Scholars began to suggest that the League either need not, as a matter of law, or did not, as a matter of practice, continue to abide by a rigid unanimity rule. Some texts credited the Covenant drafters with the flexibility and foresight to have left some loopholes for majoritarianism. Others rebuked the drafters for the naive notion that unanimous decisions were governed by both the rule that one could not be judge in one's own case and the principle of unanimity. See G. Eles, supra note 286; C. Riches, supra note 278. Jentsch saw the move away from unanimity as a process of institutional maturation. Jenks, Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations, in Cambridge Essays in International Law—Essays in Honor of Lord McNair 48, 49 (1965); see Heinberg, supra note 73; Hill, Unanimous Consent in International Organization, 22 Am. J. Int'l L. 319 (1928); Monaco, Les Systèmes de Vote dans les Organisations Internationales, in Mélanges en l'Honneur de Gilbert Gidel 469, 471 (n.d.) (explaining that unanimity has only been workable for the League because exceptions had been developed); Williams, The League of Nations and Unanimity, 19 Am. J. Int'l L. 475 (1925); see also J. Ray, supra note 209, at 221-36 (commenting on article 5). This treatment is extended and documented in J. Ray, Le Politique et la Jurisprudence de la Société des Nations (1930-1934).

Unanimity is the necessary rule for international matters in this sense that no independent state can be compelled without its own consent to accept obligations; the existing society of states has no legislature. States members of the League of Nations have created in the League a persona of international law analogous to a body corporate in private law, but with a strictly limited sphere of activity and a right to decide "by consent". In so doing they have departed from the theory of the absolute equality of states which is closely allied to the theory of unanimity. For the internal management of the collectivity so created, unanimity is not requisite, and as a result of the amendment of the Covenant, of the League of Nations, or of the accepted practice of the conduct of its affairs, unanimity is not necessary for expression of opinions, wishes, and recommendations (resolutions) of the collectivity, nor for its action in a semi-judicial capacity; equally unanimity is not needed for certain acts relating to the League, such as the admission or expulsion of members, the amendment of the Covenant, of the League of Nations, or of the increase of membership of the Council. Most important of all, the Covenant of the League can be amended without unanimity. In some of these cases a bare majority can decide; in others a certain fractional majority or unanimity minus one is required. Further there is at work the very human desire not to be isolated which prevents a real insistence on the principle of unanimity by small minorities on ordinary occasions.

So the League, following in matters international developments which have already taken place in national history, has in its own limited sphere broken with and passed beyond the principle of unanimity.

Williams, supra note 287, at 488. See J. Brierly, supra note 3, at 80-81 (The "rigidity" of the unanimity rule may be alleviated by "the immense force of international public opinion" and by the use of majority methods in committees;); H. Laski, A Grammar of Politics 627-28, 631-33 (4th ed. 1981) (Although noting that "[i]t is elementary in the history of States that a demand for unanimous consent is fatal to effective government," he suggests that there are numerous devices available to the League to overcome the handicaps of the unanimity rule;); E. Mower, International Government 176-77 (1931) (The Covenant made significant inroads upon the traditional rule of unanimity in international bodies without depriving states of essential features of their sovereignty;); J. Stone, International Guarantees of Minority Rights 184-

[Vol. 8:418]

[1987] MOVE TO INSTITUTIONS

ity might be effective in "the real world" and credited politicians with generating a more realistic, if deviationist, practice. See G. Eles, supra note 286; C. Riches, supra note 278. Jenks saw the move away from unanimity as a process of institutional maturation. Jenks, Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations, in Cambridge Essays in International Law—Essays in Honor of Lord McNair 48, 49 (1965); see Heinberg, supra note 73; Hill, Unanimous Consent in International Organization, 22 Am. J. Int'l L. 319 (1928); Monaco, Les Systèmes de Vote dans les Organisations Internationales, in Mélanges en l'Honneur de Gilbert Gidel 469, 471 (n.d.) (explaining that unanimity has only been workable for the League because exceptions had been developed); Williams, The League of Nations and Unanimity, 19 Am. J. Int'l L. 475 (1925); see also J. Ray, supra note 209, at 221-36 (commenting on article 5). This treatment is extended and documented in J. Ray, Le Politique et la Jurisprudence de la Société des Nations (1930-1934).

Unanimity is the necessary rule for international matters in this sense that no independent state can be compelled without its own consent to accept obligations; the existing society of states has no legislature. States members of the League of Nations have created in the League a persona of international law analogous to a body corporate in private law, but with a strictly limited sphere of activity and a right to decide "by consent". In so doing they have departed from the theory of the absolute equality of states which is closely allied to the theory of unanimity. For the internal management of the collectivity so created, unanimity is not requisite, and as a result of the amendment of the Covenant, of the League of Nations, or of the accepted practice of the conduct of its affairs, unanimity is not necessary for expression of opinions, wishes, and recommendations (resolutions) of the collectivity, nor for its action in a semi-judicial capacity; equally unanimity is not needed for certain acts relating to the League, such as the admission or expulsion of members, the amendment of the Covenant, of the League of Nations, or of the increase of membership of the Council. Most important of all, the Covenant of the League can be amended without unanimity. In some of these cases a bare majority can decide; in others a certain fractional majority or unanimity minus one is required. Further there is at work the very human desire not to be isolated which prevents a real insistence on the principle of unanimity by small minorities on ordinary occasions.

So the League, following in matters international developments which have already taken place in national history, has in its own limited sphere broken with and passed beyond the principle of unanimity.

Williams, supra note 287, at 488. See J. Brierly, supra note 3, at 80-81 (The "rigidity" of the unanimity rule may be alleviated by "the immense force of international public opinion" and by the use of majority methods in committees;); H. Laski, A Grammar of Politics 627-28, 631-33 (4th ed. 1981) (Although noting that "[i]t is elementary in the history of States that a demand for unanimous consent is fatal to effective government," he suggests that there are numerous devices available to the League to overcome the handicaps of the unanimity rule;); E. Mower, International Government 176-77 (1931) (The Covenant made significant inroads upon the traditional rule of unanimity in international bodies without depriving states of essential features of their sovereignty;); J. Stone, International Guarantees of Minority Rights 184-
worried that the League could not cope with the disputes that broke out often blamed the unanimity rule and suggested that even practical departures from it could not overcome the obstacle unanimity posed to community action. Late in the 1930's, texts that were even more

of International Law by the Permanent Court of International Justice 46-50 (1934) (It would be appropriate for the Council of the League to invoke the principle that no "state is judge in its own cause" in order to override the unanimity rule when consenting action under article 11 of the Covenant because ambiguous language in a covenant should be interpreted so as to fulfill the covenant's larger purpose."); Hostie, Revision of the Covenant of the League: 1. in World Organization; A Balance Sheet of the First Great Experiment 345, 384 (1942) [herein, "A Balance Sheet"] (arguing that "in disputes, unanimity has not been a stumbling-block in practice," and that the rule should be retained with minor modifications). See H.N. Brailsford, Towards a New League 56-59, 63 (1936) (outline of the League's failures to act effectively in international politics, along with a plea that the League be reformed along the lines of a federal government that can enact its measures by majority vote); L. Davies, supra note 53, at 137 (insisting that the Council of the League had been "hampered by the rule of unanimity which prevents it from reaching rapid decisions and from becoming an effective executive organ of the international authority"); id. at 146 (The Covenant should be extensively amended, "including the abolition of the rule of unanimity, which has never yet worked in any constitution."); O. Newfang, The United States of the World—A Comparison Between the League of Nations and the United States of America 46, 45-40 (1930) (largely as a result of the rule of unanimity, the League was essentially paralyzed and "contributed practically nothing to the law of nations"); Kayser, French Policy and the Reconstruction of the League, in Problems of Peace, supra note 288, at 161, 167-69 (12th ser. 1938) (argument that the unanimity rule should be abolished and that the League should be reformed on a regional basis); J. Greene, The League: Its Weakness and a Possible Remedy—Address Delivered at the Fletcher School of Law and Diplomacy (Jan. 9, 1935), in 5 League of Nations Pamphlets 10-11, 14-15 (1929-1939) (calling for the reorganization of the League along regional lines with greater possibilities for majority decision making). Cf. F. Dunn, supra note 278, at 123-34 (general argument that the unanimity rule is a "serious obstacle" to the work of international conferences); W. Elliott, The Pragmatic Revolt in Politics—Syndicalism, Fascism, and the Constitutional State 482-83 (1928) (The limitations of the unanimity rule meant that the primary value of the League was in being a "settled method of conference on international problems" and in doing "cooperative welfare work."); Heinberg, supra note 73, at 65-67 (example of the failure of the unanimity rule in Poland, resulting in a stagnation that was finally overcome by "violent revolution"); Rollin, The Peaceful Settlement of All Disputes, in Problems of Peace, supra note 288, at 22, 27 (4th ser. 1930) (The unanimity rule is a "grave defect of the League Covenant; nevertheless, the Council of the League "rendered services the importance of which is difficult to exaggerate."). Further, cf. S.S. Jones, The Scandinavian States and the League of Nations 103-03 (1939) (Although the Scandinavian states generally thought the unanimity rule was a serious stumbling block to a politically effective League, they favored gradual modifications of the rule of unanimity rather than its complete replacement.); N. Politis, The New Aspects of International Law 10 (Carnegie Endowment for Int'l Peace No. 49, 1928), at 233 ("[This is true of the League,] the rule of proportion under which less than a majority of the states may pass a resolution. We see here a rule that is nothing but a means of achieving unanimity and that makes it easier to satisfy the demands of the various states."); D. Jerold, supra note 81; V. Von Hove, supra note 6, at 120 ("[T]o lay down the principle that in an international organization every important decision must be adopted unanimously... is to admit that among nations no real organization is possible, for the rule of unanimity may lead to paralysis and anarchy."); H. Rowan-Donlon, Sanctions Begone!—A Plea and a Plan for the Reform of the League 19 (1936) ("Without the unanimity rule in the League its present form would expire. Exercising the unanimity rule it loses the power of remediying grievances or of inflicting just punishment. The unanimity rule is, in fact, the unfortunate sin of the Covenant."); Eagleton, Reform of the Covenant of the League of Nations, 31 Am. Pol. Sci. Rev. 455, 463-69 (1937) (discussing proposals to reform the League Covenant, including proposals to replace the unanimity rule with some form of majority voting when considering whether to submit a dispute to the PCIU or to take collective action under article 11 or 16; Salzer, Practical Suggestions for Reform, in The Future of the League of Nations 64, 66-67, 70-71 (1936) (calling for gradual replacement of the unanimity rule with majority voting in "special conditions").

The fact that the League was based on the absolute sovereignty of the States made it necessary that its decisions should be unanimous except in a few specified cases. This rule of unanimity has been one of the greatest hindrances to the efficient working of the League—indeed it is hardly too much to say that it has often paralysed it. Its result has been that the decisions of the League have usually been unsatisfactory compromises. It is absurd that one State, however small, should be able to prevent the League from arriving at a decision. It is also undemocratic. It would be as reasonable to give the same representation in a national parliament to the smallest village as to a city with a million inhabitants. Yet, if the principle of national sovereignty is accepted with its necessary corollary that no State must ever be compelled to do anything against its will, the rule of unanimity is inevitable.


[There are two conclusions arising out of...]. The Great Powers in the League] which are not so universally recognized.

One is that nothing is to be gained by trying to amend the rule. It is tempting to argue that a body of nearly sixty members cannot be expected to be unanimous and that, therefore, some method for arriving at a decision without unanimity ought to be introduced. But, in point of fact, the unanimity rule has hardly ever, if at all, proved a real obstacle at Geneva. The Smaller States are always ready to give way. They are never desirous of pushing things to extremity and impairing the life of the League, where they fare better than they would under any practicable alternative system. As for the Great Powers, when there is a serious disagreement between them, it is idle to imagine that it can be overcome by a majority vote. The result would most probably be to drive the Power in the minority out of the League. It is not by mechanical devices of this sort that wide differences of opinion and divergences of interest can be overcome.

The second practical conclusion is that, when the Great Powers are in disagreement on a particular subject, it is of no use to try to be solved by "referring it to the League." Such proposed extensions of the League's functions into areas between the capitals concerned by the ordinary means of diplomacy; both methods have their advantages, and there is no peculiar merit in either.

Pessimistic appeared, suggesting that although unanimity may have been essential to international organization, it presumed the very community of interests it was meant to bring about and was inherently unworkable in a world of good guys and bad guys. The only hope was to abandon organization and return to war."
These texts advanced similar arguments against unanimity and in favor of some alternative voting scheme (usually majority voting) to those which had been advanced in support of unanimity during the preceding period. Unanimity, as a matter of theory and practice, these writers argued, could neither respect sovereign autonomy nor generate sovereign cooperation. It permits states to be held hostage by one bad actor, both preventing international action and centralizing international authority so as to override sovereign authority. By reducing international cooperation to the lowest common denominator of sovereign accord, unanimity emasculates the institution and sabotages sovereign cooperation. In short, unanimity slows the momentum of institutional life and permits backsliding towards anarchy.

During this period, majority voting of one sort or another seemed the way to move forward from anarchic state interests into an organized world. Texts which treated the international institution as the sum of its sovereign members defended majority or weighted majority voting because it would decentralize international authority, allowing states to defend their interests without waiting for the go-ahead from one recalcitrant sovereign. At the same time, majority voting allows for more powerful and decisive institutional action, rendering the international mouth persuasive rather than mealy. A strong institutional mouth, in turn, fosters community. In this vision, the institution is more than the sum of its parts; it is the expression of

Clark, A New World Order—The American Lawyer’s Role, 19 Ind. L.J. 289, 294 (1944) (footnote omitted).

As far as the governmental functions of the future international community are concerned, we can hardly expect a more efficient competence than that which the Covenant of the League of Nations conferred upon the Council and the Assembly. Both were hampered by the principle of sovereign equality carefully maintained by the Covenant—the principle that no State can be bound without or against its will. Consequently, both agencies were able to adopt decisions binding upon the members only by unanimous vote and with the consent of the members not represented in the Assembly. It is superfluous to remind that these agencies did not and could not fulfill their task of guaranteeing the collective security, the peace of the world, the task for which the League was erected. If this end is to be pursued more successfully, but within the narrow limits of the principle of “sovereign equality,” the center of the international organization must, then, not be placed in an agency which pretends itself as its government and which can, in reality, only a sham government. The center of gravity must be shifted to an agency whose functions are not paralysed by the principle of sovereign equality.


It might have been foreseen from the very beginning that a world government will not succeed if its decisions have to be taken unanimously, binding no member against his will, and if there is no centralized power to execute them. It is not to be wondered at that a world parliament, or however the Assembly of the League of Nations may be characterized, can be of only nominal value if the principle of majority be almost completely excluded from its procedure. Kelsen, Revision of the Covenant of the League: 11, in A Balance Sheet, supra note 289, at 392, 396.

This view was firmly entrenched by the post-War period. See, e.g., Jenks, supra note 287, at 49 (“Unanimity as a mode of taking international decisions accordingly became, and remains, a discarded principle.”); Monaco, supra note 287, at 469, 471 (arguing that unanimity is not workable once a group of autonomous entities find themselves “in society”). It ought . . . to be recognized without further hesitation that majority rule in a world organization is just as much of the essence as in a local or national authority. The lack of it was a fatal defect in the League of Nations, in which any important and prompt action to prevent aggression was precluded by the requirement of unanimity except in relatively unimportant matters. Hamstrung with this impossible handicap, the wonder is not that the League proved impotent to prevent major war. In retrospect the wonder is that anyone could have expected it even to give pause to a determined aggressor.
sovereign cooperation. This phase was ascendant by 1945, and the institutions spawned after the Second World War exhibit a veritable cornucopia of majoritarian and weighted-voting formulas, ranging from the Great Power veto in the United Nations Security Council to the deliberately balanced voting schedule of the International Monetary Fund.

By the mid-1960’s, however, the luster was off majoritarianism. As the United Nations seemed ever less likely to live up to its

---

296 For the U.N. combination of majority voting and veto correspond to the real “relative interests and responsibilities of the members,” associating compulsory unanimity with pre-World War I powers, and hence, with the preorganizational period of international life, see Claude, supra note 8 at 125; W. Koo, supra note 278, at 285, 285-92 (arguing that the U.N.’s combination of majority voting and veto is superior to, and corresponds to, the real “relative interests and responsibilities of the members.”). For the U.S. combination of majority voting and veto, see supra note 1, at 327-64. For the U.N. positive majority/Great Power veto scheme is found in Weinschel, The Doctrine of the Equality of States and Its Recent Modifications, 45 Am. J. Int’l L. 417 (1951) (tracing the history of deviations from unanimity in the context of respect for the principle of sovereign equality). See also Vattel, The Law of Nations, 1 (1758) 273 (good analysis of U.N. Charter provisions and negotiating history written when the case for voting mechanism was uncontroversial). Interestingly, the veto was attacked and defended as unan-

297 E.g., Zamora, Voting in International Economic Organizations, 74 Am. J. Int’l L. 566 (1980); see H. Schermers, supra note 1, at 327-64. For the U.N. majority/Great Power veto scheme is found in Weinschel, The Doctrine of the Equality of States and Its Recent Modifications, 45 Am. J. Int’l L. 417 (1951) (tracing the history of deviations from unanimity in the context of respect for the principle of sovereign equality). See also Vattel, The Law of Nations, 1 (1758) 273 (good analysis of U.N. Charter provisions and negotiating history written when the case for voting mechanism was uncontroversial). Interestingly, the veto was attacked and defended as unan-
 League of Nations, supra note 290, at 70-71 ("Any procedure based on a majority vote would have to be bounded on some allocation of voting strength, with all that implies in the way of classifying the states composing the League, putting them into different categories based on intricate calculations of population, economic resources, and so on."); Webb, Die Organisation der Staatsgemeinschaft nach dem Kriege—Das Problem Einer Wahrend Repräsentation der Völker, 44 Die Friedens-Warte 49 (1944) (argument that the League was seriously flawed by incorporating the principle of equality of representation, and that international government after the War should adopt a system of representation that more accurately reflects the relative strength or power of member nations).

301 See T. Hovet, supra note 298, at 112-20 (summarizing advantages and difficulties raised for states and international institutions by bloc voting); McIntyre, Weighted Voting in International Organizations, 8 Int'l Org. 484, 497 (1954) (advocating the "special majority" as a "mild way" between Great Power dominance and equality of voting). In Newcombe, Wirt & Newcombe, Comparison of Weighted Voting Formulas for the United Nations, 23 World Pol. 452 (1971), the authors see voting reform as the potential "key" to other United Nations reforms, arguing that the principle of one-state, one-vote in the General Assembly has led to an erosion of member confidence, debilitating both members and the institution, and summarizing the literature on voting factor analyses of the U.N. voting blocs and analyses of the impact of various weighted voting schemes on those bloc configurations). See also M. Brinkmann, Majoritätsprinzip und Einstimmigkeit in den Vereinten Nationen (1978) (a late arrival to bloc/weighted voting analysis of the General Assembly); C. Manno, Weighted Voting in the United Nations General Assembly: A Study of Feasibility and Methods (1964) (unpublished Ph.D. thesis on file at American University) (analyzing the effectiveness of various General Assembly resolutions from both an institutional and national standpoint, depending in part upon how the resolution was voted); Newcombe, Ross & Newcombe, United Nations Voting Patterns, 24 Int'l Org. 100 (1970) (typical statistical analysis of U.N. voting); id. at 100 n.1 (bibliography); Newcombe, Young, & Sainko, Alternative Passes: A Study of Weighted Voting at the United Nations, 31 Int'l Org. 579 (1977) (showing how various weighted voting formulas would have changed the outcome on past U.N. resolutions).

302 Majority decisions in the equitabilist General Assembly are likely to be undemocratic in the sense that they do not represent a majority of the world's population, unrealistically in the sense that they do not reflect the greater portion of the world's real power, morally unimpressive in the sense that they cannot be identified as expressions of the dominant will of a genuine community, and for all these reasons ineffectual and perhaps even dangerous.

1. Claude, supra note 8, at 126-27.

An overwhelming majority on one side ... offers too great a temptation to ride roughshod over the minority—even though that minority holds the key to effective implementation of resolutions—and too little stimulus to fresh thinking and hard work, especially the work of persuasion, argument, patient negotiation, and search for consensus ...


The key problem in contemporary international decision making is the divorce of power from voting majorities resulting from the expansion of membership in the international system. This renders majority voting increasingly useless for lawmaking decisions because of the danger of powerful alienated minorities. Indeed, given the prominence of ideological divisions in the system, majority voting is highly likely to produce important disaffected minorities. Since weighted voting is politically unacceptable except in some specialized organizations ... the traditional decision-making procedures of the United Nations and its predecessors are seen as being no longer adequate to the task of international rule making.


303 For cooperation-based positions against majoritarianism, see, for example, The Meaning of Consensus in Multilateral Diplomacy, in Declarations on Principles—A Quest for Universal Peace 259, 260 (R. Akkerman, P. Kriekens & C. Pannenburg eds. 1977) (starting from the proposition that "[i]t is clear that in the present structure of the international community of states, with its regional and other block formations holding divergent views of their interests, recourse to the traditional process of voting has not been conducive to international cooperation"; see, e.g., C. Manno, supra note 301 (seeing weighted voting as the natural next step in the evolution of international institutions after the move from the anarchy of unanimity through the adolescence of majoritarianism and analyzing various formulas which might be adopted). See also Weintrob, North-South Dialogue at the United Nations: How the UN Votes on Economic Issues, 53 Int'l Aff. 188 (1977). Weintrob investigates "cynicism about votes in the General Assembly and its major committees" and quotes American Ambassador Scali: "Each time this Assembly adopts a resolution which it knows will not be implemented, it damages the credibility of the United Nations. ... Unenforceable, one-sided resolutions destroy the authority of the United Nations." Id. at 188. Scali's statement appears in U.S. Warnings that Present Voting Trends May Overshadow Positive Achievements of the United Nations, 72 Dept. St. Bull. 114 (Jan. 27, 1975) (statement of John Scali, U.S. Ambassador to the United Nations).

304 E.g., Sohn, Voting Procedures in United Nations Conferences for the Codification of International Law, 69 Am. J. Int'l L. 310 (1975) (meticulous summary of post-1944 practice concluding that the international community had come "full circle" from unanimity to consensus which is promoted as a way to "avoid voting"); see S. Bailey, supra note 49, at 74 (analyzing consensus procedures in the Security Council, concluding that they are "decisions" despite the lack of vote, and acknowledging that "[t]he word consensus, and the idea it denotes, have become fashionable in United Nations circles during the past four years," despite "some uncertainty as to its precise meaning"); Ninth Conference United Nations Next Decade, Decision-Making Processes of the United Nations 11-12 (Vail, Colo. 1974) (setting out arguments for and against the move to consensus); Bastid, Observations sur la Pratique du Consensus, in 1 Multitudin Legum Ius Unum—Festschrift für Wilhelm Wengler 11 (1973); Bremen, supra note 298, at 100-02 (arguing that consensus is required because the U.N. major-
Consensus seemed desirable as a voting technique because it avoided all the problems of majoritarianism. By exactly translating political reality into institutional action, consensus keeps the institution in step with all states. The minority feels attended to, included, respected; neither the big powers nor the party-blocs of the ideologically minded states are able to control the majority anymore. Consensus is the further, the Influence of the Third United Nations Conference on the Law of the Sea on International Customary Law, 43 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 566 (1983), Sohn, The Law of the Sea: Customary International Law Developments, 34 Am. U.L. Rev. 271 (1985).

The consensus system assures that decision-making at a multilateral negotiation of a convention will not be dominated by the numerical superiority of any group of nations. Rather, procedural significance will be given to the variations in the power of nations. Since it is difficult to obtain acceptance of voting systems that overtly recognize the differences in nations' importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations.


The extent to which differences in the political power of countries should be reflected in voting procedure was a serious issue not only for the Law of the Sea Conference itself, but also for the International Seabed Authority that was to be formed (in 1984) to monitor the convention's provisions on deep seabed mining reached at the Conference. As Smith noted in 1977 concerning the proposed International Seabed Authority:

One of the principal contending points of view regarding institutional arrangements has been the Group of 77's insistence that the Authority be governed exclusively on the basis of the sovereign equality of all states whereby every nation would have equal political power in the Authority's institutions. The developing countries assert, on the other hand, that because of their economic and technological advancement and their higher direct stake in the mining of the seabed, they require a voice in the Authority sufficient to protect their substantial "minority" interests.

The Evensen formulations sought to resolve these conflicting points of view by according to a demand of the developing countries that the one-nation-one-vote Assembly be declared the supreme organ of the Authority and be vested with substantial legislative powers, while providing for a chambered voting system in the Council so that developed countries could block decisions of the Authority.

Chairman Engo left these Evensen formulations almost entirely intact but chose to omit the vital protective mechanism of chambered voting. Thus, the ICNT [Informal Composite Negotiating Text] places the developed country minority at the mercy of the developing country majority within both the Assembly and Council of the Authority.

Smith, The Seabed Negotiation and the Law of the Sea Conference—Ready for a Divorce?, 18 Va. J. Int'l L. 43, 48 (1977) (footnote omitted). When President Reagan announced that the United States would not sign the accords reached at UNCLOS III, he gave as one of the reasons, the system of representation and voting in the proposed International Seabed Authority, which entailed "[a] decisionmaking process that would not give the United States or others a role they fairly reflect and protect their interests." 82 Dep't of State Bull. 71 (Aug. 1982). For discussions on the United States' position towards the International Seabed Authority and its voting procedures, see Larson, The Reagan Rejection of the U.N. Convention, 14 Ocean Dev.
perfect form of institutional deference. Moreover, consensus permits the institution to make powerful decisions and ensures compliance with such decisions as are taken. The very experience of coming to consensus builds community. Although consensus had seemed the Law of the Sea Conference’s major contribution to international institutional procedure and the key to the sense that a step forward had been taken from the anarchy and tyranny of majoritarianism, after about 1980 the consensus procedure came to be criticized. Consensus seemed linked to minority rule—some delegations were left out of the information circuit at the Conference and a strong chairman could railroad backroom compromises through the plenary, displacing the organ of international cooperation as he overrode sovereign autonomy. A single state or minority of states, by holding out, seemed able to skew the institutional product in an anticommutitarian direction. All of these arguments about plenary decision-making procedures seem remarkably similar. The success or failure of each voting mech-

of it arose from the conduct of the Chairman. Many delegations felt that he was abusing his position by taking too large a part in the drafting of the texts—to the point where he would alter agreed negotiated compromises according to his own lights, which was undoing the bargaining process and undermining the utility of the process of incremental revision towards consensus.

anism is grounded in its ability to generate sovereign cooperation without compromising sovereign autonomy. The same arguments about authority and deference continually reappear. Plenary procedures are bad when they fail to banish the threats ofarchy and tyranny; they are good when they instantiate both autonomy and cooperation among sovereigns. This exclusion and mediation repeats the work of the Covenant and fulfills the recurring need to position the organization forward of and in touch with membership—to translate the sovereign intention into organizational activity.

Through this repetition, moreover, the literature generates a sense of forward movement, of institutional maturation through reform. Although the arguments for and against consensus sound similar to those advanced for and against unanimity, these procedures are quite dissimilar. In many ways, consensus seems the exact opposite of unanimity. Because consensus produces no actual recorded vote, no written formalization of the intersovereign accord, all that is seen is the institutional output. In unanimity, the members formalize and conclude their negotiation. Unanimity seems to associate voting too rigidly with membership to constitute a workable institution, producing an arrangement at once too decentralized and liable to frustrate sovereign initiatives.

In consensus, by contrast, the institution seems to speak as a whole, losing the individuated voices of its members. Consensus suggests a pure speech situation which translates membership directly into organizational behavior. Consensus is problematic because it associates decision making too closely with organic action. Without a record, neither the members nor the organization know what happened. The plenary, if it disappears completely into the speech of the organ, can remind neither the members of their institutional commitment nor the organ of its consensual basis in membership. Consensus fails as a voting mechanism by erasing membership from the organization, permitting the institution to lose touch with the members and the members to act too autonomously. Paradoxically, the institution can seem both too independent and too deferential.

The move from unanimity through majority voting to consensus tracks a maturation of the plenary. Unanimity suggests an immature plenary, constantly recapitulating the moment of establishment. Consensus suggests a mature organizational voice finally released from its

---

313 See H. Schermers, supra note 1, at 327-28 (differentiating consensus and unanimity); Supra, supra note 303, at 266-67 (same).

314 The point was driven home by the American withdrawal from the final treaty. See Larsson, The Reagan Administration and the Law of the Sea, 11 Ocean Dev. & Int’l L. 297 (1982).

members. Majority voting seems a middle ground, a halfway house of trust, in which formalization of minority rights is still needed to shackle the organ to the members. In this, the movement from unanimity to consensus recapitulates the movement from membership to organs which animates voting. To the extent voting stands between membership and organs, moreover, it restates the position of the Covenant between the Conference and the plenary. As a result, we might read the movement from unanimity to consensus as an elaborate repetition of the Covenant’s establishment work.

The important point about the developing decision making practices of international plenaries is not so much their continual resistance to the forces ofarchy and tyranny as their ability to recapitulate an institutionalizing momentum. Just as voting repeats the work of the establishment text, so reform of the voting mechanism repeats the movement into organization as maturation. Just as the plenary seems a fluid presence by contrast to the establishing Covenant, the solid reminder of a politics transcended, so also consensus seems the practice of a body organized, by contrast to the bondage to the disorganized membership represented by unanimity. Thus, despite a certain argumentative repetitiveness, this literature presents a sense of institutional progress and literary maturity. The very rotation through arguments generates forward momentum.

This momentum can also be traced in changing levels of enthusiasm for voting within the literature about international institutions. Voting was hardly discussed by League planners and those responsible for drafting the Covenant. Many League plans had been silent on the subject and most seemed simply to presume that one-state, one-vote unanimity voting would prevail in whatever organs were established. 315 Although there was talk at the Conference about various
schemes for majority voting or special weighted majorities favoring the Great Powers, the drafters saw the problem of balancing great and small powers as one of membership and organs, resolvable by a two-house plenary with divergent membership, rather than as a problem resolvable by voting.\textsuperscript{316}

In a way, this lack of attention to voting at the moment of establishment makes sense. As the link between members and organs, voting seems an afterthought—a procedural detail at the moment of establishment. Membership seems the more appropriate concern of an establishing conference. The trouble with this interpretation is that those who established the United Nations were surprisingly preoccupied with voting issues. Similarly, although interest in the agenda, the "single text" or package deal negotiation technique, and substantive politics of resource distribution and access dominated the literature concerning the Law of the Sea Convention, there was also a burst of writing about consensus.

The focus on membership and the rather slow development of a voting literature after 1919 seems the result of the peculiar history of the League. Membership did not work out as intended: the United States did not join, Germany was not admitted until 1926, Russia until 1934, and by 1933, Germany and Japan were no longer members.\textsuperscript{317} The failure of the League to attract and retain the Great Powers has often been seen as a reason, if not the primary reason, for the League's "failure" to implement the systems of war and peace so elaborately provided for in the Covenant.\textsuperscript{318} Attributing the League's

---

1987]  MOVE TO INSTITUTIONS  975

failure to a problem of "membership" rather than, say, the Depression or fascism, seems, at first glance, an odd approach; yet, it runs throughout the literature of international institutions.

Focusing on membership has a number of advantages. It permits us to believe that the League's difficulties are not the fault of the League, or of the drafters, or of institutional design. The blame rests outside the institution, with members, or in this case, with the politicians who refused to use the beautiful machine. It also allows us to believe that the League somehow never actually happened, never got off the ground. The world did not get organized, so of course it failed. But it was a failure of organization, not an organizational failure. Nevertheless, the problem is not as intractable as fascism—it can be changed by filling the "empty chairs."\textsuperscript{319}

Concentrating on voting only began to be interesting after the institution was firmly enough established to support reform efforts; in particular, after it became possible to advocate alternative institutions. Interestingly, analyses of the League written since 1945 have been much more concerned with the League's substantive policies and activities than with either membership or voting.\textsuperscript{320}

This move from membership to voting to substantive issues is typical of the literature about the United Nations and the Law of the Sea Conference as well. After the Second World War, membership issues—the microstate problem, the problem of China, the problem of the PLO—were displaced by literature about voting.\textsuperscript{321} The displace-

been able to achieve absolute or even relative universality. It has never succeeded at any given time in including all the Great Powers of the world in its collective system." Id. at 176.

319 Indeed, even at the time, the "empty chair" problem was seen as the major impediment to League effectiveness—if for no other reason than that America's absence changed Britain's sense of commitment to the League. The guarantees of security in the Covenant (articles 10 and 16) suddenly took on a new meaning when the U.S. withdrew:

As soon as it was clear that the United States would not join the League the obligations of Articles X and XVI took on quite another aspect.

\[\text{T}h e \text{British group led by Canada, and the neutrals led by the Scandinavians, Powers, wished to reduce in scope and certainty even those guarantees which they had already given in Articles X and XVI.}\]

C.K. Webster & S. Herbert, supra note 10, at 146; see also G. Scott, supra note 76, at 399-405 (describing how the League initially survived the almost mortal blow of America's rejection).

320 See, e.g., League in Retrospect, supra note 159; G. Scott, supra note 76.

ment was relatively abrupt, perhaps because universal membership was presumed, just as unanimity had been presumed in 1919. The Law of the Sea Conference literature paid almost no attention to membership (until the United States withdrew from the process), some to consensus, and a great deal to questions of negotiating technique, dispute resolution, and substantive issues.

Although the changing enthusiasm for voting might simply have reflected diverse historical situations—the League's peculiar membership problem, the United Nations' peculiar veto structure in the cold war context, and the Law of the Sea Conference's substantive relationship to the new international economic order—these changes might also be read as a sign of institutional maturation. If we think of the institutional literature as a continuous practice beginning in the late nineteenth century, it recapitulates precisely the structure of the plenary it describes, moving from membership to voting to the substantive policies of organs.

This reading illuminates the relationship between the work of the literature and the drive to institutionalize itself. Short bursts of argument signal a move to a more mature establishment debate. Sometime prior to 1918, unanimity voting had come to seem possible among autonomous sovereigns. By permitting sovereigns to experience organization as compatible with their autonomy, unanimity was the institutional response of nineteenth-century positivism to the desire for international cooperation.

In February 1918, no institutional energy could be generated by discussing voting. Those who tried found it impossible to use voting rhetoric to agitate for a particular form of institutional life. Smuts did try—seeing a relationship between voting and membership. He thought the institution might be set against decentralized triviality and centralized tyranny through either mechanism. He concluded, however, that as no particular voting mechanism was satisfactory, the problem needed to be solved by distinguishing organs according to their membership. Like his contemporaries, he found voting uninteresting—he because no scheme seemed workable, they because unanimity seemed inevitable and quite appropriate.

Later, interest in voting arose as the institution matured—as it moved from preoccupation with membership to voting and finally to the substantive politics of its organs. Each of these moves was punctuated by a briefly renewed interest in voting and a change in the dominant decisionmaking mechanism. In a sense, then, the movement to voting and among voting schemes, like voting itself, is a continual becoming—a continual movement away from the stasis of

322 But while we avoid the super-sovereign at the one end, we must be equally careful to avoid the mere ineffective debating society at the other end. The new situation does not call for a new talking shop. We want an instrument of government which, however much talk is put into it at the one end, will grind out decisions at the other end. We want a League which will [sic] be real, practical, effective as a system of world-government. The scheme which I have seen and which brings representatives of all the independent States of the world together in one conference to discuss the most thorny of all subjects and requires that their decisions to be binding must be unanimous is from that point of view not worth discussion. It means that there never will be any decision issuing from the League; that nobody will take the League seriously; that it will not even serve as camouflage; that it will soon be forgotten and buried, leaving the world worse than it found it.

The League will include a few great Powers, a larger number of medium or intermediate States, and a very large number of small States. If in the councils of the League there are all to count and vote as of equal value, the few Powers may be at the mercy of the great majority of small States. It is quite certain that no great Power will willingly run such a risk by entering a League in which all have equal voting power. . . . The League is therefore in this dilemma, that if its votes have to be unanimous, the League will be unworkable; and if they are decided by a majority, the great Powers will not enter it; and yet if they keep out of it they wreck the whole scheme. Clearly neither unanimity nor mere majority will do. Neither will it do to assess and assign different values to the States who are members of the League. If Guatemala counts as one, what value shall be given to the United States of America? Will it be 5, or 10, or 100, or 1,000? Will the valuation proceed on the basis of wealth or population or territory? And if either of the last two bases is adopted, what about the Powers who have millions of barbarian subjects, or millions of square miles of desert territory? . . . But clearly there is no good reason to be assigned in favour of any basis of valuation, and the principle of values will not help us at all. We therefore proceed to look for some other solution of our difficulty.

J.C. Smuts, supra note 141, at 32-34.
members through a literature or text to the competences and practices of organs. At the same time, however, this movement carries with it a reminder or marker of institutional history in the form of a particular voting mechanism.

These mechanisms and the literatures which discuss them thus relate to the history of international institutions as the vote relates to the plenary. They are a written sign of a movement to organized speech. Like the Covenant between Conference and plenary, the vote and literature about it form a high-water mark of formalism, continuously restating the social contract in an ongoing repetition of the establishment itself. Just as the Covenant animates the institution and the vote animates the plenary, so the literature about voting animates the process of institutional maturation.

The literature, like the vote or the Covenant, is situated between continuity and change—here the continuity of repetition and the momentum of maturation. This double position animates the institution as a progressive movement. In a way, this observation is a commonplace. Anyone who has ever conducted a meeting knows that the decision of when to move from discussion to a vote is at least as important as the form of the vote itself—indeed, after the establishment, when the voting rules are “known,” the plenary works in large part by manipulation of the moment of voting.

Sometimes the call for a vote bursts the bubble of collective energy, collapsing each person at the meeting—each member—back into his or her autonomy. Everyone starts thinking “what do I really think about this matter?” or “what do the others think about this?” At other times, the call to vote is superfluous—it is really a call to adjourn, to reflect as a group on what, after the discussion, “we now think.” Often, however, the vote is neither a collapse nor a redundant ratification, but a moment of coming together, in which each person is momentarily reminded that they are members of the group, called upon to act as individuals, and yet in the group. It is in this sense, when people get the feeling that they are part of something bigger and yet part of it in the privacy of their own secret ballot, that voting works to constitute a community.

The rotation of arguments about voting schemes in the literature of international institutions works similarly. The call for a different voting scheme at each moment in the literature spirals forward, expresses a constructive hope that this turn would produce the feeling of transcendence, the moment at which international society would get to the plenary, get organized, and learn to conduct its politics in institutions. It seems entirely plausible that different voting schemes would give this feeling at different times. Indeed, if the goal is to produce a voting scheme which moves to the group precisely in the reinforcement of membership autonomy, it is no surprise that no particular voting scheme “works” as a logical matter, or that different schemes are defended in the same terms. In fact, one would expect organization to proceed, and the feeling of being in plenary only to be possible, if there were available a constantly changing parade of voting mechanisms. It is precisely this fickle rotation and the recurrent consumption of fashionable voting mechanisms that generates the feeling that “voting” is a movement from membership to organs. Far from criticizing the literature as a setter of trends and a follower of fashions, one should celebrate this rotation as the literature’s contribution.

Of course, there is a problem with this approach. The literature seems to imagine—and for this spiral to work, for the arguments to persuade, for the members to think they are getting organized, the literature must continue to imagine—that constitutional design is more serious than fashion design. The rotation must be continued and refined, but not noticed. Once the literature loses faith in its seriousness, even if in the process it becomes more flexible in the manipulation of its particulars, voting will no longer seem a response to anarchy or a protection against tyranny, and the sense of being organized as opposed to simply being together will fade. As a result, the literature must deny any sense of the irony of the activity of international legal scholarship in order to continue to present what turns out to be quite serious—the organization of international life.

V. A CONSTITUTED LIFE

Although modern international institutional life might be dated from the end of the First World War, the signing of the Covenant, or the opening of the League plenary, it would be most accurate to fix the birth in their interaction. Plans for and literature about the League illustrate the break associated with the transition from war to peace which provided the opportunity for institutional establishment. The Covenant of the League transformed that rupture into an institution-building momentum by providing a link between the negotiations in Paris and the League. The plenary established in Paris recapitulated these two motions both in its own structure and in the literature about decisionmaking processes which accompanied its development.

The texts which establish the modern international institution are both assertive and equivocal. The Covenant’s firm formality reminds us of the institution’s roots in war and political negotiation
while promising an institutional end to anarchy and tyranny. This promise asserts a break forward from chaos and tyranny to ordered liberty, quite literally locating disorganization outside and behind the document. At the same time, however, the Covenant equivocates in its substantive commitment between substance and procedure, war and peace, referring back to the Conference and forward to the plenary.

This textual balance of assertion and equivocation is the secret of institutional establishment. The Covenant is an open cipher, caught between the promise of a new politics and the debacle of an old regime. To contrast with both the peace treaties and the plenary, and to render a contrast between them, the Covenant repeats the exclusions and hesitations of its drafting in the language of procedure and substance, combining each reference to an earlier substantive closure with a projection forward of its reimagination. In the plenary, the vote balances assertion and equivocation quite similarly, positioning the institution between the deference of membership to sovereign autonomy and the international substantive authority of organs.

At each moment, the momentum of institution-building runs from the idea of its implementation. The historical literature moves from idealism to realism and is characteristically pragmatic and functional in its orientation to current institutional practice. The Covenant moves us from the conclusions of the Conference to the plenary process. The vote moves from the institution's constitution to its administration. Like the discipline's literature, both the Covenant and the vote move toward a pragmatic practice by constant reference back to a moment of political choice and utopian vision, excluding political imagination from present practice. For that, the institutional text refers us back to a moment of accord and forward to a moment of redemption. In short, the institutional present concerns less meat than motion.

It is customary, particularly in the literature of diplomatic history, to regard the Paris Conference as a moment of political initiative, and to treat the Covenant along with the Versailles Treaty as witness to that initiative. Institutional literature about the judiciary or the administration similarly regards the plenary as the arena for political choice and locates the political moment in the votes taken. But the various references and equivocations of the Covenant and the strange fluidity of the plenary vote are better understood in the context of their establishment work than as the products of various political configurations. The redundant equivocation of the Covenant, for example—which might seem to express a political doubt or contradic-

—seems the genius of the document's success as a constitution when situated between the Conference and the plenary.

Still, the politics of institutional establishment is a most peculiar politics. Beyond its paradoxical relationship to law—against which it constantly struggles and upon which it constantly relies—the politics of the plenary seems strangely proceduralized, as if issues of war and peace had been transposed into problems of inter-state management. From the perspective of both the Covenant and the plenary, state members are the political agents rather than the forces of economics or ideology. War starts when states experience violence and ends with an inter-state settlement. This image of politics is particularly striking in the literature of international institutions and suggests its divergence from the literature of diplomatic history, a divergence which itself emphasizes the difference between organized and disorganized international social life.

Wars make periodic appearances in the literature of international institutions as signs for changing institutional roles. Mangone, for example, considers the “Greco-Bulgarian Crisis” in the following terms:

On 22 October 1925 the Bulgarian foreign minister wired the Secretary-General of the League that a border incident had led to a flagrant invasion of Bulgarian territory by Greek forces. The Bulgarian government, therefore, requested a meeting of the Council of the League without delay to repair the breach of Covenant obligations. Within twenty-four hours Aristide Briand, Acting President of the Council, exorted the two governments that until the Council heard both sides of the case, no further military movements should be undertaken and that all troops should retire at once behind their respective frontiers.324

Although the story continues for a couple of paragraphs, a great deal is already evident in this short text. The “crisis” begins with a telegram to the League—and indeed, the incident seems significant, rises to the level of international politics, only in crisis. The cause of the crisis is “a border incident.” The crisis is an “invasion.” Mangone's institutional text is able to rely rather unproblematically on images of the wills and motives of states faced with border transgressions—it need not reach behind the veil of membership to explicate the crisis or war. The Bulgarian government therefore requested a meeting of the Council—because of the invasion, not because of the incident, or the crisis, or to conduct politics, or to settle the dispute, or simply to get together and see how things were going. The politics of the community is responsive to a governmental sense of crisis—of

324 G. Mangone, supra note 12, at 144.
terритори al transgression. Mangone goes on to tell us what the institution did, and how quickly it responded. His account stops quite naturally with the action of organs—he need not bring the reader up to date on relations along the Greco-Bulgarian border. 325

Mangone's account of the "war in the Gran Chaco" is equally telling. In three paragraphs devoted to this crisis, he gives us the following facts about what happened in the Gran Chaco: "In 1928 fighting broke out in the Gran Chaco situated between Bolivia and Paraguay." 326 From the point of view of a history of international institutions, the war "breaks out" and provides the opportunity for the institution to expand its jurisdictional competence. Indeed, the Gran Chaco incident stands for the proposition that the League can deal with matters in the Americas despite the Monroe Doctrine and the absence of the United States. Mangone's rendition reads like the resolution of an international plenary itself:

Hesitant before the admonition of Article 21 that nothing in the Covenant should affect the validity of such regional arrangements as the Monroe Doctrine and painfully conscious of the absence of the United States, Mexico, and Brazil from League Councils, the organization in Geneva watched the course of distant events with trepidation, hoping that the machinery of inter-American cooperation would soon bring peace. To its credit, the Council forcefully called the attention of Bolivia and Paraguay to their obligations. Although the war was finally ended in 1936 by the exhaustion of both belligerents rather than by the concerted efforts of the international commission and the American republics, the concern of the League for the Western Hemisphere had boldly affirmed its preoccupation with peace everywhere. 327

Although equivocation and self-containment mark the genius of the move to institutions, they raise some questions about the institutional move itself. To the extent institutional practice seems merely to repeat the establishment moment, the promise of a redeemed politics is constantly postponed. By transforming wars into "disputes" which provide opportunities for institutional development, international relations are radically decontextualized. In a sense, it is little wonder that the League found the "incidents" in Ethiopia and Manchuria so troublesome. 328 Moreover, as institutional development transforms wars into disputes, peace becomes an absence—the absence of war or the settlement of disputes.

325 Id.
326 Id.
327 Id. at 144-45.
328 See id. at 149-53; 2 F.P. Walters, supra note 10, at 465-99, 623-91.
fulfill its promise should the United States join the fully articulated institutional regime established by the Law of the Sea Convention. That people also thought this in 1919, however, suggests that these early texts might have established a pattern continued in the later extension of institutions.

Whether the insights developed in this analysis of the move to a voting plenary might be extended to the development of administration and judiciary remains to be seen. Nevertheless, at first glance, the collective imagination of those who over three generations built and analyzed the modern edifice of international institutions seems remarkably coherent. Across more than eighty years, a group of rather diverse intellectuals produced hundreds of texts and institutions with quite similar features. At a most preliminary level, these men shared a sense of the necessity and desirability of the institutions they set up as reactions to a disorganized world. The transformative power of institutionalization seemed powerful after the First World War, the Second World War, and the wars of decolonization. Although each generation experienced and acknowledged the proceduralization of their dreams and the breakdown of the organizations they founded, faith in institutionalization and fear of disorganization remained largely unshaken. Over and over, developments

---

1987] MOVE TO INSTITUTIONS 985

which began as utopian aspirations in the literature of international institutions—to replace empire, end war, or redistribute property—ended as an institutional accomplishment: voting, administrative law, or dispute resolution procedures.

At the very least, the relationship between law and politics which animates the recapitulation of the relations among Conference, Covenant, and plenary; within the plenary among membership, voting, and organs; or in voting literature among unanimity, majority voting, and consensus, suggests an approach to the recurring tripartite organizational form in international affairs. The Covenant, closing the Peace Conference with a legal document, promises to close political debate, to freeze it, to permit the politicians to return to their capitals without fear that their work will be undone. In the Covenant, law closes the social rupture worked by politics. In the plenary, law reverses direction, inaugurating a new politics, promising to channel politics and enable debate without rupture. Law becomes facilitator, background procedure, mechanism, forum.

Together, these two relationships between law and politics suggest that international law can be alternately strong and supple, standing above political struggle, stopping it, as well as humbly waiting in the wings, serving political debate, structuring it. Both efforts are performed in a self-abnegating way—the document can end politics because it freezes politics, and the plenary can structure politics because it continually reassures the agents of political energy that they can remain separate, powerful, and yet have institutional life given their collective projects. These images of law suggest some rather unsurprising roles for the judiciary and the administration.

The judiciary, organ of the law, must control both the text, protecting the political settlement, and the plenary, protecting the structure within which politics remains peaceful. These two controlling functions, however, are humble; both proceed in the name of protecting and facilitating political life. The result is a judiciary, not as various peace planners proposed, which might resolve disputes and itself substitute for war, but as it developed, first in the Permanent Court of International Justice and then in the International Court of Justice and United Nations Administrative Tribunal—as the exceptional intermeddler, the formalist interpreter familiar from domestic jurisprudence. A more ambitious judiciary, the judicial mechanism for the resolution of disputes which might fulfill the promise of the Hague arbitration arrangements, enters the scene only after faith in the plea

---

330 "Mankind has endeavoured again and again to supersede international anarchy by rational methods, and every trial has in the long run proved a failure." G. Schwarzenberger, supra note 30, at 175. Nicholson echoes these sentiments: "We came to Paris confident that the new order was about to be established; we left it convinced that the new order had merely fooled the old." Peacemaking 1919, supra note 18, at 187. But in their criticisms lie the seeds for a new institutionalization, a new order. It is not the process of organization itself which leads to failure, but rather, specific features of the organization which spell its own doom. G. Schwarzenberger, supra note 30, at 176, goes on to state: "However well devised an international organization may be, it will only work in practice if collective interests exist, if the common interests are recognized by all concerned, and if the recognition of the common necessities brings about the birth of a collective will." Nicolson goes on to blame the "inevitable curse of unanimity [which] leads to the . . . inevitable curse of compromise. All compromises generalisations a double falsity is introduced. . . . This falsity . . . was the root-cause of the perceived failure of the League to keep the peace," at 189. Claude, writing on the perceived failure of the League to keep the peace, asserts: "This total collapse of world order produced not so much a sense of the futility and hopelessness of international organization as a vivid awareness of the need for and a resolute determination to achieve an improved system of international organization." I. Claude, supra note 8, at 57.

The Security Council of the United Nations inherits the organizational ideal but none of the procedural flaws of its predecessor. Of the Security Council, Mangone writes: "Nowhere in the world or ever in history has there been assembled such a potential for preventing international war." G. Mangone, supra note 12, at 191. The ideals survive, the failure of their realization attributed not to the dream, but to the lack of smoothly operating machinery. Thus, Henkin writes: "The old infrastructure of principles, assumptions, and institutions has survived. New law for cooperation in the common welfare has taken root. The new founda

---

317 L. Henkin, supra note 3, at 313.
nary has been lost in the maturation of voting discourse—only in the United Nations Law of the Sea Treaty.

The administration must faithfully implement the product of the plenary. It will carry out the vote, not as the plenary carries out the Covenant, but without reopening the political struggle. Passed first through the Covenant, then the plenary, through the vote, and into the administration, institutional action is cleansed of politics. The administration becomes the instrument of political life which, thanks to the legal mechanisms for marking political closure, can be imagined to have already taken place. Thus, we find the administration developed by the League, but expanded and matured in the U.N. years, situated between notions of its independence from members, organs, politics, and texts. Whether discussing the role of the Secretary General, the structure of staffing, or the administrative review of staff behavior, the rhetoric is one of simultaneous independence from politics and dependence upon the international institution. The two strands which had been joined by the Covenant and the plenary—politics and international institutional activity—are now radically separated.

Treating the constitution of the Covenant-plenary—the movement to a legislative organ—as only one part of the story of the move to international institutional life recapitulates the maturation process exhibited by literature about voting throughout the institutional regime. The League, building upon the immature nineteenth-century conference system, developed a standing parliament with operative, if defective, systems of voting and membership. The United Nations reformed that parliamentary system and, building in turn upon the nascent civil services of the League and the International Labor Organization, developed a workable, if defective, administrative apparatus. Finally, the Law of the Sea Conference, while reforming the voting practices of the United Nations system and extending its administrative apparatus, is chiefly to be remembered for having contributed a complex mechanism of dispute resolution and adjudication, built on the experiences of the League and United Nations systems. The complete apparatus suggested by this story is the tripartite structure familiar from domestic civics.

The 1914-1919 break suggests something about the rhythmic energy which fueled the development of this more complete institutional apparatus. Were this analysis to be extended, one might expect to find a series of motions, as each generation transformed its utopian aspirations for peace, security, and freedom into institutional procedures, processes, and reforms, which in turn promised peace, security, and freedom. Reduced to mythic rhythm, the story is easy to tell.

Three periods, three academic generations, three institutions, three institutional dimensions. With the League came parliament, with the U.N., administration, and with the United Nations Law of the Sea Conference, adjudication. All three share an image of their necessity, their coherence, completion, and collapse.

Completing this myth of three generations might yield a more complicated sense of discursive rotation. At this preliminary point, one might compare the tripartite spatial organization of institutional types (which provides a sense of intergenerational temporal progress as well)—legislative, administrative, and adjudicative—with the tripartite temporal organization of judicial activity—jurisdiction, merits, and remedies. An initial set of correspondences seems intuitively apparent: Jurisdiction is to merits as adjudication is to legislation; merits are to remedies as parliament is to administration; and so forth.

It becomes more difficult when one attempts to describe these intuitively appealing correspondences in any detail. At first it seems obvious that the differentiating mechanisms are repeated. It is a common relative reason, objectivity, formality, legality, and cognitive controllability, which differentiates adjudication from legislation and jurisdiction from the merits. It is a common passion, subjectivity, informality, and political unpredictability, which differentiates parliament from the judiciary. The picture becomes more complex when the administration and remedies are added, for these terms seem to combine reason and passion, to face both legislation and adjudication in similarity and difference. Further confusion is generated when we realize that each boundary of differentiation is sustained by an image of relative objectivity as well as subjectivity. That the enormous number of supple differentiations provided even by this simple mental pattern of three forms and two differences could yield such a stable pattern of institutional development in this century is the puzzle that this article has sought to begin unraveling. I have sought the practices of coherence which knit these unstable social images into repeated patterns and rhythms.

The 1919 move to a plenary has suggested that this coherence might lie partly in a continual promise, or a continual sense of becoming—becoming organized—which is sustained by an elaborate set of rhetorical equivocations. International institutions promise and reassure that international social life is constantly moving forward, transcending a situation of violent politics for a more comfortable world. It would be possible to think of the move to the League either as a statement about our collective ideals—as a cultural reminder of our better natures—or as a grotesque hallucination, a continual diversion
from the task of actually dealing with violence. Similarly, it is hard to know how to evaluate the textual movement from law to politics or from utopian visions to pragmatic practices. On the one hand, the institution seems a safe repository for our cultural fears, enabling us to live without either confronting these neurotic fantasies about a collapsed civilization or accepting the extent of our fall from the garden we imagined. On the other, the institution seems to express an elaborate anti-intellectualism, constantly enslaving our thought as the humble servant of our practice, allowing us to forget what we know to be true about the law and politics of our situation. Only by interpreting the 1919 move to institutions as a cultural achievement do we seem able to wrest an institutional innovation from a war which might otherwise have been fought in vain.