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

215 Read chronologically, histories of the League show an increasing interest in humanitarian and social issues, from A. Sweetser, supra note 80, at 173-86, 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 remaining 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.23,1928 (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

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 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 transformative 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.


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

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 naive. 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

220 On the humanitarian and decolonization work of the Covenant and League, see R. Heine, supra note 14, at 153-69; 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 “[i]t seems 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 provides: “Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national 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 suffering,” appearing only as a nexus among “members” who agree to act. The Covenant evidences the moment of their agreement, at best forewarning or promising their action. When they act, the members will encourage and promote the establishment of other organizations—perhaps through other covenants—which have, in some procedure 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 humanitarian 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 inter-national Conventions existing or hereafter to be agreed upon, the Members of the League:
(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and indus-

---

222 A. Zimmern, supra note 19, at 243.
223 Id. at 244 (emphasis omitted).
224 Id.
225 Whereas the League Committee occupied a central place in the functioning of the Conference, the Committee which was drafting Section XIII treated 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 197, at 308-38 (collecting resolutions of organizations commenting on the Covenant). It is interesting that the only such proposal to be adopted concerned 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 international bureaus already established by general treaties if the parties to such treaties consent.” 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 106. 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 beneficence 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 “associating” with the United Nations, see 1 H. Schermers, supra note 1, at 177-80.
maintain the necessary international organisations." 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. 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 situ ate 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

---

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); I 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.

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 re drafted 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.
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 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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{235} The League was to play a

\textsuperscript{232} J.C. Smuts, supra note 141, at 8.

\textsuperscript{233} A. Zimmern, supra note 19, at 241-42. J 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 unpromisingly, as if to add "where they belonged" by logic, convenience, and good sense. Drafting a covenant is not the place for issues like that.

\textsuperscript{234} J.C. Smuts, supra note 141, at 11.

\textsuperscript{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
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 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

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. Zimmerm notes of wartime propagandists (other than the Fabians) that:

"The 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. Zimmerm, 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 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

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 armament 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. Zimmerm, supra note 19, at 162-63 (emphasis in original):

[Curiously 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 prohibition. None of them proposed that war, following the slave trade, should cease to be a recognized 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.]

Id.
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. Although alternative dispute resolution might occur in differentially legal forums—some proposed extending the Hague arbitration scheme, others advocated a complete judicial appa-

---

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 projects 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 mendment, the Contracting Powers engage thereupon to cease all commerce 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 Powers 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.

---

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." 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.

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

---

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, 1913, 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.
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. 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 law 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

---

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.


[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 mature 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 an 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 outlawy, these two approaches to peace coexist uneasily. An imposed “cooling off period” while a dispute is processed to resolution envisages 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

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,

251 League of Nations Covenant art. 16 provides that aggressors "may be declared to be no longer a Member of the League."
252 1. 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. 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.

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. 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 adjusting the peace, and most wartime proposals described the League as a system for peaceful change. 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.” Rather than prohibiting war, article 12 specifies procedures which members


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.

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 organisation, 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." Rather than providing mechanisms simply categorizes disputes, reminding us of its commit-

239 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.

1987] MOVE TO INSTITUTIONS 941

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 preserves 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.

... 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.

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 location. 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

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.

. . .

Larnaudé 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 Larnaudé, 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 . . .

. . .

Thus the meeting ended with a British victory. For the insertion of the new words made it clear that without them, as M. Larnaudé had argued, the first part of the clause was "only a

\(^{262}\) See W. Kappard, 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).

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'."\(^{264}\) 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

\(^{264}\) 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.").

\(^{266}\) A. Zimmern, supra note 19, at 246-47.

\(^{267}\) Id.
have “teeth,” placed their faith in article 16:264

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

264 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; I.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; I.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 choose”); 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).
between 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


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 was right that if a resort to war was 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 to questions of boundary.

A. Zimmer, supra note 19, at 227. To Zimmer, 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 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 the settlement guaranteed by this Covenant [has been rejected by the parties] any feature of the settlement guaranteed by this Covenant [has been rejected by the parties] 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 States). The Covenant drafters rejected this version, eliminating the difficulty by severing the States). The Covenant drafters rejected this version, eliminating the difficulty by severing the States"

274 See E.F. Walters, supra note 10, at 55 (discussing article 19 in his otherwise extensive

275 Peace making 1919, supra note 18, at 91-92. This institutional and political deferral.

276 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 admit 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 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

---

276 Peacemaking 1919, supra note 18, at 92.
277 See P. de Man, Allegories of Reading—Figural Language in Rousseau, Nietzsche, Rilke, and Proust 37 (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 solidarity 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 associative 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. 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.  

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. Zimmer, supra note 19. On the notions of a "plenary" session, see I. 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 "council" 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 (1946). 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).
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. 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. 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, the Sea, Oct. 7, 1982, arts. 279-299 & Annex VI; see Adee, The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention, 11 Ocean Dev. & Int’l L. 125 (1982); Adee, 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. Ranshoff-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. Bower, 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.

1987] MOVE TO INSTITUTIONS

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.

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.

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 responsible 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 ensuring a connection between 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


284 See, e.g., Hicks, supra note 273, 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. Donn, 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.IJ. (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 implicit.

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. Donn, 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. Eles, 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 treatment of the pre-1935 period); W. Koo, supra note 278, at 11 (noting the changes in voting practice in the League, and concluding that the equation of equality and unanimity “frequently serve[s] to cloak the functioning of the principle of equality of voting”); id. at 8-25 (distinguishing international conferences, at which the argument as to majority rule could be made, 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 me to be a logical contradiction of the premise of complete freedom of action from self-imposed limits.

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-