); Newcombe, Ross & Newcombe, United Nations Voting Patterns, 24 Int'l Org. 100 (1970) (typical statistical analysis of U.N. voting); id. at 100 n.1 (bibliography); Newcombe, Young, & Sinaiko, Alternative Pasts: A Study of Weighted Voting at the United Nations, 31 Int'l Org. 579 (1977) (showing how various weighted voting formulas would have changed the outcome on past U.N. resolutions).

[302] Majority decisions in the equalitarian General Assembly are likely to be undemocratic in the sense that they do not represent a majority of the world's population, unrealistic in the sense that they do not reflect the greater portion of the world's real power, morally unimpressive in the sense that they cannot be identified as expressions of the dominant will of a genuine community, and for all these reasons ineffectual and perhaps even dangerous.

I. Claude, supra note 8, at 126-27.

An overwhelming majority on one side . . . offers too great a temptation to ride roughshod over the minority—even though that minority holds the key to effective implementation of resolutions—and too little stimulus to fresh thinking and hard work, especially the work of persuasion, argument, patient negotiation, and search for consensus . . . .

Finger, A New Approach to Colonial Problems at the United Nations, 26 Int'l Org. 143, 148 (1972).

The key problem in contemporary international decision making is the divorce of power from voting majorities resulting from the expansion of membership in the international system. This renders majority voting increasingly useless for lawmaking decisions because of the danger of powerful alienated minorities. Indeed, given the prominence of ideological divisions in the system, majority voting is

Finally, by ignoring the interests of the minority, it debases the currency of international institutional outputs and results in the organization's losing respect. As a result, majority voting fails the cooperative sovereign as much as the autonomous one.[303]

By 1975, the fashionable international institution made up its mind and put words in its mouth by consensus.[304] The most fash-

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highly likely to produce important disaffected minorities. Since weighted voting is politically unacceptable except in some specialized organizations . . . the traditional decision-making procedures of the United Nations and its predecessors are seen as being no longer adequate to the task of international rule making.

Buzan, Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea, 75 Am. J. Int'l L. 324, 326-27 (1981). See also Haemmerli, International Norm-Creation for a Divided Society: A Reappraisal of Some Perennial Problems, 20 ORBIS 315, 333, 335 (1976) (Majority voting in international organizations is commonly used as a "weapon" to advance particular ideological viewpoints rather than as a method to bring about the effective and fair resolution of disputes.).

[303] For cooperation-based positions against majoritarianism, see Suy, The Meaning of Consensus in Multilateral Diplomacy, in Declarations on Principles—A Quest for Universal Peace 259, 260 (R. Akkerman, P. Krieken & C. Pannenbourg eds. 1977) (starting from the proposition that "[i]t is clear that in the present structure of the international community of states, with its regional and other block formations holding divergent views of their interests, recourse to the traditional process of voting has not been conducive to promoting international cooperation"); see, e.g., C. Manno, supra note 301 (seeing weighted voting as the natural next step in the evolution of international institutions after the move from the anarchy of unanimity through the adolescence of majoritarianism and analyzing various formulas which might be adopted). See also Weintraub, North-South Dialogue at the United Nations: How the UN Votes on Economic Issues, 53 Int'l Aff. 188 (1977). Weintraub investigates "cynicism about votes in the General Assembly and its major committees" and quotes American Ambassador Scali: "Each time this Assembly adopts a resolution which it knows will not be implemented, it damages the credibility of the United Nations. . . . Unenforceable, one-sided resolutions destroy the authority of the United Nations." Id. at 188. Scali's statement appears in U.S. Warns that Present Voting Trends May Overshadow Positive Achievements of the United Nations, 72 Dep't St. Bull. 114 (Jan. 27, 1975) (statement of John Scali, U.S. Ambassador to the United Nations.).

[304] E.g., Sohn, Voting Procedures in United Nations Conferences for the Codification of International Law, 69 Am. J. Int'l L. 310 (1975) (meticulous summary of post-1944 practice concluding that the international community had come "full circle" from unanimity to consensus which is promoted as a way to "avoid voting"); see S. Bailey, supra note 49, at 74 (analyzing consensus procedures in the Security Council, concluding that they are "decisions" despite the lack of vote, and acknowledging that "[t]he word consensus, and the idea it denotes, have become fashionable in United Nations circles during the past four years," despite "some uncertainty as to its precise meaning"); Ninth Conference United Nations Next Decade, Decision-Making Processes of the United Nations 11-12 (Vail, Colo. 1974) (setting out arguments for and against the move to consensus); Bastid, Observations sur la Pratique du Consensus, in 1 Multitudo Legum Ius Unum—Festschrift für Wilhelm Wengler 11 (1973); Bremen, supra note 298, at 100-02 (arguing that consensus is required because the U.N. majority system has gotten out of touch with political reality); Cassan, Le Consensus dans la Pratique des Nations Unies, 1974 Annuaire Français de Droit International [A.F.D.I.] 456 (Centre National de la Recherche Scientifique); Charpentier, La Procédure de Non-Objection, 70 Revue Générale de Droit International Public 862 (1966); de Lacharriere, Consensus et Nations Unies, 1968 A.F.D.I. 9; Glaser, La Place du Consensus dans les Relations Internationales Contemporaines, 19 Revue Roumaine d'Études Internationales 39 (1973); Hill, supra

ionable international institution was the United Nations Conference
on the Law of the Sea, convened to draft a Law of the Sea Treaty and
establish an international "regime" for the earth's aquatic regions.[305]

note 287; Jenks, *supra note* 287, at 57-62 (analyzing different consensus methods then in use);
Jessup, Silence Gives Consent, 3 Ga. J. Int'l & Comp. L. 46 (1973); Sohn, Introduction:
United Nations Decision-Making: Confrontation or Consensus?, 15 Harv. Int'l L.J. 438, 444
(1974) ("A closer look at United Nations records makes it quite clear, then, that despite verbal
pyrotechnics, often emphasized by the information media, the work of the United Nations
proceeds quite smoothly, most decisions being adopted by unanimity or quasi-unanimity.
Consensus has in fact replaced confrontation."); Sperduti, Consensus in International Law,
1976 Ital. Y.B. Int'l L. 33 (differentiating various forms of consensus in state practice).

[305] The consensus procedures followed at the Third Law of the Sea Conference were for-
mally expressed in the "Gentleman's Agreement," initially endorsed by the U.N. General As-
sembly at its 2169th meeting on November 16, 1973, and in Rules of Procedure of the Law of
the Sea Conference 327-340. See UNCLOS Rules of Procedure on Decision-Making at 8-10,
17, U.N. Doc. A/CONF.62/30/Rev.2 (1976), in Buzan, *supra* note 302, at 347-48 app. The
Gentleman's Agreement reads in part: "The Conference should make every effort to reach
agreement on substantive matters by way of consensus and there should be no voting on such
matters until all efforts at consensus have been exhausted." A corollary of this Agreement was
the notion of a "package deal":

> The package deal entails that all the main parts of the Convention must be looked
> upon as an entity, as a single negotiated package, where the laws of give and take
> presumably have struck a reasonable balance between the participating states—the
> Convention considered as a whole. The package deal seemed a precondition for
> adopting the Convention by consensus.

Evensen, The United Nations Convention on the Law of the Sea of December 10, 1982. Its
Political and Legal Impact—Present and Future, 38 Revue Egyptienne de Droit International
11, 19 (1982). For a detailed discussion of the debate at the U.N. General Assembly and at the
Third Law of the Sea Conference itself, leading to the adoption of the consensus procedures
finally used, see Sohn, *supra* note 304, at 333-52. See also Barile, Consensus and Voting at the
Third Conference on the Law of the Sea, 1980-1981 Ital. Y.B. Int'l L. 3 (descriptive review of
consensus procedures); Grzybowski, Reflections on UNCLOS III, 3 N.Y.L. Sch. J. Int'l &
Comp. L. 581 (1982) (unfavorable account of the negotiating process at the Conference, em-
phasizing the lack of knowledge, experience, and skill of many of the delegates); Hardy, Deci-
sion Making at the Law of the Sea Conference, 11 Revue Belge de Droit International 442
(1975) (thorough study of the procedure and practice of UNCLOS consensus); Koh, Negotiat-
ing a New World Order for the Sea, 24 Va. J. Int'l L. 761, 780-83 (1984) (glowing account of
the negotiating process and consensus procedures by a President of the Third U.N. Conference
on the Law of the Sea); Moore, In Search of Common Nodules at UNCLOS III, 18 Va. J. Int'l
L. 1, 6 (1977) (vigorous defense of the consensus method and the results reached by it); Suy,
supra note 303, at 259 (discussing use of consensus by UNCLOS and other international bod-
ies, and the legal implications of decisions reached by consensus).

The voting issue has often been discussed in the rhetoric of public international law as a
matter of sources rather than in the rhetoric of institutional design. Much of the interest in the
consensus procedures used at the Law of the Sea Conference, especially after the United States
refused to sign the final agreement, has been focused on whether the Conference and the proce-
dures established customary international law. For discussions of this issue, see Caminos &
Molitor, Progressive Development of International Law and the Package Deal, 79 Am. J. Int'l
L. 871 (1985); de Aréchaga, Customary International Law and the Conference on the Law of
the Sea, in Essays in International Law in Honour of Judge Manfred Lachs 575 (1984); Jen-
nings, What Is International Law and How Do We Tell It When We See It?, 37 Schweizer-
isches Jahrbuch für Internationales Recht 59, 79-88 (1981); MacRae, Customary International
Law and the United Nations' Law of the Sea Treaty, 13 Cal. W. Int'l L.J. 181 (1983); Schweis-

Consensus seemed a desirable voting technique because it avoided all the problems of majoritarianism. By exactly translating political reality into institutional action, consensus keeps the institution in step with all states.[306] The minority feels attended to, included, respected; neither the big powers nor the party-blocs of the ideologically minded states are able to control the majority anymore.[307] Consensus is the

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furth, The Influence of the Third United Nations Conference on the Law of the Sea on International Customary Law, 43 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 566 (1983); Sohn, The Law of the Sea: Customary International Law Developments, 34 Am. U.L. Rev. 271 (1985).

[306] The consensus system assures that decision-making at a multilateral negotiation of a convention will not be dominated by the numerical superiority of any group of nations. Rather, procedural significance will be given to the variations in the power of nations. Since it is difficult to obtain acceptance of voting systems that overtly recognize the differences in nations' importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations.

Charney, United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts, 11 Vand. J. Transnat'l L. 39, 43 (1978) (footnote omitted), quoted in Buzan, supra note 302, at 327.

[307] The extent to which differences in the political power of countries should be reflected in voting procedure was a serious issue not only for the Law of the Sea Conference itself, but also for the International Seabed Authority that was to be formed (in part) to monitor the conventions on deep seabed mining reached at the Conference. As Smith noted in 1977 concerning the proposed International Seabed Authority:

One of the principal contending points of view regarding institutional arrangements has been the Group of 77's insistence that the Authority be governed exclusively on the basis of the sovereign equality of all States whereby every nation would have equivalent political power in the Authority's institutions. The developed countries assert, on the other hand, that because of their economic and technological advancement and their higher direct stake in the mining of the seabed, they require a voice in the Authority sufficient to protect their substantial "minority" interests.

The Evensen formulations sought to resolve these conflicting points of view by acceding to a demand of the developing countries that the one-nation-one-vote Assembly be declared the supreme organ of the Authority and be vested with substantial legislative powers, while providing for a chambered voting system in the Council so that developed countries could block decisions of the Authority. Chairman Engo left these Evensen formulations almost entirely intact but chose to omit the vital protective mechanism of chambered voting. Thus, the ICNT [Informal Composite Negotiating Text] places the develped country minority at the mercy of the developing country majority within both the Assembly and Council of the Authority.

Smith, The Seabed Negotiation and the Law of the Sea Conference—Ready for a Divorce?, 18 Va. J. Int'l L. 43, 48 (1977) (footnote omitted). When President Reagan announced that the United States would not sign the accords reached at UNCLOS III, he gave as one of the reasons, the system of representation and voting in the proposed International Seabed Authority, which entailed "[a] decisionmaking process that would not give the United States or others a role that fairly reflects and protects their interests." 82 Dep't St. Bull. 71 (Aug. 1982). For discussions on the United States' position towards the International Seabed Authority and its voting procedures, see Larson, The Reagan Rejection of the U.N. Convention, 14 Ocean Dev.

perfect form of institutional deference.[308] Moreover, consensus permits the institution to make powerful decisions and ensures compliance with such decisions as are taken. The very experience of coming to consensus builds community.[309]

Although consensus had seemed the Law of the Sea Conference's major contribution to international institutional procedure and the key to the sense that a step forward had been taken from the anarchy and tyranny of majoritarianism, after about 1980 the consensus procedure came to be criticized.[310] Consensus seemed linked to minority rule—some delegations were left out of the information circuit at the Conference and a strong chairman could railroad backroom compromises through the plenary, displacing the organ of international cooperation as he overrode sovereign autonomy.[311] A single state or

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& Int'l L. 337, 342-43 (1985) (Although the leading potential miner and consumer of minerals from the deep seabed, the U.S. believed it would have no assured seat on the Council of the Authority, while the Soviet Union and Eastern Europe would have three assured seats.); Malone, The United States and the Law of the Sea, 24 Va. J. Int'l L. 785, 794 n.21 (1984) (assertions that the U.S. would be guaranteed a seat on the Council of the Authority if the U.S. signed the conventions reached at the Conference are misleading; the guaranteed seat is for the "largest consumer," which may or may not be the U.S. depending on how "largest consumer" is defined); Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60 Foreign Aff. 1006, 1013 (1982) (claiming that the "United States . . . demanded virtually autocratic ruling powers over the Seabed Authority").

[308] For autonomy-based defenses of consensus, see, e.g., Suy, supra note 303, at 260 (arguing that consensus allows members "to safeguard their positions" because it "does not force them to take clear positions as in voting"); see also Bremen, supra note 298, at 109 ("Majority rule within the General Assembly has no value unless it encompasses concensus [sic] at the same time.").

[309] For community-based defenses of consensus, see Suy, supra note 303, at 260 (arguing that consensus avoids confrontations, builds community spirit and willingness to compromise, and results in more effective decisions); see, e.g., Jenks, supra note 287, at 55-57.

[310] For general critiques of the consensus procedure used at the Law of the Sea Conference, see Barile, "Uguaglianza" e "Disuguaglianza" Degli Stati alla Conferenza sul Diritto del Mare, 62 Rivista di Diritto Internazionale 287 (1979); Buzan, supra note 302 (summarizing the proconsensus position well, analyzing the struggle to develop a consensus procedure in UNCLOS, and indicating difficulties associated with the importance of the chairman, the slowness of the process, the ambiguity of the result, and the tendency to reopen small issues); Lagoni, Multilaterale Vertragsschlussverfahren nach der III. Seerechtskonferenz, 31 Vereinte Nationen 74 (1983); Vignes, Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?, 69 Am. J. Int'l L. 119 (1975); Vitzthum, The Law of the Sea Development, 23 Indian J. Int'l L. 161, 168-75 (1983).

[311] See Buzan, "United We Stand . . ."—Informal Negotiating Groups at UNCLOS III, 4 Marine Pol'y 183, 193 (1980) [hereinafter Buzan, United We Stand] ("A key individual might, by his performance, make himself so controversial as to impede the process of negotiation"; likewise, the "overfragmentation" of delegates into specialized groups means that delegates tended to be uninformed about many important and complex issues.); Smith, supra note 307, at 46 (chairman of the seabed committee worked only with developing countries to change substantially the terms of the negotiating text for a seabed regime).

> Although part of the problem in the [seabed] committee stemmed from the complexity of the issues, and the depth of political division on preferred outcomes, part

minority of states, by holding out, seemed able to skew the institutional product in an anticommunitarian direction.[312]

All of these arguments about plenary decisionmaking procedures seem remarkably similar. The success or failure of each voting mech-

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> of it arose from the conduct of the Chairman. Many delegations felt that he was abusing his position by taking too large a part in the drafting of the texts—to the point where he would alter agreed negotiated compromises according to his own lights, which was undoing the bargaining process and undermining the utility of the process of incremental revision towards consensus.

Buzan, supra note 302, at 336-37. See Lagoni, supra note 310, at 76 (noting the enhanced power of the committee chairman and the problems that this development entailed). Cf. Miles, The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea, 31 Int'l Org. 159, 180-85 (1977) (the role of chairman and the limits of decisionmaking by consensus were major sources of controversy at the Conference); Note, Procedures and Techniques of Multinational Negotiation: The LOS III Model, 17 Va. J. Int'l L. 217, 227 (1977) (emphasizing the "enormous difficulties in communicating relevant and available information" at the Conference). But cf. Beesley, The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners—A Pattern for Future Multilateral International Conferences?, 46 L. & Contemp. Probs. 183, 191-92 (1983) (acknowledging the "tremendous powers" given to the committee chairman, especially in drafting "negotiating text[s]," but seeing such delegation of power as an important means of bringing about consensus on complex issues); Vitzthum, supra note 310, at 173-75 (The augmented competence of the chairman was necessary given the size of the Conference, the complexity of the issues, and the importance of "sustained guidance" in reaching a final consensus.).

[312] Groups . . . represent forms of display which can be very important in the non-voting environment of negotiation under consensus rules. . . . If things are not going well for a sectional interest, a group can serve in the last resort as a type of bastion for prolonged resistance. Consensus rules facilitate this tactic by enhancing the powers of organized minorities to delay the proceedings.

Buzan, United We Stand, supra note 311, at 191. Buzan also contends that some larger states were able to influence strongly the outcome on various issues through the threat of "substantial unilateral action in relation to the issue at stake." Id. at 197, 197-98.

> [C]ertain States, in order to achieve bargaining power, have employed trade off tactics which have delayed the negotiations. In a number of cases States adopted positions only for the negotiating strength that a subsequent concession would yield. The United States, for example, initially opposed a 200-mile economic zone. However, it had as much, if not more, to gain from the acceptance of extended jurisdiction as other coutnries did (if acceptance of a 200-mile zone were tied to a satisfactory resolution of other issues, including transit of straits). By continuing to oppose the 200-mile economic zone until Caracas, the United States obtained negotiating leverage on other issues within the package. Similarly, in Committee I negotiations the Soviet Union argued that the revenue from deepsea mining should be distributed to all countries, including the developed States. Even though it was clear that the developing countries inevitably would defeat such a position, the Soviets gained a significant measure of bargaining power through their intransigence. Such tactics may strengthen the position of an individual State, but they do not contribute to the expeditious development of a multilateral treaty.

Note, supra note 311, at 239-40 (footnotes omitted); see also Buzan, supra note 302, at 344 ("Consensus rules, with their opportunities for delay and defense, offer maximum scope for the law of disproportionate emphasis to come into play"—that is, near the end of long negotiations, some states may attempt to obtain concessions on relatively small issues by threatening to withdraw their approval from the whole set of accords that has already been reached.).

anism is grounded in its ability to generate sovereign cooperation without compromising sovereign autonomy. The same arguments about authority and deference continually reappear. Plenary procedures are bad when they fail to banish the threats of anarchy and tyranny; they are good when they instantiate both autonomy and cooperation among sovereigns. This exclusion and mediation repeats the work of the Covenant and fulfills the recurring need to position the organization forward of and in touch with membership—to translate the sovereign intention into organizational activity.

Through this repetition, moreover, the literature generates a sense of forward movement, of institutional maturation through reform. Although the arguments for and against consensus sound similar to those advanced for and against unanimity, these procedures are quite dissimilar.[313] In many ways, consensus seems the exact opposite of unanimity. Because consensus produces no actual recorded vote, no written formalization of the intersovereign accord, all that is seen is the institutional output. In unanimity, the members formalize and conclude their negotiation. Unanimity seems to associate voting too rigidly with membership to constitute a workable institution, producing an arrangement at once too decentralized and liable to frustrate sovereign initiatives.

In consensus, by contrast, the institution seems to speak as a whole, losing the individuated voices of its members. Consensus suggests a pure speech situation which translates membership directly into organizational behavior. Consensus is problematic because it associates decisionmaking too closely with organic action. Without a record, neither the members nor the organization know what happened. The plenary, if it disappears completely into the speech of the organ, can remind neither the members of their institutional commitment nor the organ of its consensual basis in membership. Consensus fails as a *voting* mechanism by erasing membership from the organization, permitting the institution to lose touch with the members and the members to act too autonomously. Paradoxically, the institution can seem both too independent and too deferential.[314]

The move from unanimity through majority voting to consensus tracks a maturation of the plenary. Unanimity suggests an immature plenary, constantly recapitulating the moment of establishment. Consensus suggest a mature organizational voice finally released from its

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[313] See 2 H. Schermers, supra note 1, at 327-28 (differentiating consensus and unanimity); Suy, supra note 303, at 266-67 (same).

[314] The point was driven home by the American withdrawal from the final treaty. See Larson, The Reagan Administration and the Law of the Sea, 11 Ocean Dev. & Int'l L. 297 (1982).

members. Majority voting seems a middle ground, a halfway house of trust, in which formalization of minority rights is still needed to shackle the organ to the members. In this, the movement from unanimity to consensus recapitulates the movement from membership to organs which animates voting. To the extent voting stands between membership and organs, moreover, it restates the position of the Covenant between the Conference and the plenary. As a result, we might read the movement from unanimity to consensus as an elaborate repetition of the Covenant's establishment work.

The important point about the developing decisionmaking practices of international plenaries is not so much their continual resistance to the forces of anarchy and tyranny as their ability to recapitulate an institutionalizing momentum. Just as voting repeats the work of the establishment text, so reform of the voting mechanism repeats the movement into organization as maturation. Just as the plenary seems a fluid presence by contrast to the establishing Covenant, the solid reminder of a politics transcended, so also consensus seems the practice of a body organized, by contrast to the bondage to the disorganized membership represented by unanimity. Thus, despite a certain argumentative repetitiveness, this literature presents a sense of institutional progress and literary maturity. The very rotation through arguments generates forward momentum.

This momentum can also be traced in changing levels of enthusiasm for voting within the literature about international institutions. Voting was hardly discussed by League planners and those responsible for drafting the Covenant. Many League plans had been silent on the subject and most seemed simply to presume that one-state, one-vote unanimity voting would prevail in whatever organs were established.[315] Although there was talk at the Conference about various

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[315] None of the earlier plans cited in Part II, supra note 107, with one exception, mention a voting scheme. But see Fabian Committee, supra note 92, which makes explicit provisions for voting, id. at 12-14, and for the number of judges sitting on the International Court, id. at 23. It also makes recommendations, based on the relative voting powers of states established by the Hague, for a weighted voting system:

All the Constituent States shall have equal rights to participation in the deliberations of the International Council. Any Constituent State may submit to the International Council sitting as a whole any proposal for any alteration of International Law, or for making an enactment of new law; and also (subject to the provisions of these Articles with regard to the submission of justiciable issues to the International High Court) may bring before the Council any question, dispute, or difference arising between it and any other Constituent State.

When the International Council is sitting as the Council of the eight Great Powers or as the Council of the States other than the eight Great Powers, each of the States represented therein shall have one vote only.

When the International Council is sitting as a whole or as the Council for

schemes for majority voting or special weighted majorities favoring the Great Powers, the drafters saw the problem of balancing great and small powers as one of membership and organs, resolvable by a two-house plenary with divergent membership, rather than as a problem resolvable by voting.[316]

In a way, this lack of attention to voting at the moment of establishment makes sense. As the link between members and organs, voting seems an afterthought—a procedural detail at the moment of establishment. Membership seems the more appropriate concern of an establishing conference. The trouble with this interpretation is that those who established the United Nations were surprisingly preoccupied with voting issues. Similarly, although interest in the agenda, the "single text" or package deal negotiation technique, and substantive politics of resource distribution and access dominated the literature concerning the Law of the Sea Convention, there was also a burst of writing about consensus.

The focus on membership and the rather slow development of a voting literature after 1919 seems the result of the peculiar history of the League. Membership did not work out as intended: the United States did not join, Germany was not admitted until 1926, Russia until 1934, and by 1933, Germany and Japan were no longer members.[317] The failure of the League to attract and retain the Great Powers has often been seen as a reason, if not the primary reason, for the League's "failure" to implement the systems of war and peace so elaborately provided for in the Covenant.[318] Attributing the League's

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Europe, or as the Council for America, the number of votes to be given on behalf of each State shall be as follows:

(the scale of voting stength will require to be prescribed in the treaty.)

Id. at 12-14. The Phillimore draft, for example, despite language in the interim committee report issued by the Phillimore committee rejecting majority and weighted voting of all sorts, did not specifically require unanimity. See 2 D. Miller, supra note 68, at 3-6; C. Riches, supra note 86, at 3. Article 7 of the Phillimore draft made an exception from unanimity for matters of procedure, but nowhere was the unanimity rule explicity proscribed. See 2 D. Miller, supra note 68, at 4.

[316] These themes dominate the discussions reported by Miller. See 1-2 D. Miller, supra note 68. Like League plans, those at Paris assumed that unanimity, the almost uniform practice of the 19th-century political conferences, would be continued. See E. Dickinson, The Equality of States in International Law (1920); G. Éles, supra note 286, at 13-19.

[317] See 1 F.P. Walters, supra note 10, at 64-65.

[318] Schwarzenberger's thesis is that the League failed because of the absent member:

[A]t this stage the problem of the non-participant has to be faced. If one of the communities whose adherence to the new organization is deemed to be indispensable by the others is not willing to sacrifice its independence for the common interest, the difficulty has either to be solved by force, or the other members must try to reach their goal without its co-operation.

G. Schwarzenberger, supra note 30, at 1. In conclusion, he states: "[T]he League has not yet

failure to a problem of "membership" rather than, say, the Depression or fascism, seems, at first glance, an odd approach; yet, it runs throughout the literature of international institutions.

Focusing on membership has a number of advantages. It permits us to believe that the League's difficulties are not the fault of the League, or of the drafters, or of institutional design. The blame rests outside the institution, with members, or in this case, with the politicians who refused to use the beautiful machine. It also allows us to believe that the League somehow never actually happened, never got off the ground. The world did not get organized, so of course it failed. But it was a failure of organization, not an organizational failure. Nevertheless, the problem is not as intractable as fascism—it can be changed by filling the "empty chairs."[319]

Concentrating on voting only began to be interesting after the institution was firmly enough established to support reform efforts; in particular, after it became possible to advocate alternative institutions. Interestingly, analyses of the League written since 1945 have been much more concerned with the League's substantive policies and activities than with either membership or voting.[320]

This move from membership to voting to substantive issues is typical of the literature about the United Nations and the Law of the Sea Conference as well. After the Second World War, membership issues—the microstate problem, the problem of China, the problem of the PLO—were displaced by literature about voting.[321] The displace-

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been able to achieve absolute or even relative universality. It has never succeeded at any given time in including all the Great Powers of the world in its collective system." Id. at 176.

[319] Indeed, even at the time, the "empty chair" problem was seen as the major impediment to League effectiveness—if for no other reason than that America's absence changed Britain's sense of commitment to the League. The guarantees of security in the Covenant (articles 10 and 16) suddenly took on a new meaning when the U.S. withdrew:

> As soon as it was clear that the United States would not join the League the obligations of Articles X and XVI took on quite another aspect.
>
> . . .[T]he British group led by Canada, and the neutrals led by the Scandinavian Powers, wished to reduce in scope and certainty even those guarantees which they had already given in Articles X and XVI.

C.K. Webster & S. Herbert, supra note 10, at 146; see also G. Scott, supra note 76, at 399-405 (describing how the League initially survived the almost mortal blow of America's rejection).

[320] See, e.g., League in Retrospect, supra note 159; G. Scott, supra note 76.

[321] On ministates, see Gunter, Liechtenstein and the League of Nations: A Precedent for the United Nations' Ministate Problem?, 68 Am. J. Int'l L. 696 (1974); Harbert, The Behavior of the Ministates in the United Nations, 1971-1972, 30 Int'l Org. 109 (1976); Schwebel, Mini-States and a More Effective United Nations, 67 Am. J. Int'l L. 108 (1973); United Nations Inst. Training & Research, UNITAR No. 3, Status and Problems of Very Small States and Territories (1969). For various solutions to representation issues, see Gross, Voting in the Security Council and the PLO, 70 Am. J. Int'l L. 470 (1976); Gross, Progress Towards Universality of Membership in the United Nations, 50 Am. J. Int'l L. 791 (1956); McDougle &

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ment was relatively abrupt, perhaps because universal membership was presumed, just as unanimity had been presumed in 1919. The Law of the Sea Conference literature paid almost no attention to membership (until the United States withdrew from the process), some to consensus, and a great deal to questions of negotiating technique, dispute resolution, and substantive issues.

Although the changing enthusiasm for voting might simply have reflected diverse historical situations—the League's peculiar membership problem, the United Nations' peculiar veto structure in the cold war context, and the Law of the Sea Conference's substantive relationship to the new international economic order—these changes might also be read as a sign of institutional maturation. If we think of the institutional literature as a continuous practice beginning in the late nineteenth century, it recapitulates precisely the structure of the plenary it describes, moving from membership to voting to the substantive policies of organs.

This reading illuminates the relationship between the work of the literature and the drive to institutionalize itself. Short bursts of argument signal a move to a more mature establishment debate. Sometime prior to 1918, unanimity voting had come to seem possible among autonomous sovereigns. By permitting sovereigns to experience organization as compatible with their autonomy, unanimity was the institutional response of nineteenth-century positivism to the desire for international cooperation.[322]

In February 1918, no institutional energy could be generated by

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Goodman, Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution, 60 Am. J. Int'l L. 671 (1961).

[322] By the middle of the 19th century, the notion of *pacta sunt servanda*, of sovereign consent as the legislature for a "horizontal" international society, had been invented and dominated the literature. The classic doctrinal systematization of this position is, of course, L. Oppenheim, International Law (1905-1906). The valorization of practice as evidence of custom and of treaty as opposed to custom, etc., for which this period is known, had to be thought up. See D. Kennedy, supra note 3, ch. 2, § 3 (analyzing The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)). Likewise, someone had to render that international legal positivism with its fetishization of protocol and sovereign prerogative compatible with international institutional life. See E. Dickinson, supra note 316, at 280 (writing during the War, Dickinson treats the relationship between sovereign autonomy and international organization at length without making anything of the unanimous voting procedure); id. at 337 (Dickinson's chapter on the Paris Conference, added as the book went to press, is similarly silent on the matter.). See also Vallat, supra note 297, at 273 ("Voting at international meetings is a comparatively modern device for making decisions on political matters."); id. at 273-74 ("Dans une conférence on ne vote pas: et ce pour une raison bien simple, c'est que l'unanimité est requise. A quoi bon compter les voix pour et contre, du moment qu'une seule voix contre suffit à écarter les mesures proposées?") (quoting Count Goluchowski, Remarks at the Conference of Algeciras (1906)); Weinschel, supra note 297, at 417-27 (analyzing the development of unanimity and practice).

discussing voting. Those who tried found it impossible to use voting rhetoric to agitate for a particular form of institutional life. Smuts did try—seeing a relationship between voting and membership. He thought the institution might be set against decentralized triviality and centralized tyranny through either mechanism. He concluded, however, that as no particular voting mechanism was satisfactory, the problem needed to be solved by distinguishing organs according to their membership. Like his contemporaries, he found voting uninteresting—he because no scheme seemed workable, they because unanimity seemed inevitable and quite appropriate.[323]

Later, interest in voting arose as the institution matured—as it moved from preoccupation with membership to voting and finally to the substantive politics of its organs. Each of these moves was punctuated by a briefly renewed interest in voting and a change in the dominant decisionmaking mechanism. In a sense, then, the movement to voting and among voting schemes, like voting itself, is a continual becoming—a continual movement away from the stasis of

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[323] But while we avoid the super-sovereign at the one end, we must be equally careful to avoid the mere ineffective debating society at the other end. The new situation does not call for a new talking shop. We want an instrument of government which, however much talk is put into it at the one end, will grind out decisions at the other end. We want a League which wil [sic] be real, practical, effective as a system of world-government. The scheme which I have seen and which brings representatives of all the independent States of the world together in one conference to discuss the most thorny of all subjects and requires that their decisions to be binding must be unanimous is from that point of view not worth discussion. It means that there never will be any decision issuing from the League; that nobody will take the League seriously; that it will not even serve as camoflage; that it will soon be dead and buried, leaving the world worse than it found it.

. . . .

The League will include a few great Powers, a larger number of medium or intermediate States, and a very large number of small States. If in the councils of the League they are all to count and vote as of equal value, the few Powers may be at the mercy of the great majority of small States. It is quite certain that no great Power will willingly run such a risk by entering a League in which all have equal voting power. . . . The League is therefore in this dilemma, that if its votes have to be unanimous, the League will be unworkable; and if they are decided by a majority, the great Powers will not enter it; and yet if they keep out of it they wreck the whole scheme. Clearly neither unanimity nor mere majority will do. Neither will it do to assess and assign different values to the States who are members of the League. If Guatemala counts as one, what value shall be given to the United States of America? Will it be 5, or 10, or 100, or 1,000? Will the valuation proceed on the basis of wealth or population or territory? And if either of the last two bases is adopted, what about the Powers who have millions of barbarian subjects, or millions of square miles of desert territory? . . . But clearly there is no good reason to be assigned in favour of any basis of valuation, and the principle of values will not help us at all. We therefore proceed to look for some other solution of our difficulty.

J.C. Smuts, supra note 141, at 32-34.

members through a literature or text to the competences and practices of organs. At the same time, however, this movement carries with it a reminder or marker of institutional history in the form of a particular voting mechanism.

These mechanisms and the literatures which discuss them thus relate to the history of international institutions as the vote relates to the plenary. They are a written sign of a movement to organized speech. Like the Covenant between Conference and plenary, the vote and literature about it form a high-water mark of formalism, continually restating the social contract in an ongoing repetition of the establishment itself. Just as the Covenant animates the institution and the vote animates the plenary, so the literature about voting animates the process of institutional maturation.

The literature, like the vote or the Covenant, is situated between continuity and change—here the continuity of repetition and the momentum of maturation. This double position animates the institution as a progressive movement. In a way, this observation is a commonplace. Anyone who has ever conducted a meeting knows that the decision of when to move from discussion to a vote is at least as important as the form of the vote itself—indeed, after the establishment, when the voting rules are "known," the plenary works in large part by manipulation of the moment of voting.

Sometimes the call for a vote bursts the bubble of collective energy, collapsing each person at the meeting—each member—back into his or her autonomy. Everyone starts thinking "what do I really think about this matter?" or "what do the others think about this?" At other times, the call to vote is superfluous—it is really a call to adjourn, to reflect as a group on what, after the discussion, "we now think." Often, however, the vote is neither a collapse nor a redundant ratification, but a moment of coming together, in which each person is momentarily reminded that they are members of the group, called upon to act as individuals, and yet in the group. It is in this sense, when people get the feeling that they are part of something bigger and yet part of it in the privacy of their own secret ballot, that voting works to constitute a community.

The rotation of arguments about voting schemes in the literature of international institutions works similarly. The call for a different voting scheme at each moment in the literature spirals forward, expresses a constructive hope that this turn would produce the feeling of transcendence, the moment at which international society would get to the plenary, get organized, and learn to conduct its politics in institutions. It seems entirely plausible that different voting schemes

would give this feeling at different times. Indeed, if the goal is to produce a voting scheme which moves to the group precisely in the reinforcement of membership autonomy, it is no surprise that no particular voting scheme "works" as a logical matter, or that different schemes are defended in the same terms. In fact, one would expect organization to proceed, and the feeling of being in plenary only to be possible, if there were available a constantly changing parade of voting mechanisms. It is precisely this fickle rotation and the recurrent consumption of fashionable voting mechanisms that generates the feeling that "voting" is a movement from membership to organs. Far from criticizing the literature as a setter of trends and a follower of fashions, one should celebrate this rotation as the literature's contribution.

Of course, there is a problem with this approach. The literature seems to imagine—and for this spiral to work, for the arguments to persuade, for the members to think they are getting organized, the literature must continue to imagine—that constitutional design is more serious than fashion design. The rotation must be continued and refined, but not noticed. Once the literature loses faith in its seriousness, even if in the process it becomes more flexible in the manipulation of its particulars, voting will no longer seem a response to anarchy or a protection against tyranny, and the sense of being organized as opposed to simply being together will fade. As a result, the literature must deny any sense of the irony of the activity of international legal scholarship in order to continue to present what turns out to be quite serious—the organization of international life.

V.   A CONSTITUTED LIFE

Although modern international institutional life might be dated from the end of the First World War, the signing of the Covenant, or the opening of the League plenary, it would be most accurate to fix the birth in their interaction. Plans for and literature about the League illustrate the break associated with the transition from war to peace which provided the opportunity for institutional establishment. The Covenant of the League transformed that rupture into an institution-building momentum by providing a link between the negotiations in Paris and the League. The plenary established in Paris recapitulated these two motions both in its own structure and in the literature about decisionmaking processes which accompanied its development.

The texts which establish the modern international institution are both assertive and equivocal. The Covenant's firm formality reminds us of the institution's roots in war and political negotiation

while promising an institutional end to anarchy and tyranny. This promise asserts a break forward from chaos and tyranny to ordered liberty, quite literally locating disorganization outside and behind the document. At the same time, however, the Covenant equivocates in its substantive commitment between substance and procedure, war and peace, referring back to the Conference and forward to the plenary.

This textual balance of assertion and equivocation is the secret of institutional establishment. The Covenant is an open cipher, caught between the promise of a new politics and the debacle of an old regime. To contrast with both the peace treaties and the plenary, and to render a contrast between them, the Covenant repeats the exclusions and hesitations of its drafting in the language of procedure and substance, combining each reference to an earlier substantive closure with a projection forward of its reimagination. In the plenary, the vote balances assertion and equivocation quite similarly, positioning the institution between the deference of membership to sovereign autonomy and the international substantive authority of organs.

At each moment, the momentum of institution-building runs from the idea of its implementation. The historical literature moves from idealism to realism and is characteristically pragmatic and functional in its orientation to current institutional practice. The Covenant moves us from the conclusions of the Conference to the plenary process. The vote moves from the institution's constitution to its administration. Like the discipline's literature, both the Covenant and the vote move toward a pragmatic practice by constant reference back to a moment of political choice and utopian vision, excluding political imagination from present practice. For that, the institutional text refers us back to a moment of accord and forward to a moment of redemption. In short, the institutional present concerns less meat than motion.

It is customary, particularly in the literature of diplomatic history, to regard the Paris Conference as a moment of political initiative, and to treat the Covenant along with the Versailles Treaty as witness to that initiative. Institutional literature about the judiciary or the administration similarly regards the plenary as the arena for political choice and locates the political moment in the votes taken. But the various references and equivocations of the Covenant and the strange fluidity of the plenary vote are better understood in the context of their establishment work than as the products of various political configurations. The redundant equivocation of the Covenant, for example—which might seem to express a political doubt or contradic-

tion—seems the genius of the document's success as a constitution when situated between the Conference and the plenary.

Still, the politics of institutional establishment is a most peculiar politics. Beyond its paradoxical relationship to law—against which it constantly struggles and upon which it constantly relies—the politics of the plenary seems strangely proceduralized, as if issues of war and peace had been transposed into problems of inter-state management. From the perspective of both the Covenant and the plenary, states-members are the political agents rather than the forces of economics or ideology. War starts when states experience violence and ends with an inter-state settlement. This image of politics is particularly striking in the literature of international institutions and suggests its divergence from the literature of diplomatic history, a divergence which itself emphasizes the difference between organized and disorganized international social life.

Wars make periodic appearances in the literature of international institutions as signs for changing institutional roles. Mangone, for example, considers the "Greco-Bulgarian Crisis" in the following terms:

> On 22 October 1925 the Bulgarian foreign minister wired the Secretary-General of the League that a border incident had led to a flagrant invasion of Bulgarian territory by Greek forces. The Bulgarian government, therefore, requested a meeting of the Council of the League without delay to repair the breach of Covenant obligations. Within twenty-four hours Aristide Briand, Acting President of the Council, exhorted the two governments that until the Council heard both sides of the case, no further military movements should be undertaken and that all troops should retire at once behind their respective frontiers.[324]

Although the story continues for a couple of paragraphs, a great deal is already evident in this short text. The "crisis" begins with a telegram to the League—and indeed, the incident seems significant, rises to the level of international politics, only in crisis. The cause of the crisis is "a border incident." The crisis is an "invasion." Mangone's institutional text is able to rely rather unproblematically on images of the wills and motives of states faced with border transgressions—it need not reach behind the veil of membership to explicate the crisis or war. The Bulgarian government therefore requested a meeting of the Council—because of the invasion, not because of the incident, or the crisis, or to conduct politics, or to settle the dispute, or simply to get together and see how things were going. The politics of the community is responsive to a governmental sense of crisis—of

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[324] G. Mangone, supra note 12, at 144.

territorial transgression. Mangone goes on to tell us what the institution did, and how quickly it responded. His account stops quite naturally with the action of organs—he need not bring the reader up to date on relations along the Greco-Bulgarian border.[325]

Mangone's account of the "war in the Gran Chaco" is equally telling. In three paragraphs devoted to this crisis, he gives us the following facts about what happened in the Gran Chaco: "In 1928 fighting broke out in the Gran Chaco situated between Bolivia and Paraguay."[326] From the point of view of a history of international institutions, the war "breaks out" and provides the opportunity for the institution to expand its jurisdictional competence. Indeed, the Gran Chaco incident stands for the proposition that the League can deal with matters in the Americas despite the Monroe Doctrine and the absence of the United States. Mangone's rendition reads like the resolution of an international plenary itself:

> Hesitant before the admonition of Article 21 that nothing in the Covenant should affect the validity of such regional arrangements as the Monroe Doctrine and painfully conscious of the absence of the United States, Mexico, and Brazil from League Councils, the organization in Geneva watched the course of distant events with trepidation, hoping that the machinery of inter-American cooperation would soon bring peace. To its credit, the Council forcefully called the attention of Bolivia and Paraguay to their obligations .... Although the war was finally ended in 1936 by the exhaustion of both belligerents rather than by the concerted efforts of the international commission and the American republics, the concern of the League for the Western Hemisphere had boldly affirmed its preoccupation with peace everywhere.[327]

Although equivocation and self-containment mark the genius of the move to institutions, they raise some questions about the institutional move itself. To the extent institutional practice seems merely to repeat the establishment moment, the promise of a redeemed politics is constantly postponed. By transforming wars into "disputes" which provide opportunities for institutional development, international relations are radically decontextualized. In a sense, it is little wonder that the League found the "incidents" in Ethiopia and Manchuria so troublesome.[328] Moreover, as institutional development transforms wars into disputes, peace becomes an absence—the absence of war or the settlement of disputes.

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[325] Id.

[326] Id.

[327] Id. at 144-45.

[328] See id. at 149-53; 2 F.P. Walters, supra note 10, at 465-99, 623-91.

For the plenary, peace is an elaborate self-reference—of the institution's own success, of the "spirit of the League," and of the fulfillment of the Covenant's assertions. The positive peace, the production of justice, remains to be achieved by others elsewhere. Indeed, to the plenary, peace is the absence of an agenda, for the plenary works like the Covenant—against an image of anarchy and tyranny, rather than toward justice.[329] As a result, we might best think of the Second World War as the elaborate fulfillment of the League's best substantive imagination—a war of all against the aggressor which erased the plenary agenda altogether.

Of course, it would be a mistake to evaluate the drive to institutionalize international society solely on the basis of the move from the Paris Conference into the League plenary. Public international lawyers have devoted a great deal of energy to international institutions in this century. In waves of enthusiasm and discouragement, we have erected, analyzed, critiqued, reformed, defended, and worked in an increasing array of international institutional settings. Focusing on a few Anglo-Americans writing about the League of Nations or about voting in the United Nations and the Law of the Sea Conference only begins to tap the collective work of institutionalization. Most historians of international institutions have, quite rightly, seen the League plenary as part of an institutional endeavor which needed to be completed, which only reached maturity when supplemented by judiciary and administration, which, in short, only now will become able to

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[329] This image of struggle against an imaginary world of freedom and constraint was prevalent in judicial rhetoric of the period as well, exemplified best by the *Lotus* decision, in which the court opens with an assessment of the legal world—"Is this chaos or is this tyranny?" it asks—only to determine that the answer does not matter:

> This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.
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>   . . . .
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> Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case . . . .

The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, quoted in International Law Cases, supra note 4, at 46-47.

fulfill its promise should the United States join the fully articulated institutional regime established by the Law of the Sea Convention. That people also thought this in 1919, however, suggests that these early texts might have established a pattern continued in the later extension of institutions.

Whether the insights developed in this analysis of the move to a voting plenary might be extended to the development of administration and judiciary remains to be seen. Nevertheless, at first glance, the collective imagination of those who over three generations built and analyzed the modern edifice of international institutions seems remarkably coherent. Across more than eighty years, a group of rather diverse intellectuals produced hundreds of texts and institutions with quite similar features. At a most preliminary level, these men shared a sense of the necessity and desirability of the institutions they set up as reactions to a disorganized world. The transformative power of institutionalization seemed powerful after the First World War, the Second World War, and the wars of decolonization. Although each generation experienced and acknowledged the proceduralization of their dreams and the breakdown of the organizations they founded, faith in institutionalization and fear of disorganization remained largely unshaken.[330] Over and over, developments

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[330] "Mankind has endeavoured again and again to supersede international anarchy by rational methods, and every trial has in the long run proved a failure." G. Schwarzenberger, supra note 30, at 175. Nicholson echoes these sentiments: "We came to Paris confident that the new order was about to be established; we left it convinced that the new order had merely fouled the old." Peacemaking 1919, supra note 18, at 187. But in their criticisms lie the seeds for a new institutionalization, a new order. It is not the process of organization itself which leads to failure, but rather, specific features of the organization which spell its own doom. G. Schwarzenberger, supra note 30, at 176, goes on to state: "However well devised an international organization may be, it will only work in practice if collective interests exist, if the common interests are recognized by all concerned, and if the recognition of the common necessities brings about the birth of a collective will." Nicolson goes on to blame the "inevitable curse of unanimity [which] leads to the . . . inevitable curse of compromise. All compromises have an element of falsity, but when they have to be referred back to governing principles or generalisations a double falsity is introduced. . . . This falsity . . . . was the root-cause of the whole failure" of the League. Peacemaking 1919, supra note 18, at 189. Claude, writing on the perceived failure of the League to keep the peace, asserts: "This total collapse of world order produced not so much a sense of the futility and hopelessness of international organization as a vivid awareness of the need for and a resolute determination to achieve an improved system of international organization." I. Claude, supra note 8, at 57.

The Security Council of the United Nations inherits the organizational ideal but none of the procedural flaws of its predecessor. Of the Security Council, Mangone writes: "Nowhere in the world or ever in history has there been assembled such a potential for preventing international war." G. Mangone, supra note 12, at 191. The ideals survive, the failure of their realization attributed not to the dream, but to the lack of smoothly operating machinery. Thus, Henkin writes: "The old infrastructure of principles, assumptions, and institutions has survived. New law for cooperation in the common welfare has taken root. The new founda-

which began as utopian aspirations in the literature of international institutions—to replace empire, end war, or redistribute property—ended as an institutional accomplishment: voting, administrative law, or dispute resolution procedures.

At the very least, the relationship between law and politics which animates the recapitulation of the relations among Conference, Covenant, and plenary; within the plenary among membership, voting, and organs; or in voting literature among unanimity, majority voting, and consensus, suggests an approach to the recurring tripartite organizational form in international affairs. The Covenant, closing the Peace Conference with a legal document, promises to close political debate, to freeze it, to permit the politicians to return to their capitals without fear that their work will be undone. In the Covenant, law closes the social rupture worked by politics. In the plenary, law reverses direction, inaugurating a new politics, promising to channel politics and enable debate without rupture. Law becomes facilitator, background procedure, mechanism, forum.

Together, these two relationships between law and politics suggest that international law can be alternately strong and supple, standing above political struggle, stopping it, as well as humbly waiting in the wings, serving political debate, structuring it. Both efforts are performed in a self abnegating way—the document can end politics because it freezes politics, and the plenary can structure politics because it continually reassures the agents of political energy that they can remain separate, powerful, and yet have institutional life given their collective projects. These images of law suggest some rather unsurprising roles for the judiciary and the administration.

The judiciary, organ of the law, must control both the text, protecting the political settlement, and the plenary, protecting the structure within which politics remains peaceful. These two controlling functions, however, are humble; both proceed in the name of protecting and facilitating political life. The result is a judiciary, not as various peace planners proposed, which might resolve disputes and itself substitute for war, but as it developed, first in the Permanent Court of International Justice and then in the International Court of Justice and United Nations Administrative Tribunal—as the exceptional intermeddler, the formalist interpreter familiar from domestic jurisprudence. A more ambitious judiciary, the judicial mechanism for the resolution of disputes which might fulfill the promise of the Hague arbitration arrangements, enters the scene only after faith in the ple-

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tion for international order—the law of the U.N. Charter outlawing war—is occasionally shaken, but stands." L. Henkin, supra note 3, at 313.

nary has been lost in the maturation of voting discourse—only in the United Nations Law of the Sea Treaty.

The administration must faithfully implement the product of the plenary. It will carry out the vote, not as the plenary carries out the Covenant, but without reopening the political struggle. Passed first through the Covenant, then the plenary, through the vote, and into the administration, institutional action is cleansed of politics. The administration becomes the instrument of political life which, thanks to the legal mechanisms for marking political closure, can be imagined to have already taken place. Thus, we find the administration developed by the League, but expanded and matured in the U.N. years, situated between notions of its independence from members, organs, politics, and texts. Whether discussing the role of the Secretary General, the structure of staffing, or the administrative review of staff behavior, the rhetoric is one of simultaneous independence from politics and dependence upon the international institution. The two strands which had been joined by the Covenant and the plenary—politics and international institutional activity—are now radically separated.

Treating the constitution of the Covenant-plenary—the movement to a legislative organ—as only one part of the story of the move to international institutional life recapitulates the maturation process exhibited by literature about voting throughout the institutional regime. The League, building upon the immature nineteenth-century conference system, developed a standing parliament with operative, if defective, systems of voting and membership. The United Nations reformed that parliamentary system and, building in turn upon the nascent civil services of the League and the International Labor Organization, developed a workable, if defective, administrative apparatus. Finally, the Law of the Sea Conference, while reforming the voting practices of the United Nations system and extending its administrative apparatus, is chiefly to be remembered for having contributed a complex mechanism of dispute resolution and adjudication, built on the experiences of the League and United Nations systems. The complete apparatus suggested by this story is the tripartite structure familiar from domestic civics.

The 1914-1919 break suggests something about the rhythmic energy which fueled the development of this more complete institutional apparatus. Were this analysis to be extended, one might expect to find a series of motions, as each generation transformed its utopian aspirations for peace, security, and freedom into institutional procedures, processes, and reforms, which in turn promised peace, security, and freedom. Reduced to mythic rhythm, the story is easy to tell.

Three periods, three academic generations, three institutions, three institutional dimensions. With the League came parliament, with the U.N., administration, and with the United Nations Law of the Sea Conference, adjudication. All three share an image of their necessity, their coherence, completion, and collapse.

Completing this myth of three generations might yield a more complicated sense of discursive rotation. At this preliminary point, one might compare the tripartite spatial organization of institutional types (which provides a sense of intergenerational temporal progress as well)—legislative, administrative, and adjudicative—with the tripartite temporal organization of judicial activity—jurisdiction, merits, and remedies. An initial set of correspondences seems intuitively apparent: Jurisdiction is to merits as adjudication is to legislation; merits are to remedies as parliament is to administration; and so forth.

It becomes more difficult when one attempts to describe these intuitively appealing correspondences in any detail. At first it seems obvious that the differentiating mechanisms are repeated. It is a common relative reason, objectivity, formality, legality, and cognitive controllability, which differentiates adjudication from legislation and jurisdiction from the merits. It is a common passion, subjectivity, informality, and political unpredictability, which differentiates parliament from the judiciary. The picture becomes more complex when the administration and remedies are added, for these terms seem to combine reason and passion, to face both legislation and adjudication in similarity and difference. Further confusion is generated when we realize that each boundary of differentiation is sustained by an image of relative objectivity as well as subjectivity. That the enormous number of supple differentiations provided even by this simple mental pattern of three forms and two differences could yield such a stable pattern of institutional development in this century is the puzzle that this article has sought to begin unraveling. I have sought the practices of coherence which knit these unstable social images into repeated patterns and rhythms.

The 1919 move to a plenary has suggested that this coherence might lie partly in a continual promise, or a continual sense of becoming—becoming organized—which is sustained by an elaborate set of rhetorical equivocations. International institutions promise and reassure that international social life is constantly moving forward, transcending a situation of violent politics for a more comfortable world. It would be possible to think of the move to the League either as a statement about our collective ideals—as a cultural reminder of our better natures—or as a grotesque hallucination, a continual diversion

from the task of actually dealing with violence. Similarly, it is hard to know how to evaluate the textual movement from law to politics or from utopian visions to pragmatic practices. On the one hand, the institution seems a safe repository for our cultural fears, enabling us to live without either confronting these neurotic fantasies about a collapsed civilization or accepting the extent of our fall from the garden we imagined. On the other, the institution seems to express an elaborate anti-intellectualism, constantly enslaving our thought as the humble servant of our practice, allowing us to forget what we know to be true about the law and politics of our situation. Only by interpreting the 1919 move to institutions as a cultural achievement do we seem able to wrest an institutional innovation from a war which might otherwise have been fought in vain.