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Restraining Power through Institutions

*A Unifying Theme for Domestic
and International Politics*

ALEXANDRU V. GRIGORESCU

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Contents

<i>List of figures</i>	viii
<i>List of tables</i>	ix
<i>List of abbreviations</i>	x
<i>Acknowledgments</i>	xii
1. The main question and argument driving this study	1
The main question and argument	1
Comparing domestic and international politics	3
The timeframes for the comparison	3
Comparing groups of actors rather than actors	8
Placing the main question and argument in the broader literature	9
Structure of the book	20
2. The existing literature and a first set of arguments	23
Political theory literature on fear of concentrated power and on institutional restraints within states	23
The comparative politics literature and other work on early domestic institutional power restraints	29
Liberalism in IR and its lack of emphasis on power restraints	36
Other IR literature on power restraints in the international realm	38
A first set of arguments: the nature of institutional restraints (the “outcome variable”)	46
A second set of arguments: groups of actors and their preferences for institutional restraints	51
3. The evolution of domestic institutional restraints and additional expectations for IR	65
The evolution of domestic judiciaries as institutional restraints on power	66
The evolution of domestic consultative and legislative assemblies as institutional restraints on power	79
The evolution of institutional restraints on power involving national government bureaucracies	90
The empowerment of bureaucracies	90
Restraining the power of bureaucracies	99
Support for main arguments and further expectations for the international realm	104
Assessing the argument regarding the nature of institutional restraints on concentrated power	105

Assessing the arguments regarding the main groups and their preferences	106
Assessing the arguments regarding the evolution of institutional restraints on concentrated power	109
Additional arguments involving the evolution of institutional restraints on concentrated power	111
4. International laws and courts as institutional restraints	119
The emergence of international legal norms and laws as tools for great powers	120
The emergence of the first IGOs as incipient forms of rule-based institutional restraints	123
The PCA: a first major change to the international judicial restraints on power	129
The PCIJ and ICJ: more changes to, and consolidation of, international institutional restraints	136
The ICC and other Post-Cold War courts: further consolidating international institutional restraints	143
Conclusions: comparing the evolution of international laws and courts to domestic developments	154
What types of international institutional restraints developed?	155
Who supported or opposed the institutional restraints?	159
How (and why) did international institutional restraints emerge and evolve?	162
5. International assemblies and parliaments as institutional restraints	170
The first intergovernmental assemblies and the Interparliamentary Union	172
The League of Nations: a first major change to the international assemblies as power restraints	181
The UNGA: more changes to, and consolidation of, restraints through international assemblies	192
The European Parliament and the spread of IGO parliamentary assemblies: further change and consolidation of international institutional restraints	201
Conclusions: comparing the evolution of international assemblies and parliaments to domestic developments	208
What types of international institutional restraints developed?	209
Who supported or opposed the institutional restraints?	211
How (and why) did international institutional restraints emerge and evolve?	212
6. International secretariats as institutional restraints	219
The emergence of the first IGO secretariats in the nineteenth century	221
The League and ILO: change in the autonomy of international secretariats	230

The UN: the erosion and then consolidation of international institutional restraints	243
Post-Cold War developments: restraints on international secretariats	256
Conclusions: comparing the evolution of IGO secretariats to domestic government bureaucracies	260
What types of international institutional restraints developed?	260
Who supported or opposed the institutional restraints?	262
How (and why) did international institutional restraints emerge and evolve?	264
7. Summing up	271
Support for arguments A1–A6 in the empirical chapters	272
The nature of international institutional restraints (assessing A1)	272
The positions and roles of the four groups (assessing A2, A3, A4, and A5)	273
The three phases in the evolution of international institutional restraints (assessing A6)	278
Potential methodological difficulties in assessing the arguments	281
The three forms of institutionalism	282
Rational choice institutionalism	283
Sociological institutionalism	284
Historical institutionalism	286
Differences in evolution of institutional restraints in the domestic and international realms	289
The literature on differences between dynamics in the two realms	289
Causes for different timeframes in the evolution of institutional restraints on power	292
Implications of the findings	297
Practical implications	297
Implications for the International Relations and Comparative Politics literatures	300
<i>Index</i>	303

List of figures

1.1. Two types of explanations for similarities between domestic and international institutions	16
2.1. Evolution of ratio between power of G_1 and G_2	56
2.2. Capabilities of the G_1 state in the international system relative to G_2 and G_3 states	61
3.1. Government expenditure in all states as % of GDP	100
5.1. Assemblies as power restraints in the domestic and international realms	171
5.2. UNGA “Voting Affinity” between US and all other UN member-states	200
6.1. Bureaucracies as power restraints in the domestic and international realms	220

List of tables

2.1. G_1 and G_2 expected support/opposition to institutional restraints at different times	58
2.2. Main groups involved in shaping institutional restraints	63
3.1. Main domestic groups and their preferences and roles in shaping institutional restraints	108
3.2. Evolution of institutional restraints on concentrated power in the domestic realm	115
4.1. Preferences and roles of main groups in shaping international law and courts	163
4.2. Evolution of institutional restraints through international law and courts	165
5.1. Preferences and roles of main groups in shaping international assemblies/parliaments	213
5.2. Evolution of institutional restraints through international assemblies/parliaments	215
6.1. Preferences and roles of main groups in shaping IGO Secretariats	265
6.2. Evolution of institutional restraints through international assemblies/parliaments	268
7.1. Preferences and roles of main groups in shaping international institutional restraints	277
7.2. Evolution of international institutional restraints	279

List of abbreviations

AMTC	Allied Maritime Transport Council
CCNR	Central Commission for the Navigation of the Rhine
CED	European Commission for the Danube
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECSC	European Coal and Steel Community
EEC	European Economic Community
EP	European Parliament
EU	European Union
FAO	Food and Agriculture Organization
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the Former Yugoslavia
IG	Inspector General
IGO	Intergovernmental organization
ILC	International Law Commission
ILO	International Labour Office (later International Labour Organization)
ILOAT	Administrative Tribunal of the International Labour Organization
IMF	International Monetary Fund
IPU	Interparliamentary Union
IR	International relations
ITLOS	International Tribunal of the Law of the Sea
ITU	International Telegraph Union
OIOS	Office for Internal Oversight
P5	Permanent members of UNSC
PACE	Parliamentary Assembly of the Council of Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SC	Security Council
UN	United Nations
UNAdT	UN Administrative Tribunal
UNCLOS	UN Conference on the Law of the Sea
UNEF	United Nations Emergency Force

UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UPU	Universal Postal Union
WTO	World Trade Organization

Acknowledgments

This book continues my longstanding interest in similarities between domestic and international politics, especially as they play out with regard to institutions. Over more than two decades, such similarities, and the processes that lead to them, were the subject of many of my journal articles and my two books. In virtually all of this research, I noted how decision-makers in the international realm looked to promote norms and models they were familiar with from their own countries to international institutions. This “cross-level” mechanism, to use a term from the present book, explained the projection to intergovernmental organizations of domestic institutional features such as transparency, accountability, fair representation, fair voting, parliamentary oversight, and civil society participation (and, more broadly, “nongovernmentalism,” to use a term I introduced in my 2020 book).

I soon came to wonder whether there was another way to think about such domestic–international similarities beyond simply those involving domestic–international projections. With the encouragement and support of my then department chairperson, Peter Schraeder, and the assistance of my colleagues James Gathii and Joy Gordon, in spring 2018 I organized a one-day workshop at Loyola University Chicago where a little more than a dozen scholars working on similar questions (many of whom I mention below) came to explore the future of this research. The workshop was useful in different ways for the various participants. For me, it suggested that, while we may now understand very well the “cross-level” projections leading to similarities between domestic and international institutions, there may be another approach, a “within-level” one, that had not yet been fully explored.

Over the past five years I developed this idea of “within-level” processes leading to similarities in domestic and international institutions. I looked for evidence (and lack thereof) in primary and secondary sources describing the evolution of almost two dozen intergovernmental organizations. My academic leave in the fall 2019 semester and my fellowship during those months with the American Bar Foundation (an extraordinary institution to which I am truly indebted), were crucial for completing this comprehensive endeavor. I also used that time to familiarize myself with the history of political institutions in England and France from many centuries ago, a topic that is far away from my expertise, and yet fascinating. The end result of this research is the present book.

As I suggest above, numerous colleagues, both at my university and elsewhere, have supported my efforts. Many of them offered advice on and/or read various versions and parts of my manuscript. For that, I would like to thank Mark Copelovitch, Benjamin Faude, Orfeo Fioretos, Burak Giray, Kerry Goettlich, Terence Halliday, Ian Hurd, Tana Johnson, Mathias Koenig-Arhibugi, Dillon Laaker, Julia Costa Lopez, Tofigh Maboudi, Vincent Mahler, Lisa Martin, Sarah Maxey, Andrew McWard, Molly Melin, Karolina Milewicz, Jon Pevehouse, Emilia Justyna Powell, Henning Schmidtke, Duncan Snidal, Jens Steffek, Lora Anne Viola, Jessica Weeks, and Michael Zürn. I am particularly grateful to my colleague and friend of two decades, Claudio Katz, who read the entire manuscript, some parts multiple times. Not only did my discussions with Claudio allow me to improve this book, but they led to another project, one that seeks to identify a “Lockean” form of IR liberalism.

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1

The main question and argument driving this study

The essence of international politics is identical with its domestic counterpart. Both international and domestic politics are a struggle for power [...].

Hans Morgenthau¹

The most important feature of political organization is not that the state has supplanted all other forms nor that the domain of the state has grown so large, but that ways have been found to control its coercive power.

Scott Gordon²

The main question and argument

The logic behind the above quotations, taken together, leads to the main question driving the present research. I begin from the assumption implicit in Morgenthau's statement that domestic and international politics have a great deal in common and that, if we concentrate on the concept of power, we discover important parallels in the two realms. This argument was made even more explicit a few decades after Morgenthau wrote this statement, in response to scholars questioning whether international relations (IR) should be part of the broader political science discipline. For example, William Fox stated in 1968 that "Putting 'power' rather than 'the state' at the center of political science makes it easier to view international relations as one of the political sciences."³

Given such potential power-based linkages between domestic and international politics, what does Gordon's observation about the central role of *restraints* on power at the state level teach us about the international realm? This question,

¹ Morgenthau, Hans J. and Kenneth W. Thompson. 1993. *Politics among Nations: The Struggle for Power and Peace*. New York: McGraw-Hill, 39–40.

² Gordon, Scott. 1999. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge: Harvard University Press, 4.

³ Fox, William Thornton Rickert. 1968. *The American Study of International Relations. Essays*. Columbia, SC: Institute of International Studies, University of South Carolina.

rephrased, is the main one driving this study: have similar processes as those that led to domestic restraints on concentrated power led to restraints on concentrated power in international relations?⁴

My main argument is an affirmative answer to this question. Moreover, I suggest, that the development of *restraints* on concentrated power, which Gordon considers the most significant feature of political organization, is as important a topic for IR as the one of *pursuit* of power emphasized by Morgenthau in his work. After all, the constant pursuit to increase one's own power may be essential for the most powerful actors (whether individuals, groups of individuals, or states) who can aspire to use it to control others or to challenge those who have such aspirations. However, for the vast majority of individuals and groups in a state or of countries in the world, acquiring more power to compete with the most dominant actors often appears futile, especially in the short and medium term. Therefore, they will be just as interested, if not more, in developing restraints on the most powerful and reducing the impact of tremendous discrepancies in the distribution of capabilities as in increasing their own power.⁵

While restraints on concentrated power can take place outside formal institutions, especially through the ubiquitous "balance of power," at the domestic level they have come to function primarily through formal government institutions. Thus, a more specific version of my main argument is that fear of concentrated power is generating similar *institutional* restraints in the international realm as in the domestic realm.

As I will explain in greater depth, institutional restraints, whether domestic or international, become truly relevant when they impact the most powerful actors or groups, those where, in fact, power comes to be *concentrated*. That is because weaker actors are already virtually always restrained by the most powerful, both within and outside institutions. This suggests that the present book focuses not only on the actions and interests of the powerful, but also on those of second-ranked and weak groups of actors, those who are likely to be the greatest supporters of institutional restraints on *concentrated* power. After all, these larger but weaker groups are the main promoters of institutional checks on power.

⁴ While much of the existing literature has tended to focus on concentrated *coercive* power, I will take a broader view. That is because, as I show, institutional restraints on power, the main topic of this book, are based on long term calculations, where the potential for almost any type of power to become coercive leads actors and groups to fear concentrated power, whether apparently coercive or not.

⁵ The question of whether institutional restraints on power are "good" is a complex one that requires a separate study, beyond the present one focusing primarily on comparisons between developments in the domestic and international realms. Nevertheless, it is worth mentioning briefly that if such restraints are understood as tools that allow groups to avoid the use of violent force, they should indeed be viewed as beneficial to international relations (and, of course, to domestic politics). I acknowledge, however, that there are instances when the restraints could make it more difficult for powerful states to promote important global policies (such as those involving human rights or dealing with climate change). Yet, based on past experience in the domestic realm, and if we take the comparison of institutional restraints on power in the domestic and international realms to its natural conclusion, overall, the benefits of developing such institutions in the international realm should outweigh the costs.

Thus, my emphasis on power *restraints* not only complements the vast IR literature on *pursuit* of power as an essential goal of states, but also complements scholarship that has tended to concentrate primarily on great powers with additional arguments and findings related to the interests and actions of medium-sized and small states. This shift in focus from one small group of dominant actors to other larger groups of less powerful ones, parallels developments in comparative politics where the literature on democracy has long led to equal interests in political leaders, larger groups of elites and bureaucracies, and the even larger “general public.” While I am certainly not the first to turn my attention to small and medium-sized states in seeking a more complete understanding of international politics, a main contribution of the present book to existing scholarship is that it offers important additional arguments that explain why this shift is essential for IR.

Comparing domestic and international politics

Perhaps the most important contribution of this book is that it offers a new approach to comparing domestic and international politics. Past literature has generally compared the two realms by (1) considering interactions between domestic and international actors within the same timeframe and (2) drawing parallels between the interests and actions of individuals (in domestic politics) and of states (in the international realm). I explain below how these approaches are flawed and suggest that the most fruitful analogies need to take into account different timeframes and groups of actors (rather than individual ones). In other words, any parallel between the evolution of domestic and international institutional restraints have to consider *when* such restraints developed in the two realms and *who* was involved in their development.

The timeframes for the comparison

Much of the literature drawing analogies between domestic and international realms has mistakenly focused only on the present (or recent) status quo.⁶ I posit that many of the processes that led to checks on power through international institutions over the past century or two are similar to those that took place through domestic government institutions starting with the consolidation of power in states such as England and France as far back as one thousand years ago. Implicitly,

⁶ For a comprehensive discussion of such domestic–international analogies, see Suganami, Hidemi. 2008. *The Domestic Analogy and World Order Proposals*. Cambridge: Cambridge University Press.

we can learn more about changes in international institutions from events preceding and following the signing of the Magna Carta, the emergence and evolution of the Curia Regis in England, or of the Estates General and Parlements in France, than from how governments are organized today.

Chapter 3 discusses in great detail such domestic developments. It shows how the first institutional restraints on power emerged about one thousand years ago and have since continued to develop, most often becoming stronger but, at times, also weakening. I will extract from the historical narrative focusing on such early domestic institutional restraints some observations that generate a series of expectations for developments in the international realm.

Throughout the book, but especially in the concluding chapter, I will also offer several reasons why the dynamics behind the development of institutional restraints may differ in the domestic and international realms. I will especially note how institutional restraints have taken much longer to develop in the international realm, compared to those in the domestic realm. Some of the more important factors leading to such differences are: travel and communication are likely to be more difficult when establishing institutions that bring together state representatives, rather than local and subnational ones; the benefits from domestic collaboration are often more easily recognizable compared to those that derive from international collaboration; the shifts in relative power among domestic groups usually take place faster, compared to those between states and, consequently, as I will show, there are more instances when there is sufficient support for institutional restraints within states rather than among them; the existence of foreign foes for domestic systems (but not for international ones) also contributes to the many opportunities to empower existing institutional restraints; officials from domestic institutions are more likely to develop stronger allegiances to national institutions compared to the weaker allegiances officials from intergovernmental organizations (IGOs) tend to develop, leading to faster consolidation of institutional restraints in the former compared to the latter. I will expand on these arguments in the concluding chapter.

The argument that institutional restraints on concentrated power came much later in the international realm, compared to those in the domestic realm, suggests that the current international institutional restraints are still relatively weak, similar to the very early ones that functioned through domestic institutions during the Middle Ages and that simply made it *more difficult* for rulers to take any actions they pleased but could not outright *stop them*. However, I argue that even such fairly weak institutional restraints were very important for domestic politics a thousand years ago and for recent international politics of the past century or two. Additionally, current international institutional restraints have evolved substantially over the past century and, in some instances, represent a significant feature of international relations.

For example, the 1907 Porter Convention, considered the first multilateral treaty to set legal limits on the use of force, only prohibited the use of armed force when government debt was owed to private parties. The much-debated convention was primarily intended to restrict the actions of powerful states, the only international actors who had the necessary resources to use force in recovering debts. Today, international law and international courts have set many more limits on powerful states' actions, whether in the realm of military intervention, trade, disarmament, or refugees.

Similarly, assemblies in international institutions (such as the UN General Assembly) are still weak, especially when compared to national legislative bodies. They usually have consultative roles, rather than legislative ones. However, they allow all states, even the smallest, the opportunity to voice their concerns and sometimes can "shame" great powers into altering their policies. For example, a 1997 UN General Assembly resolution that singled out Russia and the United States for not ratifying the Chemical Weapons Convention (although they were the only two declared possessors of such weapons) is generally viewed as triggering several months later ratifications of the convention by both great powers.⁷

This contrasts with the Concert of Europe, often considered the first major multilateral institution, that was composed only of the five most powerful states and rarely invited *some* small states to take part in *some* deliberations. On the few occasions when small states complained about the exclusive character of the Concert (as the King of Württemberg did in 1823), great powers scorned their ideas publicly and even threatened those who raised this issue.⁸

Another example of change in international restraints on concentrated power refers to the evolution of international secretariats. In the Central Commission for the Navigation of the Rhine, established in 1815, and generally considered the first IGO, individual staff members were intended to represent their respective member-state governments, not the organization itself. When the "commissioners" in this organization slowly moved to gain greater autonomy in the first half of the nineteenth century, their governments (led by the most powerful member of the organization, Prussia) adopted in 1868 the Treaty of Mannheim to reverse this shift.⁹ Secretariats of most other IGOs of the nineteenth century also had very little autonomy from states. As late as 1920, some IGO staff even in technical organizations, such as those that dealt with health, often considered themselves

⁷ See A/RES/51/45 (section T) available at <https://undocs.org/en/A/RES/51/45>.

⁸ Klein, Robert A. 1974. *Sovereign Equality among States: The History of an Idea*. Toronto: University of Toronto Press, 35–6.

⁹ Doerflinger, Robert. 1987. "La Commission Centrale pour la navigation du Rhin: 170 ans d'évolution du statut international du Rhin," Strasbourg: Central Commission for the Navigation of the Rhine, http://www.ccr-zkr.org/files/histoireCCNR/07_ccnr-170-ans-evolution-statut-international-du-rhin.pdf.

to represent their governments rather than the IGOs.¹⁰ However, throughout the 1920s, the notion of IGO staff autonomy was embraced by virtually all states, including powerful ones.

Over the past few decades such secretariats have used their autonomy to criticize states and even make public embarrassing information about IGO members, including great powers. In some instances, IGO secretariats revealed information that led great powers to alter their intended actions. A well-known example is that of International Atomic Energy Agency officials who informed the USSR that they were obligated to make public their findings about the 1986 Chernobyl nuclear accident if the government did not acknowledge first the magnitude of the disaster. Similarly, in 2004, the acting UN High Commissioner for Human Rights (representing the IGO, not governments) submitted a blistering report on US human rights abuses in Iraq after the 2003 invasion of that country, including the infamous actions at the Abu Ghraib prison. In both cases, actions of the autonomous IGO secretariats led powerful states to alter their policies.

This evolutionary view, of increasingly powerful international institutional restraints across time, does not imply a teleological understanding of global governance inching closer to an inevitable state-like structure.¹¹ Indeed, I will show that, although over the past two centuries, international institutional restraints on concentrated power have *generally* become stronger, they have also experienced erosions as part of broader back-and-forth shifts. The present study seeks to identify the factors that lead both to the empowerment *and* erosion of institutional restraints. To this end, the comparison with the long-term evolution of domestic institutional restraints is particularly useful. As domestic institutions were created much earlier than international ones, the restraints built in such institutions have experienced many changes, often associated with the “waves” and “counterwaves” of democracy.¹² By understanding how domestic institutional restraints have become weaker and not just stronger, we can assess better the likely evolution of international restraints.

Although I do not embrace the view that there has been a *continuous* empowerment of international institutional restraints, I also question whether the nature of IR is as immutable as realists such as Morgenthau and Gilpin suggested.¹³ After all, it took domestic institutions about a thousand years to evolve from the Witan (an early consultative assembly to Anglo-Saxon kings) and the Magna

¹⁰ See, e.g., Borowy, Iris. 2009. *Coming to Terms with World Health: The League of Nations Health Organisation 1921–1946*. Frankfurt am Main: Peter Lang, 62.

¹¹ For a discussion of the “inevitability” of a global government argument see, e.g., Wendt, Alexander. 2003. “Why a World State Is Inevitable,” *European Journal of International Relations* 9(4): 491–542.

¹² Huntington, Samuel P. 1993. *The Third Wave: Democratization in the Late Twentieth Century*. Norman, OK: University of Oklahoma.

¹³ Morgenthau, Hans J. and Kenneth W. Thompson. 1993. *Politics among Nations: The Struggle for Power and Peace*. New York: McGraw-Hill; Gilpin, Robert. 1981. *War and Change in World Politics*. Cambridge: Cambridge University Press, 7.

Carta to the powerful current restraints in more than one hundred democratic or quasi-democratic national systems, a change described in the above quotation from Gordon as the “most important political feature of political organization.” This evolution was not linear and experienced even recently several back-and-forth shifts. The present book will show that international institutional restraints on power have also developed incrementally across time and, in most cases, became stronger, even if in some instances they became weaker. These changes are comparable to those that took place in domestic institutions starting about one thousand years ago.

Specifically, I will show that the international institutional restraints on power through IGO assemblies are currently at a stage of development similar to the one experienced by the early consultative and legislative assemblies that emerged and developed in countries such as England and France from about the ninth to the thirteenth centuries. In both instances, such assemblies can raise concerns about the most powerful actors and groups of actors and make it more difficult for some actions to be taken (especially for financial or legitimacy-related reasons) but cannot outright stop them. I will also show that international law and international courts are currently experiencing dynamics similar to the ones experienced by English and French laws and courts from around the twelfth to the sixteenth centuries when judges were becoming increasingly autonomous but could still not adopt decisions against rulers’ major interests, at most against allies of the rulers and against some of the rulers’ secondary interests. Moreover, developments over the past half century involving the European Parliament and European Court of Justice, parallel those that unfolded at the state level more recently, in the first wave of democratization from the early nineteenth to the early twentieth centuries.¹⁴

While the international relations literature has sometimes turned its attention to developments from the Middle Ages, most such work has emphasized how politics in those times *differed* from those we experience today.¹⁵ Most important, the dynamics involving early domestic institutions has not been compared to recent

¹⁴ It is important to acknowledge early on in this study the high level of generality of my claims. Indeed, as in virtually all instances where the literature applies arguments across levels of aggregation (but, sometimes even within the same level) predictive power is relatively weak. As I will show, this does not imply, however, that the processes taking place in the domestic and international realms are not truly comparable and that fear of concentrated power does not affect developments in the two realms in a similar way. To paraphrase Kenneth Waltz, although the law of gravitation cannot predict the “wayward path of a falling leaf,” it is a useful law that nevertheless allows us to understand that the leaf will eventually fall. Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co., 121.

¹⁵ Among the many works that are relevant here, see, e.g., Ruggie, John Gerard. 1993. “Territoriality and Beyond: Problematizing Modernity in International Relations,” *International Organization* 47(1): 139–74; Hall, Rodney Bruce and Friedrich V. Kratochwil. 1993. “Medieval Tales: Neorealist ‘Science’ and the Abuse of History,” *International Organization* 47(3): 479–91; Friedrichs, Jörg. 2001. “The Meaning of New Medievalism,” *European Journal of International Relations* 7(4): 475–501; Costa Lopez, Julia. 2020. “Political Authority in International Relations: Revisiting the Medieval Debate,” *International Organization* 74(2): 222–52.

ones involving international institutions. Interestingly, there are still relatively few works on current institutional restraints on power in the domestic realm that seek inspiration in early institutions from the Middle Ages.¹⁶

The present study will also show that two other developments that resulted from efforts to avoid the concentration of power in domestic institutions have, in fact, been compared to similar ones in the international realm: the push to establish a civil service that is autonomous of the executive branch of government, starting around the nineteenth century, and later efforts to control the power of such bureaucracies. This was possible because some of these developments in the two realms were fairly close to each other in time and therefore more easily observable. In fact, in the early 2000s, when international institutions developed policies requiring staff to share with the public important information (viewed by many as a way of restraining the influence of increasingly powerful government bureaucracies), individuals who had been instrumental in passing freedom of information legislation within their states just a few decades or even years earlier, were called to help draft IGO policies.¹⁷ However, in most other cases the developments in domestic and international institutions that I discuss took place many centuries apart, making it difficult to notice and assess similarities in such processes.

Comparing groups of actors rather than actors

The vast majority of existing literature comparing domestic and international politics has focused on analogies between interests and actions of individuals within the state and those of individual states in the international system. I seek to move beyond such simplifying and often flawed parallels that have permeated the IR literature for a long time by focusing on groups of actors in the two realms and on their aggregate power. Indeed, at the domestic level, this approach to the study of politics has been accepted for some time and may be best summarized in the words of Hannah Arendt: “power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together.”¹⁸ Even absolute monarchs and dictators should be understood as leaders of small groups of individuals within states who have strong interests in maintaining the status quo. Similarly, in the international realm, even when power is concentrated in the

¹⁶ I will discuss some important exceptions, such as North, Douglass C. and Barry R. Weingast. 1989. “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,” *The Journal of Economic History* 49(4): 803–32; Olson, Mancur. 1993. “Dictatorship, Democracy, and Development,” *The American Political Science Review* 87(3): 567–76; Weingast, Barry R. 1997. “The Political Foundations of Democracy and the Rule of Law,” *The American Political Science Review* 91(2): 245–63.

¹⁷ E.g., Grigorescu, Alexandru. 2003. “International Organizations and Government Transparency: Linking the International and Domestic Realms,” *International Studies Quarterly* 47(4): 643–67.

¹⁸ Arendt, Hannah. 2014. *On Violence*. Cheshire: Stellar Classics, 143.

hands of one state (sometimes referred to as the “hegemon”), the power is, in fact, held by a group of individuals within that state. Moreover, throughout history, most important international developments unfolded when groups of states acted together. If we consider the power that needs to be restrained as the aggregate of multiple actors, that is, of groups of actors, whether that means groups of individuals within states or groups of states with the international system, our arguments and findings are more likely to “travel” across different types of states, across time, and, essential for this study, across the domestic–international divide.

I will identify the most important groups that contributed to the emergence, empowerment, and erosion of institutional restraints on concentrated power in the domestic and international realms. I also develop a set of expectations regarding such groups’ varied roles in the evolution of international institutional restraints on power.

This study will then assess the plausibility of my main argument, that the processes leading to the emergence and evolution of institutional restraints on concentrated power in the domestic and international realms have been similar. The rest of this first chapter begins by placing my question and argument within the broader literature discussing differences and similarities between domestic and international politics. I show how my approach takes some elements from this literature and complements it with additional ones.

Placing the main question and argument in the broader literature

The question of whether the processes leading to domestic institutional restraints on concentrated power led to similar international institutional restraints, of course, can be framed within the broader literature that compares domestic and international politics. The perceived usefulness of such comparisons has fluctuated both across time and across issues. The idea that international relations should be organized following domestic models began being promoted throughout the nineteenth century, in the writings of a handful of individuals such as Saint-Simon, Ladd, Lorimer, and Bluntschli, but it was never truly applied to real-world developments. The domestic–international analogy was much more broadly accepted when the first major international institutions such as the League of Nations¹⁹ were established in the aftermath of World War I. However, after World War II, the literature began emphasizing the differences between domestic and international politics, leading some theorists such as Charles Manning, Frederick Dunn, and Stanley Hoffman to advocate for the establishment of IR as a different field from Political Science. In 1959, Hoffman wrote: “International

¹⁹ E.g., Zimmern, Alfred. 1939. *The League of Nations and the Rule of Law 1918–1935*. London: Macmillan, chapter 7.

Relations take place in a milieu which has its own 'coherence and uniqueness,' its rules of the game which differ sharply from the rules of domestic politics, its own perspective."²⁰

It is somewhat surprising to see such an emphasis on the differences between domestic and international politics, especially after Hans Morgenthau, who had a strong influence on virtually all the aforementioned scholars, had argued (as noted in the opening quote of this study) that the two realms indeed shared a common logic, one based on actors' pursuit of power. However, when classical realists, including Morgenthau, looked to domestic analogies they rightfully dismissed any contemporary developments, but they also did not seek comparisons to early ones, from many centuries ago, as the present study does. Instead, they felt IR could best learn from interactions among individuals within communities vaguely conceptualized as ones of a Hobbesian state of nature. If more detailed comparisons were sought, the literature focused on "primitive" societies,²¹ in other words on the period that preceded those of state formation and consolidation emphasized in this book. It is through such power-based arguments²² (but also through others²³) that IR was brought closer to mainstream political science in the 1960s.

Throughout the later part of the Cold War, the differences between domestic and international politics were emphasized once more, especially after Kenneth Waltz's "neorealist" approach highlighted the dichotomous distinction between domestic systems seen as hierarchic in nature and the international system understood as anarchic.²⁴ Additionally, neorealism embraced even more than classical realism two other important assumptions that made any domestic–international comparisons difficult to sustain: that in IR states are unitary actors and that they are the only relevant actors.²⁵

Some challenged these assumptions well before the end of the Cold War.²⁶ However, especially with the emergence of constructivism and new liberalism in the

²⁰ Hoffmann, Stanley. 1959. "International Relations: The Long Road to Theory," *World Politics* 3(11): 346–77, 347.

²¹ E.g., Masters, Roger D., 1964. "World Politics as a Primitive Political System," *World Politics* 16(4): 595–619.

²² E.g., Fox, William Thornton Rickert. 1968. *The American Study of International Relations. Essays*. Columbia, SC: Institute of International Studies, University of South Carolina.

²³ See, e.g., Spiro, Herbert. 1966. *World Politics: The Global System*. Homewood IL: Dorsey Press; Rosenau, James. 1966. *Calculated Control as a Unifying Concept in the Study of International Politics and Foreign Policy*. Princeton: Center for International Studies Princeton University.

²⁴ Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co.

²⁵ See, e.g., Milner, Helen V. 1998. "Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics," *International Organization* 52(4): 759–86; Staton, Jeffrey K. and Will H. Moore. 2011. "Judicial Power in Domestic and International Politics," *International Organization* 65(3): 553–87. Hafner-Burton, Emilie M., David G. Victor, and Yonatan Lupu. 2012. "Political Science Research on International Law: The State of the Field," *American Journal of International Law* 106(1): 47–97.

²⁶ E.g., Allison, Graham T. 1969. "Conceptual Models and the Cuban Missile Crisis," *The American Political Science Review* 63(3): 689–718; Ruggie, John. 1982. "Continuity and Transformation in World Politics: Toward a Neorealist Synthesis," *World Politics* 35: 261–85; Ashley, Richard. 1984. "The Poverty

1990s, IR theory increasingly questioned that states are always the most important actors²⁷ and that they are unitary actors.²⁸ Most important, they challenged the argument that the international system is truly anarchic.²⁹

Helen Milner suggested as early as 1991 that domestic politics is often not very hierarchical in nature because in most states, authority is not concentrated but, rather, diffused. Conversely, due to the existence of international governing institutions and to a body of international laws, international politics is not completely anarchic. The question for her rather referred to *the degree* to which international institutions command obedience. This argument led Milner to an observation that is essential for the present study: that anarchy and hierarchy (that implies concentration of authority) is best understood as falling at different times and in different systems across a continuum, rather than representing two completely opposed concepts.³⁰

Alexander Wendt added to this argument the one that, even if the system was truly anarchic, states did not necessarily need to act as potential enemies towards each other.³¹ He later expanded suggesting that state behavior depended on the “culture of anarchy” prevalent in the international system, distinguishing between three such cultures that, as in the case of Milner’s argument, also implied the existence of a continuum: the Hobbesian (realist) variant of anarchy (where states would indeed see others as enemies), the Lockean one (where they would be rivals), and the Kantian one (where they would be friends).³²

By 1998, Milner argued that over the previous decade “the degree of divergence between IR and the rest of the political science [...] seems to have lessened,” and that the potential “cross-fertilization” between the subfields was due to the relatively recent relaxation of the basic assumptions of neorealism.³³ Over the past two decades, the IR literature has indeed paid much more attention to the hierarchic

of Neorealism,” *International Organization* 38(2): 225–86; Putnam, Robert. 1988. “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” *International Organization* 42(3): 427–60.

²⁷ E.g., Keck, Margaret E. and Kathryn Sikkink. 1998. *Activists beyond Borders: Advocacy Networks in International Politics*. Ithaca, NY: Cornell University Press.

²⁸ E.g., Moravcsik, Andrew. 1997. “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organization* 51(4): 513–53.

²⁹ See, e.g., Staton, Jeffrey K. and Will H. Moore. 2011. “Judicial Power in Domestic and International Politics,” *International Organization* 65(3): 553–87; Milner, Helen. 1991. “The Assumption of Anarchy in International Relations Theory: A Critique,” *Review of International Studies* 17(1): 67–85. Lake, David. A. 2010. “Rightful Rules: Authority, Order, and the Foundations of Global Governance,” *International Studies Quarterly* 54(3): 587–613.

³⁰ Milner, Helen. 1991. “The Assumption of Anarchy in International Relations Theory: A Critique,” *Review of International Studies* 17(1): 74–6.

³¹ Alexander Wendt. Spring, 1992, “Anarchy is what States make of it: The Social Construction of Power Politics,” *International Organization* 46(2): 391–425.

³² Wendt, Alexander. 1999. *Social Theory of International Politics*. Cambridge: Cambridge University Press.

³³ Milner, Helen V. 1998. “Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics,” *International Organization* 52(4): 759–86, 760.

structures in global governance³⁴ and, consequently, has laid the groundwork for more refined comparisons between the domestic and international realms.

Despite this greater willingness to seek similarities between domestic and international politics, the mainstream IR literature has nevertheless continued to emphasize differences between the two realms. In part, this trend has been spurred by the fact that it is indeed true that there are many important differences between *current* domestic and international institutions.³⁵ Additionally, for centuries, potential (and superficial) similarities between the domestic and international realms have generated numerous idealistic proposals that, in turn, led to a stigma against analogies crossing the national–international divide.

There appear to be differences between the various subfields of international relations regarding the perceived usefulness of domestic–international comparisons. For example, the study of inter-state conflict relies heavily on the anarchic nature of IR and does not find much use for domestic analogies. Similarly, international law scholarship starts from the premise that the lack of a global government does not allow for the enforcement of international agreements in the same way that domestic laws are enforced.³⁶ Even when such scholarship identified possible ways in which the study of the international realm can benefit from our understanding of domestic developments (as in the case of the literature on global constitutionalism³⁷ or the one on administrative law³⁸) its conclusions have tended to be more normative, speaking to the potential changes to international institutions and law in order to make them more similar to *current* domestic institutions and law, rather than explanatory, accounting for the evolution of international law *in the past*.

In contrast, the scholarship on international institutions, has tended to acknowledge, more than the other bodies of IR literature, the similarities between the two realms.³⁹ Indeed, how could it not do so? After all, within IGOs individuals representing large (usually national) groups gather in international legislative-type

³⁴ See, e.g., Cooley, Alexander. 2005. *Logics of Hierarchy: The Organization of Empires, States and Military Occupations*. Ithaca, NY: Cornell University Press; Donnelly, Jack. 2006. "Sovereign Inequalities and Hierarchy in Anarchy: American Power and International Society," *European Journal of International Relations* 12(2): 139–70; Ikenberry, John. 2011. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*. Princeton, NJ: Princeton University Press; Lake, David. 2009. *Hierarchy in International Relations*. Ithaca, NY: Cornell University Press; Ward, Kerry. 2009. *Networks of Empire*. New York: Cambridge University Press; Weber, K. 2000. *Hierarchy amidst Anarchy*. Albany: State University of New York.

³⁵ Although the present study focuses primarily on similarities between developments in the two realms, in the empirical chapters and conclusions it will also point out important differences.

³⁶ E.g., Hurd, Ian. 2015. "The International Rule of Law and the Domestic Analogy," *Global Constitutionalism* 4(3): 365–95.

³⁷ For an excellent comprehensive survey of the literature, see Lang, Anthony F. and Antje Wiener. 2017. *Handbook on Global Constitutionalism*. Cheltenham UK: Edward Elgar Publishers.

³⁸ See, e.g., Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. 2005. "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68: 15–62.

³⁹ Milner, Helen V. 1998. "Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics," *International Organization* 52(4): 759–86, 760.

forums and vote on important questions such as those related to health, labor, and economic policies, just as domestic legislators gather and vote on such issues in parliamentary bodies. Many of these votes lead to rules that IGOs then apply in their global governance efforts just as legislatures adopt domestic laws that governments then implement.

With a few relevant exceptions, decisions within IGOs are adopted through simple majority voting. Two-thirds majority votes are usually required for the more important matters, just as in many national parliaments across the world. Moreover, international institutions generally establish two different bodies that need to mutually accept each other's decisions and that reflect striking similarities with the workings of bicameral legislatures. For example, numerous decisions in the UN, from the acceptance of new members to the selection of the Secretary-General, need to be approved both by the Security Council and by the General Assembly. Over the past century almost forty IGOs have created parliamentary assemblies.⁴⁰ Many of them adopted rules of procedure that are very similar to those from national parliaments.

Dozens of international courts have also emerged to arbitrate and adjudicate international cases in similar ways as domestic courts deal with cases between individuals and institutions at the national level.⁴¹ In such international and domestic courts, judges, prosecutors, and registrars have similar roles. The similarities appear to have become even more noticeable with the emergence of international courts such as the ones for the former Yugoslavia, for Rwanda, and the International Criminal Court that focus on crimes committed by individuals rather than inter-state disputes. The independence of the judges in such courts is increasingly emphasized, just as with judges from domestic courts.⁴²

The parallels between international institutions and domestic ones have been spurred over the past two decades by the emergence of a multitude of IGO offices that are intended to provide a greater degree of oversight over IGO staff. Inspection, evaluation, investigation, and ethics offices were generally created in IGOs starting in the late 1980s and mimic institutions that hold officials accountable in national government structures.⁴³ Domestic models appear to have been used for the fairly recent establishment of rules and offices that encourage civil society

⁴⁰ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, 248–49.

⁴¹ Romano, Cesare P.R. 1999. "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," *NYU Journal of International Law and Politics* 31(4): 709–52.

⁴² E.g., Zimmermann, Dominik. 2014. *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*. Baden-Baden: Nomos.

⁴³ E.g., Park, Susan. 2010. *World Bank Group Interactions with Environmentalists Changing International Organisation Identities*. Manchester: Manchester University Press; Grigorescu, Alexandru. 2010. "The Spread of Bureaucratic Oversight Mechanisms across Intergovernmental Organizations," *International Studies Quarterly* 54(3): 871–86.

organizations to work more closely with IGOs and for those that place obligations on IGOs to share information with the public.

Additionally, IGOs have created institutions that guard the autonomy of their staff. The vast majority of IGO staff has formed unions, mirroring developments in domestic government institutions. Recently, IGOs also adopted whistleblower protection policies like those in domestic government institutions.

The study of international institutions also appears to have embraced more than other IR subfields theoretical approaches that have been previously applied to domestic politics. The work on IGOs has thus borrowed from all three forms of institutionalism developed to explain domestic institutions: rational choice, sociological, and historical.⁴⁴ Recently, the literature on IGOs has applied principal-agent approaches that originated in the study of the domestic realm and has been particularly successful in explaining actions of bureaucracies.⁴⁵ The public administration literature has also sought to apply domestic approaches for the study of bureaucracies to IGOs.⁴⁶ The fact that many of the explicit parallels between the use of such theoretical approaches in the domestic and international realms are recent, should not obfuscate the fact that the study of international institutions has sought inspiration in theoretical approaches from comparative politics for decades.⁴⁷ However, all such analyses have been used simply to explain international developments and only rarely to account for the surprising similarities

⁴⁴ For examples of rational choice institutionalism see, e.g., Abbott, Kenneth W. and Duncan Snidal. 1998. "Why States Act through Formal International Organizations," *The Journal of Conflict Resolution: A Quarterly for Research Related to War and Peace* 42(1): 3–32; Koremenos, Barbara, Charles Lipson, and Duncan Snidal. 2004. *The Rational Design of International Institutions*. Cambridge: Cambridge University Press; Important examples of sociological institutionalism are Finnemore, Martha. 1996. *National Interests in International Society*. Ithaca, NY: Cornell University Press; Finnemore, Martha and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change," *International Organization* 52(4): 887–917. Recent relevant examples of historical institutionalism are Fioretos, Orfeo. 2011. "Historical Institutionalism in International Relations," *International Organization* 65(2): 367–99; Rixen, Thomas, Lora Anne Viola, and Michael Zürn. 2016. *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics*. Oxford: Oxford University Press. Zürn, Michael. 2018. *A Theory of Global Governance: Authority, Legitimacy, and Contestation*. Kettering: Oxford University Press. Of course, there are many more examples of the very broad literature on the application of the three types of institutionalism to IR.

⁴⁵ Nielson, Daniel L. and Michael J. Tierney. 2003. "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform," *International Organization* 57(2): 241–76; Hawkins, Darren G., David A. Lake, Daniel Nielson and Michael Tierney (eds.). 2006. *Delegation and Agency in International Organizations* (Political Economy of Institutions and Decisions). Cambridge: Cambridge University Press; Grigorescu, Alexandru. 2010. "The Spread of Bureaucratic Oversight Mechanisms across Intergovernmental Organizations," *International Studies Quarterly*, 54(3): 871–86.

⁴⁶ Ness, Gayl D. and Steven R. Brechin. 1988. "Bridging the Gap: International Organizations as Organizations," *International Organization* 42(2): 245–73. E.g., Bauer, Michael W., Christopher Knill, and Steffen Eckhard (eds.). 2017. *International Bureaucracy: Challenges and Lessons for Public Administration Research*. London/New York: Palgrave Macmillan; Bauer, Michael W. and Jörn Ege. 2016. "Bureaucratic Autonomy of International Organizations' Secretariats," *Journal of European Public Policy* 23(7): 1019–37; Geri, Laurance. 2001. "New Public Management and the Reform of International Organizations," *International Review of Administrative Sciences* 67(33): 445–60.

⁴⁷ Neoliberal Institutionalism has been particularly acceptant of domestic approaches to the study of institutions. See, e.g., Krasner, Stephen D. 1982. "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36(2): 185–205; Keohane, Robert O.

between domestic and international institutions, the main focus of the present study. The similarities were, at best, mentioned in passing and the causes for such similarities were rarely discussed.

In a handful of exceptions, sociological institutionalist approaches have offered fairly comprehensive accounts of how domestic norms such as those of anti-corruption,⁴⁸ accountability,⁴⁹ or civil society participation,⁵⁰ actually led to similarities between the two realms.⁵¹ However, these explanations simply suggest that IGOs copied elements from domestic institutions and do not address the question of whether there are certain conditions both in the domestic and international realms that are more likely to lead to such similarities.

I complement the research discussing how domestic norms and models are projected *across levels*, leading to institutions in the international realm similar to those in the domestic one, by suggesting that such similarities are also due to the same types of processes unfolding *at each of the two levels*, often independent of each other and at very different moments in history. The first type of research, focusing on “cross-level” dynamics, seeks primarily to explain *how* international institutions come to be similar to domestic ones once actors decide to establish them. The second type of research, focusing on dynamics that unfold within one level, and which I am pursuing in this study, addresses the question of *why and when* actors in the domestic and international realms decide in the first place they need to adopt institutions that, in many cases, end up being similar. In other words, I ask whether the same mechanism that led to pressures for the adoption of power restraints in the domestic realm also function in the international realm.

Figure 1.1 illustrates the two types of explanations. The white arrow represents processes discussed as cross-level projections (from the domestic institution, I_1 , to the international one, I_2), mostly in the sociological institutionalist literature. The black arrows represent processes unfolding within separate individual levels but triggered by the same factor (F) and therefore leading to the adoption of similar domestic (I_1) and international (I_2) institutions. I will refer to the two types of process as “cross-level” and “within-level” to differentiate between them.

1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ: Princeton University Press; Stein, Arthur A. 2010. “Neoliberal Institutionalism,” in Reus-Smit, Christian and Duncan Snidal (eds.). *The Oxford Handbook of International Relations*. Oxford: Oxford University Press, 201–21, 215–6.

⁴⁸ E.g., McCoy, Jennifer. 2001. “The Emergence of a Global Anti-corruption Norm,” *International Politics* 38: 65–90.

⁴⁹ Park, Susan. 2006. “Theorizing Norm Diffusion Within International Organizations,” *International Politics* 43(3): 342–61.

⁵⁰ Tallberg, Jonas, Thomas Sommerer, Theresa Squatrito, and Christer Jonsson. 2013. *The Opening Up of International Organizations: Transnational Access in Global Governance*. Cambridge: Cambridge University Press.

⁵¹ Koenig-Archibugi, Mathias. 2011. “Is Global Democracy Possible?,” *European Journal of International Relations* 17(3): 519–42.

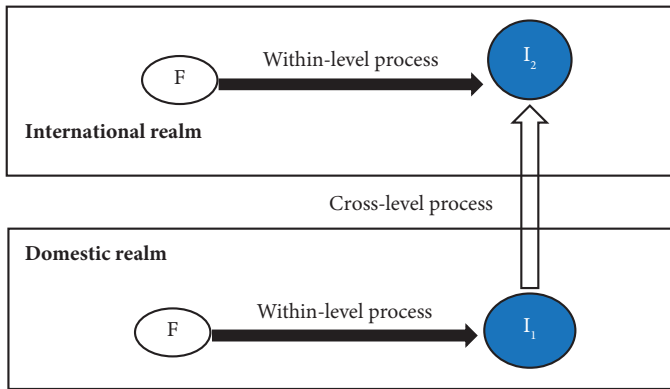


Figure 1.1 Two types of explanations for similarities between domestic and international institutions

It should be noted that the independent effects of the cross-level and within-level processes cannot always be distinguished easily. There are instances when similar factors will lead decision-makers in the two realms to seek institutional solutions (within-level dynamic), but when they do so in the international realm, they may find domestic models that have worked well and that they now believe will also work in international institution (cross-level dynamic). For example, such a combined process is likely to have unfolded recently when IGOs adopted whistle-blower policies as a solution to the same kind of problems international secretariats faced as domestic government bureaucracies. Specifically, in both realms there was a perceived need to have career bureaucrats more autonomous of top-level political appointees. As IGOs sought to deal with such a need they turned to recent domestic policies for inspiration. The two processes illustrated in Figure 1.1 with the white and black arrows also combined in the early 2000s when IGOs sought to develop images of trustworthy institutions (especially after scandals) and adopted public information policies similar to the freedom of information laws many governments embraced in the 1990s when faced with similar crises of trust.⁵²

However, there are also instances when the search for international institutional solutions to certain problems does not lead to copying of domestic institutions, at least not a *purposeful* one. Such processes are more likely to be found in cases when the emergence of domestic institutions of a certain type took place centuries or even millennia before the problem was sought to be resolved in the international realm. In these instances, the original reasons for establishing a domestic institution (and the original logic behind the choice for that particular institutional

⁵² Grigorescu, Alexandru. 2003. "International Organizations and Government Transparency: Linking the International and Domestic Realms," *International Studies Quarterly* 47(4): 643–67.

feature) may be lost in time. Therefore, current-day decision-makers in the international realm are likely to adopt similar institutional solutions as those that were found in the domestic realm many centuries earlier without even being aware that they are doing so.

I should note that the similarities between domestic and international institutions I discuss here are not the result of “mistakes” or “pure chance.” They are the result of purposeful calculations that individuals and groups make and reactions to similar circumstances. The evolution of domestic and international developments parallel each other just as the evolution of various institutions such as religion, slavery, or police force emerged across states that did not have contact with each other. They were all purposeful reactions to similar events but did not involve copying from one culture to another.⁵³

In the international realm one such example is that of the League of Nations establishing an Assembly where all states were allowed to participate. This organ was added to the original plans for the IGO, after the five great powers victorious in World War I initially sought to establish an organization that would work almost entirely through a Council, where membership was to be limited to themselves. They accepted the more inclusive Assembly in order to bestow greater legitimacy on the new IGO. However, during the debates that led to the establishment of the two main organs of the League, the Council and Assembly, there was no mention of the analogy between such a structure and the bicameral one in domestic legislatures. Perhaps more important, international decision-makers after World War I did not make any connection between their inclusion of small states in the main international institutions and the actions of early rulers such as Henry III who in 1254 extended for the first time participation in the English Parliament to representatives of commoners from all counties, or to similar examples of broadening representation in assemblies from other states. I will show that the reason for making the English Parliament more inclusive was the same as the one that resulted in the League allowing small states to participate: a powerful group of actors sought greater legitimacy and additional allies in its clashes with

⁵³ Such processes are discussed in other fields beyond political science. Most notably, some of the earliest studies of anthropology, in the nineteenth century, noted the similarities between the shapes of various objects, such as boats or oars, produced by groups from cultures that had no contact with each other. See e.g., Boas, Franz. 1974. *The Shaping of American Anthropology, 1883–1911: A Franz Boas Reader*. New York: Basic Books, 103–5. More recently, some anthropologists, such as Walter Goldschmidt, explained in greater detail that, despite the broad diversity of human cultures, there are numerous common functions that need to be discharged in all societies and that lead to fairly common practices among groups with little or no interactions (Goldschmidt, Walter. 1966. *Comparative Functionalism: An Essay in Anthropological Theory*. Berkeley: University of California Press). An even more recent influential (but also controversial) study on how anthropology explains similarities across very different cultures that have not interacted with each other is Brown, Donald George. 1991. *Human Universals*. New York: McGraw-Hill.

other groups by including a weaker group of actors in decision-making institutions. However, the *similarity* between the domestic and international institution was not a purposeful one, as in the case of cross-level processes.

Just as important, when great powers acquiesced to making the League more inclusive in membership, they did not foresee the degree to which the new Assembly (and other IGO assemblies, such as the UN General Assembly, that later adopted this model) would eventually develop into meaningful restraints on their abilities to take international actions. The process was similar to the one that unfolded in England in the thirteenth century, when Henry III did not foresee that his actions would sow the seeds of a process that eventually led several centuries later to the House of Commons becoming the principal legislative government institution, one that came to act as the most significant restraint on the English monarch's power. And yet, I will show that the processes leading to domestic assemblies and international ones were triggered by similar factors, even if most international institutions are still at a very early stage and, at first sight, may seem different from current domestic institutions.⁵⁴

Similarly, in the twelfth century, English kings came to rely more on itinerant law courts to project their authority across their territories when it became too difficult for them to adjudicate in person. Such courts were thus established as a way to extend their power, across space, over their subjects, certainly not as a check on their own power. In time, the judicial profession became more specialized and judges slowly came to use their expertise to carve out a greater degree of independence for themselves. Eventually, this change allowed domestic courts to act increasingly as important checks on the most powerful group of domestic actors. I will show that when the first broadly accepted international laws and the first international institutions were introduced, they were also intended to act as conduits for projecting the power of dominant states to other parts of the world, not as checks on their power. However, in time, as international lawyers forged professional and even personal ties with each other across borders, they formed an important group that promoted independence of judges in the international institutions that emerged after World War I and World War II. This process was similar to the one that unfolded many centuries earlier in the domestic realm (i.e., an example of parallel within-level dynamics). It is true that, recently, there have been increasing calls for independence of judges in international courts. Such calls have often compared the need for independence in international courts to the independence of domestic courts (i.e., an example of cross-level dynamics).

⁵⁴ An important exception is the European Parliament (EP) where I will show that similar need for greater legitimacy as in the domestic realm led to the establishment of this type of institution (a within-level process). However, unlike the case of other international institutions, the EP was also established based on a clear domestic model (through a cross-level process).

However, when the *first* international courts were established, only within-level processes contributed to the similarities between them and domestic courts.

In sum, my focus on parallel within-level processes that took place at very different moments in time, represented by the black arrows in Figure 1.1, allows for yet another type of explanation for the similarities between domestic and international institutions, that complements the already rich literature on cross-level processes represented by the white arrow in the same figure. As this chapter suggests, it is easier to distinguish between the two processes when we consider domestic developments from long ago, that international decision-makers may not remember and therefore are not likely to use in their promotion of similar institutions.⁵⁵ In such cases, the within-level processes are far less likely to involve purposeful imitations of domestic developments while the cross-level processes are primarily based on imitations. This book will point out numerous occurrences of this important second type of parallel within-level processes leading to institutional similarities across the domestic–international divide.

To be clear, this does not mean that the cross-level process does not take place. In fact, often they both unfold at the same time: when within-level dynamics take place, groups and actors search for good models from the domestic realm that they can apply to the international one. I emphasize the within-level process because the literature has generally focused solely on the cross-level one. Moreover, the dynamics of the process (i.e., the timing of the changes) are driven primarily by the within-level process, giving it the overall direction. The cross-level one simply complements it.

I will seek to distinguish between the cross-level and within-level processes leading to similar institutions by identifying the arguments used by international decision-makers for adopting new institutional restraints. I will be especially focusing on the rhetoric that emphasizes fear of present or future concentrated power vs. rhetoric that promotes the adoption of domestic models (often based on the application of domestic norms to the international realm). Such arguments offer potential evidence that the within-level process plays a more important role than the cross-level one.⁵⁶

⁵⁵ The decision to compare domestic developments over the past millennium with international ones over the past century or two is not due primarily to the fact that they are sufficiently distant in time to allow me to disentangle within-level process from cross-level ones. The comparison is simply chosen because, for the most part, the evolution of institutional restraints on concentrated power, the topic of this study, *did* unfold at very different moments in the two realms.

⁵⁶ Of course, this methodological approach is not infallible. Decision-makers may not explain their reasons for creating or changing institutional restraints. Alternatively, the reason they emphasize in their rhetoric may not be the real one triggering their actions. I will discuss such potential methodological problems in greater depth in the concluding chapter and note that they are not specific to my study.

Structure of the book

The following chapter will discuss fear of concentrated power as one important common factor (“F” in Figure 1.1) that has led to similarities in the evolution of domestic and international institutions. I summarize the broad political theory literature on fear of concentrated power, emphasizing how much of it connects to an important yet somewhat neglected core tenet of liberalism. I then highlight some of the relatively few works seeking to explain the development of the early institutional restraints on power in the domestic realm and that are relevant for the present study. I also discuss the literature on international restraints on power, showing where my approach overlaps with and complements existing ones. I develop five arguments regarding the evolution of institutional restraints on power based on scholarship and from the logic underlying such scholarship.

Chapter 3 tracks the evolution of restraints on concentrated power in the domestic realm. Specifically, I look at the processes that led to the emergence and later development of courts, assemblies and parliaments, and government bureaucracies in England and France, starting more than one thousand years ago. I focus on these three major types of institutions because they are broadly considered to be the most important and effective potential restraints on the most powerful domestic actors and groups. This exercise serves two purposes. First, it is a plausibility probe for the expectations regarding the evolution of all institutional restraints on concentrated power outlined in Chapter 2 and that are greatly based on arguments from existing literature and from extension of such arguments arrived at through deductive reasoning. Second, it allows me to refine those expectations, based on inductive reasoning, specifically, on the observed evolution of institutional restraints on concentrated power in the domestic realm. This leads to a sixth argument regarding the broad patterns involving developments in the international realm.⁵⁷

Specifically, I note that developments in the international realm are expected to follow the same three phases in the evolution of institutional restraints as those identified in the domestic realm: emergence, change, and consolidation. The three phases allow me to outline the scope conditions of my previous five arguments by recognizing that there are different dynamics in the various phases of evolution of institutions.

Chapters 4–6 follow the evolution of institutional restraints in the international realm. I consider the emergence and development of international law and international courts (Chapter 4), IGO assemblies and parliamentary bodies (Chapter 5), and IGO secretariats (Chapter 6). The three types of international

⁵⁷ I thus join those who have emphasized the need to incorporate arguments derived both deductively and inductively in seeking a better understanding of domestic and international politics. For a well-known discussion of the need to combine deductive and inductive reasoning in IR see Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co., 13–7.

institutions are chosen because they are analogous to the domestic ones that have been traditionally viewed as the primary forms of institutional restraints on power. In each of the three chapters, I focus primarily on debates and decisions leading to the first relevant international institutional restraints on power. I also discuss later changes in the nature of the restraints on power through those IGOs and through other ones, established later. Specifically, Chapter 4 considers the evolution of international law from its beginnings through the nineteenth century and the establishment of the Permanent Court of Arbitration and Permanent Court of International Justice. I also touch upon the changes that came with the later founding of about half a dozen other international courts such as the International Court of Justice and International Criminal Court. In Chapter 5 I consider primarily the Concert of Europe, the League of Nations (that together reflect a shift from the first exclusive international deliberative bodies to the first inclusive one), as well as the Council of Europe and European Union (where the first major international parliamentary assemblies were established). Chapter 6 discusses changes in autonomy of international civil servants from the Central Commission for the Navigation of the Rhine (the first IGO) to the League of Nations and its International Labour Office (the first major IGOs to allow for a fairly autonomous secretariat), and, later, to the UN. I also consider the emergence of IGO accountability mechanisms, especially those in the World Bank and UN, starting in the 1980s.⁵⁸

Each empirical chapter answers the same three questions: What types of international institutional restraints developed? Who supported or opposed the institutional restraints? How (and why) did international institutional restraints emerge and evolve?

The concluding chapter (7) assesses the degree to which the expectations derived from my six arguments in Chapters 2 and 3 are met by developments in the international realm and, more broadly, whether the evolution of international institutional restraints on power discussed in Chapters 4–6 followed the same patterns as those in the domestic realm. I consider some differences, and not just similarities, in the evolution of the three types of international institutions: courts, assemblies, and secretariats. I especially focus on the factors that have led to the slower evolution of international institutional restraints, compared to the one of domestic restraints. Additionally, I note the relevance of rational choice, sociological, and historical institutionalist approaches for explaining the dynamics in the international realm.

⁵⁸ The choice of specific IGOs discussed within each of the three categories in Chapters 4–6 is based on generally accepted understandings of their prominence (as in the case of the League, UN, or EU) or on the fact that they were the first in each of these categories and therefore influenced all later organizations (such as the PCA, International Telegraph Union, and Commission for the Navigation of the Rhine). I also include discussion of several dozen other of the most prominent IGOs to illustrate the patterns in the evolution of institutional restraints over time.

The conclusions also lay out the practical and theoretical relevance of the findings. Here I will only mention briefly the three most important ones. First, in practical terms, I emphasize both the short-term importance of working with existing institutional restraints and of seeking small, incremental, changes, and the long-term goals based on calculations involving future potential global power shifts.

Second, in theoretical terms, the book suggests that by focusing on institutional restraints on concentrated power, we can find ways of bringing closer two main subfields of political science: comparative politics and international relations. While the literature has called for such “cross-level” comparisons, few works have offered substantive parallels between the two realms. My arguments both challenge and complement those from multiple bodies of IR literature, such as global constitutionalism, social constructivism, and soft balancing. They also suggest that IR would benefit from a broader understanding of liberalism, one that also encompasses important themes from classical liberal political thought, especially the work of John Locke, to complement the existing strands that have primarily borrowed from Adam Smith, Immanuel Kant, and John Rawls. Moreover, my findings may also be relevant for comparative politics.

Third, as discussed, the present study expands the usual narrow focus on great powers to medium-size and small states. It thus takes into account much more than the mainstream literature the interests and actions of dozens of other actors, allowing for a more complete and accurate portrayal of real-world developments. By considering the roles of weaker actors and groups, the book also shifts attention from IR’s traditional focus on “struggle for power,” to one on the neglected “restraints on concentrated power” that Gordon considered “the most important feature of political organization.”

2

The existing literature and a first set of arguments

As Figure 1.1 suggests, we should expect that, at times, the same factor (F) will trigger the emergence of similar institutions in the domestic and international realms. The present study focuses on one such factor that has shaped both domestic and international institutions: the fear of concentrated power. My focus on this factor is not simply intended to offer an example of parallel within-process dynamics in the domestic and international realms. It is chosen because it is one of the most important elements driving social interactions.

Individual thinkers as diverse as Thucydides and Einstein have argued that fear is an essential trigger of human action.¹ Fear of those who concentrate power in their hands and who can do most harm to others at all levels of human aggregation (local, national, or international), is therefore, not surprisingly, a recurring theme in social sciences literature. I discuss below how the theme has permeated political theory, comparative politics, and IR. I then develop multiple arguments building upon such bodies of literature and develop a set of expectations for developments involving international institutional restraints on concentrated power.

Political theory literature on fear of concentrated power and on institutional restraints within states

The understanding that “fear of power” is a principal driving force behind domestic politics can be traced back to political theory writings from hundreds if not thousands of years ago. Without doubt, among the most influential work that contributed to the centrality of fear of power in the study of politics is Thomas Hobbes’ *Leviathan*. According to Hobbes, the reason why life in the state of nature is indeed “solitary, poore, nasty, brutish and short” is “feare and danger of violent death.”²

¹ Thucydides argued that fear, honor, and interest are the strongest motives of human action. See Thucydides 1982. *The Peloponnesian War*. Trans. Richard Crawley. New York: Modern Library, 44. Albert Einstein has been quoted as saying that “Three great forces rule the world: stupidity, fear and greed.” See, e.g., Kollwee, Julia. 2008. “Fear is the New Mindset in the Irrational World of Finance,” *The Guardian*. October 23, 2008, at <https://www.theguardian.com/business/2008/oct/23/recession-market-turmoil-psychology-stress>

² Hobbes, Thomas. 1985. *Leviathan*. London: Penguin, 186.

However, the fear generating the need for the Leviathan was not a reaction to *concentrated* power, the central theme of the present book, but rather, the result of the relatively *equal power* of all individuals.³

According to Hobbes, it is due to the virtual *equality* of power among individuals and the fear and danger that result from it, that power needs to be concentrated in governments. The idea that concentrated power is a necessary and practical solution to human needs had been presented in other writings before those of Hobbes, perhaps most forcefully in the work of Jean Bodin. Indeed, in the second half of the sixteenth century, Bodin developed and applied the concept of “sovereignty” to argue for the need of hierarchical systems within polities. By placing sovereign authority in one individual (usually a monarch), he argued that hierarchical systems brought much more stability to states than those systems that placed sovereignty within a smaller group of individuals (aristocracies) or within many individuals (democracies). Thus, by following the Aristotelian classification of governments (by one, few, or many), he offered a strong argument for power concentration within one single locus, rather than within more, based on the perceived effectiveness and durability of the monarchic system.⁴

Bodin further argued that even if sovereignty was shared by more individuals, concentration of power had to be absolute and permanent. Consequently, he saw virtually no limitations on the sovereign’s actions. Not surprisingly, Bodin’s work has often been considered as nothing more than “political propaganda” intended to vindicate the emerging royal authority in France in the sixteenth century at the time he was elaborating his sovereignty doctrine.⁵

Although Hobbes’ support for power concentration in the hands of government was more subtle than that of Bodin, he too connected his arguments to an important contemporary event: the English Civil War. He posited that shared power (between the monarch and Parliament) was responsible for English society sliding back towards the “state of nature.” Hobbes’ attack on such instances of divided power was more specific in *Behemoth*, a work that he did not publish and therefore was less known than *Leviathan*. That work repeatedly placed the blame of Civil War squarely on Parliament, pointing to the folly of developing autonomous authorities of any kind, secular or ecclesiastic, that seek to share power with the

³ Specifically, Hobbes argued: “Nature hath made men so equal in the faculties of the body and mind, as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For, as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself” (Hobbes, Thomas. 1985. *Leviathan*. London: Penguin, 183).

⁴ Bodin, Jean and Julian H. Franklin. 1992. *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*. Cambridge: Cambridge University Press.

⁵ Henderson Burns, James. 1959. “Sovereignty and Constitutional Law in Bodin,” *Political Studies* 7(2): 174–7.

monarch.⁶ According to Hobbes, concentration of power was *a necessary condition* for cooperation.

The arguments *against* concentrated power have also permeated political writings for some time, starting with those of Classical Athens and, especially, Republican Rome. Among these, perhaps the most influential was the work of Aristotle. After offering his aforementioned typology of governments, of the one, the few, and the many, Aristotle concluded that the most practicable type is a “mixture” of the three. Additionally, he noted that in each constitution there were three elements, the “deliberative,” “the officials,” and the “judicial.” Some consider that this distinction as well as the conceptualization of “mixtures” of types of governments, planted the seeds for later ideas involving “constitutional” government, based on separation of power and checks and balances within domestic institutions.⁷

Despite the acknowledgement that scholarship emphasizing restraint on concentrated power can be traced back thousands of years, there is a general recognition that our current understanding of this important concept was in fact formed in the classical liberal writings, starting with those of John Locke. His *Second Treatise*⁸ offered a forceful repudiation of Hobbes’s defense of the leviathan state. Locke engaged directly with the Hobbesian notion that fear of *each individual’s* power drives human actions and he argued forcefully that the fear of the state’s *concentrated power* trumped their fear of each other. He wrote: “This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions.”⁹

Another way to frame the difference between the Hobbesian and Lockean perspectives on the major threats to societies, and one that allows for a direct application of such perspectives to the international realm, is that, while Hobbes feared primarily the effects of *anarchy* that resulted from relatively *equal* distribution of power among units, Locke focused on the negative effects of a *hierarchy* based on a very *skewed* power distribution among units. This distinction is particularly important for understanding two different roles that institutions (both domestic and international) can play: enhancing cooperation or restraining power. Indeed, for Hobbes, power concentration was a prerequisite for cooperation. Therefore, institutions were intended primarily as conduits for power projection that would foster cooperation. For Locke, restraints on power were necessary to protect individuals’ freedoms, without which true cooperation could not take place. Therefore,

⁶ Hampton, Jean. 1986. *Hobbes and the Social Contract Tradition*. Cambridge: Cambridge University Press, 111.

⁷ Finley, M. I. 1983. *Politics in the Ancient World*. Cambridge: Cambridge University Press, 58.

⁸ The treatise’s subtitle, “*An Essay Concerning the True Original Extent and End of Civil Government*,” offers a clear signal that it engages with the idea that the government’s power cannot be absolute.

⁹ Locke, John and Peter Laslett. 1963. *Two Treatise of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett*. New York: The New American Library, 372.

although he acknowledged the need for the powerful to play important roles in fostering cooperation (for example, to organize national defense), he emphasized the restraining function of institutions more than their ability to project power.¹⁰ In the concluding chapter I explain how IR could benefit from the application of a Lockean form of liberalism. Indeed, although there are multiple forms of liberalism applied to IR, none of them embraces the Lockean (and classical liberal) one focusing on power restraints.

The Lockean shift from an emphasis simply on fear of others' power to the additional (and main) fear of *concentrated* power, led to the long classical liberal tradition of devising restraints on tyrannical governments.¹¹ Montesquieu, Madison, and other scholars of the eighteenth century further developed the practical ideas of how to best achieve a separation of powers and checks and balances in order to avoid dangerous concentrations of state power.¹² Liberals shifted their prescriptions as their understanding of the principal threat to liberty changed. Thus, John Stuart Mill's liberalism extended the traditional protection against the tyranny of rulers to protections against the tyranny of majority opinion.¹³ Virtually all such power restraints discussed in classical liberalism were institutional in nature.

At its core, classical liberalism emphasized the freedom of each *individual*, thus balancing the strong Bodinian and Hobbesian focus on the greater good of *society*. While the need for cooperation among individuals was, of course, essential for Locke, Montesquieu, Madison, and other early liberals, the protection of such individuals from the government's coercive power was seen as a necessary

¹⁰ Judith Shklar offered one of the most eloquent interpretations of this argument: "What the liberalism of fear owes to Locke is also obvious: that the governments of this world with their overwhelming power to kill, maim, indoctrinate, and make war are not to be trusted unconditionally ('lions'), and that any confidence that we might develop in their agents must rest firmly on deep suspicion. Locke was not, and neither should his heirs be, in favor of weak governments that cannot frame or carry out public policies and decisions made in conformity to requirements of publicity, deliberation, and fair procedures. What is to be feared is every extralegal, secret, and unauthorized act by public agents or their deputies. And to prevent such conduct requires a constant division and subdivision of political power." See Shklar, Judith. 1989. "The Liberalism of Fear," in Nancy L. Rosenblum (ed.), *Liberalism and the Moral Life*. Cambridge, MA: Harvard University Press.

¹¹ Other important theoretical traditions also emphasize the importance of restraints on concentrated power (and of striking a balance between extreme hierarchy and anarchy). For example, republicanism (together with its recent "neo-republican" version) also connects domestic and international restraints (see, e.g., Deudney, Daniel H. 2007. *Bounding Power: Republican Security Theory from the Polis to the Global Village*. Princeton NJ: Princeton University Press; also, Pettit, Phillip. 2010. "Legitimate International Institutions: A Neo-Perspective," in Besson, Samantha and John Tasioulas (eds.), *The Philosophy of International Law*. Oxford: Oxford University Press. 139–160). However, this approach tends to emphasize the restraints on *institutions* rather than on the groups that use institutions to project their power. Moreover, recent literature has argued that the differences between liberal and neo-republican approaches are murky at best (e.g., Zuckert, Michael P. 1998. *Natural Rights and the New Republicanism*. Princeton NJ: Princeton University Press, 152).

¹² Gordon, Scott. 1999. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge: Harvard University Press, 83.

¹³ Mill, John Stuart and R. B. McCallum. 1948. *On liberty and Considerations on Representative Government*. Oxford: B. Blackwell, 1.

condition for their coming together to seek the promotion of their common goals. Classical liberalism acknowledges that restraining concentrated power could lead to less stable systems than those advocated by Bodin and Hobbes. However, they saw such rare instability (and even revolution, according to Locke) as necessary for the protection of the essential individual freedoms. Individual freedoms, in turn, were necessary for individuals to come together in truly cooperative processes, not those imposed from above.

Most of the literature has attributed the idea of establishing a separation of powers and checks and balances as emerging in the seventeenth century, with John Locke.¹⁴ Therefore, even for those who consider ancient Greek and Roman writings as precursors of later discussions of institutional restraints, there is an implicit understanding that during more than a millennium there was a relative hiatus in the development of such ideas. As I will suggest, this interruption in the development of political thought on this topic may have been in great part due to the nature of the medieval European political systems. The already existing fragmentation of power in such systems reduced the likelihood that one single actor or group could become sufficiently powerful to control others and, consequently, the pressure to establish checks and balances was not as great as during ancient or modern times.

Indeed, in the judicial realm, the power of the king was far from absolute during early medieval times. In Europe, the first “national” laws and, implicitly, the adjudication of such laws, only began replacing local laws and their local adjudication during the Frankish kingdom of the eighth and ninth centuries.¹⁵ Yet, even when laws came to be adopted at the national level, the king’s role was initially limited. In France, for example, until the sixteenth century the monarch could only “discover” laws that had been in existence in earlier times; he could not make such laws himself.¹⁶ Additionally, during medieval times, many administrative positions were filled by local lords rather than by the king. In such a system of fragmented power, the types of restraints on the dominant actor differed from those in the centralized states that emerged towards the end of the Middle Ages. While there are few writings from that time theorizing the need for checks on power, we can understand these early restraints by studying the institutions of that time and the arguments used by those who participated in establishing and altering such institutions to explain how restraints were conceived. This exercise is an important one because the main argument of this study is that we can explain the evolution of current international institutions by comparing them to early domestic government institutions, many of them from the medieval era.

¹⁴ Gordon, Scott. 1999. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge: Harvard University Press, 4.

¹⁵ Strayer, Joseph R. 2005. *On the Medieval Origins of the Modern State*. Princeton, NJ: Princeton University Press, 13–4.

¹⁶ Collins, James B. 1996. *The State in Early Modern France*. Cambridge: Cambridge University Press, 3–4.

Recent political theory literature has focused less on restraints on power than classical liberalism did up through the nineteenth century. It is interesting to note that the topic of fear of concentrated power became secondary for twentieth century scholars even in the liberal tradition. While some authors, such as Judith Shklar,¹⁷ continued to connect important contemporary tenets of liberalism to the fear of concentrated power, mainstream twentieth century liberal thought foregrounded other questions. It is particularly important to note that John Rawls, the political theorist who perhaps is most often seen at the center of twentieth century political thought in the liberal tradition, sought to explain the terms on which individuals can agree to cooperate, that is, to find fair terms of cooperation that are justifiable and can be justified to all parties. For Rawls, state institutions both embody and police the terms of cooperation.¹⁸ Specifically, Rawls argued: “the principles of justice provide a response to the fundamental question of political philosophy for a constitutional democratic regime. That question is: what is the most acceptable political conception of justice for specifying the fair terms of cooperation between citizens regarded as free and equal and as both reasonable and rational, and as normal and fully cooperating members of a society over a complete life, from one generation to the next?”¹⁹

The current relative lack of emphasis on the fear of concentrated power is, in part, due to the fact that, in domestic politics, the democratic (or even quasi-democratic) model based on systems of checks and balances has spread across most states. After World War II even authoritarian political systems allowed for a modicum of checks on concentrated power. Notably, the Soviet Union, the symbol of authoritarianism throughout the Cold War, moved away from the Bodinian absolute model of governance represented by Stalin’s rule to a somewhat more pluralistic model where power came to be shared by multiple individuals in the Politburo (sufficiently powerful to remove their own leader, Khrushchev, in 1964). Moreover, in democratic polities where twentieth century liberalism was being shaped, the notion of restraints on power seemed sufficiently accepted at that time to allow it to be foregrounded and for other themes to take center stage. Recent political theory literature, especially under the guise of “realist liberalism” has critiqued the Rawlsian overemphasis of cooperation. Scholars such as Williams and Shklar have pointed out that what often appears to be unfettered cooperation may, in fact, be coercion by the powerful over the weak.²⁰ While most realist liberals

¹⁷ Shklar, Judith. 1989. “The Liberalism of Fear,” in Nancy L. Rosenblum (ed.), *Liberalism and the Moral Life*. Cambridge, MA: Harvard University Press.

¹⁸ See Grigorescu, Alexandru and Claudio Katz. 2022. “Recovering ‘Lockean Liberalism’ in IR: International Restraints on Concentrated Power,” paper presented at International Studies Association conference, Nashville, TN.

¹⁹ Rawls, John and Erin Kelly. 2001. *Justice as Fairness: A Restatement*. Cambridge, MA: Belknap Press of Harvard University Press, 8.

²⁰ See Shklar, Judith. 1989. “The Liberalism of Fear,” in Nancy L. Rosenblum (ed.), *Liberalism and the Moral Life*. Cambridge, MA: Harvard University Press; Williams, Bernard. 2005. *In the Beginning*

have focused their critique primarily on Rawls's insufficient attention to questions of power (and politics), some, like Judith Shklar, also connected such deficiencies to the original classical liberal emphasis of fear of concentrated power and its potential consequences. Thus, to some degree, liberalism in political theory is only now returning to the Lockean emphasis on power restraints. This return to the theme of restraints on power also coincides (purposefully or not) with the challenges that democratic systems face both from outside (as the Chinese authoritarian yet economically effective model has come to appeal to many states) and inside (as the January 6, 2021 events at the US Capitol showed).

The comparative politics literature and other work on early domestic institutional power restraints

There are relatively few works in comparative politics scholarship explaining the emergence and later development of early domestic institutional restraints on power. In part, this is because such explanations are not very relevant for the study of *current* politics, the main focus of this subfield. Indeed, research on current domestic institutional restraints on power benefits from a choice of more than one hundred states that have relatively similar political structures. Therefore, comparative politics does not have as much *need* to turn to cases from long ago as IR does. As there is only one international system, the study of international politics generally seeks comparisons to previous international systems, across time, or on rare occasions, to early domestic systems, such as primitive ones.²¹ Of course, the present study adds to this small number of cross-temporal comparisons another one, between recent international dynamics and domestic institutions from the medieval period.

Even when the comparative politics literature seeks parallels across fairly broad periods of time, it finds it more useful to focus on modern institutions that have more to tell us about contemporary politics than on earlier ones, including from the medieval period. Therefore, scholarship has generally followed developments that unfolded during periods when there were already some restraints in place, such as relatively effective courts and parliamentary assemblies, and when the public and civil society organizations played important roles. Perhaps more important, it has sought to explain how different models of institutional restraints on power were embraced by some states after observing their success in other states. Indeed, the diffusion and adaptation processes involved in the spread of

Was the Deed: Realism and Moralism in Political Argument, ed. Geoffrey Hawthorn. Princeton, NJ: Princeton University Press, 3–4, 74.

²¹ E.g., Masters, Roger D., 1964. "World Politics as a Primitive Political System," *World Politics* 16(4): 595–619.

domestic institutional restraints on power²² are much more common and relevant for understanding current government institutions than the dynamics that led to courts, parliaments, and to government bureaucracies gaining a modicum of autonomy, almost one thousand years ago.

And yet, within the extraordinarily rich research on democratic institutions there are some important works offering insights into the development of early institutional restraints on power. Many of these works are not, strictly speaking, part of the comparative politics subfield, but are nevertheless useful for the present discussion.

For example, a relevant body of literature for this study is that on state formation. Numerous well-known works have focused on the dynamics that led to the emergence of centralized states, especially in medieval Europe.²³ Such work, as one would expect, focuses almost entirely on processes of state centralization, that is, on the concentration of power, rather than on its restraint. However, it is at least indirectly useful for this study because it explains how the dominant domestic group of actors, made up of rulers and their close allies, developed important institutions to gain more control over other groups. I will show that even such very early institutions that were not intended to constrain the most powerful actors, triggered dynamics that eventually led to meaningful restraints on concentrated power.

In terms of the literature that speaks directly to the early evolution of institutional restraints, one of the most important works is that of Scott Gordon, from which I cited at the beginning of this book. In his comprehensive study of institutional restraints on government power, Gordon connects current theories of constitutionalism to earlier scholarship, beginning with that of ancient Athens and

²² For important examples of the rich literature on diffusion of democracy and of some institutional restraints on power, see Starr, Harvey. 1991. "Democratic Dominoes: Diffusion Approaches to the Spread of Democracy in the International System," *Journal of Conflict Resolution* 35(2): 356–81; O'Loughlin, John, Michael D. Ward, Corey L. Lofdahl, Jordin S. Cohen, David S. Brown, David Reilly, Kristian S. Gleditsch, and Michael Shin. 1998. "The Diffusion of Democracy, 1946–1994," *Annals of the Association of American Geographers*, 88(4): 545–74; Kopstein, Jeffrey S. and David A. Reilly. 2000. "Geographic Diffusion and the Transformation of the Postcommunist World," *World Politics* 53(1): 1–37; Brinks, Daniel and Michael Coppedge. 2006. "Diffusion is no Illusion: Neighbor Emulation in the Third Wave of Democracy," *Comparative Political Studies* 39(4): 463–89; Gleditsch, Kristian Skrede. 2009. *All International Politics is Local: The Diffusion of Conflict, Integration, and Democratization*. Ann Arbor: University of Michigan Press; Elkins, Johan A. 2011. "The International Diffusion of Democracy," *Comparative Political Studies* 44(12): 1651–74.

²³ See, e.g., Tilly, Charles. 1990. *Coercion, Capital and European States*. Oxford: Blackwell; Spruyt, Hendrik. 1991. *The Sovereign State and its Competitors: An Analysis of Systems Change*. Princeton, NJ: Princeton University Press; Strayer, Joseph R. 2005. *On the Medieval Origins of the Modern State*. Princeton, NJ: Princeton University Press; Hui, Victoria Tin-bor. 2005. *War and State Formation in Ancient China and Early Modern Europe*. Cambridge: Cambridge University Press; Boix, Carles. 2015. *Political Order and Inequality: Their Foundations and Their Consequences for Human Welfare*. Cambridge: Cambridge University Press; Maine, Henry Sumner. 1999. *Lectures on the Early History of Institutions*. Kitchener, Ont.: Batoche; Boucoyannis, Deborah. 2021. *Kings as Judges: Power, Justice, and the Origins of Parliaments*. Cambridge: Cambridge University Press.

Republican Rome. More important for this study, it discusses the evolution of such ideas across the next two millennia, including during the Middle Ages.

Gordon's ability to find early constitutional elements in political systems that predate the ones that the literature usually refers to (in seventeenth century England and late eighteenth century France and United States) is based on his identifying a "pluralist model" of government that stands in contrast to the "hierarchical" one. The latter model derives the Bodinian notion of sovereignty while the former focuses on countervailance. The pluralist model does not necessarily imply checks and balances *among* branches of government. It can also be based on restraints on the power of the dominant actors *within* the same branch. According to Gordon, in all pluralist systems the coercive power of the state is controlled, at least to some degree, by introducing new actors who come to share some of the political power with the ruler.²⁴ I build on this interpretation of institutional restraints, as part of the pluralist model that applies both to domestic institutions (and that originate in the medieval period) and international ones (that emerge primarily over the past century).

An important connection between the present book and Gordon's work can be drawn if one considers that domestic government structures (like international ones later) grew with the need to deal with additional tasks. Such new tasks, in turn, encouraged the rulers (the "principals") to add more "agents" to the political institutions, whether subservient judges, members of rubber-stamp assemblies, or compliant civil servants. All these additional actors, in time, gained greater autonomy and came to challenge some of the principal's actions, thus allowing for the emergence of the pluralist model. Indeed, the principal-agent literature can be useful for explaining the emergence and later development of domestic and international institutional restraints on power.²⁵ The present book complements Gordon's work by focusing on *how* actual institutional restraints emerged and were later empowered, rather than on the evolution *of the ideas* behind institutional restraints, the main purpose of Gordon's work.

A handful of works, mentioned briefly above, directly discuss the emergence and evolution of early institutional restraints. For example, North and Weingast's seminal work on the empowerment of the English Parliament after the Glorious Revolution offered an important and generalizable example of a crucial moment in the evolution of institutional restraints. The two argued that this was one of the

²⁴ Gordon, Scott. 1999. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge: Harvard University Press, 16.

²⁵ See, e.g., Alchian, Armen A. and Harold Demsetz. 1972. "Production, Information Costs, and Economic Organization," *The American Economic Review* 62: 775–95; Williamson, Oliver E. 1985. *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*. New York: Free Press; Kiewiet, D. Roderick and Mathew D. McCubbins. 1991. *The Logic of Delegation*. Chicago: University of Chicago Press. In the study of international organizations, see e.g., Nielson, Daniel L. and Michael J. Tierney. 2003. "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform," *International Organization* 57(2): 241–76.

rare instances where the struggle for power (between the monarchy and elites) led to such changes. They explained the change by showing how the monarchy's need to show it can keep promises led it to adopt a formal pact of power-sharing.²⁶

In yet another important work explaining the evolution of early institutional restraint on government power, Olson focused, just as North and Weingast, on the 1688 Glorious Revolution (as well as on several other important moments in the history of England and the US). Also, like those two authors, Olson considered that instances of such important changes were rare, representing "accidents of history." Yet, he offered a more specific argument than those of North and Weingast with regard to the moment when we expect changes to institutional restraints on power. He noted that shifts from an autocratic rule towards a more democratic one unfolded when "None of the victorious leaders, groups, or tendencies was then strong enough to impose its will upon all of the others or to create a new autocracy."²⁷ This argument can be interpreted as a broader version of yet another important observation noted by Stasavage, that wars weaken rulers who, in turn, require the consent of the governed to respond to external foes. The need for such consent has bolstered domestic institutions of representative government.²⁸ I will explain below how this literature is directly relevant for my explanations of changes in institutional restraints on power. I will also note in the conclusions how such arguments lead to some potential *differences*, in our expectations for developments in the domestic and international realms.

The comparative politics literature probably most useful for explaining the evolution of early institutional restraints on power is the one on comparative authoritarianism. Some of this work asks the important question of why authoritarian systems need to develop institutions that are similar to those we see in democratic systems, such as parliaments, political parties, advisory councils, and political bureaus. Implicitly, it explains the development of institutions that lead rulers to share some of their power and develop rudimentary institutional restraints.²⁹

²⁶ North, Douglass C., and Barry R. Weingast. 1989. "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England." *The Journal of Economic History* 49(4): 803–32, 829–32; in a later piece (1997) Weingast returns to arguments from his article with North but also emphasizes the importance of the "self-reinforcing" nature of such pacts between the most powerful and other actors. Although not made explicit, underlying both these articles is the argument that the need to not have promises broken by the most powerful actor derives from the fear of its extraordinary power.

²⁷ Olson, Mancur. 1993. "Dictatorship, Democracy, and Development". *The American Political Science Review* 87 (3): 567–76, 574.

²⁸ Stasavage, David. 2016. "Representation and Consent: Why They Arose in Europe and Not Elsewhere," *Annual Review of Political Science* 19(1): 145–62.

²⁹ Some of the most important such works are: Myerson, Roger B. 2008. "The Autocrat's Credibility Problem and Foundations of the Constitutional State," *The American Political Science Review* 102(1): 125–139; Gandhi, Jennifer and Adam Przeworski. 2007. "Authoritarian Institutions and the Survival of Autocrats," *Comparative Political Studies* 40(11): 1279–301; Boix C. and Svobik M.W. 2013. "The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-sharing in Dictatorships," *Journal of Politics* 75(2): 300–16. For a broader approach see also Pepinsky, Thomas.

This scholarship offers two main explanations for the establishment of power-sharing institutions, that is, of institutions through which rulers are restrained, at least to some degree, from always acting as they please. A first explanation is that autocratic leaders need institutions to dominate some groups by broadening their basis of support and coopting others. The larger the group that needs to be countered by rulers, the more inclusive the representation of the new institution needs to be. In other words, authoritarian leaders may create narrow institutions such as juntas, politburos, and councils to coopt a small group of actors in their struggles against somewhat larger groups of other elites. However, when the groups that need to be dominated become broader, they come to establish more inclusive quasi-representative assemblies, often with legislative functions.³⁰ In sum, this argument suggests that the relative power of small groups of elites or large groups from the public, will dictate the inclusivity of institutions that the ruler needs to establish.

Boix and Svolik offer a second explanation that emphasizes the same type of cooptation processes initiated by autocratic leaders. However, they posit that the main reason for the emergence of power-sharing institutions is the need to reduce asymmetries of information between the dictator and the most powerful individuals who at that time support the status quo. Such trust-building institutions are useful for rulers because they are likely to extend the life of their autocratic regimes.³¹ It is important to note that these authors only expect power-sharing institutions to develop when the threat of rebellion from weaker actors is sufficiently credible. Conversely, they posit that power-sharing institutions will collapse when the dictator gains power and the success of a rebellion is less credible.³² These expectations acknowledge, as Olson's main argument does, that institutional restraints on power are likely to emerge or become more powerful at times of relative power parity between the ruler and one or more groups in a state. Additionally, Boix and Svolik's work emphasizes the important role that uncertainty about intentions (to which, I will add, uncertainty of the power distribution among groups), can play in these important processes.

Last but not least, the very broad body of literature on bureaucracies and their impact on domestic politics is also useful for the present study on restraints on power. The relevance of bureaucracies for domestic politics came to be recognized as early as the late nineteenth century, soon after they began gaining autonomy in

2014. "The Institutional Turn in Comparative Authoritarianism," *British Journal of Political Science* 44(3): 631–53.

³⁰ E.g., Gandhi, Jennifer and Adam Przeworski. 2007. "Authoritarian Institutions and the Survival of Autocrats," *Comparative Political Studies* 40(11): 1280.

³¹ Boix and Svolik 2013. Boix C. and Svolik M.W. 2013. "The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-sharing in Dictatorships," *Journal of Politics* 75(2): 300–16

³² Boix C. and Svolik M.W. 2013. "The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-sharing in Dictatorships," *Journal of Politics* 75(2): 302–3.

many government institutions across the world. Indeed, the question of bureaucratic autonomy became essential to the study of government institutions, starting with the writings of Max Weber,³³ and, later, in narrower bodies of scholarship, such as those on principal-agent relations, mentioned earlier, or on the organizational environment,³⁴ as well as, of course, in the comprehensive studies of bureaucratic politics.³⁵

Within this broad literature, there are two important arguments that are directly relevant for a discussion of institutional restraints on power. First, there is a general recognition that bureaucrats pursue their own interests even though they work under constraints imposed by political leaders. Their interests often involve the empowerment or, at least the survival, of their institution.³⁶ Based on this logic, we can extend this argument to officials working in government institutions such as courts and parliamentary assemblies, and not just those in government administrations. All three groups can be expected to act in ways that increase the relevance of their institutions and, implicitly, come to restrain further the ability of the most powerful actors in domestic systems to act as they please.

A second argument derived from this literature and which is important for the present study is that one of the main reasons why bureaucracies gain greater autonomy is their control over technical expertise and information.³⁷ This implies that in earlier government institutions where selection was based primarily on patronage, bureaucratic autonomy was not only weak but there were no real incentives for lower-level government officials to seek specialization. Yet, when bureaucratic selection processes came to be based primarily on expertise, the shift towards increased specialization also led such officials to become more influential and,

³³ Weber, Max, Hans Gerth, and C. Wright Mills. 1948. *From Max Weber: Essays in Sociology*. London: Routledge.

³⁴ See, e.g., Pfeffer, Jeffrey and Gerald R Salancik. 1978. *The External Control of Organizations*. New York: Harper and Row Publishers; DiMaggio, Paul J. and Walter W. Powell. 1983. "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review* 48:147–60; Scott, W. Richard. 1992. *Organizations: Rational, Natural, and Open Systems*. 3rd edn. Englewood Cliffs, NJ: Prentice-Hall; Pfeffer, Jeffrey. 1997. *New Directions for Organization Theory Problems and Prospects*. New York, NY: Oxford University Press. Some of this literature is especially useful for understanding processes of mimetics and isomorphism that lead to similar domestic institutions and can also be extended to explain similarities between domestic and international institutions.

³⁵ See, e.g., Downs, Anthony. 1966. *Inside Bureaucracy*. Boston, MA: Little, Brown; Beetham, David. 1987. *Bureaucracy*. Minneapolis, MN: University of Minnesota Press; Peters, B. Guy. 2018. *The Politics of Bureaucracy: An Introduction to Comparative Public Administration*. New York, NY: Routledge, especially chapter 8.

³⁶ See, e.g., Downs, Anthony. 1966. *Inside Bureaucracy*. Boston, MA: Little, Brown ; Pfeffer, Jeffrey. 1997. *New Directions for Organization Theory Problems and Prospects*. New York, NY: Oxford University Press.

³⁷ See Weber, Max, Hans Gerth, and C. Wright Mills. 1948. *From Max Weber: Essays in Sociology*. London: Routledge & Kegan Paul; also, Schaar, John. 1984. "Legitimacy in the Modern State," in William Connolly (ed.), *Legitimacy and the State*. Oxford: Basil Blackwell, 104–33, 120; Beetham, David. 1987. *Bureaucracy*. Minneapolis, MN: University of Minnesota Press, 74–5; in IR see especially, Barnett, Michael N. and Martha Finnemore. 1999. "The Politics, Power, and Pathologies of International Organizations," *International Organization* 534: 699–732, 704–6.

implicitly, to increased restraints on the actions of the most powerful domestic actors.³⁸

In sum, the literature on domestic institutions includes some important insights into the broader processes that may lead to the emergence of restraints on power. However, I consider such work as only partially useful in answering my main question regarding the similarities between the evolution of institutional restraints on power in the domestic and international realms. First, most of the aforementioned works focus on a relatively small number of moments in the evolution of institutions. It is important to determine whether the arguments they make are applicable to other moments in time. This is especially true because the evolution of institutional restraints is expected to go through multiple stages and the mechanisms involved in each stage may differ. For example, the emergence of the first institutions, discussed in some of the above works, involves different dynamics from those underlying their later spread across states. Of course, for the purposes of this book, it is also useful to expand the number of cases of change in institutional restraints that we study so we can assess, more broadly, whether the patterns in the domestic realm parallel those from the international realm. Indeed, as I will show, the emergence and change in institutional restraints, whether in the domestic or international realms, are rare occurrences. Therefore, it is important to consider all such cases in order to draw more generalizable conclusions about the processes leading to them.

Second, each of the aforementioned works focus on only one type of institution, such as legislative bodies or government bureaucracies. This has led to arguments mentioned above (such as the one regarding the importance of information-sharing through parliamentary assemblies or specialization for bureaucracies) that appear to be specific to only one branch of government and are not applicable more broadly to other domestic and, moreover, to international institutions.

Third, and perhaps most important, with the exception of the literature on bureaucratic politics, the emphasis on the development of institutional restraints in the comparative politics literature tends to be on the role of the dominant actor, usually the authoritarian ruler. Although some of the scholarship acknowledges that the relative power distribution between the ruler and other actors can play a role in such processes, the actions that are considered relevant are almost always

³⁸ A useful example of government officials becoming increasingly powerful in time due to their expertise is offered by Abbott et al. 2020 when discussing competence-control theory, an approach that is broader than the principal-agent approach. Not only is this an example of government officials (the Carolingians) becoming more powerful than the governors themselves (the Merovingians), it is one that bolsters the main argument of the present book, that we can draw important conclusions regarding recent international (and domestic) political developments based on examples of interactions between domestic groups more than a thousand years ago. See “Competence–Control Theory: The Challenge of Governing through Intermediaries,” in *The Governor’s Dilemma: Indirect Governance Beyond Principals and Agents*, edited by Kenneth W. Abbott, Bernhard Zangl, Duncan Snidal, and Philipp Genschel. Oxford: Oxford University Press, 2020.

those taken by that powerful individual. The roles played by the other actors and groups of actors is seldom made explicit in this scholarship.

Liberalism in IR and its lack of emphasis on power restraints

As a field that is generally considered to have emerged only at the beginning of the twentieth century, IR has sometimes, understandably, sought roots in traditional political theory, projecting long-standing arguments that apply to interactions between actors within states to those between states. Most important for the purposes of the present study, realism in IR has often traced its roots to Hobbes and Machiavelli while IR liberalism has generally built upon the writings of Adam Smith, Immanuel Kant, and John Rawls. The influence of Smith and Kant (rather than of Locke or Montesquieu, for example) was partially due to the fact that some of their writings were directly applicable to the international realm, offering clear prescriptions for global peace and prosperity. Kant's "perpetual peace" arguments were particularly important for shaping liberalism in IR after World War I and after the end of the Cold War, when scholars and practitioners were looking to alter the status quo that had led to a devastating conflict or the potential for one, respectively. The scholars who applied liberalism to the international realm during those periods looked to the specific Kantian prescriptions of spreading democracy, promoting free trade, and developing cooperation between states through international law and international organizations.³⁹

Two of these three elements of the "Kantian tripod," the emphasis on democracy and on international institutions, can be connected to the Lockean focus on restraints on power. However, due to the import of the arguments from Kant (as they were directly applied to the international realm) rather than Locke (whose arguments needed to be projected by analogy to relations between states), the types of restraints on power that were emphasized in the IR literature have been narrower than those discussed in the present book. Democracy *within states* allows the public from particular states to restrain their own governments from using force. Neither Kant nor IR scholars building on Kant's arguments directly tackled the application of democratic principles (and restraints on power) *between states*. In other words, when power is concentrated within one state in the international system, the Kantian form of liberalism relies only on the ability of the public from

³⁹ For one of the most complete discussions of the different forms of liberalism in IR during the interwar era see Long, David and Peter Wilson. 2003. *Thinkers of The Twenty Years' Crisis: Inter-war Idealism Reassessed*. Oxford: Clarendon Press; Richardson, J. L. 2001. *Contending Liberalisms in World Politics: Ideology and Power*. Boulder, CO: Lynne Rienner; among the most influential works interpreting Kant for IR towards the end of the Cold War see Doyle, Michael W. 1983. "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12(3): 205–35; Doyle, Michael W. 1986. "Liberalism and World Politics," *American Political Science Review* 80(4): 1151–69.

that state to keep the use of force in check, not on the rest of the world (as one would derive from a Lockean version of liberalism).

The second relevant element emphasized by Kant, the reliance on international institutions to restrain bellicose states, is much closer to the Lockean understanding of restraints on power than the democratic element. However, the twentieth century interpretations of Kant and liberalism have tended to emphasize such institutions primarily for their role of fostering cooperation among states. They thus downplayed their role as potential restraints on power which can be understood as a necessary condition for true cooperation, rather than coercion by the powerful over the weak. In fact, many of the critiques of liberal internationalism of the late twentieth century (that, in turn, was built on Kantian liberalism) noted the problems posed by such a narrow understanding of “cooperation” in the presence of inequality.⁴⁰

This critique of overemphasizing cooperation was even more direct with regard to another form of late twentieth century IR liberalism, the neoliberal institutional (NLI) variant that is primarily associated with the work of Robert Keohane. Keohane’s focus on cooperation (or, in his own words, on “the role of human-created institutions in affecting how aggregations of individuals make collective decisions”⁴¹) was considered by him the main reason why his work was associated with liberalism. NLI was very much influenced by Rawls (who Keohane cited multiple times in his book) as opposed to Locke and other classical liberal political thinkers. It is not surprising, therefore that, just like Rawls’s work was criticized for an overemphasis on cooperation and on his lack of attention to inequality of power among the actors who engage in cooperative arrangements, NLI was criticized for being based simply on a narrow understanding of international institutions as places for bargaining between relatively equal actors.⁴²

In sum, although the IR literature has often applied arguments from liberal political thought to the international realm, the emergence of this broad theoretical approach to IR at the beginning of the twentieth century, and revival at the end of the same century, led to an emphasis on Kantian and Rawlsian approaches, respectively, rather than on the original Lockean one, with its focus on power restraints. The following section will nevertheless discuss several other important IR bodies of literature that are relevant for questions regarding power restraints.

⁴⁰ See, e.g., Hoffmann, Stanley. 1995. The Crisis of Liberal Internationalism. *Foreign Policy* 98, 159–77; Reus-Smit, Christian. 2001. The strange death of liberal international theory. *European Journal of International Law*, 12 (3): 573–93.

⁴¹ Keohane, Robert O. 1989. *International institutions and state power: essays in international relations theory*. Boulder CO: Westview Press, 10.

⁴² Reus-Smit, Christian. 2001. The strange death of liberal international theory. *European Journal of International Law*, 12 (3): 582; Richardson, James L. 2008. “The Ethics of Neoliberal Institutionalism,” in Reus-Smit, Christian, and Duncan Snidal (eds). Oxford: *Oxford Handbook of International Relations*, 223–33.

Other IR literature on power restraints in the international realm

Although the idea of developing restraints on concentrated *international* power did not derive originally from liberal thought, it can be traced at least as far back as the writings of Ancient Greece, especially in Thucydides' well-known account of the Peloponnesian War and of his discussion of balance of power as a way to achieve such restraints on the most powerful states. Similarly, in "Laws," Plato explained how Argos, Messene, and Lacedaemon agreed to a system in which "there were always two cities ready to take the field against any one of the cities that disobeyed the established laws."⁴³ Many others, including Machiavelli, Rousseau, and Hume also referred at length to balancing between states (or city-states) as a way to bring about stability and peace. However, none of these writers connected their discussion of international balance of power to the question of institutional restraints on power in domestic politics, although some of them attacked in their other works authoritarian structures within states.⁴⁴ One possible reason for the lack of such connections is that in the international realm power is seen as only being concentrated within the units that make up the system (i.e., the individual states), because there is no global government.⁴⁵ This differs from the domestic realm where power is generally seen as concentrating within national governments rather than within the individuals who make up the state. As past domestic–international analogies have been, as mentioned, based on comparisons between individuals within states and states within the global system (rather than groups), the parallels between power concentration in the two realms have been more difficult to identify.

For a long time, the most important restraint on concentrated power according to the IR literature has been the one that unfolds outside of formal institutions, through the balance of power among states. Interestingly, Morgenthau, who is cited early in this chapter, did not explain balance of power as a reaction to fear of concentrated power. This is particularly surprising considering that he drew a

⁴³ See Plato and Thomas L. Pangle. 1980. *The Laws of Plato*. New York: Basic Books, 684.

⁴⁴ See, e.g., Whelan, Frederick G. 1995. "Robertson, Hume, and the Balance of Power," *Hume Studies* 21(2): 315–32. In fact, the first clear link between domestic restraints on power and international balancing was made by Hans Morgenthau. Morgenthau described balance of power as a "universal" concept (1993, 183). He argued that the term's universality derived not only from its applicability to both domestic and international politics but, more broadly, to all sciences, including the hard sciences. In the domestic realm, Morgenthau offered the example of the American system of checks and balances (citing Federalist No. 51), as well as instances of weaker political parties balancing against the most powerful one (Morgenthau, Hans J. and Kenneth W. Thompson. 1993. *Politics among Nations: The Struggle for Power and Peace*. New York: McGraw-Hill, 185–8.).

⁴⁵ Although the literature has noted the growing ability of international institutions to act as fairly independent agents and to shape global governance, there is a general agreement they are still far from becoming relevant loci of power concentration, analogous to domestic government institutions. A possible exception is the EU that is seen as a formidable force in European politics and a possible source of fear due to its capacity to concentrate power.

clear parallel between balancing among and within states. Yet, for him, the balancing processes in states and among states are virtually automatic. Indeed, he considered it a “misconception” that there is an actual choice between balancing or not balancing, as all systems, whether in the social or physical sciences, tend towards an “equilibrium” (a term which for him is synonymous to “balance”). Specifically, he argued that “whenever the equilibrium is disturbed either by an outside force or by a change in one of the other elements, the system shows a tendency to re-establish either the original or a new equilibrium.”⁴⁶ Balancing is thus a natural, automatic, process for him, one that does not need to be explained as resulting from fear or from anything else.

Most other realists, however, note that state balancing is indeed the result of fear of concentrated power. Even Kenneth Waltz, whose structural approach would not lead us to expect explanations focusing on individual states or groups of states, acknowledged the relevance of fear as a driver of balancing. For him, balance of power theory (which he characterized as the closest we have come to a “distinctively political theory of international politics”⁴⁷) is an acceptable “microtheory” that explains the interactions of units in the system. He argued that fear “stimulates states to behave in ways that tend toward the creation of balances of power.”⁴⁸

Realist scholarship rarely made the connection between balance of power outside institutions and restraints on power through institutions. Even Morgenthau, who emphasized the importance of balance of power to both domestic and international politics, did not consider whether and how this principle extended specifically to international institutions that, when he was writing, were developing rapidly. The oversight is noticeable considering that in his fairly comprehensive discussion of “international government,” he touched upon the role of the Holy Alliance, the League of Nations, and the United Nations in maintaining peace.⁴⁹ And yet, this omission is expected because, only a few years after the failure of the League, one of the main purposes of his book was to show that, in order to function properly, such institutions had to reflect the global power structure and give great powers a dominant role. Not surprising, he did not discuss the need for developing institutional restraints on the most powerful states.

Discussions of the connections between institutional restraints on power in domestic and international politics only really began with the literature of the post-Cold War era.⁵⁰ In international law, the most important body of literature to make

⁴⁶ Morgenthau, Hans J. and Kenneth W. Thompson. 1993. *Politics among Nations: The Struggle for Power and Peace*. New York: McGraw-Hill, 184.

⁴⁷ Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co., 117.

⁴⁸ Waltz, Kenneth N. 1979. *Theory of International Politics*. Reading, Mass: Addison-Wesley Pub. Co., 118.

⁴⁹ Morgenthau, Hans J. and Kenneth W. Thompson. 1993. *Politics among Nations: The Struggle for Power and Peace*. New York: McGraw-Hill, 299–330.

⁵⁰ I use the traditional term “Post-Cold War era” when referring to the period after the break-up of the Soviet Union in 1991 to the present. I am aware, however, that recent developments in US–Russian

this link is the one on “global constitutionalism.” The research on this topic over the past two decades has been extensive. It has identified four principles that lead to the “constitutionalization of international law”⁵¹: rule of law, balance or separation of powers, constituent power, and rights.⁵² However, this literature is only partially relevant for this study. That is primarily because global constitutionalism tends to focus on a fairly specific present-day model of domestic governance and seeks to apply it as a template for *future* global governance.⁵³ In contrast, I emphasize multiple possible restraints on concentrated power that were developed through early domestic government institutions and find how these have also appeared over the years in international institutions. Implicitly, this study can complement the global constitutionalism literature by identifying the processes that allow for certain types of restraints on power to emerge at certain times.

Of the four principles mentioned in this literature, only the first and (partially) second is truly relevant for the study of current power restraints in the international realm. Indeed, the understanding that even monarchs were not above the law led to what was historically the first check on the dominant domestic actors.⁵⁴ Implicitly, my focus in chapter 4 on efforts to make international arbitration and adjudication mandatory, including for great powers, will emphasize the application of the analogous principle of rule of law to global governance.

In time, as domestic judges came to be more independent of kings, yet another restraint emerged, one related to the balance of power (but not the separation of power) mentioned as part of second principle of constitutionalization in the global constitutionalist literature. My focus on efforts to carve out greater independence for international judges therefore speaks to the application of the domestic principle of checks and balances to global governance, discussed in that literature.

The last two principles from this literature will not be discussed in as great a depth as the first two. That is because I argue that the main promoters and potential beneficiaries of checks on concentrated power in the international realm have been (and still are) states, rather than individuals. Indeed, the concept of constituent power as used in the global constitutionalist literature implies that constitutional orders ultimately need to be established based on the will of “the

relations are likely to lead to a reassessment of this term, taking into account the argument that perhaps the Cold War never truly ended or that it has been rekindled. As the book is written at a time when there is no clear agreement on a new term for the 1991–2022 period, I will not replace the “Post-Cold War” term with another one.

⁵¹ Habermas, Jürgen and Ciaran Cronin. 2008. *The Divided West*. Cambridge: Polity.

⁵² Anthony F. Lang and Antje Wiener (eds.). 2017. *Handbook on Global Constitutionalism*. Cheltenham: Edward Elgar Publishers, 2.

⁵³ See, e.g., Krisch, Nico. (2010). *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford: Oxford University Press.

⁵⁴ It should be noted that the emphasis on this primary restraint on power is at the center of Locke’s work. Locke was particularly concerned with the monarch’s ability to corrupt the independence of judges. See, e.g., Locke, John, and Peter Laslett. 1963. *Two Treatise of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett*. New York: The New American Library, 20, 202, and 219.

people.”⁵⁵ Human rights also imply that individuals have rights that transcend the narrow confines of domestic legislation. In the international realm, due to the additional introduction of states as an intermediate form of aggregating the will of people, two models have emerged. The cosmopolitan model emphasizes the importance of having all individuals represented and involved in decision-making.⁵⁶ While the communitarian model, like the cosmopolitan one, starts out from the idea that all individuals need to shape global decisions, it also emphasizes social ties among individuals. Therefore, for communitarianism, the groups that form based on such ties deserve respect and protection. Implicitly, states, as perhaps the most important reflections of communities, need to be represented in shaping global constitutionalism just as much (if not more) than their citizens.⁵⁷ I argue that, so far, the communitarian model appears to still prevail and, therefore, a study of restraints on power (and especially of their historical evolution) needs to focus primarily on the actions of states and consider fairly recent events as reflections of non-state actors only just beginning to influence global governance. Indeed, while nongovernmental organizations, labor unions and other transnational actors have played important roles in shaping the human rights agenda, states are still responsible for accepting international obligations and implementing them.

At a broader level, the present study differs from the global constitutionalist literature because it does not share a similar normative emphasis. Indeed, global constitutionalism offers prescriptions for future possible improvements of international law and institutions. It is rare however that such work seeks to explain the processes that led both to domestic and international restraints on power. Comprehensive studies that address both domestic and international restraints note the similarities between them and sometimes even explain how domestic and international restraints on power have emerged.⁵⁸ However, they have yet to explain whether and how the two processes share common elements. In fact, the strong normative character of the global constitutionalism literature implies that it tends to focus more on the differences rather than similarities between domestic and international developments in order to then address the question of how to alter international institutions to make them more like domestic ones.

⁵⁵ Niesen, Peter. 2017. “Constituent Power in Global Constitutionalism,” in, Anthony F. Lang and Antje Wiener (eds.). 2017. *Handbook on Global Constitutionalism*. Cheltenham: Edward Elgar Publishers, 222–33.

⁵⁶ E.g., Held, David. 1995. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford, California: Stanford University Press.

⁵⁷ Bienen, Derk, Volker Rittberger, and Wolfgang Wagner. 1998. “Democracy in the United Nations System: Cosmopolitan and Communitarian Principles,” in Archibugi, Daniele, David Held, and Martin Köhler (eds.). *Re-imagining Political Community: Studies in Cosmopolitan Democracy*. Stanford, CA: Stanford University Press, 287–308, 301–2.

⁵⁸ See, e.g., Anthony F. Lang and Antje Wiener (eds.). 2017. *Handbook on Global Constitutionalism*. Cheltenham: Edward Elgar Publishers, especially chapters 3 and 5 on early developments regarding constitutionalism in states.

In international relations, once the literature moved beyond its primary focus on balance of power (that, as discussed, is an essential mechanism of restraining concentrated power) and began increasingly considering the relevance of international institutions, several works specifically touched upon the comparison of domestic restraints on power and international ones. The most relevant study on this topic is probably John Ikenberry's, *After Victory*. The book, as well as some more recent works by the same author have been discussed as part of the literature on hierarchy in IR (mentioned in chapter 1). However, Ikenberry's arguments are particularly relevant for the present book and deserve a separate discussion and more in-depth discussion than the broader hierarchy literature.

The main argument of *After Victory* is that after major conflicts new international institutions emerge locking in the leadership role of the most powerful state through constitutional elements. The "constitutional bargain" states reach after major wars offers the great power a valuable, predictable, and legitimate international order in exchange for its acceptance of restraints on the use of power. Weaker states acquiesce to the rules shaped by the great power in order to gain such restraints.⁵⁹

While this argument is very important for the present study, it offers only a partial explanation for the emergence and, especially, for later development of international restraints on power. First, its focus is almost entirely on the role of the most powerful state: the UK in the nineteenth century and the US in the twentieth.⁶⁰ Implicitly, it tends to downplay the actions of other actors. Although Ikenberry notes that other states are involved in the constitutional agreement, their preferences appear to be fixed and, moreover, to come into play only immediately after major wars.⁶¹

This (over)emphasis on the actions of the most powerful state in shaping global order is based, as previously mentioned, on a long-standing tradition in international relations. Even the literature that appears to consider an important role for individual "rising challengers"⁶² or of groups of other great powers,⁶³ generally reverts to arguments that place the interests and actions of the most powerful state center stage, often as a reaction or calculation to the potential actions of other

⁵⁹ Ikenberry, G. John. 2001. *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars*. Princeton, NJ: Princeton University Press, 56–7.

⁶⁰ Moreover, in a more recent study, Ikenberry acknowledges that the UK promoted an international system that was as much illiberal (due to its domination through colonial power) as it was liberal (through its commitment to free trade) and, in fact, developed very few and weak institutional restraints on its power. See Ikenberry, John. 2011. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*. Princeton, NJ: Princeton University Press, 16.

⁶¹ Ikenberry, G. John. 2001. *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars*. Princeton, NJ: Princeton University Press, 56–61.

⁶² E.g. Gilpin, Robert. 1981. *War and change in world politics*. Cambridge: Cambridge University Press, 7.

⁶³ E.g., Keohane, Robert O. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, N.J.: Princeton University Press. discusses the international system after hegemony, that is at a time when secondary powers play a much more important role; see also Martin,

states. I show that secondary powers, but also small states and IGO officials (and sometimes even international civil society organizations and the general public) play important roles in shaping institutional restraints on the most powerful state. Specifically, I suggest that although the most dominant state is usually instrumental in establishing international institutions, it rarely, if ever, does so to tie its hands as part of a constitutional bargain, as Ikenberry suggests. However, once such institutions are established, the seeds are sown for the emergence and development of institutional restraints in ways that often run counter to great power interests.

A second limitation to the usefulness of Ikenberry's arguments to the present study is that he discusses the emergence of international institutions only after major wars.⁶⁴ In reality, many international institutional restraints on power appeared (and were certainly altered) at other times in history. This study will consider the evolution of international institutional restraints on concentrated power over long periods of time, not only those after major global conflicts.

Third, we should expect the international constitutional bargains that Ikenberry discusses to lead to weak institutions. That is because, especially after wars, hegemons are in strong bargaining positions. Moreover, if they accept institutional restraints, they do so only formally, making sure that there are loopholes allowing them to erode the mechanisms later. Even if such potential loopholes are not apparent when the international institution is being established, powerful states will develop them at a later date.⁶⁵ I argue that the institutional restraints resulting from post-war bargains that Ikenberry considers relevant for giving "voice" to weaker states, are only a starting point for the development of power restraints. Such institutions become stronger in time, through a similar process as the one that led to institutional consolidation in the domestic realm, involving a gradual

Lisa L. 1993. "The Rational State Choice of Multilateralism," in John Gerard Ruggie (eds.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form*. New York: Columbia University Press, 91–121, 110.

⁶⁴ In a separate piece, Ikenberry acknowledges that "order-building" (based on international institutions) does not necessarily have to come after major wars and offers the example of China's current rise as a possible example of a peaceful change in the leadership of the international system. See Ikenberry, G. John. 2014. "The Logic of Order: Westphalia, Liberalism, and the Evolution of International Order in the Modern Era," in G. John Ikenberry (eds.), *Power, Order, and Change in World Politics*. Cambridge: Cambridge University Press, 83–106.

⁶⁵ In one of the most complete discussions of IGO rules benefiting powerful states, Randall Stone argues that without such arrangements great powers may not even be willing to join international institutions. (See Stone, Randall W. 2011. *Controlling Institutions: International Organizations and the Global Economy*. Cambridge: Cambridge University Press). He considers such design choices to be "tacit concessions to powerful countries" (15). While the present book builds on the understanding that great powers indeed seek such rules, I suggest that their acceptance by other states is not necessarily tacit and shows that, in fact, there have been many instances when smaller states have been relatively successful in either eliminating these rules or weakening them. Additionally, I suggest that the efforts to establish informal rules often unfold considerably later than the actual establishment of IGOs (as Stone suggests), at times when there are important shifts in relative power among states. Lastly, I argue that even such informal rules rarely allow powerful states complete immunity from the original restraints built into international institutions and that, in fact, all powerful states can do is limit the *degree* to which they are restrained.

shift towards independence of officials from the institutions. While Ikenberry's discussion of international institutions does touch upon some instances of path dependency and increasing returns, in the development of international institutions,⁶⁶ I seek to build on his arguments and add a more complete account of the back-and-forth evolution of institutional restraints on power.

Another very important work that addresses the relationship between domestic and international restraints on power is Daniel Deudney's *Bounding Power*. Deudney frames his arguments on a "republican security theory" that subsumes both IR realist and liberal arguments. His approach emphasizes the need to simultaneously avoid the extremes of anarchy and hierarchy at all levels of aggregation, local, regional, national, and international. While Deudney focuses on some of the same questions I pose, his answer to the international threat of violence focuses primarily on the United States and on its ability to *project* its models and values (whether through international institutions or outside of them). Indeed, he notes that "without American power, there would probably not be any democracies at the end of the twentieth century."⁶⁷ That is because, according to Deudney, only the US republic has solved the problem of projecting power across space and, at the same time, avoided despotism. It has been able to strike a balance through which it avoided both international anarchy and domestic hierarchy. However, his arguments only briefly touch upon the ways in which we can avoid extremes of *international hierarchy* by bounding power internationally, especially through international institutions, as the present book does. He focuses more on avoiding *international anarchy* (through American international activism) and *domestic hierarchy*. In other words, while my research seeks to understand when the most powerful state accepts international institutional restraints on its own power, the bounded power that Deudney discusses in greatest depth is at the domestic level.

Deudney acknowledges the "American-centered" nature of his study.⁶⁸ In contrast, my focus on restraining power *especially* of the most powerful state takes into account the efforts of weak actors, not just powerful ones, in establishing institutional restraints. Moreover, I consider both rapid and incremental advances that all such actors and groups have *already* achieved over more than a century and the restraints that do exist in the international realm. In this sense, my study complements Deudney's that looks at the current domestic American republican system and sees it as a model for a *future* "world federal government"⁶⁹ in a similar normative way as the global constitutionalism literature does. Nevertheless, the overlap

⁶⁶ Ikenberry, G. John. 2001. *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*. Princeton, NY: Princeton University Press, 17.

⁶⁷ Deudney, Daniel H. 2007. *Bounding Power: Republican Security Theory from the Polis to the Global Village*. Princeton, NJ: Princeton University Press, 185.

⁶⁸ Deudney, Daniel H. 2007. *Bounding Power: Republican Security Theory from the Polis to the Global Village*. Princeton, NJ: Princeton University Press, xii.

⁶⁹ Deudney, Daniel H. 2007. *Bounding Power: Republican Security Theory from the Polis to the Global Village*. Princeton, NJ: Princeton University Press, 20. See also 37–41, 59–60.

of some of my arguments and his will lead me to note throughout this book other important similarities and differences with his arguments and build upon them.

Yet another relevant body of IR scholarship for explaining institutional restraints on power is the one on “soft balancing.”⁷⁰ This literature started from the puzzle that after the end of the Cold War, states did not engage in traditional (“hard”) balancing against the United States. Instead, secondary powers such as China, Russia, and France, sought to restrain US actions through non-military (“soft”) balancing. An important soft balancing strategy involves working through international institutions to de-legitimize and make more costly any US behavior that is perceived threatening to other states.⁷¹

While the soft balancing literature is useful for my study due to its focus on power restraints through international institutions, it does not explain the emergence and later changes in such restraints. Rather, it shows how such international institutional restraints were used once they were established and later altered. Also, although it is among the few bodies of literature that shifts attention from the most powerful state to second-ranked powers, it downplays the common goal of eroding institutional checks that all great powers have, whether the single most powerful state or the next three to four most powerful ones. For example, China, France, and Russia, three second-ranked powers that played crucial roles in the oft-cited example of soft balancing intended to restrain the US from invading Iraq in 2003, hold vetoes in the UN Security Council. Therefore, they are among the most ardent supporters of institutional loopholes that allow them, as well as the US, to eschew checks on their actions even if, at times, they may seek to restrain each other. Therefore, I suggest that when studying the establishment and evolution of institutional checks on power, in addition to the interactions between the most powerful state and second-ranked powers, emphasized in the soft balancing literature, we should also consider the dynamics involving clashes between *all* great powers and all other actors: small states and IGO officials.

Indeed, my study starts out from the premise that the 4 or 5 most powerful states in the system have often acted in concert when establishing and later altering international institutions; it was rare that only the most powerful state was

⁷⁰ Joffe, Josef. 2002. “Defying History and Theory: The United States as the Last Remaining Superpower,” in John G. Ikenberry (ed.). *America Unrivaled: The Future of the Balance of Power*. Ithaca: Cornell University Press, 155–80; Walt, Stephen M. 2002. “Keeping the World Off-Balance: Self-Restraint and US Foreign Policy,” in G. John Ikenberry (ed.). *America Unrivaled: The Future of the Balance of Power*. Ithaca: Cornell University Press, 121–54; Pape, Robert A. 2005. “Soft Balancing against the United States,” *International Security* 30(1): 7–45; Brooks, Stephen G. and William C. Wohlforth. 2005. “Hard Times for Soft Balancing,” *International Security* 30(1): 72–108; Paul, T. V. (2005) “Soft Balancing in the Age of US Primacy,” *International Security* 30(1): 46–71; Paul, T. V. 2018. *Restraining Great Powers Soft Balancing from Empires to the Global Era*. New Haven, CT: Yale University Press.

⁷¹ E.g., Pape, Robert A. 2005. “Soft Balancing against the United States,” *International Security* 30(1): 7–45; Paul, T. V. 2018. *Restraining Great Powers Soft Balancing from Empires to the Global Era*. New Haven, CT: Yale University Press.

responsible for the eventual institutional outcome.⁷² Additionally, I argue that, very often, these states took a common position opposing institutional restraints on power while virtually all other groups of actors (small states, IGO officials and civil society representatives) supported them. These preferences have been reflected in the original structure of international institutions such as the Concert of Europe, League of Nations, United Nations and World Bank, where the rules gave the five most powerful states (and, interestingly, almost always five) the same advantages and placed them in a more advantageous position than all other states. However, at other times, secondary powers acted against the most powerful state. In yet many more cases the secondary powers were split in their support for the most powerful state or in opposing it. I posit that the degree to which the 3–4 secondary powers support the most powerful state is essential to understanding the emergence and evolution of restraints on power.

In sum, although there is a good deal of literature that refers to institutional restraints on concentrated power in the domestic and international realms, few works address the main question of my study, regarding the parallel evolution of such institutions. Even those that can contribute directly to answering this question, generally focus on individual types of restraints, on specific phases in the evolutionary processes, and, most important, on only one realm, either domestic or international. In order to develop a set of general arguments that can explain the broader processes involving the development of multiple types of institutional restraints across longer periods of time and across the domestic-international divide, I move beyond extant scholarship. My focus on groups' reactions to their fear of power concentration, both domestically and internationally, provides a broad umbrella that covers arguments and themes from multiple rich bodies of work.

A first set of arguments: the nature of institutional restraints (the “outcome variable”)

The above literature allows me to tease out several arguments regarding the evolution of institutional restraints on concentrated power. The logics leading to these arguments take into account the two novel considerations I introduced to compare developments in domestic and international politics: 1) I am generally comparing events that unfolded almost one thousand years ago in the domestic realm to those that took place over the past century or two in IR; 2) I am comparing preferences and actions of groups rather than individuals.

⁷² For a somewhat similar view, see, e.g., Simpson, Gerry J. 2004. *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*. Cambridge: Cambridge University Press.

A first such argument specifies the meaning of the term “institutional restraints on concentrated power,” the main focus of the present study. To explain this concept, I build on existing literature, primarily on the pluralist model of Scott Gordon, expanding it from its application to the domestic realm to the international one, and on the concept of soft balancing in IR, focusing on the institutional tools mentioned in that literature.

Like Gordon, I begin from the understanding that domestic restraints on concentrated power began developing well before the principle of separation of powers came to be embodied in modern institutions in the United States in the late eighteenth century. This long-term view of domestic institutional restraints starting more than a thousand years ago suggests that we need to distinguish early developments from recent ones. Most important, we need to tease out an often neglected distinction from the literature, the one between “separation of powers” (based on three branches of government) and “checks and balances.” I argue that while the former concept is a modern one, that has been applied to domestic institutions starting in the late eighteenth century, the latter has been applied far earlier and is much more relevant for comparisons with developments in IR.

Indeed, although much of the literature has treated separation of powers and checks and balances as if they were one concept, in fact they are distinct. There are multiple mechanisms that can restrain the most powerful actors in political systems. The separation of the legislative, executive, and judicial powers is only one such mechanism. For example, the idea of federalism, inherent in the US Constitution, was also seen as an important mechanism restraining the power of the central government, alongside the separation between branches of government.⁷³ Another very recent example of how officials from within one branch (in this case the executive) can act as effective restraints on power of the same branch was illustrated in the subtitle of a well-known 2018 *New York Times* op-ed: “I work for the president but like-minded colleagues and I have vowed to thwart parts of his agenda and his worst inclinations.”⁷⁴

The broader concept of “checks and balances” is of greater interest for this study and will be considered virtually synonymous to the one of “restraints on concentrated power.” The two words, “checks” and “balances” are necessarily connected. In order to place a check (i.e., to restrain) any actor, especially the very powerful ones, one needs one or more other actors that somehow “balance” power, an observation that can be traced at least to Locke’s work, if not earlier.⁷⁵ Yet such

⁷³ Bailyn, Bernard. 1990. *Faces of Revolution Personalities and Themes in the Struggle for American Independence*. New York: Knopf, 235.

⁷⁴ See Anonymous. 2018. “I Am Part of the Resistance Inside the Trump administration,” *The New York Times*, September 5, 2018, <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

⁷⁵ Locke, John and Peter Laslett. 1963. *Two Treatise of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett*. New York: The New American Library, e.g., sects. 107, 143 and 159.

restraints can be devised *within* one single branch of government (i.e., when executing one function of governance), whether legislative, executive, or judicial, and do not necessarily imply having each branch counter the others. The institutionalization of the principle of federalism through separate houses in the US Congress, is an example of checks and balances within one government branch. Similarly, appellate courts in the judicial system are instances of checks and balances within the same branch of government. Internal inspection units within administrative government offices represent formal restraints on power within the executive branch while the aforementioned example of members of the Trump administration seeking to thwart the president's "worst inclinations" is one of informal, yet still effective, restraint on power, also within one government branch.

More generally, building on Gordon's pluralist model, I posit that by giving *any* additional group of actors a role in decision-making, as small as that role may seem, the restraints on the power of the dominant actor increase.⁷⁶ This argument is implied in the handful of comparative politics works mentioned above, that seek to explain the quasi-democratic institutions that authoritarian rulers sometimes create, especially parliamentary bodies.

The actors that are introduced in the political process through the establishment of new institutions can help balance the existing powerful ones. As kings began relying on others to hear cases when they could not deal with the growing number of requirements of administering justice in their increasingly centralized states, they implicitly shared their power with the new judges and established a new type of institution that could potentially keep their own power in check. Many of the early arguments supporting power restraints emphasized how even the king should not be above the law⁷⁷ and how judges may have qualities that make them better suited than even the king to apply the law.⁷⁸ Only later, did arguments emerge about how other branches can check the power of the judicial branch and, conversely, how the judicial branch can check the power of other branches.

Similarly, when kings sought counsel from their close allies and, later, from increasingly large (and representative) assemblies, they also established potential restraints on their ability to act. Such counsel was considered an essential aspect of how the country should be governed. For example, the lords that imposed the Magna Carta on King John requested he return to the practice of always seeking their counsel (rather than the counsel of foreigners that John had relied upon).⁷⁹

⁷⁶ As mentioned, this argument can be seen as drawing upon and adding to the principal-agent literature. As principals need new agents and as these become more autonomous, principals have a more difficult time achieving their goals.

⁷⁷ E.g., Bracton, Henry de, George E. Woodbine, and Samuel E. Thorne. 1968. *On the Laws and Customs of England*. Cambridge, MA: Harvard University Press, 100–2.

⁷⁸ E.g., Baker, John. 2018. *The Reinvention of Magna Carta 1216–1616*. Cambridge: Cambridge University Press.

⁷⁹ Maddicott, John Robert. 1999. "The Earliest Known Knights of the Shire: New Light on the Parliament of April 1254," *Parliamentary History* 18(2): 109–29, 118.

Also, as kings delegated tasks to individuals across their territory and to increasingly specialized experts, they gave up part of their control over administrative matters. Moreover, in time, all such additional actors came to be more autonomous, first informally and later formally. Through such autonomy they consolidated their ability to restrain power.⁸⁰ Even more broadly, one can argue that each time a “principal” controlling an institution adds one more agent to those already involved in fulfilling the tasks it has delegated, it sows the seeds for a future potential restraint.

In sum, the early domestic restraints on concentrated power did not involve a clear separation of powers across branches of government. For a long time, the ruler was seen as embodying and leading all three government functions: making laws, implementing laws and, adjudicating laws. Therefore, the early restraints on power could only truly reside within one single branch of government or even within one institution. Even today, there are important such checks on power *within* branches and institutions alongside the important ones *between* branches of government or institutions. The present study will focus on the development of these early and more basic institutional mechanisms at the state level because it is argued here that it is from such restraints that we can learn about the mechanisms developed in the international realm. I will also note, however, instances where international restraints are the result of interplay between *different* institutions.

I will show that these types of institutional restraints, that simply involved the addition of actors to the ones already part of decision-making processes (thus leading to a pluralist system such as the one emphasized by Gordon) were the first to emerge within domestic systems, more than a thousand years ago and also the ones that are generally present now in the international realm, having developed slowly over the past two centuries. Such restraints may appear feeble for us, especially when considering the powerful checks and balances that have developed over time in democratic states. They do not stop powerful actors from doing as they please. However, they can make it more difficult and costly to do so and thus restrain them at least to some degree. As I will illustrate in this study, even the early restraints, based on inclusion of additional actors in decision-making, have played an important role both in domestic and international politics.

⁸⁰ It should be noted that the literature on restraints on power of government bureaucracies is considerably more recent than the one on such restraints within the judicial branch or the legislative branch. In part, this is due to the fact that in most states bureaucracies only became truly relevant actors in the nineteenth century. Therefore, it is towards the end of that century that scholars such as Weber (see Weber, Max, Hans Gerth, and C. Wright Mills. 1948. *From Max Weber: Essays in Sociology*. London: Routledge & Kegan Paul) and Wilson (see Wilson, Woodrow. 1887. “The Study of Administration,” *Political Science Quarterly* 2(2): 197–222) offered more complete explanations of the relationships between government officials within the executive branch and the political leaders from the same branch. Also, very recent literature has emphasized the need for restraints on the increasingly powerful bureaucracies from within such institutions. See e.g., Schedler, Andreas, Larry Diamond, and Marc F. Plattner (eds.). 1999. *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder, CO: Lynne Rienner.

As mentioned, the soft balancing literature is also useful in thinking about the types of restraints that can be placed on the most powerful actors. In one of the early and most influential definitions of soft balancing, Robert Pape considered the term to refer to actions that “use non-military tools to delay, frustrate, and undermine aggressive and unilateral US military politics.”⁸¹ A more recent (and elaborate) definition, offered by T.V. Paul, is “restraining the power or aggressive policies of a state through international institutions, concerted diplomacy via limited, informal ententes, and economic sanctions in order to make its aggressive actions less legitimate in the eyes of the world and hence its strategic goals more difficult to obtain.”⁸² Overall, these definitions offer a similar view of restraints on power as those discussed by Gordon for the domestic realm. They do not allow for drastic checks on the most powerful actors that we have become accustomed to in democratic states. They may not be able to *outright stop* the most powerful actors and groups from taking the actions that they want. However, they are sufficiently significant to “delay, frustrate and undermine” such actions. From Paul’s list of possible actions that represent soft balancing, the ones that take place through institutions are, of course, relevant for the present study. In his *Restraining Great Powers*, he follows the evolution of soft balancing through institutions, starting with the Concert of Europe and, in doing so, offers numerous examples of IGO mechanisms that restrained powerful states from taking certain actions. However, as mentioned in the above broader section on soft balancing, Paul also does not explain how such mechanisms emerged and developed to become useful tools for soft balancing.

Lastly, I should point out that institutional restraints on concentrated power discussed both by Gordon and the soft balancing literature emphasize the limitation placed on the most powerful actors and groups. Of course, if institutions have the ability to restrain even the most powerful, they will also be able to restrain weaker actors and groups.

In sum, as my main argument is that international institutional restraints are following a similar evolution as the early domestic restraints of the medieval era, the empirical sections of this book will go back in time, highlighting the increasingly inclusive nature of international judicial, deliberative, and administrative institutions that *made it more difficult* (not necessarily outright stopped) great powers from taking the actions they wanted to take. They will also highlight how the restraints usually involved developments within a single institution rather than among institutions and “branches” of governance (as the traditional understanding of restraints on power through “checks and balances” implies). Thus,

⁸¹ Pape, Robert A. 2005. “Soft Balancing against the United States,” *International Security* 30(1): 7–45.

⁸² Paul, T. V. 2018. *Restraining Great Powers: Soft Balancing from Empires to the Global Era*. New Haven and London: Yale University Press.

a first principal argument that applies both to the domestic and international realm is:

A1) Early institutional restraints make it more difficult for powerful groups to take certain actions but do not outright stop them; they act primarily within individual institutions, not among them.

This argument (or, rather the combination of two sub-arguments) is essential for identifying institutional restraints on power, the “outcome variable” of this study. They clarify that in order to compare developments in the domestic and international realms we need to adopt a broader understanding of such institutions than the narrow ones we have come to expect based on contemporary democratic political systems. The following arguments (A2 to A6) will allow us to move from simply identifying the institutions I am looking for in the empirical sections (as A1 does) to ones that explain how they came to exist and later evolve.

A second set of arguments: groups of actors and their preferences for institutional restraints

The comparative politics and IR literatures offer only partial accounts of how early institutional restraints on concentrated power emerge. In the international realm, such restraints have been, at best, explained as the result of constitutional bargains, especially after major wars. The comparative politics literature has focused on only a few similar early constitutional moments and has tended to explain them, as in the case of the IR literature, from the perspective of the most powerful actor, downplaying the roles of other actors. As mentioned, I seek to complement and, to some degree, even challenge such explanations.

As Ikenberry, North, Weingast, and Olson note, the emergence and later development of the institutional restraints on concentrated power are rare occurrences that require specific conditions.

Yet, I suggest that when considering these few instances of change, we need to also note the almost *constant* pressures to avoid having one group concentrate too much power. Indeed, classical liberalism accounts for such pressures, explaining them as a result of the fear of concentrated coercive power and expects actors to come together to restrain it.

Similarly, the IR literature, especially realist scholarship, has argued that the fear of power concentration in one state or group of states has *consistently* led other groups to engage in balancing behavior. The soft balancing literature also places a great deal of emphasis on the importance of fear of concentrated power and on the almost continuous processes that unfold, even between major wars. Such fear leads states, especially second-ranked powers, to counter the actions of the most

dominant state. One can distinguish in this literature two causes for states' balancing behavior (whether hard or soft): 1) in the short term they may fear direct attacks from the most dominant state or indirect threats that are unintended consequences of some of the great power's actions; 2) in the long term they may fear that the most powerful state will become so dominant (i.e., become the "hegemon") that later balancing will be impossible.⁸³ These two arguments imply that 1) *the level* of the dominant state's relative power vis-à-vis that of secondary states and 2) *the change* in its relative power are relevant for soft balancing calculations.

As mentioned, in IR scholarship the soft balancing literature is perhaps the closest to the present study in emphasizing restraints on concentrated power through institutions, *rather than* through threat or use of military force. This distinction is essential. The usual restraint on concentrated power through balancing is seen as an ad-hoc process. States come together only temporarily to restrain the most powerful state when they fear its actions in the present or near future.⁸⁴ The existence of institutions allows for restraints even further into the future, regardless of where power will be concentrated and whether such power is likely to be used against others or not at a specific moment in time. An actor or group of actors may want to establish institutions to restrain the actions of those who *currently* hold the most power. However, they also consider that *in the future* such institutional restraints may impede their own actions or those of their allies. While such a sacrifice may seem acceptable in the present, it may not be acceptable in the future. For that reason, the calculations that go into the establishment and later change of institutional restraints on concentrated power are expected to be more complex than those that go into hard balancing.

Perhaps the most important difference between the calculations that take place to establish restraints through institutions rather than outside them is that in the former instance long-term perceived threats are more important than in the latter instance. The weak know that even if the powerful do not exhibit threatening behavior now, they may do so in the future. Both at the domestic and international levels, this is particularly true because changes in state leadership may alter perceptions of the aggressive intentions of the most powerful group of actors. However, institutions are designed taking into account such leadership changes and are not as affected by the ebb and flow of perceived threats.⁸⁵ Therefore, I expect the calculations of weak groups to be determined primarily by relative power considerations and fear of concentrated power rather than by actual threat.

⁸³ See, especially Pape, Robert A. 2005. "Soft Balancing against the United States," *International Security* 30(1): 7–45; Paul, T. V. 2005. "Soft Balancing in the Age of US Primacy," *International Security* 30(1): 46–71; Paul, T. V. 2018. *Restraining Great Powers Soft Balancing from Empires to the Global Era*. New Haven, CT: Yale University Press.

⁸⁴ See, e.g., Mearsheimer, John J. 1994. "The False Promise of International Institutions," *International Security* 19(3): 5–49.

⁸⁵ For a well-known distinction between actions of states based on balance of threat rather than balance of power, see Walt, Stephen M. 1987. *The Origins of Alliances*. Ithaca: Cornell University Press.

Even at times when the dominant group does not appear to be aggressively pursuing more power, weaker groups seek restraints knowing that in the future others' preferences and actions may change.

As assessments of intentions and threats become less relevant, the sheer distribution of material capabilities (and its potential evolution) becomes paramount in determining the preferences of the main groups of actors. For this reason, although I acknowledge that power is an extraordinarily complex concept with many different facets and "faces,"⁸⁶ for the purposes of the present study, I focus primarily on the distribution of *material* capabilities, especially military and economic.⁸⁷ The fear that these capabilities can generate when they are concentrated within one group of actors is the main factor driving the emergence and later developments involving institutional restraints.

The focus on distribution of material capabilities allows me to distinguish between three groups⁸⁸ that are identifiable both in domestic and international politics and that are composed of actors with fairly cohesive interests regarding the existence and strength of institutional restraints on concentrated power: a relatively small group, but that includes the most powerful actor (G_1); a slightly larger group that includes actors that are second-ranked in terms of their power (G_2); a large group of all other (weak) actors (G_3).⁸⁹ A fourth group of actors (G_4), made up of individuals who work in institutions, will be discussed later. As a reminder, the emphasis on groups rather than individuals allows me to offer arguments that are applicable across different types of social systems, including across

⁸⁶ For comprehensive discussions of the various forms of power in both domestic and international systems, see, e.g., Lukes, Steven. 2009. *Power: A Radical View*. New York: Palgrave Macmillan; Barnett, Michael N. and Raymond Duvall. 2011. *Power in Global Governance*. Cambridge: Cambridge University Press.

⁸⁷ I will show that this is especially possible and necessary in the international realm, the main focus of this book.

⁸⁸ Their formation based on the distribution of capabilities suggests that, while the groups are somewhat fluid and individuals or individual states can move from one group to another, they are nevertheless more stable than ad hoc "coalitions" made up of individuals or individual states. For a well-known discussion of such coalitions see, Spruyt, Hendrik. 1991. *The Sovereign State and its Competitors: An Analysis of Systems Change*. Princeton, NJ: Princeton University Press.

⁸⁹ Of course, I am not the first to discuss how states with similar levels of power have relatively similar interests and act as fairly coherent groups in international interactions. An early example of such classifications of groups based on power can be found in A. F. K. Organski's 1958 well-known illustration of the "pyramid" comprising five groups of increasingly numerous states (rather than the three discussed here), the dominant state, great powers, middle powers, small powers and colonies, have increasingly greater degrees of dissatisfaction with the status quo. See Organski, Abramo Fimo Kenneth. 1958. *World Politics*. New York: Alfred A. Knopf. He even drew a brief parallel to the processes involving groups within states (345). However, Organski used this classification to explain the connection between power transitions and major wars, building on the extant literature on balancing in IR, rather than the development of international institutions and international restraints on power, as the present study does. More recent bodies of literature, such as the aforementioned one on soft balancing, also base their arguments on understandings of IR as interactions between groups of states organized on the basis of their relative power. Yet, as mentioned, such works focus on how second-ranked power use international institutions to restrain power rather than on how such institutional restraints emerge, become stronger, or weaker, as the present study does.

the domestic–international divide. These arguments derive from the literature mentioned above, and from the logic underlying such literature.

A first such argument derives directly from the fact that these groups are defined in terms of their relative power. As institutional restraints are intended to level the playing field between the more powerful and the less powerful, I posit that:

A2) The more powerful groups (G_1 and, to some degree, G_2) are more likely to oppose institutional restraints than the less powerful groups (G_3 and G_4).

I expand below on this argument and on the expected preferences of these four groups. While A2 offers the “baseline” preferences for the four groups, I take into account that such preferences can change under certain circumstances. Indeed, in “normal” conditions, powerful groups will generally oppose restraints while weak ones will support them. If such preferences were to remain fixed, institutional restraints would never develop. Therefore, I seek to add several more arguments that lay out the scope conditions of A2. In other words, I seek to explain when G_1 and G_2 may come to support institutional restraints and also when G_3 and G_4 may oppose them (or support them even more than in normal conditions). I thus derive two arguments concerning the changes in restraints on power (identifying the “explanatory variables”).

In the domestic realm, G_1 was traditionally composed of the most powerful individual, such as a king, together with some very close allies whose fate was often intrinsically tied to that of the ruler (e.g., members of the royal family and close personal advisors). Later, somewhat larger groups of individuals, as politburos, juntas, or even political parties, became the most powerful collective actors. In the international realm, G_1 is usually represented by the single most powerful state (which, of course, represents a large group of individuals).⁹⁰

G_1 is the group that is most likely to concentrate power and therefore the one that others primarily seek to restrain. Consequently, for the most part, I do not expect G_1 to support the establishment of institutional restraints on its power.⁹¹ There are some circumstances when it may support restraints, hence the probabilistic nature of A2. First, when new institutions are established, G_1 focuses on the ways in which they can help project its power and allow it to take a leadership role in resolving collective problems. It seldom takes into account the ways in which such institutions may, in time, develop into restraints on its power.

⁹⁰ One should note that the United States is often called the “G1” in international financial institutions such as the International Monetary Fund and World Bank, reflecting its enormous influence. This term contrasts with the one of “P5” that is used to reflect the five influential veto-holders in the UN system, or “G7,” and “G20” that are actual international forums for global economic cooperation. These terms should not be confused with G_1 , G_2 , G_3 , and G_4 used in this book and that are notations for the four groups of actors within domestic and international politics.

⁹¹ Of course, there have been many exceptions, such as those of political leaders imbued with strong democratic principles, such as George Washington, as reflected in his Farewell Address.

Second, when it becomes clear that a new group of actors may soon take its place as the dominant one in the system, it may indeed support institutional restraints, to keep the *future* G_1 in check. In the domestic realm, this may happen when a state leader is about to be replaced by another or when one political party is about to move from government into opposition. In the international realm, it may happen when a current challenger to the most dominant state appears to be on track to becoming the most powerful state in the system.⁹²

In the domestic realm, G_2 included early on powerful lords, the Church, the dominant class, or opposition political parties later on. In the international realm, it is usually composed of the three or four next most powerful states, the main ones that are seen as engaging in soft balancing in the literature.

G_2 is an important driver of the processes leading to changes in powerful institutional restraints on concentrated power. Its relevance derives from a relative ambivalence towards institutional restraints (compared to the generally more stable preferences of the other three groups). On the one hand, G_2 is likely to benefit from institutional restraints on concentrated power, just like other (weaker) groups, because it fears the potential of G_1 becoming so powerful that it cannot be restrained later. However, G_2 is also likely to benefit from the lack of institutional restraints on power and therefore it is often expected to join G_1 in opposing them. For example, during the Middle Ages, weak judicial systems allowed not only kings but also powerful nobles to avoid punishment for misdeeds. Similarly, a patronage system in the bureaucracy gave nobles at least some control over administrative appointments, especially in their own lands. International institutions often offer both G_1 and G_2 states certain privileges in terms of representation (as in the case of the exclusive Concert of Europe or the permanent seats in the League of Nations Council), voting (as in the case of the veto in the UN Security Council or of weighted voting in the World Bank), or in the choice of IGO officials (as in the selection of judges in the Permanent Court of International Justice and the International Court of Justice where the five most powerful states have always had at least one of their nationals sit as judge or in the selection of the UN Secretary-General where the P5 states can always veto the choice for an individual).

Moreover, some of the actors within G_2 may hope to someday become part of G_1 . For instance, nobles may expect that they or their family members would become part of the king's inner circle or even kings. Political opposition parties often base their decisions on calculations that take into account that they may

⁹² The literature in IR has long emphasized the changes in international orders that came with "power transitions," when the most powerful state (the hegemon) was close to being overtaken by a secondary power (the challenger). See, e.g., Organski, Abram Fimo Kenneth. 1958. *World Politics*. New York: Alfred A. Knopf; Gilpin, Robert. 1981. *War and Change in World Politics*. Cambridge: Cambridge University Press. Much of this literature on power transitions intended to explain major conflicts. By contrast, the present study emphasizes such moments as relevant for the establishment of institutional restraints on power, often before the actual transition took place.

govern the country soon. Rising second-ranked states may hope to become the most powerful in the system. More broadly, G_2 's ambivalence is partly due to the possible difference in affinities between the individual members making up this group. Some nobles may have more similar interests with the king than others. Some states may also be more supportive of the hegemon than others.

Because of such inconsistency, G_2 , as a group, sometimes may be more supportive of establishing institutional restraints and sometimes less so. Based on the main argument of the present study, that fear of concentrated power is an important driver of actors' and groups' actions, and on other arguments I extracted from the literature, I expect that a) the *greater the relative power* of G_1 , compared to G_2 , the more likely G_2 will support institutional restraints on power; b) the *faster the increase in relative power* of G_1 compared to G_2 , the more likely G_2 will support institutional restraints on power. That is because, as mentioned earlier, both the level of G_1 's relative power and the increase in its power contribute to G_2 's fears and, therefore, influence its preferences for institutional restraints.

Figure 2.1 illustrates the above-mentioned expected dynamics between G_1 and G_2 that determine the likelihood of institutional restraints being accepted by these two groups. When G_1 is in a position of great power vis-à-vis G_2 (as in moments 2 and 3) or when G_1 's relative power is increasing (as in moments 1 and 2), it is unlikely to accept institutional restraints.

Only when G_1 is in a weak position *and* likely to become even weaker (as in moment 4), is it possible to accept institutional restraint on its power. Even in this last case, G_1 is still unlikely to accept restraints, unless it feels that some of the actors within G_2 may soon form the most powerful group and that it now needs to place restraints on the future G_1 because it fears the concentration of power in another group's hands. These expectations are consistent with the logic underlying

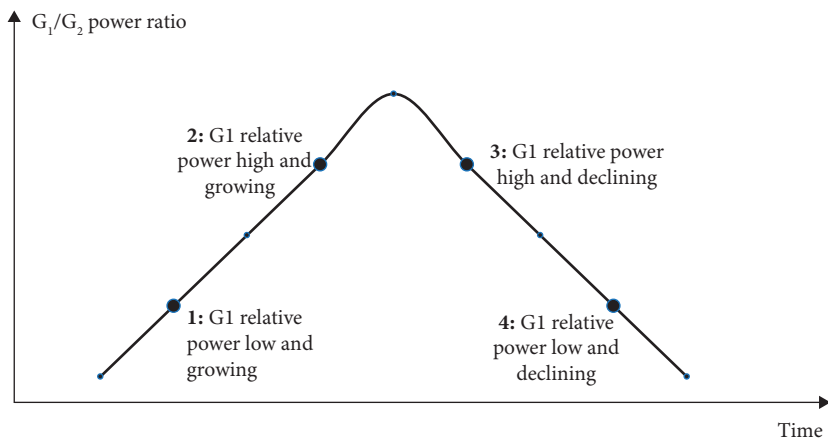


Figure 2.1 Evolution of ratio between power of G_1 and G_2

some of the previously mentioned comparative politics works, especially the one of Boix and Svolik who argued that powerful rulers will only establish power-sharing institutions when they are relatively weak and fear rebellion from the other actors. However, my extension of the logic based on calculations that take into account only current and short-term situations, to one that also considers long-term calculations, suggests that there may be more instances of G_1 supporting institutional restraints than those predicted by extant literature.

Additionally, by considering G_2 as one of the principal motors behind the changes in institutional restraints (or at least an equal partner, together with G_1), we may complement existing comparative politics explanations of the dynamics involved in the long-term tug-of-war between the two dominant groups.⁹³ Indeed, G_2 's preferences are expected to be the virtual opposite of those of G_1 . It is most likely to support the establishment of institutional restraints on power when G_1 is powerful and becoming more powerful (as in moment 2). At that point, the fear of present and future concentrated power is sufficiently great to exceed G_2 's perceived advantages from weak institutional restraints. At other times of moderate fear, such as those when G_1 is particularly powerful but its power is declining (as in moment 3) or when G_1 's power is increasing but not yet very high (as in moment 1), G_2 may want to support institutional restraints on power. However, its perceived advantages stemming from institutional change may not exceed its perceived costs of losing its privileged status conveyed by existing rules.

G_2 is likely to be even more ambivalent when G_1 is weak and becoming weaker (as in moment 4) because it is possible that a subgroup within its fold may believe it can become the next G_1 and thus erode the unity of the group. And yet, I suggest that it is in such "moment 4 instances" that there is the greatest likelihood of the two most powerful groups reaching that rare point where they both accept stronger institutional restraints on concentrated power. The main factor leading them to such a rare joint decision is the high degree of uncertainty in terms of present and future power distribution among themselves.

Indeed, the ambiguity of G_2 's position in so many instances and even of G_1 (especially in moment 4 situations), is in great part driven by the uncertainty that comes from assessing power. Such uncertainty may mean that it is not clear who the dominant group is (i.e., what G_1 's relative power is vis-à-vis G_2) or will be (i.e., whether G_1 's relative power vis-à-vis G_2 is declining). Thus, it is at times such as moment 4 that we should *sometimes* expect the two dominant groups to accept institutional restraints because that is when their uncertainty and *common* fear of future power concentration is greatest.

⁹³ Some of the comparative politics works discussed earlier focus somewhat more on the struggles between the two groups rather than solely on actions of G_1 . For example, Gandhi, Jennifer and Adam Przeworski. 2007. "Authoritarian Institutions and the Survival of Autocrats," *Comparative Political Studies* 40(11): 128 explain that these institutions resulted primarily from clashes between the "ruling elite" and the second elite "that come from outsiders within society."

Table 2.1 G₁ and G₂ expected support/opposition to institutional restraints at different times

	G1 power growing	G1 power declining
G ₁ power/ G ₂ power great	<u>Moment 2</u> G ₁ : strong opposition to restraints (– –) G ₂ : strong support for restraints (+ +)	<u>Moment 3</u> G ₁ : strong opposition to restraints (– –) G ₂ : weak support for restraints (+)
Overall degree of support	0	–
G ₁ power/ G ₂ power small	<u>Moment 1</u> G ₁ : strong opposition to restraints (– –) G ₂ : weak support for restraints (+)	<u>Moment 4</u> G ₁ : weak support for restraints (+) G ₂ : weak support for restraints (+)
Overall degree of support	–	++

G₁ and G₂'s expected preferences at the four moments depicted in Figure 2.1 are captured in Table 2.1. The table shows that G₁ is likely to express strong opposition to restraints (represented with “– –”) in moments 1, 2, and 3, making it highly unlikely that restraints are established at such times, even if G₂ offers strong support (“+ +”) for them in moment 2 and weak support (“+”) in moments 1 and 3. It is only in moment 4 that there is a *chance* for restraints to be instituted, when G₁ and G₂ both offer some (weak) support for them (“+”).

It is important to note that uncertainty about power distribution is relatively common both in the domestic and international realms. The topic permeates writings on domestic politics at least as far back as those of Hobbes and, to some extent, Locke. In IR Robert Gilpin famously argued that states rarely can assess each other's power. In fact, he suggested that it is really only after “hegemonic wars” that states know who controls more power. At all other times, between wars, the uncertainty of the distribution of power leads all actors to rely on “prestige” (which he defined as the reputation of power) for their calculations.⁹⁴ This argument, together with the ones I developed above, suggest that it is *less* likely to see new or stronger institutional restraints on power after major conflicts compared to other times because there is more certainty about power distribution after such wars. This argument runs counter to ones from most of the existing literature on this topic.⁹⁵

⁹⁴ Ikenberry, John. 2011. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*. Princeton, NJ: Princeton University Press, 29–34.

⁹⁵ Ikenberry, John. 2011. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*. Princeton, NJ: Princeton University Press.

Of course, it is to be expected that after power distribution is altered yet again and the conditions that triggered the strengthening of institutional restraints disappear, G_1 will seek to erode the new restraints as soon as possible. G_2 's usual ambiguity towards institutional restraints may also lead it to support G_1 in its efforts to weaken the institutional restraints. However, like all institutions, the restraints on power discussed here may develop sufficient inertia to not allow for quick reversals. In sum, an argument regarding the evolution of institutional restraints on power (and the third overall argument) explains when the virtually constant pressures for change are likely to eventually lead to actual changes:

A3) G_1 is more likely to support institutional restraints when it is becoming weaker relative to G_2 . As it becomes more powerful once more, it seeks to erode them.

Although I posit that G_1 and especially G_2 are the dominant groups involved in the processes leading to the early forms of institutional restraints on concentrated power, I consider that the two other groups (G_3 and G_4) at times also play significant roles. In the domestic realm G_3 was initially composed of lesser nobles and town leaders. Over the past two and a half centuries, the general population and civil society organizations became prominent parts of G_3 . In the international realm, G_3 has included smaller states and international nongovernmental organizations. Recently, in rare instances, the public also played a role in global governance, as part of G_3 . While subgroups within G_3 (as well as in the other three groups) may often have different interests, I expect their common fear of concentrated power to make them fairly cohesive in their joint efforts for institutional restraint. There may be instances when some actors within G_3 will oppose restraints⁹⁶ because they may see themselves benefitting from the status quo (especially if they are close allies of G_1 or even G_2). However, overall, they are expected to benefit far less from weak restraints than actors from within G_2 and, of course, than G_1 . Therefore, as I posited in A2, the individuals who make up G_3 are expected almost always to seek institutional restraints on concentrated power.

The fourth relevant group (G_4) is also brought together due to common preferences among individuals, but ones that do not derive only from actors' power status and fear of concentrated power, but also from the common interests of the individuals from this group, in preserving and, if possible, augmenting, the relevance of the institutions for which they work. Indeed, in time, officials working in such institutions develop vested interests in empowering their own institution

⁹⁶ Even when I refer to "restraints" or "restraints on power," I use the terms as shorthand for restraints on *concentrated* power. Consequently, I acknowledge that many weak actors from G_3 , such as weak states, may not support the broader restraints that institutions, such as IGOs, may impose on *all* actors. However, they will almost always support restraints on the most powerful group, where power is *concentrated*.

for purely professional reasons (rather than fear). Specifically, individuals that are part of G_4 pursue greater autonomy in order to achieve their immediate goals more easily and, even though that may not be their main intention, their actions lead to the more powerful restraints. This additional G_4 , indirect, support for institutional restraints adds to their baseline support for institutional restraints due to fears of concentrated power captured by A_2 . This suggests an additional argument:

A4) In time, G_4 develops additional (vested) interests in empowering its own institution, beyond its baseline support for institutional restraints due to fear of concentrated power.

Although G_3 and G_4 may be weak groups, under certain circumstances they may come to play an important role in the establishment of institutional restraints. I expect this to be especially likely when G_1 or G_2 seek additional allies in their clashes with each other, in a development that is not very different from those of “balancing” from the IR literature or of “cooptation” discussed in some of the aforementioned comparative politics work.⁹⁷

I should note that this dynamic becomes more evident when focusing on groups of actors rather than on individuals. As a reminder, the importance of considering groups was one of the two clarifications I made early on in this analysis to facilitate the comparison across the domestic–international divide. If we acknowledge that actors within each of the four groups discussed here have fairly cohesive preferences, based primarily on their individual status within the hierarchy of power (most powerful actors, second-ranked actors, and weak actors) or on their status within institutions, we should expect balancing to occur between them. When either G_1 or G_2 are in a relatively weak position, and they believe that an alliance with G_3 or G_4 is likely to make a difference in the clashes with each other, they both may seek ways to empower these two groups. We therefore expect G_3 and G_4 to play a more significant role in shaping domestic institutional restraints in the same “moment 4” instances mentioned earlier, when G_1 ’s power compared to that of G_2 is low and declining and when there is uncertainty about the future distribution of power between the two main groups.

Additionally, one expects that G_1 or G_2 are more likely to seek G_3 as an ally when the relative power of this third group is sufficiently great to “matter,” that is, when its relative power compared to that of G_1 or G_2 is high. Taken together, these two conditions (relative power parity between G_1 and G_2 and increased relative power of G_3) suggest the empowerment of G_3 is a relatively rare occurrence that explains the long timeframes involved in the changes in institutional restraints on power that involve this third group.

⁹⁷ E.g., Gandhi, Jennifer and Adam Przeworski. 2007. “Authoritarian Institutions and the Survival of Autocrats,” *Comparative Political Studies* 40(11): 1280.

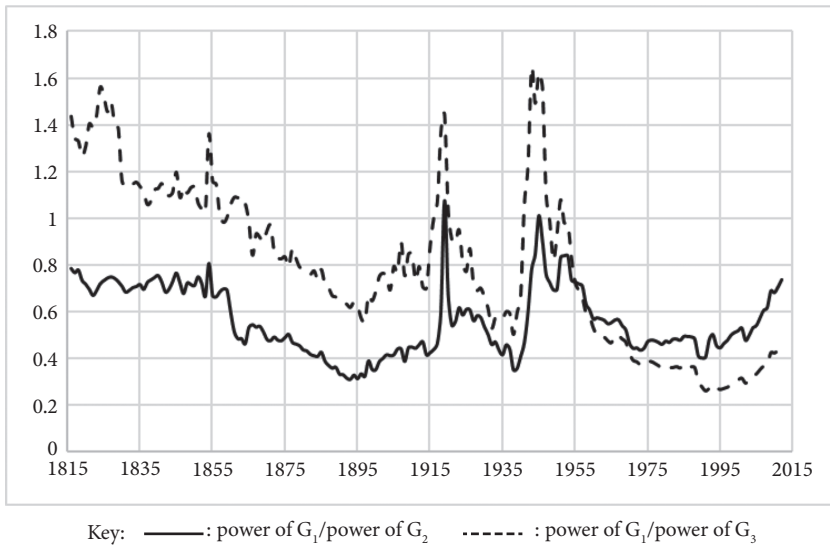


Figure 2.2 Capabilities of the G_1 state in the international system relative to G_2 and G_3 states

Figure 2.2 follows across time the relative power of G_1 , relative to that of G_2 and G_3 , as applied to states in the international system. The full line is the ratio between the power of the most powerful state (G_1) and the aggregate power of the second, third, fourth, and fifth most powerful states (G_2).⁹⁸ The dotted line is the ratio between the most powerful state (G_1) and all states besides the five most powerful ones (G_3). Based on the above arguments, one expects international institutional restraints on power to become more significant when the ratio G_1/G_2 is at a low and is declining (a moment 4 instance). According to the figure, this happened at the end of the nineteenth century (when there was a change in G_1), in much of the interwar era, and in the first half of the Cold War. One also expects that G_3 states will play a greater role in shaping institutional restraints when the dotted line is at a low (as in the 1930s or 1990s).

However, I also posit that, once G_3 comes to play an important role in the dynamics involving institutional restraints on power, it becomes difficult to later erode its role. In part this can be the result of the inertia that all institutions exhibit. Additionally, once individuals within G_3 actually act together, they may develop a sense of solidarity that will allow the group to identify better its common interests and promote them.

⁹⁸ The measure of power I use (the “CINC score”) is based on National Material Capabilities data set. Singer, J. David, Stuart Bremer, and John Stuckey. 1972. “Capability Distribution, Uncertainty, and Major Power War, 1820–1965.” In Bruce Russett (ed.), *Peace, War, and Numbers*, Beverly Hills: Sage, 19–48.

G_4 may also come to play a more important role in the evolution of institutional restraints when it has the ability to make a difference in the interactions between the groups and when other groups seek to empower it as a potential ally in their clashes with each other. Indeed, G_1 , G_2 or even G_3 may consider empowering judges, members of assemblies or bureaucrats from institutions if they feel that by doing so, they may gain the upper hand over the other two groups. When the clashes between powerful groups subside, they may seek to erode G_4 's role. However, such erosion may be difficult to achieve due to the same factors mentioned earlier, when discussing the role of G_3 . Institutional inertia and an increased awareness of the group's vested interests will lead G_4 to continue playing an important role in shaping developments.

To sum up the main conclusions of the discussion of these dynamics of balance between groups, I argue that:

A5) G_3 and G_4 may play more important roles in the evolution of institutional restraints at times of power parity between G_1 and G_2 . As G_1 and G_2 's need for alliances declines, they seek to erode G_3 or G_4 's role.

Before concluding this section discussing the preferences and roles played by groups, it is worth mentioning two potential caveats. First, like any classification of "groups," the one I offer is only an approximation of the real world. As suggested above, some of these groups can be more or less cohesive. Individuals or subgroups may often consider their allegiance to lay outside the group's (as defined here) and may shift to another group.⁹⁹ However, as in the case of other concepts used in the social sciences, I consider the existence and roles of these four groups to be sufficiently meaningful in the evolution of institutional restraints to warrant such imperfect approximations.

Second, the above arguments derive primarily from a basic logic that takes into account material cost-benefit calculations of the groups. I acknowledge that such groups may support institutional restraints on concentrated power for other reasons, such as increasingly powerful norms (especially democratic ones), reputation, or secondary material interests. In fact, one of the reasons why the strengthening of restraints may not be easily reversible is that norms based on established customs may act against the erosion of the institutions. In the empirical sections of this book, I will offer examples of such norms and of other ideational factors affecting developments. However, in order to bring greater clarity to the analysis, I will focus primarily on material elements. Thus, I suggest that, all other factors being equal, actors' interests and actions involving the emergence and later

⁹⁹ I acknowledge that a continuous treatment of actors' preferences, such as that of Boix and Svolik (2013), offers a more precise understanding of who supports or opposes institutional restraints than mine, that is based on only three groups. However, in the present study, the ability to draw parallels between developments across long periods of time and, more important, across both domestic and international groups, requires accepting a somewhat less precise delineation of actors' preference.

Table 2.2 Main groups involved in shaping institutional restraints

Groups	G₁ (most powerful)	G₂ (second-ranked powers)	G₃ (numerous weak actors)	G₄ (individuals from institutions)
Examples of groups in the domestic realm	Kings and close allies, heads of state, dominant political party	Most powerful nobles, Church, dominant class, opposition parties	Lesser nobles, town leaders, the public, civil society organizations	Judges, counselors, legislators, administrative officials
Examples of groups in the international realm	Most powerful state	Second-tier states	Weak states, international civil society	Officials from international courts, assemblies, parliaments, and IGO secretariats
Expected support for institutional restraints in “normal” conditions (argument)	Almost always opposes restraints (A2)	Ambiguous in its support for restraints (A2)	Almost always supports restraints (A2)	Almost always supports restraints (A2)
Expected change in preferences and roles under specific conditions (argument)	When G ₁ ’s relative power is low and declining it may support restraints (A3)	When G ₁ ’s relative power is low and declining it is more likely to support restraints (A3)	Changes in power parity between G ₁ and G ₂ may lead to a greater role, but not change in preferences (A5)	Changes in power parity between G ₁ and G ₂ may lead to a greater role (A5); in time its support for restraints increases due to vested interests (A4)

development of restraints will be shaped by their inclusion in one of the above groups, defined by their relative material power and their potential resulting fear of power concentration. Table 2.2 summarizes the above arguments regarding the classification of the four main groups and their preferences for developing institutional restraints on power. The first two rows offer examples of actors that make up the domestic and international groups. Row 3 indicates each group's expected overall preference for institutional restraints. Row 4 notes how such group preferences and roles may be altered at times when G_1 's power is low and declining relative to G_2 . I include in rows 3 and 4, in parentheses, the arguments that underlie these expectations.

The following chapter seeks to assess whether the expectations based on the five arguments derived here are met by developments in the domestic realm. To summarize, my arguments refer to 1) the nature of institutional restraints (A1), 2) the preferences for restraints of the four groups (A2, A3, and A4), and 3) which groups play the important roles in the evolution of institutional restraints on power (A5). Chapter 3 also allows me to generate some additional expectations for the international realm based on the patterns observed in domestic systems. The following chapters seek to determine whether all arguments, both those derived deductively from extant literature (and discussed in this chapter) and those derived inductively (in chapter 3), are upheld by the evolution of international law and courts (chapter 4), international assemblies and parliaments (chapter 5), and IGO secretariats (chapter 6).

3

The evolution of domestic institutional restraints and additional expectations for IR

This chapter follows the development of institutional restraints on concentrated power in the domestic realm. It is intended as a plausibility probe of arguments A1–A5 from chapter 2. Additionally, it allows me to tease out some more arguments based on domestic dynamics which I seek to apply to international ones.

It is not possible to cover developments across all states, especially as the book primarily seeks to offer numerous comparisons *across* the domestic–international divide. For sake of brevity, the analysis therefore focuses on the evolution of institutional restraints in only two states: England and France. I chose to consider these cases because of the extraordinarily rich literature covering developments in the two countries. The wealth of historical sources allows for a more complete understanding of institutional evolution. Indeed, the following narratives of the evolution of restraints on concentrated power in the domestic realm complement extant political science literature that, as mentioned, has focused considerably less on the very early government institutions from one thousand years ago, compared to the modern and contemporary ones involving systems of checks and balances among branches of government. For the purposes of developing observations that are applicable to the international realm, it is important to follow in greater depth institutional developments from the more distant past. The rest of this chapter will therefore follow events presented in historical accounts of the evolution of domestic institutions, highlighting the main moments and patterns discussed in chapter 2.

It is important to note that the arguments I developed in the previous chapter were presented as sufficiently generalizable to be applied both to the domestic and the international realm. It therefore follows that one should expect them to be applicable to many (if not all) domestic political systems across space, cultures, and time. However, I am aware that there is a broad body of literature that has identified important factors specific to Western Europe that led to differences in the processes of state formation and even international relations in this world region compared to other regions.¹ Therefore, I acknowledge that more research

¹ The literature especially notes differences between developments in Asia and Europe. See Tilly, Charles. 1990. *Coercion, capital and European states*. Oxford: Blackwell (Full citation already exists in chapter 2), 4–6; also, Gordon, Scott. 1999. *Controlling the state: constitutionalism from ancient Athens to*

is necessary to assess whether specific elements from other parts of the world limit the generalizability of the domestic processes leading to institutional restraints on power found in the West.

In Europe, the five centuries prior to the fall of the Western Roman Empire in 476, represented a period of enormous power concentration in the hands of an emperor. With the subsequent emergence of the feudal system, power was fragmented across virtually all European states for at least five hundred years. Throughout that period, overlapping forms of authority within states led to continuously shifting coalitions among factions, prohibiting the emergence of an all-powerful national ruler. Subjects' shifting allegiances were most often to individual leaders rather than to a geographic area, as changes were continuously made to the boundaries of the conquered dominions.² The personal nature of power relations was reflected in the Salic law of the Germanic tribes controlling most of Europe during those times. Under that system, powerful individuals were granted greater protection by the law than weak individuals.³

The balancing that took place among various groups *within* political entities was similar to processes described as balance-of-power *between* such entities. Leaders could rarely take control of large territories for long periods of time. Eventually, however, one group, usually formed around a “king,” was able to amass sufficient power to make balancing by foes more difficult or even impossible. The original main task of such national leaders was to organize collective responses to those attacking the kingdom from outside. It is when such leaders (G_1 , to use the terminology from chapter 2) concentrated a great deal of power that others came to fear them and sought to restrain the power through institutions.

The evolution of domestic judiciaries as institutional restraints on power

In Europe, it was really only with the Frankish kingdom of the eighth and ninth centuries and the Anglo-Saxon Kingdom of the tenth and eleventh centuries that kings took on the broader role of maintaining peace within the land and established “national” justice systems.⁴ Before such times, each local lord determined what justice was and applied it on his territory.

today. Cambridge: Harvard University Press (also in chapter 1), 2. For the specific nature of West European international relations see, e.g., Hui, Victoria Tin-bor. *War and State Formation in Ancient China and Early Modern Europe*. 2005. Cambridge, UK: Cambridge University Press (also in chapter 1); e.g., Spruyt, Hendrik. 2020. *The World Imagined: Collective Beliefs and Political Order in the Sinocentric, Islamic and Southeast Asian International Societies*. Cambridge; New York: Cambridge University Press.

² Lacroix, Paul. 2011. *Medieval Life*. Arcturus Digital, 4.

³ Lacroix, Paul. 2011. *Medieval Life*. Arcturus Digital, 17.

⁴ See Strayer, Joseph R. 1980. *The Reign of Philip the Fair*. Princeton: Princeton University Press.

In England, the Norman conquest eliminated the powerful Anglo-Saxon aristocracy and, by doing so, led to the consolidation of the central monarchic power. Many other European states went through similar centralizing processes throughout the eleventh and twelfth centuries. It is generally considered that France truly became a distinct entity, with its own language, in the twelfth century. Early in that century, Louis VI became the first French king to issue ordinances that applied to the entire territory over which he ruled.⁵

Before these processes of state consolidation unfolded, “general taxes” across the kingdom were virtually unheard of. Kings’ incomes would come primarily from their own lands. However, in time, they began instituting tolls, market dues, and fines for various offences across the land. Implicitly, kings sought to expand their judicial reach to allow for a continuous flow of revenues. As most of their lands came to be too far from the royal courts to control directly, rulers named individuals to manage their estates: “shire-reeves” (sheriffs) in England and “prévôts” in France. Such estate managers were the first permanent state functionaries. They were involved primarily in collecting taxes from the king’s lands and, somewhat later, in distributing justice. For a long time, sheriffs and prévôts only took on the latter task when it referred to questions of land ownership and taxation.⁶ Moreover, initially they only had judicial control over lands owned by the king. Local lords remained in charge of dispensing justice across all other lands.⁷

One of the most important factors that led to the emergence of political stability and state building in Western Europe was the increased role taken on by the Church. In the eleventh century the Church sought to become more independent of lay authority under the leadership of the pope. The resulting “Investiture Conflict” of the late eleventh century led to a clearer distinction between lay and ecclesiastical rulers. The former began being seen as the guarantors of justice, while the latter decided what that justice was.⁸ In time, for virtually all rulers across Europe, their judicial role became their primary one.⁹ Indeed, the king’s power to judge was seen as even more important than the power to legislate.¹⁰ By the thirteenth century, Henry de Bracton observed that the king was the “judex ordinarius of the realm” and his “duty primo et principaliter was to judge.”¹¹ When they were crowned, kings’ oaths almost always included wording regarding their duty to do

⁵ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 10.

⁶ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 28–9.

⁷ Harding, Alan. 1973. *The Law Courts of Medieval England*. London: Allen & Unwin, 19.

⁸ Strayer, Joseph. 1956. “Philip the Fair: A ‘Constitutional’ King,” *The American Historical Review* 62(1):18–32, 23.

⁹ Turner, Ralph. 2009. *King John: England’s Evil King?* Stroud, UK: History Press, 9.

¹⁰ Krasner, Stephen D. 1993. “Westphalia and All That,” in Goldstein, Judith and Robert Owen Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*. Ithaca, NY: Cornell University Press, 235–64, 254.

¹¹ Cited in Turner, Ralph. 2009. *King John: England’s Evil King?* Stroud, UK: History Press, 9.

justice. Throughout Europe, the state thus came to be “based on law and existed to enforce law.”¹²

The process through which kings increased their control over judicial issues was a slow one. Initially, they only dealt with arbitration between lords because, as mentioned, the local lords had their own laws within their territories. In time, an increasing number of cases, especially serious crimes, such as murders, reached the king. More important, throughout the twelfth and thirteenth centuries, individuals were given the right to appeal to the king the decisions of local courts, thus stripping the lords of a great degree of authority and increasing judicial centralization. The cases reaching the king came to be an important source of revenue as they resulted in fines extolled from guilty individuals. Moreover, such cases allowed kings to further their prestige and their control over the entire territory of the state, especially over districts where they did not have any lands and rights of justice. This was partly possible because early on judges were not independent of the monarch. They were considered the “king’s judges.” For example, in 1178, King Henry II chose five members of his household as his first judges.¹³

The centralization process took place faster in England than elsewhere in Europe. The relatively small geographic area controlled by the king, compared, for example, with those controlled by French rulers, allowed for faster travel and communication over the entire kingdom and, implicitly, for a more rapid process of centralization. Additionally, the large number of estates changing hands after the Norman conquest, contributed to the growth in the number of important cases that the king’s court adjudicated.

As the need for the king to become involved in judicial decisions increased, two types of important institutions developed as part of the consolidation of European states. First, the power to judge of the sheriffs and prévôts, discussed earlier, was extended to include matters beyond those directly related to taxation and also beyond the lands that the king owned. In time, the functions of taxation and judgment began being separated. Kings delegated itinerant judges (also known as “circuit judges”) to represent them in cases being tried far away from his court, leaving the local administrators to deal solely with questions of taxation.¹⁴ The itinerant judges eventually developed permanent locations across the country. In England, this happened around the late twelfth century.

¹² Strayer, Joseph. 1956. “Philip the Fair: A ‘Constitutional’ King,” *The American Historical Review* 62(1):18–32.

¹³ Zimmermann, Dominik. 2014. *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*. Baden-Baden: Nomos; Oxford: Hart Publishing, 56–7.

¹⁴ Strayer, Joseph. 1956. “Philip the Fair: A ‘Constitutional’ King,” *The American Historical Review* 62(1): 39; Turner, Ralph V. 1968. *The King and his Courts: The Role of John and Henry III in the Administration of Justice, 1199–1240*. Ithaca, NY: Cornell University Press, 10; Harding, Alan. 1973. *The Law Courts of Medieval England*. London: Allen & Unwin, 32.

Second, as the process of centralization led the king to be faced with more complex tasks, his need for advice from individuals who had experience in questions such as taxation, warfare, and law also increased. Kings' royal "courts" (that were primarily composed of such advisors) slowly swelled. Within these courts, there appeared a degree of specialization. In England, Henry II established at his court three bodies that he consulted separately when establishing laws, when applying them, and when adopting financial decisions: the Great Council, the Curia Regis, and the Exchequer, respectively. By the middle of the twelfth century, the court began designating individuals that could dispense justice in his name when he was not present. Such delegation of the king's duties became especially important in England, where the first Norman kings travelled abroad for long periods of time. However, at that time, all judges, whether at the royal court or at other locations across the land, were under the direct supervision of the king and had no real independence.¹⁵

In France, similar divisions in the "Cour du Roi" were fairly informal in the twelfth century but was formalized by the thirteenth century when Louis the IX established three distinct bodies: the Great Council, Parlement, and Chambre des Comptes. The bodies dealt with the same three issues as those in the English court: adopting laws, dispensing laws, and dealing with financial issues, respectively.¹⁶ The Parlement became especially important, initially for upholding the law but, as I will show, eventually also in the adoption of laws.

The first documented mention of the Parlement dates from 1239, but more as a forum for discussions (hence the etymology of the word) with individuals who counseled the king on matters of dispensing justice. In 1302, under Philip the Fair, the Parlement separated physically from the Cour du Roi, moving to a different building in Paris. A few years later the separation became official when it received its own "seal" and, implicitly, the right to adopt its own decisions.¹⁷ Starting in the mid-fifteenth century several more parlements were established across France to deal more easily with cases far from Paris. However, due to its location in the capital, the Parlement of Paris came to play a greater role during some of the most important moments in French history, including the 1789 revolution.

Rulers across Europe had almost complete control over the judicial bodies that they initially established within their courts and across their territories. In fact, in the late twelfth and early thirteenth century, English kings began using the judiciary as tools for increasing their power over local lords. The change was especially noticeable after the kings lost territories they had controlled outside the British Isles and, therefore, travelled abroad less and took a much more active approach

¹⁵ Turner, Ralph V. 1968. *The king and his courts: the role of John and Henry III in the administration of justice, 1199–1240*. Ithaca, NY: Cornell University Press, 15 and 270.

¹⁶ Prothero, G. W. 1898. "The Parlement of Paris," *The English Historical Review* 13(50): 229–41, 231–2; Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 10.

¹⁷ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 20.

to governance at home, including in judicial matters. In particular, King John came to see the judiciary as an effective way to control his barons. Most often, he would influence judicial outcomes simply by delaying trials. These delays were among the main complaints of the barons (G_2) that imposed the Magna Carta upon the king (G_1) in 1215.¹⁸

The signing of the Magna Carta is often viewed as a momentous and unique event that contributed suddenly to the erosion of absolute monarchic power. However, this summary view is an oversimplification of the complex processes that unfolded around that time. First, the document was not truly unique. Other similar documents assuring local lords of a set of clear rights in their relationship with their monarchs emerged around that time in other European kingdoms, as in Aragon, France, and Hungary.¹⁹ Second, the "Great Charter" was amended several times after its signing in 1215 and lost much of its original strength.

The adoption of the Magna Carta was, indeed, primarily the result of English barons' grievances against King John. However, it should be noted that John had continued many of the same practices that his father, Henry II, had initiated. Henry had used judicial power to fine his adversaries through the courts of common pleas. He also broke with the tradition that trials of feudal lords be judged by their peers rather than the king's magistrates.

However, John further extended such abuses. He sought to seize control over the Church of England from the pope. He hired foreign mercenaries that allowed him to control feudal lords militarily. He also sought to erode the power of towns. While many of his predecessors had improved their relations with the Church and towns to increase their control over barons, John sought to dominate all three groups at once, in a bid to gain unprecedented power in the state.²⁰ However, by late 1214, after a series of failed military campaigns in France, he returned to England much weaker. His power relative to that of the secondary group (G_2) was low and declining. It was at that point that John and his close advisers (G_1) and the representatives of the lords and church (G_2) signed the Magna Carta, one of the most well-known early documents to embody restraints on concentrated power.

One of the essential achievements of the Magna Carta is that it formally introduced the idea that even the king was not above the law. The initial 1215 version of the Charter reflected the tremendous power of those who came together to place restraints on the king. The most significant such reflection was found in clause 61

¹⁸ Turner 1968, Turner, Ralph. 2009. *King John: England's Evil King?* Stroud, UK: History Press, 270 and 276.

¹⁹ Thompson, Faith. 1967. *The First Century of Magna Carta: Why it Persisted as a Document*. New York: Russell & Russell, vii.

²⁰ Thompson, Faith. 1967. *The First Century of Magna Carta: Why it Persisted as a Document*. New York: Russell & Russell, 3.

that established a council of 25 barons to monitor and ensure John's adherence to the agreement.²¹

Almost immediately after John signed the Charter, he sought ways of undoing the power of the document. Most important, he realized that he needed the support of at least some of his adversaries. He had extended an olive branch both to the pope and to Londoners even before his meeting with the barons at Runnymede, but at that time it was too late to stop the unfolding of events. After signing the Charter, John nevertheless moved quickly to make peace with the pope.

When the barons learned of John's efforts to undo the Magna Carta, they called on Louis VIII of France. The French king entered London, forcing John to flee. Filling the leadership gap left by John's departure, Louis declared that he accepted all the laws of the country, including the Magna Carta. As John initiated a military campaign to regain the throne, he died somewhat unexpectedly, of dysentery. His death, a little more than a year after he had signed the fateful document, led to an easing of tensions across the country. The relative peace between the monarchy and the barons was in great part possible because John's successor, his son, Henry III, was underage at the time of his coronation in 1216 (and thus in a weak position). The regency of the young king was therefore arranged to reflect that both the Church, through the papal legate Guala Bicchieri, and the lords, through William Marshal (representatives of the two main subgroups from G_2), held some control over state affairs. Henry's immediate declaration of allegiance to the Charter also contributed to the de-escalation of tensions.

The promise of stability in England led both the pope and French king to support Henry III. Such support allowed Henry to adopt a new, somewhat weaker version of the Charter in 1217. In 1223, when Henry came of age, he adopted yet another such version. Even after 1223, some friction remained between the king and his barons over the fate of properties that John had taken by force. Therefore, in 1225, Henry III reconfirmed his support for the rights of the barons in yet another document. The 1225 Charter, adopted ten years after the original one, is the one that eventually came to be considered thereafter as the binding "law of land."²²

These revised charters maintained virtually all provisions from the 1215 document. However, one of the most important changes was the elimination of clause 61.²³ During and especially after Henry's regency, he (G_1) had regained sufficient power vis-à-vis the nobles and ecclesiastics (G_2) to erode the institutional restraint on his power.

Some consider that the binding nature of the 1225 Charter is what made it truly relevant. Indeed, the rights mentioned in the document had been informally

²¹ Turner, Ralph. 2009. *King John: England's Evil King?* Stroud, UK: History Press.

²² Thompson, Faith. 1967. *The First Century of Magna Carta: Why it Persisted as a Document*. New York: Russell & Russell, 6 and 9.

²³ Turner, Ralph. 2009. *King John: England's Evil King?* Stroud, UK: History.

accepted well before 1215. However, the understanding that the stipulations of the 1225 document were to be compulsory and enduring was new.²⁴ A little more than a decade after the adoption of the Charter, jurist Henry de Bracton was probably the first to articulate the importance of the principle enshrined in the document, that the king did not wield absolute power: "The king has a superior, namely, God. Also the law by which he was made king. Also his curia, namely, the earls and barons, because if he is without a bridle, that is without law, they ought to put the bridle on him."²⁵

Despite the king's loss of absolute control of judiciary power through the Magna Carta, during the reign of Henry III and those of other kings throughout the following two or three centuries, the justice system continued to be dominated by monarchs. The events leading to the further erosion of the king's control over judicial matters in England during those centuries unfolded much slower than the revolutionary ones before the meeting at Runnymede.

The main factor that contributed to such erosion was the emergence of an increasingly professionalized and, ultimately, independent judiciary. This process had begun almost as soon as the king started delegating judicial powers to judges within his court (G_4), as well as across the country. The specialization and clique-like character of the legal profession was primarily the product of a common education system that developed in virtually all states. In England, the first actual law schools emerged in the twelfth century and were run by the Church.²⁶ However, after a 1218 papal bull prohibited the clergy from practicing in secular courts, law began being taught in London in three lay schools. The monopoly of these schools over legal education was sealed by Henry III through a royal proclamation. The "Inns of Court," modeled after trade guilds, emerged around the same time as these law schools. In practice, the inns were a series of buildings where lawyers traditionally lodged, trained, and carried on their profession.²⁷ This common experience contributed to shaping the distinct and fairly unified group of individuals practicing law.²⁸

In France, the professionalization of the legal institutions followed a similar pattern. Virtually everyone who practiced law was educated at the University of Paris, founded in the mid-twelfth century.²⁹ However, in the French case, an even more important factor that led to the empowerment of this professional group

²⁴ Thompson, Faith. 1967. *The First Century of Magna Carta: Why it Persisted as a Document*. New York: Russell & Russell, 11–2.

²⁵ Bracton, Henry de, George E. Woodbine, and Samuel E. Thorne. 1968. *On the Laws and Customs of England*. Cambridge, MA: Harvard University Press, Vol. 2, 101.

²⁶ Bellot, Hugh. 1902. *Inner and Middle Temple: Legal, Literary, and Historic Associations*. London: Methuen, 32.

²⁷ Bellot, Hugh. 1902. *Inner and Middle Temple: Legal, Literary, and Historic Associations*. London: Methuen, 36.

²⁸ Baker, John Hamilton. 1986. *The Legal Profession and the Common Law: Historical Essays*. London: Hambledon, 7.

²⁹ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 14.

was the slow process through which the Parlement, mentioned earlier, became increasingly independent.

As noted, the physical separation between the Parlement and the royal court took place at the beginning of the fourteenth century. This separation, as well as the institution's increasingly complex structure, allowed it to insulate itself to some degree from the king's influence on its work. Although the Parlement was initially intended only to apply the laws (as a judicial institution) it was quickly given another task that, at first sight, appeared to only be a formality, that of "registering" the laws. The registration of decrees was initially seen as a technical question, intended to avoid laws that would duplicate or clash with existing ones and that allow the expertise of the members of Parlement to contribute to the accuracy of the language in the laws. However, this initially formal task came to be taken more seriously by the Parlement and led the institution to also delve into more serious questions involving the adequacy of a law's substance. Of course, this development suggests that the institution had acquired a legislative role, not only a judicial one.

While the legislative power of the Parlement was certainly important (and will be discussed further in the following section), the institution's judicial power was perhaps even more significant in terms of the limits it imposed on the king's ability to dispense laws as he pleased. The first clashes between the Parlement and the French king came in the mid-fourteenth century, when Philip V voiced his frustration with the slow and deliberate pace with which the institution was dispensing justice, especially when he sought speedy verdicts against his foes. His attempts to reform the Parlement were met with resistance as its members (an example of G_4) pushed back against what they perceived to be an attempt of the king (G_1) to apply laws in a hasty manner, in a way that ran counter to the professional norms in which, by now, they had been socialized through their education and work. In the end, Philip's efforts of reforming the judicial system only had a small effect on the functioning of the Parlement.³⁰

In the fourteenth century, even the small degree of autonomy that characterized the relationship between the Parlement and the king, led some lords (G_2) to submit their disputes with members of the king's inner circle, including his family (G_1), to that institution. While the Parlement sometimes adopted decisions against the king's close allies, it should be noted that it never took a case against the king himself. Until 1789, the lack of a revolutionary moment such as the one preceding the signing of the Magna Carta in England, allowed the French system to continue embracing for a long time the idea that the king himself was not accountable to law.

An even more relevant set of cases reflecting how the Parlement's actions could run counter to the French king's interests involved the Church (also part of G_2). While monarchs across Europe and the Catholic Church had established a modus

³⁰ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 27–8.

vivendi since the eleventh century, the delicate balance between these two important forces began to crumble in France in the late thirteenth century. In 1296 Pope Boniface VIII threatened to excommunicate any lay ruler who taxed the clergy without his consent. Philip the Fair responded immediately with two ordinances prohibiting any money from leaving the country without the king's consent and forbidding foreigners, including papal legates, to remain in the country. The back-and-forth actions of the two sides culminated in 1302 with Boniface excommunicating Philip and declaring him incapable of acting as king. The monarch's disputes with Rome led to a decline in his power (i.e., that of G_1) relative to the power of the secondary group of domestic actors, especially the Church (G_2).

Throughout the fourteenth century, as French kings sought to gain greater control over the Church, they empowered the Parlement (considering the institution a tool that simply extended their own reach) by allowing it to take on ecclesiastic cases. Implicitly, the members of the Parlement (G_4) became more powerful and played a more meaningful role. While in most instances the Parlement sided with the king, it did so solely through decisions based on existing laws and customs. This "technical" approach encouraged the clergy to bring their own cases (often against each other) to this secular court, expecting just decisions. By the late fourteenth century, the Parlement came to be viewed as a fairly unbiased arbiter between the Church and monarch that, in some instances, would adopt decisions in favor of the former over the latter. The Parlement thus became the most important defender of the idea that kings had an obligation to uphold the liberties of the French Church.

With the accession of Louis XI to the throne in 1461, the pope and the French king reached a compromise and relations between the two sides improved considerably. Interestingly, the Parlement that had benefitted, as expected, from the clashes between the monarch and Rome, initially did not support this rapprochement. In 1465 it sought unsuccessfully to dissuade the king from abolishing several laws against the pope. As the relations between the pope and king improved, Louis did not allow the Parlement to take on any more cases involving clerics. In other words, with the king and the French Church finding themselves much more often in agreement, the power of the Parlement (G_4) that had previously acted as an ally for one or the other of these two major domestic groups (G_1 and G_2) eventually waned.

However, the developments of the fourteenth century in France suggest that the king's judicial power was no longer absolute and that rulers could only act "in accordance with what was customary, through channels that were legal and after due consideration of the options of his counsellors."³¹ This idea, was articulated in the early fifteenth century by Jean Gerson, the Chancellor of the University of Paris who argued that "even the king cannot slay any man except by process of

³¹ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 182.

law.”³² This suggests that the French judicial system, like the English one, had also developed by then some restraints on the king’s power.

In time, as French kings continued to amass power, their control over the judiciary and the weakening of the Parlement became more apparent, as expected based on the arguments from chapter 2. Early in the seventeenth century, Cardinal Richelieu established an alternate court intended to erode the power of the relatively independent Parlement. A few decades later, during the long reign of Louis XIV, as the king’s power (that is of G_1) reached its peak, the Parlement became virtually irrelevant. Overall, despite increased professionalization and autonomy, before the mid-eighteenth century the French judiciary could not truly challenge the king’s power. It was only in the years immediately prior to the French Revolution that the Parlement and individual members of the judiciary became sufficiently independent of the monarch to play a truly important role in domestic politics.

In England, the king’s power in the judicial realm appeared to be eroded somewhat faster than in France or other countries. In part, this was due to the country’s strong reliance on common law. Common law, generally viewed as emphasizing continuity, gave specialized judges a more prominent role than civil law, where there was more room for the ruler’s intervention.³³ The clash between the king (G_1) who preferred civil law and judges (G_4) that had been practicing and supporting common law came to a head in the early seventeenth century. At that time, King James, even more than most of his predecessors, was using the judiciary to consolidate his power. He had numerous barristers imprisoned for questioning royal decisions and superior judges called before him for “consultations.” More important, he had decided to seek the replacement of the common law system with one of civil law.

The king saw the introduction of the civil law system as a way to regain the control over the judiciary that he once had. Although the common courts were becoming more independent of him, he was able to maintain an important judicial role through appellate cases. Traditionally, the king had used the Curia Regis to deal, directly or through his close advisors, with all such appeals. As the royal court provided the seeds that led to the development of the House of Lords, this upper house of Parliament also took on the appellate power. Despite this apparent shift of power from the Crown to Parliament (still G_1 and G_2 , respectively, at that time), until the sixteenth century, the king continued to be able to influence decisions in this “high court.” Moreover, the court remained active when petitioners were reluctant to seek justice in the lower courts or when they appealed decisions from lower courts. Yet, by the mid-sixteenth century, the professionalization of judges

³² Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 182.

³³ Baker, John Hamilton. 1986. *The Legal Profession and the Common Law: Historical Essays*. London: Hambledon, 205.

slowly led to an increased trust in the lower courts. Indeed, between 1514 and 1589 the high court only heard five cases and from 1589 and 1621 it did not hear any cases. By the 1620s the Clerk of the Parliaments noted that “the execution of all our laws has been long since distributed by Parliament unto the inferior courts”³⁴ (reflecting the empowerment of G_4 in the judicial realm).

It is in this context of gradual professionalization of judges (G_4) and the erosion of judicial power both for the king (G_1) and Parliament (G_2) that we need to understand the clashes of the early seventeenth century between Edward Coke, the Chief Justice at that time, and the Crown. In 1608 Coke famously argued that the king may have the constitutional power to be the final judge in a dispute, but he did not have the “artificial reason” to correctly exercise such power. That is because the knowledge of laws “requires long study and experience before that a man can attain to the cognizance of it.”³⁵ In many of his speeches, Coke made references to the Magna Carta, and especially its chapter 29, to challenge the king’s encroachments on common law.³⁶ The essential principle of due process enshrined in the Magna Carta was perceived as a critical restraint on the king’s arbitrary use of power. Coke claimed that judicial decisions should be independent of the king’s will and that only judges should be responsible for dispensing justice, not the king or his representatives. This implied an even more powerful restraint on the absolute judicial power of the king than the one implicit in the Magna Carta. However, it appears that Coke’s ideas were not yet ripe for the times. Indeed, in 1616 he was dismissed by the king and English monarchs continued to influence outcomes of cases for at least another century.³⁷

Even the Civil War in the mid-seventeenth century only took the judicial power away from the king for a short time. In fact, as soon as the monarchy was restored, Charles II saw the judiciary as one of the most important tools through which he could regain more power. He replaced numerous senior judges that had been advanced to their positions by Oliver Cromwell. By 1680, the Commons pushed a bill that would have been the first to protect judges’ tenure (an instance of G_2 seeking to empower G_4 in its struggle for power with G_1). However, the House of Lords, closer to the king’s views, did not take up the bill.

³⁴ Pike, Luke Owen. 1894. *A Constitutional History of the House of Lords*. London: Macmillan, chapter XIII; see also Powell, J. Enoch 1968. *The House of Lords in the Middle Ages: A History of the English House of Lords to 1540*. London: Weidenfeld & Nicolson.

³⁵ Cited in Pasquino, Pasquale. 2003. “Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History,” *The Law and Practice of International Courts and Tribunals: A Practitioners’ Journal* 2(1): 11–25, 20.

³⁶ The chapter reads: “The body of a free man is not to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way ruined, nor is the king to go against him or send forcibly against him, except by judgment of his peers or by the law of the land.” (See Magna Carta Project at http://magnacarta.cmp.uea.ac.uk/read/articles_of_barons/Article_29).

³⁷ Baker, John Hamilton. 1986. *The Legal Profession and the Common Law: Historical Essays*. London: Hambledon, 210–23.

Charles' ability to control the judiciary was in great part due to the fact that he was fairly popular both among the public and among the lords who at that time were tired of the tumult of the previous several decades. They were therefore inclined to give him the benefit of the doubt in his actions. However, when James II acceded to the throne in 1685, the situation changed as the monarch's relative power was eroded. His open support for Roman Catholicism led the Anglican Church and many lords to oppose him. James reacted to this increased opposition with attempts to wrangle more power, especially by gaining greater control over the judicial system. He began replacing senior Anglican judges with Catholics. In 1688, those opposing James called upon William of Orange to become king. After James fled but before William officially took the throne, the Parliament passed the Bill of Rights in 1689. This important moment was one when the power of the monarchy had clearly declined and was at an all-time low (a "moment 4" type of situation, represented in Figure 2.1). Future uncertainties for both G_1 and G_2 led to the general acceptance of the institutional restraints on power embodied by the Bill of Rights.

Among the stipulations of its earlier drafts, the Bill provided for protection of judges, in that they "were not to be removed or suspended from the execution of their office, but by due course of law."³⁸ However, the provision was dropped in the final version of the Bill. Just three years later a House of Commons Bill that sought to regulate judges' salaries was defeated by representatives of the monarch based on the argument that "it did entrench on the King's prerogative and would render judges independent of the Crown."³⁹ Of course, by then the king had regained the relative power vis-à-vis secondary domestic actors and was seeking to erode the institutional restraints on his power.

When Mary died childless in 1694, the succession to the English Crown was thrown into doubt. Thus, G_1 's power relative to that of G_2 once more was declining and was at a low. In order to avoid developments similar to those from James II's reign, Parliament passed in 1701 the Act of Settlement through which Protestant succession was assured. Also, to avoid future monarchs from extending their control over the judiciary, as James had sought to do, the Act stipulated that one needed a majority of both houses of parliament to replace a judge. Most consider that only after this act was adopted, did judges truly become independent of the Crown and, implicitly, the judiciary developed into an effective restraint on the king's power.

It should be noted that even the Act of Settlement did not eliminate all royal influence in the judicial realm. Monarchs could still replace judges upon their

³⁸ Stevens, Robert. 2002. "Setting the Tone: The Act of Settlement and the Emergence of the Balance of Powers," in *The English Judges: Their Role in the Changing Constitution*. London: Hart Publishing, 5.

³⁹ Stevens, Robert. 2002. "Setting the Tone: The Act of Settlement and the Emergence of the Balance of Powers," in *The English Judges: Their Role in the Changing Constitution*. London: Hart Publishing, 6.

coronation. This power was used by kings and queens throughout the eighteenth century.⁴⁰ Moreover, the Act was relevant in that it gave Parliament greater influence over the judiciary. The joint (strong) control of the judiciary by Parliament and Crown is reflected in the fact that, more than a decade later, 85 % of senior judges had previously been members of parliament and 92 % had “Crown service.”⁴¹

However, the Act was never used by Parliament to replace a judge, suggesting that it was successful in giving judges more autonomy from the legislature (G_2) and not only from the king (G_1). It is primarily for this reason that the Act has been considered by many as being at “the crossroads of the English Constitution.”⁴² It was also seen as a model worth following by promoters of judicial independence from other countries.⁴³

Judicial independence continued to develop in England throughout the eighteenth century. The American colonies adopted much from the English model but improved on it in the seventeenth century, even before the principle of separation of powers became enshrined in the US Constitution in 1791.⁴⁴ By the nineteenth century, the United States came to be viewed as the model for judicial independence. That model has now spread across most states and has even been accepted through international agreements.⁴⁵

In sum, by the mid-eighteenth century, several states had developed restraints on the powerful actors through domestic judicial institutions. Such restraints functioned within the same branch of government, rather than between branches. In other words, judges and members of the Parlement came to share a greater proportion of judicial power with rulers. Conversely, kings became more limited in their ability to use judicial instruments to act as they pleased. Only starting in the late eighteenth century, with the emergence of separation of powers doctrines, did political institutions systems such as the American and British ones, move to a

⁴⁰ Stevens, Robert. 2002. “Setting the Tone: The Act of Settlement and the Emergence of the Balance of Powers,” in *The English Judges: Their Role in the Changing Constitution*. London: Hart Publishing, 11.

⁴¹ Lemmings, David. 2002. *Gentlemen and Barristers: The Inns of Court and the English Bar, 1680–1730*. Oxford, UK: Clarendon Press.

⁴² Stevens, Robert. 2002. “Setting the Tone: The Act of Settlement and the Emergence of the Balance of Powers,” in *The English Judges: Their Role in the Changing Constitution*. London: Hart Publishing, 9.

⁴³ One such champion was Charles-Louis de Secondat, Baron de La Brède et de Montesquieu who presided over the Bordeaux Parlement in the early eighteenth century. Montesquieu’s disappointment with the judicial power of French Parlements at the time he was writing, in the mid-eighteenth century, led him to famously argue that judicial power was “next to nothing.” (See Montesquieu, Charles Secondat de, Mortimer J. Adler, Robert Maynard Hutchins, Thomas Nugent, and J. V. Prichard. 1952. *The Spirit of Laws*. Chicago: Encyclopaedia Britannica).

⁴⁴ See Gerber, Scott Douglas. 2011. *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787*. New York, NY: Oxford University Press.

⁴⁵ The principle was mentioned more broadly in Articles 14 and 26 of the 1966 International Covenant on Civil and Political Rights but has since been discussed more specifically in the 1983 Montreal Universal Declaration on the Independence of Justice and the 2002 Bangalore Principles of Judicial Conduct.

more complex system of restraints on power, *among* rather than *within* branches of government.

The evolution of domestic consultative and legislative assemblies as institutional restraints on power

The origins of national legislative assemblies can be traced to ancient traditions of tribal leaders seeking counsel from some of their most important subjects. In Europe, after the fall of Rome, this practice was embraced by Germanic political groupings. During the early medieval era, counsel-seeking was not truly “national” and was infrequent in nature. At that time, kings would sometimes summon local lords to join their courts at important events such as coronations or before taking important decisions, especially those involving military campaigns. There is no evidence, however, whether those who attended these assemblies could actually influence the king’s decision, either alone or collectively.⁴⁶

In time, as kings sought to consolidate their power, the complexity of the issues they faced led them to rely more on the numerous individuals at their courts for advice and for carrying out decisions. They also found it increasingly useful to expand consultations beyond such small groups and formed broader assemblies to obtain the necessary financial assistance and legitimacy for some of their actions, such as military campaigns and the adoption of major laws. In time, these assemblies came to complement the work of the smaller councils made up of individuals with whom the king consulted on a virtually permanent basis. The two types of forums also became increasingly distinguishable from each other in terms of name and function.

In England, the smaller council, often referred to the “familiar counsel,” included only a small number of individuals who resided at the royal court. The larger assembly, that during the reign of the Anglo-Saxon kings was known as the “Witenagemot” (or Witan), functioned at least since the seventh century and was made up of several dozen of the most important nobles (G_2). The Witenagemot was given a more important role in the early tenth century, during the reign of Æthelstan. At that time, as the Anglo-Saxon kings had come to control increasingly large geographic areas, they found it easier to summon assemblies of local lords within their lands rather than travel together with their courts to meet with them individually. The assemblies came together at fairly regular intervals, usually during holidays such as Easter and Christmas. By the eleventh century, they brought together approximately one hundred local leaders.⁴⁷

⁴⁶ Maddicott, John Robert. 2010. *The Origins of the English Parliament, 924–1327*. Oxford: Oxford University Press, 1.

⁴⁷ Maddicott, John Robert. 2010. *The Origins of the English Parliament, 924–1327*. Oxford: Oxford University Press, 11–2, 86.

These larger assemblies were very festive in nature, with the king wearing a crown and dressing in his most imposing robes. This tradition was primarily intended to portray him as a semi-divine character who was predestined to lead his subjects. These large and glamorous assemblies were also intended to show that the decisions that were adopted were the result of a consensus among a large number of individuals and that the king garnered broad support. Just as important, once decisions were adopted, the lords attending the assemblies were responsible for making them known across the land. From 899 to 1022 of the twenty-two law codes that Anglo-Saxon kings enacted, nineteen of them resulted from consultation that took place as part of such assemblies.⁴⁸ In other words, by the mid-eleventh century, a tradition appears to have developed in England where important laws were generally passed only after consultations within broad assemblies rather than solely after discussions within the smaller court institutions.

After the Norman invasion, not only did William decide to continue the tradition of summoning consultative assemblies but, in fact, he brought them under the new Curia Regis that he established. It has been argued that this decision to continue the tradition of the Witenagemot was especially important because the new foreign king and his Norman nobles needed to gain legitimacy in the eyes of the local populace. Therefore, he felt that by accepting existing customs and institutions he would enhance the perceived rightfulness of his rule.⁴⁹

William's successors continued to rely on such assemblies to adopt the most important laws and decisions. Already, by the reign of Henry II, in the second half of the twelfth century, the assemblies came to bear the name of "parlement," from the French word. Based on existing historical sources, there is no indication that the lords present at such assemblies ever expressed their opposition to the king's policies. Rather their presence was used as a sounding board that allowed the ruler to determine the degree to which his subjects would support his decisions.⁵⁰

The assemblies, however, became truly relevant institutions during successions, especially when multiple individuals challenged each other for the throne. At such times, the choice for the new king would often involve lords selecting the new monarch, sometimes even through an electoral process. Such "moment 4" instances (represented in Figure 2.1) took place when the monarchy (G_1) was weak and depended on the most prominent nobles (G_2). They were also times of high uncertainty with regard to the future relative power of the dominant groups.

⁴⁸ Maddicott, John Robert. 2010. *The Origins of the English Parliament, 924–1327*. Oxford: Oxford University Press, 20.

⁴⁹ Wood, Ellen M. 1991. *The Pristine Culture of Capitalism: A Historical Essay on Old Regimes and Modern States*. London: Verso; Powell, J. Enoch and Keith Wallis. 1968. *The House of Lords in the Middle Ages: A History of the English House of Lords to 1540*. London: Weidenfeld & Nicolson.

⁵⁰ Maddicott, John Robert. 2010. *The Origins of the English Parliament, 924–1327*. Oxford: Oxford University Press.

By giving kings a sense of their subjects' opinions on important matters, such forums could offer early signals of potential rebellion. Indeed, the most well-known rebellion took place during the reign of King John. The tensions between the king and his lords had already swelled during the previous decade when Richard I had reigned. Richard had increased taxes to pay for wars. After John acceded to the throne, fiscal pressures also combined with other actions (some of which were mentioned in the previous section) to make him particularly unpopular. That eventually led to the broad coalition that forced him to sign the Magna Carta. Among the many demands that the barons made in the Charter, was that the king needed to always seek "proper counsel." In particular, the Charter specified that such counsel was necessary before the king would make decisions of taxation.⁵¹

The first assemblies called upon by Henry III, John's son, began taking on a much more confrontational character than those of the previous centuries. The stronger institutional restraint on the king's power, notably, came at a time when G_1 was weak relative to G_2 . There were approximately two dozen such assemblies convened in the first decade after the signing of the 1215 Charter. The most important one was held in 1225 and was often referred to as the "Great Council." It was summoned at a time when Henry's forces had experienced a number of defeats in France. There was a general expectation that England would be invaded very soon. In order to increase taxes for his army so as to contend with the foreign threats, the relatively weak king convened the assembly. The discussions in the assembly lasted for about a week. In the end, the group of secondary domestic actors agreed to the increased taxes but requested that the former confirm and reissue the Magna Carta, yet another example of groups accepting to bolster institutional restraints on power during a moment when G_1 's power had declined and was low.

The continued erosion of the English king's power was reflected in the evolution of the parliamentary institutions that followed the 1225 Great Council (often considered to be the first "parliament"). In 1254 the Parliament included for the first time representatives of all counties (known as "knights of the shire") that were not selected by the Crown. This decision was a result of the growing tensions between Henry III (G_1) and his lords (G_2). At the time, Henry was in particularly great need to acquire as much financial support for his military campaigns as possible. While he was abroad waging war, he instructed his wife, Queen Eleanor of Provence, to convene the Parliament. When it became clear that many of the major lords were not prepared to support the king, Henry sought to broaden the assembly to include representatives from all counties, an instance of G_1 empowering G_3 as a result of seeking allies in its clashes with G_2 (as expected based on A5).

⁵¹ Maddicott, John Robert. 2010. *The Origins of the English Parliament, 924–1327*. Oxford: Oxford University Press, 106–7, 118.

He decided that such individuals be elected by the local population because he felt that they were more likely to support his cause than if they were chosen by local sheriffs who he perceived as close to the powerful local nobles (i.e., part of G_2).⁵² While his calculations were correct in that particular instance, the tradition that he began, of including elected (and, therefore, independent) “commoners” in parliaments, in time led to a gradual empowerment not just of the lower class (G_3) but also of members of parliament (G_4). This process, of course, also led to increased restraints on the Crown (G_1).

The representatives of the commons already played an important role after the 1258 revolt by demanding, among other things, that the king summon parliaments at regular intervals. In 1265 yet another rebellion against Henry III led to the summoning of a parliament that included for the first time representatives of both counties and towns.⁵³ By 1295, the Parliament had swelled to comprise nobles and bishops as well as representatives from each county and town in England and Wales. In the fourteenth century the Parliament came to be divided in two houses, a House of Lords, with noblemen and bishops, and a House of Commons, with local representatives (“burgesses”). Starting in 1341 the House of Commons began meeting separately from the House of Lords and emerged as a powerful institution in its own right.

Despite the differences between the two houses (representing G_2 and G_3), all members of Parliament would often come together to seek the empowerment of their common institution over the Crown (a reflection of how such individuals could forge a coherent G_4). In 1362, Parliament passed a statute decreeing that all taxes needed to be approved by the two houses. This came towards the end of Edward III’s very long reign when the monarch had come to be less successful in foreign campaigns and his overall power had waned. In 1376, Edward’s last year on the throne, Parliament prosecuted or impeached some of the king’s advisors. In 1399 Parliament voted to depose King Richard II, enabling Henry IV to assume the throne.⁵⁴

As Henry IV had become king with the help of the Parliament (at a time when G_1 was weak compared to G_2), he accepted an even greater expansion of the institution’s power. During his reign, Parliament claimed the right to grant taxation only after the king addressed grievances brought before him. When Henry V, Henry IV’s son, ascended to the throne in 1414, he became the first monarch to formally accept that he needed the approval of both Houses of Parliament to make new

⁵² Maddicott, John Robert. 1999. “The Earliest Known Knights of the Shire: New Light on the Parliament of April 1254,” *Parliamentary History* 18(2): 109–29.

⁵³ See UK Parliament website, especially section of the origins of the parliament at <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/keydates/1215to1399/>

⁵⁴ Jones, Dan. 2012. “Richard Alone” in *The Plantagenets: The Kings Who Made England*. London: HarperPress.

laws. At that point, one can argue that the institution became a true restraint on the previously concentrated power of the king. Over the next few centuries, the Parliament and monarch came to share power, with each side becoming more influential at different times.⁵⁵

Although the present study does not aim to offer a complete history of the evolution of the English Parliament, it is important to note another key moment, in the early 16th century. Specifically, from 1529 to 1536 Henry VIII summoned Parliament to settle his divorce from Catherine of Aragon, which the pope was blocking. Henry instructed this “Reformation Parliament” to adopt numerous new laws, many of which dealt with religious practice and doctrine that had previously been only dealt with by the Church. Thus, in order to challenge one powerful group of actors (the Church, an example of G_2), the king (G_1) felt compelled to empower another group (members of Parliament, i.e., G_4)⁵⁶ to act as his ally. In other words, by formally offering Parliament supreme authority in making laws, the king, in fact, felt his own power grow over his most important previous adversary.

The new alliance came to be formalized in constitutional law through the development of the term Crown-in-Parliament, which implied that authority now resided jointly in monarchs and the two houses of parliament. Henry VIII realized that this coalition with Parliament gave him more power than he had before. He expressed this thought when addressing Parliament: “We be informed by our judges that we at no time stand so highly in our estate royal as in the time of parliament.”⁵⁷ Of course, about a century later the coalition between Crown and Parliament broke down. The next few centuries can be understood as a back-and-forth struggle to avoid the concentration of power in one locus. That period also was characterized by increased efforts to develop institutional restraints on power, including through more sophisticated checks and balances between branches of government, rather than the simpler checks on power within one branch, as in the previous centuries.

Historians generally consider that England’s case involved special circumstances that led to the weakening of the monarch and the empowerment of Parliament well before similar developments unfolded in other European states. Indeed, Henry II’s long regency (i.e., a period of eroding *and* low levels of power of G_1 compared to G_2) allowed the lords to maintain control over the king for a considerable amount of time and to consolidate the power they had gained by revolting against King John. These events led to the emergence in the thirteenth century of the “conciliar government,” that is, a government in which the still

⁵⁵ Editors. 2019. *British Parliament*. Available at www.history.com/topics/british-history/british-parliament.

⁵⁶ And also empowered G_3 (and a part of G_2) that were represented by the members of parliament.

⁵⁷ Elton, Geoffrey Rudolph. 1974. *Studies in Tudor and Stuart Politics and Government. Papers and Reviews 1946–1972*. Parliament/Political Thought Volume 2. London: Cambridge University Press, 32.

powerful monarch was forced to accept the counsel of a broad array of important individuals from across the land, an example of institutional restraint on G_1 's power.

However, it should be noted that many other European states also developed similar "proto-parliamentary" assemblies around the same time, often referred to as an "age of estates," even if such institutions did not last very long or were not as powerful as the English Parliament. The first such institutions were the Cortes that emerged around the middle of the twelfth century in several kingdoms on the Iberian Peninsula. Over the next century, dozens of proto-parliaments, both national and provincial, appeared across Europe. In fact, by the end of the thirteenth century, the political entities that did not have parliamentary assemblies (for example, those under Ottoman rule and German and Italian municipal governments) were the exceptions rather than the rule.⁵⁸

A comparative study of European proto-parliaments notes that they were most likely to emerge when the king was not sufficiently powerful to rule over his extended lands and needed to gain the support not only of strong local lords but also of other increasingly powerful groups in towns and the countryside. More specifically, as in England, the assemblies were generally convened when kings sought to collect taxes for costly military campaigns, at times of monarchic successions (especially when there were multiple claimants to the throne), or simply when the king needed a show of support at times of internal or external threats.⁵⁹

In such cases, kings' decisions to convoke assemblies usually came as responses to pressures from secondary actors who sought greater influence in the state's decisions. In fact, kings who failed to convene such assemblies, especially when the stakes were high, provoked rebellions. This suggests that the monarch (G_1) was often acting under the potential threat of losing the support of his subjects (G_2 and G_3). Therefore kings, especially the weaker and vulnerable ones, felt obligated to seek counsel fairly often. However, when monarchs were sufficiently powerful, they did not feel as vulnerable and therefore convened assemblies sporadically, as we would expect based on A3.

The evolution of the early French legislative institutions offers a particularly interesting set of differences and similarities to the one of the English Parliament. Indeed, the French tradition of assemblies advising leaders appears to be even older than the English one. Historians have pointed to some rudimentary advisory institutions as far back as ancient Gaul before the Roman Conquest.⁶⁰ Although in the first few centuries after the fall of Rome such assemblies appear to have disappeared in the territories that make up current day France, they reemerged during

⁵⁸ Esmein, Jean Paul Hippolyte Emmanuel Adhémar. 1911. "States-General," in Chisholm, Hugh (ed.). *Encyclopædia Britannica* 25 (11th edn.). Cambridge: Cambridge University Press, 803–5; Spufford, Peter (ed.). 1967. *Origins of the English Parliament*. London: Longmans, 2.

⁵⁹ Spufford, Peter (ed.). 1967. *Origins of the English Parliament*. London: Longmans, 22.

⁶⁰ Picot, Georges. 1969. *Histoire des États généraux*. New York: B. Franklin, vol. 1, p. 2.

the reigns of Pepin the Short and Charlemagne. Like most assemblies throughout Europe before the thirteenth century, those from the time of the Carolingian kings did not have much power. They lasted several days, during which time lords would request clarifications from the king about his decisions. However, they never led to real changes in the king's proposed actions.⁶¹

In the eleventh century, in addition to the consultations that French kings ordinarily had with nobles and ecclesiastics (as in other kingdoms), they also began calling upon representatives of major towns to come together and offer advice on important matters. The main reason for including representatives of this group was the growing importance of merchants and craftsmen from towns. Although merchants were still a relatively weak group of actors (G_3), the king (G_1) sought their support when powerful nobles (G_2) opposed his plans. By that time, this "bourgeoisie" (a word originally linked to the existence of cities and that referred to individuals who lived within the walls of the "burgh") had come to amass considerable wealth and therefore became of interest for taxation purposes. There were approximately two hundred major towns ("bonnes villes") that sent representatives to the assemblies by the early fourteenth century.⁶²

In 1302, Philip IV (Philip the Fair) convoked for the first time all three assemblies simultaneously, bringing together representatives of towns, nobility, and clergy, and dubbed the meeting "Estates General." His decision came during his disputes with the pope over the control of the French Church, that were discussed in the previous section.⁶³ This unfolded, of course, at a time when the power of G_1 compared to the power of secondary actors had eroded and was at a low. Throughout their dispute, the pope and French King each sought to show the strong popular support they commanded. In 1300 Pope Boniface proclaimed the first "jubilee" year. The number of pilgrims converging on Rome that year increased extraordinarily compared to previous years. One of the purposes of attracting such crowds was financial as the pope sought to gather money from the many pilgrims to make up for funds that he could not extract any more from the French Church. However, the jubilee was also envisaged to enhance the pope's prestige as the great number of pilgrims showed how strong his support was across all states.⁶⁴

It is in this context that Philip's simultaneous convocation of the three estates needs to be understood. The Estates General of 1302, as well as many of the ones that followed, were primarily intended to show the broad support that the king had among his subjects. Indeed, like the Anglo-Saxon Witan, the French Estates

⁶¹ Picot, Georges. 1969. *Histoire des États généraux*. New York: B. Franklin. Jones, Dan. 2012. "Richard Alone" in *The Plantagenets: The Kings Who Made England*. London: HarperPress, 8–11.

⁶² Hilton, R. H. 1995. *English and French Towns in Feudal Society: A Comparative Study*. Cambridge: Cambridge University Press, 227.

⁶³ Strayer, Joseph. 1956. "Philip the Fair: A 'Constitutional' King," *The American Historical Review* 62(1): 18–32.

⁶⁴ Thurston, Herbert. 1900. *The Holy Year of Jubilee*. St. Louis MO: B. Herder, 6–25.

Generals of the fourteenth century have been compared to “political rallies,” rather than to debates of the king’s decisions.⁶⁵ To use, once more, the terminology used in chapter 2, these events can be considered examples of G_1 empowering G_3 at a time when it was engaged in clashes with G_2 , as expected based on A5.

Initially, the Estates Generals, like most proto-parliaments, did not have a truly legislative purpose. They were intended to complement the work of the Parlement that was seen as part of the king’s government and that was formally endowed with the power to assist the king in his legislative and judicial tasks. In theory, the Estates Generals also allowed the king’s subjects to collectively present “complaints and grievances,” through their representatives. However, in practice, the complex and cumbersome process through which all such complaints were boiled down into a series of “cahiers” that would be given to the king, suggests that the nature of this institution was primarily festive, seeking to show support for the king, rather than deliberative.⁶⁶

The three estates initially had very little power and could never truly challenge the king.⁶⁷ The king selected the lords and clergy who attended the assemblies. There was an expectation that some of the most influential clergy (representing abbeys or cathedrals) and the most powerful lords (controlling the largest territories) needed to be included in these meetings. Therefore, such individuals could be considered as fairly independent actors. And yet, in the end, even their presence in the Estates General was not a given, being ultimately up to the king.

However, the king did not select representatives of the major towns composing the original “Third Estate.” They were usually the top municipal officials who were elected by their own towns to represent them in the Estates General. This advantage of G_3 ⁶⁸ planted the seeds of the group’s increasing independence from G_1 and of its eventual success in the 1789 Revolution that led to the Third Estate becoming the new G_1 .

In 1468, the king extended the electoral process to the selection of some clergy and lords. That year, the towns were instructed to each select three representatives: an ecclesiastic, a noble, and a burgess. These elected individuals joined the representatives of the first two estates that were, once again, chosen directly by the king.

⁶⁵ Picot, Georges. 1969. *Histoire des États généraux*. New York: B. Franklin, vol. 1, 22.

⁶⁶ See, e.g., Friedland, Paul. 2018. *Political Actors: Representative Bodies and Theatricality in the Age of the French Revolution*. Ithaca: Cornell University Press. Available online at <https://doi.org/10.7591/9781501724237>, 33–5; also, Fawtier, Robert and Ferdinand Lot. 1958. *Histoire des Institutions Françaises au Moyen âge Tome Second*. Paris: Presses universitaires de France, 224.

⁶⁷ Bisson, Thomas N. 1973. *Medieval Representative Institutions: Their Origins and Nature*. Hinsdale, Ill: Dryden Press, 107.

⁶⁸ The representatives of G_3 in the Estates General are not considered to also be part of G_4 . Due to their infrequent meetings, especially from the sixteenth to the eighteenth centuries, members of the Estates General did not develop the same kind of allegiance to the institution nor the necessary degree of specialization that characterizes G_4 . In contrast, members of the Parlement (in France) or of the Parliament (in England) met frequently and came to identify with the institutions and with a set of common interests and also developed considerable expertise.

By 1484 the representatives of all three estates were chosen by direct suffrage as the king gave up virtually all of his control over their selection. As the Third Estate also came to represent individuals from the countryside, not just those from towns, the selection process became more complicated because the population was not easily summoned for elections within rural areas. Therefore, the selection involved two steps. A first one led to country communities and small towns choosing electors. In a second phase the electors came together to select their representatives to the Estates General.

The main reason for the move towards electing representatives of the three estates, rather than having at least some selected by the king, was that throughout the fifteenth century the purpose of the Estates General also shifted. While the early assemblies were primarily convened by the king to “give counsel” (and the king preferred having compliant individuals who would show public support for his policies) those of the fifteenth and sixteenth centuries were primarily in order to “give aid” and therefore required real representation so that the king would be able to assess the degree to which the country was prepared to support him financially.⁶⁹

Indeed, an important purpose of the Estates Generals, besides that of showing political support for the king, was to raise taxes. Implicitly, many of them were convoked before major military campaigns, when the king needed additional support in his actions. Therefore, as the power of French kings increased, the frequency of the assemblies declined. When the Crown was able to make most of the taxes permanent it did not need to convene the Estates Generals.⁷⁰ The increased power of G₁ thus allowed it to erode the ability of the Estates General to act as a potential restraint on concentrated power. From the sixteenth to the eighteenth century (their last three centuries of existence), the Estates Generals were only convoked five times, in 1560, 1576, 1588 (all three to raise taxes during the Wars of Religion), 1614 and 1789.

The last two instances are telling for the nature of such assemblies. They were both convoked at times when the monarch's power was low and had declined. The Estates General of 1614 was called by Marie de Médicis, the mother and regent of Louis XIII, to gain support in putting down the uprising of the prince of Condé who sought the throne for himself. The 1789 Estates General was summoned by Louis XVI, in a last-ditch effort to control the tumultuous developments that preceded the revolution. However, he lost control over that assembly. The main political force opposing the king by that time was the Third Estate, whose representatives, as discussed, had virtually always been elected. By the end of the

⁶⁹ See Chisholm, Hugh. 1910. Entry for “States General” in the *Encyclopaedia Britannica*, New York: Encyclopaedia Britannica, at <https://archive.org/details/encyclopaediabri25chisrich/page/802/mode/2up>, 83

⁷⁰ Moreover, the Estates General were weakened by the decision that they should deliberate separately.

eighteenth century, as the Third Estate had come to represent virtually everyone who was not an ecclesiastic or noble, it was viewed as far more relevant than it had in the past and thus became the new G_2 , replacing the powerful nobles who had been the secondary power in the country for many centuries.

Therefore, when the 1789 meetings were convened, the representatives of the Third Estate were bitterly disappointed that they were not given the important role they felt they deserved. Although the king agreed that the number of representatives of the Third Estate should be increased to match the combined number for the first and second estates, in the end, each of the three estates were given only one vote based on a centuries-old rule. Moreover, the representatives of the Third Estate felt insulted by other traditions they considered degrading, from the black attire that they were forced to wear, to the fact that they had to enter the hall through side doors.⁷¹ In the end, the Third Estate revolted and formed a separate "National Assembly." Although the king and representatives of the aristocracy and Church recognized the new institution, it was too late for them to control the events that in the following weeks led to the outbreak of the revolution.⁷² By that time, the Third Estate managed to garner sufficient power to become the new G_1 .

Despite the fact that the Estates General eventually became an incredibly powerful restraint on the monarch's power (and, in fact, in 1789, was responsible for the monarchy's demise), throughout most of its existence the institution's functions were primarily ceremonial in nature and it lacked real legislative power. In fact, up until the late eighteenth century the Parlement acted as a much more significant restraint on the king's power in the legislative realm than the Estates General. Indeed, although the Parlement was originally intended to play a judicial role, it is important also to highlight here its legislative role.

As discussed earlier, the Parlement emerged as a separate institution from the original Curia Regis in 1302, the same year that the first Estates General was convened by Philip the Fair. The two institutions were intended to complement each other's work. The Parlement was to meet on a permanent basis and, therefore, required and developed a group of professional officials (G_4) who were paid for the advice they offered the king. By contrast, the Estates General met infrequently and was primarily relevant as a legitimizing representation of the king's subjects. The individuals who took part in the Estates General did not need any particular expertise and, therefore, as mentioned, they are not considered as belonging to G_4 . Rather, they should be seen as representative of the class and the geographic space they were supposed to speak for (i.e., G_3).

Since its inception as a separate institution from the "Cour du Roi," under Philip the Fair, the Parlement had the formal power to discuss and suggest changes to

⁷¹ Roberts, John Morris. 1997. *The French Revolution*. Oxford: Oxford University Press.

⁷² Rothrock, George A. 1960. "The French Crown and the Estates General of 1614," *French Historical Studies* 1(3): 295–318; LeRoy Ladurie, Emmanuel. 1994. *The Royal French State 1460–1610*. Oxford: Blackwell.

laws enacted by the king. Throughout the fourteenth century, several of the king's ordinances were registered with the wording "seen, read and corrected" by the Parlement. However, the changes to such laws were more cosmetic than substantive.⁷³ It is from this practice of reviewing draft laws that arose a formal procedure of "remonstrances," through which the members of the Parlement could refuse to register royal decrees.⁷⁴ They eventually came to use this power when protesting against laws they felt were inappropriate. However, in practice, the remonstrances only delayed the process of registration, as the king could enforce the acceptance of laws through the formal "lit de justice" procedure which meant he had to be present physically at the Parlement's proceedings.⁷⁵

The role of the Parlement waxed and waned across time, depending on the relative strength of the monarch. As mentioned in the previous section, throughout the second half of the fourteenth century and the first half of the fifteenth, during the conflicts between the French king and the pope, the institution was given more judicial power over Church affairs and was used as a tool by the king. However, during that period, it was also able at times to take the Church's side and sought to delay (and sometimes even block) the king's legislation. By 1475, when the dispute between the king and the pope ended, the Parlement's legislative role was also diminished. In 1515, when the powerful Francis I acceded to the throne, the Parlement became nothing more than a rubber stamp that accepted virtually all of the king's laws.⁷⁶

The lowest point of the Parlement's legislative role came towards the end of the seventeenth century, as the king was able to concentrate more power in his hands. In 1673 Louis XIV decided that the remonstrances procedure could only be used *after* the law was registered, thus stripping the Parlement of all leverage in the legislative process. The king presented this change as necessary for reasons of expediency.⁷⁷ Despite the Parlement's tepid opposition to this decision, it remained in place throughout all of Louis XIV reign, thus offering an important example of erosion of institutional restraints on power. It was only in the second half of the eighteenth century that the institution regained its strength. In fact, as the country drew nearer to the revolution, the Parlement played an increasingly strong role in opposing the king. Not only did it adopt a number of remonstrances

⁷³ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 160.

⁷⁴ French kings both before and after Louis XIV came to consider the Parlements their "bitterest and most dangerous enemy." Cobban, Alfred (1901–1968). 1971. *A History of Modern France. Volume 1: 1715–1799*. Harmondsworth: Pelican, 65–7.

⁷⁵ Cobban, Alfred (1901–1968). 1971. *A History of Modern France. Volume 1: 1715–1799*. Harmondsworth: Pelican, 67; Singer, Brian C. J. 2008. "Montesquieu on Power: Beyond Checks and Balances," in Rebecca Kingston (ed.). *Montesquieu and His Legacy*. Albany, NY: SUNY Press.

⁷⁶ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 167–73; 181–2; 201–17.

⁷⁷ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 278.

refusing to register royal ordinances, but it began making them public, to gain popular support for its opposition to the king, an instance of G_4 seeking the support of G_3 in its clashes with G_1 .

While initially it was solely the Parlement of Paris that took a contentious position vis-à-vis the king, by the 1760s some of the regional Parlements became even more bellicose. In 1774, when seeking to regain greater support for his policies, Louis XVI restored the power of the Parlement.⁷⁸ However, as mentioned, the institution did not help the monarch to placate the demands of the Third Estate. After the revolution, the Parlement was dissolved, like virtually all other institutions of the Ancien Régime. Throughout the nineteenth century the French legislative institutions came to be increasingly independent of rulers and developed the same type of meaningful restraints on the executive as the English and American legislatures. Other states later emulated these institutions.

In sum, by the late eighteenth century, domestic consultative and legislative institutions had established restraints on the most powerful actors within the same branch of government, similar to developments in the judicial realm discussed earlier. Kings came to increasingly share their control over such institutions with counselors, members of large assemblies and, eventually, parliaments. The evolution of such checks on power involved a tug of war in which additional actors sought to limit the ruler's ability to legislate. Only starting with the late eighteenth century did political systems such as the American, British, and French ones move to a more complex form of restraints on power, *among* branches of government.

The evolution of institutional restraints on power involving national government bureaucracies

The empowerment of bureaucracies

With the development of writing more than five thousand years ago, record-keeping came to be an essential part of government administration. In some of the oldest civilizations, such as Sumer, Egypt, and China, the demand for individuals who had writing and record-keeping skills led to the establishment of schools to train "scribes." In most cases, the administrative positions held by scribes became hereditary.⁷⁹

About two thousand years ago, China introduced imperial exams for government administrative positions. By allowing any individual, regardless of class, to

⁷⁸ Shennan, Joseph H. 1968. *The Parlement of Paris*. London: Eyre & Spottiswoode, 316, 324.

⁷⁹ Pearce, Laurie E. 1995. "The Scribes and Scholars of Ancient Mesopotamia," in Sasson, Jack M. (ed.). *Civilizations of the Ancient Near East*. Vol. 4. New York: Scribner, 2265–78.

take such exams, Emperor Wu of Han (G_1) hoped he would weaken the increasingly powerful alliance between the imperial bureaucracy (G_4) and the influential families (G_2) from where such bureaucracies were recruited based on a hereditary system.⁸⁰ A few countries in the region, such as Korea, Vietnam, and, briefly, Japan, adopted the Chinese model for competitive exams approximately one thousand years later. It took European states almost another thousand years to embrace the practice of such exams. France adopted civil service examinations in 1791, soon after the revolution but only for a short time. Prussia introduced them around 1800, and Britain in 1870, after having instituted them in 1855 in India. Most other countries accepted similar examination systems only in the twentieth century.⁸¹

The reluctance to introduce selection processes based on qualifications of administrators in most states was primarily driven both by rulers' (G_1) and powerful nobles' (G_2) interests in controlling the choice and, ultimately, the individuals who made up the government bureaucracies. Indeed, early administrators (G_4) were completely subservient to both powerful groups of actors. For many centuries, administrators with weaker clerical skills but that were trusted were preferred over those with better skills but that could side with one's foes.

In medieval Europe, the need to control administrative officials increased during times of territorial expansion, as rulers came to delegate many of the government's tasks across the territory to individuals. The first such local administrators, English sheriffs or French prévôts, were initially selected directly by the king (G_1). This was possible for a fairly long time due to the small size of governments. For example, in England, as late as the eighteenth century, central government bureaucracies only consisted of a few dozen individuals working as "secretariats" for the individual advisors at the royal court.⁸²

In the early Middle Ages, English kings personally knew all court advisors and local sheriffs. As administrations grew, kings increasingly had to rely on others for advice in selecting many government officials. This led to the establishment of the patronage system through which kings selected and replaced all individuals in government administrative positions based on the advice of a trustworthy "patron." This process reflects how actors from G_2 (and not just G_1) may benefit from the establishment of such domestic institutions intended primarily to project the ruler's power. In England, the patronage system was maintained intact throughout the eighteenth century. In fact, scholars often refer to the bureaucratic British government structures prior to the nineteenth century as "medieval" or

⁸⁰ Ko, Kwang Hyun. 2017. "A Brief History of Imperial Examination and Its Influences," *Society* 54(3): 272–8, 274.

⁸¹ Têng, Ssu-yü. 1943. "Chinese Influence on The Western Examination System," *Harvard Journal of Asiatic Studies* 7(4): 267–312.

⁸² Finer, Samuel Edward. 1952. "Patronage and the Public Service," *Public Administration* 30(4): 329–60, 335.

“gothic” in nature.⁸³ Similar patronage systems came to be the norm in virtually all states.

By the early nineteenth century, as governments continued to grow from several hundred to several thousand, even this indirect selection process became cumbersome.⁸⁴ Administrative selection systems were therefore slightly altered in most states, with heads of state choosing only the top several dozen government administrators. Additional administrators were selected by other powerful individuals in the state (G_2) or by some of the top administrators themselves (G_4). At that point, heads of states (G_1) also began seeing the benefits of having lower-level officials selected based on merit rather than by present or future potential rivals.

In Prussia, the rapid increase in the size of the government bureaucracy took place earlier than in most other European states, in the second half of the eighteenth century, especially during the time of Frederick the Great. Frederick constructed this powerful bureaucracy and placed himself at the center of it. He thus became indispensable for the work of the administrative machinery. He separated government offices from each other, having them work and communicate only through him. Thus, not even his top government officials were able to amass sufficient information or administrative power to erode his leadership. However, to maintain such absolute control over the government, Frederick was required to work almost incessantly.⁸⁵

Frederick's strong hold over his bureaucracy allowed him to be directly engaged in the selection processes within government. However, after his death, none of his successors were able to continue the same extraordinary control over the formidable administrative apparatus. By the end of the eighteenth century, the now very large professional Prussian bureaucracy came to be a force to be reckoned with, just as the Chinese administrative apparatus had come to be seen as a threat by Emperor Wu of Han almost two thousand years earlier. Power slowly shifted from the monarch to high-ranking ministerial and local administrators, in some of the first instances of G_4 becoming almost as powerful, if not more, than the other three groups of actors discussed in this study (thus perhaps even becoming the new G_1 within some states⁸⁶). In fact, the Prussian political system of the late eighteenth century has often been described as a “dictatorship of the bureaucracy” as the administrative apparatus was able to delay and even challenge

⁸³ Finer, Samuel Edward. 1952. “Patronage and the Public Service,” *Public Administration* 30(4): 329–60.

⁸⁴ Brown, Ronald G. S. and D. R. Steel. 1979. *The Administrative Process in Britain*. London: Methuen, 24.

⁸⁵ Dorn, Walter L. 1931. “The Prussian Bureaucracy in the Eighteenth Century,” *Political Science Quarterly* 46(3): 403–23.

⁸⁶ See, e.g., Abbott, Kenneth W., and Duncan Snidal. 1998. “Why states act through formal international organizations,” *The Journal of Conflict Resolution: A Quarterly for Research Related to War and Peace* 42(1): 3–32.

decisions made by the king.⁸⁷ Prussian monarchs regained control over the powerful bureaucracy by instituting in 1800 the first lasting system of examinations for government officials in Europe. This system weakened the high-ranking officials in the central and local administrations who had previously had the power to select lower-level officials arbitrarily. Not surprising, the Prussian examination system was based on the age-old Chinese model that had come to be well-known in Europe since the seventeenth century.⁸⁸ By instituting the meritocratic selection rules, G_1 and G_2 were able to develop some of the first institutional restraints on the power that, in this case, had begun to be concentrated in G_4 .

It was another half century before other powerful European states sought to develop meritocratic selection processes for their bureaucracies. However, in most cases, the change led to the erosion of G_1 and G_2 's power (as these were the groups that primarily controlled the selection processes), rather than that of G_4 's power, as in the case of Prussia (where top government officials controlled such selection).

The second European state to adopt a lasting meritocratic selection system was the UK. When seeking a model for bureaucratic professionalization, the British government did not rely very much on the existing Prussian exam system. Instead, it sought to follow the model that had been adopted in the early nineteenth century by the East India Company that, in turn, was based on the Chinese model.⁸⁹ The first British school for public administrators was established by the East India Company in 1806 in Haileybury, near London. It came to train administrators both for the Company and for the government and emerged as the first such specialized school in Europe.

One should point out, however, that the professionalization that came with such education did not *lead* to greater autonomy for the British bureaucracy, at least not initially.

Up to the nineteenth century, in virtually all states, including the UK, government bureaucracies continued to be seen simply as the extensions of the ruler's power. Political leaders could still hire and fire bureaucrats at their whim. In the few states that developed administrative education systems, they were now more likely to select government officials with such administrative expertise. However, there were sufficient individuals that had acquired the necessary expertise for political leaders to still have a great say in the selection process.

In Britain, the selection of government administrators had been controlled for many centuries by the king. The Parliament (that had been engaged in clashes with monarchs for several centuries in a bid to become the new G_1) sought to erode the

⁸⁷ Simms, Brendan. 2002. *The Impact of Napoleon: Prussian High Politics, Foreign Policy and the Crisis of the Executive, 1797–1806*. Cambridge: Cambridge University Press.

⁸⁸ Têng, Ssu-yü. 1943. "Chinese Influence on The Western Examination System: I. Introduction," *Harvard Journal of Asiatic Studies* 7(4): 267–312, 275.

⁸⁹ Têng, Ssu-yü. 1943. "Chinese Influence on The Western Examination System: I. Introduction," *Harvard Journal of Asiatic Studies* 7(4): 267–312, 283.

Crown's control over government administration (i.e., over G_4). This was especially important as the parties in Parliament found it increasingly difficult to shape bureaucracies because they gained and lost political power relatively quickly, compared to the institutions of the Crown that were much more stable and were able to maintain their control over central and local administrations more consistently.⁹⁰ It was therefore the Parliament (still part of G_2 at the time, at least when it came to administrative issues) that called for an end to the patronage system, to erode the Crown's power.⁹¹ It promoted increased autonomy for G_4 to check G_1 's power. While the Crown was still powerful, it did not accept such changes. However, as Parliament eventually became more powerful than the Crown (emerging as the new G_1), its interest in empowering G_4 declined.

An important step in the long process that led to greater bureaucratic autonomy in UK took place in 1850. That year, William Gladstone, who at the time was a member of the opposition party (i.e., a representative of G_2), became the main promoter of civil service reform. He entrusted the technical aspects of such changes to his private secretary, Stafford Northcote. Northcote, together with Charles Trevelyan, an assistant secretary of the Treasury, and a former civil servant from the East India Company, drafted in 1854 a report recommending a permanent politically neutral civil service, with appointments made on merit.⁹²

The Northcote–Trevelyan report made four recommendations: 1) in hiring personnel, there should be a distinction between “intellectual” work, that required a higher level of education, and “mechanical” duties that did not require explicit qualifications; 2) this idea implied having competitive examinations at least for the civil service involved in the first type of work; 3) the various departments were to be brought together under a unified service, allowing for easy transfers and promotions across departments; 4) promotion (and retention) needed to be based on merit. Most important, the report stipulated the need for civil servants to possess “sufficient independence, character, ability, and experience to advise, assist, and, to some extent, influence, those who are from time to time set over them.”⁹³

However, the idea that the Northcote–Trevelyan report truly brought about the reform leading to a permanent and autonomous civil service is generally considered a “myth.”⁹⁴ The proposals from the report were only implemented starting

⁹⁰ Brown, Ronald G. S. and D. R. Steel. 1979. *The Administrative Process in Britain*. London: Methuen, 21.

⁹¹ Rouban, Luc. 2007. “Politicization of the Civil Service,” in B. G. Peters and J. Pierre (eds.), *Handbook of Public Administration: Concise Paperback Edition*. London: SAGE Publications Ltd., 199–210, 202.

⁹² Brown, Ronald G. S. and D. R. Steel. 1979. *The Administrative Process in Britain*. London: Methuen, 22.

⁹³ See The Northcote–Trevelyan Report. 1954. *Public Administration*, 32: 1–16.

⁹⁴ Greenaway, John. 2004. “Celebrating Northcote/Trevelyan: Dispelling the Myths,” *Public Policy and Administration* 19(1): 1–14.

around 1870, when Gladstone was prime minister. That year the new Civil Service Commission instituted the rule that all positions in the civil service needed to be filled through open competition. Even then, positions in the Foreign Office and Home Office were exempted from the rule.⁹⁵

The literature has argued that an important reason for the eventual acceptance of the reforms giving British civil servants autonomy in 1870 was the extension of the franchise in 1867. That historic event led to a weakening of the upper class that had come to wrangle control over the bureaucracy from the Crown by that time.⁹⁶ Before the Commons could emerge as the new G_1 and the upper class was preparing to become G_2 , representatives of the latter group decided that it was finally in their interest to eliminate the age-old patronage system, so as to not allow future governments to concentrate too much power in their hands.⁹⁷

Perhaps just as important, by the 1870s the increasingly educated bureaucracy (i.e., G_4) had become sufficiently strong to promote its powerful interests in gaining greater autonomy from political groupings. Its Oxbridge educational experiences had led it to develop political networks (i.e., alliances with G_1 and G_2) to achieve its goals. A contagion effect was spurred by the British example. In 1873, the highly educated and professionalized Prussian bureaucracy was able to also increase its autonomy through a series of reforms.⁹⁸ Other countries, such as Canada (1882) and Japan (1887), adopted around that time reforms of their government bureaucracies, eroding patronage systems and giving civil servants greater autonomy.

The process leading in 1883 to the adoption of the Pendleton Act, that introduced reforms giving the federal bureaucracy greater autonomy in the United States, was also partly driven by the contagion effect. In fact, US promoters of the reforms often made reference to the fact that other “civilized nations” had already brought about such changes.⁹⁹ These arguments were important in the US because by the end of the nineteenth century, public opinion (that as one would expect supported fair processes of appointing government officials) had come to play an important role in politics, more so than in many other states at that time.¹⁰⁰ Moreover, in the US, the rapid increase in the size of government during the Civil War had not been followed by a similar “retrenchment” after the end of the war. This

⁹⁵ Brown, Ronald G. S. and D. R. Steel. 1979. *The Administrative Process in Britain*. London: Methuen, 23.

⁹⁶ Skowronek, Stephen. 1982. *Building a New American State*. Cambridge; New York: Cambridge University Press, 48.

⁹⁷ Greenaway, John. 2004. “Celebrating Northcote/Trevelyan: Dispelling the Myths,” *Public Policy and Administration* 19(1): 10.

⁹⁸ Morstein Marx, Pritz. 1975. *The Administrative State: An Introduction to Bureaucracy*. Chicago, IL: The University of Chicago Press, 80.

⁹⁹ Skowronek Stephen. 1982. *Building a New American State : The Expansion of National Administrative Capacities 1877–1920*. Cambridge Cambridgeshire: Cambridge University Press, 47–8.

¹⁰⁰ Theriault, Sean. 2003. “Patronage, the Pendleton Act, and the Power of the People,” *Journal of Politics* 65: 50–68.

sparked deep public resentment for the inefficient patronage system, considered to be a strong cause for the bloated government.¹⁰¹ Last but not least, public opinion (and even some politicians) came to support civil service reform after President Garfield's assassination in 1880 by a disgruntled civil service position seeker.

However, even in the US, it is generally argued that public pressures alone could not have led to the reform of the bureaucracy. As in the UK, the defining factor was the emergence of well-defined political groups that each feared the other gaining control over the increasingly important civil service.¹⁰² To use, yet again, the terminology from chapter 2, the US had become a system in which the two main political parties (G_1 and G_2) would alternate in power, thus allowing for many successive "moment 4" situations (represented in Figure 2.1).

Throughout the 1870s Democrats initially backed the reforms when they were not in office in order to loosen the federal bureaucracy from Republicans' grip. Their efforts increased after they were swept away in the 1880 elections for president and the two houses. Even after Garfield's assassination that year, while Republicans often offered support for the reforms in public, in private they opposed them knowing that they would erode their political advantage. At that time, even President Arthur initially opposed the legislation arguing that it would establish a powerful officeholding class. Democrats rode the issue of civil service reform during their successful bid to take over Congress in the 1882 by-elections. However, as soon as Republicans lost those elections, in the lame duck session, they became the most ardent supporters of the reforms as they feared that Democrats would use their new power in the legislature to adopt rules giving them greater control over the bureaucracy.¹⁰³

As expected, even after the adoption of laws establishing competitive entrance examinations for civil service in the late nineteenth century, in practice, many political leaders continued to find ways to influence the selection of bureaucrats in yet another instance of reversal of institutional restraints on power. In fact, in some countries, such as France, the new civil service laws did not have any meaningful effects as top-level political appointees continued to make their hiring and promotion decisions primarily with their party interests in mind, while paying lip service to the meritocratic systems that had been put in place. In part, this was due to the difficulty of showing that hiring or firing decisions were based on patronage rather than merit.

This inertia was countered with increased efforts to professionalize the administrative government apparatus from multiple actors: government bureaucrats

¹⁰¹ Skowronek Stephen. 1982. *Building a New American State : The Expansion of National Administrative Capacities 1877–1920*. Cambridge Cambridgeshire: Cambridge University Press, 50.

¹⁰² Skowronek Stephen. 1982. *Building a New American State : The Expansion of National Administrative Capacities 1877–1920*. Cambridge Cambridgeshire: Cambridge University Press, 68

¹⁰³ Theriault, Sean. 2003. "Patronage, the Pendleton Act, and the Power of the People," *Journal of Politics* 65: 53.

themselves (G_4), political parties (usually the ones that did not control the executive branch of government, i.e., G_2) and, by now, the public (G_3). The civil service fought for greater autonomy in several ways. Perhaps most important, it started organizing in unions and seeking to develop institutions to protect its autonomy. In the UK, civil service unions were accepted after World War II, although they had also been recognized briefly in the early twentieth century.¹⁰⁴ Similar unions emerged and were accepted in other states.¹⁰⁵ In France, the main impetus for the civil service eventually gaining autonomy also came after World War II, when public sector unions were recognized by the upper-level political appointees.¹⁰⁶ In the United States, the postal workers' union, established in 1889, was the first civil service union. In 1918, American teachers and firefighters formed national unions.¹⁰⁷ However, unlike other democracies, throughout the twentieth century the United States generally did not extend its emerging labor legislation to the public sector. The 1935 US National Labor Relations Act did not include public employees within the same framework for collective bargaining. Only by the 1950s did some state and local governments adopt aspects of the private-sector model of collective bargaining. While in 1960 about 2% of state and local public-sector employees had the right to bargain collectively, by 2010, the proportion had grown to 63%.¹⁰⁸

Currently, most countries have accepted unions of civil servants. In fact, in many cases the rate of unionization in the public sector has come to exceed the one for the private sector.¹⁰⁹ Although civil service unionization has come to be the norm across virtually all states, the right to strike, perhaps the most powerful tool in unions' arsenals, has been treated very differently.¹¹⁰ In some countries, such as France, there are generally more days of strike in the public sector than in the private sector while in others it is the other way around.¹¹¹ Yet, even in systems such as

¹⁰⁴ Morstein Marx, Pritz. 1975. *The Administrative State: An Introduction to Bureaucracy*. Chicago, IL: The University of Chicago Press, 106.

¹⁰⁵ Bach, Stephen. 2005. *Public Service Employment Relations in Europe Transformation, Modernization or Inertia?* New York: Routledge.

¹⁰⁶ Morstein Marx, Pritz. 1975. *The Administrative State: An Introduction to Bureaucracy*. Chicago, IL: The University of Chicago Press, 75–6.

¹⁰⁷ See, e.g., Murolo, Priscilla. 2018. *Five Lessons from the History of Public Sector Unions*, available at <https://www.labornotes.org/2018/06/five-lessons-history-public-sector-unions>.

¹⁰⁸ Keefe, Jeffrey H. 2013. "A Reconsideration and Empirical Evaluation of Wellington and Winter's The Unions and The Cities," *Comparative Labor Law and Policy Journal* 34(2): 251–2.

¹⁰⁹ Eylert, Mario and Reinhard Schinz. 2012. *Strike in the Public Sector*, ILO report available at https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—dialogue/documents/meetingdocument/wcms_167301.pdf, 4.

¹¹⁰ Morstein Marx, Pritz. 1975. *The Administrative State: An Introduction to Bureaucracy*. Chicago, IL: The University of Chicago Press, 107–08.

¹¹¹ Eylert, Mario and Reinhard Schinz. 2012. *Strike in the Public Sector*, ILO report available at https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—dialogue/documents/meetingdocument/wcms_167301.pdf, 2 and 4.

the American one, with less tolerance for public sector strikes, civil servants have been active in using this tool when seeking a more autonomous status.¹¹²

Perhaps more important, civil servants have sought to carve out their autonomy through legal actions. They have been able to do so through national courts, after labor laws initially dealing with the private sector have come to be applied to the public sector, starting in the early twentieth century.¹¹³ Additionally, over the past half century, countries have adopted more specific laws to protect civil servants' autonomy. For example, in 1978 the US Civil Service Act established the Senior Civil Service, only 10 % of which could be politically appointed. Germany and France have also adopted limits for the number of political appointees.¹¹⁴ Overall, the past century has thus seen a gradual empowerment of the civil service (G_4) across states.

It should be emphasized, however, that the process through which government bureaucracies have come to be more autonomous and powerful, has experienced back-and-forth shifts across time, reflecting the tug of war between G_4 and G_1 .¹¹⁵ One of the reasons for the frequent shifts in the power of government bureaucracies is that their relations with top political appointees from the executive branch (representatives of G_1) has only rarely been the subject of constitutional provisions. The general view remains that, although government bureaucracies may operate somewhat autonomously, the executive is in fact responsible for its actions.¹¹⁶ In fact, the bureaucracy is rarely even mentioned in constitutions.¹¹⁷

One interesting exception is the German Constitution, adopted after the country's defeat in World War I, which specifically stipulated autonomy for government civil servants. In that case, the tradition of a strong bureaucracy was important at a time when the country was undergoing significant changes, including the abolition of its monarchy. However, Hitler's rise quickly proved that even such constitutional protections are not sufficient to maintain civil service autonomy in times of extreme power concentration within the state.¹¹⁸

¹¹² As early as 1940 there had already been more than one thousand such strikes. Ziskind, David. *One Thousand Strikes of Government Employees*. New York: Columbia University Press.

¹¹³ Morstein Marx, Pritz. 1975. *The Administrative State: An Introduction to Bureaucracy*. Chicago, IL: The University of Chicago Press, 80–4.

¹¹⁴ Rouban, Luc. 2007. "Politicization of the Civil Service," in B. G. Peters and J. Pierre (eds.). *Handbook of Public Administration: Concise Paperback Edition*. London: SAGE Publications Ltd., 202.

¹¹⁵ Rouban, Luc. 2007. "Politicization of the Civil Service," in B. G. Peters and J. Pierre (eds.). *Handbook of Public Administration: Concise Paperback Edition*. London: SAGE Publications Ltd., 205.

¹¹⁶ Peters, B. Guy. 2010. *The Politics of Bureaucracy*. London: Routledge, 288. Peters acknowledges, however, that over the past decades legislatures have taken a greater role in bureaucratic oversight (20).

¹¹⁷ Peters, B. Guy. 2010. *The Politics of Bureaucracy*. London: Routledge, 15.

¹¹⁸ Morstein Marx, Pritz. 1975. *The Administrative State: An Introduction to Bureaucracy*. Chicago, IL: The University of Chicago Press, 80–1.

Restraining the power of bureaucracies

Despite back-and-forth shifts, by the end of World War II, in most democratic states, bureaucracies had an increasingly wide range of laws that allowed them to develop a fairly autonomous status. This autonomy, coupled with their rapid increase in size, has given them tremendous influence in political systems. Thus, while bureaucracies (G_4) have been controlled for many centuries by political leaders in the executive branch of government (usually G_1) and later, also by those in the legislative branch (initially part of G_2 , but in some instances later becoming G_1), by the second half of the twentieth century they were a very important group of actors in their own right, not just in collaboration with other groups.

Indeed, the tasks governments were entrusted with had grown considerably throughout the nineteenth and early twentieth centuries. Although the laissez-faire ideology in the UK and most other powerful states continued to be strong during that time, there was an important shift from governments taking on solely “defining functions”¹¹⁹ up through the eighteenth century (such as foreign affairs and tax collection), to becoming involved in a greater number of regulatory tasks by the nineteenth century. Throughout the twentieth century, and especially with the “New Deal” era, governments grew at an even faster pace when they also added resource mobilization and social activities to their existing defining functions and regulatory tasks.¹²⁰

Figure 3.1 illustrates the increased relevance of government bureaucracies. It depicts the evolution across time of the average ratio between government expenditures and GDP in all states. This ratio is a common gauge of government size.¹²¹ The figure suggests that government bureaucracies have grown considerably over the past century and a half. However, the greatest growth took place in the middle of the Cold War, in the 1960s and 1970s.

Starting in those decades, the now autonomous and powerful government bureaucracies came to be viewed as additional potential loci of power concentration, i.e., another possible future G_1 . France (with its powerful “clique” of graduates from the Ecole Nationale d’Administration and the Ecole Polytechnique) and Japan (where the bureaucracy until the 1980s was part of an influential “iron triangle” together with the Liberal Democratic Party and major state enterprises) are

¹¹⁹ Rose, Richard. 1976. “On the Priorities of Government: A Developmental Analysis of Public Policies,” *European Journal of Political Research* 4: 247–89.; Figure 3.1 is based on data from International Monetary Fund at <https://www.imf.org/external/datamapper/exp@FPP/USA/FRA/JPN/GBR/SWE/ESP/ITA/ZAF/IND/TUR>

¹²⁰ Brown, Ronald G. S. and D. R. Steel. 1979. *The Administrative Process in Britain*. London: Methuen, 25.

¹²¹ See, e.g., OECD website: <https://data.oecd.org/gga/general-government-spending.htm>; also, Glenn, John. 2009. “Welfare Spending in an Era of Globalization: The North–South Divide,” *International Relations* 23(1): 27–50.



Figure 3.1 Government expenditure in all states as % of GDP

examples of states with government bureaucracies that were particularly successful in garnering political power and that may have even vied to become the most powerful group of actors within these respective states, i.e., G_1 .¹²²

As bureaucracies became increasingly influential and had the potential to concentrate power, other important domestic actors and groups sought to restrain their power in multiple ways. An early example of these efforts is the adoption of the US Hatch Act in 1939, soon after the New Deal had led to a particularly impressive increase in government size. The Act prohibited civil servants from running for office or campaigning for candidates. The impetus for this law did not only come from Republicans, who did not control any of the branches of government at that time (and thus were part of G_2), or from Congress, which saw the growing bureaucracy as empowering the executive branch further. The most important push came from within the Democratic party itself (G_1 at that time).¹²³ Soon before and after World War II, several other countries adopted similar laws that limited the role of civil servants in politics.

Most other mechanisms for restraining bureaucratic power have been more subtle and are generally described as forms of “bureaucratic accountability.” The issue of such accountability has been widely discussed in the Public Administration and Political Science literatures. In fact, many consider that the rise of civil service power led to the development in the 1930s of the field of Public Administration

¹²² Rouban, Luc. 2007. “Politization of the Civil Service,” in B. G. Peters and J. Pierre (eds.), *Handbook of Public Administration: Concise Paperback Edition*. London: SAGE Publications Ltd., 199–210, 202; Johnson, Chalmers (1982) *MITI and the Japanese Miracle*. Stanford, CA: Stanford University Press.

¹²³ Dunn, Susan. 2010. *Roosevelt’s Purge: How FDR Fought to Change the Democratic Party*. Cambridge, MA: The Belknap Press of Harvard University Press, 115–6.

that, in great part, asks how bureaucracies can be controlled.¹²⁴ Political Science has also studied such accountability and the ability of governments to control bureaucracies from its early days in the nineteenth century.¹²⁵ In fact, according to Guy Peters, the problem of control over the bureaucracy “is as old as government itself, but the increased prominence of organizations implementing policies has made these questions more central.”¹²⁶

Until recently, the literature on bureaucratic restraints focused primarily on the ability of the legislative branch to keep in check the civil service that was seen as an extension of the executive branch (thus, a clash between G_1 allied with G_4 , on one side, most often against G_2 , on the other side). Such accountability is generally referred to as “horizontal” (or “constitutional”) because it refers to relationships between officials from one branch of government being held accountable by those in another, equal, branch.¹²⁷ It lies in contrast to “vertical” accountability that is viewed as the more traditional one, where the public or the officials elected in the executive branch by the public (thus G_3 or G_1) control government bureaucracies (G_4).

An independent legislature is a necessary condition for achieving horizontal accountability. Similarly, free and fair elections are necessary for the functioning of vertical accountability. However, in neither case, are these conditions also sufficient. Just as important is the ability of legislatures and the public to extract information from bureaucracies. The need for transparent political systems was emphasized as far back as the writings of Weber, who pointed out that bureaucratic power relies heavily on their expertise and control over information.¹²⁸ In fact, in a broadly accepted definition of accountability Andreas Schedler emphasized the importance of information: “A is accountable to B when A is obliged to *inform* B about A’s (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct.”¹²⁹

Since World War II, there has been a push to make more government information public and thus break the monopoly that bureaucracies within executive

¹²⁴ E.g., Bendor, Jonathan. 1994. “The Fields of Bureaucracy and Public Administration: Basic and Applied Research,” *Journal of Public Administration Research and Theory*: J-PART 4(1): 27–39.

¹²⁵ It is noteworthy, for example, that Woodrow Wilson, who was president of the American Political Science Association before he was president of the United States, was the author of the aforementioned 1887 seminal article titled “Study on Administration” arguing for a separation between bureaucracies and politics.

¹²⁶ Peters, B. Guy. 2010. *The Politics of Bureaucracy*. London: Routledge, 260.

¹²⁷ Emphasis is added. See Schedler, Andreas, Larry Jay Diamond, and Marc F. Plattner. 1999. *The Self-restraining State: Power and Accountability in New Democracies*. Boulder, Co: Lynne Rienner Publishers, 3.

¹²⁸ Weber, Max, Hans Gerth, and C. Wright Mills. 1948. *From Max Weber: essays in sociology*. London: Routledge.

¹²⁹ Schedler, Andreas. 1999. “Conceptualizing Accountability,” in Andreas Schedler, Larry Diamond, and Marc F. Plattner (eds.). *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder, Co: Lynne Rienner, 13–28, 17. Emphasis is added.

branches have held over this important commodity. The many “freedom of information” laws that have emerged in the past seven decades are the results of pressures from those demanding that secretive and powerful public administrations become more accountable.¹³⁰ With the exception of Sweden, which adopted such a law in the eighteenth century, states only began passing access to information legislation after World War II. By 1990, about 7% of countries had freedom of information laws. By 2010 that proportion grew to about 30%.¹³¹

Similarly, the decades after World War II have experienced the worldwide spread of another important set of domestic institutions: internal auditing agencies, anticorruption bodies, ombudsmen, and investigative offices. These institutions are also intended to hold bureaucracies accountable, thus applying restraints on G_4 and making it more difficult for it to concentrate too much power. They usually reside in the executive branch, rather than in the legislative branch but are considered forms of horizontal accountability because they do not involve the public or publicly elected officials. The heads of such institutions are appointed by those controlling either the executive or the legislative branch.

To differentiate between these mechanisms of horizontal accountability and the traditional ones, working through legislatures, the former are often referred to as forms of “internal accountability” because they are part of the same institutions they are holding accountable. Internal accountability mechanisms have generally been the first to emerge in domestic systems. That is because they do not require the existence of independent branches of government to keep each other in check. They can function even when only one group (G_1) controls all three branches of government. Internal horizontal accountability institutions are seen even today as very effective in establishing restraints on power by punishing officials guilty of malfeasance and, just as important, deterring malfeasance through their simple existence.

As Schedler’s aforementioned definition suggests, such ability to punish, together with the ability to extract information, are essential for achieving accountability.¹³² In the vast majority of states, freedom of information laws were adopted by legislatures after scandals that rocked the executive branch and underscored

¹³⁰ See, e.g., Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-making Rules*. Cambridge: Cambridge University Press, chapter 5.

¹³¹ See, e.g., Martin, Robert and Estelle Feldman. 1998. *Access to Information in Developing Countries*. Berlin: Transparency International; Mock, William. 1999. “On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency,” *The John Marshall Journal of Computer and International Law* 17(4): 1069–100; Florini, Ann. 2002. “Increasing Transparency in Government,” *International Journal on World Peace* 19(3): 3–34; Florini, Ann. 2003. *The Coming Democracy: New Rules for Running a New World*. Washington, DC: Island Press; Grigorescu Alexandru. 2015. *Democratic Intergovernmental Organizations? : Normative Pressures and Decision-Making Rules*. New York NY: Cambridge University Press.

¹³² Schedler, Andreas, Larry Diamond, and Marc F. Plattner. 1999. “Introduction” in Andreas Schedler, Larry Diamond, and Marc F. Plattner (eds.). *The Self-Restraining State: Power and Accountability in New Democracies*. Boulder, Co: Lynne Rienner, 1–13, 4.

the dangers of secrecy. The internal horizontal accountability mechanisms also emerged at such times but were usually the result of leaders from the executive branch also playing a role in shaping the response to scandals.

For example, in the United States, in 1974, soon after Watergate led to President Nixon's resignation, Congress sought to adopt the Privacy Act to give the relatively weak 1967 Freedom of Information Act the teeth it needed to do away with what was perceived to be overly secretive practices of the executive branch (i.e., an alliance between G_1 and G_4). Despite President Ford's veto of the 1974 bill, the lame duck Congress overrode the veto. Some Republicans voted for the override suspecting that in the new Congress, after the Democrats had gained even more seats in the House and Senate, the bill would eventually pass anyway.¹³³ Similar political scandals have led to legislative branches adopting freedom of information laws in countries such as Bulgaria, Ireland, Japan, Romania, Thailand, and South Africa over the past three decades.¹³⁴

The Watergate scandal also led to pressures for establishing the all-important Inspector General (IG) offices for all US federal departments. Such offices are generally considered among the most important safeguards against wrongdoings of civil servants from the executive branch. In 1959, a first, independent, IG was instituted in the State Department. The reason for its strong autonomy was that in 1959 neither the Democratic majority in Congress nor the Republican president (thus representatives of G_2 and G_1 , respectively) wanted to risk having this important position controlled by the other. They both preferred its autonomy to a potential dependence on their political adversaries.

In 1978, the Democratic Congress trusted the Democratic president sufficiently to allow for the establishment of multiple IGs that were to be dominated by the executive branch. At that time, President Carter was at the beginning of his term in office and was riding a wave of legitimacy as the first elected president after the Watergate scandal. The new institutions required that Congress accept the IGs appointed by the president and that the office report both to the executive and legislative. However, presidents were the only ones who could fire IGs.¹³⁵ Recently, President Trump's firing of several IGs investigating wrongdoings in his administration highlights how the lack of autonomy of such horizontal accountability institutions may preclude them from restraining concentrated power.¹³⁶

¹³³ Blanton, Thomas. 2002. "The International Movement for Freedom of Information," paper presented at the International Studies Association annual meeting, New Orleans, LA, March 27, 2002.

¹³⁴ Grigorescu, Alexandru. 2003. "International Organizations and Government Transparency: Linking the International and Domestic Realms," *International Studies Quarterly* 47 (4): 643–67.

¹³⁵ Light, Paul C. 1993. *Monitoring Government: Inspectors General and the Search for Accountability*. Washington, DC: Brookings Institution.

¹³⁶ Walcott, John. 2020. "Trump's Firing of State Department Inspector General Is Just the Latest in a Rolling Purge" *Time*, May 18, 2020. Available at <https://time.com/5838599/trump-fires-steve-linick-state-department/>.

This last example is a reminder that political groups who seek to concentrate more power in their hands are still able to do so by altering laws and practices and thus erode existing institutional restraints. Some have pointed to similar cycles of increased or lesser bureaucratic autonomy playing out in many countries over the past few decades.¹³⁷ However, overall, the broader tug of war between those seeking such power concentration within states and those wanting to restrain them, has slowly given the latter group more tools, at least in democratic systems. The patterns leading to the establishment of these tools to restrain the power of bureaucracies appears to have followed similar ones, discussed in the previous sections on courts and legislative bodies, but came considerably later in time.

Support for main arguments and further expectations for the international realm

The above narrative describing the evolution of institutional restraints on concentrated power serves two purposes. First, by following developments in the domestic realm I sought to confirm empirically the arguments derived in chapter 2 through extensions of existing literature. This chapter therefore assesses the arguments regarding the nature of early institutional restraints, the preferences of the four main groups of actors, and the evolution of institutional restraints on concentrated power. Second, the narrative allows me to tease out one more argument based on the patterns observed in the domestic realm, and that generates additional expectations for the international realm.

As I summarize the above discussion of changes in domestic judicial, consultative/legislative, and administrative institutions, I will emphasize primarily the similarities across these three branches of government. This allows me to identify the general trends and assess whether they confirm expectations.

For now, I will only mention briefly what is perhaps the most important difference between the three major forms of restraints, that in some countries, these judicial and legislative institutions came to take forms very similar to our current ones by the end of the eighteenth century. Administrative institutions continued to evolve substantially during the nineteenth and twentieth centuries, at a time when factors such as public opinion and democratic decision-making came to also play important roles. I will expand further on the relevance of this difference and of others in the concluding chapter.

¹³⁷ Verheijen, Tony. 2007. "Independent Civil Service Systems: A Contested Value?" in *Crossing Borders: Constitutional Development and Internationalisation: Essays in Honour of Joachim Jens Hesse*, Berlin: De Gruyter Recht, 249–65, 252.

Assessing the argument regarding the nature of institutional restraints on concentrated power

The first domestic institutions allowing for some restraints on the most powerful domestic actors were, of course, far less complex than the current ones, especially those in today's advanced democracies. As posited through A1, they did not involve systems of checks and balances between various branches of government. In fact, until the late eighteenth century there was no separation between branches as monarchs were involved in making, applying, and administering laws. Also, the incipient institutional restraints did not involve checks on power in which the public (i.e., G_3) played a meaningful role. Not only were there no democratic mechanisms such as popular elections in place, but even threats of popular revolts were generally less significant for monarchs than those of nobles revolting.

Despite our current-day perception that such early institutional restraints were weak, they nevertheless played significant functions in the political systems of their time and were very important for the main actors. Monarchs often did everything in their power to avoid having any limits imposed on their actions. Numerous weaker actors made tremendous efforts to establish a judiciary to which even the king would be bound, to have their voices heard in small councils or large assemblies, and to not allow rulers complete control over government administrations. Throughout history, some individuals were willing to give their lives for what they perceived to be essential limitations against the concentration of power in the hands of absolute monarchies.

These early institutional restraints rarely could *stop* the most powerful actors from taking their preferred actions. They were primarily tools making it *more difficult* for them to do so. In the Middle Ages, kings often needed to gather large assemblies such as the English Witan or the French Estates General to gain much needed legitimacy for decisions as well as for military or financial support. They were also expected to meet with small groups of advisors before important decisions. Even if powerful kings could manipulate or overrule decisions in such institutions, the necessary consultative process would often delay their actions and, sometimes, led to concessions on their part. Moreover, in time, as consultative forums morphed into fairly independent legislative bodies, such as the French Parlements (that needed to register the king's decrees), the English Parliament, and the French Estates Generals (especially in the 1780s), the restraints on kings' powers became truly meaningful.

Also, even though, for a long time, kings remained the supreme arbiters within judicial systems, most often they needed to dispense justice through their courts, rather than directly. This process often led to delays in imposing their will. Moreover, while the early courts in England and France hardly ever adopted decisions against kings themselves, they sometimes passed verdicts against the monarch's close allies and, more broadly, against the monarch's interests. In time, as judges

became more independent, courts were able to act as even stronger restraints on power.

Lastly, administrators, especially those far away from royal courts, could sometimes alter the application of the monarch's decisions. When administrators were named by local lords, their actions were even more likely to run counter to the king's wishes. Of course, as bureaucracies became more powerful and autonomous starting in the nineteenth century, their ability to restrain rulers increased. In fact, by the second half of the twentieth century, bureaucracies had become so influential that other groups of actors began fearing their power. Therefore, numerous accountability mechanisms were established as institutional restraints on bureaucratic power.

I also expect the vast majority of international institutional restraints on power to be at an incipient stage of development, similar to the one that domestic institutions experienced in the first few centuries after they were established. In such a stage, international institutions are expected to slowly come to have more specialized staff and begin seeking greater autonomy from the most powerful actors. In most cases, the autonomy and effectiveness of such institutions will not be sufficient yet to *stop* the most powerful actors from doing as they please. Rather, in the international realm, the institutions may be used by others as "nonmilitary tools to delay, frustrate, and undermine" powerful states' aggressive policies, the basic elements of what has been coined "soft balancing."¹³⁸

Additionally, I do not expect international institutions to have developed already meaningful checks and balances among "branches" of global governance. Also, I expect them to rarely allow for real input from the public through democratic mechanisms.

In sum, although early domestic institutional restraints were relatively weak, they had an important impact on politics and, in time, they became stronger and more relevant, although, at times, they also experienced some erosion. I expect international institutional restraints on concentrated power over the past two centuries to have been weak but to have become stronger, playing increasingly important roles in IR, despite some erosion of their effectiveness at various times.

Assessing the arguments regarding the main groups and their preferences

The previous narrative also offers support for the arguments involving the various interests of the four groups regarding institutional restraints on concentrated power. Indeed, as expected based on A2, I found that weaker groups (G_3 and G_4)

¹³⁸ Pape, Robert A. 2005. 'Soft Balancing against the United States,' *International Security* 30(1): 7–45.

were more likely to support institutional restraints whilst powerful ones (especially G_1 but often also G_2) were less likely to accept such restraints. I expand on this finding below.

Despite their general opposition to institutional restraints on power, all early rulers, together with a small group of individuals close to them (G_1), needed to create institutions based on immediate cost-benefit calculations. Courts, consultative bodies, and administrative institutions were increasingly necessary to deal with governance issues as the territories that had to be controlled expanded and as governing functions became more complex. As these institutions involved delegation of tasks to others, they sometimes made it more difficult for rulers to take their preferred actions or, at least, to do so swiftly. However, the practical benefits of such institutions and delegation outweighed for them the costs of introducing more individuals in the processes of making, adjudicating, and implementing laws.

It is important to point out that G_1 did not support the establishment of these early institutions *in order to* restrain its own power. Also, G_1 very rarely supported later on the empowerment of existing institutional restraints. It did not need to accept changes in support of restraints when it was in a position of power or when its power was increasing. As expected, based on A3, there were, however, instances when it supported increased restraints and that will be discussed in the following section.

G_2 , whether composed of powerful nobles in the early Middle Ages, or the English Parliament before the seventeenth century, or of opposition political parties in the UK and US in the nineteenth and twentieth centuries, was indeed found to have an ambivalent position towards restraints on power (as expected based on A2). It did, however, promote restraints when G_1 was weak and appeared to become weaker, as was the case when nobles and ecclesiastics pressured King John to sign the Magna Carta, or in 1362 when Parliament passed a statute decreeing that all taxes imposed by the king needed to be approved by the two houses, at a time when Edward III's power had waned. In most other instances, G_2 was not as adamant about imposing restraints.

The chapter also found that G_3 almost always supported institutional restraints on concentrated power, as expected based on A2. Of course, in some instances, when the group became more powerful, as was the case of the Third Estate in France in the 1780s or of the House of Commons in England during the time of the English Civil War, it moved from being G_3 to becoming the new G_2 or even G_1 .

Lastly, G_4 did not play an important role in the *early* evolution of institutional restraints on concentrated power and its preferences at that time are difficult to ascertain. However, in time, as the individuals from this group came to specialize within their professions, their common vested interest in empowering their own institution and their push for greater autonomy led them to enhance institutional restraints, as expected based on A4. G_4 's preferences for institutional restraints

Table 3.1 Main domestic groups and their preferences and roles in shaping institutional restraints

	G ₁	G ₂	G ₃	G ₄
Examples of groups in the domestic realm	Kings and close allies, heads of state, dominant political party.	Most powerful nobles, Church, dominant class, opposition parties.	Lesser nobles, town leaders, the public, civil society organizations.	Judges, counselors, legislators, administrative officials.
Expected support for institutional restraints in “normal” conditions (argument)	Almost always opposes restraints (A2)	Ambiguous in its support for restraints (A2)	Almost always supports restraints (A2)	Almost always supports restraints (A2)
Expected change in preferences and roles under specific conditions (argument)	When G ₁ ’s relative power is low and declining it may support restraints (A3)	When G ₁ ’s relative power is low and declining it is more likely to support restraints (A3)	Changes in power parity between G ₁ and G ₂ may lead to a greater role, but not change in preferences (A5)	Changes in power parity between G ₁ and G ₂ may lead to a greater role (A5) but not a change in preferences; in time its support for restraints increases due to vested interests (A4)
Findings regarding support for institutional restraints	Supported original institutions; also supported restraints when it was weak and becoming weaker; all other times it opposed institutional restraints	Sometimes opposed and sometimes supported restraints; more likely to support restraints than G ₁ but less likely than G ₃ and G ₄	Almost always supported restraints but rarely played an important role in their establishment.	Supported restraints; as it became more specialized and autonomous it came to support further restraints
Examples of moments when change in preferences or roles led to increased institutional restraints	Stronger Parlement; Expansion of Estates General and English Parliament; Pendleton Act.	Magna Carta; greater role for English Parliament; Northcote-Trevelyan reforms; freedom of information laws.	Empowerment of Third Estate and English Parliament; Pendleton Act.	Autonomy of Parlement and English courts; meritocratic selection system for civil servants.

were particularly visible in the actions of judges in England, members of the Paris Parlement, members of the English Parliament, and, later, in those of bureaucrats in virtually all states. Similarly, I expect international judges, members of international assemblies, and IGO civil servants to vie for greater autonomy and thus allow their respective institutions to act as more meaningful restraints on all states, including the most powerful ones.

Table 3.1 summarizes the findings regarding the main groups and their preferences. It builds on Table 2.2. It maintains from that table the three rows that list examples of domestic actors in the four groups and that summarize expectations for the groups' preferences and the potential changes in preferences (in white). It adds two more rows (in gray). The first additional row highlights the findings confirming the expected group preferences for institutional restraints on concentrated power. The second additional row offers examples of changes in preferences and roles of the various groups at times when G_1 was relatively weak and becoming weaker.

Before concluding this subsection, I should note that, as expected, the chapter has shown that the classification of groups is sometimes difficult to assess in the real world. Groups that are the most powerful (G_1) or secondary (G_2) may become less powerful in time and become G_2 or G_3 , respectively. G_3 , can also eventually become more significant and be the new G_2 or even G_1 . The normal shifts in power therefore need to be noted carefully, acknowledging that the same individuals within a group can act differently once they become part of G_1 , G_2 , or G_3 . The difficulty in assessing which group is more powerful (i.e., who is in fact G_1 , G_2 , and G_3) may be greater in the domestic realm than in the international one, where size of military, national GDP, and other more easily measurable characteristics, are readily available in comparable format than gauges assessing the power of the monarchy, nobles, church, commoners, or towns in domestic politics.

The support for my arguments from chapter 2 regarding preferences for the four groups in the domestic realm (A2) offers further reason to expect such preferences in the international realm. Specifically, I expect the most powerful states (G_1) and even secondary states (G_2) to oppose the establishment and empowerment of institutional restraints on power. I also expect small states and groups from international civil society (G_3) to support restraints. International judges, members of international assemblies and international civil servants (G_4) are also expected to support institutional restraints.

Assessing the arguments regarding the evolution of institutional restraints on concentrated power

This chapter also found support for the arguments from chapter 2, regarding the changes in preferences for institutional restraints on power (A3, A4, and A5).

Specifically, A3 posited that restraints are more likely to develop when G_1 is weak and becoming weaker, relative to G_2 . The above narrative offered multiple examples of this dynamic. This happened, for example, before the signing of the Magna Carta. Other examples are those of Edward III extending the role of Parliament over questions of taxation (towards the end of his long reign, when his power was waning) or of Philip the Fair allowing the Parlement to take on more cases (after his clashes with the pope weakened him). It also happened when the British Crown and upper class realized that with the extension of the franchise in 1867, the House of Commons would become the new G_1 and therefore they sought to give bureaucracies a greater degree of autonomy. Similarly, French monarchs empowered the Estates General at times when they were weak and feared that others could replace them as the dominant group, as in the case of Marie de Médicis or Louis XVI. I also expect institutional restraints on concentrated power to develop in the international realm when the most powerful state (G_1) is weak and becoming weaker relative to the group of secondary powers (G_2).

As mentioned, in time, as officials from domestic institutions (G_4) came to have increased expertise and became more powerful, their interests and roles in supporting institutional restraints increased, as A4 posits. This development added to their existing baseline support for restraints that came from fear of concentrated power.

The events described here also offer support for A5, stating that weak domestic actors (G_3) become more influential when clashes between G_1 and G_2 lead one of these powerful groups to purposefully give G_3 a greater role. This also happened at times when G_3 became more powerful, for example in 1254 when a weak Henry III sought to expand participation in Parliament and allowed for the first time representatives of commoners to take part in deliberations. A similar situation led Philip the Fair to broaden his consultations from ones involving the two original estates to the Third Estate. I expect the most powerful states in the international system (either G_1 or G_2) to also empower weak states or civil society groups (G_3), especially when there is relative parity in the power balance between these two dominant groups.

The above narrative also offered examples of the clashes between G_1 and G_2 leading one of these powerful groups to empower G_4 , composed of judges, members of assemblies and parliaments, and government administrators, a finding that is also consistent with A5. Of course, G_4 was especially likely to be given a greater role when its relative power was already sufficiently significant to give G_1 or G_2 an advantage when partnering with it. This dynamic, for instance, led to the Parlement of Paris becoming more powerful in the fourteenth century or to government bureaucracies in the UK and US gaining greater autonomy (and power) in the late nineteenth century. We also expect similar developments in IR: some of the most powerful states are likely to support the autonomy and empowerment of international courts, assemblies, and IGO secretariats in their struggles with other

states, especially when the collective power of such G_4 groups becomes sufficiently meaningful to warrant alliances for G_1 or G_2 .

Additional arguments involving the evolution of institutional restraints on concentrated power

As mentioned, besides assessing the plausibility of the five arguments from chapter 2, the present chapter is intended to derive additional expectations for international relations, inductively, based on the patterns uncovered in domestic politics. This is an important aspect of my analysis considering that the main purpose of this study is to show that institutional restraints on power evolved in a similar fashion in domestic and international politics.

Indeed, the evolution of all three types of domestic institutional restraints discussed in this chapter appear to have followed similar patterns, ones that we also expect to see replicated in the international realm. Specifically, institutional restraints through the judiciary, through assemblies and parliaments, and through administrative institutions, have all experienced three similar phases¹³⁹: emergence, change, and consolidation. The identification of these three phases in the above narrative is important because they exhibit different dynamics and different roles for the main groups. Therefore, they further specify the expected preferences and actions of these groups, and thus complement A2, A3, A4, and A5. In fact, in these three phases, the preferences of the four groups and the roles that they play appear to exhibit some fluctuations, suggesting that my arguments require further clarifications by identifying scope conditions. Perhaps most important, the dynamics in the emergence phase appear to differ considerably from those in later stages, when the institutions already exist. In this first stage it is more obvious that institutions, of course, have other purposes besides restraining actions. They both *enable* and *restrain*.¹⁴⁰

Governmental and intergovernmental institutions almost always involve the most powerful groups. They come into existence when such groups understand

¹³⁹ It is useful to mention two aspects related to the terminology I adopt here. First, some of these “phases” lasted only a few years or even less than a year (especially in the case of change or emergence) and may be best understood rather as brief “moments” in the centuries-long evolution of institutional restraints on power. What is important is that they should be considered as finite time periods that, together, do not span the entire history of this evolution. Indeed, there are important periods before, between, and after the three phases when the institutions do not change. Second, although all three phases, in fact, involve changes to institutions, I only label the second one as “change” to distinguish it from the others. It involves relatively rapid and drastic changes in formal rules, compared to the rules in the same institution or those in the institution immediately preceding it. It follows the abrupt creation of the institution (“emergence”) and precedes the “consolidation” phase where institutional changes are incremental and may also involve informal rules.

¹⁴⁰ See, e.g., Hodgson, Geoffrey M. 2006. “What Are Institutions?,” *Journal of Economic Issues* 40(1): 1–25.

the new institutions as offering benefits for projecting their power that exceed the costs of potential restraints on their power. Thus, in the emergence phase, G_1 and G_2 consider that the benefits of cooperation and power projection through international institutions exceed the costs of the potential restraints on power that come with the new institutions. Such moments are usually triggered by exogenous factors (often exogenous *shocks*) altering the usual perceived cost-benefit calculations.¹⁴¹

Indeed, this chapter has shown that in the emergence phase, most domestic institutions were established to allow rulers (G_1) to gain better control over their subjects (G_2 and G_3). They were intended to deal with governance issues, as territories that had to be controlled expanded and as their functions became more complex. These processes are explained in great depth by the state-formation literature discussed in chapter 2. Additionally, there were times when rulers sought to show that their actions were supported broadly by their subjects, suggesting that the narrower norm of “representativeness” was relatively strong even before it came to be placed under the broader umbrella of norms we now associate with democracy. G_1 therefore often created fairly broad quasi-representative assemblies to legitimate its most important decisions. However, as expected based on A2, it did not intend for any of these institutions to act as (or include) meaningful restraints on its power. After all, a basic characteristic of the emergence phase is that G_1 is seeking to extend its control over more individuals and groups and over more issue-areas. This implies that its power is increasing (such as moments 1 and 2 in Figure 2.1). At such times, G_1 is therefore very unlikely to accept institutional restraints on its power.

In most cases, in this first phase, G_2 sought shared control over institutions together with G_1 , rather than stronger institutional restraints. This is to be expected because at such times of great and increasing power for the ruler, G_2 is aware that G_1 will not acquiesce to institutional restraints on its power. Indeed, almost simultaneously with the emergence of government institutions, powerful nobles (G_2) came to be involved alongside rulers (G_1) in the appointment of judges, counselors, representatives in consultative bodies, and officials in administrative bodies. Also, in this first phase, G_3 and G_4 did not play meaningful roles. This is also expected because G_1 and G_2 are less likely to be engaged in struggles with each other and therefore are not seeking to empower G_3 and G_4 as potential allies. Also, at that time, G_3 and especially G_4 are still weak and the more powerful groups do not find it useful to form alliances with them.

We also expect international institutions to be initially established primarily to allow powerful states to control weaker states by conveying legitimacy to their

¹⁴¹ As this argument for the emergence of international institutions is widely accepted, I do not present it as an additional argument (beyond A1–A6).

actions. Additionally, we expect G_1 and even G_2 states to be involved in the founding of such institutions in the international realm. G_2 states are also expected to seek some control over international institutions, together with G_1 , primarily as a way to maintain superiority over G_3 and G_4 .

In a second phase, of “change,” G_1 and G_2 altered the domestic institutional status quo by enabling the first more significant institutional restraints on concentrated power to form. This is the phase that is characterized by the dynamics underlying A3. It is only under the very specific scope conditions of such rare moments (when G_1 is weak and becoming weaker relative to G_2 and when neither G_1 nor G_2 are certain of future power distribution) that the powerful groups’ interests are indeed altered, as A3 posits. As soon as such conditions disappear, G_1 and G_2 seek to reduce yet again the roles of G_3 and G_4 . Indeed, the aforementioned domestic developments support A3. In most cases, the changes in institutional restraints on power took place when G_1 was relatively weak and becoming weaker. In some cases when its power had declined and when it feared that others could become more dominant, G_1 supported institutional restraints on concentrated power. Examples of such instances were offered throughout this chapter.

The above narratives also suggest that G_1 sought to weaken the institutional restraints when it became more powerful once more (something that is expected based on arguments from the comparative politics and IR literature discussed earlier).¹⁴² For instance, French kings did not summon the Estates Generals after they became sufficiently powerful to not require a show of support for their actions. Similarly, although Henry III reconfirmed in 1225 his support for the Magna Carta signed ten years earlier by his father, as he was now in a position of considerable power, he eliminated from the Charter the all-important clause 61 that established a council of barons to monitor and ensure the king’s adherence to the agreement.

Indeed, all such examples remind us that the evolution of institutional restraints on power does not have to be unidirectional. In many instances G_1 and G_2 were successful in eroding existing restraints. I will show that such shifts towards weaker restraint on power also took place in the international realm. However, due to reasons discussed below, it was difficult for G_1 and G_2 to eliminate completely existing institutional restraints and, of course, G_3 and G_4 , that opposed such erosion, were in stronger positions when seeking to defend the advances they had made. These dynamics underlie the *back-and-forth* developments regarding the strength of institutional restraints on power throughout the change phase.

By the third, “consolidation,” phase G_3 and G_4 , have acquired greater power and seek to bolster the enhanced roles they were given during times of clashes between the more powerful groups, as A5 posits. This may happen, for instance,

¹⁴² E.g., Boix Carles and Milan W Svoblik. 2013. “The Foundations of Limited Authoritarian Government: Institutions Commitment and Power-Sharing in Dictatorships.” *The Journal of Politics* 75(2): 302–3; Stone, Randall W. 2011. *Controlling institutions: international organizations and the global economy*. Cambridge: Cambridge University Press.

due to a sense of solidarity that developed during their previous collective actions or from the usual inertia that characterizes virtually all institutions. Additionally, the consolidation phase involves the processes through which judges, members of assemblies and government bureaucrats come to be increasingly specialized. Such specialization, in turn, allows the individuals from G_4 to gain greater autonomy from the most powerful actors and groups. It is in this phase that A4 truly is relevant for understanding the evolution of institutional restraints on power. However, this phase does not only involve G_4 but also G_3 . Like G_4 , G_3 does not want to give up the gains it has made during the change phase.

The narrative in this chapter includes several examples of consolidation processes. The developing solidarity of the G_3 groups represented in the House of Commons in England or the Third Estate in France led to the consolidation of these groups' prominent roles, despite G_1 and G_2 's later attempts to erode the power of the two institutions. Also, the efforts of increasingly specialized English judges and members of the Paris Parlement to gain greater autonomy in the seventeenth century are reflections of the important role G_4 can play in this consolidation phase. Similarly, the actions of government bureaucracies from around the world in developing civil service unions and gaining the right to strike are also reflective of this phase.

Table 3.2 summarizes the dynamics of the three phases. It also notes the groups involved in each phase and the processes underlying the arguments that we are most likely to observe. The table is based on observations from developments in the domestic realm and offers expectations for the international one. Lastly, it indicates when it is likely to find evidence for arguments A3, A4, and A5 regarding the interests and roles of the four groups.

The last row in the table notes the types of institutional approaches expected to best contribute to our understanding of the three phases in the evolution of institutional restraints. Indeed, as mentioned in the introductory chapter, the main contribution of the present research to theory building is to show that processes in international relations are similar to those in domestic politics and, in particular, that fear of concentrated power has led to institutional restraints on power both at the state and international level. Implicitly, this study does not seek to develop a new theoretical framework for explaining developments in IR. Rather, I rely on the traditional approaches that have been used to explain both domestic and international institutions and show that they can account for developments in both realms. Specifically, the mechanisms that I discuss as leading to both domestic and international restraints on power will draw from all three forms of institutionalism: rational choice, sociological, and historical.

Rational choice institutionalist explanations emphasize how exogenous material factors alter actors' cost-benefit calculations that, in turn, shape

Table 3.2 Evolution of institutional restraints on concentrated power in the domestic realm

Phase	1) Emergence of first government institutions	2) Changes in strength of institutional restraints	3) Consolidation of institutional restraints on concentrated power
Main groups involved in phase (argument underlying expectations)	G ₁ and most of G ₂	G ₁ and most of G ₂ (A3)	G ₃ and especially G ₄ (A5 and A4)
Examples of domestic developments in phase	Witan, Curia Regis and shire-reeves in England; Parlement, Estates-General and prévôts emerge in France.	Adoption of Magna Carta; law that Parliament has to accept all taxes and acceptance of civil service unions in UK; introduction of remonstrances in Parlement; acceptance of Third Estate in meetings; kings eroding institutional restraints when regaining power	Judges and civil servants in England and France gaining more autonomy; members of English Parliament gaining more autonomy from king; in time government officials becoming very powerful and triggering adoption of accountability mechanisms; members of House of Commons and Third Estate maintaining relevance; civil service maintaining important role after being empowered in phase 2.
Expectations for the international realm	International institutions emerge primarily due to great powers' interests in controlling collective response to problems	International institutions are altered during times of potential power transitions; when dominant state becomes more powerful restraints are eroded.	Small states, NGOs, and IGO officials maintain important roles after being empowered in phase 2; IGO officials become more autonomous and powerful and seek to strengthen institutional restraints further
Main institutional approaches explaining developments	Rational Choice and Sociological	Rational Choice and Sociological	Sociological and Historical

institutions.¹⁴³ The present chapter has shown that the shifts in the distribution of power in domestic politics, have indeed led to the emergence, weakening, or empowerment of institutional restraints in the emergence and change phases in ways that are consistent with rational choice institutionalist arguments.

Sociological institutionalist explanations also consider the role of ideational factors in the emergence and change of institutions.¹⁴⁴ The explanations of the evolution of institutional restraints on power draw upon this literature in two ways. First, when discussing the establishment of institutions, it is apparent that we should not only consider the relevance of material capabilities, but also the perceived legitimacy of the most powerful groups. At the domestic level, national leaders have long sought such legitimacy, basing it sometimes on spiritual sources or on the representative character of government institutions. Thus, sociological institutionalist explanations can help us understand the establishment and even change of institutions that G_1 seeks to use for increasing the legitimacy of its actions as was the case of the increasingly inclusive assemblies. Second, it can help us understand how norms, such as those underlying long-held practices in the judicial, legislative, and administrative realms helped maintain and consolidate institutions in the third phase.

Historical institutionalism has traditionally emphasized the “stickiness” of institutions and the difficulties in altering them.¹⁴⁵ One reason for such resilience that is relevant for this study, is that particular institutional arrangements can lead some groups to adopt strategies that not only reflect but also reinforce the institution.¹⁴⁶ Some studies have drawn upon historical institutionalist analysis to emphasize the ways in which self-reinforcing mechanisms have established feedback loops that made institutions increasingly resistant to change.¹⁴⁷ The present study will build on this type of argument to show that, once international institutional restraints

¹⁴³ For a comprehensive discussion of all three forms of “new institutionalism,” see, e.g., Hall, Peter A. and Rosemary C. R. Taylor. 1996. “Political Science and the Three New Institutionalisms,” *Political Studies* 44 (5): 936–57; also

Peters, B. Guy. 2019. *Institutional Theory in Political Science: The New Institutionalism*. Northampton, MA: Edward Elgar; for an important example of rational choice institutionalism applied to IR, see, e.g., in Koremenos, Barbara, Charles Lipson, and Duncan Snidal. 2004. *The Rational Design of International Institutions*. Cambridge: Cambridge University Press.

¹⁴⁴ See, e.g., Hall and Taylor, 1996; Peter, 2019; in IR see, e.g., Finnemore, Martha, and Kathryn Sikkink. 1998. “International Norm Dynamics and Political Change.” *International Organization*, 52(4): 887–917.

¹⁴⁵ e.g., Pierson, Paul. 2000. “Increasing Returns, Path Dependence, and the Study of Politics,” *The American Political Science Review* 94(2): 251–67; Mahoney, James. 2000. “Path Dependence in Historical Sociology,” *Theory and Society* 29: 507–48; Jervis, Robert, Henry R. Nau, and Randall L. Schweller. 2002. “Correspondence: Institutionalized Disagreement,” *International Security* 27(1): 174–85, 175.

¹⁴⁶ E.g., Streeck, Wolfgang. 1992. *Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies*. London: SAGE Publications.

¹⁴⁷ E.g., Thelen, Kathleen Ann. 1999. “Historical Institutionalism in Comparative Politics,” *Annual Review of Political Science* (2): 369–404; Pierson, Paul. 1993. “When Effect becomes Cause: Policy Feedback and Political Change,” *World Politics* 45(4): 595–628.; Ikenberry, John. 1994. “History’s Heavy Hand: Institutions and the Politics of the State,” presented at conference on The New Institutionalism, University of Maryland, October 14–15, 1994, available at <https://scholar.princeton.edu/>

on power are established, it is difficult to alter them and, of course, to eliminate them. Therefore, this approach is primarily useful for explaining the third phase in the evolution of institutional restraints on concentrated power, the one of consolidation.

I especially consider such self-restraining processes when making the above argument that institutional restraints on power are consolidated through the empowerment of G₄. This group, composed of judges, members of assemblies, and bureaucrats from both domestic and international institutions, develops vested interests in maintaining such institutions and in acquiring greater autonomy for itself. Its autonomy, in turn, comes to act as a self-reinforcing mechanism consolidating the institutional restraints on power.

The Neoliberal Institutional approach noted decades ago that historical institutionalism can be applied to international institutions.¹⁴⁸ More recent work has built on this argument and offered historical institutionalist explanations of changes (not just stability) in IGOs.¹⁴⁹

The following chapters will discuss specific examples of how the three institutional approaches can help explain developments in the international realm in the three evolutionary phases. In the concluding chapter, I offer some generalizations regarding the usefulness of the three forms of institutionalism in each of the three phases of the evolution of restraints on power through domestic and international institutions. I will also discuss how the three approaches complement each other.

However, a much more important contribution of this book to theory building than the aforementioned integrative approach bringing together the three forms of institutionalism, is its emphasis on comparing the evolution of early government institutions to recent international institutions. By showing that international institutional restraints on power evolved in a similar way as domestic ones, I offer an important example of how our analyses of political processes can cross the domestic–international divide. The next three chapters will therefore consider the evolution of international restraints on power through international law and courts, international assemblies and parliamentary bodies, and international

sites/default/files/HistorysHeavyHand0.pdf; Krasner, Stephen D. 1988. "Sovereignty: An Institutional Perspective," *Comparative Political Studies* 21 (1): 66–94, 83.

¹⁴⁸ Keohane, Robert O. 1984. *After hegemony: cooperation and discord in the world political economy*. Princeton, NJ: Princeton University Press; Stein, Arthur A. 2010. "Neoliberal Institutionalism." In Reus-Smit, Christian, and Duncan Snidal, eds. *The Oxford handbook of international relations*. Oxford: Oxford University Press, 201–21.

¹⁴⁹ E.g., Fioretos, Orfeo. 2011. "Historical Institutionalism in International Relations". *International Organization*, 65(2): 367–99; Rixen Thomas Lora Anne Viola and Zürn Michael. 2016. *Historical Institutionalism and International Relations : Explaining Institutional Development in World Politics*. Oxford: Oxford Univ Press. For a recent comprehensive study of the evolution of global governance that has utilized elements from historical institutionalism to show how this approach can explain both self-reinforcing and "self-undermining" processes see Zürn, Michael. 2018. *A Theory of Global Governance: Authority, Legitimacy, and Contestation*. Kettering: Oxford University Press, 17.

secretariats to show that such institutions followed similar patterns as the domestic institutions discussed in this chapter.

In addition to evaluating the plausibility of the five arguments from chapter 2 in the international realm, chapters 4–6 will assess the degree to which the evolution of international institutional restraints on power followed the same three phases and experienced similar dynamics as those in the domestic realm discussed in this chapter. Specifically, it will evaluate a sixth and final argument (A6) that, as mentioned, complements A2, A3, A4, and A5 in further clarifying the dynamics in the evolution of institutional restraints on concentrated power:

A6) The evolution of institutional restraints on power experiences three different phases (emergence, change, and consolidation), where different groups play the principal roles.

In order to consider all six arguments, each chapter will ask the same three questions. As a reminder, these are: What types of international institutional restraints developed? Who supported or opposed the institutional restraints? How did international institutional restraints evolve? The first question helps me assess A1. The second question is primarily intended to assess A2, A3, and A4. The third (broader) question allows me to assess the plausibility of A5 and A6. Each chapter concludes with a brief discussion of how the three forms of institutionalism can account for the evolution of the international institutional restraints on concentrated power.

4

International laws and courts as institutional restraints

Despite the problems of enforcing international law, over time a number of international legal restraints have developed to counter, or at least erode, the power of states, including the most powerful ones. The first section of this chapter will discuss the early evolution of international law and, especially, of the idea that it *should* apply to all states, even the most powerful. By doing so, it allows me to draw parallels between international developments and those in the domestic realm where a similar idea, that even the most powerful groups of actors (monarchs and their inner circles) are not above the law, evolved gradually over many centuries. I will show how international norms and laws have long acted as (relatively weak) restraints on the most powerful states by delegitimizing some actions, just as national laws constituted similar (relatively weak) restraints on the most powerful groups of actors in the domestic realm hundreds of years ago, well before courts became the strong institutions we know today.

In the second section I will discuss the earliest IGOs of the nineteenth century. These organizations came to generate numerous fairly technical rules, such as those involving river navigation, telecommunications, and transportation, that all member-states had to accept. Such early international regulations represented an important step toward the development of international law. The chapter then goes on to focus on the establishment of the first international courts, starting with the Permanent Court of Arbitration (PCA) in 1899. I further show how later international courts, especially the Permanent Court of International Justice (PCIJ) of the League of Nations system, and the International Court of Justice (ICJ) of the United Nations system, found a balance between giving judges sufficient independence to adopt decisions running counter to great power interests and leaving loopholes that allowed great powers to ignore such decisions when the cost of accepting them was too high. The next section follows developments surrounding the establishment of several international courts in the post-Cold War era. I show how the International Criminal Court (ICC), the most notable international judicial institution to emerge in the past few decades, has allowed for even greater independence of its judges than previous international courts.

The concluding section highlights the parallel evolution of judicial restraints on the most powerful actors in the domestic and international realms. In doing

so, it assesses the degree to which A1-A6 are supported by developments in international judicial institutions.

The emergence of international legal norms and laws as tools for great powers

Some of the weak agreements guiding relations between states thousands of years ago have been considered incipient international “laws.” The vast majority of such agreements between cities and states were bilateral in nature. The earliest known examples of multilateral agreements were those between the city-states of Sumer, in Mesopotamia, starting around 4000BC. In those systems, the most powerful city-state would acquire the “kingship” which, among other advantages, involved its right to arbitrate between the other states. The strong influence of power over law characterized virtually all ancient international relations.¹ During the Warring States period in China, a somewhat similar arrangement was made among states that together formed a “league”: the most powerful state was entrusted with enforcing interstate agreements. In some instances, when the most dominant state was one of the disputants, another state would be given the right to arbitrate between the two parties. However, based on the evidence we have, imposing rule-based decisions on the most powerful state was very rare.²

The ancient Chinese system also led to some of the first writings on questions of international relations. As one might expect for that period, they were strongly influenced by Confucianism. Specifically, the Confucian idea of deference and hierarchy in inter-human relations within family and society was projected to the international realm where inequality among states was considered essential for the harmonious functioning of the interstate system. Mencius, a follower of Confucius who wrote in the fourth century BC, was among the first to apply Confucianism to interstate relations, emphasizing the need for small states to show deference to large ones.³ To the extent that there were any legal obligations on states, these derived from power considerations, not any abstract ethical theories. While war was generally understood to be a last resort, its justification was based on the success of the military actions rather than on the factors that went into the decision to start the war.⁴

In contrast to the extensive writings on international law in early Chinese texts, Ancient Greeks had less to add to this topic. In part, this neglect was the result of

¹ Watson, Adam. 1992. *The Evolution of International Society*. New York, NY: Routledge, 27.

² Walker, Richard Lewis. 1953. *The Multi-State System of Ancient China*. Hamden Conn: Shoestring Press, 87–91.

³ Mencius. 2009. *Mencius*. Edited by Phillip J. Ivanhoe. New York, NY: Columbia University Press, 139–40.

⁴ Friday, Karl F. 2004. *Samurai, Warfare and the State in Early Medieval Japan*. New York, NY: Routledge, 21–2.

the broad autarchic view that most scholars such as Aristotle and Plato embraced and that called for as little interstate interaction as possible. Even so, the lack of attention to laws among states is somewhat surprising considering the advances that ancient Greek scholarship made in the broader realm of law and especially the introduction of ideas of natural law that later had an important impact on scholars focusing on interstate relations.⁵

Ancient Roman legal scholars also emphasized that military might should only be used to further a just cause.⁶ Perhaps more important, these scholars introduced the concept of “*jus gentium*” (sometimes translated as law of peoples or law of nations). *Jus gentium* does not represent a form of international law involving relations between states; instead, it refers to private law that applies to relations between individuals coming from different states. However, the idea that such common legal principles transcend borders contributed a great deal to the notion that some laws should be applicable to the actions of all states, even to the most powerful ones, and influenced the field of international law for many centuries.

Medieval Europe built on the ancient world's concepts of natural law and *jus gentium* and on the underlying assumption that there was a common law to the behavior of all states. This assumption implied that even the most powerful states had certain limits on what they could do. In addition to the ideas of natural law that were inherited from the ancient Greeks and Romans, Medieval Europe benefited from the unifying force of the Holy Roman Empire as well as of the Catholic Church. It is not surprising, therefore, that it was during this time in European history that the laws of states came to be seen as increasingly unified rather than state-specific.

Particularly relevant for that period was the development of the just war doctrine among scholars. Of course, the idea of only engaging in “just wars” implied that all states, including the most powerful, were limited in their possible actions. Although there is evidence that the doctrine was applied as far back as ancient Egyptian times, its influence on modern thought is generally traced to scholars associated with the Catholic Church, such as Saint Augustine and Thomas Aquinas.⁷ However, despite the fairly cohesive body of literature on this doctrine in medieval times, powerful states—and even the papacy—would rarely apply it in practice.

The first bodies of international law resulted from a need to regularize the increased interactions that came with advances in navigation and the ensuing growth in international trade. Not surprisingly, the evolution of international law

⁵ Neff, Stephen C. 2014. *Justice among Nations: A History of International Law*. Cambridge, MA: Harvard University Press, 42.

⁶ Livius, Titus. 1960. *The Early History of Rome*. Trans. Aubrey de Sélincour. Harmondsworth: Penguin, 57.

⁷ Cox, Rory. 2017. “Expanding the History of the Just War: The Ethics of War in Ancient Egypt,” *International Studies Quarterly* 61(2): 371.

was particularly visible in the development of *Lex Mercatoria* (or the “Law Merchant”). This was a body of customary law that was generated, adjudicated and even enforced by private merchants, not the state. After developing initially as domestic legislation, starting at the end of the 11th century it also began taking on international dimensions. The same merchant community that was responsible for the emergence of domestic merchant law, developed a transnational body of customary law that continued in the spirit of *jus gentium* to regulate commercial transactions between private individuals from different states. This legislation led to the establishment of “pie powder” courts that would resolve merchant disputes directly at commercial fairs across Europe.⁸

The first institutions of international law thus emerged through a “bottom-up” process, based on practice of individuals, rather than a “top-down” one, imposed by rulers of the most powerful states.⁹ This may suggest that the benefits or costs resulting from international law were not perceived by states (especially powerful ones) to warrant their intervention in shaping such law. Private actors, on the other hand, recognized the strong benefits of international laws, despite the costs and problems they faced in imposing them.

However, in time, rulers came to see the importance of transnational trade laws for their country’s prosperity. By the middle of the seventeenth century, an entire network of treaties of amity and commerce developed *between states* across Europe.¹⁰ It is primarily due to this emergent practice of international law that the theories underlying it also began shifting from natural law to positivism.¹¹ The shift coincided with governments becoming increasingly involved in international merchant disputes on behalf of their subjects.

Indeed, by the early seventeenth century the influence of natural law on international law had reached a peak. The idea that universal precepts applied to relations between states and that obligations existed both for weak and powerful states echoed across the scholarship of the time, especially that of Suarez and Grotius. However, even then, international law theory came to consider both natural and “man-made” (positive) laws that had come to exist, based on customs.

Throughout the eighteenth century this combination between the two main views of international law (exemplified perhaps best in Vattel’s writings) led rationalists such as Wolff to develop for the first time the idea of equal legal status of all states. Wolff based his arguments on natural law. However, like many of his predecessors, he noted that in reality relations between states have always been

⁸ See Kulsrud, Carl J. 1936. *Maritime Neutrality to 1780: A History of the Main Principles Governing Neutrality and Belligerency to 1780*. Boston, MA: Little, Brown, 17–37.

⁹ Neff, Stephen C. 2014. *Justice among Nations: A History of International Law*. Cambridge, MA: Harvard University Press, 203.

¹⁰ Bouchaud, Mathieu-Antoine. 2005. *Théorie des traités de commerce entre les nations*. Farmington Hills, MI: Thomson Gale.

¹¹ Neff, Stephen C. 2014. *Justice among Nations: A History of International Law*. Cambridge, MA: Harvard University Press, 201.

hegemonic. This acknowledgment led others, such as Moser, Martens and Scott (dubbed “pragmatists”) to push the understanding of international law further towards positivism, arguing that international law is in fact only customary law that has been instituted by powerful states.¹² Throughout the rest of the eighteenth century international law increasingly embraced the pragmatist approach that led to the positivism of the nineteenth century.

The emergence of the first IGOs as incipient forms of rule-based institutional restraints

The Concert of Europe was a fairly informal institution. However, by adopting a set of stable rules and procedures for the consultation and coordination of its members for almost a century, it established a convergence of expectations that is characteristic of formal institutions. In this respect, it represented a shift from the fluid alliances that states had adopted up to that time.¹³ More important, these rules and procedures came to serve as the starting point for the establishment of many formal IGOs starting in the nineteenth century.

The Concert was formed by the four major victorious powers of the Napoleonic wars: Austria-Hungary, Britain, Prussia, and Russia. The exceptionally high costs associated with the wars convinced leaders of these dominant states to coordinate with each other to avoid yet another major conflict. Although some authors have considered the Concert an institutional restraint on French power,¹⁴ in reality this was only true for its initial plans. As soon as the Concert was established, France successfully lobbied for membership, arguing that it was only appropriate that all great powers (and only they) be part of international decisions.¹⁵

The Congress of Vienna and the emergence of the Concert of Europe are generally seen as representing a hiatus in the long history of European balance of power politics. Balancing strategies had been successful in staving off the concentration of power in a single state after the collapse of the Roman Empire. Before 1815, the most powerful European states had never been on the same side as much as

¹² E.g. De Witt Dickinson, Edwin. 1920. *The Equality of States in International Law*. Cambridge, MA: Harvard University Press, 122.

¹³ Indeed, although there had been international institutions prior to the nineteenth century, such as the Holy Roman Empire, the Papacy, or the Hanseatic League, there is a general agreement that the Concert was the most representative precursor to the IGOs that later developed. See, e.g., Mitzen, Jennifer. 2013. *Power in Concert: The Nineteenth-Century Origins of Global Governance*. Chicago: The University of Chicago Press.

¹⁴ Ikenberry acknowledges that the attempts to develop restraints on (primarily British) power through the Concert of Europe were not as successful as those through international institutions in the twentieth century (Ikenberry, G. John. 2001. *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*. Princeton: Princeton University Press, 79–83).

¹⁵ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-making Rules*. Cambridge: Cambridge University Press, 52–3.

they came to be after the Congress of Vienna. With the emergence of the Concert there was no real counterweight to their now collective power. Indeed, at the time, these five states together controlled about two thirds of global power and close to 90% of European power. Among them, the UK was the most dominant, controlling slightly more than one third of total global power and about half of European power. It is generally acknowledged that the Concert was primarily the result of British efforts (that is, of G_1).

Although the Concert eroded the restraints on concentrated power through traditional military balancing (*outside* international institutions), it opened the door for restraints on power *through* institutions. The Concert gave the five great powers some ability to restrain each other's actions through the consultation process but was very weak as an institutional restraint on the collective power of these dominant states (G_1 and G_2). Small states were sporadically allowed to attend some of the Concert's meetings but, even then, their presence was accepted only for consultations. They did not have any decision-making power. However, the many technical IGOs that came into existence through collaborations that the Concert made possible indeed established some restraints on the actions of all states, including powerful ones.

As early as 1815, the Concert of Europe established the Central Commission for the Navigation of the Rhine, generally considered the first IGO. The subsequent decades of the nineteenth century saw a flurry of other IGOs. Most of them reflected the need to regularize the increased international interactions that came with the rapid changes in travel and communication at that time.¹⁶ For international relations, the novelty of such early institutions was that they replaced the traditional one-time agreements among states with treaties involving follow-up conferences and permanent secretariats to deal with the day-to-day issues in between conferences.¹⁷ The advances in international law brought about by these first IGOs of the nineteenth century, may seem minor to us today. However, they were considered groundbreaking at the time.¹⁸ They were possible primarily because the most powerful states worked together for the first time in an institutionalized setting that facilitated their finding of common areas of agreement.

¹⁶ The nineteenth century is considered the era of "industrialization, imperialism and free trade," when states saw dramatic increase in their interactions. During that time, governments (especially those of powerful states) saw the benefits of advancing international law to regulate such interactions. This response was similar to the one states had during the "age of discovery" of the fifteenth to the eighteenth centuries, when the development of navigation and trade led to the promotion of the first international legal agreements. For a classification of eras in terms of international interactions and waves of globalization, see Osterhammel, Jürgen and Niels P. Petersson. 2009. *Globalization: A Short History*. Princeton, NJ: Princeton University Press.

¹⁷ Reinalda, Bob. 2020. *International Secretariats: Two Centuries of International Civil Servants and Secretariats*. Abingdon, Oxon; New York, NY: Routledge.

¹⁸ Murphy, Craig N. 1994. *International Organization and Industrial Change: Global Governance since 1850*. Cambridge: Polity Press.

When these international organizations emerged, they were usually promoted by the most powerful states. Thus, Prussia was behind the establishment of the Rhine River Commission, France pushed for the creation of the International Telegraph Union (ITU) (established in 1865) and the International Bureau of Weights and Measures (established in 1875), and the United States and Germany were the motors behind the founding of the International Postal Union (established in 1874). Most of these organizations were also supported by the United Kingdom, the most powerful state at that time. Conversely, in instances when the United Kingdom was adamant in its *opposition* to the establishment of an international institution, it was very rare that the other countries moved ahead with such plans. For example, starting in 1834, the UK opposed the creation of an international institution to coordinate world-wide quarantines in order to stop the spread of communicable diseases such as cholera. It felt that such an organization potentially could impose too many restraints on its all-important international trade interests.¹⁹ In part, due to such opposition, the first international organization to deal with health issues, the International Office of Public Health, was only established in 1907, when according to most measures of national power, the UK was no longer the dominant state.

The vast majority of early IGOs were technical in nature and focused on relatively narrow issues. They created rules that all states needed to accept and marked the beginning of the spread of global regulatory regimes.²⁰ In this sense, they can be seen as imposing restraints on the actions of all states. Great powers accepted the IGOs because they felt that they could benefit considerably from a common set of rules, ones that they thought they could control better than small states. Indeed, most of these organizations had voting systems that took into account power differences between states.²¹ G_1 and G_2 states therefore encouraged a wide membership in these organizations so that their influence in the international institutions could be projected as widely as possible to the rest of the world. In this sense, the first IGOs were similar to the legal institutions that emerged within states during medieval times as they were also primarily tools for the most powerful to project their influence over the weak.

In time, some of the technical rules that emerged from these organizations came to also run counter to great power interests. Such instances of international institutions imposing some restrictions on the most powerful states were nevertheless accepted by them because the issues that were at stake were fairly narrow in scope

¹⁹ Youde, Jeremy. 2018. *Global Health Governance in International Society*. Oxford: Oxford University Press, 14–5.

²⁰ Battini, Stefano. 2016. "The Proliferation of Global Regulatory Regimes," in Cassese, Sabino (ed.). *Research Handbook on Global Administrative Law*. Cheltenham: Edward Elgar Publishing; for a seminal article on the regulatory system of the EU, see Giandomenico, Majone. 1994. "The Rise of the Regulatory State in Europe," *West European Politics* 17(3): 77–101.

²¹ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-making Rules*. Cambridge: Cambridge University Press, 93–117.

and tended to focus on relatively minor problems. Implicitly, in the rare cases when the rules ran counter to their interests, powerful states only incurred minor costs while reaping benefits in most other instances. Moreover, it should be noted that, as is the case even today, states were never obligated to join such organizations and could opt out of them whenever they chose if they felt that the restraints on their potential actions came to be too great.

Although the scope of such organizations was technical and narrow, collectively they were responsible for developing a substantial body of multilateral intergovernmental agreements. These agreements contrasted with the numerous bilateral ones that existed prior to the emergence of the organizations. The complex institutional arrangements that developed at that time generated a need for a more legalistic approach to international relations, thus contributing to the development of international law.

The events leading to the establishment of the Concert of Europe shaped international law in yet another way, beyond the emergence of the public international unions with their dense systems of regulations. With powerful conservative states such as Britain, Prussia, Russia, and Austria-Hungary defeating Napoleon, the power of liberal ideas (and their strong link to natural law) that had underlain the French Revolution, quickly eroded. Even before the revolution, starting in the 1750s a group of French writers known as “physiocrats,” who emphasized the centrality of natural law, argued for strengthening central government and weakening local and feudal powers. They promoted a number of fairly radical reforms for those times, including the free marketability of land, something that feudal magnates opposed vehemently.²² After the 1789 Revolution, French officials adopted international policies that were based on similar ideas stemming from natural law and that were perceived by most other governments as radical. For instance, the Declaration of Peace of 1790 announced the government’s renunciation of “the undertaking of any wars aimed at conquest” and vowed to “never employ its forces against the liberty of any people.” In 1792, the French National Assembly, voted for the abolition of the capture of private property in maritime warfare. The constitution of 1793 proclaimed the French people “the friends and natural allies of free peoples” and committed France to granting asylum to “foreigners who, in the name of liberty, are banished from their homelands,” but excluding “tyrants” from this principle.²³ Many of these actions led to an important question for international law that went beyond the specific case of France. Could one expect any degree of continuity between revolutionary governments and their predecessors? Were treaties concluded by the French royal government still relevant for international law? The French Revolutionary governments did not establish a general

²² Neff, Stephen C. 1990. *Friends but No Allies: Economic Liberalism and the Law of Nations*. New York, NY: Columbia University Press, 30–3.

²³ Grewe, Wilhelm G. (ed.). 1992. *Fontes Historiae Juris Gentium: Sources Relating to the History of the Law of Nations*, vol. 2. Berlin: Walter de Gruyter, 647–9.

policy regarding such questions. Thus, in international law circles, the French Revolution highlighted the problems that could stem from discarding existing practices in the interactions among states and therefore strengthened the positivist view.

Edward Burke's work perhaps best embodies the reaction to French revolutionary policies and the resulting shift away from natural law towards positivism. In his writings, he argued against revolutionary leaders who "despise all their predecessors, and all their contemporaries" and who rely on "extravagant and presumptuous speculations."²⁴ Burke promoted the idea of building on past concrete experiences rather than on speculation.

Although the positive law approach came to develop in virtually all states, whether in Europe, North America and South America,²⁵ Britain and other great powers came to be the strongest proponents of positive law prescriptions.²⁶ This preference is not surprising because positivism considered the "will of states" to be the true source of all international law, rather than "natural law." As the will of the most powerful states was much more likely to shape international law than that of smaller ones, the new approach did not place as strong an emphasis on normative restraints on power as the natural law tradition had. The only legal limitations on state action that positive law allowed for needed to be self-imposed.²⁷

Despite this appeal of positivism for great powers, the new approach also had implications attractive to small states. Indeed, since the positivism claimed that international law needed to be accepted by each state, states were implicitly equal under such laws.

Of course, even in the very positivist nineteenth century, there were scholars who voiced opinions that international law should not exclude all possible restraints on states' actions. Although liberalism only truly took shape as a comprehensive approach to international law well into the twentieth century, its roots can be traced to the nineteenth century. Indeed, at that time, it extended its broad theme of protection of individuals from their own governments to the one of also protecting them from foreign governments. According to liberals, such protections from arbitrary oppression by foreign governments did not need to be stipulated in treaties, rather they derived from customary law. In the words of Elihu Root, they derived from "a standard of justice, very simple, very fundamental, and of such

²⁴ Burke, Edmund. 1993. *Reflections on the Revolution in France*, ed. L. G. Mitchell. Oxford: Oxford University Press, 37.

²⁵ Even in France, August Comte proclaimed himself the inventor and champion of the "positive philosophy"

²⁶ See, e.g., Brierly, J. L. 1958. *The Basis of Obligation in International Law, and Other Papers*. Oxford: Clarendon Press, 3–9.

²⁷ E.g., Calvo, Carlos. 1880. *Le droit international théorique et pratique*, vol. 1. Paris: Pedone-Lauriel, 386–411; also Papaligouras, Panayis A. 1941. *Théorie de la société internationale*. Zürich: Éditions Polygraphiques, 279–316.

general acceptance by all civilized countries as to form a part of the international law of the world.”²⁸

Perhaps most important for the subject of this book, early liberal international law understandings of protections of individuals from foreign governments led to reactions of positivists such as Carlos Calvo who promoted the idea that protections of foreign individuals should not be used as an excuse to take actions that run counter to the principle of non-intervention. According to the Calvo Doctrine, which small countries came to support in the late nineteenth century, a foreigner could not claim to be mistreated if treated in the same way as nationals in that state.²⁹ This led to a clash between two principles that were seen as equally important for liberalism: the principle of protection of nationals and the principle of nonintervention (which can be understood as an important restraint on powerful states). Liberalism was forced to struggle with this clash.

Yet another growing challenge to nineteenth century positivism came from a loosely connected group of scholars who are often referred to as “solidarists.” Solidarism emphasized the importance of ties between all humans within the broader global community (rather than national ones) and the promotion of the general welfare of such individuals. As part of the broader efforts to promote global welfare, solidarists promoted economic progress through open trade, increased communication, and development of transport networks. This approach, of course, further bolstered the development of the international public unions of the nineteenth century.

It is noteworthy that the positions of international lawyers often appeared to reflect the interests of their states. For example, German international lawyers in the last quarter of the nineteenth century were among the strongest proponents of sovereignty at a time when a united Germany was just emerging and needed to solidify its identity as a unified state. The French sought a more internationalist view that would allow for the dissemination of core legal values, many of which happened to also be French values.³⁰ As mentioned, the strong British support for the positivist approach was also to be expected for the most powerful state at that time. The extraordinary size of the British Empire required that it find ways to develop global communications and transportations.

Despite such differences, international lawyers nevertheless came to form throughout the nineteenth century an increasingly cohesive and powerful professional group. This was in great part possible due to the increase in global communication and transportation. In 1869, the *Revue Générale de Droit International et de Législation Comparée* was founded by a group of scholars from

²⁸ Root, Elihu. 1910. “The Basis of Protection to Citizens Residing Abroad,” 4 *AJIL*, 517–28, 521.

²⁹ Calvo, Carlos. 1880. *Le droit international théorique et pratique*, vol. 1. Paris: Pedone-Lauriel, 225–6.

³⁰ Schiff, Benjamin. 2008. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 18.

several states and developed into an international forum for exchanging ideas on comparative and international law. National journals of international law were established in the following decades. The *Zeitschrift für internationales Privat- und öffentliches Recht* was launched in 1890 in Germany. The *Revue Générale de Droit International Public* was established in France in 1894 and the *American Journal of International Law* was founded in 1907.

The Institute of International Law and the Association for the Reform and Codification of the Laws of Nations (later renamed the International Law Association) were both established in 1873 and organized international conferences allowing experts to develop personal connections with foreign colleagues. National societies of international law generally emerged soon after the international ones.

International law began being taught in universities in the second half of the nineteenth century, in 1851 in Italy, 1852 in the US, 1856 in Canada, and 1859 in the UK³¹ Before that, international law experts had been trained solely in municipal law (usually in criminal law).³²

The emergence of specialized international lawyers and the increase in their number eventually led to their inclusion in government institutions. Most important, foreign ministries began hiring permanent staff as legal counsels starting in the 1870s. The demand for international lawyers within national government institutions was sparked by the aforementioned spread of international institutions. Thus, despite the erosion of natural law *norms* restraining powerful states from taking some actions, the development of international law *practice* flourished throughout the nineteenth century due to the emergence of dozens of international institutions that set down rules limiting actions of both weak and powerful states. Of course, the increased international law expertise within government institutions brought about by the hiring of international lawyers in turn led to an even greater spread of multilateral treaties and organizations towards the end of that century.³³

The PCA: a first major change to the international judicial restraints on power

The Permanent Court of Arbitration, the first multilateral international court, was established in 1899. The intergovernmental conference that led to the creation of

³¹ Lachs, Manfred. 1982. *The Teacher in International Law* (Teachings and Teaching). The Hague: Martinus Nijhoff, 146.

³² Neff, Stephen C. 2014. *Justice among Nations: A History of International Law*. Cambridge, MA: Harvard University Press, 304.

³³ Reinalda, Bob. 2013. *Routledge History of International Organizations: From 1815 to the Present Day*. London: Routledge.

the PCA can be understood as the continuation of previous efforts to establish institutions for international arbitration. As mentioned, there had been various forms of international arbitration as far back as Ancient Greece. The first modern treaty involving arbitration was the bilateral 1794 Jay Treaty between the UK and US.³⁴ Between 1794 and 1899 almost two hundred arbitrations took place among states with more than half unfolding in the last two decades of the nineteenth century.³⁵

However, before 1899, international arbitration was an ad hoc process, with countries seeking appropriate judges and developing new arbitration rules for each dispute. The first efforts to establish a permanent international arbitration system was initiated in 1838 by several nongovernmental American, British, and Swiss groups, thus an example of an initiative of weak actors, from G_3 .³⁶ They jointly called upon states to form a high court of arbitration. Their plan required all states to take all disputes to the court and that arbitration decisions be mandatory. Governments did not give much attention to this proposal. It did not have the backing of any of the powerful actors from G_1 or G_2 , or even from some of the other important subgroups in G_3 (such as small states). However, the idea of establishing a court of arbitration became more pertinent in 1873 when the Institute for International Law, another nongovernmental entity, yet one composed of well-connected international law scholars, proposed a model arbitration procedure that all states would have been required to adopt.

In 1889, the Interparliamentary Union (IPU) also began promoting international arbitration. While the IPU was not a true IGO, it was composed of members of national parliaments who came from government *circles*. In the early 1890s, IPU members called on governments to take up the issue of international arbitration. Their pressures led to the first intergovernmental conference on the topic in the Hague in 1899.

As one would expect, although the initial pressures to hold the Hague Conference came from weak actors (from G_3), the conference itself would not have been possible without the support of at least some great powers. Indeed, the two main countries that took the lead in preparing the Hague Conference were Russia and the US. According to a generally accepted measure of state power, in 1897, just as the first plans for the conference were underway, Russia was the fifth most powerful country in the world and the US had just overtaken the UK to become the

³⁴ Scott, James Brown. 1921. *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*. New York: Oxford University Press, 70. This volume is considered the most complete and accurate archival source for the proceedings of Hague conferences of 1899 and 1907.

³⁵ Lyons, F. S. L. 1963. *Internationalism in Europe 1815–1914*. Leiden: A. W. Sijthoff, 355.

³⁶ Allain, Jean. 2000. *A Century of International Adjudication: The Rule of Law and its Limits*. Cambridge University Press, 11.

most dominant state; its share of global power had increased from about 8% to 19% from 1860 to 1899.³⁷

For the purposes of the present study, this apparent change in G_1 is, of course, important. However, it should be noted that in 1899, most decision-makers still perceived the US to be a second-ranked power and the UK to be the global leader.³⁸ Of course, the exact moment of the change in leadership is difficult to assess as our measures of power can only offer an approximation of the real world and, in fact, decision-makers' perceptions are more important than our calculations more than a century after the events. That being said, for the purposes of this study, it is not essential to classify the US at that time as either G_1 or G_2 . As a reminder, according to A3, during times of relative power parity such as the one the world was experiencing at the end of the nineteenth century, we should expect powerful states from both these groups to be more likely to accept institutional restraints than at other times, precisely because power hierarchies are not clear and there is uncertainty in terms of who G_1 is or will be.

A truly significant change unfolding in the 1890s that virtually everyone acknowledged at that time, was the rapid waning of the UK's relative power. Indeed, the UK's share of global power declined during the last four decades of the nineteenth century from 30% to 18%. For the first time in almost a century (since the defeat of Napoleon), other countries perceived the former hegemon as relatively close in power to them but, more important, as still declining.

The relevance of the 1890s moment is noticeable in Figure 2.2. In 1897 there was a change in global leadership (i.e., a change in G_1), at least according to the aforementioned measure of national power. However, as mentioned, even more importantly the figure illustrates that at that time G_1 's power relative to G_2 was at a low and was expected to continue declining. In other words, this was a "moment 4" instance, when there is great uncertainty for future power distribution and when dominant states are more likely to accept institutional restraints on power.

The same figure suggests that G_3 's relative power was also at a peak. Therefore, not surprisingly, small states also took on an important role during the Hague Conference. Indeed, throughout the conference, the main clashes were not only between powerful states (i.e., G_1 and G_2), as had been the case at the founding of the Concert of Europe or in pretty much all other international conferences prior to 1899. The inclusion of small states (G_3) in the debates was due to three developments. First, as mentioned, by the late nineteenth century legal positivism had come to be the dominant approach to international law. This strengthened the legal principle of equality of states. The Hague Conference indeed accepted

³⁷ See Singer, J. David, Stuart Bremer, and John Stuckey. 1972. "Capability Distribution, Uncertainty, and Major Power War, 1820–1965." In Bruce Russett (ed) *Peace, War, and Numbers*, Beverly Hills: Sage, 19–48.

³⁸ See Myers, Denys P. 1914. "The Origin of the Hague Arbitral Courts," *The American Journal of International Law* 8(4):769–801, 800.

this principle and allowed all countries, strong and weak, to be represented in the discussions of the various committees.

Second, great powers had accepted and even promoted broad participation of states, regardless of power, in the first IGOs that had emerged in the previous decades. As discussed, those very early organizations were established by great powers in order to impose their will more easily on as many other states as possible, by developing rules and regulations they supported in several technical matters. It was difficult now for them to revert to the Concert of Europe exclusionary practices of keeping small states out of international conferences.

Third, the main promoters of international arbitration, Russia and the United States (countries that were part of G_2 or that at least perceived themselves to be part of G_2), initially sought the support of small states (G_3) because they knew that they too were promoters of institutional restraints. The increased power of G_3 states at that time made such support worth seeking. Russia and the US hoped that, together, they could persuade the UK (still perceived as G_1) and even other G_2 states (such as France) to accept institutional restraints as they feared the potential future power concentration in one such state. The US feared that a European hegemon would become even more active in the Western Hemisphere. Russia felt that it could not keep up with the rapidly evolving arms race and also feared a future all-powerful state.³⁹

When the Hague Conference opened, Russia and the US were the first to call for a system of compulsory arbitration for all states and for the establishment of a Permanent Court of Arbitration. Small states also supported the new court. Yet, during the proceedings of the conference, the alliance between the two major powers that initiated the debates and the many G_3 states crumbled. The main disagreements came to be between G_1 and G_2 states working together on one side and G_3 states on the other side.

Indeed, towards the end of the 1899 Hague Conference, none of the G_1 or G_2 states were truly willing to allow for formal rules that would erode their control over international affairs. In fact, most of them even protested the relatively innocuous Article 27 that stated: "The signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to *remind* these latter that the Permanent Court is open to them" (emphasis added). Instead, they sought to develop rules giving them almost complete control over the institution. For example, they proposed that only five countries name judges to the court.⁴⁰ The long history of the Concert of Europe giving virtually complete control to the five most powerful states made it fairly obvious which countries would be represented on the court under this plan. Great powers argued that it was only

³⁹ Allain, Jean. 2000. *A Century of International Adjudication: The Rule of Law and its Limits*. Cambridge University Press, 21.

⁴⁰ Scott, James Brown. 1921. *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*. New York: Oxford University Press, 127.

normal for them to take on a more important role in the PCA because they were the only ones that could actually enforce international law.⁴¹

Small states countered this great-power initiative. The Bulgarian delegation proposed that all states have equal representation in the selection of judges. The American, British, and German representatives responded declaring that they were willing to allow for such broad input in judges' selection, but only if countries with larger population, production, and trade would have permanent representation on the court while smaller states would be present by rotation.⁴²

Faced with the prospect of having yet another international institution controlled almost entirely by great powers, small states came together to block the proposal. Great powers decided to acquiesce to some of the small states' demands so they could establish a truly multilateral institution. The French jurist and president of the conference, Leon Burgeois, sought to assuage small state fears by arguing that:

"International institutions like this will be the guarantee of the weak against the strong. In conflicts in strength when it is a question of lining up soldiers of flesh and steel, there are the great and the small, the weak and the strong. When swords are thrown into the two trays of the balance, one may be heavier and the other lighter. But, when we throw in ideas and rights, the inequality ceases and the rights of the smallest and the weakest weigh equally with those of the greatest. This idea has dictated our work, and we have thought especially of the weak in carrying it out."⁴³

In the end, the two groups agreed to have judges come from all states.⁴⁴ However (especially due to this agreement), the introduction of mandatory adjudication procedures, was only supported in the end by small states. Great powers either opposed mandatory adjudication from the start (as in the case of the UK and France) or initially backed it only to later reverse course (in the case of the US and Russia). The PCA therefore had to settle for *voluntary* adjudication.

Moreover, to ensure that the rule allowing judges to come from all states did not affect the outcome of decisions, great powers insisted that parties to an arbitration could choose any judges, including their own nationals. They also did not introduce any requirement that arbitrators be impartial.⁴⁵

⁴¹ Scott, James Brown. 1921. *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*. New York: Oxford University Press, 337.

⁴² Caron, David D. 2000. "War and International Adjudication: Reflections on the 1899 Peace Conference," *American Journal of International Law* 94(1): 4–30, 22.

⁴³ Scott, James Brown. 1921. *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*. New York: Oxford University Press, 138.

⁴⁴ Mackenzie, Ruth, Kate Malleson, Penny Martin, and Philippe Sand. 2010. *Selecting International Judges: Principle, Process and Politics*. Oxford: Oxford University Press, 12.

⁴⁵ Scott, James Brown. 1921. *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*. New York: Oxford University Press, 68.

While the PCA is now seen as a weak institution compared to the international courts that emerged later, it played an important role in the evolution of international law. It became a true international *institution*, albeit a crude one, where states, especially powerful ones, had a great degree of control over who conducted the arbitration and even over some of the arbitration rules. Great powers' ability to shape judicial outcomes in the PCA can therefore be considered similar to that of monarchs and of powerful nobles during the Middle Ages. In both cases G_1 and even G_2 could manipulate the weak institutions to avoid decisions that ran counter to their interests.

And yet, one can argue that the PCA also was not the kind of institution that would have been designed had only great powers been part of the founding negotiations. Small states were able, at least in principle, to enshrine legal equality of states in the rules of the PCA. They could now speak out against the most powerful states and could at least *seek* arbitration when they felt that great powers had wronged them. This approach was very different than the one in the Concert of Europe where, as mentioned, small states rarely participated in deliberations and, in fact, were threatened by great powers when they voiced their concerns about the unfair way in which they were treated.

Once it became clear that the PCA would be weak, some small states pushed for the establishment of complementary international institutions for mandatory arbitration. In 1902, Costa Rica, El Salvador, Honduras, and Nicaragua founded the Central American Court of Justice. The court provided for obligatory arbitration.⁴⁶ This was possible in part because Mexico and, especially, the US, were willing to enforce the decisions of the court.⁴⁷

Among US officials, the strongest supporter of the Central American Court was Elihu Root, who at that time was secretary of defense.⁴⁸ A few years later, in 1907, Root became secretary of state and his support for mandatory arbitration became even more visible in the Second Hague Conference. From his official position, he instructed the US delegation to this important conference to seek the transformation of the PCA into a permanent court with full-time judges and compulsory jurisdiction. As in 1899, American efforts to develop a more powerful international judicial system were primarily due to top US officials seeking to tie the hands of powerful European states. Interestingly, although by that time the US was almost certainly more powerful than any other state and its relative power compared to that of the next four most powerful states was increasing (as Figure 2.2

⁴⁶ Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 42.

⁴⁷ Allain, Jean. 2000. *A Century of International Adjudication: The Rule of Law and its Limits*. Cambridge University Press, 73.

⁴⁸ Allain, Jean. 2000. *A Century of International Adjudication: The Rule of Law and its Limits*. Cambridge University Press, 77.

suggests), European decision-makers still viewed their American counterparts as representatives of a second-rate power.⁴⁹

Root promoted the idea of compulsory PCA rulings. He felt that the main reason states refused the court's compulsory character was that judges were not independent. Despite strong American support for a more powerful PCA, the conference reflected even greater dissensions between powerful and weak states than in 1899. While most small states supported compulsory arbitration, powerful states other than the US opposed it. Moreover, even for the US, support for this principle was contingent on having powerful states gain greater representation on the court.⁵⁰ Small states, many from Latin America (led by Brazilian Ruy Barbosa), opposed an organization reflecting existing power disparities. Negotiations for a reformed PCA thus broke down. While small states could not transform the PCA into an organization with mandatory arbitration *and* with equal representation, they were able to avoid the creation of a powerful institution completely controlled by the five most powerful states.

One of the few successes of the 1907 conference was the Porter Convention. The treaty was proposed by the American diplomat Horace Porter and represented a compromise between the European powers that did not want to set any limits on states' military intervention and smaller states promoting the Drago doctrine. The Drago doctrine (itself a narrower application of the Calvo doctrine) had been advocated for some time by Latin American states which sought to ban the use of armed force to collect state debts. The Porter Convention prohibited the use of armed force when government debt was owed to private parties. However, it did not prohibit intervention when the debt was owed to other states. In other words, powerful states were willing to accept some restraints when governments were not directly affected by the issue and nongovernmental actors owed the debt. Moreover, force could still be used even in the case of privately owned debt if the debtor state either refused arbitration or failed to implement an arbitral decision. Many small states eventually refused to join the convention as they felt it did not limit powerful states sufficiently.⁵¹ However, despite its narrow application, the Porter Convention became a milestone in international law as it was the first multilateral treaty to stipulate actual legal limits on the use of military force.⁵²

⁴⁹ See, e.g., Obregón, Liliana. 2017. "The Third World Judges: Neutrality, Bias or Activism at the Permanent Court of International Justice and International Court of Justice?," in Schabas, William and Shannonbrooke Murphy (eds.). *Research Handbook on International Courts and Tribunals*. Northampton, MA: Edward Elgar Publishing, 181–200.

⁵⁰ Scott, James Brown. 1921. *The Hague Conventions and Declarations of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*. New York: Oxford University Press, 70.

⁵¹ See Hague Convention II on the Limitation of Force for the Recovery of Contract Debts, October 18, 1907, Charles I. (Charles Irving) Bevans, and United States. *Treaties And Other International Agreements of the United States of America, 1776–1949*, Department of State:1976, 607–18.

⁵² Neff, Stephen C. 2014. *Justice among Nations: A History of International Law*. Cambridge, MA: Harvard University Press, 338.

The PCIJ and ICJ: more changes to, and consolidation of, international institutional restraints

The death and destruction of World War I led to increased pressures for the development of institutionalized international law mechanisms. The initial negotiations involving the League of Nations Covenant referred to the Covenant as a “Constitution.”⁵³ Most important, there was support for the new League of Nations to include an international court for interstate disputes. The initial great power proposals for the League mentioned such a court but did not go into detail describing it. Woodrow Wilson only made a vague reference to the court in his initial plans for the IGO, despite being told by Colonel House, his main advisor on League issues, that “in time the court might well prove the strongest part” of the organization.⁵⁴

The first specific proposal for such a court came from Denmark, Norway, and Sweden (G₃ states).⁵⁵ Great powers opposed it. Robert Cecil, head of the League of Nations section of the British Foreign Office and one of the main architects of the new IGO, foresaw problems with the court “if the small states maintained the attitude they adopted in 1907” and argued that they “must and will abandon the doctrines of Barbosa.”⁵⁶ Indeed, when negotiations on the Covenant broadened beyond great powers, small states came out insisting on a specific reference to the principle of equality among states. Even Germany, which after losing the war was not considered a great power at that time, requested this reference. The American, British, and French delegations did not give in, keeping wording on state equality out of the Covenant. Moreover, they requested specifically that the selection of judges for the court be primarily in their hands.⁵⁷

It is perhaps important to point out that by 1919 the US was acknowledged to be the dominant state (the new G₁). However, Figure 2.2 suggests that the rapid increase in the US relative power immediately after World War I was short lived. As many European great powers were able to quickly recover from the conflict fought on their territories, the collective power of G₂ quickly caught up with G₁’s power. Therefore, through most of the interwar era, especially in the 1930s, there

⁵³ See, e.g., Milewicz, Karolina. 2020. *Constitutionalizing World Politics: The Logic of Democratic Power and the Unintended Consequences of International Treaty Making*. Cambridge; New York: Cambridge University Press, 4.

⁵⁴ Miller, David H. 1928. *The Drafting of the Covenant*. Volume II. New York: G.P. Putnam’s Sons, 7. This volume (written by a legal adviser to the US peace delegation who co-authored the draft Covenant used as the basis for the negotiations) and Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press represent the main archival sources for debates surrounding to PCIJ’s establishment.

⁵⁵ This important role of G₃ states should not be surprising. As Figure 2.2 indicates, after World War I, their relative power was considerable, and it continued to grow throughout the 1920s.

⁵⁶ Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 95.

⁵⁷ Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 98–9, 101.

was some uncertainty in terms of the relative power of G_1 and of several G_2 challengers. Consequently, this period also experienced moments when great powers were prepared to accept institutional restraints.

During the negotiations leading to the League of Nations, small states were allowed to participate, just as they had been included in those leading to the establishment of the PCA two decades earlier. It was difficult to keep them out of this process after decades in which the customs of all international meetings had given all states the right to participate. Moreover, during times when the most powerful states, especially the US, were promoting democratic norms of equality to the functioning domestic government institutions around the world, it was difficult for them to completely deny such equality in the international realm.

Therefore, although the initial discussions for establishing the League took place only among great powers, in time all states were given a word in designing the new IGO. When great powers and small states met to discuss the Covenant in spring 1919, G_1 and G_2 states could not agree with G_3 states on the plans for the future court. The former wanted the Council, where they had more influence, to control the court, while the latter preferred having the more egalitarian and inclusive Assembly control it.⁵⁸ The two sides were only able to include general guidelines for the court in the Covenant and established a body of experts to adopt specific rules. Great powers supported this solution because they thought that, as the most influential legal experts came from their countries, the experts would push for rules giving them greater control over the new court.

This Advisory Committee of Jurists met in June and July 1920 and submitted to the League a series of draft court rules. The most important aspects for the present study to come out of this committee's work were its support for 1) the independence of court judges from the "political" matters of the League and 2) the role of both great powers and small states in selecting judges. Support for the independence of judges in the PCIJ was so great among the expert jurists from all states that, when the committee's proposal reached the League, even government representatives of powerful states were pressured to accept it. The French statesman Leon Bourgeois, who presided over the League Council, argued:

"It will be for the League to establish the Court and to draft its Statute. But from that moment, and so long as the League of Nations has not by its sovereign power altered those rules, the Court is independent."⁵⁹

Article 2 of the court's rules stipulated that "The Permanent Court of International Justice shall be composed of a body of independent judges elected regardless of

⁵⁸ Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 104–5.

⁵⁹ Cited in Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 120

their nationality [...].” However, in part because of such independence, great powers opposed giving the court a mandatory jurisdiction while small states supported it.⁶⁰ Countries reached a compromise by adding a protocol that allowed states to choose whether they accepted the court’s compulsory jurisdiction or not.

The election of judges was a more contentious issue than that of their independence. As expected, powerful states sought a greater say for their countries in the elections and therefore wanted the decisions to be taken in the League Council. Small states preferred they be taken in the Assembly. The debates were similar to those in the 1907 Hague Conference. In fact, many officials from the 1907 conference (and even from the one in 1899) were present in the 1920 negotiations for the PCIJ.

The solution to the dilemma of judges’ selection was offered in the Advisory Committee by Elihu Root, the former US secretary of state and secretary of war who now was present in his personal capacity, as a judicial expert. He proposed that the Council and Assembly be equally involved in judges’ selection so all states, great and small, could influence the process. Observers from that time considered that without this “mixed” solution the two sides would not have agreed on how to elect judges.⁶¹

Several other elements in the process of judges’ selection allowed powerful and small states to accept this compromise. First, the Committee of Jurists called for the PCA (where all states had equal influence) to be responsible for nominations. Second, it established a rule allowing all states involved in a dispute before the court to have one of their own nationals participate in the case as judge.

Of all the states represented at the founding of the PCIJ, the UK was originally the least enthusiastic for a powerful court. However, it should be noted that there was a tremendous difference between the positions of the British government, which opposed a strong PCIJ, and those of British jurists, who promoted the idea of an independent and powerful court. In the end, the former group ceded to the pressures from the latter group and to those from smaller states and accepted the independence of the PCIJ judges.⁶²

The PCIJ served as a precedent for the application of the principle of international judges’ independence in many future international courts, starting with the International Court of Justice, established after World War II as part of the UN. However, the principle was not truly enshrined in the other international tribunals that were set up in the years immediately following the end of World War

⁶⁰ Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 189–92.

⁶¹ Hudson, Manley O. 1972. *The Permanent Court of International Justice, 1920–1942: A Treatise*. New York: Arno Press, 181.

⁶² Lloyd, Lorna. 1985. “A Springboard for the Future: A Historical Examination of Britain’s Role in Shaping the Optional Clause of the Permanent Court of International Justice,” *American Journal of International Law* 791: 28–51.

II, the International Military Tribunal (known as the Nuremberg Tribunal), that tried German officials for crimes committed during the war, and the International Military Tribunal for the Far East (known as the “Tokyo Tribunal”), that tried Japanese officials involved in the same war. Notably, both tribunals were established at a time when G₁’s relative power (i.e., that of the US) was at a peak and when we would not expect it to allow international courts to act as restraints on the most powerful states.

The two international tribunals were the first of their kind, intended to deal with individuals rather than states. Previous similar initiatives, such as the one during the 1899 Hague Convention that sought to establish an international criminal court and the 1918 efforts to put Kaiser Wilhelm on trial for his actions at the outset and during World War I, never came to fruition. In 1937, the League of Nations also adopted a treaty to establish an international criminal court, but the treaty never received the necessary number of ratifications.⁶³

In his opening statement at the Nuremberg trials, the US prosecutor presented the significance of the tribunal in the following manner: “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”⁶⁴ Despite this official argument that the proceedings were somehow a restraint on powerful states’ decisions, in practice, the tribunal generally has been portrayed by historians as lacking the necessary independence from the international politics of those times. In fact, it was seen as an instrument of the powerful rather than a restraint on them. It is true that the tribunal was a more moderate solution than the one offered by Stalin, who suggested that ten to fifty thousand Germans be executed. Although Churchill was shocked by these numbers, he too supported executions initially arguing that the guilt of such individuals “was simply too obvious” for a trial.⁶⁵

While the tribunal indeed allowed the punishment of top German officials through a judicial approach, it was nevertheless far from being the objective instrument that the victorious powers sought to portray. For instance, the charter of the tribunal was devised by officials who later served on it. In fact, the charter was adopted in a forum over which US Supreme Court Justice Robert Jackson presided. Jackson ended up being the US Prosecutor during the trials. The judges on this tribunal were only from the four great powers which had won the war against Germany: France, UK, US, and USSR. Additionally, throughout its

⁶³ Schiff, Benjamin. 2008. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 23.

⁶⁴ See Jackson, Robert. 1945. “Opening Statement before the International Military Tribunal” available at <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>

⁶⁵ Bloxham, Donald. 2001. *Genocide on Trial: The War Crimes Trials and the Formation of Holocaust History and Memory*. Oxford: Oxford University Press, 9.

proceedings, the tribunal brought four types of charges against German officials: waging an aggressive war, crimes against humanity, war crimes, and conspiring to commit the first three crimes. Of these four categories of crimes, only war crimes had been defined in international law prior to the war.⁶⁶ Even the unanimous nature of the verdicts did not help dispel the opinion that the tribunal's decisions were political in nature and had been made prior to the start of the trials. The establishment and functioning of the Nuremberg Tribunal, as well as other developments immediately after World War II, are reminders that the evolution of international institutional restraints (like the one of domestic institutional restraints) are not always towards stronger restraints. There are also times of reversals, especially when there is a strong power imbalance among the dominant states.

By contrast, the Tokyo tribunal included justices from eleven different states, some of which were not great powers. The decisions at the Tokyo Tribunal were often split with judges from some of the smaller states disagreeing with those coming from powerful states.⁶⁷ However, even the Tokyo tribunal was seen as a politicized institution, especially as it ignored certain types of crimes and individuals (most importantly, Emperor Hirohito) while trying others. Also, it was established through a declaration issued by General Douglas MacArthur, the Supreme Commander of the Allied Forces in Japan, and was virtually entirely devised by US officials.⁶⁸

Great powers also dominated, as expected, other international institutions established immediately after World War II. This was in part possible because G_3 's relative power after World War II was at the lowest point for the entire period of the nineteenth and twentieth centuries, as Figure 2.2 indicates. From the outset, small states had hoped that the ICJ could become a restraint on the other organs of the United Nations.

Most of the efforts to give the ICJ such a prominent role emphasized its ability to keep the Security Council in check, as the latter was considered to have become the most influential UN organ. In the negotiations that took place in 1945 over the charter, Belgium led small states' efforts to introduce an amendment that would have given any state that was part of a dispute discussed in the Council the right to request an advisory opinion from the ICJ as to whether the UN Security Council's decision respected its "independence and vital rights." The USSR, US, and UK all spoke out against this amendment and were able to keep it out of the charter.⁶⁹ The

⁶⁶ Carlson, Kerstin Bree. 2018. *Model(ing) Justice: Perfecting the Promise of International Criminal Law*. Cambridge: Cambridge University Press, 20.

⁶⁷ Carlson, Kerstin Bree. 2018. *Model(ing) Justice: Perfecting the Promise of International Criminal Law*. Cambridge: Cambridge University Press, 34–5.

⁶⁸ Bassiouni, M. Cherif. 1986. "Nuremberg Forty Years After: An Introduction," *Case Western Reserve Journal of International Law* 18: 261–6.

⁶⁹ Amr, Mohamed Sameh M. 2003. *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*. The Hague: Kluwer Law International, 300–1.

agreement among the apparent G_1 and G_2 states is expected. As Figure 2.2 indicates, after World War II (just like after World War I), it was clear once more that the US was by far the most powerful state and that its relative power had, in fact, increased. There was no reason for G_2 states to believe that the superpower would accept any restraints on its power even if at least one of them (the USSR) may have truly feared such power concentration. Moreover, as mentioned, G_3 states were weak and, therefore, G_2 did not find it useful to support their positions.

And yet, China, a second-ranked power at that time, with a permanent seat and veto in the UNSC, was more accepting of the ICJ playing a restraining role on the UNSC. In fact, as early as the 1944 Dumbarton Oaks Conference which brought together the great powers to discuss the future United Nations, the Chinese delegation was the one that requested the addition of wording mentioning that UN actions needed to be “in conformity with the principles of justice and international law” in the very first article the charter. This addition reflected China’s fears that, through the UNSC, the US and the other great powers may come to yield too much influence and that they needed to be restrained in some way.⁷⁰

Despite the fact that the ICJ was established at a time when the main approach to international relations had shifted from the idealism of the post-World War I era to realism, and when there had been some changes among the states that dominated global politics, the new ICJ followed the PCIJ model in many ways. In fact, many scholars consider the former simply a virtual continuation of the latter.⁷¹ Article 2 of the ICJ statute copied almost word for word Article 2 of the PCIJ statute proclaiming judges’ independence. The PCA nominates ICJ judges just as it nominated PCIJ judges. Also, the UN General Assembly and Security Council both vote on candidates for judges, just as the Assembly and Council had voted in the League. The rule allowing states involved in a dispute to have a judge serve on the case also remained.⁷²

ICJ judges have fairly long (9-year) terms to insulate them from political influences. However, the decision to allow ICJ judges to renew their tenure implies they are under pressure to “please” states, especially powerful ones that have a veto in their election in the UNSC.⁷³

It is also relevant to note that each of the five most powerful states (P5) have always had one national as a judge on the ICJ. This outcome is based only on tradition, not formal rules. Similarly, all great powers (including the US which

⁷⁰ Amr, Mohamed Sameh M. 2003. *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*. The Hague: Kluwer Law International, 281.

⁷¹ Oppenheim, Lassa and Ronald F. Roxburgh. 1952. *International Law: A Treatise*. London: Longmans, Green, 47.

⁷² Posner, Eric A. and Miguels De Figueiredo. 2005. “Is the International Court of Justice Biased?,” *Journal of Legal Studies* 34: 599–630.

⁷³ Zimmermann, Dominik. 2014. *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*. Baden-Baden: Nomos; Oxford UK: Hart Publishing, 159–60.

was not a member of the League of Nations) had at least one and sometimes even two judges on the court in the PCIJ.

Just as important, the ICJ has maintained the same optional clause allowing states to choose whether or not they want to accept the mandatory jurisdiction of the court. While some great powers have at times accepted the clause, they are far less likely to do so than small states. Currently, of the 74 countries accepting compulsory jurisdiction, only the UK is a P5 state.

Most significant, in 1986 the US withdrew from the clause. This came after the ICJ sided with Nicaragua in its case against the US, finding that the US had violated international law when supporting the Contras in their fight against the Sandinistas. The decision required that the US pay \$17 billion reparations to Nicaragua. The US refused to accept the decision and pay the reparations.⁷⁴ At that time, the American ambassador to the UN, Jeane Kirkpatrick, declared that the Court was a “semi-legal, semi-judicial, semi-political body, which nations sometimes accept and sometimes don’t.”⁷⁵ The question of the reparations was brought to the UN Security Council six times between 1982 and 1986. Each time the US vetoed the resolution that called for its compliance with the ICJ judgment.⁷⁶

Despite the advantages that great powers have had in the PCIJ and the ICJ, these courts nevertheless functioned many times as restraints on their ability to take the actions that they pleased. Thus, in 1924, in the “Mavrommatis Palestine Concessions” case, the second case heard by the PCIJ, the court came down with a decision that gave Greece at least a partial victory over the UK (that at that time had a mandate over Palestine). The case arose from the Palestinian government’s refusal to recognize a contract that a Greek citizen had concluded with Ottoman authorities for some public works concessions. The UK tried unsuccessfully to have the case dismissed by arguing that the court lacked jurisdiction over the matter. While the PCIJ upheld the British claim for the public works in Jaffa, it dismissed it for those in Jerusalem.⁷⁷ Of course, this took place while the UK was the most dominant European state and, together with France, one of the two major powers left in control of the League of Nations, the umbrella organization under which the PCIJ functioned.

Similarly, in 1927, France lost the “Lotus” case it had brought against Turkey in the PCIJ. In this early landmark case, the court found that Turkey’s decision to institute criminal proceedings against a French lieutenant responsible for a

⁷⁴ Bilder, Richard. 1987. “International Dispute Settlement and the Role of International Adjudication,” *Emory Journal of International Dispute Settlement* 1(2): 142–73, University of Wisconsin Legal Studies Research Paper Archival Collection, Available at SSRN: <https://ssrn.com/abstract=1551963>

⁷⁵ Posner, Eric A., and Miguel F. P. de Figueiredo. 2005. “Is the International Court of Justice Biased?” *The Journal of Legal Studies* 34(2): 599–630, 600.

⁷⁶ See Global Policy Forum at <https://www.globalpolicy.org/component/content/article/102/40069.html>

⁷⁷ See Permanent Court of International Justice. 1924. “The Mavrommatis Palestine Concessions, Publications of the Permanent Court of International Justice,” Series 1, No. 2, August 30th, 1924, Leyden, A.W. Siedjhaffs Publishing Co. at https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf

collision between ships that had killed eight Turkish nationals did not conflict with principles of international law, as France claimed.⁷⁸

Since the ICJ was established, great powers such as France, Russia/USSR, UK, and the US, together have lost more cases than they have won. In other instances, cases that were brought to the court by these powerful countries were dismissed because they were found to not fall under the jurisdiction of the court.⁷⁹ On yet other occasions, great powers did not even seek to take matters to the ICJ because they knew that they would lose the cases.

It is perhaps noteworthy that the US, the most powerful state in the second half of the twentieth century, lost more cases in the ICJ than the other P5 countries put together. In its first ever case brought to the ICJ, in 1950, the US claimed that a new system of import license controls adopted in Morocco impeded upon the rights of its nationals in that country. It lost that case just as it lost more than half a dozen other ICJ cases throughout the Cold War.⁸⁰ Virtually all such losses were instances either where the World Court *did not* take an action that the US sought or where it made a decision that ran counter to US interests but was not extraordinarily costly for the superpower.

These cases of international institution acting as a fairly weak restraint on the most powerful state (as well as on those of the next 3–4 most powerful states) are similar to those discussed in chapter 3 where medieval courts often could make it more difficult for monarchs to take the action that they wanted but not to outright stop them from such actions. The literature has not focused as much on the many cases where the most dominant states *could not achieve* their goals through the ICJ. Instead, it has highlighted the more widely reported yet narrower set of instances where great powers *did not accept ICJ decision*, such as the aforementioned dispute between Nicaragua and the US, where great power interests, in fact, were *not* affected. Due to such focus, we have often overlooked the weak but still important role that the World Court has played as a restraint on powerful states.

The ICC and other Post-Cold War courts: further consolidating international institutional restraints

The demand for international criminal courts was spurred after the end of the Cold War, when numerous civil wars erupted. The first post-Cold War criminal courts were the International Tribunal for the Former Yugoslavia (ICTY), established in

⁷⁸ See Permanent Court of International Justice. 1927. “The Case of the S.S. Lotus. Publications of the Permanent Court of International Justice,” Series 1, No. 10, September 7, 1927, Leyden, A.W. Siedjhaffs Publishing Co. at https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf

⁷⁹ This observation is based on all cases in which the P5 countries were involved, from <https://www.icj-cij.org/en/cases-by-country>

⁸⁰ International Court of Justice. 1950. Rights of Nationals of the United States of America in Morocco. <https://www.icj-cij.org/en/case/11>

1993, and the International Criminal Tribunal for Rwanda (ICTR), established in 1995. They both focused on crimes committed in specific countries. Moreover, the countries from which the defendants came were relatively small. The states that were primarily behind the establishment of these tribunals were powerful ones, especially the P5 states. Implicitly, these international institutions, like the Nuremberg and Tokyo tribunals after World War II, were perceived as tools for the powerful to impose their will on weaker states, not as institutional restraints on concentrated power.⁸¹

For example, after NATO's 1999 bombings intended to drive Serbian forces out of Kosovo ended up killing hundreds of civilians, the alliance's spokesperson, Jamie Shea, declared that ICTY would only look into the issue of indiscriminate bombings if NATO would allow it to do so. Although ICTY's chief prosecutor later investigated the bombings, many saw the process as one leading to a foregone conclusion, reflecting, once again, the will of powerful states.⁸²

The two tribunals had numerous flaws that contributed to their ineffectiveness. Nationals from the former Yugoslavia and from Rwanda who wanted to cooperate with the tribunals feared retribution, especially because the witness protection mechanisms were weak. The tribunals had a difficult time recruiting and retaining staff from among locals and even from other states. ICTY and ICTR also faced financial problems. In some instances, these led to corrupt practices and, implicitly, to an even greater erosion of their perceived legitimacy. As the UN Security Council only dictated the broad institutional structure of these organizations, they left the all-important rules of procedure and evidence up to the courts themselves. This, in turn, led to accusations that the ICTY and ICTR institutions modified the rules under which they worked to fit their own purposes and, ironically, led to further accusations that they were in fact just tools through which great powers could achieve their goals.

A reflection of great power influence in the work of the two ad-hoc tribunals is that they both functioned on the principle of "primacy" rather than "complementarity" on which the ICC was later established. In the former case, one expects the actions and decisions of the tribunal to supersede those of domestic courts from the country where the crime was perpetrated while in the latter instance cases are only taken on when states have not dealt with them. Also, unlike ICTY and ICTR, which were established by the UNSC and implicitly allowed for much greater input from powerful states, the ICC was subject to considerable scrutiny and direction from all states through the intergovernmental Assembly of State Parties that founded the tribunal. While the latter, more inclusive, process was also

⁸¹ Carlson, Kerstin Bree. 2018. *Model(ing) Justice: Perfecting the Promise of International Criminal Law*. Cambridge: Cambridge University Press.

⁸² Schiff, Benjamin. 2008. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 63.

more politicized, it was seen as bestowing greater legitimacy on the ICC, compared to that of the ICTY and ICTR.⁸³

Great power influence over the ICTY and ICTR was also reflected in the design of the two tribunals. As ICTY needed to be established quickly, soon after he was named president of the tribunal, Antonio Cassese immediately took up an American proposal for rules of procedure. The UK also played an important role in finalizing the rules. Not surprisingly, the ICTY (and the ICTR that copied most of its rules from the ICTY) came to be based primarily on the common law tradition of these two powerful states.⁸⁴ In the negotiations for the ICC statute, states with civil law systems, especially France, sought to adopt a model that was closer to their own. Perhaps most important, the ICC established a Pre-Trial Chamber of judges, between the Prosecutor and the Trial Chambers. This innovation was intended to give judges a greater say in shaping cases, as is the case in the civil law tradition.⁸⁵

One of the main reasons ICTY was not very successful (at least initially) was that powerful Western states did not want to add to the already broadening operational mandate of post-Cold War NATO in apprehending suspected war criminals. Without NATO support, the capture of suspects was extremely difficult. In 1998, when Louise Arbour took over as Chief Prosecutor of the ICTY and ICTR, she often used her office to shame states into action. Rather than issuing public indictments and then criticizing states for not acting upon them, she first issued secret indictments, letting states know that if they did not act to arrest the suspects, she would make them public.⁸⁶

Despite their flaws, the ICTY and ICTR contributed to the advancement of international law. They expanded and clarified the earlier crime definitions that had been established by the post-World War II tribunals. The international law that they shaped also led to renewed interest in an international criminal court after the failed attempts of 1899, 1919, and 1937. The two tribunals proved that the UN could create the necessary organizations to deal with international crimes that before would go unpunished. Moreover, due to the amount of time and effort that states had to put into establishing and running the two tribunals, a “tribunal fatigue” developed that led to pressures for the establishment of a permanent ICC, to avoid forming separate criminal courts each time it was necessary.⁸⁷

⁸³ Schiff, Benjamin. 2008. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 47.

⁸⁴ Williams, Paul R. and Michael P. Scharf. 2002. *Peace with Justice?: War Crimes and Accountability in the Former Yugoslavia*. Lanham, MD: Rowman & Littlefield, 106.

⁸⁵ Schiff, Benjamin. 2008. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 49.

⁸⁶ Hazan, Pierre. 2004. *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia*. College Station: Texas A & M University Press, 94–8.

⁸⁷ Scheffer, David J. 1998. *Challenges Confronting International Justice Issues*. New England International & Comparative Law Annual 4: 1–6.

The post-Cold War movement to establish the International Criminal Court actually started before the ICTY and ICTR were created. In 1989, Arthur Robinson, Prime Minister of Trinidad and Tobago (who had previously been the director of an NGO called the Foundation for the Establishment of the International Criminal Court), together with some other longtime advocates for such an institution who came from nongovernmental circles, proposed that the idea of an international criminal court be studied by the UN's International Law Commission (ILC). The UN General Assembly approved the plans to have the ILC take up this question that same year. Although the first proposals for such a court centered on the narrow criminal issue of illicit drug trafficking, discussions within the ILC took on a broader focus, especially as news of atrocities from the wars in Yugoslavia made headlines.⁸⁸ By 1994 the ILC submitted to the UN General Assembly a first draft of the ICC statute. The General Assembly took up discussions of the statute in 1995 and set up a Preparatory Committee to negotiate the details of the new court and to eventually advance towards a plenipotentiary conference. By June 1998, when the Rome Conference was held to set up the ICC, the Preparatory Committee had expanded substantially on the ILC's original statute, going into much greater detail.

During the Rome Conference, and even in the years immediately preceding it, the main drivers of the ICC's founding process were the countries from the so-called group of "like-minded states," as well as a number of NGOs. Most of the states from this group were from the European Union. France, as mentioned, was seeking to avoid having yet another international tribunal (especially a permanent one) built almost exclusively on common law principles; together with Germany, it led the EU group. This original group of like-minded states (a combination of G₂ and G₃ states) built on the ILC proposal and sought a court that would deal with genocide, aggression, war crimes, crimes against humanity, as well as other crimes that had been the topic of already existing international conventions. The group pushed for a statute that would give the court a broad jurisdiction and a great deal of independence from the UN.⁸⁹

The Non-Aligned Movement states also joined early on in the process leading to the establishment of the ICC.⁹⁰ Not surprising, one of their main goals was to highlight crimes of aggression among the ones included in the statute. Some developing states also sought prohibitions against the use of nuclear weapons.⁹¹

⁸⁸ Schiff, Benjamin. 2008. *Building the International Criminal Court*. Cambridge: Cambridge University Press, 37.

⁸⁹ Schabas, William A. 2004. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press, 16–7.

⁹⁰ Figure 2.2 suggests that the G₂–G₃ coalition was expected. Immediately after the end of the Cold War, their respective power relative to G₁ was at a peak. However, by the mid-1990s, G₁'s relative power began increasing once more.

⁹¹ Benedetti, Fanny and John L. Washburn. 1999. "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance* 5(1): 1–37.

Other than France, the P5 states were much more cautious in their support for the emerging ICC. At best, they were willing to accept a weak court under the direct control of the UNSC. However, the UK shifted towards a more supportive position on the ICC when the Labour Party came to power, soon before the Rome Conference began. It thus joined the other EU member-states in their efforts to carve out an independent court.⁹²

Despite its general wariness of a powerful ICC, or perhaps because of such wariness, the US eventually became directly involved in the drafting process. It had the largest delegation at the conference and its representatives were active in negotiations of virtually all aspects of the statute. Its vigorous involvement in the negotiations also led most other states to compromise on their original positions in the hope of inducing the US to accept membership in the ICC. In the end, although the Clinton Administration supported membership in a weakened organization, it quickly became obvious that the Senate would not ratify the Rome Treaty. Moreover, soon after George W. Bush became president, the US “unsigned” the treaty. US rejection of ICC membership (and its leadership role in establishing the 1990s ad hoc tribunals that were not truly independent of great powers) supports A2 and does not run counter to expectations based on A3. Indeed, although Figure 2.2 indicates that US relative power compared to G₂ states was low in the immediate Post-Cold War era, it also shows that it was not declining any more, as it had in the first half of the Cold War, and in fact was slightly increasing. In other words, the 1990s were not a moment 4 instance when we expect a shift towards stronger institutional restraints.

The various compromises that states made throughout the negotiations of the Rome Treaty, especially in their attempts to appease the US, eventually led to a weaker ICC than the group of like-minded states had originally proposed and to an organization where great powers had more influence than small and medium-sized states that worked on the statute early on had envisioned. Such influence was assured through the powerful role that the Court’s Statute gave to the UN Security Council, both in the process of assigning cases and in the one of suspending activities. The Statute also did not include any provisions criminalizing the use of weapons of mass destruction, something that many weak states had originally sought.

However, there were also a good number of states that felt that the court was given *too much* independence and that the new institution allowed for *too much* erosion of state sovereignty. Some of these states, most importantly the US and China, voted to delay the establishment of the ICC. The vast majority of other countries nevertheless accepted the Statute, despite some of their misgivings. Most of these supporters of the institution saw the simple emergence of a permanent

⁹² Schabas, William A. 2004. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press, 16–7.

international criminal court as a momentous event, especially given the history of failed attempts to create one over the previous century.

One of the most important aspects of the ICC's ability to act as a restraint on great powers was the strong emphasis on the independence of its judges. Indeed, the Rome Statute is considered to be much more specific than the founding documents of previous international courts with regard to qualifications of its judges and to the criteria for their selection to the court. The strict guidelines for judges' selection were presented by their proponents as essential for avoiding as much as possible the politicization of this process.⁹³

The strong efforts to have independent ICC judges can be seen, at least in part, as the result of the increasingly powerful norms that developed throughout the post-Cold War era. As mentioned, legal scholars had promoted the projection of such norms from the domestic realm to the international one for almost a century, an example of the cross-level processes that led to similar institutions in domestic and international realms, represented with a white arrow in Figure 1.1. However, with the increase in the number of democratic states and independent domestic judiciaries around the world in the post-Cold War era, the norm of judges' independence was bolstered considerably compared to its standing during the Cold War. A reflection of these worldwide efforts as early as the 1980s was the adoption of the Montreal Declaration on the Independence of Justice that applies both to domestic and international judges.⁹⁴ The declaration resulted from an impressive coordination effort between legal experts from many international nongovernmental organizations, most notably the International Bar Association, International Commission of Jurists, LAWASIA, Amnesty International, and numerous international lawyers' associations. Notably, they were joined in their efforts by officials from existing international courts (i.e., from the now vibrant G_4 in the international judicial realm), such as the International Court of Justice and the European Court of Human Rights (ECHR).⁹⁵ Many similar concerted efforts to promote greater independence of domestic and international judges unfolded throughout the 1980s and 1990s. At the time of the ICC's establishment in 1998, the norm was widely accepted and thus codified in the Rome Statute.

In 2002, the International Criminal Court began operating. Currently, more than two thirds of all states have signed and ratified the Rome Treaty and become

⁹³ Mackenzie, Ruth, Kate Malleon, Penny Martin, and Philippe Sand. 2010. *Selecting International Judges: Principle, Process and Politics*. Oxford: Oxford University Press, 18.

⁹⁴ See <https://www.jiwp.org/montreal-declaration-1983>; also Shetreet, Shimon. 2003. "Standards of Conduct of International Judges: Outside Activities," *The Law & Practice of International Courts and Tribunals* 2(1), 127–62; Olbourne, Ben. 2003. "Independence and Impartiality: International Standards for National Judges and Courts," *The Law and Practice of International Courts and Tribunals: A Practitioners' Journal* 2(1): 97–126.

⁹⁵ Some have come to consider this broad epistemic community of international law experts to have played an even greater role than the one emphasized here, of simply contributing to the greater independence of international judges. See, e.g., Koskeniemi, Martti. 2010. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press.

members of the organization. Notably, all cases that have advanced in the ICC so far have been brought against nationals from G₃ states. This suggests that the court has functioned more as an organization allowing G₁ and G₂ to project their power rather than restraining it.

The three most powerful states (China, Russia, and the US) either never signed the treaty or signed but did not ratify it. Despite the decision of these great powers to not accept ICC membership, stipulations in the Rome Statute allow under certain circumstances for the court to take actions that could still affect them. Most important, citizens of non-member states could still be tried by the ICC for crimes committed on the territory of member-states.

Among great powers, the US has been the most outspoken critic of ICC intrusiveness. Its objections to the court are numerous. Perhaps most important it has argued that it “runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence.”⁹⁶ The argument implies that the ICC is not just a restraint on the US’ ability to act as it pleases, but that even this very powerful state could not act as a “check and balance” on the court once it becomes a member. While the argument may be an exaggeration of the ICC’s power, it does reflect that the court is perceived by some as having the ability to eventually become an important restraint on great powers’ actions.

The potential impact of the ICC, even on non-members, led the Bush Administration to take some immediate actions in 2002–2003 to ensure that US citizens, especially its armed forces, would not be subjected to the Court’s jurisdiction. On several occasions during those years, it threatened to veto UN Security Council extensions of UN peacekeeping operations if the resolutions would not include a clause stipulating that US military personnel were exempt from ICC jurisdiction. Also, in 2003, the US Congress passed the Servicemen’s Protection Act that placed severe restrictions on American federal and state institutions’ interactions with the ICC.⁹⁷

Most important, in 2002 the US began negotiating bilateral non-surrender agreements with numerous countries. These agreements are based on a loophole that the US purposefully supported in the Rome Statute. Specifically, Article 98 of the Statute stipulates that “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State

⁹⁶ Bolton, John R. 2003. “American Justice and the International Criminal Court: Remarks at the American Enterprise Institute, Washington, DC,” November 3, 2003 at <https://2001-2009.state.gov/t/us/rm/25818.htm>

⁹⁷ Benzing, Markus. 2003. “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity,” 7 *Max Planck Yearbook of United Nations Law*, 187–90. Available at https://www.mpil.de/files/pdf1/mpunybenzing_8.pdf

is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”⁹⁸ Since 2002 more than a hundred countries have signed such bilateral accords with the United States, thus agreeing not to surrender Americans to the jurisdiction of the ICC.

Overall, despite the original intent of small states that the ICC be a strong institution that could act as a restraint on the actions of all states, including the most powerful, the most dominant countries have not yet been *directly* affected by its emergence, especially as they have not yet accepted membership.⁹⁹ And yet, one can argue that the Court has taken some actions that *indirectly* run counter to interests of great powers. For example, in 2009 the Court issued a warrant for the arrest of Sudan’s president, Omar Hassan Al Bashir. After he was ousted from power in 2019, the Sudanese government declared that it would hand him over to the ICC.¹⁰⁰ These actions unfolded despite China’s strong support for Al Bashir and its interests in Sudan.¹⁰¹

An even more recent example of the ICC acting against the interests of a great power is the 2020 decision of the court’s Appeals Chamber to authorize an investigation into the situation in Afghanistan.¹⁰² Well before the court sought to identify individual American military personnel involved in crimes in Afghanistan the simple fact that it took on this issue was seen as unacceptable by the US government. In June 2020, only a few months after the ICC had declared that it would take on cases from the war in Afghanistan, the US president issued an executive order authorizing asset freezes and family entry bans against several ICC officials.¹⁰³

This last example offers an important illustration of how even the most powerful state has come to recognize the relevance and autonomy of individual staff from the ICC and from other international courts, that is of G₄. Indeed, the asset freezes and entry bans targeted individual ICC officials, not their countries of origin or the ICC itself.

⁹⁸ https://legal.un.org/icc/statute/99_corr/cstatute.htm

⁹⁹ In fact, small states, especially African ones, feel that the court is nothing more than an instrument intended to fulfill the will of great powers. See., e.g., Cole, Rowland J. V. 2013. “Africa’s Relationship with the International Criminal Court: More Political than Legal,” *Melbourne Journal of International Law* 14(2): 670–98.

¹⁰⁰ *The Guardian*. 2020. “Sudan Signals it May Send Former Dictator Omar al-Bashir to ICC.” *The Guardian*. 11 February 2020. At <https://www.theguardian.com/world/2020/feb/11/sudan-says-it-will-send-former-dictator-omar-al-bashir-to-icc>

¹⁰¹ In 2011, the Chinese president, Hu Jintao called Al-Bashir “a friend and brother.” Sen-gupta, Somini, 2015. “Omar al-Bashir Case Shows International Criminal Court’s Limitations,” *New York Times*, June 15, <https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html>

¹⁰² See International Criminal Court. 2020. “Situation in the Islamic Republic of Afghanistan.” ICC-02/17, available at <https://www.icc-cpi.int/afghanistan>

¹⁰³ See Human Rights Watch. 2020. “Q&A: The International Criminal Court and the United States,” September 2, 2020, at <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>

In sum, the ICC can be viewed as yet another incipient institutional restraint on powerful states. Although relatively weak, it does impact the perceived legitimacy of great powers and has often made it more difficult even for the most dominant states, such as the US and China, to achieve their goals. In this sense, it is indeed similar to the restraints on power generated by the early medieval courts in England and France, discussed in chapter 3.

The emergence of the ICC can be understood as part of the broader trend of rapid increase in the number of international courts in the post-Cold War era. In a comprehensive survey of developments, The Project on International Courts and Tribunals counted more than 120 international judicial or quasi-judicial bodies, almost 50 of which were established in the 1990s.¹⁰⁴ These bodies have been very diverse. Some of them are global in reach while others are regional or sub-regional. Some even focused narrowly on cases within only one or two countries, such as the Claims Resolution Tribunal for Dormant Accounts in Switzerland, established in 1997, or the Eritrea–Ethiopia Claims Commission, established in 2000. Some deal with relatively narrow issues while others took on a broad agenda that sought to resolve long-standing questions. In the latter category two very visible courts stand out: the International Tribunal of the Law of the Sea (ITLOS) and the World Trade Organization’s (WTO) Appellate Body, both established in the mid-1990s.

ITLOS began functioning in 1996 and was based on the UN Convention on the Law of the Sea, an agreement opened for signature in 1982 but only became effective in 1994. The convention represented the culmination of intergovernmental negotiations that took place over decades. By the twentieth century, the traditional seventeenth century understanding of a country’s territorial waters extending solely three nautical miles off its coast, had been replaced by a series of unilateral claims sometimes extending hundreds of miles from countries’ shores. A 1930 attempt to resolve the matter was unsuccessful. In 1956, the first UN Conference on the Law of the Sea (UNCLOS I) led to the adoption of four treaties but could not reach agreement on the essential question of the breadth of territorial waters. UNCLOS II, held in 1960 also was not successful in resolving this problem. The proceedings of both UNCLOS I and II reflected the strong tensions between the US and USSR. The vast majority of smaller states did not play a role in the negotiations as they had just become independent through processes of decolonization and were confronted at that time with numerous other more urgent domestic and international issues.¹⁰⁵ Currently, the 1982 Convention has been signed and

¹⁰⁴ See <https://www.elaw.org/content/project-international-courts-and-tribunals-international-judiciary-context-matrix>. For similar surveys see, e.g., Salles, Luiz Eduardo Ribeiro. 2015. *Forum Shopping in International Adjudication: The Role of Preliminary Objections*. Cambridge: Cambridge University Press. 18–19; Mitchell, Sara McLaughlin and Emilia Justyna Powell. 2013. *Domestic Law goes Global: Legal Traditions and International Courts*. Cambridge: Cambridge University Press, 1.

¹⁰⁵ Treves, Tullio. 2015. “Historical Development of the Law of the Sea,” in Rothwell, Donald, Alex G. Oude Elferink, Karen N. Scott, and Tim Stephens (eds.). *The Oxford Handbook of the Law of the Sea*. Rothwell. Oxford, New York: Oxford University Press, 1–23.

ratified by almost all states. However, significantly, the US is among the few countries to have held out from joining the convention and ITLOS. One of the main US government objections to the convention and membership in UNCLOS is that it would open itself up to climate change-related lawsuits.¹⁰⁶ All other great powers have ratified the convention and are part of UNCLOS.

In contrast, the US has been a strong proponent of the Dispute Settlement Understanding that came into being in 1995 when the WTO was established. This may be seen as intriguing considering that immediately after World War II the US resisted ratification of the International Trade Organization and, by doing so, led other states to give up on that IGO. The US decision in the early 1950s contrasted with its position during the war, when Roosevelt and Churchill called upon the creation of such an international institution in their 1941 Atlantic Charter.¹⁰⁷

After the end of the Cold War, not only did the US join the WTO, but it pushed for membership in the new organization of many other powerful states. Most notably, the US considered Chinese membership in the WTO essential because the strong rules of the new IGO could impose significant restraints on this rising economic giant (possibly the next G_1) in the future. The US felt that the benefits it would reap from placing restraints on this potential challenger (and on other states) was worth the costs it would incur from accepting the binding decisions of the WTO body.¹⁰⁸

One possible explanation for the American support of the WTO dispute settlement system but not of many other international tribunals formed in the early Post-Cold War era, such as the ICC or ITLOS, is that the superpower placed greater importance on trade, as China's rising *economic* power was more concerning to it. China's *military* power, while formidable, was less concerning to the US, relative to its own power, and therefore did not lead it to seek institutional restraints such as those that are offered through the ICC or ITLOS.¹⁰⁹

Although the present study focuses primarily on *global* restraints on power through international institutions, it is nevertheless useful to offer at least a brief discussion of the emergence and evolution of the European Court of Justice (ECJ), the most significant example of regional international courts mentioned above. While the most powerful countries in the world are not members of the ECJ and

¹⁰⁶ See, e.g., Groves, Steven. 2012. "Accession to U.N. Convention on the Law of the Sea Would Expose the US to Baseless Climate Change Lawsuits," *The Heritage Foundation*, March 12 2012. At <https://web.archive.org/web/20120314044246/https://www.heritage.org/research/reports/2012/03/accession-to-un-convention-on-the-law-of-the-sea>

¹⁰⁷ Daniel, Bugge Thorbjørn. 2005. *WTO Adjudication: An Institutional Analysis of Adjudicative Balancing of Competing Interests; Exemplified with Developments in Interpretation of GATT Article III and XX*. København: Thomson—Gadjura, 32–42.

¹⁰⁸ See Lardy, Nicholas R. 1999. "China's WTO Membership," in Brookings Policy Briefs, available at <https://www.brookings.edu/research/chinas-wto-membership>

¹⁰⁹ This argument is a reminder that, although I take a first-cut broad approach to power and its concentration, a disaggregation of the various types of power (such as military, economic, or soft) may offer an even more refined and complete understanding of developments.

therefore are not subject (at least not directly) to that court's influence, it has been argued that this European body can serve as a model for other international legal institutions and therefore deserves attention.¹¹⁰

The ECJ was not established as a purposeful restraint on states' actions. In fact, there is a general agreement that, when it was created in 1952 as part of the European Coal and Steel Community, it was intended to empower member states by assuring that the supranational high authority would not become too influential.¹¹¹ The Treaty of Rome confirmed the expectation that the ECJ would be a tool for protecting states' power within the European institutions, not erode it, and instead it was to act as a check on the power of the supranational Commission.

However, in time, the ECJ began carving out increased independence from governments. The court's judges' high degree of specialization in European Law insulated them from top government officials who were less versed in the intricacies of this increasingly rich and complex body of law. Additionally, they found allies in judges from domestic courts. They also collaborated closely with the Commission, with which they shared the same interests in empowering European rather than national institutions. ECJ judges and Commission officials are obvious examples of individuals from G₄. Their ability to develop and implement their long-term interests of gaining greater influence in European affairs gave them an advantage over national politicians who could only act based on their immediate, short-term, interests.¹¹²

The ECJ's potential to restrain governments' actions increased consistently from the 1960s until today. States did seek several times to regain their influence by weakening the ECJ. Not surprisingly, the efforts to erode such restraints were led by the most powerful states in the organization: France (when in the mid-1960s De Gaulle felt the ECJ could indeed become too powerful¹¹³), Germany (as was the case in 1966 when the government instructed customs officials and tax courts to ignore the ECJ's "Liitticke" decision¹¹⁴), and the UK (when in the early 1990s the government sought a smaller role for the ECJ in the negotiations before the Maastricht Treaty¹¹⁵). In all such instances, the smaller member-states generally fought against the weakening of the ECJ, an example of G₃ seeking an alliance with G₄ when the latter's relative power was on the rise and when it was becoming

¹¹⁰ Alter, Karen J. 1998. "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice," *International Organization* 52(1): 121–47, 145.

¹¹¹ Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers, 201–12.

¹¹² Alter, Karen J. 1998. "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice," *International Organization* 52(1): 121–47.

¹¹³ Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers, 351.

¹¹⁴ E.g., Stocker, Hans A. 1967. "Einzelklagebefugnis und EWG-Konmissionsentscheidung: Alternative oder ku- mulierter Rechtsschutz in Umsatzausgleichsteuersachen," *Der Betrieb* 40: 1690–92.

¹¹⁵ Brown, Kevin. 1995. "Government to Demand Curb on European Court," *Financial Times*, 2 February, 9.

a relevant partner in the ongoing tug of war over the future of European institutions. Today, the Court has come to act as one of the strongest restraints on an international institution's member-state actions. It can declare illegal national laws that are adopted and that violate EU laws, from gender equality to industrial relations. Just as important, member-states, including powerful ones such as France and Germany have come to accept virtually all of the court's decisions.¹¹⁶ Of course, the UK's recent withdrawal from the European institutions offers a pertinent example of how great powers can still avoid institutional restraints on their power when they feel they have come to be too constraining.

As a reminder, the above examples of ICC, ITLOS, the WTO's Appellate Body, and the ECJ, are only the most prominent ones of the spread and empowerment of international courts. Most consider that the proliferation of such tribunals has gone hand in hand with wider jurisdiction and more cases.¹¹⁷ Perhaps more important, it has gone hand in hand with the increasing independence of judges on these courts, with some scholars arguing that there is now a growing acceptance "that the future legitimacy and credibility of international tribunals will be critically tied to the extent to which they are viewed as independent."¹¹⁸ Indeed, in virtually all courts established in the post-Cold War era there have been efforts to insulate such institutions even more than before from great power influence, in a similar way as efforts in the nineteenth century led to a greater independence of domestic judiciaries in many states around the world.¹¹⁹ In sum, although great powers can still ignore many international laws and international courts, these institutions have come to form a broad network of significant restraints on all states, including on the dominant ones in the system. This development becomes especially evident when one compares the current status quo with the one two centuries ago when the Concert of Europe emerged or even about one century ago when the most meaningful international court in existence was the very weak PCA.

Conclusions: comparing the evolution of international laws and courts to domestic developments

By following the evolution of restraints on power through international law and courts in this chapter I can compare developments in the international realm over

¹¹⁶ Alter, Karen J. 1998. "Who Are the 'Masters of the Treaty'?": European Governments and the European Court of Justice." *International Organization* 52(1): 121–47.

¹¹⁷ Zimmermann, Dominik. 2014. *The independence of international courts: the adherence of the International judiciary to a fundamental value of the administration of justice*. Baden-Baden: Nomos, 102.

¹¹⁸ Benvenisti, Eyal and George W. Downs. 2011. "Prospects for the Increased Independence of International Tribunals," *German Law Journal* 12(5): 1057–82, 1057.

¹¹⁹ Zimmermann, Dominik. 2014. *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*. Baden-Baden: Nomos, 519.

the past two centuries with those involving restraints on power through domestic laws and courts over the past millennium. As mentioned, in this chapter, as well as in the two following chapters, I answer three main questions: What types of international institutional restraints developed? Who supported or opposed the institutional restraints? How (and why) did international institutional restraints emerge and evolve? By answering these questions, I can assess whether the six arguments regarding international institutional restraints on power derived in the previous chapters are supported and, more broadly, whether the processes in the two realms followed similar patterns.

What types of international institutional restraints developed?

The previous chapters have posited that international institutions are expected to be weak, similar to the incipient institutional restraints on concentrated power in the domestic realm starting in the Middle Ages. The laws and courts and, more broadly, all government institutions that emerged across states one thousand years ago were intended to help kings project their power and rule over others. They were not seen, at least initially, as vehicles through which weaker actors and groups of actors could make it more difficult for monarchs to take the actions they wanted. I also expected international law and courts to be relatively weak restraints on the most powerful states. Moreover, I expected restraints to generally act *within* one institution, not *among* various international institutions, checking and balancing each other (A1).

The above sections support these expectations. For millennia, there were few international laws. The ones that did emerge thousands of years ago, and that appeared to apply to multiple states, were hierarchical in nature, giving the most powerful actors more rights than weaker ones. This “might makes right” approach is similar to the one underlying very early domestic laws, such as the Salic ones of Germanic tribes, that granted powerful individuals greater protection than weak individuals.

When the first international laws began to develop in the modern era and became more broadly accepted across borders, they were initially the product of “bottom-up” processes, as various groups with no direct ties to rulers developed them primarily as ways to facilitate international trade. They did not truly apply to inter-state relations and were fairly contested. The problem of developing laws to guide inter-state relations derived in great part from the lack of international bodies to apply decisions based on such laws. While powerful states could use the ambiguous international laws to justify some of their actions, there was little to stop them from breaking the laws when they pleased. At most, one can argue that some vaguely prescribed *norms* (that later came to underlie international legislation), such as the norm of non-aggression, were the only real restraints, limiting to

some degree actions of powerful states. However, these norms were only likely to function as restraints on great powers when the material benefits of acting against them did not exceed or barely exceeded the material costs of doing so. When the benefits of neglecting such norms were considerably higher than the costs incurred by doing so, the restraints were far less likely to function.

In the nineteenth century, when there was a shift from the dominance of natural law to positive law principles, even these weak norms of restraint became less relevant. International law began being shaped more through top-down processes, being dictated by powerful states, rather than bottom-up, as it had been earlier. This process was similar to the one at the domestic level during periods of state consolidation, when monarchs became sufficiently powerful to impose their own laws on weaker actors and groups of actors and not just enact laws that they “discovered” in existing traditions. In the international realm, the shift coincided with the emergence of the Concert of Europe when G_1 (the UK at that time) and G_2 (the other four members of the Concert) came to work together for the first time in an institutionalized manner.

The process of international institutionalization led to the emergence of numerous international public unions throughout the nineteenth century. New organizations such as the Rhine River Commission, the International Telegraph Union, or the International Postal Union, generated regulations that came to be accepted by virtually all states, including powerful ones. The field of “international institutional law” has long considered such IGO-imposed regulations as playing an important role in the development of international law.¹²⁰

However, the restraints on great power actions that derived from the nineteenth century public international unions referred to very narrow technical issues where the dominant states had more to gain from the overall imposition of regulations than to lose from the few instances where specific rules ran counter to their interests. Moreover, as the regulations only applied to members of the international institutions, great powers always had the ability to avoid them by not joining or by leaving the institutions.

Great powers’ preferences in including as many states as possible in the early technical IGOs (so as to spread their influence widely) bolstered the positive law principle of equality among states. Positivism indeed acknowledged the long-standing reality that individual states determined their own destinies. The principle, however, clashed with others emphasized by positivism and that derived from another reality, that powerful states had a greater say in international relations. This tension came to the fore in the First and Second Hague Conferences where several powerful states initially empowered G_3 states in their clashes with each other over the future of international institutional restraints. Given a voice

¹²⁰ E.g., Klabbers, Jan. 2015. *An Introduction to International Institutional Law*. Cambridge: Cambridge University Press.

for the first time in a major international forum, G_3 used this opportunity to seek the codification of the equality principle in international law. It was somewhat successful in its efforts when the PCA was established.

Indeed, the emergence of the PCA marked an important moment in the development of international law and international courts. Although it is a weak institution, with relatively flexible rules for arbitration and a large pool of arbitrators from which states can choose, it is an international judicial institution where, at least in principle, for the first time all states were considered equal before the law, even in the most contentious issue-area of territorial disputes. This first codification of the principle of equality among states in an international court is similar to the one in the domestic realm where charters such as the Magna Carta upheld the principle that everyone, including monarchs, are subject to laws (even though in both cases, in practice, the principle was often not upheld).

Also similar to early developments in the domestic realm, this first multilateral international court did not require that judges be independent of the most powerful groups. The principle of judicial independence only came to be promoted to international courts at the beginning of the twentieth century, first unsuccessfully in the Second Hague Conference, and then successfully, after World War I, when the PCIJ was established.

This decision to accept judicial independence in the PCIJ was an important shift in the evolution of international institutional restraints on power in the judicial realm. The Iran–US claims tribunal and the trade-dispute panels set up under GATT are among the few examples of international courts that have functioned with judges who are *not* independent of the countries that select them. In fact, some argue that the lack of independence of such tribunals make them more effective in resolving disputes than tribunals with independent judges.¹²¹ Indeed, the PCIJ and its successor, the ICJ, could have opted to specify that judges were not independent of their states. They did not do so.

The principle of judicial independence has permeated almost all international courts established after the PCIJ. There were, of course, moments when great powers were able to weaken the principle, reflecting, yet again, that the evolution of institutional restraints is not always unidirectional towards more restraints. This took place, for example, in the ad-hoc tribunals that were established immediately after World War II, at a time when G_1 was much more powerful than G_2 states. Yet, overall, judicial independence has led many international courts to adopt at least some decisions against great power interests. All such international institutions should be understood primarily as restraints on power in the same way as the early judicial institutions acted as restraints on power in England and France: increasingly independent judges in English courts and in the French Parlement

¹²¹ Posner, Eric A. and John C. Yoo. 2010. "Judicial Independence in International Tribunals," *Economics of Public International Law* 350–423.

made it *more difficult* for kings and their entourage to attain their goals, rather than outright *stop* them from doing so.

Over the past few decades, the number of international courts and the volume of international law have increased substantially, making it even more difficult for great powers to ignore them. Some of the new global courts focusing on relatively narrow issues, such as the WTO's Appellate Body, have come very close to the kind of powerful restraints that we are accustomed to seeing in the domestic judicial realm. Additionally, a handful of regional judicial institutions, especially the ECJ, have virtually the same ability to stop powerful actors and groups of actors from taking certain kinds of actions as domestic courts in democratic states.

The trends of the past few decades suggest that international courts and international law, as a whole, have come to impose increasingly strong restraints on the most powerful states, even though there have been periods of erosion of these institutions. While great powers can still refuse to accept some decisions of international courts when they find them too costly, they accept many others. The chapter has offered multiple examples of such courts (including the ICJ and ICC) that make it more difficult for great powers to achieve their goals. In this sense, international judicial institutions have reached a stage similar to the one that domestic judicial institutions experienced before the seventeenth century in England and France, when monarchs still had sufficient control over courts to avoid decisions detrimental to their most significant interests but accepted most other decisions, even if they were not aligned with their preferences. In sum, the above narrative suggests that the nature of international judicial restraints on power over the past two centuries is indeed similar to that of early domestic judicial restraints on power, as expected based on A1.

Additionally, also confirming expectations based on A1, these restraints almost always act *within* the judicial realm and only rarely as checks on the power of international assemblies or on that of executive organs within international institutions. One possible example of a mostly unsuccessful attempt to place limitations through international judicial institutions on the actions of other international institutions (and not just on those of states) occurred after World War II, when G₃ states sought to have the ICJ become a formal check on the power of the Security Council (the UN's dominant executive and even legislative organ). In fact, there were some states that even sought to have all major UN organs acting as checks on each other.¹²² While this latter plan never truly materialized, in time the ICJ has embraced a greater role as adjudicator between UN institutions, although its decisions are simply "advisory opinions" that powerful organs can and often do ignore.

¹²² See Paulus, Andreas L. 2009. "The International Legal System as a Constitution," chapter in Jeffrey L. Dunoff and Joel P. Trachtman (eds.). *Ruling the World?: Constitutionalism, International Law, and Global Governance*. Cambridge: Cambridge University Press, 69–110, 77.

The EU offers an important exception to the lack of checks *between* institutions. Indeed, the powerful ECJ is part of a system of checks and balances between the Council, Commission, Parliament, and other European institutions.

Who supported or opposed the institutional restraints?

This chapter offered multiple examples in support of A2. Indeed, powerful groups (especially G_1 , but also G_2) tended to oppose institutional restraints; the weaker ones (G_3 and G_4) tended to support them.

Also as expected, the most powerful state in the system (G_1) was instrumental in establishing a series of international institutions discussed in this chapter. The UK, the most dominant state after the Napoleonic wars, led the effort to form the Concert of Europe and many of the subsequent technical institutions that emerged throughout the nineteenth century. Conversely, as in the domestic realm, the institutions that G_1 did not support rarely came into existence. However, G_1 's efforts towards institutionalization were not purposeful attempts to develop restraints on power.¹²³ Rather, they were intended to allow it to project its power through laws and regulations.

The first international court (the PCA, established in 1899) and the first formal legal restraints on the actions of the powerful states were in great part initiated by the US, a rising power at that time. The US took on a cause that throughout the nineteenth century had only been championed, unsuccessfully, by nongovernmental groups and small states (G_3). Although according to our current measures of material capabilities, the US appears to have been the most powerful state at that time (G_1), accounts of the proceedings in the First and Second Hague conferences suggest that international decision-makers still perceived it a second-ranked power (G_2). As mentioned, the degree to which such perceptions were correct is not essential for the purposes of this study. After all, according to A3, we should expect that at times of relative power parity between the two most powerful states (i.e., during changes in the identity of G_1), the uncertainty that comes with assessing power may lead both G_1 and G_2 states to support institutional restraints. The US was joined by Russia, another second-ranked rising power,¹²⁴ to advocate for a strong PCA. Small countries (G_3) were very strong supporters of the new international institutional restraints and, in fact, sought even more intrusive ones than those championed by second-ranked powers. As G_3 was relatively powerful at that time, G_2 (and even G_1) states sought its support. After playing an important role at the founding of the PCA, small states came to expect a seat at the table in the

¹²³ See e.g., Milewicz, Karolina. 2020. *Constitutionalizing World Politics: The Logic of Democratic Power and the Unintended Consequences of International Treaty Making*. Cambridge; New York: Cambridge University Press, 7.

¹²⁴ Between 1860 and 1899, Russia's share in global power increased from 7% to 11%.

negotiations leading to the establishment of other international courts, starting with the PCIJ.

Other powerful states opposed the greater institutional restraints on power from the start of the 1899 conference. The UK, which had been the most dominant state of the nineteenth century, and which was still perceived to be the most dominant one in 1899 (and, thus, could still be considered G_1), together with France (a G_2 state), initially opposed an effective PCA. However, in time, they accepted the presence of small states in the Hague deliberations and gave lip service to the principle of equality among states. Yet, when small states requested PCA decisions be mandatory *and* that states have equal representation in the institution (conditions that truly would have established very strong restraints on all states, including the powerful ones), even the G_2 countries that had originally supported a fairly strong PCA, such as the US, Russia, and Germany, opposed the plan.

The most powerful states (G_1 and G_2) accepted the establishment of the PCIJ (at a time of relative power parity, as Figure 2.2. indicates). However, they were not prepared to give it too much power. As mentioned, despite his strong overall support for the League project, Wilson saw the court as a weak appendage to the main organization. As expected based on A2, it was small states (G_3) and, especially, international legal experts who pushed for a more meaningful court with independent judges. The legal experts who were called upon to draw up the rules of the new institution included only very few judges who had sat on international courts. In other words, the vast majority were not part of G_4 . At that time, the judges serving on international courts had not yet morphed into a group with vested interests in the development of “their” international institutions. The PCA only brought them together sporadically, if and when they were selected by states to serve in an arbitration. Other international courts also had not given judges sufficient time to form as a coherent G_4 . The vast majority of the legal experts that contributed to the founding of the PCIJ were, in fact, individuals whose practical expertise derived from experiences in domestic institutions.¹²⁵ Yet, their common training led them to act as a fairly cohesive group, often embracing different positions than those of their governments.¹²⁶ Therefore, the group should be understood as part of the broader global civil society and, implicitly, part of G_3 , rather than G_4 . The group’s support for stronger restraints on power is thus consistent with expectations of A2.

After the decision was made in 1919 that international courts should have some degree of independence from the governments that established them, the judges

¹²⁵ For example, Elihu Root, one of the most active and outspoken legal experts throughout the processes leading to the PCA and PCIJ, held the position of Secretary of War during the First Hague conference, Secretary of State during the second conference and chairman of the nongovernmental Council on Foreign Relations when he took part in the debates surrounding the establishment of the PCIJ.

¹²⁶ One may consider this group an instance of a nongovernmental “epistemic community.” See Haas, Peter M. 1989. “Do Regimes Matter?: Epistemic Communities and Mediterranean Pollution Control,” *International Organization* 43(3): 377–403.

and other staff from these institutions (G_4) gradually came to play a greater role in promoting further judicial independence *within their own institutions* and, implicitly, in shaping more robust international restraints on power, as expected based on A4. This specialization gave G_4 more influence in the international judicial realm, especially in the second half of the Cold War, in a way similar to how it bolstered the role of English judges in carving out more independent domestic courts in the sixteenth century. This process was perhaps most visible when the ECJ became more powerful in the 1970s and 1980s through the efforts of its judges, who by that point had become highly specialized in European Law.

Additionally, international judges sometimes came together to promote judicial independence in *other international courts*. An example of this process unfolded in the late 1980s when ICJ and ECHR officials joined legal experts from non-governmental groups in drafting the Montreal Declaration of Independence of Justice. By the end of the twentieth century it became common for international judges from existing courts to push for greater independence of their own institutions *as well as* for other institutions that were being established at that time, such as the ICC. In sum, this chapter offers support for the argument that both G_3 and G_4 generally promote increased restraints on power, as expected based on A2 and A4.

The chapter also offers examples of G_1 and G_2 states seeking (often successfully) to weaken international judicial restraints on power. When establishing the ICJ, powerful states made sure that the new court could only take action against them when they gave it permission. They also opposed a stronger role for the ICJ in controlling the major UN organs, especially the UNSC, although China, a G_2 state at the time, supported the plan. The US has constantly sought to weaken the ICC and opposed ICLOS. France, Germany, and the UK, at times, have been strong opponents of judicial restraints through the ECJ. These observations offer further support to A2.

Interestingly, the US supported international restraints through the WTO. As mentioned, this exception does not necessarily run counter to A3. Although G_1 's relative overall power compared to G_2 states had stopped declining at that time, and therefore we do not expect it to support institutional restraints, it was aware of China's economic rise and therefore, sought to strengthen existing international institutional restraints in the trade realm.

In the case of the ICC, it was yet again secondary powers together with many small states and nongovernmental organizations (G_2 and G_3 , respectively) that promoted strong restraints on power. At this time, G_3 (a group composed both of small states and a growing number of civil society organizations involved in this process) had gained a considerable amount of power. Although the US played an important role in the negotiations leading to the founding of the court, together with the two other major powers in the current system, China and Russia, it generally intended to weaken the institutional restraints.

Table 4.1 summarizes the roles of G_1 - G_4 . It builds on Table 2.2 by offering examples of the various groups promoting or opposing institutional restraints on power from the evolution of international laws and courts. The table indicates that, overall, this chapter found support for the expected preferences and roles of the four groups (from A2) in empowering or eroding international institutional restraints on power. It also offers some examples in support of A3 and A5, regarding changes in the preferences and roles of the groups.

How (and why) did international institutional restraints emerge and evolve?

Formal restraints on power through international laws and courts evolved during the past two centuries in a similar way as domestic laws and institutions developed before the eighteenth century. They went through the phases of emergence, change, and consolidation mentioned in A6. Table 4.2 builds on Table 3.2, offering examples of developments in the international judicial realm from the three phases.

The first international laws that emerged in the Middle Ages (such as those dealing with trade) were tolerated by powerful states primarily because of the small impact they had on them at that time. In fact, the courts that were charged with upholding such laws were usually composed of merchants, not representatives of kings (i.e., of the state). Even when some aspects of these laws ran counter to great power interests, dominant states often accepted them due to long-standing domestic norms that had developed in support of the laws. This process is consistent with sociological institutionalist accounts, however they emphasize the cross-level dynamics, rather than within-level ones emphasized in the present study. It is not surprising therefore that it has no equivalent in the emergence phase of domestic institutional restraints because the institutions generally appeared before the international norms did.

As the global interactions between states became more intense, especially during the nineteenth century, powerful states were often the ones initiating international organizations and regulations. Their actions can be understood as based on the kinds of cost-benefit calculations emphasized by rational choice institutionalism. Thus, throughout the nineteenth century, powerful states spearheaded the establishment of international institutions with rules that gave them considerable control over outcomes as well as greater legitimacy. Moreover, powerful states could easily defect from international institutions and, implicitly, from the potential institutional restraints on their actions. In sum, during the long formative period of international law and of IGOs, up to the end of the nineteenth century, as expected, the most powerful states sometimes promoted international

Table 4.1 Preferences and roles of main groups in shaping international law and courts

Group	G ₁	G ₂	G ₃	G ₄
Types of actors making up group (with examples)	most powerful state (mostly UK and US)	second-tier states (3-4 next most powerful states)	weak states, international civil society (NGOs in 19th century; legal scholars in 20th century)	officials from international institutions (international judges)
Expected support for institutional restraints in “normal” conditions (argument)	almost always opposes restraints (A2)	ambiguous in its support for restraints (A2)	almost always supports restraints (A2)	almost always supports restraints (A2)
Examples of support for or opposition to institutional restraints on power	UK supported the public international unions but not restraints through the PCA or PCIJ; US opposed restraints through PCIJ, ICJ, ICC, ITLOS, but not WTO.	Secondary powers supported public international unions, but not as restraints; supported some restraints in PCA and PCIJ; China supported greater role for ICJ; France & UK supported restraints in ICC; other times G ₂ states opposed restraints.	Small states supported restraints in virtually all instances (e.g., 1899, 1907, 1919, 1945, and 1998); NGOs launched idea of strong PCA; transnational groups of legal experts and NGOs supported judicial independence in PCIJ, ICC and other international courts.	International judges supported restraints by seeking greater independence <i>in their own</i> institutions, starting in the 1970s-1980s in the ECJ. Since late 1980s, international judges promoted judicial independence in <i>other</i> institutions besides their own.

Continued

Table 4.1 *Continued*

Group	G ₁	G ₂	G ₃	G ₄
Expected change in preferences and roles under specific conditions (argument)	when G ₁ 's relative power is low and declining it may support restraints (A3)	when G ₁ 's relative power is low and declining it is more likely to support restraints (A3)	changes in power parity between G ₁ and G ₂ may lead to a greater role, but not change in preferences (A5)	changes in power parity between G ₁ and G ₂ may lead to a greater role (A5); in time its support increases due to vested interests (A4)
Examples of changes in preferences or roles of groups	US support for PCA and Porter Convention; US support for WTO.	Russian and German support for PCA; French and British support for ICC and WTO.	Russia and US promote important role for small states at founding of PCA; virtually all states support role for transnational group of legal experts at founding of PCIJ; powerful European states encourage small states to play important role in shaping ICC.	Judges of PCIJ, ICJ and ICC, are given greater independence after states from G ₁ , G ₂ and sometimes G ₃ clash when these institutions are established.

Table 4.2 Evolution of institutional restraints through international law and courts

Phase	1) Emergence of laws and institutions with some restraints built in	2) Changes to laws and courts acting as institutional restraints	3) Consolidation of institutional restraints through international laws and courts
Main groups involved in phase (argument underlying expectations)	G ₁ and most of G ₂	G ₁ and most of G ₂ (A3)	G ₃ and especially G ₄ (A5 and A4)
Expectations for the international realm	International institutions emerge primarily due to great powers' interests in controlling collective response to problems	International institutions are altered during times of potential power transitions; when dominant state becomes more powerful restraints are eroded.	Small states, NGOs, and IGO officials maintain important roles after being empowered in phase 2; IGO officials become more autonomous and powerful and seek to strengthen institutional restraints further
Examples of international developments in phase	Development of international law and early IGOs, before 1899	Founding of PCA; Porter Convention and other later laws restraining intervention; judicial independence in PCIJ; WTO given judicial role; PCA, PCIJ, ICJ, & ICC weakened by G ₁ .	Independent judges in ICJ, ICC, ECJ, etc., increasingly likely to adopt decisions against great powers; small states remain part of deliberations for PCIJ and ICJ; powerful states maintain international judges' independence

collaboration through institutions but never really in ways that would restrain their power.

The second phase in the evolution of international institutional restraints on power, the one of change, began at the end of the nineteenth century. As mentioned, the changes were primarily championed by second-ranked powers (or, at least by states that perceived themselves to be second-ranked) and were, of course, supported by small states.

When the PCA was established, the US and Russia initially joined forces with weak states to promote the new institution. The US was particularly supportive of small states' positions in its attempts to find allies against the traditional great powers, France and the UK. This development offers an important example of a G_2 - G_3 coalition (against G_1 and another part of G_2).

The 1899 (and, to some degree, 1907) moment of change, when the first formal restraints on power came into being, coincided with the important shift from the nineteenth century British global leadership to the twentieth century American one. More important, during those years, the UK, and later, the US, had one of the smallest overall proportions of global power of a dominant state compared to the power of the next four most powerful states. This critical moment did not come after a major war, as one would expect based on existing literature. The processes leading to the PCA's establishment thus offers support for A3: changes in institutional restraints on power are likely to take place when G_1 is weak and appears to become weaker. Moreover, they are likely to come when G_3 becomes more powerful (as was the case in 1899).

A second crucial change in the evolution of international institutional judicial restraints on concentrated power came soon after World War I, at the founding of the PCIJ. As mentioned, although the US initially emerged from the war as the clear G_1 , its relative power almost immediately declined (as Figure 2.2 indicates). Therefore, it was somewhat willing to accept some power restraints. The PCIJ was the first global institution that embraced the principle of judicial independence and resulted from two important decisions G_1 and G_2 made. First, great powers acquiesced to small states' pressures to include them in the negotiations for the new League of Nations (and of the PCIJ). Initially G_1 and G_2 states sought to keep this important deliberative process exclusively to themselves, without any input from small states, a development that is to be expected based on the rational choice institutionalist approach. However, the strong normative pressures that came after a century of inclusive international public unions led powerful states to accept G_3 input, a development that sociological institutionalism can account for. Because of the strong role given to G_3 states in the negotiations for the League, the main clashes over the future of the PCIJ took place between G_1 and G_2 , on one side, and G_3 on the other side.

Second, great powers gave legal experts a defining role in the establishment of the PCIJ, an example of A5, but an unusual one where the two most powerful

groups decided to empower part of G_3 (a transnational group of legal experts) to counter another part of G_3 (small states). Their plan did not work. The legal experts were primarily responsible for the acceptance of the principle of judicial independence in the PCIJ and, indirectly, for the application of this principle to other international courts that followed.

In the end, the support of small states for the PCIJ, and the compromise between powerful and weak states, led to a stronger court than the one that dominant actors would have ordinarily accepted. However, as in the case of the PCA, powerful states were able to develop loopholes in the rules of the PCIJ to make sure that they did not have to always abide by the court's decisions. Indeed, after eliminating even the most innocuous wording intended to encourage governments to turn to the PCA for their disputes, G_1 and G_2 states only used this international judicial institution sporadically.

G_1 as well as G_2 states were especially successful in reducing most institutional restraints after World War II. As in the PCA and PCIJ, they maintained their ability to choose whether and when to accept ICJ decisions. This came at a time when G_3 (both small states and the relatively few international civil society organizations that had emerged by then) was weak and G_1 was particularly powerful, as Figure 2.2 indicates. Powerful states made sure they always had judges on the ICJ, even though formal rules did not require it. Additionally, they established powerful international tribunals to try war crimes committed by the defeated powers in World War II. G_1 and G_2 states were also able to maintain control over the tribunals that were established soon after the end of the Cold War, such as the one for the former Yugoslavia and for Rwanda. This came when US power relative to G_2 's power (especially that of its challenger, the Soviet Union) ceased to decline. Therefore, as expected based on A3, G_1 was more likely to seek the erosion of most institutional restraints. US efforts (as well as those of some other great powers) also assured that the ICC was a relatively weak institutional restraint. Indeed, in time, the US found multiple ways to erode the power of the ICC after the court was established.

In sum, many international courts established immediately after major wars represented a step back from the restraints on power that had been in place prior to such wars, contrary to what we should expect based on existing literature. This observation is also in tune, however, with the logic underlying A3, that such institutional restraints are more likely to emerge close to the slow global power transitions that *do not* follow major conflicts. It is in such cases of uncertainty that *both* G_1 and G_2 fear that others may acquire too much power in the future, rather than immediately after major wars, when there is a greater degree of certainty in terms of the global power hierarchies.

The evidence from this chapter also suggests that, in the international judicial realm, many of the institutional restraints on power that developed after major wars and that have been touted by others as meaningful restraints (such as those

through the Concert of Europe and the ICJ)¹²⁷ were, in fact, weak. Although the PCIJ allowed for the first time for judicial independence in an international court, it was weakened considerably by powerful states from the original plans drawn up by legal experts. Just as important, one of the major advances in institutional restraints on concentrated power came at the end of the nineteenth century (when the PCA was established) when US power came to match (and even exceed) British power. In other words, it was a time of great hierarchical uncertainty and, therefore, was more conducive to increases in international institutional restraints on power. This observation also supports A3.

It is also important to note that, even when great powers were able to weaken new international courts, these institutional restraints on power did not disappear completely. For example, although states' views of international relations shifted considerably from idealism to realism after World War II, the new ICJ maintained almost the exact same rules as its predecessor, the PCIJ. The resilience of the judicial independence principle in international courts is partly due to an increasingly powerful norm that had taken root in some of the most powerful (democratic) states at that time, especially the US, UK, and France, but also one that has already spread across international institutions. It is also due to the incremental empowerment of international judges who have promoted their own independence starting in the late twentieth century, through a self-reinforcing mechanism. Such examples of growing judicial independence in the international realm and the resulting increased role of G_4 support A4. The rules that protect judges' independence allowed international courts throughout the Cold War to sometimes adopt decisions against great powers, just as the PCIJ did. This happened despite great powers being given a greater say in other new global institutions after WWII.¹²⁸

The resilience of the institutional restraints though international courts thus appears to have been possible through processes consistent both with sociological and historical institutionalism. As mentioned briefly above, each of the institutionalist approaches, rational choice, sociological, and historical, appear to offer more useful explanations of the evolution of international institutional restraints on power in some of the three phases than in others.

More broadly and most important for this study, this chapter suggests that the emergence and evolution of judicial checks on powerful states in the international realm exhibit similarities with processes that unfolded within states starting with the emergence of the first judicial institutions from the all-powerful European

¹²⁷ Ikenberry, G. John. 2001. *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*. Princeton: Princeton University Press.

¹²⁸ Most important, the UNSC gave veto power to only the five most powerful states while the League Council had functioned on the principle of unanimity, thus giving both great powers and small states de facto veto in decisions.

royal courts. Developments surrounding the formation and later functioning of the PCA, PCIJ, ICJ, ICC, and other international courts 1) led to similar types of restraints on the most powerful, 2) involved similar preferences of the four main groups of actors, and 3) went through similar evolutionary phases as those surrounding the early domestic judicial institutions.

International assemblies and parliaments as institutional restraints

Chapter 3 showed that some of the earliest restraints on concentrated power in domestic systems emerged when various types of consultative bodies were formed to offer advice to monarchs. These could be smaller councils, such as the English Curia Regis or the French Great Council, made up of only a handful of individuals who resided at the royal court (i.e., part of G1 rather than G2) or larger assemblies, such as the Anglo-Saxon Witan, that consisted of several dozen of the most important nobles or the French Estates General that, before the emergence of the Third Estate (G3), included only major nobles and ecclesiastics (G2).

In time, the smaller councils came to include increasingly powerful and independent individuals from G2. Similarly, the larger assemblies became more inclusive, giving representatives of G3 a voice, alongside the existing ones of G1 and G2 and, eventually, the greatest influence in such bodies. Parallel to this gradual process, the assemblies usually developed some form of legislative powers. An obvious example is the English Parliament that developed from the Witan, an older body with only a consultative role. In other cases, such as the one of the French Parlement, quasi-legislative bodies morphed from narrower judicial forums, rather than from broader consultative ones. However, the end result was similar: an assembly of individuals who played a role in shaping legislation, in budgetary issues, and, more broadly, that could restrain, at least to some degree, the power of monarchs. Although monarchs were initially able to select the members of such legislative bodies, they eventually lost the ability to do so. This process, in turn, increased the assemblies' abilities to act as effective restraints on power although, of course, there were periods when they became weaker.

The restraints on the power of monarchs and, later, of presidents and prime-ministers through such assemblies, is represented in Figure 5.1. The full arrows reflect the ability of the most powerful group (G1) to influence the inclusive institutions directly, through arrow 3, or indirectly, through their executive councils (bodies that, in the domestic realm, shifted from being virtually completely G1 to a combination of G1 and G2), through the combination of arrows 1 and 5. The dashed arrows are forms of power restraints on G1. Arrows 2 and 4 are restraints directly on the ability of G1 to achieve its goals while arrow 6 is a restraint on the interests of G1 as well as of G2. As this chapter focuses on the broader assemblies (i.e., the bottom circle in Figure 5.1), it is particularly important to consider the

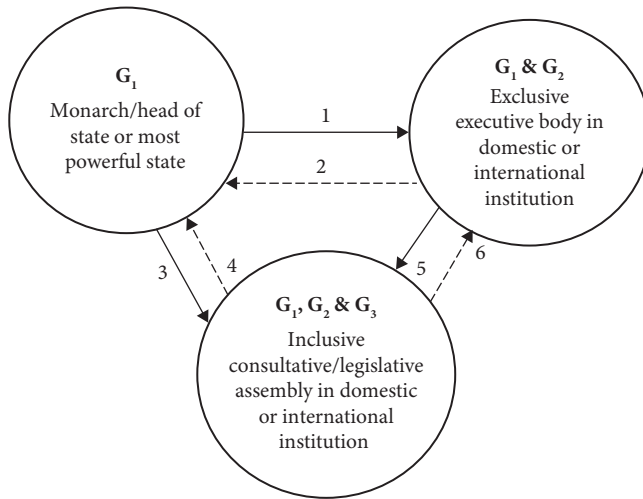


Figure 5.1 Assemblies as power restraints in the domestic and international realms (dashed arrows represent restraints on powerful actors)

evolution of arrows 4 and 6, through which such bodies can restrain G1 and G2 by making it more difficult for those two groups to achieve their goals.

The present chapter will discuss the analogous developments in the international realm. Figure 5.1 therefore can also be understood as depicting similar international institutional restraints, not just domestic ones.¹ For the same reasons mentioned above, my main focus will be on the ability of international assemblies (especially those in the League and UN), to restrain the most powerful state (G1) as well as the smaller international forums (such as the League Council or UN Security Council), where the most powerful state (G1), together with the second ranked powers (G2), control much of the work of the respective organizations (through arrows 4 and 6, respectively).² The chapter will also discuss international parliamentary assemblies (as those in the Council of Europe and EU) that, as I will show, have a slightly different mechanism of restraining power than the usual assemblies in IGOs, represented in Figure 5.1.

¹ One possible difference is that G1's control over G2 in exclusive councils from the domestic realm was initially much greater than the one in the international realm. However, for the purposes of this chapter focusing on assemblies, the difference is one of degree and secondary, at best, to my main arguments.

² I will not focus, however, on the ability of councils (such as the League Council or UN Security Council) to restrain G1 states. Starting with the Concert of Europe, such exclusive forums have virtually always functioned on the principle of unanimity among great powers. Consequently, they have been able to restrain the most powerful state from taking actions *through these IGOs* but not outside of the IGOs (as was the case of the UNSC refusing to take collective action against Iraq in 2002, despite US pressures). This type of restraint, represented by arrow 2 in the figure has not changed much over the past century and therefore will not be addressed in this chapter.

By tracing the evolution of international assemblies, I will emphasize the changes in the inclusion and relative strength of G1, G2, G3, and, to some degree, G4, in these bodies, as well as their ability to restrain power through the mechanisms illustrated in Figure 5.1 (arrows 4 and 6). More important, the following narrative allows me to assess the plausibility of arguments A1–A6 as applied to international assemblies and parliaments.

The first intergovernmental assemblies and the Interparliamentary Union

The first few intergovernmental institutions did not have “assemblies” with broad membership. The Concert of Europe was conceived as an exclusive forum for only the five most powerful states. When it was being established, Spain argued for its inclusion as a sixth great power. However, the five existing members refused, suggesting that Spain was not sufficiently powerful to warrant membership in their elite group.³

As mentioned earlier, smaller states were only allowed to participate in Concert meetings on rare occasions, when invited by the five members, and then only to speak on very specific topics that were deemed relevant for them. Beyond this “executive” body where the five great European powers (i.e., the G1 and G2 states) would meet, the Concert did not have any forums where weaker states or, of course, non-governmental actors (G3) could be represented. In this respect, it was indeed similar to the first (small and very exclusive) domestic consultative institutions developed by English and French kings in the Middle Ages, as the Curia Regis or Great Council, respectively.

Like the Concert, the Central Commission for the Navigation of the Rhine (CCNR), the first actual intergovernmental organization to be established (in 1815) also did not have an assembly. Its simple administrative structure was initially nothing more than a council-like institution, that brought together representatives of all seven states that held Rhine territory: Baden, Bavaria, Hessen-Darmstadt, Nassau, Prussia, France, and the Netherlands. Over its first few decades of existence, the Commission shifted several times back-and-forth from its role as a “council” (representative of government interests) to one of “secretariat” (where officials sought to play an autonomous role from that of governments).⁴ These shifts will be discussed in greater detail in the following chapter. Throughout the long history of this IGO, none of the riparian states were ever excluded

³ Klein, Robert A. 1974. *Sovereign equality among states: the history of an idea*. Toronto: University of Toronto Press, 25.

⁴ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press.

from participation in any of its bodies.⁵ The relatively small number of states included in the organization made it virtually impossible to create forums that would differentiate between the most powerful states and the weaker ones. Prussia indeed played a dominant role in the organization during much of the nineteenth century.⁶ However, the nature of the collective action problem that the IGO was intended to solve (freeing navigation on the river from all hindrances in order to achieve conditions that were “the most favourable to the commerce of all Nations”⁷) implied that all states great and small needed to be included in the organization. Without the cooperation of all states, the collaborative project of river navigation simply could not function.

In time, as the CCNR became increasingly complex, state representatives handed over most of the organization’s work to a secretariat and only came to participate in plenary meetings at regular intervals, once and later twice a year. The plenary meetings continued to include all riparian states. Other smaller bodies established by the IGO have also remained inclusive of all states. Therefore, the organization never had to distinguish between an exclusive body controlled primarily by great powers and an inclusive one where small states sought to restrain the power of the dominant members.

The need to establish large IGO assemblies separate from the smaller IGO councils began with the emergence of the first truly global organizations, the technical “public international unions” established in the second half of the nineteenth century. The first such IGO, the International Telegraph Union (ITU) was founded in 1865. It was soon followed by the Universal Postal Union (UPU) (established in 1874). As in the case of the CCNR, these IGOs had virtually no restrictions on membership.⁸ This inclusive approach to international institutions, of course, differed from the exclusive Concert system, where great powers continued to selfishly guard their security and territorial interests by keeping consultations and decision-making open only to themselves. An important reason for this difference is that the technical organizations involved “common aversion” coordination problems, where states seek a solution to their common problems but are relatively indifferent to what that solution is.⁹ These differ from “common interests” collaboration

⁵ Conversely, after World War I, Belgium, Italy, and the United Kingdom (as Allied powers), as well as Switzerland, were granted membership in the organization. The United States also became a member after World War II as an occupation power. All non-riparian countries eventually resigned from the organization several decades after becoming members.

⁶ Van Eysinga, W. J. M. 1935. *La Commission centrale pour la navigation du Rhin: Historique*. Leyde: Société d’éditions A.W. Sijthoff.

⁷ Van der Werf, Hans. 2014. “Address by the Secretary General at Congress on ‘Congress of Vienna and its Global Dimension: 1814–2014’” (18–22 September, 2014) at https://www.ccr-zkr.org/files/histoireCCNR/20140918_HvdWerf_Vienne.pdf

⁸ Murphy, Craig N. 1994. *International organization and industrial change: global governance since 1850*. Cambridge: Polity Press, 47.

⁹ The typical example of such a problem is the choice between driving on the right or left hand of the road. Actors are relatively indifferent to the solution as long as such a solution is adopted by all.

problems where each actor may have a very different preference for the solution.¹⁰ The former types of organizations need to include as many states as possible (if not all) to avoid free-rider problems inherent in their collective decisions. The benefits from increasing the speed and reducing the fees for international communication, through the ITU and UPU (and soon after that of international travel, through IGOs such as the International Railway Congress Association or Central Office of the International Railway Transport founded in 1884 and 1890, respectively), outweighed the costs for great powers of extending membership and decision-making power to many states.¹¹

The efforts to establish these all-inclusive IGOs was primarily spearheaded by the powerful states, as expected based on a similar logic as that involving the emergence of domestic institutions, discussed in chapter 3, and summarized in Table 3.2. France and Germany were the main advocates for the establishment of the ITU. It is true that the powerful UK and US did not initiate this particular IGO. In the former case this was because telegraph companies were initially in private hands and the government had little control over them. In the latter case it was due to the fact that a permanent underwater connection was made between the American and European telegraph systems a year after the ITU was established, in 1866. Only after that moment did the US become interested in a global collective agreement for telegraphy. However, it should be mentioned that neither great power opposed the establishment of the ITU and soon after its creation, both joined as members.¹²

Similarly, Germany eventually became the main driver of the process that led to the establishment of the UPU. However, it is also important to note that the US had organized a previous international conference on postal matters (in 1865), but that initiative did not lead to the formation of an IGO.¹³ All great powers were among the original members of the UPU.

Although powerful states supported broad membership in these early global IGOs, they also sought to maintain control over outcomes in the same way that they had controlled decisions in the Concert of Europe. The tension between these preferences led to two types of solutions for them. First, they looked for ways to

¹⁰ There are several important studies that emphasize such differences between collective problems and the ensuing differences in the nature of international institutions established to resolve them. See, e.g., Stein, Arthur A. 1982. "Coordination and Collaboration: Regimes in an Anarchic World," *International Organization* 36(2): 299–324; Snidal, Duncan. 1985. "Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes," *The American Political Science Review* 79(4): 923–42.

¹¹ Reinsch Paul S and World Peace Foundation. 1911. *Public International Unions : Their Work and Organization : A Study in International Administrative Law*. Boston: Ginn and Company, 23.

¹² See, e.g., Grigorescu, Alexandru. 2020. *The Ebb and Flow of Global Governance: Intergovernmentalism versus Nongovernmentalism in World Politics*. Cambridge: Cambridge University Press, 225–27.

¹³ Lyall, Francis. 2016. *International Communications: The International Telecommunication Union and the Universal Postal Union*. London: Routledge, 229–34.

have more votes in the organizations. They realized that one way to do that was to include representation for various parts of their countries. In the ITU, this process was reflected in colonial powers being given separate membership rights for some of their colonies. This way, countries like the UK and France, in fact, had multiple representatives in meetings and multiple votes.¹⁴ While the colonies indeed supported the colonial powers (G1 and G2 states) in the early years of these IGOs, in time they became more independent of them.

A second solution to the dilemma powerful states faced in seeking both more inclusive IGOs as well as ones that they could still control, was to establish in the organizations smaller committees where they could more easily shape outcomes.¹⁵ This solution had been embraced, at least to some degree, as early as the Congress of Vienna. During the Congress, work was divided into ten committees. The most important committees (such as those dealing with territorial issues) only included the five great powers while others (such as those dealing with river navigation or the slave trade) included virtually all interested states.¹⁶ In the technical IGOs of the late nineteenth century, even though the smaller committees were formally open to all IGO members (G1, G2, and G3 states), in practice great powers (G1 and G2 states) were represented much more often. In part, this was due to small states not being able to meet the high costs of sending sufficient delegates for all of these forums.¹⁷

Great powers knew that the work of these IGOs could not take place solely in the small committees that they dominated and therefore accepted the existence of large IGO forums where all members were represented. This broad representation gave IGOs the necessary legitimacy, just as broad domestic forums such as the Estates General or the Witan were established by monarchs to offer them increased legitimacy, especially when their power was eroding. At the same time, powerful states tried to reduce the influence of the large forums, often arguing that they were not as effective as smaller decision-making bodies. The clashes between those advocating for greater roles for the more inclusive or exclusive IGO forums have continued across virtually all international institutions to this day.

In the ITU, the first global IGO, the dominant states sought to erode the power of the broad forum by making it only meet sporadically. Indeed, in the first four

¹⁴ In the UPU, a similar process unfolded at the very start of the negotiations for the organization, when Austria-Hungary sent two separate delegations, one for Austria and one for Hungary. See Lyall, Francis. 2016. *International Communications: The International Telecommunication Union and the Universal Postal Union*. London: Routledge, 233–4.

¹⁵ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, 58.

¹⁶ Nicolson, Harold. 1946. *The Congress of Vienna; a Study in Allied Unity, 1812–1822*. London: Constable & co. Ltd., 138.

¹⁷ Lyons, Francis Stewart Leland. 1963. *Internationalism in Europe 1815–1914*. Leiden: A. W. Sijthoff, 23.

decades of its existence, representatives of all states came together in the all-inclusive “diplomatic conferences” (that discussed potential changes to the IGO’s Constitution) and “administrative conferences” (that were intended to deal with the details of international telegraphy, such as the tariffs and taxes for telegrams) only about half a dozen times. The rest of the time the IGO’s work took place in smaller permanent bodies where great powers had a greater say. In 1932, the ITU came together with the International Radiotelegraph Union (that had been established in 1906) to form the International Telecommunication Union, an IGO that continues today to function under this name. In time, the need for better coordination on the increasingly complex and diverse technical matters led to the organization’s formal inclusive meetings becoming more common and eventually to the requirement that conferences with broad representation be held every year. G3 states wholeheartedly supported this increased role for the broad forum.¹⁸

The UPU’s evolution experienced similar dynamics. It is important to note the parallel between these processes and those that led to the increased frequency of meetings in the English Parliament and French Estates General at times when monarchs sought greater legitimacy.

The decisions in these large forums became binding only after all members in the IGO accepted them. Therefore, these early institutions cannot be considered true restraints on powerful states (or even on small ones), just as early domestic assemblies could not restrain monarchs. However, the ITU and UPU inclusive forums served as models for major IGO bodies that emerged later, such as the League of Nations Assembly and the UN General Assembly, and that, as I will show, often came to represent important restraints on the most powerful states in ways that are consistent with the ones illustrated in Figure 5.1.

Before moving to discuss the significant changes that took place in international assemblies starting with the League, it is important to consider the peculiar case of the Interparliamentary Union. This organization had the potential of becoming an important institutional restraint on other international institutions and on the actions of great powers, but its members never truly acted upon this potential.

The idea of having an international (or transnational) parliament playing a role in global politics has been advocated by individual writers since the seventeenth century,¹⁹ soon after the first relatively independent national parliaments had emerged. However, it was only in 1889, at a time when a majority of states had adopted parliamentary institutions, that the first actual international parliamentary body, the Inter-parliamentary Union (IPU), was established.²⁰

¹⁸ Lyons, Francis Stewart Leland. 1963. *Internationalism in Europe 1815–1914*. Leiden: A. W. Sijthoff, 145–6.

¹⁹ See, e.g., Penn, William. 1912. *An Essay Towards the Present and Future Peace of Europe: By the Establishment of an European Dyet, Parliament or Estates*. Boston: Directors of the Old South work.

²⁰ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, 226.

The founders of the IPU were individual members of national parliamentary bodies (primarily from Britain and France), often from opposition parties, who were seeking additional ways of influencing their powerful executive branches of government. When they could not keep their national leaders in check through the existing domestic institutions, they sought allies in other states to collectively pressure their respective governments to change policies. This approach appeared particularly important in international disputes that had the potential of leading to major wars.²¹ In fact, when the IPU was founded in 1889, its inaugural conference was named the “Parliamentary Arbitration Conference.” The conference’s invitation letter stated: “Two hundred and thirty-three members of the British Parliament and one hundred and twenty members of the French Parliament have signed memorials in favour of treaties of arbitration with the United States of America. The United States’ Senate have authorized the President of the United States to conclude treaties of arbitration with any Government willing to do so. The desire for such treaties increases daily.”²² The second IPU conference, in 1892, was titled the “Inter-Parliamentary Conference for Arbitration.” The organization adopted its current name in 1908, as its conferences took on other (mostly national) issues, beyond international arbitration.

These early IPU initiatives were indeed reflective of groups of weak domestic actors seeking to develop restraints on the use of force by the most powerful states in the system (G1 and G2). Such individuals came together to form an international nongovernmental organization, that, as mentioned in chapter 2, can be considered to be part of G3, alongside small states. Many of them were members of national parliaments who had not been successful in passing national legislation on other issues, such as voting rights and workers’ rights, and therefore sought an international platform from which they could collectively pressure their own governments and national parliaments to take the actions they were fighting for.

The main reason that the founders of the IPU saw their organization as necessarily nongovernmental was that it was intended to balance the influence of their respective governments, both in the domestic and international realms. As mentioned, domestically they felt many of their goals could only be achieved through international nongovernmental pressures. Internationally, they saw themselves as an alternative to intergovernmental conferences and incipient intergovernmental institutions that had been launched by the late nineteenth century.

Over time, various IPU members and groups sought to transform the organization into an official “world parliament,” having the same power over the collective decision-making processes of governments within IGOs, as domestic parliaments had over their respective national executive bodies. The first such proposal came

²¹ Douglas, James. 1975. *Parliaments across Frontiers: A Short History of the Inter-Parliamentary Union*. London: H.M.S.O., 1–6.

²² Douglas, James. 1975. *Parliaments across Frontiers: A Short History of the Inter-Parliamentary Union*. London: H.M.S.O., 4.

as early as 1904.²³ Although the organization never came to represent the powerful restraint on concentrated power in the international realm as this ambitious proposal or other later ones envisaged, it consistently embraced a vision of itself as the embryo of an independent organization on its way towards something much greater, not as a secondary partner for IGOs.²⁴

The goals of the IPU dictated its membership and functioning. From the start, it was open only to members of national parliamentary bodies. After all, these were the individuals who sought international coalitions when they saw that their domestic ones were not sufficient for promoting their desired social changes. IPU membership was open to representatives of national parliaments from all parties, whether in power or not. This allowed individual members to seek the broadest (and most persuasive) possible international coalitions for their causes. Also, their goals implied that the organization needed to remain independent of national governments.

As mentioned in the previous chapter, one of the first and most important initiatives of the organization was to promote in 1895 the establishment of an International Court for Arbitration. The IPU's emphasis on its nongovernmental character and independence from governments was reflected in the title of the memoir that it used to launch this initiative: "Memoire to the Powers." These words implied that, although many of the document's authors were citizens and even members of the legislative branch of "the powers," they did not identify themselves with their respective national leaders.²⁵

Throughout its long history, the IPU has often discussed questions that were directly relevant for its independence from national governments. Virtually each time, it concluded that its independence was more important than its other principles. It was essential for maintaining its primary role as a check on the collective executive power of governments, analogous to the restraining role of national parliaments on individual governments. To maintain such independence, the IPU sought to not take sides with one government or another, portraying this practice as one that avoided "politics."

A first important debate reflecting the IPU's desire for impartiality when dealing with one government or another came soon after the organization was established

²³ Kissling, Claudia. 2011. "The Inter-Parliamentary Union: Its Development and its Contribution to Global Democracy," in Levi, Lucio et al. (eds.) *International Democracy Report: The Democratization of International Organizations*, Moncalieri, Italy: Centre for Studies on Federalism. At www.internationaldemocracywatch.org/attachments/453_IPU-kissling.pdf, 8.

²⁴ See, e.g., Gobat, Albert. 1895. "Organisations-nous!" *La Conférence Interparlementaire* 2(17): 264–6, 266.

²⁵ Sabic, Zlatko. 2008. "Building Democratic and Responsible Global Governance: The Role of International Parliamentary Institutions," *Parliamentary Affairs* 61(2): 255–271, 263; Kissling, Claudia. 2011. "The Inter-Parliamentary Union: Its Development and its Contribution to Global Democracy." In: Lucio Levi, et. al. (ed.). *International Democracy Report, The democratization of international organizations*, Moncalieri, Italy: Centre for Studies on Federalism. At www.internationaldemocracywatch.org/attachments/453_IPU-kissling.pdf, 4 and 44.

and involved the choice between including only members of actual “parliaments” or also accepting representatives of states that were not democratic but had various forms of national assemblies. The IPU chose to broaden its membership (despite its avowed support for democratic representative institutions) as a pragmatic way of including individuals from non-parliamentary bodies of important states, such as Russia, and thus expecting to gain greater influence over all governments, whether democratic or not. In 1896 it adopted an amendment to its statutes (referred to as the “Russian article”) that allowed representatives of “facultative councils, or other similar institutions of non-constitutional countries” to become members of the organization.²⁶ The decision suggests the IPU recognized the importance of placing greater collective restraints on governments, as weak as those restraints might have been, even if that meant eroding its democratic credentials. This idea is in tune with expectations based on AI, stating that international restraints on concentrated power have been weak, especially early on in their development of international institutions.

Several other important debates related to the IPU’s independence unfolded when major IGOs were established. For example, when the PCA was created, even though it had played an important role in launching the organization, the IPU chose to not adopt a formal relationship with it. It adapted a similar “arm’s length” relationship with the PCIJ although it was instrumental in its establishment. It also did not seek formal relations with the League of Nations. This decision came despite the fact that the IPU had long advocated for the establishment of a League-like organization and that, in fact, one of the main drafts of the Covenant was written by IPU president, Lord Robert Cecil.²⁷

The IPU’s emphasis on its nongovernmental character, one that would not take sides between states, was also reflected after World War I, in discussions involving the presence of representatives of parliaments from the Central Powers in its first post-war meeting. Although Belgian and French representatives in the IPU opposed the presence of Germany and its wartime allies in the meeting, the vast majority of other representatives vigorously opposed this position and adopted a resolution stressing the need for an inclusive and nongovernmental organization.

The IPU’s strong nongovernmental (and independent) approach was also reflected in a very noncommittal first official declarations regarding the UN. However, it did speak out later when it felt that that too much power was being given to the Security Council and not enough to the Assembly, thus declaring its affinity

²⁶ Kissling, Claudia. 2011. “The Inter-Parliamentary Union: Its Development and its Contribution to Global Democracy.” In: Lucio Levi, et. al. (ed). *International Democracy Report, The democratization of international organizations*, Moncalieri, Italy: Centre for Studies on Federalism. At www.internationaldemocracywatch.org/attachments/453_IPU-kissling.pdf, 5

²⁷ Miller, David H. 1928. *The drafting of the Covenant*. (volumes I and II) New York: G.P. Putnam’s Sons, 61–4.

with the more inclusive UN body.²⁸ In fact, the IPU only altered its statutes in the 1980s to declare its official support for the UN. Similarly, the UN only gave the IPU “consultative status” with ECOSOC (that several hundred other NGOs also had), rather than “observer status” (as several dozen IGOs held).

The organization sought to further broaden its definition of parliaments during the Cold War in order to include even more states in its fold. This position also allowed it to present itself as an organization that did not take sides and that, therefore, was independent of all governments, regardless of their ideologies or power.

To this day, the IPU continues to adopt this inclusive approach to membership. It also continues to embrace its independence vis-à-vis governments and, consequently, vis-à-vis the most powerful states, by choosing to remain outside intergovernmental structures, rather than seeking a more direct role in international politics.

The IPU model differs from the international parliamentary assemblies that have been established over the past century within IGOs. This latter model has come to be especially prominent in the second half of the twentieth century within European institutions, as will be discussed later in this chapter. It involves an international parliamentary assembly that is part of the IGO and that, therefore, has a direct influence on intergovernmental relations and, through the IGO can also affect decisions of governments. The members of the parliamentary body can be directly elected (as in the European Parliament) or selected by domestic legislatures or even governments. In this context, interparliamentary assemblies can be understood as one specific form of the broader assembly model represented in Figure 5.1 as they are part of the IGO, unlike the IPU that has chosen to work outside of IGOs.

The IPU has in common with some more recent interparliamentary assemblies the fact that they rely on the independence of the individuals in international parliamentary bodies to restrain international concentrated power, whether that power resides in individual states or, collectively, in IGOs. In the IPU, the international body chose to be very independent of governments and IGOs but, by acting outside government structures, has been less influential. International parliamentary assemblies have been more influential over IGOs but, as I will show, have struggled with their independence from governments. Both types of institutions, therefore, have been imperfect restraints on power, at least before the 1980s when the EP became the influential institution we know today.

One should nevertheless note that the IPU’s independence and the concerted efforts of national members of parliaments in influencing their respective governments have led to some successes. As mentioned, it contributed to the

²⁸ Zarjevski, Yefime. 1989. *The People Have the Floor: A History of the Inter-Parliamentary Union*. England: Dartmouth: Aldershot, Hants, 94.

establishment of the PCA and PCIJ that both played a role in restraining great power actions. When the UN was established, it contributed to the international efforts (described below) of ensuring that the inclusive General Assembly played an important role in the IGO. It also promoted the establishment of parliamentary assemblies in almost two dozen IGOs over the past century.²⁹ More recently, it has served as a model for other international parliamentary bodies that seek to influence specific IGOs (such as the World Bank and World Trade Organization) and that will be discussed later in this chapter. In sum, it contributed to the development of international institutional restraints on concentrated power.

The League of Nations: a first major change to the international assemblies as power restraints

When the League of Nations was established in 1919, two intergovernmental trends from the late nineteenth century and early twentieth century (rather than the nongovernmental ones, reflected in the emergence of the IPU, discussed above) came to a head. On the one hand, great powers sought to keep all small states out of international conferences dealing with security issues, just as they had through the Concert of Europe. On the other hand, they needed as many states as possible to participate in the technical conferences and organizations. The latter inclusive trend raised small states' expectations for the League, where it was anticipated that state representatives would discuss many different issues, beyond those involving security.

The great powers of the immediate post-World War I era pursued a compromise that would allow them to deal with this dilemma. They sought to establish within the League a powerful but exclusive "Council" that would be the executive body of the new IGO. They originally envisioned the Council to only include the five major victorious powers of World War I: France, Italy, Japan, the UK, and US. They saw this organ as a continuation of the Concert structures, albeit with a different group of states. Moreover, they sought to continue the practice of the Concert through which the defeated great powers could eventually join them in this very exclusive forum.

However, unlike the Concert of Europe model, they quickly acknowledged that they needed to develop a second body in the League where all states could also express their opinions on questions that were not related to security. Their original plan for this "Assembly" reflected a very weak organ, at best with a vague consultative status, that would meet sporadically, perhaps once every few years,³⁰ just

²⁹ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, 232–4.

³⁰ Marks, Sally. 1995. "The Small States at Geneva," *World Affairs*, 157(4): 191–6, 191.

as had been the case of the inclusive forums in the ITU and UPU. This solution, promoted by G1 and G2 states, was very similar to the one adopted in medieval times for the inclusive but weak domestic assemblies that met sporadically, only when rulers called upon them. However, it is important to note that none of the participants in the international negotiations after World War I made any explicit references to this parallel.

A reflection of the primarily exclusive approach originally promoted by great powers is that the initial plan for the League emerged first in the UK and US and was later negotiated in the Supreme Council and the Council of Four (between France, Italy, United Kingdom, and United States), as the war was still being fought. Even after the end of the war, as Woodrow Wilson was convinced that the League Covenant needed to be part of the 1919 Paris Peace Conference Agreement, the first more detailed conversations involving the future IGO continued to take place only among the victorious great powers. Moreover, of the various drafts for the Covenant, the one that was selected as a starting point for discussions was a joint American–British draft (i.e., one that involved the respective new and old G1 states in the system).

The strong imbalance of power between the Council and Assembly in the “Cecil–Miller” draft led to an “almost open revolt”³¹ of the small states as soon as they had access to the draft. Belgium’s Paul Hymans argued that the powerful states were proposing “a revival of Holy Alliance of unhallowed memory.”³² Other small state representatives used similar arguments and explained that the reason the Great War had been triggered in the first place was that powerful states had failed to heed small states’ opinions. This point was notably reflected in the speech of the Serbian delegation.³³

The strength of small states was bolstered by the decision to include dominion and colonial states in the negotiations, based on the aforementioned tradition from the technical IGOs of the late nineteenth century. As in the ITU and UPU, the presence of dominion and colonial states in the negotiations for the League was advocated by colonial powers, especially the UK. Australia, Canada, India, New Zealand, and South Africa were accepted as full members in the League of Nations.³⁴ However, even before the organization was formally established, these smaller states indicated that their positions would now be independent of the UK’s position. For instance, not only were they among the main proponents of giving the Assembly greater power in the League, but they spearheaded the efforts to

³¹ Miller, David H. 1928. *The drafting of the Covenant* (volumes I and II). New York: G.P. Putnam's Sons, 84.

³² Bonsal, Stephen. 1944. *Unfinished business*. Garden City, NY: Doubleday, Doran and Company, 26.

³³ Miller, David H. 1928. *The drafting of the Covenant* (volumes I and II). New York: G.P. Putnam's Sons, 162.

³⁴ Northedge F. S. 1986. *The League of Nations: Its Life and Times*. Leicester: Leicester Univ. Press.

eliminate the original word "Executive" from the title of the Council because they felt it indicated a strong "super-state" role for this body.³⁵

Small states were also very critical of the fact that the blueprints for the new IGO had only been discussed among great powers and that such discussions had often unfolded in a secretive manner, despite their leaders' calls for greater "publicity" and for an end to secret diplomacy. Indeed, Wilson had initially planned on having only representatives of the five major powers in the League Covenant drafting committee of the Paris Peace Conference. When other states heard of this plan there were "violent discussions" involving "vigorous language."³⁶ Great powers' acknowledgement that they needed smaller states involved in many of the issue-areas the League was going to deal with, led them to acquiesce to a more inclusive drafting committee, allowing initially to have five representatives from small states alongside the ten from the five great powers. Small states found this solution to also be unacceptable and pressured the great powers to have four more small state representatives in the committee. The most adamant opposition to this change in the composition of the committee came from the US (the clear G1, at that time). Despite this opposition, however, as one American delegate noted, it quickly became apparent that "the exclusion of Belgium and all other Small Powers from the drafting of the Covenant was an impossibility and a reluctant acceptance of the facts by Wilson."³⁷

Small states were not satisfied simply with having a seat at the negotiating table. They used their presence in ensuing debates to pressure great powers to extend Council membership to some of their representatives. However, as this powerful executive body of the League was envisaged to work on the principle of unanimity, great powers were very concerned with such an enlargement as they saw it eroding the effectiveness of the decision-making process. When they first gave in to these pressures, they proposed adding two more seats for small states to the five held by them. When the G3 states did not accept this proposal, great powers reluctantly accepted a Council with nine seats, five permanent ones for them and four non-permanent ones for small states. The US and UK, the leaders of the great powers group and the most reluctant to include small states in the Council, made it clear, however, that they would never accept an equal or greater number of small states in the Council than of great powers. The two sides agreed at the time that if other powerful states were to be included later in the League, and if they would be granted permanent seats in the Council, small states could also increase the number of their representatives. This informal agreement was necessary because it was

³⁵ Webster, Charles K. and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 48.

³⁶ Miller, David H. 1928. *The Drafting of the Covenant* (volumes I and II). New York: G.P. Putnam's Sons, 84.

³⁷ Miller, David H. 1928. *The Drafting of the Covenant* (volumes I and II). New York: G.P. Putnam's Sons, 84–5.

expected that Germany and the Soviet Union would indeed join the League in the not-too-distant future.

I argued elsewhere that one of the main reasons why small states were successful in gaining a seat in the League Council was that their arguments were based on democratic norms that Woodrow Wilson and other leaders of that time had bolstered in their own rhetoric applying them both to the domestic and international realms.³⁸ For example, in an important declaration at the end of the war, US secretary of state, Robert Lansing, had noted that he opposed “an international oligarchy to direct and control world affairs” and that the League of Nations had to be based on principles of “international democracy,” not “international aristocracy.”³⁹

Small states continued to pressure for even greater influence in the Council after the drafting committee completed its work and opened negotiations with all other states.⁴⁰ However, as mentioned, the five great power states were not prepared to make additional concessions on this point. Therefore, G3 states changed tactics by trying to gain some more advantages by demanding a more powerful Assembly vis-à-vis the Council and for more frequent Assembly meetings than the great powers had proposed. Their position was boosted by the fact that there were numerous additional proposals for this inclusive organ in the League that came from the budding global civil society. Various nongovernmental groups called for a much more independent role for the Assembly. In early 1919 the IPU and the Socialist International both suggested in separate proposals an inter-parliamentary body in the League with delegates selected by national parliaments. The acceptance of a far less radical type of IGO organ (the Assembly), one where all states were to be included, albeit based on the representation of executive branches of government rather than the legislative ones, can be seen as a compromise that great powers felt they needed to accept as what some of them called “a necessary evil.”⁴¹

It should be noted that the name “Assembly” came as a result of the pressures from such nongovernmental groups, replacing the original name of Body of Delegates that had been originally vehiculated by the great powers in their original proposal for the organization. Moreover, this change in perspective did, in the end, allow states to include in their delegations for the Assembly representatives from their parliaments.⁴² As mentioned, some of these parliamentarians who were

³⁸ Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, 61–63.

³⁹ Lansing, Robert. 1921. *The Peace Negotiations: A Personal Narrative*. Boston, MA: Houghton Mifflin Co., 58.

⁴⁰ Miller, David H. 1928. *The drafting of the Covenant* (volumes I and II). New York: G.P. Putnam's Sons, 306–7.

⁴¹ Ellis, Charles Howard. 2003. *The Origin, Structure & Working of the League of Nations*. Clark, NJ: Lawbook Exchange, 128.

⁴² Webster Charles K and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 47 & 53.

part of their national delegations to the League were also members of the IPU, thus allowing for a significant nongovernmental influence in this body.

Overall, G3 (made up both of small states and nongovernmental organizations) was somewhat successful in its efforts. The Covenant came to establish a relative equality between the two main organs or, at least, an overlap in their work. This overlap was, in part, the result of a compromise⁴³ between the G1 and G2 states' interests in boosting the Council's power and G3's preference for giving the Assembly a greater role. Both sides feared that a clear delimitation of powers would reduce the future roles of their preferred IGO body in some important issue-areas.⁴⁴ This ambiguity later came to have a negative effect on the IGO and its functioning.

Just as important, in the negotiations leading to the establishment of the League, G3 was able to have the Covenant stipulate that the Assembly would meet in annual sessions. This was considerably more often than every four years, as great powers had requested,⁴⁵ based on practices from the inclusive forums in the ITU and UPU.

The power struggle between the Council and Assembly tilted considerably in the latter's favor after its first official meeting in November 1920, a moment described by Robert Cecil as a "turning point" in the relationship between the two organs.⁴⁶ The Council had already met multiple times, starting on January 16, 1920 (only six days after the Covenant came into force), and adopted a series of decisions before the first Assembly meeting. Moreover, it had adopted a report of its work for the Assembly, as the rules of the organization stipulated. Powerful states had seen this report as a formality through which Council members would simply inform states who were not members of the Council of the organ's main discussions and decisions. However, the representatives of the G3 states saw the report as an opportunity to open broader debates on the Council's actions and even to criticize them. Two factors led them to be particularly critical of the more exclusive organ. First, many small states saw the Assembly meetings as rare opportunities to have their voices heard. Second, in an era of strong pressures for transparency in international relations (a strong norm that had been promoted most famously in Woodrow Wilson's Fourteen Points speech), the Assembly had opened its meetings to the press and public. The Council, seeing itself function

⁴³ Some, in fact, have referred to this decision as a "constitutional compromise." See, e.g., Ellis, Charles Howard. 2003. *The Origin, Structure & Working of the League of Nations*. Clark, NJ: Lawbook Exchange, 127.

⁴⁴ Miller, David H. 1928. *The drafting of the Covenant* (volumes I and II). New York: G.P. Putnam's Sons, 315.

⁴⁵ Northedge F. S. 1986. *The League of Nations : Its Life and Times*. Leicester: Leicester Univ. Press, 50; Ellis, Charles Howard. 2003. *The Origin, Structure & Working of the League of Nations*. Clark, NJ: Lawbook Exchange, 128.

⁴⁶ *New York Times*, November 15, 1920. Cited in Housden, Martyn. 2012. *The League of Nations and the Organisation of Peace*. New York: Pearson Longman, 13.

like a closed-door “cabinet” rather than a public forum such as parliaments, had indeed worked outside the public eye. Therefore, the inaugural Assembly became a first opportunity to exercise “moral pressures” on the representatives of states.⁴⁷ In the first few days of the Assembly’s inaugural session, representatives of powerful states showed their dissatisfaction with discussions by refusing to take the floor. Most of them were low-ranked officials, reflecting G1 and G2 states’ original lack of interest in this body. This contrasted with G3 states that were represented by foreign ministers or even heads of state, many of them prominent individuals with considerable oratory skills. However, in time, great power representatives felt obligated to engage in the debates to defend the Council’s actions.⁴⁸

Not accustomed to debating in front of the press and public, officials from the powerful states were forced to make a number of additional concessions, giving the Assembly even greater powers than the Covenant and informal agreements had made. First, G1 and G2 states conceded that the Assembly could take up any issue it wanted to. Their representatives unsuccessfully tried to at least keep the more representative body outside discussions on the most salient issues, such as disarmament, because they were too “technical” for the Assembly. G3 states such as Norway and South Africa, fired back by arguing that disarmament affects the whole world and has implications for a broad set of political, economic, and social questions that indeed needed to be taken up by the Assembly.⁴⁹ Just as important, the proponents of a stronger Assembly often invoked Article 3 from the Covenant, which stated that “The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.”⁵⁰

That first Assembly session also marked another important victory for G3 states by giving the inclusive forum power over the budget. In part, this was possible because G1 and G2 states considered budget decisions to be relatively innocuous (also based on experiences with the fairly low costs of running the technical IGOs) and they felt that the Council should not spend its precious time on them. This decision, however, soon became a very important one as the tasks of the League increased and budgetary questions became strongly politicized. In fact, the Assembly was not only given power over the budget of the League proper but also of affiliated bodies and organizations such as the PCIJ and International Labour Office.⁵¹

⁴⁷ Housden, Martyn. 2012. *The League of Nations and the Organisation of Peace*. New York: Pearson Longman, 13.

⁴⁸ Walters, Francis Paul. 1952. *A History of the League of Nations*. Volume 1, London: Oxford University Press, 119.

⁴⁹ Ellis, Charles Howard. 2003. *The Origin, Structure & Working of the League of Nations*. Clark, NJ: Lawbook Exchange, 130.

⁵⁰ Webster Charles K and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 71.

⁵¹ Ostrower, Gary B. 1996. *The League of Nations: From 1919–1929*. Garden City Park, NY: Avery Publishing Group, 116.

Thus, in the end, the role of the Assembly came to be much greater than that which G1 and G2 states had originally envisaged. In a 1933 in-depth survey of the functioning of the League, two close observers of the organization noted: "Nothing illustrates better the immense difference between the conception of the League which was in the minds of its founders in 1919 and the reality which has appeared than the place of the Assembly in the whole organization. It is indeed not yet a stable one and may radically alter in the course of succeeding years. But the part it has played in the early years of the League is one which no one suspected was possible in 1919."⁵²

Great powers had been correct in fearing that by opening the door to some small states' demands they would eventually lose even more power in the League. The unanimity system in both the Council and the Assembly gave all states, great and small, veto power. This additional influence of G3 states, in turn, gave them greater leverage in later negotiations that eventually led to an increase in the nonpermanent seats in the Council a few years later, when Germany joined the League and sought permanent membership in this body. The Assembly's increased relevance was illustrated by the fact that, starting in 1924, powerful states such as France and the UK began sending their prime ministers to the organ's meetings, following the example of small states that, as mentioned, had adopted this practice as early as the first meeting, in 1920.

The League Assembly was eventually given about the same amount of power as the Council. Its resolutions were binding to states, just as in the case of the Council. Moreover, although it functioned based on unanimity, it did not allow states involved in a specific conflict to vote on that particular resolution.⁵³ It is for that reason, for example, that the Assembly was able to adopt in 1935 a resolution imposing economic sanctions against Italy (one of the five permanent members of the Council) even though this G2 state opposed the resolution.

The initial idea that the Assembly should be a place for small states to also be involved in the League implied that, as mentioned earlier, it should be able to discuss any issues, including security, because, at that time before the Council came to include some G3 states, it was envisaged that they would not have any other forum for such discussions. Even though the Council eventually did open up its membership to some small states, the rule that the Assembly could deal with virtually all issues remained and was stipulated in Article 3 of the Covenant. Additionally, Article 15 allowed the Council to refer any international dispute to the Assembly rather than deal with it itself.

Of course, those who sought a greater role for the Council and a weaker one for the Assembly did not fully give up their fight. By the mid-1920s powerful states

⁵² Ostrower, Gary B. 1996. *The League of Nations: From 1919–1929*. Garden City Park, NY: Avery Publishing Group, 64.

⁵³ Grigorescu, Alexandru. 2005. "Mapping the U.N.—League of Nations Analogy: Are There Still Lessons to Be Learned from the League?" *Global Governance* 11(1): 25–42.

were successful in moving some of the broader discussions that had ordinarily taken place in the Assembly to special conferences that focused on narrow topics such as transit, opium, and health (in a strategy similar to the one mentioned earlier and that they had used in the Congress of Vienna and in the technical IGOs of the nineteenth century). The flexibility of rules in such conferences allowed great powers to shape the agenda and outcomes more easily than in the League Assembly.

The Assembly nevertheless came to be a very powerful organ that took on many different issues, including peace and international security. For the purposes of the present study, it is important to note that it came to develop a role as a true restraint on states, including some of the most powerful ones. Of the several dozen cases of conflict that were referred to the League, the Assembly only played important roles in a handful of instances.⁵⁴ However, some consider that the simple existence of the Assembly, with its strong influence on international public opinion, and the potential to become involved in international disputes due to the aforementioned Article 15 in the Covenant (that allowed the Assembly to take over matters under certain circumstances), gave this organ an essential role in the evolution of international restraints on power.⁵⁵

Perhaps the best example of how the League Assembly became involved in restraining the use of force is the one instance where Article 15 was indeed invoked: after Japan's invasion of Manchuria, in 1931. The invasion was prompted by an explosion on the South-Manchurian Railway. Japan had acquired control of the railway and the right to station troops to protect it under the Treaty that had ended the Russo-Japanese war, in 1905. After the explosion, Japanese troops immediately attacked the local garrison in Mukden and occupied the city. In the following days, multiple skirmishes ensued between Japanese and Chinese troops, leading to thousands of deaths. The Japanese quickly gained control over large portions of Manchuria, well beyond the railway that they purported to protect. Just three days after these events were triggered, China appealed to the League of Nations under Article 11 of the Covenant. The Council met and called upon Japanese troops to withdraw back to their original positions around the railway and formed a commission of inquiry to investigate the incidents. However, before the commission arrived in the region, the growing influence of Japanese nationalism in Tokyo and the realization that major Western powers were too preoccupied with their own brewing crises to initiate military actions in this part of the world, led Japan to disregard the Council's request. Instead, it increased its military

⁵⁴ Webster Charles K. and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 159.

⁵⁵ Webster Charles K. and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 162.

presence over all of Manchuria and formed the puppet state of “Manchukuo” to take full control over the area.⁵⁶

The escalation of tensions and fighting in the area became more significant for the international community when they spilled over into Shanghai, China’s most important port. After the city had been opened to foreign trade in the mid-nineteenth century, American, British, and French nationals came to form their own settlements with independent administration and police forces. Several thousands of troops from these countries as well as from Japan were also stationed in the area. Therefore, when fighting erupted in Shanghai, Japan sent a cruiser, an aircraft carrier and four destroyers to the port to protect its nationals in the city. Western powers could not agree on a common position on the conflict.

Despite the threat of an all-out war and despite the potential costs to Western trade in the region, it became clear that great powers were not prepared to take any real action against Japan. At that point, China shifted its approach from one based on Article 11 of the Covenant, with a greater role for the Council, to one based on Article 15, with the Assembly at the center of the decision-making process. The latter article not only allowed for all League members, great and small, to become involved in resolving the conflict, but it also was more specific in requiring that belligerents such as China and Japan could not veto resolutions. Although the Council expected the two states involved in the dispute to abstain from decision-making in such instances, League rules were not sufficiently clear if, in fact, they had an obligation to do so. Article 15, however, specifically required the exclusion of the two disputants from voting in the Assembly.⁵⁷

The Assembly met in a special session and unanimously called for an immediate ceasefire, for negotiations between the two belligerents, and for a Japanese withdrawal from Shanghai. It also declared it would not recognize Manchukuo and established its own committee to monitor the situation. G3 states were the most forceful in condemning Japanese actions because of their “anxiety lest the precedent should weaken their own [future] position,”⁵⁸ as one observer noted.

While the tensions and fighting did not disappear across the entire region, the Assembly’s forceful response, taking over in essence from the Council (that some considered “powerless”⁵⁹ at that time) at least led Japan to withdraw its troops from the outskirts of Shanghai.⁶⁰ Over the next year, the Assembly continued to

⁵⁶ Henig, Ruth. 2010. *The League of Nations*. London: Haus Publishing, 134–47.

⁵⁷ Northedge F. S. 1986. *The League of Nations : Its Life and Times*. Leicester: Leicester Univ. Press, 155.

⁵⁸ Webster Charles K. and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 169.

⁵⁹ Henig, Ruth. 2010. *The League of Nations*. London: Haus Publishing, 148.

⁶⁰ Webster Charles K. and Sydney Herbert. 1933. *The League of Nations in Theory and Practice*. London: George Allen & Unwin, 170; Northedge F. S. 1986. *The League of Nations : Its Life and Times*. Leicester: Leicester Univ. Press, 157.

take a firmer position than the Council on the conflict in Manchuria. Great powers (including the US, that, although not a member, coordinated with the League on this issue) were not prepared to apply economic sanctions against Japan or use military force to aid China. Of course, small states were not prepared to take such actions on their own, either. The best that both groups could do was condemn Japan and continue to refuse recognition of Manchukuo. In a February 1933 Assembly meeting, all states expressed this position (except for Thailand, that abstained). At that point, Japan decided to withdraw from the League of Nations.⁶¹

While it did not play as important a role as in the Manchurian crisis, the Assembly also was central to the all-important decision of applying economic sanctions against Italy after that country's invasion of Abyssinia in 1935. In that crisis, the powerful European states were, once more, hesitant to confront a powerful state, this time Italy. As one observer of the events noted, "They hoped to stop Mussolini from getting what he wanted; but they did not wish to annoy him, hurt him, to humiliate him, and above all they did not wish to bring about his fall."⁶² Therefore, the Council initially delayed for about eight months taking on the dispute and, when it did, treaded carefully. As it was working, once more, under the aforementioned Article 11 of the Covenant, it required unanimity to take any action and it quickly became clear that such unanimity could not be achieved. The solution, yet again, was to entrust the issue to the Assembly. However, this time, the reasoning behind the shift from the exclusive organ to the more inclusive one was different than in the Manchurian crisis. League members felt that one way to deter Mussolini from taking further action was by threatening him with (or even adopting) economic sanctions, based on Article 16 of the Covenant.⁶³ The Covenant, however, had not specified exactly how the decision to adopt economic sanctions should be taken. Most important, would this be a decision for the Council, the Assembly, or both organs?

Interestingly, just one year after its establishment, the League had created a "Blockade Commission" to study the legality of economic sanctions of all kinds, especially those stipulated in Article 16 of the Covenant. At that time, when, as mentioned, the Assembly had come to assert its power vis-à-vis the Council, it was able to establish that the decision of applying sanctions should rest with individual

⁶¹ Northedge F. S. 1986. *The League of Nations : Its Life and Times*. Leicester: Leicester Univ. Press, 160.

⁶² See Walters, Francis Paul. 1952. *A History of the League of Nations*. Volume 2, London: Oxford University Press, 646. During the Abyssinian crisis, Walters was deputy secretary-general of the League of Nations.

⁶³ The pertinent part of the article read: "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 between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

member states because they each had to cope with very different economic realities. The Assembly therefore insisted that the Council could only “recommend” such sanctions.⁶⁴ This decision, as well as several others pertaining to economic sanctions, were incorporated into the so-called “Resolutions of 1921.”⁶⁵

In 1935, these resolutions came to be discussed for the first time since they had been adopted, almost a decade and a half earlier. There was a general recognition that they could not be treated as binding because they had been adopted “provisionally” at that time. However, as they had established an important precedent, in the Abyssinian crisis the Assembly quickly built on those early decisions, arguing, as in the past, that the decision of applying economic sanctions should rest with individual member-states. This time around, the argument was not only due to this inclusive forum’s wish to be at the center of such decisions. It was also a way to circumvent the practical problem of having some states veto a binding resolution (mandatory for all states) in the Council or the Assembly. Just as important, at a time when powerful states continued to avoid damaging their relations with Italy (a G2 state), they preferred having the most important debates about the sanctions moved to the Assembly where it was more likely that they would establish, as one observer argued, “the moral basis without which individual action could not be possible.”⁶⁶

Indeed, the debates over the 1935 sanctions, the only ones that the League ever truly applied, were very normative in nature. Virtually all speakers condemned Italian actions. However, smaller states were much more critical of this great power than the dominant states present in the League. They expressed their apprehensions regarding not just present but future potential power concentration.⁶⁷ The most outspoken representative was the one from Haiti, Alfred Nemours, who argued: “Great or small, strong or weak, near or far, white or coloured, let us never forget that one day we may be somebody’s Abyssinia.”⁶⁸

Fifty of the fifty-four states represented in the Assembly expressed their support for economic sanctions. The final vote on the matter reflected this split, with only one state opposing the decision, and three abstaining. The Assembly resolution also established a “Co-ordination Committee” that was to deal with the actual details of the sanctions. The same fifty states were represented on the committee,

⁶⁴ See, Taylor, Amos E. 1925. “Economic Sanctions and International Security,” *University of Pennsylvania Law Review* 74(2): 155–168, 161.

⁶⁵ Zimmern, Alfred. 1935. “The League’s Handling of the Italo-Abyssinian Dispute,” *International Affairs* 14(6): 751–68, 764.

⁶⁶ Walters, Francis Paul. 1952. *A History of the League of Nations*. Volume 1, London: Oxford University Press, 656.

⁶⁷ Walters, Francis Paul. 1952. *A History of the League of Nations*. Volume 1, London: Oxford University Press, 649.

⁶⁸ Cited in Housden, Martyn. 2012. *The League of Nations and the Organisation of Peace*. New York: Pearson Longman, 104.

yet again a reflection of the inclusive nature of the approach taken to this crisis and of the Assembly's leading role in the process.

While the Assembly's actions in these two disputes, triggered by Japan and Italy, were perhaps the most visible, there were, of course, other instances when this inclusive body took on an important role, often more important than that of the Council. Examples of such moments range from some of this forum's first meetings (such as those in 1921 when small states used it to support a more effective and independent PCIJ, as discussed in the previous chapter⁶⁹) to its last ones (such as the one in December 1939 when it was the organ that adopted the formal resolution that led to the exclusion of the Soviet Union after the country's invasion of Finland⁷⁰).

More broadly, the Assembly is considered to have contributed to the overall League efforts to bring about an essential change in the evolution of restraints in the international realm: to limit the traditional right of states to wage wars. Together with the Council, it was, at minimum, successful in slowing down the processes that led to wars and to establish some deterrents for taking military actions.⁷¹

It is also worth noting that other IGOs that formed after World War I also established similar inclusive assemblies that played important roles in restraining power. The most prominent such organization was probably the International Labour Office (ILO). The ILO also experienced a similar process as the one in the League, where normative pressures eventually led to greater representation for small states in the executive organ (the Governing Body) and to a strong role for the IGO's assembly.⁷²

The UNGA: more changes to, and consolidation of, restraints through international assemblies

After World War II, the same League model for IGOs, with an exclusive council and an inclusive assembly, spread to the numerous IGOs established at that time. Most important, of course, it was embraced by the new United Nations, both for the organization proper and for the many other IGOs created under its umbrella, most prominent being its "specialized agencies" such as the Food and Agriculture Organization, the UN Educational, Scientific and Cultural Organization, or the

⁶⁹ Ellis, Charles Howard. 2003. *The Origin, Structure & Working of the League of Nations*. Clark, NJ: Lawbook Exchange, 367–8.

⁷⁰ See, e.g., Bendiner, Elmer. 1975. *A Time for Angels: The Tragicomic History of the League of Nations*. New York: Knopf, 397.

⁷¹ Barros, James. 1970. *The League of Nations and the Great Powers: The Greek–Bulgarian Incident, 1925*. Oxford: Clarendon Press, 116.

⁷² See, e.g., Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, chapter 3.

World Health Organization. In one form or another, it was also embraced by the new financial institutions that appeared to require a more “bank-like” organization, as was the case of the World Bank and International Monetary Fund, with their inclusive Board of Governors and exclusive Board of Directors or Executive Board, respectively, where powerful states (with greater voting power) were each represented by their nationals, but smaller states (with less voting power) shared representation.

As the UN was being shaped, its founders indeed built on the experience of the League. On the one hand, the now influential realist approach to international relations reflected a greater emphasis on the new Security Council (SC), rather than the General Assembly (GA). More broadly, the approach led to the shaping of institutions that great powers could control more easily. This is yet another example of a shift from stronger to weaker institutional restraints. In the UNSC, only the five most powerful states were given a veto while the non-permanent members only had a simple vote. The same powerful states also had virtually permanent representation in other important organs such as the Trusteeship Council and in the Economic and Social Council. As mentioned, informally, since the inception of the IGO, they have also managed to place at least one of their respective nationals as judges on the ICJ.

On the other hand, even the now dominant realist approach could not completely eliminate the practice of maintaining an inclusive and meaningful assembly to complement the powerful UNSC. The GA emerged as the main organ where great powers were equal (at least in representation and voting) to all other states. Yet, G1 and G2 states decided that in the new IGO the division of tasks between these two main organs should be spelled out better, allowing for very little overlap, as had been the case of the League. The great powers’ original plans for the UN involved having the SC focus on peace and security and the GA on economic and social questions.⁷³ As G3 states were brought into the planning of the IGO, they made it clear they would not accept reverting to a system where they had little or no influence on international security.⁷⁴ They pushed back on great powers’ original plan. In the end, the two sides reached yet again a compromise on the powers of the two organs, one that is reflected in the Charter.

Most important, Article 10 of the Charter came to stipulate that “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.” On the one hand, the article made it clear that the GA had the right to discuss all issues, including those pertaining to security. On the other hand, great powers were able to limit this right, through Article 12, only

⁷³ Henig, Ruth. 2010. *The League of Nations*. London: Haus Publishing, 184.

⁷⁴ E.g., Wilcox, Francis O. 1945. “The Yalta Voting Formula,” *The American Political Science Review* 39(5): 943–56, 946.

to instances when the SC is not “exercising in respect of any dispute or situation the functions assigned to it in the present Charter.” Great powers would later use this stipulation by leaving its debates on various disputes open, often for years on end, and, therefore, argue that the GA should not deliberate the same question. Just as important, Article 12 reiterated the fact that the GA could only make (non-binding) “recommendations” to member-states or the UNSC. Additional articles continued to list other possible tasks for the UNGA. Article 11 stipulated that the GA could “consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments.” Article 13 referred to the Assembly’s promotion of international co-operation through “progressive development of international law and its codification.” Article 14 added its right to “recommend measures for the peaceful adjustment of any situation, regardless of origin.” Article 16 gave it the main budgetary role while Article 17 gave it prerogatives in the trusteeship system. Article 15 stipulated that the SC deliver an annual report to the GA. Conversely, Article 24 noted that “Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf” (emphasis added).

In sum, although the GA maintained some roles that the Assembly had played in the League, powerful states were able to limit these roles more clearly in the UN. With this clearer delineation of tasks, the GA emerged as an organ with less power than the League Assembly. Most important for the present study, its design made it very difficult, if not impossible, to restrain the actions of the most powerful states. This outcome is expected based on A3. In the immediate aftermath of World War II, when the UN was being established, the US emerged as the clear G1. It was only in the late 1940s and early 1950s that the Soviet Union came to be perceived as a possible challenger to its hegemony and when US relative power declined (as Figure 2.2 indicates). Therefore, the interplay among G1 and G2 states’ interests did not result in a demand for institutional restraints when the UN emerged in 1945.

And yet, in time, the GA nevertheless came to craft a more important role for itself. The most important reflection of this trend was the adoption and later application of the Uniting for Peace Resolution. The resolution came in 1950, after it became clear that a combination of the veto in the UNSC and the Cold War disagreements were going to make it virtually impossible for this organ to take any meaningful actions, at least during periods of great tensions between great powers. It is noteworthy that the resolution was passed when G1’s power relative to that of the G2 challenger was low.

In the late 1940s most of the members of the UNSC tended to back US positions. The USSR therefore found itself using the veto often to stop the UN from taking

actions contrary to its interests. In the first five years of the UN's existence, all 46 vetoes in the UNSC were cast by the Soviet Union.⁷⁵ This paralysis was followed by a brief respite, in the first half of 1950, when the Soviets boycotted the UNSC because the organ refused to unseat the Nationalist Chinese delegation and replace it with a People's Republic of China delegation. In June and July 1950, during the Soviet absence from the UNSC, this body passed three important resolutions dealing with the Korean conflict and was able to establish a force to "repel the armed attack" from the North. As the Soviets realized that such resolutions would not have passed had their representatives been present during the votes, in August 1950 they ended their boycott. As soon as they returned in the UNSC, the Soviet Union went back to its practice of vetoing resolutions, including, of course, those referring to Korea. At that time, the United States considered that the only way to have the UN function as it had originally been intended in maintaining international peace, was to give the General Assembly a role in decisions involving such disputes. Therefore, on November 3, 1950, it was able to gain sufficient support to pass a resolution in the General Assembly (that has come to be known as the "Uniting for Peace" resolution) stating that "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."⁷⁶

The resolution was initiated by the US and several of its Cold War allies (including France and the UK, also permanent members of the UNSC). However, it was the small states that appeared to be its most ardent supporters. Many of them noted that they had only agreed to the veto in San Francisco on condition that the UNGA could also adopt resolutions referring to security issues when the UNSC could not reach agreement.⁷⁷ The representative of Uruguay called the resolution "the most decisive progress so far made by man towards the organization of peace and security."⁷⁸ The one from the Philippines argued: "I doubt whether any single act of the United Nations, other than the adoption of the Charter will loom so large and

⁷⁵ <https://research.un.org/en/docs/sc/quick>

⁷⁶ United Nations. 1950. "Uniting for Peace." A/RES/377(V) at [https://www.un.org/en/sc/repertoire/otherdocs/GAres377A\(v\).pdf](https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf)

⁷⁷ United Nations. 1952. *Uniting for Peace; How the General Assembly Arrived at its Momentous Resolution, with the Text of the Resolution, Excerpts from the Debate, and the Conclusions of the Collective Measures Committee*. New York: United Nations, 9.

⁷⁸ United Nations. 1952. *Uniting for Peace; How the General Assembly Arrived at its Momentous Resolution, with the Text of the Resolution, Excerpts from the Debate, and the Conclusions of the Collective Measures Committee*. New York: United Nations, 17.

vital as this in the history of the Organization.”⁷⁹ The one from Iran considered it “the most important of all the resolutions which the different General Assemblies have passed since the setting up of the United Nations.”⁸⁰ Small states appeared truly hopeful that this resolution would act as a restraint on future actions of all great power.

The resolution passed easily (with 52 votes for, two abstentions, and only five votes against) at a time when the US indeed had a great deal of support in this inclusive organ. Using the terminology of the present study, this action can be described as a case of G1 increasing the role of an assembly dominated by G3 in order to counter the growing potential threat of a challenger, still a G2 state at the time.

In fact, while the Uniting for Peace resolution was the most successful and visible US attempt to shift some of the UNSC’s role to the UNGA early on in the Cold War, it was not the only one. In November 1947, the United States spearheaded the establishment of the UNGA “Interim Committee” intended to deal with matters of international peace and security, between the close of this organ’s ordinary session and the opening of a new one.⁸¹ Also in 1947, when the Soviets vetoed the creation of an observer mission to monitor Albanian, Bulgarian, and Yugoslav guerilla support for the communist movement in Greece, the US took the issue to the UNGA.⁸² The UN Commission on the Balkans, the first UN observer mission to ever be established, was thus created by the Assembly, not the Council. In 1949, the US Senate had proposed an international convention to give the UNGA the ability to call for the use of force against an aggressor when the UNSC could not “fulfil its duties” because of its voting procedures.

It should also be noted that, as expected, although virtually all G3 states supported giving the UNGA a greater role, G2 states did not always back this G1 proposal. Most important, the UK, probably the US’s staunchest ally in the early years of the Cold War, originally did not want to back this initiative. It felt that, with such added powers, the UNGA could, at some point act against British interests. The British Permanent Representative to the UN later explained, “we thought it dangerous to put real power in the hands of a body which might, by

⁷⁹ United Nations. 1952. *Uniting for Peace; How the General Assembly Arrived at its Momentous Resolution, with the Text of the Resolution, Excerpts from the Debate, and the Conclusions of the Collective Measures Committee*. New York: United Nations, 18.

⁸⁰ United Nations. 1952. *Uniting for Peace; How the General Assembly Arrived at its Momentous Resolution, with the Text of the Resolution, Excerpts from the Debate, and the Conclusions of the Collective Measures Committee*. New York: United Nations, 23.

⁸¹ Petersen, Keith S. 1959. “The Uses of the Uniting for Peace Resolution since 1950,” *International Organization* 13 (2): 219–232. Starting in the 1980s, the UNGA shifted towards “year round” sessions. See Johnson, Larry D. 2014. “‘Uniting for Peace’: Does it Still Serve Any Useful Purpose?,” *American Journal of International Law* 108: 106–15.

⁸² Krasno, Jean and Mitushi Das, “The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council,” in Bruce Cronin and Ian Hurd (eds.). *The UN Security Council and the Politics of International Authority*. London: Routledge, 2008, 173–95, 177.

a two-thirds majority, vote for action disapproved of by a permanent member.”⁸³ The UK therefore first sought to make only some smaller changes to the UNGA rules of procedure (for example, allowing it to convene within 24 hours of a member’s request). When it saw that the US could not be swayed, it eventually joined its more powerful ally and voted for the resolution. Interestingly, just a few years later, the Uniting for Peace Resolution was indeed used against the UK, during the Suez Canal crisis.

Of course, the passage of the Uniting for Peace Resolution was not enough to give the UNGA sufficient power to impose any actions on dominant states. After all, this organ could only adopt “recommendations,” not binding decisions as in the case of the UNSC. However, even such non-binding resolutions are considered to be significant potential restraints on the use of force because they are important “value judgements,” representing the opinion of virtually all existing states.⁸⁴ Moreover, the resolution allowed states to bypass the UNSC when great powers would veto resolutions and take some actions, including establishing peacekeeping operations (as in the case of UNEF I in the Suez crisis of 1956 and ONUC in the Congo in 1960) and adopting some “voluntary sanctions” (four times in the history of the UN).

Despite the importance that some authors place on the Uniting for Peace Resolution, others note that it did not change too much in the status quo.⁸⁵ All aforementioned practical measures were in conformity with the Charter’s existing stipulations. Peacekeeping operations were not deemed “enforcement measures” (that only the UNSC could take). Therefore, the UNGA could have taken them even without the Uniting for Peace Resolution. The sanctions were “voluntary” and therefore were up to each member-state, not mandatory as those imposed by the UNSC. Last, but not least, although the Charter had given the SC primary responsibility for international peace and security questions, it had not excluded the GA from this important issue-area.

What the Uniting for Peace resolution managed to change was two important practices that were not necessarily obvious in the founding documents. It led to the institutionalization of UNGA meetings even outside its original 3-month fall sessions and it allowed it to discuss any dispute, even if the UNSC had also taken up this matter. The first change, mentioned earlier, was fairly easy to bring about because the Charter already allowed for “special sessions” beyond the regular ones and because it did not specifically prohibit ad-hoc meetings. In time, the practice

⁸³ Cited in Bourantonis, Dimitris and Konstantinos Magliveras. 2002. “Anglo–American Differences over the UN during the Cold War: The Uniting for Peace Resolution,” *Contemporary British History* 16(2): 59–76, 69.

⁸⁴ Carswell, Andrew J. 2013. “Unblocking the UN Security Council: The Uniting for Peace Resolution,” *Journal of Conflict and Security Law* 18(3): 453–80.

⁸⁵ Johnson, Larry D. 2014. “‘Uniting for Peace’: Does it Still Serve Any Useful Purpose?,” *American Journal of International Law* 108: 111.

of having additional UNGA meetings outside of the regular sessions became so common that, by the 1980s the organization decided to officially make the regular sessions year-round.

The second change, however, was somewhat more difficult because Article 12 of the Charter specifically stipulated that “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.” In fact, those opposing the Uniting for Peace Resolution, especially the USSR, used this stipulation to argue against the legality of the resolution. Those supporting the resolution, however, noted that this procedure is only used when the UNSC is paralyzed and therefore it is not, in fact, exercising its functions.⁸⁶

Despite such disagreements, in time, it became common practice to allow both the UNGA and the UNSC to simultaneously deal with the same questions. In 2004, the practice was eventually formalized, when the International Court of Justice noted in its “Wall Advisory Opinion,” that, despite the stipulations of Article 12, four decades of practice have already altered the article.⁸⁷ It is perhaps worth noting that this slow shift from practice to formalization was similar to the one that led to the UNGA having year-long sessions.

In the first few decades after the Uniting for Peace Resolution was adopted, virtually all states supported its use in certain instances. While the USSR (a G2 state) had opposed its original use in the Korean conflict, in some later cases it was the one requesting that the UNGA be given the power to act on security issues and the United States (the G1 state) was the one opposing it. Since 1950, the Uniting for Peace resolution was used a dozen times. In 1956 it was invoked after the Suez crisis and led, as mentioned, to the establishment of UNEF I. That same year, the resolution was used in the aftermath of the Soviet intervention in Hungary. Later, the resolution allowed the UNGA to take up situations in Lebanon (in 1958), the Middle East (1967, 1980, 1982, 1997), the Congo (1960), Bangladesh (1971), Afghanistan (1980), Namibia (1981), and, just recently, Ukraine (2022).⁸⁸ Of course, the nature of this procedure implies that, virtually each time, it did so

⁸⁶ Carswell, Andrew J. 2013. “Unblocking the UN Security Council: The Uniting for Peace Resolution,” *Journal of Conflict and Security Law* 18(3): 468–9.

⁸⁷ Carswell, Andrew J. 2013. “Unblocking the UN Security Council: The Uniting for Peace Resolution,” *Journal of Conflict and Security Law* 18(3): 469. The ICJ had also sided with the UNGA as early as 1962 when it argued that the inclusive organ could indeed take on questions of international peace and security because the Charter stipulated that the UNSC has *primary* but not *exclusive* authority in this realm. See Krasno, Jean and Mitushi Das. 2008. “The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council,” in Bruce Cronin and Ian Hurd (eds.), *The UN Security Council and the Politics of International Authority*. London: Routledge, 181–82.

⁸⁸ See, e.g., Miluna, Ieva. 2014. “What Does the Uniting for Peace Resolution Mean for the Role of the UN Security Council?” *American Journal for International Law* 108: 118–22; Petersen, Keith S. 1959. “The Uses of the Uniting for Peace Resolution since 1950,” *International Organization* 13 (2): 219–32; Panke, Diana and Ulrich Petersohn. 2012. “Why International Norms Disappear Sometimes,” *European Journal of International Relations* 18(4): 719–42.

contrary to the wishes of one of the G1 or G2 states, at least those that have a veto in the UNSC. Some note that even some current G2 states that are not permanent members of the UNSC but see themselves as potentially gaining such a status in the future (such as India, Brazil, and South Africa) are now very careful about how they portray the Uniting for Peace Resolution.⁸⁹ This common understanding among great powers that the procedure acts as a double-edged sword for them and that, as a group, they would much prefer to maintain important security discussions in the UNSC rather than the UNGA (where G3 states dominate the vote) has led them all to avoid invoking the resolution since 1982 (although small states have invoked it once more, in 1997).⁹⁰ Of course, there have been exceptions to this trend, most recently the use of the Uniting for Peace mechanism against Russia after this G2 state launched a war against Ukraine in early 2022.

What is uncontested, however, is that, starting with the 1950 resolution, there has been a shift in power from the UNSC to the UNGA and, as many observers note, from the stronghold that G1 and G2 states appeared to have on the IGO to an increased influence of G3 states.⁹¹ Contrary to the intentions of the great powers that founded the UN, it has become clear that the UNGA can take up any international issue at any time. Indeed, it has increasingly used this prerogative to make G3 voices heard, often expressing their disagreement with G1 and G2 actions.

A reflection of the UNGA's transformation into a more meaningful restraint on power has been G3 states' greater willingness to express their criticism of great power policies, especially of those of the G1. Figure 5.2 illustrates how the votes of G3 and G2 states in the GA have come to be increasingly divergent from the US votes.⁹² The figure suggests that, starting around 1970, other states used the GA to express their disagreement with the superpower. While the trend tapered off with the end of the Cold War, on average, the almost two hundred other UN members generally tend to disagree rather than agree with the US in matters discussed by the GA (reflected in the negative average score in voting in almost all years since 1989).

The figure shows that G2 and G3 support for US positions eroded starting around 1970, about the same time when US power relative to the USSR's power (and the power of other G2 states) stopped declining (as indicated in figure 2.2).

⁸⁹ Carswell, Andrew J. 2013. "Unblocking the UN Security Council: The Uniting for Peace Resolution," *Journal of Conflict and Security Law* 18(3): 478.

⁹⁰ Carswell, Andrew J. 2013. "Unblocking the UN Security Council: The Uniting for Peace Resolution," *Journal of Conflict and Security Law* 18(3): 456.

⁹¹ E.g., Andrassy, Juraj. 1956. "Uniting for Peace," *American Journal of International Law* 50(3): 563–82, 581.

⁹² The chart depicts the average "affinity" score between the US and all other states. The measure is based on state voting positions in the UNGA using the "S3uni" affinity measure (that excludes 1964 when there are no UNGA votes and is based on "yes," "no," and "abstain" votes (rather than just on "yes" and "no," as in the case of "S2uni" measure). See https://pages.ucsd.edu/~egartzke/data/affinity_codebook_03102006.pdf

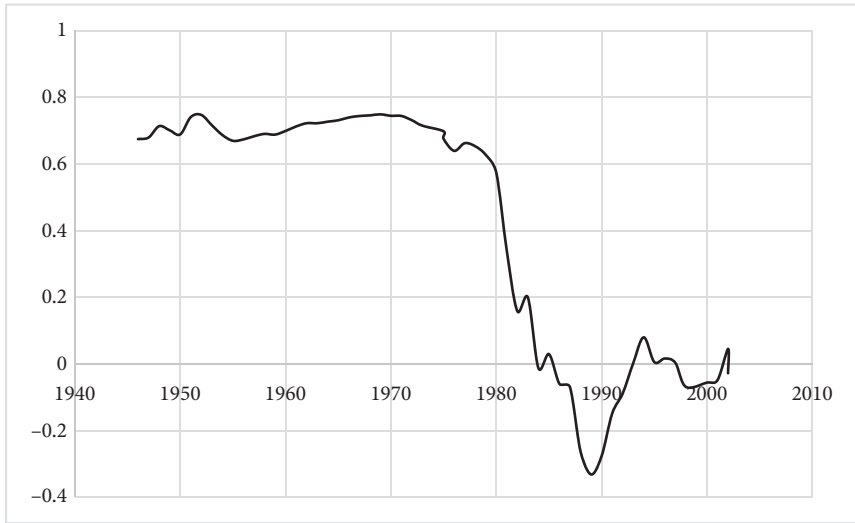


Figure 5.2 UNGA “Voting Affinity” between US and all other UN member-states

The “moment 4” in the first part of the Cold War era was indeed one of relatively high uncertainty regarding who will be the future G1. During those early years of the UN, the US (and, eventually, all other dominant states) empowered the General Assembly, hoping to gain greater support from G3 states in its clashes with the most powerful G2 state, the USSR. Once the UNGA became more powerful, the US lost control over this organ even as its relative power vis-à-vis the USSR began increasing once more. G3 states made use of the newly empowered UNGA to express their displeasure with G1’s policies.

Another way of interpreting the trend in Figure 5.2 is that the decline in support for US positions is the result of the many new states that emerged as part of the decolonization process. Although the US had supported decolonization, backing the creation of the Trusteeship Council (certainly more than the French and British⁹³), this process, combined with the empowerment of the UNGA (also supported initially by the US) led the organ to become more hostile to G1.

A first reflection of the new reality that the US faced within the UNGA was the adoption in 1971 of Resolution 2758 that formally recognized the People’s Republic of China as “the only legitimate representative of China to the United Nations” and removed “the representatives of Chiang Kai-shek” from the United Nations.⁹⁴ The decision came after many years in which the US tried to stave off the change in Chinese representation. Of course, the decision to seat the PRC in the UN (and

⁹³ Louis, William Roger. 2006. *Ends of British Imperialism: The Scramble for Empire, Suez and Decolonization: Collected Essays*. London: I.B. Tauris, 586.

⁹⁴ United Nations. 1972. “Restoration of the Lawful Rights of the People’s Republic of China in the United Nations,” A/RES/2758(XXVI) at <https://digitallibrary.un.org/record/192054?ln=en>

especially in the SC, where it had a veto) altered the dynamics of great power politics and, consequently, limited the actions the US could take in the future in the IGO and even outside it.

Another example of the impact that GA decisions have had on US actions is that of Resolution 51/45 adopted in January 1997 that noted how, although Russia and the United States were the only two declared possessors of chemical weapons, they were among the few states that had not yet ratified the Chemical Weapons Convention at that time. The adoption of this resolution came about after long and heated debates among representatives from G1, G2, and G3 states. US and Russian officials sought unsuccessfully to avoid having their countries singled out in the resolution in a relatively embarrassing manner. After its adoption, the resolution contributed to the push that the two great powers' legislatures apparently needed and in April and May 1997, just a few months after the UNGA chastised them, the US Senate and the Russian Duma, respectively, ratified the treaty.⁹⁵

In sum, although the UNGA does not adopt binding resolutions, it has acquired the ability to shape international norms and understandings of legitimacy (and in some instances even taken action), and, by doing so, sometimes "delayed, frustrated, and undermined" (i.e., soft balanced) aggressive actions of great powers. Moreover, some decisions, such as the one on Chinese representation, have had direct effects on G1's ability to take certain action. This development is similar to the one through which early domestic assemblies made it more difficult for monarchs and their close allies to take any actions they pleased. Of course, the UNGA has also taken control of budgetary questions, giving it the "power of the purse" that domestic assemblies were also able to slowly acquire. This has made it increasingly difficult for great powers to use the funds of the IGO that they created to attain many of their goals, just as, during the Middle Ages, monarchs came to depend more on the early national assemblies for much needed funding, especially for military campaigns.

The European Parliament and the spread of IGO parliamentary assemblies: further change and consolidation of international institutional restraints

The evolution of the European Parliament (EP) is an important development in the history of international assemblies. Not only has this institution become the most powerful such assembly so far, but it sparked a trend in many other IGOs that now have also come to include some form of parliamentary body.

⁹⁵ Personal interview with diplomat in UNGA First Committee who took part in deliberations surrounding A/RES/51/45 in 1996–1997.

Like the CCNR, the EU is not a global institution, as the other IGOs discussed so far. To some extent, this implies that the dynamics leading to its emergence and later development may differ from those characterizing the evolution of IGOs such as the League of Nations or UN. Indeed, one can argue that the European institutions emerged as a reaction of several G2 states (France, Germany, and the UK) faced with an extraordinarily powerful G1 (the US) immediately after World War II and as well as with an increasingly threatening G2 state (USSR) vying for the G1 position. This process is, of course, different than the one discussed so far, both in the domestic and international realms, where G1 was directly involved in the establishment of the institutions that eventually became restraints on power (although it also did not oppose it). Nevertheless, as I will show, the regional dynamic, where European states viewed each other with a good deal of mistrust is similar to the global dynamic that characterized the evolution of global IGOs such as the League and UN. Indeed, the members of the European institutions supported or opposed the development of institutional restraints as a result of calculations that often only involved their perception of each other's relative power and intentions, just like great powers in global IGOs acted based on perceptions of each other. In other words, the processes involving the EU exhibit sufficient similarities to the global ones to contribute to our broader understanding of the emergence and empowerment of international assemblies.

Before the founding of the European Coal and Steel Community (ECSC) in 1952, the precursor of today's EU, the region established in 1949 the Council of Europe, another important international institution, and also one with a parliamentary assembly, named simply the Parliamentary Assembly of the Council of Europe (PACE). The push to create such an assembly came primarily from "below," as various nongovernmental groups associated with the federalist movement advocated for a Europe integrated at multiple levels, including among parliaments.⁹⁶ The Benelux countries (G3 states) together with France (a G2 state) supported this initiative and proposed to have PACE as part of the new organization. The UK, a G2 state at the global level but probably the G1 state in Europe in the immediate aftermath of World War II, was the greatest opponent of the parliamentary assembly, as A2 predicts.⁹⁷ It offered a counterproposal to the plans that had been offered by France and Benelux countries. The British plan only included a Council of Ministers and no parliamentary assembly. In the ensuing negotiations, the UK eventually agreed to include an assembly but one that met only once a year and that was simply consultative in nature (similar to the original

⁹⁶ Walker, Barbara. 2003. "Selected Timeline—Events, Efforts & Ideas to Create Global Assemblies," in Walker, Barbara and Saul H. Mendlovitz (eds.). *A Reader on Second Assembly & Parliamentary Proposals*. Wayne, NJ: Center for UN Reform Education, 136–144, 136; Young, Hugo. 1999. *This Blessed Plot: Britain and Europe from Churchill to Blair*. Woodstock, NY: Overlook Press, 41.

⁹⁷ Hawtrey, R. G. 1949. *Western European Union: Implications for the United Kingdom*. London: Royal Institute of International Affairs, 26.

Anglo-American plans for the UNGA). Moreover, it requested specific wording in the new IGO's Statute stipulating that the delegations to PACE would be appointed by governments, not parliaments.⁹⁸ Last but not least, they sought provisions that limited the role of the Council of Europe to issues that did not fall within the functions of major existing IGOs, such as the UN or the Organization for European Economic Co-operation. After the UK was able to weaken PACE considerably, it finally conceded and "gave them this talking shop" (in the words of then foreign secretary Ernest Bevin).⁹⁹

It is important to note, however, that in the negotiations leading to the establishment of the Council of Europe, proponents of strong supranational institutions were at least able to have all states declare their endorsement of a "functionalist" approach to European affairs through intergovernmental accords and "specialized authorities in the field."¹⁰⁰ This consolation prize for the supporters of a strong Council of Europe had an important impact on later developments. It boosted the plans for the ECSC that had only just begun to be discussed and, more broadly, it eventually shaped the European Union.

The developments surrounding the establishment of the Council of Europe indeed convinced other European states (both G2 and G3) that any attempt at a regional institution with significant parliamentary restraints on power needed to exclude the UK. When the Paris Treaty established the ECSC not only was the UK kept out of the negotiations for the new IGO, but it was not even informed of them until after agreement was reached. The ECSC thus emerged with a Common Assembly composed of representatives selected by parliaments, not governments.

Although the ECSC's Assembly was more powerful than PACE, early on member-states were still not willing to give it an equal role to that of the Council of Ministers (where governments were represented) or even to the supranational High Authority.¹⁰¹ In its first few years the Assembly only played a deliberative role. Jean Monnet, originally did not even want to include such an institution in the ECSC, considering it simply a "representation of the west's spiritual superiority."¹⁰² Yet, when the negotiations for the IGO began he, like many other supporters of the High Authority, realized that the Assembly could be a good check on the power of the Council, an example of how G4 sought the support of an institution

⁹⁸ Robertson, Arthur H. 1956. *The Council of Europe: Its Structure, Functions and Achievements*. New York: Praeger, 5.

⁹⁹ Young, Hugo. 1999. *This Blessed Plot: Britain and Europe from Churchill to Blair*. Woodstock, NY: Overlook Press, 42.

¹⁰⁰ Schuman, Frederick L. 1951. "The Council of Europe," *The American Political Science Review* 45(3): 724-40, 736-37.

¹⁰¹ Westlake, Martin. 1994. *A Modern Guide to the European Parliament*. London, New York: St. Martin's Press, 34.

¹⁰² Featherstone, Kevin. 1994. "Jean Monnet and the 'Democratic Deficit' in the European Union," *Journal of Common Market Studies* 32(2): 149-70, 160.

made up primarily of representatives of G3 in order to restrain the most powerful actors in the IGO.

His instincts were correct. As soon as the Assembly was established, its members tended to promote a supranational role for the ECSC rather than the intergovernmental one supported by governments, especially those of the most powerful states. Moreover, as A4 posits, Assembly members quickly sought to gain greater independence from their governments and to empower their institution. They established supranational political parties so the Assembly could offer a more united front and be more representative of the interests reflected in domestic parliaments.¹⁰³ They also began seeking a broadening of the Assembly's tasks including in the budgetary realm. Perhaps most important, they pushed to have direct elections of Assembly members. They felt that such elections would increase the legitimacy and independence of their institution even beyond the one derived from their selection by domestic parliamentary bodies.¹⁰⁴

In the first two decades of the Assembly's existence (both as part of the ECSC and of its successor, the European Economic Community), the clashes between "federalists," who supported such increased power for the institution, and "confederalists," who wanted to maintain a strong intergovernmental character for the European institutions, dominated virtually all debates. The latter group simultaneously argued that it was not appropriate to give too much power to a supranational parliament that was not directly elected and that it was wrong to organize elections for members of an Assembly that was just a talking shop.¹⁰⁵

Federalists realized that the only way to garner more power for the Assembly was to advance their goals piecemeal, to counter the "circular" arguments used by the confederalists. Therefore, at times when they promoted greater prerogatives for the Assembly (as in the late 1960s when they sought budgetary powers for the institution), they did not also request direct elections. Conversely, at times when they were promoting direct elections, as in the early 1960s and early 1970s, they were careful to downplay their efforts to empower the Assembly.¹⁰⁶

The confederalists initially appeared to gain the upper hand in their battles with the federalists. Most important, the 1957 Rome Treaty eliminated an important provision from the ECSC Treaty (through Article 21) that allowed members to select their representatives to the Assembly through direct elections rather than

¹⁰³ E.g., European Coal and Steel Community. 1955. "Common Assembly Debates." May 10–14.

¹⁰⁴ European Coal and Steel Community. 1952. "Memorandum sur l'articulation des Taches Initiales de la Haute Autorite." XI.075.350.

¹⁰⁵ E.g., Constitutional Assembly of the Ad Hoc Assembly. 1953. "Analyse de Principaux Arguments presentees dans la Commission et l'assemblee a l'appui des dispositions institutionnelles du projet de traite." AA/CC/GT (5) 42, 4; European Coal and Steel Community. 1953. "Ad Hoc Assembly. Minutes in Extenso." January 9, 142.

¹⁰⁶ European Parliament Political Committee. 1961. "Working Papers on the Community's Objectives during the Second Stage of the Transitional Period of the Common Market." CARDOC PEO AP RP /POLI. 1961 A00100/62.

through designation by national parliaments. The federalists were at least able to negotiate the introduction in the Treaty of an article (138-3) stating that the Assembly should offer some proposals for direct elections. They were also successful in introducing the word “parliamentary” in the body’s new name under the Treaty. In time, the name changed, yet again, from the “European Parliamentary Assembly” to the “European Parliament” (EP) to reflect even better the federalists’ plans for an organ analogous to domestic parliaments and, of course, with all of the prerogatives of such domestic institutions.

Throughout the 1950s and 1960s the main opposition to a greater role for the Assembly came from France, at that time the most powerful member-state. De Gaulle and other French officials were the strongest supporters of the confederalist approach. Some internal memos from that time reflected that the French efforts to maintain a weak EP, and thus keep powerful states’ ability to control the EC almost unhindered, were substantial and concerted.¹⁰⁷

At that time, some of the debates between federalists and confederalists directly touched upon the question of restraints on power emphasized by this book. Thus, confederalists argued that the ministers of the Council were more effective in checking the power of the Commission because they, in turn, were more accountable to the public even than directly elected MEPs.¹⁰⁸ Federalists countered this argument by explaining that an independent EP was not only a check on the Commission but also on the Council.¹⁰⁹

A formal proposal for direct elections in all member-states was finally introduced in 1960. France, however, continuously vetoed the proposal in the Council over the next decade. The tide began to change in 1970. That year federalists gained sufficient support to adopt the Treaty of Luxembourg with stipulations that allowed the EP to control its budget and propose changes to the Community budget. This came immediately after the Commission acquired its own budget.¹¹⁰ This result can be interpreted as an instance when the Council (where powerful European states like France dominated decision-making) agreed to partner with the EP (an institution made up of weaker actors) to counter the growing power of G4.

As mentioned, as soon as they achieved their victory in increasing EP prerogatives, in the early 1970s federalists moved back to promoting direct elections. They were also emboldened by the expected erosion of French opposition to a more powerful EP in the post-de Gaulle era. However, even before it joined the EEC in

¹⁰⁷ See, e.g., Peyrefitte, Alain. 1962. “The Negotiations for Political Europe—A Document Outlining a Tactic,” *Agence Internationale D’Information Pour La Presse*, 142: 1–8.

¹⁰⁸ European Parliament Political Committee. 1972. “Minutes of Political Commission of the European Parliament,” March 2. PE/I/PV/72-6, 11.

¹⁰⁹ European Parliament. 1965. “Monthly Bulletin of European Documentation,” July; European Parliament. 1968. *European Parliament: The First Ten Years, 1958–1968*. Luxembourg: General Secretariat of the European Parliament, 51–4.

¹¹⁰ Scalingi, Paula. 1980. *The European Parliament: The Three Decade Search for a United Europe*. Westport, CN: Greenwood Press, 114.

1973, the UK, yet another G2 state at the global level, and one vying for the G1 position in Europe, became the main opponent of a more powerful EP.

In the 1976 summit, however, proponents and opponents of a more powerful EP reached an important compromise. Confederalists were successful in formalizing the establishment of the European Council, a purely intergovernmental forum that had functioned informally for some time and that they saw as the supreme authority among the European institutions.¹¹¹ Federalists had been critical of the informal forum because it functioned outside the European institutions and, therefore, there were no checks on its power. Supporters of the Council pounced at the opportunity to make it a formal institution. To appease its critics, they agreed to empower the EP by finally allowing for direct elections. They felt that, even with such elections that would, in time, give greater legitimacy to the EP, the formalization of the European Council would push the entire European system towards a greater intergovernmental character.¹¹² The three countries that were most supportive of the intergovernmental European Council were also the most powerful ones: France, Germany, and the United Kingdom while most of the smaller states were supportive of direct elections, a stronger EP, and, consequently, of increased power restraints.¹¹³

The EP held its first direct elections in 1979. However, the 1980s saw continued clashes between the group supporting a more powerful EP and those seeking a weaker one. A first victory of the former group came in 1983, when the Council adopted the formal responsibility to answer all questions addressed by the EP, an important restraint on the organ controlled primarily by the great European powers. In 1986, when the Single European Act was adopted, federalists were able to include the “cooperation procedure” to the existing decision-making procedures, giving the Parliament a first real institutional check on the power of the Council. It was deemed a necessary addition at a time when the effectiveness and power of the Council was increasing, especially after the adoption of the qualified majority voting that replaced the more cumbersome unanimity voting system.¹¹⁴ The cooperation procedure allowed the EP to offer amendments that would need a unanimous Council vote to be rejected. This is generally considered the third essential moment in the evolution of the EP’s power, equal in relevance to those of 1970, when the institution was granted budgetary powers, and 1979, when the first direct elections were held.¹¹⁵ It is, of course, noteworthy that moments

¹¹¹ Bulmer, S. and W. Wessels. 1987. *The European Council. Decision-making in European Politics*. London: Macmillan, 39.

¹¹² European Community. 1975. *Official Journal*. “General Debates of the European Parliament.” January 14.

¹¹³ Moravcsik, Andrew. 1998. *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca, NY: Cornell University Press, 310.

¹¹⁴ Rittberger, Berthold 2005. *Building Europe’s Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press, 128.

¹¹⁵ Westlake, Martin. 1994. *A Modern Guide to the European Parliament*. London, New York: St. Martin’s Press, 102.

in the evolution of the EP are similar to those experienced by the early national assemblies discussed in chapter 3, that also gained incremental budgetary and legislative powers, especially after they acquired greater legitimacy by becoming more representative of the general population (i.e., of G3).

The 1992 Treaty on the European Union added the co-decision legislative procedure, giving the EP the right to veto legislation in 15 policy areas; 23 more were added in 1997 and 35 in 2001. The Treaty also established a formal relationship between EP and the Central Bank, tasked the EP with electing an Ombudsman, and allowed it to bring other EU organs before the European Court.¹¹⁶

In 1997, the EP's important role came to the fore when the Santer Commission was forced to resign due to serious corruption allegations. Although the Commission narrowly escaped a no-confidence vote in the EP, it soon became clear that it needed to resign.

In 2007 the Treaty of Lisbon gave Parliament co-decision on 75% of policy areas and control over the entire EU budget. Most important, it came to be considered as having "equal treatment" in the legislative process.¹¹⁷ At that moment, one can argue that the development of the EP's role as a restraint on power within the EU reached the same level as that of many parliaments in democratic states in the modern era, albeit in a much shorter timeframe than the changes in the domestic realm.

The EP has come to be the most powerful and best-known IGO parliamentary assembly and offers a useful example of the long-term evolution of such bodies. However, it certainly is not the only such institution. Almost three dozen international parliamentary assemblies were created as part of IGOs since PACE and the ECSC's Common Assembly were established (and a couple even before that). Two dozen emerged after the end of the Cold War.¹¹⁸

Other IGOs, including major ones such as the UN, have also begun discussing developing international parliamentary bodies, although many of them are still far from such an important decision.¹¹⁹ Two prominent organizations, the World Bank and the WTO, now have affiliated assemblies, functioning outside of the actual IGO institutions, based on a model closer to (and promoted by) the IPU than to the one of interparliamentary assemblies.

Indeed, the World Bank was the first international financial institution that began working with international parliamentary bodies, in part due to its

¹¹⁶ Corbett, Richard. 1994. "Governance and Institutional Development," in Neill Nugent (ed.), *The European Union 1993: Annual Review of Activities*. Oxford: Blackwell Publishers, 31–4.

¹¹⁷ Dosenrode-Lynge, Sören Zibrandt Von. 2012. *The European Union after Lisbon: Polity, Politics, Policy*. Farnham, Surrey: Ashgate, 166.

¹¹⁸ See Grigorescu, Alexandru. 2015. *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*. New York: Cambridge University Press, table 7.4, p. 250. Interestingly, the increase in the number of such intergovernmental assemblies appears to have tapered off over the past decade.

¹¹⁹ See, e.g., Habegger Beat. 2010. "Democratic Accountability of International Organizations: Parliamentary Control within the Council of Europe and the OSCE and the Prospects for the United Nations," *Cooperation and Conflict* 45(2): 186–204.

traditionally strong reliance on the US Congress (probably the most powerful institutional restraint on the Bank's actions). In 2000 it partnered with the "Parliamentary Network on the World Bank" (that later became the Parliamentary Network on the World Bank and International Monetary Fund) to engage in dialog with national parliamentarians.¹²⁰ In 2004, the IGO began organizing training programs for members of national parliaments and established a World Bank Parliamentary Relations Team. As more than ten thousand parliamentarians went through the training program, the discussions between the Bank and parliamentary network have become more meaningful and have been framed in terms of enhancing the IGO's accountability.¹²¹

The IPU and EP have spearheaded the effort to establish a "Parliamentary Conference on the WTO" in 2003. The conference has now become an annual gathering of representatives from various national parliaments who discuss the work of the IGO. Although some have called for a WTO Parliamentary Assembly functioning as a formal body of the organization,¹²² the dominant states and the leaders of the IGO are not willing to move beyond the current arrangement of a conference with an informal system of parliamentary representation.¹²³

The last two cases suggest that the IPU model for international parliamentary bodies has also come to be increasingly used over the past few decades. It complements the more prominent EP model.

Conclusions: comparing the evolution of international assemblies and parliaments to domestic developments

The above description of the evolution of restraints on power through international assemblies and parliaments allows us to compare it to the evolution of restraints through domestic assemblies and parliaments over the past millennium, described in chapter 3. This concluding section will address, once again, three main questions: What types of international institutional restraints developed? Who supported or opposed the institutional restraints? How (and why)

¹²⁰ See <https://www.parlnet.org/about/>.

¹²¹ Migliorisi, Stefano and Clay Wescott. 2011. "A Review of World Bank Support for Accountability Institutions in the Context of Governance and Anticorruption," *IEG Working Paper*; 2011/5. Washington, DC: World Bank. At <https://openknowledge.worldbank.org/handle/10986/26685https://openknowledge.worldbank.org/bitstream/handle/10986/26685/667550NWP00PUB00AccountabilityFinal.pdf?sequence=1>, p. 24.

¹²² Levi, Lucio. 2003. "Globalization, International Democracy and a World Parliament," in Mendlovitz, Saul H. and Barbara Walker (eds.). *A Reader on Second Assembly and Parliamentary Proposals*. Wayne, NJ: Center for UN Reform.

¹²³ See Moore, Mike. 2002. "The Parliamentary Assembly of the Council of Europe," *WTO NEWS: SPEECHES—DG MIKE MOORE*, January 23, 2002, at https://www.wto.org/english/news_e/spmm_e/spmm75_e.htm.

did international institutional restraints emerge and evolve? The answers to these questions allow me to assess the plausibility of A1–A6.

What types of international institutional restraints developed?

With the exception of the EP, the international assemblies and parliaments that have emerged within IGOs have been relatively weak (as expected, based on A1), similar to the early domestic assemblies in the Middle Ages. However, also as A1 posits, virtually all such international bodies, starting with the first global forums that the ITU and UPU established, have sometimes made it more difficult for great powers to achieve their goals, even if they could not outright stop them from doing so. In part, that is why powerful states have often supported giving the most important prerogatives to the smaller exclusive councils within IGOs that they could control more easily. The history of international assemblies, including those of the prominent League Assembly and the UNGA, have involved continuous tensions between these bodies and the more exclusive IGO councils, the League Council and UNSC, respectively.

These assemblies sometimes slowed down (without actually stopping) the aggressive actions of several G2 states, as was the case of those initiated by Japan and Italy in the inter-war era or of France and the UK at the beginning of the Cold War, or of close allies of powerful states, as in the case of North Korea. However, neither the League Assembly nor the UNGA acted directly against G1's use of force. In the interwar era that was not truly possible as the US was not a member of the League. In fact, the number of other powerful states that eventually left the League reflects the flaws of this IGO. The UNGA never used its most powerful tool, the Uniting for Peace mechanism, against the US, although it did use it against its close allies. It is perhaps also noteworthy that Uniting for Peace was used in 1956 and 1980 directly against the USSR who, although not G1, was vying for that position. In sum, these two assemblies were indeed similar to early domestic parliaments that sometimes took actions against the monarch's allies but hardly ever against the monarch himself.

The UNGA did, nevertheless, use its ability to legitimate (and delegitimize) actions by applying normative pressures against G1, as Figure 5.2 suggests. While the UNGA resolutions did not stop the US from taking the actions that it truly wanted to take, it made it more difficult for it to do so, in a way that is perhaps best described by the soft balancing literature. Moreover, there were some very rare instances where it appears that such resolutions contributed to actions that directly ran counter to G1 security interests, as in the question of Chinese representation in 1971 or the one of ratification of the Chemical Weapons Convention in 1997.

It is also important to note that virtually all IGO assemblies, including the one in the League and UN, have come to be the main bodies controlling their respective

organization's budget and, by doing so, have developed additional abilities to limit certain great power actions through the organization. This outcome is similar to the one in the domestic realm where monarchs came to depend on the willingness of ad hoc and later permanent assemblies to raise money, especially before costly military campaigns.

The parliamentary assemblies established outside IGOs (such as the IPU) have been less effective in restraining great powers. However, even such weak institutions sometimes played indirect roles in developing other more effective restraints (such as the PCA and PCIJ).

The EP stands out as an exception among all international assemblies. It has developed the ability to outright stop all members, including great powers such as France, Germany, and (until recently) the UK, from taking some actions that they wish to take, albeit not military actions. Additionally, the EU has developed restraints on power through checks and balances among institutions, alongside the Council and Commission, not just within individual institutions, similar to those modern democracies have established. This development also appears to be an exception among IGOs.¹²⁴

Of course, one important possible reason why the EU developed as an exception is because it is a regional IGO and also one that does not include the global G1. Moreover, even one of the most powerful G2 states, the UK, recently left the organization due in great part to the many restraints it felt were placed on its actions. Also, the EU's prerogatives in the security realm are still weak. Therefore, compared to developments in other IGOs, in the EU G2 states may be more likely to give up part of their ability to act independently so they can come together in a more powerful institution that can challenge the current and future G1.

Overall, international assemblies and parliamentary bodies are indeed similar in their weak but nontrivial ability to restrain power to early domestic parliaments. Also, these consultative and legislative international institutions are currently considerably more powerful than those that first emerged more than one hundred years ago, even though many of them have gone through periods when they were considerably weakened (as was the case of the UNGA in its first years of existence). International assemblies meet often and deal with a broad set of issues. Their decisions, even when not binding, can make it more difficult for powerful states to act. As the following sections will show, their slow evolution from weaker to stronger restraints, with some reversals at various moments in time, mirrors developments involving domestic parliaments over the past one thousand years.

¹²⁴ It is also worth noting the checks that the UNSC and UNGA have developed against each other. However, it is difficult to consider these to be analogous to those between the legislative, executive, and judicial branches that exist in domestic democratic systems. The two UN organs, together, are closer to a bi-cameral legislative institution than to executive ones. Moreover, G1 and G2 governments are represented in both UN organs (as opposed to the clear delineation between parliamentary and executive representation in EU institutions), similar to the way in which monarchs participated in all three types of decisions in the Middle Ages: legislative, executive, and judicial.

Who supported or opposed the institutional restraints?

Virtually all instances in the evolution of international assemblies and parliamentary bodies described above appear to support A2. G1 and, most often, G2 states, generally opposed strengthening institutional restraints. Indeed, in the first global organizations that emerged at the end of the nineteenth century, the ITU and UPU, great powers tried to limit the frequency with which the inclusive forums would meet and also developed smaller (exclusive) technical committees that they could control more easily. They also sought a very limited role for the League Assembly and envisaged it meeting only every few years. They opposed giving that body too much say in the all-important security realm but, in the end, they turned to it for actions against Japan and Italy. The events surrounding the establishment of the UNGA and its later increased role through the Uniting for Peace Resolution also suggest a similar pattern of great powers generally opposing an effective assembly except when seeking G3 allies for their actions.

In the European institutions, the powerful UK was the most adamant opponent of a strong PACE and French resistance to an increased role for the EP affected developments well into the 1970s, as one expects based on A2. These two dominant states were often joined by the third great European power, Germany, in limiting the EP's role. However, they sometimes turned to the EP to develop the institution's supervisory role over the Commission (representing G4) when they felt that this latter all-important body needed to be restrained.

This chapter also noted instances when G1 (and usually G2) states sought to establish international assemblies to bolster the legitimacy of their actions. Such instances are analogous to those when monarchs initiated domestic assemblies that later came to act as restraints on their power. The plans for the first IGOs that allowed for inclusive global forums, the ITU and UPU, were initiated by great powers. The League Assembly was included in the very first Anglo-American plans for the new IGO. Great powers also all took it for granted from the start that the UN should have an inclusive assembly. France initially spearheaded the efforts to establish a meaningful Common Assembly in the ECSC, even if a few years later it began seeking to erode its role.

Just as important, great powers supported inclusive IGO assemblies to justify sharing the costs of such organizations with G3 states. This was evident early on when the plans for funding the ITU and UPU were being discussed. The UPU's differentiated funding system later came to be a model that many other IGOs followed at least in principle.¹²⁵ G1 and G2 states' partial reliance on G3 states for funding IGOs led to the inclusive assemblies gaining the main budgetary roles in the organization (as in the case of the League Assembly and UNGA). By acquiring

¹²⁵ Coddington, George A., Jr. 1964. *The Universal Postal Union: Coordinator of International Mails*. New York, NY: New York University Press, 80–3.

the “power of the purse,” these inclusive forums were later able to add even more prerogatives to those they already had.

Throughout the entire history of the IGOs discussed in this chapter, G3 states virtually always supported having stronger international assemblies and parliamentary bodies, as A2 posits. Their efforts were particularly visible when the League was deciding on the future role of the Assembly and when this body was used to restrain the aggressive actions of several G2 states in the inter-war era. They were also very visible during the UNGA’s discussions of the organ’s ability to circumvent the UNSC when great power vetoes paralyzed it. Small states (together with the EP members) were also the main proponents of giving the EP greater legitimacy through direct elections and of extending the body’s prerogatives, although it is important to note that a few of them opposed, at times, the empowerment of this institution.

G4 has played only a very small role in the battles over the empowerment of IGO assemblies and parliaments. The main exception, yet again, unfolded in the EU. The Commission (made up of individuals who may be considered part of G4) often supported a more powerful EP, especially as they saw this body as a useful ally in restraining the power of the intergovernmental institutions of the IGO.

More important, as members of the EP came to be elected directly by the public, rather than appointed by governments of G1–G3 states, they morphed into a coherent and relatively powerful G4 supporting their own institution, as both A2 and A4 suggest. It is also worth mentioning that ICJ judges, who can also be considered representatives of G4, were supportive of the UNGA in its disagreements with the UNSC in several cases, as in the ones in 1962 and 2004, mentioned above.

Table 5.1 summarizes the above findings regarding the role played by the four main groups in shaping international assemblies and parliaments. It builds on Table 3.1 and is analogous to Table 4.1. It shows that developments in the evolution of these international bodies offer support for A2–A5. It also includes some examples of the four groups seeking to make them weaker or more powerful.

How (and why) did international institutional restraints emerge and evolve?

The ability of international assemblies and parliaments to restrain power appears to have evolved in a similar way to domestic assemblies and parliaments, experiencing the phases of emergence, change, and consolidation, mentioned earlier, as A6 posits. Table 5.2 builds on Table 3.2 and, like Table 4.2, offers examples of developments in the three phases.

In the emergence phase, the first international consultative body of the early nineteenth century, the Concert of Europe (but, to some degree, also the first IGO, the CCNR), was exclusive, similar to the “councils” that monarchs formed at

Table 5.1 Preferences and roles of main groups in shaping international assemblies/parliaments

Group	G1	G2	G3	G4
Types of actors making up group (with examples)	Most powerful state (UK and US in global institutions; France and UK in PACE, ECSC, EEC)	Second-tier states (3-4 next most powerful states)	Weak states, international civil society (NGOs, including IPU)	Officials from international institutions (members of EP and EU Commission, ICJ judges)
Expected support for institutional restraints in “normal” conditions (argument)	Almost always opposes restraints (A2)	Ambiguous in its support for restraints (A2)	Almost always supports restraints (A2)	Almost always supports restraints (A2)
Examples of support for or opposition to institutional restraints on power	US & UK often supported the founding of IGOs with assemblies but also sought to weaken these inclusive forums in early global technical IGOs as well as in the League and UN; UK opposed a powerful PACE; France opposed a powerful EP when it became the most powerful member-state	Secondary powers supported the founding of IGOs with assemblies, but very rarely as restraints; G2 states in the EU were ambiguous in their support for a more powerful EP.	Small states almost always supported powerful international assemblies acting as restraints on power; with some exceptions, they generally supported a powerful EP; the IPU sought an independent role and fought to develop both judicial and assembly-like international institutional restraints.	EP members were prominent advocates of direct elections and greater EP prerogative; European Commission officials supported the EP understanding it as a transnational ally against the powerful intergovernmental Council; ICJ judges sided with the UNGA over the UNSC.

Continued

Table 5.1 *Continued*

Group	G1	G2	G3	G4
Expected change in preferences and roles under specific conditions (argument)	When G1's relative power is low and declining it may support restraints (A3)	When G1's relative power is low and declining it is more likely to support restraints (A3)	Changes in power parity between G1 and G2 may lead to a greater role, but not change in preferences (A5)	Changes in power parity between G1 and G2 may lead to a greater role (A5); in time its support increases due to vested interests (A4)
Examples of changes in preferences or roles of groups	G1 states supported founding and empowerment of IGO assemblies when in need of legitimacy or of sharing financial burdens; US supported greater role for League Assembly to confront rising Japan; US supported greater role for UNGA when UNSC could not take actions it wanted and when it felt Soviet relative power growing; France supported strong EP to keep powerful Commission in check.	G2 states often supported the League Assembly and UNGA acting as restraints against other G2 states but eventually all came to oppose them; their support was especially noticeable when the G2 states they sought to restrain were perceived as rising powers that could become G1 states (e.g., Japan, Italy, or USSR).	After G3 states were included in first global IGOs, it was difficult to leave them out of League (and other IGOs); in time, a growing number of G3 states were critical of the US in UNGA; G3 states in League Assembly and UNGA came to use their power of legitimation and budgetary powers to increase the role of international assemblies and parliaments	Members of the EP fought for increased legitimacy (through direct elections) and prerogatives of their organization; they came to play a greater role after direct elections gave them the necessary independence and, eventually, expertise.

Table 5.2 Evolution of institutional restraints through international assemblies/parliaments

Phase	1) Emergence of international assemblies with some restraints built in	2) Changes to international assemblies acting as institutional restraints	3) Consolidation of institutional restraints through international assemblies
Main groups involved in phase (argument underlying expectations)	G1 and most of G2	G1 and most of G2 (A3)	G3 and especially G4 (A5 and A4)
Expectations for the international realm	International institutions emerge primarily due to great powers' interests in controlling collective response to problems	International institutions are altered during times of potential power transitions; when dominant state becomes more powerful restraints are eroded.	Small states, NGOs, and IGO officials maintain important roles after being empowered in phase 2; IGO officials become more autonomous and powerful and seek to strengthen institutional restraints further
Examples of international developments in phase	Great powers seek to establish inclusive IGOs in late nineteenth century; they empower small committees, but also create inclusive forums to legitimize IGO decisions and share budgetary costs; US and UK accept relatively strong League Assembly; PACE and ECSC Assembly are established by great powers to garner greater legitimacy for the new IGOs.	Great powers accept strong League Assembly when they feel threatened by G2 challengers (Japan and Italy); US empowers UNGA at time when it is threatened by rising USSR Possible exceptions: great powers support increased EP role to check power of Commission and Council.	Established practices do not allow the League Assembly and UNGA to slide back into irrelevance, once they are empowered by G1 and G2 states; G3 states fight to maintain strong assemblies; as members of EP become more independent, they continue to expand the prerogatives of their institution; ICJ judges and European Commission representatives (i.e., G4) support stronger assemblies.

their courts in the early Middle Ages. Its establishment was based on calculations regarding the potential costs of a re-emergent French threat and were spearheaded by the most powerful state (G1). Towards the end of the nineteenth century (also in the emergence phase), great powers found they needed more inclusive international institutions to deal with technical “common aversion” coordination problems. Broader membership in these organizations was beneficial for powerful states that needed the common technical rules for telegraphy, postal services, or railroad transportation to apply to as many states as possible. The costs of including many states in such IGOs were minimal, especially as the work of the organizations could be shifted to small committees leaving the inclusive forums to deal with broader questions and only sporadically. The above types of calculations leading to the emergence of the IGO forums are consistent with rational choice institutionalist expectations.

The benefits of inclusive IGO forums also derived, in part, from the legitimacy that they bestowed upon IGO decisions. PACE and the ECSC Assembly were deemed important by the European powers seeking legitimization of their organizations during times when the West sought to differentiate between the democratic principles it embraced and authoritarian ones characterizing East Europe. These developments are consistent with sociological institutionalist expectations. However, as in chapter 4, this norms-based mechanism is primarily a cross-level one, rather than within-level ones that are the main focus of the present study. It should also be noted that these incipient and weak forums, “tolerated” by G1 and G2, are similar to the first assemblies that monarchs organized more for “show” than for actual input from other actors.

The practice of opening the first global IGOs to all states, at least in some forums, led to a strong demand for inclusive organs in the important organizations that emerged after World War I, such as the League of Nations and ILO. In this phase of “change,” powerful norms of inclusivity, derived in part from past practice but also by the strong democratic norms promoted by Wilson and other leaders in the aftermath of the war, were too strong for powerful states to resist G3 states’ demands for participation. These sociological institutionalist explanations of change can account both for the more inclusive IGO councils of the post-World War I era but, more important, for the purposes of this chapter, for the greater role given to IGO assemblies. It should be noted yet again, however, that the role that democratic norms played, involved cross-level processes, rather than the within-level ones emphasized in this book.

Just as important, the change that led to the empowerment of the League Assembly was accepted by the US and UK that were vying for the G1 position at that time. Although the US appeared to emerge as the clear dominant power immediately after World War I, just a year or two later its relative power declined abruptly compared to G2 states. Moreover, by the late 1920s and 1930s, even as it was not

a member of the League, it sought to influence the IGO in giving the Assembly a greater role during the Manchurian crisis.

Another important process in the change phase of international assemblies unfolded in the 1950s, when G1 (the US) sought G3 support as it felt confronted by a rising challenger G2 state (the USSR). These processes exemplify the rational choice institutionalist approach. Indeed, Figure 2.2 suggests that, after US dominance had reached a peak in 1945, by 1950, its relative power was declining and the growing potential threat posed by the Soviet Union led to a “moment 4” situation, as described in A3. This, in turn, led to the empowerment of the most important international assembly of the post-World War II era, the UNGA. In these instances, powerful states had the support of G3 states who, as mentioned, had virtually always sought stronger IGO assemblies. G3 states played more important roles, through the UNGA, at times when there was greater power parity among the most dominant states, as A5 posits. These developments in the “change” phase of IGO assemblies are thus best explained through rational choice institutionalist explanations.

After the UNGA was given greater power through the Uniting for Peace Resolution, and after it was used against both G1 and G2 states, great powers sought to erode this mechanism intended to circumvent the UNSC, as expected based on A5. However, also as expected, it was difficult to do so. In part, this was due to the strong norms that had developed and that favored inclusive IGO organs (a development that is in tune with sociological institutionalist arguments). It is important to note that such norms of representation were primarily due to the customs that had developed in IGOs (thus within-level processes), rather than from an import of domestic norms of fair representation that were adopted by analogy to the domestic norms (cross-level processes), as was the case immediately after World War I. Throughout the consolidation stage, the UNGA began meeting year-round and the IGO came to accept the practice of the UNGA discussing any issue, even when the UNSC was also dealing with it. Most important, decolonization led to a shift in UN membership that became increasingly critical in the UNGA of certain great power actions. Lastly, the ability of the UNGA to resist declining relevance was due to the independent ICJ judges who backed this inclusive organ in its disagreements with the exclusive UNSC. All of these developments offer examples of the staying power of institutional restraints through mechanisms discussed by historical institutionalism.

The consolidation stage is also exemplified by recent developments leading to the empowerment of the EP. Members of the EP became increasingly more independent. A first step in this direction took place as early as the ECSC was formed, when the IGO introduced a system where members of the assembly were selected by domestic legislatures rather than by governments, as in PACE. More important, EP members came to be directly elected by the public starting in 1979. Almost immediately after that, the very independent EP members came together as a G4

group and became much more successful in carving out a greater role for this European institution. This consolidation stage in the evolution of the EP is also consistent with expectations based on historical institutionalism.

The EU's history since the 1980s has been one of fairly rapid consolidation of EP power, with a broadening of the institution's prerogatives. The Parliament has come to be a highly effective restraint on power, virtually equal in strength to domestic parliaments. While it may be seen as an exception to developments in international assemblies, the flurry of new international parliaments over the past two decades may suggest that other IGOs may, at some point, reach a similar consolidation phase.

Overall, the above examples, as well as the rest of the chapter, offer support for the main argument of this book, that developments over more than a century of restraints on power through international assemblies and parliaments have followed similar patterns to those of domestic assemblies starting with the earliest ones, about one thousand years ago (A6). The inclusive forums in the first global IGOs of the late nineteenth century, the League of Nations, the UN, and many other IGOs led to similar institutional restraints, were altered due to similar group preferences, and experienced similar changes as early domestic assemblies and parliaments. Moreover, the EP has undergone similar dynamics as modern and even contemporary domestic parliaments. Developments throughout the three phases in the evolution of international assemblies and parliaments can be explained using the three different institutional approaches, as expected based on the main arguments of this book.

International secretariats as institutional restraints

I have shown in chapter 3 that government bureaucracies can also play important roles in restraining the most powerful domestic actors. As part of national governments, they are able to sometimes curb the actions of heads of state and other top leaders of the executive branch (G_1), but also to counter initiatives of second-ranked domestic actors (G_2), such as those who come together in national legislatures. Their ability to restrain may derive from their expertise and the legitimacy carried by the advice they offer to powerful actors and groups of actors. That same expertise as well as their access to extraordinary amounts of information also allows bureaucracies to serve as permanent deterrents to some actions of G_1 and G_2 due to their potential to publicly shame such powerful actors.

In modern political systems, the distinction between G_1 and G_2 within states can be understood as one between the political party in power and those in opposition. The top officials in bureaucratic institutions are usually political appointees, primarily controlled by G_1 . However, in most democratic systems, their appointment is the result of compromises between the party in power and those in opposition, especially when the executive and legislative branches of government are controlled by different parties. In sum, domestic national bureaucracies (G_4) are controlled primarily by G_1 (arrow 1 in Figure 6.1) but also, to some degree, by G_2 (arrow 2 in Figure 6.1). Conversely, increasingly autonomous civil servants, through their expertise and ability to offer advice to heads of state and other top officials, may sometimes restrain the actions of these two powerful groups (dashed arrows 4 and 5 in Figure 6.1).

Lastly, civil society and the press (G_3) can influence bureaucracies, especially by shaming individual members or even larger subgroups of G_4 when the actions being scrutinized are particularly egregious (arrow 3 in Figure 6.1). G_4 can sometimes also shape public opinion and thus influence the actions of G_3 (arrow 6 in Figure 6.1). The ability of G_3 and G_4 to influence each other has generally been weak compared to the relations involving G_1 and G_2 . However, recent institutional developments, especially the spread of freedom of information laws across states, have strengthened G_4 accountability to all three major groups, including G_3 . Similarly, the spread of “press offices” and of comprehensive websites in domestic institutions has allowed G_4 to communicate directly with G_3 and, by doing so, have a powerful influence over that group.

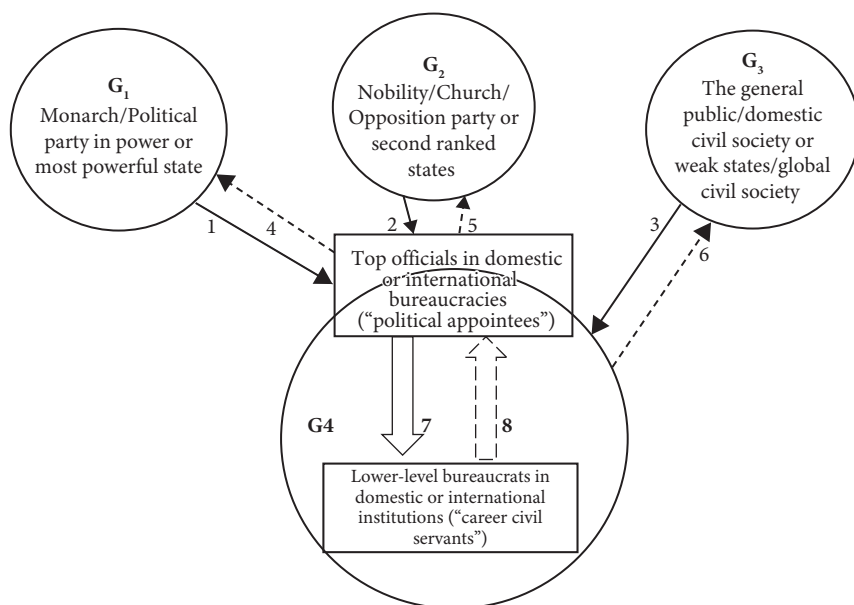


Figure 6.1 Bureaucracies as power restraints in the domestic and international realms (dashed arrows represent restraints on powerful actors)

Perhaps most important for the discussion of G₄'s ability to act as a restraint on power, especially on the most powerful groups, is the increasingly clear distinction that has emerged in domestic political systems, between top-level political appointees in government institutions¹ and lower-level career civil servants (also represented in Figure 6.1). Indeed, while G₁ and G₂ initially controlled the entire civil service (especially when institutions were small enough for the monarch to personally know all of the officials representing him), in time, states have allowed these dominant groups to only exert their direct influence over domestic institutions through top political appointees (arrow 7 in Figure 6.1). Career civil servants have thus been insulated to some degree from direct G₁ and G₂ influences. The spread of competitive examinations to fill civil service positions and the erosion of patronage systems, the increased expertise of such lower-level bureaucrats, their ability to communicate directly to the general public and shame G₁, G₂, and even political appointees (especially after whistleblower protection policies were adopted) have slowly transformed them into increasingly formidable restraints on the powerful groups. This all-important restraint is represented by arrow 8

¹ Top-level officials are represented in Figure 6.1 as only partially included in G₄. Indeed, they formally represent the other groups. However, at times, they may side with the civil servants they lead and clash with top political leaders (G₁ and G₂). The representation of such top-level bureaucrats being partially included in G₄ is a reflection of the previously mentioned difficulties of drawing clear distinctions between the actors making up the four groups.

in Figure 6.1. As discussed in chapter 3, the essential factor affecting the ability of bureaucracies (both lower level and upper level) to act as restraints on the power of G_1 and G_2 is their autonomy. Also as mentioned, as bureaucracies have become more autonomous and powerful (in some states even vying to become the new G_1), the other groups have established multiple oversight mechanisms within institutions, enhancing their control over bureaucracies (arrow 7 in Figure 6.1). The figure also suggests that the same dynamics underlying G_4 's ability to restrain the power of the dominant groups have developed in international institutions.

The rest of this chapter will assess whether developments involving international bureaucracies within IGOs indeed have paralleled those in domestic government institutions. I will trace the evolution of international secretariats, emphasizing the emergence and increased role of G_4 in IGOs, starting with the CCNR (considered the first IGO) and continuing with the ITU, UPU, League of Nations, UN and several other more recent IGOs. I will highlight the changing interests of G_1 , G_2 , and G_3 with regard either to the empowerment or restraint of G_4 . As in the previous two empirical chapters, the following narrative allows me to then assess the plausibility of arguments A1–A6 as applied to the international realm. I conclude the chapter by answering the same three main questions asked in the two other empirical chapters, regarding the types of international institutional restraints that developed, the degree to which the various groups supported or opposed such restraints, and the broader patterns characterizing the evolution of the institutional restraints.

The emergence of the first IGO secretariats in the nineteenth century

The Central Commission for the Navigation of the Rhine is generally considered the first ever IGO. It was established in 1815 following negotiations in one of the technical committees of the Congress of Vienna. Article 17 of the treaty that founded the CCNR stipulated that each state would be represented in the organization by one commissioner. These representatives of individual governments thus came to be the first appointed staff in an IGO.²

The same Article 17 also noted that decisions within the CCNR would be adopted by a simple majority of such commissioners. However, a decision would not be compulsory for states whose commissioners opposed it. Moreover, the treaty and the original rules of procedure made no distinction between substantive and procedural decisions.

² Michaels, David B. 1971. *International Privileges and Immunities: A Case for a Universal Statute*. The Hague: Martinus Nijhoff, 1.

The very intergovernmental nature of this organization³ was reflected in the fact that its work was conducted by the individual commissioners and other support staff with *national* rather than *intergovernmental* allegiances. They were accountable to their governments and were paid from the budgets of their respective national institutions.⁴ The staff of this first IGO was thus made up almost entirely of “political appointees” (the top box in G₄ from Figure 6.1).

It is important to note that the IGO was in fact the successor of a bilateral institution between the French Empire and the Holy Roman Empire of the German Nation that was established through the 1804 Octroi Convention on the Navigation of the Rhine.⁵ That institution included a director-general, as well as numerous inspectors and toll agents. While the inspectors and agents were named by the two states (in equal number) and were representatives of their respective states, the director-general’s allegiance, was formally to “the governments as a collective organization signatory to the treaty.”⁶ When the CCNR was established, the seven national commissioners collectively took over the role of the director-general, eliminating almost entirely all supranational elements that had existed in its precursor bilateral organization. The lower-level staff of the organization were fairly extensive, with several hundred inspectors, revenue stations, and an accounting office. However, all such individuals were, in fact, government employees of individual member states.⁷

Despite this early decision that virtually the entire staff of the CCNR be representative of governments, an important shift began to take place in the organization soon after it was established. The shift was primarily due to the tension between the unanimity decision-making rule it had adopted and the need to resolve effectively small day-to-day problems. The commissioners soon realized that they needed to establish a set of informal rules to circumvent the cumbersome official ones. In matters they considered to be procedural (such as setting their agenda or selecting a commissioner to preside over meetings) they first adopted informal decisions by majority vote and then presented the decisions to their governments as being adopted by unanimity. In all other matters, they continued to use the formal system of unanimity. This shift to informal decision-making on

³ For a discussion of how IOs can all be placed on an intergovernmental–nongovernmental continuum and therefore be seen as *more or less* intergovernmental, see Grigorescu, Alexandru. 2020. *The Ebb and Flow of Global Governance: Intergovernmentalism versus Nongovernmentalism in World Politics*. Cambridge: Cambridge University Press.

⁴ Riches, Cromwell A. 1940. *Majority Rule in International Organization: A Study of the Trend from Unanimity to Majority Decision*. Baltimore: Johns Hopkins Press, 18.

⁵ Technically that bilateral institution was not an *intergovernmental* organization that, by definition, needs to include at least three member-states.

⁶ Mangone, Gerard J. 1975. *A Short History of International Organization*. Westport, CN: Greenwood Press, 69.

⁷ Spaulding, Robert Mark. 2018. “The Central Commission for the Navigation of the Rhine and European Media, 1815–1848,” in J. Brendebach, M. Herzer, and H. Tworek (eds.), London: Taylor and Francis, 17–38.

technical issues among the commissioners led to the development of a strong sense of camaraderie among them, that is, to an increased sense that they were part of the same group (G_4) and sometimes had common interests that did not necessarily match the interests of the states that they represented (whether from G_1 , G_2 , or G_3). Of course, such informal procedures weakened their governments' control over the organization (the full arrows in Figure 6.1).

In time, the informal decision-making process began being applied even to fairly substantive decisions. This resulted in some relatively important decisions becoming binding for all states even though the respective governments had not been consulted and, moreover, although some commissioners had voted against the decision in the informal vote.⁸ This process was the first instance of an international G_4 developing an autonomous role and directly affecting the interest of an IGO's member-states (the dashed arrows in Figure 6.1).

Not only did the commissioners adopt decisions that were increasingly more autonomous of their governments, but they also sought to have some of the IGO's staff representing the organization rather than member-states, as had been the case of the position of director-general in the earlier Octroi Convention on the Navigation of the Rhine. In 1831, after a decade and a half of working together in more than 500 meetings, they were sufficiently united to convince their respective governments to adopt a formal constitution for the organization to clarify a series of organizational issues. They also added some new legal clauses. Most important, the Convention of Mainz created the position of "chief inspector" who was intended to be an international civil servant, appointed by the Commission and who answered directly to the commissioners, not to his own national government. Arguably, this position came to be the first truly international civil servant in an IGO. The decision formally established an insulated lower-level bureaucracy (represented with the bottom box in G_4 from Figure 6.1). Another important institutional development at that time was that the CCNR formed a system of courts to deal with contentious cases. Although the court judges were appointed nationally, they too took an oath to apply the Rhine regulations "unrestricted by local jurisprudence."⁹

It should be noted that these changes took place at a time when France had regained some of the power it had lost after the Napoleonic wars and was becoming once more a formidable challenger to Prussia, the dominant member-state in the CCNR in the IGO's early years. This development supports A3, stating that institutional restraints are more likely to become stronger during times of power parity between dominant states.

⁸ Walther, Henri. 1965. *Revision de la Convention de Mannheim Pour la Navigation du Rhin Annuaire Français de Droit International*, CNRS Editions Paris : CNRS Editions PERSÉE : Université de Lyon, CNRS & ENS de Lyon, 810–22, 813.

⁹ Michaels, David B. 1971. *International Privileges and Immunities: A Case for a Universal Statute*. The Hague: Martinus Nijhoff, 13.

It took about half a century, but member-state governments eventually stepped in to curtail the autonomy of the commissioners and to eliminate the chief inspector position. In 1868, they adopted the Treaty of Mannheim that made several important changes to the statute. This change took place at a time when Prussia had just defeated Austria and had become, yet again, the clear dominant power among CCNR state-members. In fact, just a few years later, it also defeated France in the 1870 war. Prussia spearheaded the effort to reform the CCNR, as A3 predicts. Among other changes, this involved moving the headquarters of the organization to its own territory. Most important for the purposes of this study, the new statute stipulated that none of the Commission decisions would be mandatory for a state whose *government* opposed it (rather than its *commissioner*, as in the Treaty of Vienna). Due to this change, commissioners altered their practice of seeking swift decisions among themselves and then promoting them to their respective governments and introduced a system through which they first sought approval from their governments for virtually all decisions. This represented, of course, a sharp decline in the relative autonomy of the commissioners. The new decision-making process became more cumbersome, especially as this was still a time of slow international communications.¹⁰

Another river commission, the European Commission for the Danube (CED—based on the acronyms of the French name), was established in 1856 and underwent a parallel process to the one of the CCNR with regard to its staff. CED's staff was also composed of commissioners who represented their governments. However, the formal decision-making process was, from the start, based on majority voting rather than unanimity, as had originally been the case at the CCNR. The officials involved in the establishment of CED had been aware of the problems and solutions that the Rhine River commissioners had faced in the first years of the organization's work. Like the CCNR, CED also established a handful of positions that were supranational in character, such as those of the Inspector General and the Captain of the Port of Sulina who were to carry out their obligations under the "direction of the European Commission, and as invested with an international character."¹¹ While these two positions were initially at least formally filled and paid for by the Ottoman Empire, in time the commissioners came to play the leading role in naming the two civil servants and also developed a system of tariffs

¹⁰ This problem, compounded with the need to adopt solutions by unanimity was not solved until the rules of procedure of the Commission were changed in 1963. At that point members adopted an innovative procedure through which decisions made by commissioners would not be final until 30 days after their vote. In those 30 days, governments could officially reverse the vote of their commissioners. This has, in practice, led to an increased number of decisions being adopted unanimously by the members of the Commission. See Doerflinger, Robert. 1987. "La Commission Centrale pour la navigation du Rhin: 170 ans d'évolution du statut international du Rhin; Strasbourg: Central Commission for the Navigation of the Rhine, at http://www.ccr-zkr.org/files/histoireCCNR/07_ccnr-170-ans-evolution-statut-international-du-rhin.pdf.

¹¹ Krehbiel, Edward. 1918. "The European Commission of the Danube: An Experiment in International Administration," *Political Science Quarterly* 33(1): 38–55, 51.

for ships to pay for the organization's staff independently from states.¹² In sum, as in the CCNR, the two groups of international civil servants emerged: the top ones formally representing states; the lower-level ones relatively autonomous of government influence.

Also, as in the CCNR, CED commissioners developed a strong sense of collegiality and often took actions that drifted away from their governments' narrow instructions. Most important, CED was originally intended to work on a temporary (and somewhat experimental) basis for a period of two years. Its first efforts to open up the lower part of the river to navigation through dredging were not successful. Four of the seven governments involved in CED gave instructions to their respective commissioners to suspend all work as the costs of the dredging were not seen as reaping any benefits. However, the respective commissioners voted contrary to their governments' wishes, and allowed for the continuation of the work, one of the most obvious examples of top IGO officials adopting a decision that was not supported by states. This decision was particularly important when it came to the British commissioner, John Stokes. As the clear hegemon at that time, the UK was perceived as taking the lead in most international initiatives and its representatives were usually given a leadership position. Therefore, when Stokes chose to disregard his government's instructions and voted for continuing the organization's work, not surprising, other commissioners followed his lead. As one observer of the organization later explained "Legally he was clearly bound to execute the mandate of his nation; morally he—and his nation—were bound by his vote as a commissioner."¹³

Stokes' dominant position in the CED allowed him to remain a commissioner as late as 1871, long after all his original commissioner colleagues had been replaced in the organization. In fact, while all other governments involved in CED named the same official both as Commissioner and as vice-consul to Galați, the British preferred separating the two positions.¹⁴ The experience and prestige he developed led him to become the *de facto* leader of the institution for more than a decade.¹⁵

Under Stokes' leadership, the organization became even more autonomous from governments. CED adopted tariffs on transportation on the Danube and used such funds for the organization's work. In some instances, it adopted decisions for questions where it did not have an official mandate, such as the establishment of a pilot service from the sea to Braila, outside the geographic area where

¹² Michaels, David B. 1971. *International Privileges and Immunities: A Case for a Universal Statute*. The Hague: Martinus Nijhoff, 14.

¹³ Krehbiel, Edward. 1918. "The European Commission of the Danube: An Experiment in International Administration," *Political Science Quarterly* 33(1): 38–55, 45.

¹⁴ Ardeleanu, Constantin. 2018. "Stokes, Sir John" in *IO BIO, Biographical Dictionary of Secretaries-General of International Organizations*, edited by Bob Reinalda, Kent J. Kille and Jaci Eisenberg, www.ru.nl/fm/iobio, 3.

¹⁵ Reinalda, Bob. 2020. *International Secretariats: Two Centuries of International Civil Servants and Secretariats*. Abingdon, Oxon; New York, NY: Routledge, 13.

it officially had jurisdiction.¹⁶ It adopted legislation regarding the navigation on the Danube (through the 1865 Public Act). Article 1 of the Public Act placed CED and its staff “under the guarantee and protection of international law.”¹⁷ It even developed its own insignia and flag. The vast majority of such actions were initiated by the commissioners and only later accepted by governments. In some cases, governments were not even consulted. Perhaps most important, Stokes and the other commissioners were able to convince their governments to prolong the existence of the CED several times, despite the original temporary nature of the organization.

River commissions that emerged in the nineteenth century after the founding of the CCNR and CED adopted many of the same rules as these two organizations. They maintained the positions of commissioners that came to combine their allegiance to their respective governments with allegiance to the organizations, a formal recognition that the group of high-level IGO officials straddled the line separating G_4 from the other (national) groups depicted in Figure 6.1. The commissioners developed considerable *national* civil services as well as some small *international* ones.

In the second half of the nineteenth century, starting with the ITU, states began establishing the first inclusive IGOs, with dozens of members and focusing on fairly technical issues. These public international unions were in fact an institutionalization of the conferences and the follow-up conferences of the first half of that century. The increased need to organize more meetings among government representatives and experts and to generate comparable information across states led to institutional structures that represented yet another step in the evolution of the international civil service. The need for larger IGO secretariats led states to limit their involvement in the appointment and oversight of staff to only the top echelons of the international bureaucracies. They expected that these top-level officials would, in turn, deal with lower-level appointments and oversight of lower-level staff.

Indeed, the secretariats of the international public unions of the nineteenth century separated more clearly than the river commissions the roles of top-level IGO officials representing their governments and lower-level IGO officials intended to be impartial experts. However, these secretariats were certainly far from being autonomous of member-states. Due to the problems related to travel and communication at that time, the vast majority of the individuals working in the secretariats of the early IGOs came from the host country and often continued to be viewed as national civil servants just as much as international ones.

¹⁶ Krehbiel, Edward. 1918. “The European Commission of the Danube: An Experiment in International Administration,” *Political Science Quarterly* 33(1): 50–1.

¹⁷ Cited in Reinalda, Bob. 2020. *International Secretariats: Two Centuries of International Civil Servants and Secretariats*. Abingdon, Oxon; New York, NY: Routledge, 14.

In the first three years after the ITU's establishment in 1865, member-states found it difficult to exchange the necessary information about their telegraph systems through their usual bilateral channels. Therefore, at the organization's second conference, in 1868, they decided to establish a secretariat that has been hailed as "at once a model and beacon for international organization."¹⁸ As in virtually all subsequent instances of establishing IGOs, the question of where to place the secretariat became an important one. While river commissions had chosen cities that were situated on such rivers and also close to the areas deemed problematic for river navigation (as was the case of Galati for CED), the public international unions of the late nineteenth century had many more choices for their headquarters. The ITU chose to place its secretariat in Berne. The selection of Switzerland for the headquarters (one for which the Swiss government lobbied) was due to the country's neutrality and its perceived role as a bridge between German and French cultures. This latter role appears to have been essential for bringing together under the ITU two previous international telegraphic agreements: the Austro-German Telegraph Union and the Western Europe Telegraph Union, founded in 1850 and 1855 respectively. Not surprising, therefore, the ITU chose Louis Curchod, the head of the Swiss Telegraph Office, as the IGO's first director. The Swiss named a different head of their telegraph office to formally separate the international and national institutions. However, the Swiss government was given a "supervising" role over the international bureau. It also hired three other permanent employees: an administrative secretary, a technician, and a copyist, all Swiss nationals.¹⁹ Thus, formally, the ITU's staff had little autonomy to act and was controlled almost entirely by a G₃ state.

However, in practice, the ITU official also developed a degree of autonomy from the Swiss and other governments. Curchod took a fairly hands-on approach to his position. He had his secretariat prepare conferences for member-states, he participated in discussions at such meetings, established direct correspondence with about three dozen national telegraph administrations, and was successful in altering voting procedures so that states that did not reply within four months to proposals for changes in technical regulations (many initiated by the secretariat) would become bound by the new regulations.²⁰ At times, the ITU hired temporary staff (for example, more than 30 in 1899) with hardly any input from governments.

When established in 1874, the Universal Postal Union also formed a secretariat based on the ITU model. It was also headquartered in Berne and was led by Eugène

¹⁸ Mangone, Gerard J. 1975. *A Short History of International Organization*. Westport, Conn: Greenwood Press, 75.

¹⁹ Simone Fari and Gabriele Balbi. 2017. "Curchod, Charles Louis" in *IO BIO, Biographical Dictionary of Secretaries-General of International Organizations*, edited by Bob Reinalda, Kent J. Kille, and Jaci Eisenberg, www.ru.nl/fm/iobio

²⁰ Mangone, Gerard J. 1975. *A Short History of International Organization*. Westport, Conn: Greenwood Press, 76.

Borel who served as the director of the Swiss Department of Posts and Telegraph (and who stepped down as soon as he took on his international position). Borel, however, as well as his six employees were appointed and supervised by Swiss postal administration.²¹ The Swiss government recruited staff, audited the UPU's accounts, and had disciplinary powers over its employees. The status of the individuals making up the IGO's secretariat was identical to the one of Swiss national employees, without any of the immunities and privileges that developed across IGO secretariats in the twentieth century. In fact, it was only in 1947 that UPU staff acquired formal international status.²² Thus, yet again, an early IGO's staff was formally controlled by governments (the full arrows in Figure 6.1), with very little autonomy for actions.

However, also as in the case of the ITU's administration, the IPU's secretariat came to carve out an important role for itself. It collected and distributed information from member-states. Its director participated in conferences and addressed state representatives. The IGO's staff would also help organize intergovernmental conferences, offer opinions when states involved in a dispute requested it, and introduce proposals for changes to administrative rules.²³ The secretariat began to grow, reaching a maximum staff of about 50 in the inter-war era.²⁴

Up to World War I, most IGOs followed the same model as that for the ITU and UPU for their secretariats. They were generally made up of nationals from the host country, under the supervision and paid by the government of that country. This did not preclude the staff sometimes informally adopting fairly autonomous roles. However, in time, there were some small but important changes in the degree of autonomy of organizations' staff as governments, especially those of the most powerful states, moved to reassert their influence.²⁵

As discussed in chapter 5, the first IGOs were primarily intended to deal with questions of coordination and to resolve "common aversion problems" where the actual nature of the solution was not that important to member-states. Due to the technical aspect of the issues they dealt with and their personal beliefs, the IGO staff often placed their common interests above those of their governments. However, their individual (increasingly similar) preferences were also the result of their socialization within a community of technical experts. This community was primarily made up of the commissioners in the CCNR and CED but was much larger

²¹ Reinalda, Bob. 2020. *International Secretariats: Two Centuries of International Civil Servants and Secretariats*. Abingdon, Oxon; New York, NY: Routledge, 18.

²² Langrod, Georges. 1963. *The International Civil Service*. Leyden: A.W. Sythoff, 41.

²³ Mangone, Gerard J. 1975. *A short history of international organization*. Westport, Conn: Greenwood Press, 79.

²⁴ Langrod, Georges. 1963. *The International Civil Service*. Leyden: A.W. Sythoff, 51.

²⁵ Siotis, Jean. 1963. *Essai sur le secrétariat international*. Geneva: Librairie Droz, 39.

in the international public unions of the late nineteenth and early twentieth centuries, also encompassing technical experts from within national institutions, not just the international one.

Therefore, even when states stepped in to curtail unwanted actions by IGO staff, it was already difficult to completely eradicate the autonomy of these new international bureaucracies. Not only had the communities of international experts been established but the organizations had come to develop their own budgets that gave them some control over the hiring of staff. Some of the early IGOs also acted as important loci for in-depth communication and were thus among the first instances of international bureaucracies being given control over information. A few of them even were required to "register" various forms of information from their government. This was most evident in the case of the first international intellectual property organizations established in the 1880s and known by its French acronym: BIRPI (Bureaux internationaux réunies pour la protection de la propriété intellectuelle). The organization was eventually assigned the task of registering trademarks. As the example of the Parlement of Paris suggests, this apparently technical role could, in time, lead to greater power for the organization as it could, at least potentially, use this prerogative to delay registration and hold up processes that were important for member-states.²⁶

Last but not least, the autonomy of the international public unions' staff resulted from the inability of governments to have national representatives in the many new organizations. While the IGOs had some relatively regular (yet sporadic) meetings of government representatives, most of the organizations' work came to be tasked to the technical staff. Even when states sought to intervene in the organizations' work outside of the intergovernmental meetings, this was difficult to achieve as their representatives, usually diplomats posted in cities many miles away from the IGO's headquarters, lacked the expertise to assess the work of the organization.

The staff within public unions that formed before WWI became increasingly autonomous. They used their autonomy to shape numerous policies across states. Craig Murphy notes that one gauge of the degree to which such international secretariats had come to take over some of the work of governments is that right before World War I, the number of international meetings called by IGO staff was greater than the number of meetings called by governments.²⁷

²⁶ Woolf, Leonard Sidney. 1916. *International Government*. New York: Brentano's, 310.

²⁷ Murphy, C. 1994. *International Organization and Industrial Change: Global Governance since 1850*. New York: Oxford University Press, 112.

The League and ILO: change in the autonomy of international secretariats

Most observers consider that the “first true international civil service” emerged in the League of Nations and its International Labour Office, established after World War I.²⁸ Although, as mentioned, the existing IGOs had fairly international secretariats, most of them continued to be very small and staffed primarily with officials from the host country. Thus, the nature of the League’s secretariat has come to be seen as representing a clear break from the way in which IGOs had been staffed up to that time.²⁹

The very crucial national security issues that the League was intended to deal with led the great powers that founded the IGO to generally consider irrelevant the experiences of the secretariats of the more innocuous river commissions and international public unions of the nineteenth century. In fact, almost all of the discussions leading up to the adoption of the League Covenant focused on the prerogatives of the new organization, the future roles of the Council and Assembly, and the membership in the IGO and its bodies. The multiple drafts for the Covenant hardly even mentioned the Secretariat.³⁰ This neglect may be considered particularly intriguing considering Woodrow Wilson’s previous academic interests in government bureaucracies.³¹ The only relevant article in the Covenant was Article 6, specifying that a Secretary-General will be appointed and that he shall, in turn, appoint all staff with the approval of the Council. Small states did propose an amendment to this article as soon as they were able to contribute to the debates surrounding the Covenant. They requested the following addition: “So far as possible, the Secretaries and the personnel shall belong to different nationalities.”³² In other words, they sought to increase their control over the IGO bureaucracy (arrow 3 in Figure 6.1) and consequently erode the one of G_1 and G_2 states. However, great powers refused to include the amendment.

The world leaders gathered in Paris decided to appoint Eric Drummond as the League’s first Secretary-General, the private secretary of then-British foreign secretary Arthur Balfour. Drummond wasn’t the first choice to lead the League. When

²⁸ E.g. Villalpando, Santiago. 2016. “The Law of the International Civil Service,” in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.), *Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 1069–84, 1070.

²⁹ Walters, Francis Paul. 1986. *A History of the League of Nations*. London, New York: Oxford University Press, 75.

³⁰ See Ranshaffen-Wertheimer, Egon F. 1972. *The International Secretariat: A Great Experiment in International Administration*. New York: Kraus, 13–16. In fact, in the detailed descriptions of the inter-governmental negotiations leading to the establishment of the League there is no real mention at all of the nature of the Secretariat. See Miller, David H. 1928. *The Drafting of the Covenant* (Volumes I and II). New York: G.P. Putnam’s Sons.

³¹ Wilson, Woodrow. 1887. The Study of Administration. *Political Science Quarterly* 2(2): 197–222.

³² Weiss, Thomas G. 1982. “International Bureaucracy: The Myth and Reality of the International Civil Service,” *International Affairs* 58: 287–306, 293.

several important statesmen and high-ranking national civil servants refused, he became the consensus choice for all great powers represented at the conference. This selection was particularly important because right before Drummond accepted the position, it had been offered to another prominent civil servant, Maurice Hankey, who had served as secretary of the Imperial War Cabinet during the war. Indeed, one of the most significant international experiences that Hankey and other top British officials could draw upon in 1919 were the multiple war councils that had coordinated purchases and shipping for the Allies starting in 1914. The most important such council, and the one that served as a model for international cooperation immediately after the war was the Allied Maritime Transport Council (AMTC). Its importance for the study of international cooperation was spurred by the fact that two of the top officials who worked in the AMTC were Arthur Salter and Jean Monnet, both of whom later referred to this experience in their writings and sought to apply it in their work within IGOs.³³

The AMTC model that Hankey had observed gave a great degree of control to governments (the full arrows in Figure 6.1), as one should expect of an institution established during a major war. Its staff was national in character and was intended to represent the states that worked together in the organization, rather than be autonomous of them. When France and Italy (the two G₂ members of the AMTC) sought to give the organization a more autonomous role, the other two members, the US and UK (arguably the two states vying for the G₁ position at that time), refused to do so, as expected based on A2.³⁴ Their relative support for a very intergovernmental international institution was somewhat unexpected considering the strong bureaucratic autonomy norms that had developed in the two states. Indeed, as mentioned in chapter 2, the two countries had instituted reforms over the past half century that had led to a professionalization and relative autonomy of their domestic bureaucracies.

Hankey's proposed plan for the new IGO secretariat involved staff formed from temporarily detached national officials, similar to the AMTC.³⁵ In this formula, each of the powerful states on the Council would appoint a diplomat as "principal secretary" and a second as "assistant to the principal secretary." These officials would act as liaisons between their governments and the League's Secretary-General. After a period of five years, the diplomats would return to their national governments and be replaced by other national representatives. This model involved a very strong government influence over the IGO's staff, similar to the CCNR. It is worth mentioning, however, that Hankey did not refer to the

³³ See Salter, Arthur. 1921. *Allied Shipping Control*. Oxford: Clarendon Press, 252.

³⁴ Holthaus, Leonie and Jens Steffek. 2015. "Experiments in International Administration: The Forgotten Functionalism of James Arthur Salter," *Review of International Studies* 42: 114–35, 120.

³⁵ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat: A Great Experiment in International Administration*. New York: Kraus Reprint, 70–1.

CCNR in his proposal and was probably not familiar with the functioning of what was then a century old IGO. He only referred to the AMTC model.

Interestingly, about two months later, a second proposal for the League's Secretariat was submitted to Drummond, one that also built upon the experience of the AMTC. This latter proposal, authored by Salter who had served as secretary to the AMTC, was also very intergovernmental in nature. Like Hankey's proposal, Salter's envisaged a secretariat composed of individuals representing states. However, it differed from the former model as it expected the intergovernmental work in the Secretariat to take place primarily among lower-level government officials, who did not come from "political" government institutions but rather "economic" ones.³⁶ Salter argued that such interactions between specialists would lead to better understanding among states and an erosion of the nationalism that was likely to grow even stronger in an organization that was dealing with divisive issues, especially in the Council and Assembly. This proposal may be seen as one that sought to shift the control over the Secretariat from top echelons of governments (especially from G_1 and G_2 states) to lower-level ones (the domestic G_4 s). However, within the IGO it would not have led to a more autonomous Secretariat. The League would still be firmly controlled by governments, albeit at a lower level.

Drummond considered both Hankey's plan and Salter's. In the end, while he rejected both of them, he adopted certain elements from each one. More important, he laid out a different model, one that would give more power to the League's Secretariat that, of course, he himself was going to lead. On May 29, 1919, he issued a news release where he described his plan as one for "a truly international secretariat, whose members ... must divest themselves of national preconceptions and devote themselves wholeheartedly to the service of the League."³⁷ His plan thus emphasized an IGO staff that would be, in principle, autonomous from governments (i.e., of G_1 and G_2 and even of G_3), and thus was opposed to Hankey's plan. However, it was also autonomous from lower-level governmental institutions (that is of the national G_4 s). He later discussed this vision of the Secretariat as one "utterly opposed" to the others he had received and which he felt were "nothing more and nothing less than a permanent conference of representatives of the powers members of the League."³⁸

Despite declaring the Secretariat's future autonomy from governments, Drummond's long experience working within political institutions led him to a compromise between staff autonomy from governments and international and domestic power considerations. His emphasis on political expediency took the form of

³⁶ Dubin, Martin David. 1983. "Transgovernmental Processes in the League of Nations," *International Organization* 37(3): 469–93.

³⁷ Cited in Dubin, Martin David. 1983. "Transgovernmental Processes in the League of Nations." *International Organization* 37(3): 472.

³⁸ Hon. Sir Drummond, Eric. 1931. "The Secretariat of the League of Nations." *Public Administration* 9: 228

two decisions. First, in addition to the position of Deputy Secretary-General (that the Paris Conference had already agreed upon) he also created one for an Under-Secretary-General. This way he could include nationals from two other powerful states that had established the League, the US and France. He explained this decision “as it was desirable to obtain as much political support as possible for the League.”³⁹ He then accepted the establishment of two more positions of Under-Secretary for nationals of the lesser great powers of the League, Italy and Japan.⁴⁰

Second, he conceded to a structure in which the various ministries from the member-states could establish contact with the Secretariat of the League, as the Salter plan had envisaged. However, he called for all such interactions to be made through the national representatives in the Council or Assembly.⁴¹ Drummond proposed that foreign ministries coordinate all communications from national governments with the League.⁴²

With this balance between staff autonomy and a strong oversight by governments (represented by the dashed and full arrows, respectively, from Figure 6.1), he sought approval for his plan from the most powerful states during the Paris meetings. Aware of the need to give G_1 and G_2 states the greatest say in staff issues (arrows 1 and 2 in Figure 6.1, rather than arrow 3), he proposed that the intergovernmental control over the Secretariat take place through the Council, rather than the Assembly. Great powers accepted his plan and Drummond was given a fairly free hand in shaping the League’s Secretariat.

As soon as the Paris Peace Conference ended, Drummond began working in London with a small group of individuals on more detailed plans for the Secretariat. Yet again, he was faced with choices that involved the future autonomy of the IGO’s staff. Perhaps the most important such choice was whether to organize the work of the organization geographically or across issue-areas. He opted for the latter alternative, as he felt that it made it more likely for the staff to express their technical opinions rather than their national ones. To strengthen the autonomous nature of the secretariat he also established an informal rule that staff could not be involved in matters that were “of particular interest” to their own country.⁴³

³⁹ Hon. Sir Drummond, Eric. 1931. “The Secretariat of the League of Nations.” *Public Administration* 9: 229.

⁴⁰ Drummond later noted that he “did not feel it right to object to this proposal” (Hon. Sir Drummond, Eric. 1931. “The Secretariat of the League of Nations.” *Public Administration* 9: 229).

⁴¹ Dubin, Martin David. 1983. “Transgovernmental Processes in the League of Nations.” *International Organization* 37(3): 479.

⁴² Some member-states took Drummond’s advice and coordinated all their communications through their foreign ministries. Others accepted Salter’s plan and allowed for direct communications between national ministries and the League Secretariat. The British government was the most opposed to this latter practice and adopted a rule that all communications from its national ministries would go through the prime minister’s office.

⁴³ Dubin, Martin David. 1983. “Transgovernmental Processes in the League of Nations.” *International Organization* 37(3): 232.

Drummond's initial vision for the League Secretariat, a combination between staff autonomy and great power oversight, was bolstered by the final report of a committee that the Council set up to assess the nature of the bureaucratic apparatus planned for the new IGO. The Balfour Report, bearing the name of the committee chair, Sir Arthur Balfour, reiterated the provisions of the Covenant, that selection of staff was to be made by the Secretary-General and approved by the Council.⁴⁴ However, it went well beyond the Covenant's stipulations when it expressed its strong support for Drummond's proposed principle of staff autonomy noting that "the members of the Secretariat, once appointed, are no longer the servants of the country of which they are citizens but become for the time being the servants only of the League of Nations. Their duties are not national but international."⁴⁵ The report also expressed the need to not only select the best possible people for the Secretariat but to include officials from "various nations" because "no one nation or group of nations ought to have a monopoly in providing the material for this international institution."⁴⁶ The Council's strong support for Drummond was also reflected in its acceptance of his staffing proposals. Although the Covenant required the body to approve all staffing decisions, it never opposed any that the Secretary-General made.⁴⁷

The Balfour report had been initiated before the League began to function and was delivered to the Council in May 1920, about half a year before the Assembly even had an opportunity to meet for the first time. It was codified through four Council resolutions which, of course, reflected primarily the views of the most powerful states.

Up to that point, small states had had very little input in shaping the League Secretariat. They wasted little time in making their voices heard in the League's first Assembly, in late 1920. Led by the representative of New Zealand, they requested that staffing be done through competitive examinations. They believed that such a practice would level the playing field, taking away the informal channels that great powers had in influencing staffing decisions. To use the analytical framework depicted in Figure 6.1, this G_3 initiative of empowering G_4 was intended to weaken the control that G_1 and G_2 had over the League's bureaucracy (arrows 1 and 2), rather than strengthening its own control (arrow 3).

The French objected to the small states' proposal, arguing that it was virtually impossible to organize examinations during the formative period of the organization. As a compromise, Drummond proposed to establish "an impartial body to

⁴⁴ This support for the plans of the League's Secretary-General should not be surprising. As a reminder, Drummond had recently been Balfour's personal secretary when the latter was foreign secretary.

⁴⁵ Cited in Langrod, Georges. 1963. *The International Civil Service*. Leyden: A.W. Sythoff, 51.

⁴⁶ Drummond, Eric. 1920. Appointment of Personnel, 26 June 1919, League of Nations Archives, RI460.

⁴⁷ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat : A Great Experiment in International Administration*. New York: Kraus Reprint, 43.

make the choice.”⁴⁸ While some called for this body to include state representatives, Drummond was successful in establishing it as a forum composed solely of individuals within the Secretariat. This move increased the top-level League’s officials’ influence (including his own) over lower-level ones (arrow 7). As powerful states still exerted a good deal of control over the top echelon of the Secretariat, (arrows 1 and 2), of course, small states were not pleased with the outcome. G₃ states understood that staffing decisions made behind closed doors within a small committee led by top Secretariat officials (who, at that time, were virtually all nationals of great powers) were likely to be biased against their interests. It is worth noting that, while the League Staff Committee (later renamed the Appointments Committee) was made solely of top League officials, including the Secretary-General, half of the analogous ILO body was appointed by the staff union, thus giving the latter IGO’s secretariat a greater degree of autonomy from powerful member-states.

Small states, however, did not completely give up seeking greater influence over staffing decisions in the League. They requested that the Assembly set up its own committee (independent from the Balfour Committee that the Council had established) to deliver a report on the new international secretariat at the second Assembly, in 1921. At first sight, the report of the Noblemaire Committee (named after the French diplomat who chaired it) was fairly similar to the Balfour Report. However, it offered some important additions. Most significant, when expressing the need for hiring the best possible staff for the League, it called for processes of “competitive recruitment,” defined as “open competitive examination, or selection based on a comparison of the records and qualifications of candidates.”⁴⁹ It also emphasized more than the Balfour Report the “extreme desirability” of fair national representation.

The debates surrounding the Noblemaire report took place during the meetings of the second Assembly, in September 1921. While the clashes over the Secretariat that had taken place during the founding of the organization and in its first year within the Council were about the fair distribution of top positions among G₁ and G₂ states (reflecting arrows 1 and 2 in Figure 6.1), the ones in the Assembly in 1921 were more clearly about how to give weaker states some input in this matter (arrow 3). The Indian representative pointed out that almost three quarters of the approximately 360 individuals from the Secretariat were either British (139), French (73), or Swiss (62) nationals, although these three countries together contributed less than 20 % of the IGO’s budget. In contrast, India paid 6.6 % of the budget but only had one national in the Secretariat staff. He noted that other states such as Brazil, Cuba, and Romania did not have any nationals among League staff. India thus

⁴⁸ League of Nations. 2020. Minutes of Fourth Committee, Second meeting, 19 November 1920.

⁴⁹ League of Nations. 1921. Organization of the Secretariat and the International Labour Office. The Records of the Second Assembly. Meetings of the Committees II, Annex 2, 188.

proposed a resolution stipulating that no state would be allowed to have a proportion of staff greater than double the proportion of its financial contribution to the organization.⁵⁰

Drummond himself responded to this proposal by arguing that such a practice would be impossible and that all the League could do for now was to ensure that a greater balance of the number of nationals coming from all countries in the organization's staff would be "progressively realized." The more powerful states stepped into the Assembly's debate and softened the initial draft resolution proposed by G₃ states, eliminating wording calling for national quotas and instead mentioning "fair proportions from the various States member of the League [...] regard always being had to the requirements of efficiency."⁵¹

Even such softened wording was considered a victory for G₃ states as it introduced for the first time the principle of fair representation of member-state nationals within an IGO's staff. The debates within the Assembly and the resolution that was eventually adopted led to the inclusion in 1922 in the Staff Regulations of Article 15 stipulating that "special regard will be had to the development and international character of the organisation."⁵²

The battle over fair representation of nationals in the League Secretariat indicates that despite the declared autonomy of the IGO's staff, there was a clear awareness that powerful states continued to exert a strong influence on the international civil servants (arrows 1 and 2 in Figure 6.1). Indeed, with the help of the British and French representatives at the League, Drummond was able to maintain a solid great power presence in the Secretariat. He, together with the rest of the Appointments Committee, would often reject G₃ candidates for staff positions because they came from countries with different bureaucratic traditions arguing that such individuals would require added education and supervision. Also, by adopting a very conservative promotion system, from within the ranks of the existing staff (explaining that such individuals had already proved themselves in working in an international setting), they perpetuated the strong British and French presence in the Secretariat.

And yet, small states' pressures slowly chipped away at the influence that great powers had over the Secretariat and, consequently, led to a shift towards further staff autonomy. They were able to do so by acting through the Assembly and, especially, through its Fourth Committee. It is important to point out that the Covenant had not given the Assembly any role in Secretariat oversight. However, as the Assembly's Fourth Committee dealt with budgetary issues and as staff

⁵⁰ Gram-Skjoldager, K. 2019. "A Great Experiment": Professional Self-Perceptions and Working Conditions in the Secretariat," in H. A. Ikonomidou and K. Gram-Skjoldager (eds.). *The League of Nations: Perspectives from the Present*. Aarhus: Aarhus University Press, 235–45, 266.

⁵¹ League of Nations. 1921. Minutes of Fourth Committee, 15 September 1921, 37.

⁵² League of Nations. 1919. Appointment of Personnel, 26 June 1919, League of Nations Archives, R1460.

salaries were the largest component of the League's budget, this body emerged as a powerful institution in shaping staff decisions.

The autonomy of the staff also improved with the slow introduction of open examinations for staffing. Although it was still difficult to compare individuals coming from very different bureaucratic traditions (and this argument continued to be used to avoid the introduction of examinations in many parts of the Secretariat), the meritocratic selection practice slowly came to be applied to numerous posts.⁵³ With increased experience working in the League, and with greater emphasis on merit, Secretariat staff developed a stronger influence over the working of the organization, just like domestic bureaucracies had achieved about half a century earlier in major states.

The Assembly (and the G₃ states that controlled it) was able to enhance its control over the Secretariat's work through yet another important institution for staff oversight: the Supervisory Commission. This body was primarily intended to oversee the expenditures of the League. When it was established in 1921, it was decided that the Council should appoint its members. In 1929, at the proposal of the Norwegian representative, the Assembly took over this role based on the argument that control of the League's expenditures should be given to the body where all states contributing to the budget were represented. This decision was later described as a "constitutional change of the first magnitude"⁵⁴ that altered the balance between the League's two main bodies and, of course, in the control over the secretariat by G₁ and G₂ vs. G₃ states.

Through these two bodies, small states were able to slowly increase their influence over the Secretariat. This was perhaps best reflected in the fact that the proportion of top staff coming from the powerful permanent members of the Council, declined from 75% in 1922, to 51% in 1930 and 25% by 1938. From 1920 to 1930 the number of states with nationals serving in the League Secretariat increased from 15 to 38.⁵⁵

Throughout the 1920s, several very important institutions were established within the League to safeguard staff autonomy. First, the League accepted the creation of a staff union. Not surprising, the impetus for this development in the league came from the ILO. The ILO had emphasized the importance of unions from the start, when it embraced the tripartite structure that gave decision-making power to representatives from labor unions and from organizations of employers, not just government officials. In fact, the Commission for Labor Legislation that

⁵³ Conference on training for international administration Washington D.C. 1944. *Proceedings of a Conference on Training for International Administration Held at Washington D.C. August 21–22 1943 Under the Auspices of the Division of International Law of the Carnegie Endowment for International Peace*, 126–8.

⁵⁴ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat : A Great Experiment in International Administration*. New York: Kraus Reprint, 21.

⁵⁵ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat : A Great Experiment in International Administration*. New York: Kraus Reprint, 67.

was set up in January 1919 to discuss the establishment of the ILO was headed by Samuel Gompers, chairman of the American Federation of Labor. Albert Thomas, the first director of the ILO also had strong ties to labor unions. As a Socialist member of the Chamber of Deputies, during World War I he was selected to lead various important institutions that required a strong relationship with unions, including the Ministry of Armaments.

Even before opening the ILO's offices in Geneva, the staff of the incipient IGO expressed to Thomas their concern that there was a great deal of uncertainty regarding their working conditions in this novel status of international civil servants. After all, when joining the ILO staff, virtually all of them were leaving behind comfortable national positions. Thomas immediately set up an improvised committee made up both of top secretariat officials and representatives of the lower-level staff (i.e., from both "boxes" that make up G_4 in Figure 6.1) to discuss the "rights guaranteed to members of staff." His familiarity with negotiations over such rights in the French system gave him a clear advantage compared to his British colleagues (including Drummond) who did not have much experience working with unions.⁵⁶

In late April 1920 the negotiations led to the adoption in the ILO of the first staff regulations, more than a year prior to the adoption of similar regulations in the League. Article 9 of the ILO staff regulations stipulated that the staff be invited to form a committee made up of four representatives elected by the IGO's staff (called simply the Staff Committee) to "facilitate relations between the Director and the staff as a whole."⁵⁷ The staff held a meeting in early May and immediately made some important demands to the top-level officials of the secretariat with regard to their prerogative to meet whenever they pleased and to secure long-term employment during the period when they were moving to Geneva. By August 1920, the ILO staff formally established a union, a body that has functioned almost continuously since then.

A second important type of institution that emerged in the League and that has contributed to the autonomy of international civil servants is the administrative tribunal. As early as 1920, the Assembly had considered the possibility of labor disputes emerging but decided to leave the task of handling them to the Council, as the Covenant had named the more exclusive body as the main institution involved in staff questions.⁵⁸ However, as soon as the first actual labor dispute arose in 1925, the Council realized that it did not have the time or expertise to become involved

⁵⁶ The Staff Union of the International Labour Office Its Origins and the Commencement of its Activity. Geneva: International Labour Organization.

⁵⁷ Djokitch, Alexandre. 1973. *The Staff Union of the International Labour Office Its Origins and the Commencement of its Activity*. Geneva: International Labour Organization, 15.

⁵⁸ Villalpando, Santiago. 2016. "The Law of the International Civil Service." In Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (ed.). *Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 1087.

in such matters and established an ad-hoc committee of jurists to take on this task. In 1929 the League created a standing body called the Administrative Tribunal to deal with administration-staff disputes. The ILO staff were also to use the League's Tribunal. It was composed of three judges and three deputy judges who would come from different states. Throughout its existence, it heard twenty-one cases. It is generally considered to have adopted fair decisions protecting staff from top League administrators' arbitrary decisions.⁵⁹

Overall, the Secretariat's autonomy increased in the League throughout the 1920s. In fact, some observers have argued that, during that time, staff autonomy in the IGO was greater than in domestic government institutions because government oversight is inevitably more difficult to achieve in the former than in the latter.⁶⁰

However, in the second decade of the League's existence, staff autonomy slowly eroded. This is generally attributed to two important developments. The first was the change in Secretary-General in 1933. At that time, the bureaucracy of the League began functioning in a more "top-down" fashion. All correspondence to the IGO would go to the office of the Secretary-General and then the tasks deriving from such correspondence would be distributed to the lower levels of the Secretariat. This contrasted with the "bottom-up" system of the 1920s where lower-level League offices would correspond directly with outside governmental and nongovernmental institutions and only refer the most important tasks to the Secretary-General. This change in the functioning of the Secretariat was also the result of the growth in the number of League staff. While the organization had a little more than 150 employees in 1920, by 1933 when Avenol took office the number had topped 700.⁶¹ The more top-down system helped avoid the overlap of tasks within the secretariat and to reduce some of the rising costs in the IGO at a time of global economic hardship. Of course, the system also eroded the ability of lower-level staff to take initiatives and concentrated more power in the upper echelon of the Secretariat.

The second reason for reduced staff autonomy, generally considered more important than the first, was the very "national" positions that staff from some states, especially Germany and Italy began taking. Germans perceived the League as an institution designed to preserve the status quo after their defeat in World War I and did not trust its staff. After Germany joined the League in 1926, the press from that country reported on dozens of alleged anti-German plots by the

⁵⁹ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat : A Great Experiment in International Administration*. New York: Kraus Reprint, 261.

⁶⁰ Salter, Arthur. 1921. *Allied Shipping Control*. Oxford: Clarendon Press, 199; more recently see Bauer, Knill, and Steffen. 2017. Johnson, Tana. 2017. *Organizational Progeny: Why Governments are Losing Control Over the Proliferating Structures of Global Governance*.

⁶¹ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat : A Great Experiment in International Administration*. New York: Kraus Reprint, 241–2.

"Geneva bureaucracy." Virtually all new staff appointments were seen by them as further proof of the League's efforts to reduce German power. In the words of one close observer of the organization, "the impression was deliberately created that the Secretariat was a center of conspiracy not only against Germany, Italy and other 'frustrated' nations, not only against disarmament and against the protection of minorities, but against the peace of the world."⁶²

Not surprising, the Germans who were appointed to the League Secretariat perceived themselves to still be part of their national civil service and did not seek to adopt the same autonomous stance that other international civil servants in the IGO had generally embraced. This national approach to the League's Secretariat was perhaps even more visible in the case of Italy. In 1927, that country passed a law requiring all of its nationals who wanted to enter the service of an international institution (including the League) to seek the approval of the Italian Foreign Ministry. That same year, Mussolini appointed his personal secretary, Giacomo Paulucci di Calboli, to the League Under-Secretary-General position that his country informally had been allotted. Paulucci organized all Italian staff in the League under his leadership to promote Italy's political goals.⁶³ Several other countries followed, at least to some extent, the German and Italian models and pressured their nationals in the League Secretariat to promote their national policies. This situation eventually led in 1932 to the League requiring that all staff take an oath of office to the organization.⁶⁴

In 1930, as a response to such increased staff bias, the Assembly requested another report regarding the functioning of the Secretariat. The report of the so-called Committee of Thirteen supported, yet again, Drummond's principle of staff autonomy from governments. However, it went even further in protecting such autonomy. First, it requested better pay for League staff stipulating that their salaries "cannot be less than those drawn by the best paid officials in the national civil services."⁶⁵ Second, it established a pension scheme that would provide staff with the kind of long-term security that national civil servants had. Third, for the first time it distinguished between top-level League officials who had temporary contracts (and who were appointed by states and returned to national civil service positions after they left the League) and lower-level ones with permanent contracts (and who were supposed to be autonomous of any government influence). On the

⁶² Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat: A Great Experiment in International Administration*. New York: Kraus Reprint, 393.

⁶³ Weiss, Thomas G. 1982. "International bureaucracy: the myth and reality of the international civil service". *International Affairs* 58: 294.

⁶⁴ Dag Hammarskjöld Foundation. 2020. *The International Civil Service: A Reference Compendium for United Nations Personnel*. Uppsala: Dag Hammarskjöld Foundation. Available at <https://www.daghammarskjold.se/wp-content/uploads/2020/11/international-civil-service-reference-compendium.pdf>, 12.

⁶⁵ League of Nations Committee of Enquiry on the Organisation of the Secretariat, the International Labour Office and the Registry of the Permanent Court of International Justice (Committee of Thirteen). 1930. Report of the Committee, Geneva, 28 June 1930, Official No.: A. 16, 1930, 17.

one hand, this gave even greater stability to the majority of staff and made it more practical for them to embrace the autonomous positions that they were required to take. On the other hand, the distinction between these two levels of staff also institutionalized the practice that allowed top officials to take on a dual role of League staff and representative of their state (as the flagrant example of Paulucci suggests).

The Report of the Committee of Thirteen differed in another important way from those of the Balfour and Noblemaire Committees of the early 1920s. While these two early reports reflected a unanimous opinion, the 1930 one included a "Minority Report" written by the representatives of Colombia, Germany, Italy, and Venezuela that challenged the principle of staff autonomy, arguing for a system where the Secretariat staff would be representative of the "public opinion" of their home state. One close observer of the League's Secretariat argued that "Carried to their logical conclusions, the suggestions of this group would have led to the adoption of the system of national representation rejected by the Secretary-General when organizing his Secretariat."⁶⁶

However, it should be noted that the same observer, as well as many others, did not necessarily consider the proposal of these four states as completely flawed. Most of them acknowledged that by 1930 the Secretariat had indeed become a formidable force that required better oversight by state representatives. The most powerful version of this argument found its way into the Minority Report: "The political influence of the Secretariat and especially of its principal officers is in fact enormous and it would be a mistake to close our eyes to this fact [...] The organization of the higher direction of the Secretariat (is of capital importance); to a certain extent it determines the future of the League."⁶⁷

This apprehension of a powerful IGO bureaucracy was later echoed by many other states. Perhaps most important, it became a constant concern of various US administrations, especially in the post-Cold War era. However, in the League, it was rather a reflection of rising G₂ states who felt that the staff were controlled by other powerful states.

There are indeed numerous examples of League officials seeking to influence international policies and, in many instances, by doing so, restraining powerful states. The most visible ones involved the two Secretary-Generals of the League. In 1932, although he rarely availed himself of his prerogative to speak in Council or Assembly meetings, Drummond addressed the Council and read the Chinese communication requesting that the League take action after the Japanese invasion of Manchuria.⁶⁸ He also took the unusual step of consulting with the United States,

⁶⁶ Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat : A Great Experiment in International Administration*. New York: Kraus Reprint, 30.

⁶⁷ Langrod, Georges. 1963. *The International Civil Service*. Leyden: A.W. Sythoff, 76.

⁶⁸ Morley, Felix. 1932. *The Society of Nations; Its Organization and Constitutional Development*. Washington DC: Brookings Institution, 266.

which was not a member of the League during the Manchurian crisis.⁶⁹ Moreover, he asked the United States to take the lead in seeking to restrain Japanese actions when he saw that the UK and other great powers in the League were not prepared to act.⁷⁰

Similarly, Avenol opened himself to criticism by League member-states when he traveled to Rome in 1936 after Italy had invaded Abyssinia. He argued that his actions had been “in the normal performance of his duties,”⁷¹ seeking to find a peaceful solution to a brewing conflict.

Of course, neither Drummond nor Avenol were successful in restraining the aggressive actions of these rising G₂ states. More broadly, as part of a still relatively weak international civil service, neither the Secretary-Generals of the League nor lower-level officials were able to influence powerful states in their actions in the political and security realms. However, numerous observers have pointed out that the Secretariat was most effective in carving out autonomous policies in the more technical bodies of the League. In some instances, the directors of the specialized organizations took policy decisions on their own and only later sought approval from the Council. Other times, officials from the Secretariat would informally approach a national delegate they felt would be inclined to support their view and suggest a particular policy solution. The delegate would then submit the proposal formally in one of the political bodies of the League.⁷² Of course, as time went by and the permanent staff came to have considerably more experience with League affairs than the government representatives, delegates would be the ones seeking out advice from the Secretariat.

The influence of staff from the specialized organizations came to be even greater during the 1930s when the financial problems of the League (and of virtually all governments) led to a greater reliance on private funding for some of the IGO's programs. For instance, the International Health Section, led by the Polish medical expert Ludwig Rajchman, came to receive about half of its funding from the Rockefeller Foundation. As its policies came to be increasingly autonomous due to external funding that bypassed control of member-states, the British stepped in and led the intergovernmental efforts to replace the very activist Rajchman, criticizing him for creating a “super-medical” authority with little government control.⁷³

⁶⁹ Department of State. 1931. Papers relating to the foreign relations of the United States, 1931, The Far East, Volume III, documents 22 and 384, available at <https://history.state.gov/historicaldocuments/frus1931v03/d22> and <https://history.state.gov/historicaldocuments/frus1931v03/d384>.

⁷⁰ Chapman, Michael E. 2013. “Fidgeting Over Foreign Policy: Henry L. Stimson and the Shenyang Incident, 1931,” *Diplomatic History* 37(4): 727–48, 727.

⁷¹ League of Nations. 1936. *Official Journal of League of Nations*. Vol. 17, 1139.

⁷² Ranshofen-Wertheimer Egon Ferdinand. 1972. *The International Secretariat: A Great Experiment in International Administration*. New York: Kraus Reprint, 315 and 395.

⁷³ See League of Nations. 1925. Minutes of Fourth Health Committee Meeting, 15 May 1925.

It is important to point out that in the specialized organizations from the League system, the government control that did exist was also based on experts. Most of the work involving such government representatives took place in relatively small committees where the lines between governmental and IGO representatives often became blurred.⁷⁴ Not surprisingly, the influence of League staff was indeed considerably greater in these more technical realms. This was perhaps most evident in the ILO where Albert Thomas had taken a much more active leadership than Drummond. In part, such a role was necessary in an organization where the director had to also mediate between the three groups making up the tripartite structure, and not only between member-states. Both he and other ILO secretariat officials often addressed the Governing Body and the International Labour Conference. They offered proposals for every item before these two intergovernmental bodies and then defended them.⁷⁵

Overall, although the seeds of the international civil service were planted with the establishment of the first IGOs of the nineteenth century, it is generally agreed that it took its first steps towards autonomy from powerful states in the League and ILO secretariats.⁷⁶ Virtually all other IGOs that were established after these two organizations adopted the same model of a fairly autonomous and increasingly specialized bureaucracy, similar to the ones that had been in place in national political systems for some time.

The UN: the erosion and then consolidation of international institutional restraints

Despite the popular understanding that, when the United Nations was established, the framers sought to create a very different type of organization, one that would not lead to the “failures” of the League, the post-World War II global organization copied many elements of its precursor. The continuity between the two IGOs was especially noticeable when it came to the work and rules of their secretariats. That should not be surprising, considering that most of the government officials involved after World War II in the Preparatory Commission and its Executive Commission for establishing the UN had worked in the League system.⁷⁷ Even in the case of the United States, which had not been a member of the League,

⁷⁴ Greaves, Harold Richard Goring. 1931. *The League Committees and World Order: A Study of the Permanent Expert Committees of the League of Nations As an Instrument of International Government*. London: Oxford University Press, 11.

⁷⁵ Jenks, C. Wilfred. 1943. “Some Problems of an International Civil Service,” *Public Administration Review* 93–105: 94.

⁷⁶ Villalpando, Santiago. 2016. “The Law of the International Civil Service.” In Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (ed.). *Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 1070.

⁷⁷ Luard, Evan. 1982. *A History of the UN, Volume 1*. New York: St. Martin's Press.

the plans for the UN involved some Americans with a good understanding of the IGO. For example, Arthur Sweetser, a journalist who had participated in the Paris meetings establishing the League and who was later assigned to the Provisional Secretariat of the League (before it became clear that the US would not join the IGO), promoted through his writings the League's work during the inter-war era⁷⁸ and offered important advice to the UN towards the end of war.⁷⁹

The UN's adoption of the League's model in terms of its bureaucracy, with an emphasis on its autonomy from member-states, is evident in the articles from the Charter that refer to the Secretariat. The second paragraph of Article 100 stipulates that "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities." Despite this formal call for the Secretariat's autonomy from individual states, as in the case of the League, in the UN there was concern that, in practice, staff would have a difficult time shedding their allegiance to home states. The second paragraph of Article 101 of the Charter therefore restated a principle that had been included in the three aforementioned reports from the League (Balfour, Noblemaire, and the Committee of Thirteen), that, "[although] the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity [...] due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."⁸⁰

In sum, early in its existence, the UN inherited from the League the same tensions regarding staff autonomy. First, although staff officials were formally intended to be autonomous of the states from where they came, in practice some governments sought to influence their nationals in the secretariat. As I will show, it was primarily the most powerful states (the US and USSR) that embraced this latter practice in the UN (just as powerful states like Germany and Italy did in the interwar era).⁸¹ Second, although in practice early in the history of the UN powerful states continued to be overrepresented in the secretariat (just as they had done in the League), there was a formal understanding that staff positions in the IGO should be distributed as fairly as possible among all states.

Early on the UN appeared, however, to take slightly different positions than the League in finding balances on these two issues. Such positions derived, at least in part, from Roosevelt's understanding that one reason for the League's failure

⁷⁸ Sweetser, Arthur. 1920. *The League of Nations at Work*. New York: Macmillan.

⁷⁹ Sweetser, Arthur and W. R. Sharp. 1944. *The Differential Participation of States in International Organization*. New York: Council on Foreign Relations.

⁸⁰ See <https://www.un.org/en/about-us/un-charter/chapter-15>

⁸¹ For a comparison of such practices in the two IGOs see Weiss, Thomas G. 1975. *International Bureaucracy: An Analysis of the Operation of Functional and Global International Secretariats*. Lexington, MA: Lexington Books, 198.

was the weakness of the Secretary-General position. Therefore, he envisaged a powerful head of the UN, selected from among prominent statesmen (not unlike the original plans for the League).⁸² Even after Roosevelt passed away, the decisionmakers who established the UN chose to give the Secretary-General a great deal of power over the secretariat (arrow 7 in Figure 6.1), compared to the situation in the League.⁸³

Of course, the US also expected to have a great deal of control over the Secretary-General and, more broadly, over the entire secretariat. This was especially true once the decision was made to have the headquarters of the organization in New York. Indeed, in the first years of the IGO's existence almost half of the UN staff,⁸⁴ and almost two-thirds of those working at the New York headquarters,⁸⁵ were Americans.

The Soviets also sought a strong influence over the secretariat but were not very successful. They even put forth a proposal at the founding San Francisco conference that would have given the most powerful states a preponderance in the secretariat's staffing.⁸⁶ However, at that late stage of the UN's planning small states already had a voice, and used it to defeat this proposal and introduce the principle of fair distribution of secretariat posts among states.

Although the official rules that came out of the negotiations at the founding of the UN maintained a good deal of Roosevelt's plan for a strong Secretary-General, the growing tensions between the US and USSR led to some compromises that, in reality, weakened great power influence over the head of the secretariat. Indeed, it quickly became clear that the new veto system in the UNSC (one of the two organs that had to approve any Secretary-General) made it very difficult for the top UN administrator to come from any one of the powerful states when the two sides of the Cold War were very apprehensive of each other.

The power of the Secretary-General over UN staff was particularly visible with regard to the IGO's administrative tribunal. When former League employees sought to introduce such a tribunal in the UN, to continue the work of the tribunal in the League, the two most powerful states, the US and USSR, objected. They were especially opposed to establishing the very autonomous body that such former G₄ members proposed. However, as the UN (like all IGOs by that time) enjoyed diplomatic immunity and could not be brought to national courts by employees, in 1947 top officials acquiesced to a rudimentary internal judiciary system

⁸² Behrstock, Julian. 1987. *The Eighth Case: Troubled Times at the United Nations*. Lanham, MD: University Press of America, 12.

⁸³ See e.g., Siotis, Jean. 1963. *Essai sur le Secrétariat international*. Genève: Droz, 161.

⁸⁴ Ameri, Houshang. 1996. *Politics of Staffing the United Nations Secretariat*. New York: Peter Lang, 163–4.

⁸⁵ Behrstock, Julian. 1987. *The Eighth Case: Troubled Times at the United Nations*. Lanham, MD: University Press of America, 28.

⁸⁶ Behrstock, Julian. 1987. *The Eighth Case: Troubled Times at the United Nations*. Lanham, MD: University Press of America, 12.

for adjudication of disputes between staff and Administration. The proposal for this Board was made by a US representative arguing that “an administrative tribunal would dangerously undermine the authority of the Secretary-General and the sovereignty of the General Assembly.”⁸⁷ In terms of the selection of its members and its functioning rules, the Board was a weak institution. In its almost three years of existence, it heard 58 cases. In only 15 cases the Board found in favor of a staff member. However, of those 15 cases, the Secretary-General only accepted four decisions and partially accepted three more. It accepted all of the Board’s decisions against staff.⁸⁸

It took several years until other states and the secretariat itself was able to convince the US to accept the establishment of an administrative tribunal in the UN. In the meantime, the League of Nation’s Administrative Tribunal had been turned over to the International Labour Organization, the main institution that survived from the global organization of the inter-war era. Indeed, as the ILO was in need of such an institution and, as the League’s Assembly was liquidating the various institutions of the old IGO, in 1946 the tribunal was simply turned over to the ILO changing its title to the Administrative Tribunal of the International Labour Organization (ILOAT).⁸⁹ In 1948, the new World Health Organization was confronted with an administrative case and, as the UN was still delaying the establishment of its own tribunal, it turned the case over to ILOAT. Other IGOs from the UN family were also prepared to make use of ILOAT. It was in part due to the realization that the UN would miss out on the opportunity to take the lead in administrative issues that the US accepted the creation of the UN Administrative Tribunal (UNAdT) in 1949. Other specialized agencies were at that point left with a choice between using the ILOAT or the UNAdT for their administrative needs or establishing their own tribunal. Interestingly, the majority of IGOs have since turned to the more experienced ILOAT, even many that were not headquartered in Geneva or were not part of the UN family. Some consider that the preference for ILOAT was due to staff perceptions, especially in the late 1940s and early 1950s when many such decisions were made, that the UN (and its UNAdT) were more likely to be affected by strong US interests and therefore that tribunal would be less impartial than the ILOAT.⁹⁰

Indeed, when the UNAdT was established, it functioned on the basis of a series of rules that weakened the autonomy of the institution. Many of those rules had been proposed by the Secretary-General or the US. As one observer

⁸⁷ United Nations, Fifth Committee. 1946. “Delegation for the United States: Proposal on Establishment of an Administrative Tribunal,” General Assembly document A/C.5/56, paragraph 2.

⁸⁸ Megzari, Abdelaziz. 2015. *The Internal Justice of the United Nations: A Critical History 1945–2015*. Boston: Brill, 16.

⁸⁹ Villalpando, Santiago. 2016. “International Administrative Tribunals,” In Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (ed.). *Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 1087.

⁹⁰ Akehurst Michael Barton. 1967. *The Law Governing in International Organizations*. Cambridge: Cambridge University Press, 14.

pointed out, the new Tribunal embraced “the widest possible dimension for the discretionary power of the Secretary-General that would actually result in an unbridled, almost arbitrary, power over the staff. This power would be limited only by the overwhelming influence of the major powers which actually appointed the Secretary-General.”⁹¹ Its weak autonomy was reflected in virtually all aspects, from the political process underlying the selection of the UNAdT’s members), to their short term in office (three years) and dependence on powerful states for re-election, to its financial and operational dependence on member-states and the Secretary-General. Overall, the UNAdT was seen as a clear step back from the administrative tribunal that had functioned in the League and its successor in the ILO.⁹² Perhaps the most egregious limitation on its work was that the UNAdT excluded all disputes arising from disciplinary actions from its competence.

Despite the relative weakness of the UNAdT, its first judgments supported UN staff, in an unexpected blow to the first Secretary-General, Trygve Lie. They involved sixteen cases of the Secretary-General terminating contracts of temporary UN staff. The tribunal found in favor of all sixteen applicants arguing that, according to staff regulations, the Secretary-General was not “empowered to terminate temporary-indefinite contracts for any reason he might consider proper to apply in a given case, whatever that reason might be, or simply for no reason at all” and that he needed “to determine the ‘conditions’ to which temporary contracts should be subject, making thus absolutely clear its will that temporary contracts and their termination must be subject to certain conditions which it permitted the secretary-general to elaborate.”⁹³ These decisions were adopted despite the dissent of the American sitting on the tribunal.

Lie was obligated to accept the UNAdT’s decision. However, soon after, he turned to member-states requesting that staff regulations be altered to specify that, in the future, he could dismiss temporary staff members without having to offer any reason for such dismissals. His increased discretionary powers (arrow 7 in Figure 6.1) became effective in March 1952, just in time for the most important cases that the UNAdT had ever heard, those referring to the Americans from the UN secretariat who had invoked the Fifth Amendment before the US Senate Internal Security Subcommittee as part of the McCarthy witch-hunts of the early 1950s.

Interestingly, the Secretary-General had taken action to screen American nationals working for the UN as early as 1948, more than a year before Joseph McCarthy had made his first accusations of American officials with alleged communist sympathies. Lie responded in 1948 to a statement made by a lower-level

⁹¹ Megzari, Abdelaziz. 2015. *The Internal Justice of the United Nations: A Critical History 1945-2015*, Boston: Brill, 20.

⁹² E.g., Megzari, Abdelaziz. 2015. *The Internal Justice of the United Nations: A Critical History 1945-2015*, Boston: Brill, Chapter 2.

⁹³ United Nations. 1947. A/RES/161(II).

State Department official that there were “hundreds of foreign agents” among the Americans working at the UN. Although Secretary of State George Marshall denied the accusation, the UN Secretary-General reached out to the FBI requesting the US agency screen all American nationals applying for UN jobs. In January 1949 the FBI accepted this request and formalized a secret agreement with the UN for the screenings.⁹⁴

Not surprising, therefore, a few years later, when the official investigations into American UN staff unfolded, the Secretary-General was quick to support the official US agencies. The investigations culminated in public hearings in the US Senate’s Internal Security Sub-committee tasked to deal with “espionage, sabotage, and the protection of the internal security of the United States.” The subcommittee was chaired by Senator Pat McCarran and was part of the larger Committee of Government Operations chaired by Joseph McCarthy. In Fall 1952, the subcommittee summoned 30 Americans from the UN secretariat. During the proceedings of the subcommittee 18 of the 30 individuals who were questioned invoked the Fifth Amendment against self-incrimination.

At that point, Trygve Lie hand-picked a Commission of Jurists to offer advice on how the UN should deal with the eighteen Americans. In late November 1952, the three jurists on the commission concluded that “if an officer of the United Nations invoked the 5th Amendment, he could have done so exclusively ‘on the only lawful ground open to him, that in answering he would become a witness against himself,’ which would automatically mean that he was indeed guilty of the grave accusations implied in the questions that were put to him.”⁹⁵ Without consulting with any other UN bodies or with member-states, Lie decided to terminate the employment of all eighteen Americans. His decision was criticized by representatives of some states when the issue was later discussed in the UNGA’s Fifth Committee. The decision was especially considered surprising given that Lie had just resigned as UN Secretary-General and could have easily left the matter to his successor, Dag Hammarskjöld.⁹⁶

The UN Staff Association sprang into action to defend the American officials fired by the Secretary-General. They submitted their cases to the UNAdT. The tribunal found (with one exception) in favor of the officials who had permanent appointments but against those with temporary-indefinite appointments. Due to

⁹⁴ Preston, William, Edward S. Herman, and Herbert I. Schiller. 1989. *Hope & Folly: The United States and Unesco, 1945–1985*. Minneapolis, MN: University of Minnesota Press, 63.

⁹⁵ United Nations. 1953. “Opinion of the Commission of Jurists, 29 November 1952,” Annex III to the “Report of the Secretary-General on Personnel Policy,” A/2364, 30 January 1953, 27.

⁹⁶ Lie’s resignation had been due to Soviet pressures after he had acted in strong support of South Korea, a position seen by the USSR as running counter to his obligations of impartiality. Interestingly, at that time, the USSR proposed changing the individual position of a secretary-general to one of a “troika” of individuals, one of them appointed by Moscow, who could veto the decisions of the other two “co-secretary-generals.” See Doyle, Michael W. 2009. “The UN Charter – A Global Constitution?” in Jeffrey L. Dunoff and Joel P. Trachtman (eds.). *Ruling the World?: Constitutionalism, International Law, and Global Governance*. Cambridge: Cambridge University Press, 113–32.

the aforementioned changes that Lie had made to staff rules regarding temporary appointments in early 1952, the UNAdT felt it had little choice but to accept the Secretary-General's decision regarding individuals from the latter group.

It is worth noting that ILOAT was faced with eight similar cases involving American nationals whose employment had been terminated by the Food and Agriculture Organization (FAO) and UNESCO. All eight officials won their cases in ILOAT, whether they had permanent or temporary appointments in their organizations. It is true that FAO and UNESCO had not adopted similar drastic rules allowing their directors to terminate temporary appointments without any explanations (as was the case in the UN). However, observers consider that the ILO's tribunal was considerably more autonomous than the one in the UN, and that the outcome of these cases would have been similar in the ILOAT even if it had to work within the same rules as UNAdT.⁹⁷

UNAdT's decisions involved the secretariat paying full salary and some compensations for the officials who had been reinstated. Some member-states felt that it was inappropriate for them to contribute to such costs without being involved in the process leading to the decisions. In December 1953, the General Assembly therefore requested an advisory opinion from the International Court of Justice regarding the legality of the UNAdT's decision. In July 1954, the ICJ gave its Advisory Opinion arguing that the Administrative Tribunal was indeed "an autonomous and truly judicial body pronouncing final judgments without appeal," and not "an advisory organ or a subordinate committee." It thus concluded that "according to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force."⁹⁸ In the context of the current analytical framework, we can interpret the ICJ's support of the UNAdT as a reflection of the solidarity that developed in time among judges from various domestic and international institutions (all part of G₄) and that was discussed in chapter 4.

It is worth pointing out that the official US position during the 1953 UNAdT proceedings involving American nationals from the UN staff was somewhat ambiguous. Perhaps most important, the US did not have any nationals sitting on the tribunal. Indeed, in December 1951, after Rowland Egger ended his term, the United States decided to not submit any Americans as candidates for that position. In fact, the 1952–1953 period was the only one in the entire history of the UN when the United States did not have a national among the members of UNAdT.⁹⁹

⁹⁷ Megzari, Abdelaziz. 2015. *The Internal Justice of the United Nations: A Critical History 1945-2015*, Boston: Brill, 182.

⁹⁸ International Court of Justice, "Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954," 47.

⁹⁹ Megzari, Abdelaziz. 2015. *The Internal Justice of the United Nations: A Critical History 1945-2015*, Boston: Brill, 175.

This author has not been able to discover evidence to explain this unusual decision. After all, at the same time as the State Department decided to not have any Americans sit on the Tribunal there were clear indications that the McCarthy investigations into officials from domestic institutions would spill over to affect Americans working for the UN. Why wouldn't the US seek direct influence over the upcoming UNAdT decisions?

While we may never know the actual reasons, it is worth pointing out that there appeared to be a striking difference in the early 1950s between US domestic and international reactions to the relative rise in power of the USSR (the G₂ state emerging as a challenger to the US's G₁ position), represented most obviously by the Communist country's development of its first atom bomb in 1949. Domestically McCarthyism has often been considered a reaction to the fear that the rising challenger had infiltrated US institutions and therefore there was a great need for control over its bureaucracy. Internationally, the US was aware that if the Soviet Union would continue to gain relative power (and become the new G₁) it could benefit one day from the lack of UN staff autonomy. Therefore, the US preferred not to formally promote the weakening of the secretariat's institutions, as A3 posits. Starting around 1952, the US did not speak out against the UN Secretary-General's efforts to restrain the UNAdT or the UN staff. However, it also did not speak out against the UNAdT or staff autonomy. This balance likely reflected the US State Department's ambiguous position.

Observers indeed have noted that during the McCarran subcommittee investigations, the State Department felt caught in the middle between its obligations towards the US Senate and the UN.¹⁰⁰ Its difficult balancing act was especially visible in November 1953 when Abraham Feller committed suicide. Feller had been an American national who was assistant Secretary-General and the UN's chief legal counsel, as well as a close adviser to Lie. Although he had not been under Senate investigation himself, the strain of being at the center of the UN investigations (as well as the suicide of his friend Alger Hiss, who had been investigated by the Senate committee) are considered to have led him to take his own life. It is noteworthy that US secretary of state Dean Acheson attended Feller's funeral. Eleanor Roosevelt publicly paid homage to him for his contribution "to the creation and the work of the United Nations" and mentioned that "he felt most keenly the triumphs and the trials through which this Organization of the world community has passed."¹⁰¹

In time, the internal administrative legal system of the UN and other IGOs became even stronger after they introduced procedures allowing staff to appeal tribunal decisions. Appeals boards such as the Joint Appeals Board of the UN,

¹⁰⁰ Behrstock, Julian. 1987. *The Eighth Case: Troubled Times at the United Nations*. Lanham, MD: University Press of America, 20.

¹⁰¹ United Nations. 1952. General Assembly, Seventh Session, Official Records, 398th Plenary Meeting, 25 November 1952, A/PV.398, 287–8.

the Appeals Board of UNESCO, or the ILO's Joint Committee, were established and all included staff representatives. These institutions, together with the ICJ, developed throughout the Cold War years a rich body of international civil service jurisprudence, separate from any kind of municipal law, thus furthering the autonomy of IGO staff.¹⁰² One of the most important ICJ decisions involving the international civil service is generally considered to be one in 1954 that emphasized the importance of "letters of appointment" in determining an IGO's clear contractual obligations towards individuals.¹⁰³ This decision (and later practice) has insulated international civil servants even further from the arbitrary influence of member-state governments or top IGO officials in a similar way as domestic legislation protecting government civil servants from G_1 and G_2 spread across states in the late nineteenth and early twentieth centuries.

UN staff autonomy was bolstered further with the establishment in 1974 of the International Civil Service Commission, comprising officials from across the entire UN system. The initiative to establish this commission belonged to the UNGA and small states.

Most recently, the UN created in 2008 yet another institution to protect international civil servants: the UN Ombudsman and Mediation Services. This office offers IGO staff the opportunity for informal resolution to their disputes with upper management and is also involved in autonomous monitoring of management practices.¹⁰⁴ Some of the regional IGOs that have developed their own administrative judicial systems, especially the EU, are considered to have advanced even further in adopting protections for their staff.¹⁰⁵

This important trend towards increased bureaucratic autonomy in the UN and other IGOs throughout the Cold War (the dashed arrows in Figure 6.1) was paralleled by another trend, the growing proportion of international civil servants coming from G_3 states.

Indeed, as mentioned, due to the need for rapid staffing of the UN in its first years (and to his own pro-US stance), Trygve Lie allowed for almost half the UN staff to be Americans who were readily available for the New York positions. In 1946, about 80% of all UN staff were either from North America or Western Europe. Two thirds of the staff were from the US, UK, or France.¹⁰⁶

¹⁰² Villalpando Santiago. 2016. "The Law of the International Civil Service," In Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (ed.). *Oxford Handbook of International Organizations*, Oxford: Oxford University Press.

¹⁰³ Villalpando, Santiago. 2016. "The Law of the International Civil Service." In Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (ed.). *Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 1073.

¹⁰⁴ United Nations, A/RES/61/261 and A/RES/62/228.

¹⁰⁵ Villalpando Santiago. 2016b. "International Administrative Tribunals," In Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (ed.). *Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 1092.

¹⁰⁶ United Nations. 1981. A/RES/36/407; United Nations. 1982. A/RES/37/378.

The shift towards greater G_3 influence over the UN secretariat (arrow 3 in Figure 6.1) was primarily due to the fact that the staffing policies came to be shaped by the inclusive General Assembly (as it was tasked to deal with all budgetary issues) rather than by the Security Council where great powers dominated all decisions. In this respect, the process was very similar to the one in the League where small states were also able to use their control over the Assembly to push for greater representation of their nationals in the League secretariat.

In the late 1940s and throughout much of the 1950s, the US (G_1) and West European states (especially the UK and France, two important G_2 states) still had a great deal of control over decisions in the General Assembly. Therefore, they sought to quickly shape future staffing rules when they knew that they may not have such control much longer. They proposed that the proportion of staff in the UN secretariat be roughly proportional to states' contributions to the IGO. Of course, that implied that the wealthy G_1 and G_2 states would continue to dominate the secretariat, yet not quite to the same extent as in the UN's first year of existence.¹⁰⁷ By a very slim margin (driven by small states' preferences), the GA, however, did not accept this formula for staffing and sought a proposal from the Secretary-General for a fairer process of staffing the secretariat. Lie made only very small changes to the original great power proposal, accepting the principle that staffing should be proportional to budgetary contributions. However, he sought to give himself greater freedom in selecting staff by introducing a stipulation that the relationship between budget contribution and staff could vary both upwards and downwards by 25%. He also offered some support for G_3 states' interests by seeking a rule that would not allow states with more than 10% contributions to the budget a greater proportion of staff representation than their budgetary contribution required. He also considered that any state that had four staff members in the UN or less could not be considered as exceeding its quota. This somewhat more balanced proposal was accepted by states and was the basis of staffing decisions throughout the 1950s.

By the early 1960s small states were not willing to accept the existing staffing rules any longer. In 1961, UN membership had come to be more than double (104) its original size (51).¹⁰⁸ The vast majority of new members had emerged from the decolonization process. In 1960 alone, seventeen new members joined the UN, sixteen of which had just recently become autonomous states.¹⁰⁹ Representing now the majority of votes in the UN, developing states requested a change in staffing rules. They reached an agreement that three more factors, in addition to budget contributions, should be taken into account in staffing: "membership" (implying

¹⁰⁷ Ameri, Houshang. 1996. *Politics of Staffing the United Nations Secretariat*. New York: Peter Lang, 170.

¹⁰⁸ The same increase in number of states was responsible for the addition of four more non-permanent seats on the UN Security Council in 1965.

¹⁰⁹ United Nations. 2022. Growth in Membership at <https://www.un.org/en/about-us/growth-in-un-membership>.

that each member-state was entitled to a minimum number of nationals in the secretariat), population, and balance among the seven main geographic regions (broadly following the continents and a division between East and West Europe). Small states were especially supportive of the membership factor, as many of them did not have any nationals in the secretariat.¹¹⁰

While the Secretary-General, as expected, wanted to maintain all these principles as simple “guidance” for him (so he could maintain flexibility in personnel decisions), in time states’ expectations that the four criteria be taken into account increased. By 1969, small states were sufficiently influential in the GA to institute a requirement for quotas of staff from various regions (rather than from individual states) in the UN’s staff.¹¹¹ In the latter part of the Cold War, the organization embraced an ever more rigid quota system allowing for greater presence (and influence) of staff coming from G₃ states.¹¹² Throughout the 1970s the UN used a formula to establish the “desirable range” of staff from various countries that placed 66% of weight on budgetary contributions, 25% on membership, and 9% on population. The formula was altered in 1980 with weights of 57% for budgetary contributions, 36% membership, and 7% population. As a result of these formal changes, the ratio of UN staff from North America and West Europe declined from 80% in 1946, to 47% in 1963, 44% in 1990, and 24% by 2020.¹¹³ Currently, all nationals from P5 states represent only about 11.5% of the UN staff.¹¹⁴ The same broad distribution of staff across nationalities can be found among the vast majority of other IGOs.

The two important trends discussed so far in the UN secretariat, 1) the increased autonomy of lower-level staff from G₁ and G₂ states and from the top echelons of the IGO’s bureaucracy, and 2) the increased influence of G₃ states over the UN’s secretariat, were accompanied by a third important trend, the growing professionalization and increased power of the organization’s secretariat. Multiple bodies of IR literature have discussed how bureaucracies from the UN and other IGOs have become increasingly influential in international decisions and how such decisions often run counter to states’ interests, even those of great powers.¹¹⁵

¹¹⁰ United Nations. 1961. General Assembly Official Records, Sixteenth Session, 5th Committee, 864th meeting (25 October 1961).

¹¹¹ Weiss, Thomas G. 1982. “International Bureaucracy: The Myth and Reality of the International Civil Service”. *International Affairs* 58: 287–306, 293.

¹¹² Weiss, Thomas G. 1982. “International bureaucracy: the myth and reality of the international civil service”. *International Affairs*. 58: 293.

¹¹³ Ameri, Houshang. 1996. *Politics of Staffing the United Nations Secretariat*. New York: Peter Lang, 164 and 184–5; also see <https://unsceb.org/human-resources-statistics>

¹¹⁴ <https://unsceb.org/human-resources-statistics>

¹¹⁵ See, e.g., Weiss 1975; Weiss, Thomas G. 1982. “International bureaucracy: the myth and reality of the international civil service”. *International Affairs*. 58: 293; Ness, Gayl D., and Steven R. Brechin. 1988. Bridging the Gap: International Organizations as Organizations.” *International Organization* 42(2): 245–73; Barnett, Michael N. and Martha Finnemore. 2004. *Rules for the World: International Organizations in Global Politics*. Ithaca, NY: Cornell University Press; Mathiason, John. 2007. *Invisible Governance: International Secretariats in Global Politics*. Bloomfield, CT: Kumarian Press; Oestreich,

The bulk of the literature discussing international bureaucracies as autonomous actors generally emphasizes how IGO staff often seek to extend mandates of organizations to new issue-areas or in time, beyond member-states' perceived usefulness of programs or even organizations.¹¹⁶ It has focused on dozens of IGOs, whether broad multi-issue organizations such as the United Nations¹¹⁷ and EU¹¹⁸ or narrower ones focusing on security,¹¹⁹ economic,¹²⁰ environmental,¹²¹ or

Joel E. 2012. *International Organizations as Self-directed Actors: A Framework for Analysis*. Abingdon, Oxon: Routledge; Hawkins, Darren G. 2008. *Delegation and Agency in International Organizations*. Cambridge: Cambridge University Press; Bauer, Michael W. and Jörn Ege. 2016. "Bureaucratic autonomy of international organizations' secretariats", *Journal of European Public Policy* 23(7):1019–37; Bauer, Michael W., Christopher Knill, and Steffen Eckhard (eds.). 2017. *International Bureaucracy: Challenges and Lessons for Public Administration Research* London/New York: Palgrave Macmillan. Johnson, Tana. 2017. *Organizational Progeny: Why Governments are Losing Control over the Proliferating Structures of Global Governance* Oxford: Oxford University Press.

¹¹⁶ See, e.g., Johnson 2017; Kanninen, Tapio and Touko Piiparinen. 2014. "Why Bureaucracies Matter in the Global Age: A Post-Weberian Explanation with the Case Study of Preparing and Implementing the United Nations' *An Agenda for Peace*," *International Relations* 28(1): 46–66; Hall, Nina. 2013. "Moving Beyond Its Mandate? UNHCR and Climate Change Displacement," *Journal of International Organization Studies* 4(1): 91–108.

¹¹⁷ Besides those discussed earlier, see also McLaren, R. I. 1996. "Fifty Years of Staffing the UN Secretariat: Three Stages in the Quest for Merit," *International Review of Administrative Sciences* 62(1): 63–73; Patz, R. and Goetz, K. H. 2019. *Managing Money and Discord in the UN: Budgeting and Bureaucracy*. Oxford: Oxford University Press.

¹¹⁸ Ongaro, E. 2012. "Editorial Introduction: Managerial Reforms and the Transformation of the Administration of the European Commission," *International Review of Administrative Sciences* 78(3): 379–382; Stevens, Anne and Handley Stevens. 2001. *Brussels Bureaucrats?: The Administration of the European Union*. Houndsmill, Basingstoke: Palgrave; Ellinas, Antonis A. and Ezra N. Suleiman. 2012. *Bureaucratic Autonomy and the European Commission: Europe's Custodians*. Cambridge: Cambridge University Press; Christiansen, Thomas. 1997. "Tensions of European Governance: Politicized Bureaucracy and Multiple Accountability in the European Commission," *Journal of European Public Policy* 4(1): 73–90.

¹¹⁹ E.g., Biermann, Rafael. 2008. "Towards a Theory of Inter-organizational Networking: The Euro-Atlantic Security Institutions Interacting," *Review of International Organizations* 3(1): 151–77; Dijkstra, Hylke. 2015. "Functionalism, Multiple Principals and the Reform of the NATO Secretariat after the Cold War," *Cooperation and Conflict* 50(1): 128–45; Da Veiga, Maria do Rosário, and Maria Major. 2019. "Governance as Integrity: The Case of the Internal Oversight at the United Nations through the Lens of Public and Private Bureaucracies Transaction Cost Economics," *Journal of Public Budgeting, Accounting & Financial Management* 32(1): 67–91.

¹²⁰ E.g., Nelson, Stephen and Catherine Weaver. 2016. "The Cultures of International Organizations," in Jacob Cogan, Ian Hurd and Ian Johnstone (eds.). *The Oxford Handbook of International Organizations*. Oxford: Oxford University Press, 920–39; Nelson, Stephen. 2017. *The Currency of Confidence: How Economic Beliefs Shape the IMF's Relationship with its Borrowers*. Ithaca: Cornell University Press; Nielson, Daniel L. and Michael J. Tierney. 2003. "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform," *International Organization* 57(Spring): 241–76; Weaver, Catherine. 2008. *Hypocrisy Trap: The World Bank and the Poverty of Reform*. Princeton, NJ: Princeton University Press; Chwioroth, Jeffrey M. 2013. "The Silent Revolution: How the Staff Exercise Informal Governance over IMF Lending," *The Review of International Organizations* 8(2): 265–90.

¹²¹ Haas, Peter M. 1989. "Do regimes matter?: epistemic communities and Mediterranean pollution control". *International Organization* 43(3): 377–403; Gehring, Thomas and Sebastian Oberthur. 2006. *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies*. Cambridge: MIT Press; Bauer, Steffen. 2006. "Does Bureaucracy Really Matter? The Authority of Intergovernmental Treaty Secretariats in Global Environmental Politics," *Global Environmental Politics* 6(1): 23–49.

other¹²² issues. It should not be surprising that the question of extended IGO mandates has been the focus of the literature on bureaucracies, considering that the broader scholarship on domestic bureaucratic politics has primarily emphasized analogous behavior.¹²³ However, such actions are not truly instances of IGO bureaucracies restraining powerful states. There are not many examples in the literature of how IGO staff contributed to making G₂ and, especially, G₁ states, refrain from taking the actions that they would have otherwise taken. There are even fewer such examples in the security realm, where restraints are expected to be more clearly the result of fear of concentrated power, the driving force of the institutional changes discussed in this book.

Perhaps the best examples of such institutional restraints on concentrated power come from the events preceding the 2003 US-led war in Iraq. After all, that was also the case that led to the rich literature on soft-balancing. Indeed, multiple works have shown that G₂ states such as China, France, Germany, and Russia took actions within the UN to make US aggressive actions towards Iraq more difficult to achieve.¹²⁴

A handful of works have also discussed how UN arms experts provided detailed and credible information that challenged US assertions that Saddam Hussein was still actively seeking to develop chemical and nuclear weapons, one of the key arguments used by the Bush Administration to launch the invasion of Iraq.¹²⁵ This alternative view eroded the legitimacy of US military actions and emboldened G₂ states to soft-balance G₁. This important role of the UN staff contributing to the delegitimization of US actions in 2002 has been contrasted with its role in supporting the US as a response to Iraq's invasion of Kuwait in 1991. The distinction between the IGO's roles in the two American military actions has been explained by Alexander Thompson as the result of the organization's "screening power," that is, of its ability to offer credible information (based on its perceived neutrality)

¹²² E.g., Yamey, Gavin. 2002. "Education and Debate: WHO's Management: Struggling to Transform a 'Fossilised Bureaucracy,'" *British Medical Journal* 325: 1170–3; Sean Cooney. 1999. "Testing Times for the ILO: Institutional Reform for the New International Political Economy," *Comparative Labor Law and Policy Journal* 20(3): 365–400.

¹²³ Downs, Anthony. 1967. *Inside Bureaucracy*. Boston: Little Brown and Co.

¹²⁴ Joffe, Josef. 2002. "Defying History and Theory: The United States as the Last Remaining Superpower." in John G. Ikenberry, ed., *America Unrivaled: The Future of the Balance of Power*, 155–80, Ithaca: Cornell University Press; Walt, Stephen M. 2002. "Keeping the World Off-Balance: Self-Restraint and US Foreign Policy," in G. John Ikenberry (ed.), *America Unrivaled: The Future of the Balance of Power*. Ithaca: Cornell University Press, 121–54; Pape, Robert A. 2005. 'Soft Balancing against the United States,' *International Security* 30(1): 7–45; Brooks, Stephen G., and William C. Wohlforth. 2005. "Hard Times for Soft Balancing," *International Security* 30(1): 72–108; Paul, T. V. (2005) "Soft Balancing in the Age of US Primacy," *International Security* 30(1): 46–71; Paul, T. V. 2018. *Restraining Great Powers: Soft Balancing from Empires to the Global Era*. Yale University Press.

¹²⁵ For very detailed discussions of the behind-the-scenes efforts of the Bush Administration to challenge UN weapons inspectors' reports (including Colin Powell's well-known speech in the UN Security Council on February 5, 2003) see Blix, Hans. 2004. *Disarming Iraq*. New York: Pantheon Books; for a broader view of the available information on inspections of weapons of mass destruction see Duelfer, Charles. 2009. *Hide and Seek: The Search for Truth in Iraq*. New York: Public Affairs.

to the international community. Such information sometimes may clash with the information received from individual states. When it does, states are more likely to lose credibility because their information is seen as potentially more biased than the information coming from IGO staff.¹²⁶

The same credibility allowed UN officials to erode the legitimacy of US actions *after* the 2003 invasion. This was especially true after events at Abu Ghraib prison in Iraq became the subject of a report authored by UN human rights experts.¹²⁷

It is worth noting that the informational role of IGO bureaucracies' restraining actions of the most powerful actors and groups is similar to the one that domestic bureaucracies have played for some time.¹²⁸ Indeed, other US military actions, such as the war in Vietnam or the covert support of Contras in Nicaragua, were impacted by reports that came from within domestic institutions and were made public.¹²⁹ In both cases, when G_4 revelations reached domestic actors, the government's actions were delegitimized and restrained.

The above sections suggest that G_4 's increased autonomy and expertise in the international realm sometimes allowed it to be seen as an important (potential) restraint on power. One of the main ways it has been able to restrain powerful states is by making information available to G_2 and G_3 states that, in turn, came together to "soft balance" (or restrain) G_1 .

Post-Cold War developments: restraints on international secretariats

It should not be surprising that some of the most obvious examples of IGO bureaucracies contributing to the restraints on great powers can be found in the last decade of the twentieth century. Not only had the staff across IGOs become more autonomous and influential, but IGOs themselves became more relevant. Tensions between the US and USSR that had paralyzed the UN and other IGOs were reduced considerably starting in the 1990s. The two superpowers, as well as the

¹²⁶ Thompson, Alexander. 2006. "Screening Power: International Organizations as Informative Agents," in Hawkins, Darren G., David A. Lake, Daniel L. Nielson and Michael J. Tierney (eds.). *Delegation and Agency in International Organizations*. Cambridge: Cambridge University Press, 229–54.

¹²⁷ <https://news.un.org/en/story/2004/06/105,692-un-human-rights-report-urges-steps-end-abuses-iraq>

¹²⁸ Thompson, in fact, compares this role to the one of legislative committees in the US. Thompson, Alexander. 2006. "Screening Power: International Organizations as Informative Agents," in Hawkins, Darren G., David A. Lake, Daniel L. Nielson and Michael J. Tierney (eds.). *Delegation and Agency in International Organizations*. Cambridge: Cambridge University Press, 233.

¹²⁹ See, e.g., Ellsberg, Daniel. 2002. *Secrets: A Memoir of Vietnam and the Pentagon Papers*. New York: Viking; also, Walsh, Lawrence E. 1997. *Firewall: The Iran-Contra Conspiracy and Cover-up*. New York: Norton.

other UNSC permanent members were less likely to veto decisions in this important UN body. In fact, in part due to such increased great power agreement, the UN approved more than twice the number of peacekeeping missions in the 1990s than it had in its first four decades of existence.¹³⁰ New IGOs such as the WTO were established with mechanisms that made them more influential than the organizations that had been created before or during the Cold War. Other existing IGOs, such as the World Bank, IMF, and the EU came to be seen as “mattering” more than before.

Among these organizations, the EU (with its powerful Commission) became the poster child of truly influential international civil servants and led to the coining of the phrase “democratic deficit.” While the term refers to lack of *multiple* democratic mechanisms within IGOs, most often it is used to refer to the fact that “faceless” international bureaucracies influence or even adopt decisions that now impact millions of people without much input from more representative bodies. The term has been used beyond the European institutions, to describe the growing influence of bureaucracies from the International Whaling Commission¹³¹ to the International Monetary Fund.¹³²

As in the case of domestic developments, with the increased perception that bureaucracies were becoming more powerful, other actors, both powerful and weak, sought to develop institutions to increase G_4 's accountability. Some IGOs had some such institutions in place before the end (or even the beginning) of the Cold War. However, the vast majority created them over the past few decades. Global organizations such as the UN and World Bank and regional ones such as the African Development Bank and Organization of American States have established offices of oversight dealing with internal audits, inspections, investigations, and evaluations. In addition, many IGOs adopted policies protecting whistleblowers,¹³³ requiring financial disclosures from officials, or defining conflict of interests.¹³⁴ All these offices and policies are intended to improve bureaucratic oversight. They primarily empower higher-level appointees in organizations over the permanent staff (arrow 7 in Figure 6.1) as well as G_1 and G_2 that traditionally have had greater control over the top-level staff (arrows 1 and 2 in Figure 6.1).

¹³⁰ See United Nations, <https://peacekeeping.un.org/en/past-peacekeeping-operations>

¹³¹ E.g., Kuyper, Jonathan W. 2013. “Designing Institutions for Global Democracy: Flexibility through Escape Clauses and Sunset Provisions,” *Ethics & Global Politics* 6(4): 195–215.

¹³² E.g., Nye, Joseph S., J. P. Einhorn, B. Kadar, H. Owada, L. Rubio, and S. Young. 2001. *The “Democracy Deficit” in the Global Economy Enhancing the Legitimacy and Accountability of Global Institutions*. Washington, Paris, Tokyo: The Trilateral Commission.

¹³³ While whistleblower policies can be seen as empowering lower-level bureaucrats who can reveal information about higher-level officials in organizations (arrow 8 in Figure 6.1), of course, they also allow staff to report any wrongdoings of their colleagues from the lower levels, thus limiting opportunities for collusion among G_4 actors.

¹³⁴ For discussions of the spread of such institutions in IGOs see, e.g., Woods, Ngaire. 1999. “Good Governance in International Organizations,” *Global Governance* 5(1):39–61; Grigorescu, Alexandru. 2010. “The Spread of Bureaucratic Oversight Mechanisms across Intergovernmental Organizations,” *International Studies Quarterly*, 54(3): 871–86.

The principal model for such “horizontal accountability” mechanisms developed in the United Nations and later spread to dozens of other IGOs. In 1993 the UN established the Office for Internal Oversight (OIOS). The new office added the function of internal investigations to existing ones of audits, inspections, and evaluations. The UN thus became the first IGO with a comprehensive system of internal oversight, similar to that of domestic government institutions. The main thrust in the creation of OIOS came from the United States. As the main contributor to the UN’s budget, the superpower had consistently promoted strong fiscal oversight. In fact, in 1985, the US Congress passed an amendment threatening the UN with withholding American contributions to the IGO if the organization did not adopt important financial reforms. When the role and costs of the UN increased with the end of the Cold War, the US became even more adamant about the establishment of strong oversight institutions in the IGO. George H. W. Bush, who in the early 1970s held the position of US permanent representative to the United Nations, was particularly interested in reforming the UN. In 1992, he used US influence in the organization to name former US attorney general Richard Thornburgh as UN Under-Secretary-General for Administration and Management. Thornburgh drew from his past domestic administrative experiences to create institutions based on the American model, including a UN “inspector general” position. Many G₃ states opposed such horizontal accountability mechanism. After all, by then their nationals represented the vast majority of UN staff. Therefore, they were not inclined to have the secretariat (over which they now had a good deal of control) weakened.¹³⁵

Of course, internal accountability mechanisms, such as those that the UN imported from the US, differ across states. Thus, the IGO could have used many other national governmental models. Moreover, the UN was also offered models from the business sector. For example, in 2006 PricewaterhouseCoopers offered the IGO some recommendations based on solutions adopted in the private sector. The US and other member-states rejected such proposals, arguing that they were not appropriate for international public organizations such as the UN.¹³⁶

In turn, as OIOS was the first comprehensive oversight institution to emerge in an IGO (moreover, in the most prominent one), it quickly became the main model that other organizations followed. In fact, sometimes both American and UN officials encouraged other IGOs to adopt this model. For instance, a 2000 report Thornburgh wrote for the World Bank was instrumental in the creation of the bank’s Department of Institutional Integrity. Several dozen IGOs as diverse as the Organization of American States, EU, UN High Commissioner for Refugees,

¹³⁵ Grigorescu, Alexandru. 2008. “Horizontal Accountability in Intergovernmental Organizations,” *Ethics & International Affairs* 22(3): 285–308.

¹³⁶ Martinetti, Irene. 2006. “Reforming Oversight and Governance of the UN Encounters Hurdles,” Center for UN Reform Education, New York; available at <https://centerforunreform.org/2006/12/04/reforming-oversight-and-governance-of-the-un-encounters-hurdles/>.

International Organization for Migration, International Atomic Energy Agency, European Bank for Reconstruction and Development, and World Meteorological Organization all established similar offices for oversight to deal with internal audits, inspections, investigations, and evaluations over the past two decades.¹³⁷

Yet another very important type of policy that has been established in many domestic and international institutions and that seeks to control the power of bureaucracies is that of public information. Such policies, similar to the freedom of information laws that emerged across states in record numbers in the 1990s, can be understood as broader tools for accountability than those discussed above. By making public the information that bureaucracies have at hand as well as the information about their actions, staff within both domestic and international institutions become more accountable not just to their direct superiors and the powerful actors who control them (G_1 and G_2), but to all actors (including G_3). One can argue that public information policies are particularly important restraints on G_4 because, after all, information is generally considered the most important source of bureaucracies' power.

The flurry in the adoption of IGO public information rules also came as a reaction to the perceived increased power of bureaucracies in such organizations. In many cases official policies emerged after scandals and ensuing pressures for reform from the general public, NGOs, and the press, in other words from G_3 actors that are *not* states. For example, the first significant public information policy in an IGO was adopted in the World Bank in 1994, following a protracted battle that began with local protests in India where the IGO was not releasing information regarding the environmental impact and resettlement plans for the Sardar Sarovar Dam it was helping finance.¹³⁸ The corruption scandal that led to the European Commission stepping down in 1999, the 1999 Seattle riots targeting the WTO's work, or the 2004 Oil-for-Food scandal in the United Nations, similarly all triggered public information reforms in such IGOs. However, observers note that the changes in IGO information policies would not have been possible without member-states (especially the US) joining the nongovernmental actors in demanding reform.¹³⁹ Small states, on the other hand, generally opposed the adoption of IGO public information policies and internal oversight offices as they felt that they would erode the influence of their nationals, who, by now, occupied

¹³⁷ Grigorescu, Alexandru. 2010. "The Spread of Bureaucratic Oversight Mechanisms across Intergovernmental Organizations," *International Studies Quarterly*, 54(3): 871–86.

¹³⁸ E.g., Udall, Lori. 1998. "The World Bank and Public Accountability: Has Anything Changed?" in Jonathan Fox and L. D. Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movement*. Cambridge: MIT Press, 391–427.

¹³⁹ Connelly, Joel. 1999. "Clinton Implores WTO to Open Itself Up," *Seattle Post-Intelligencer*. December 2, 1999; Greenwood, Justin. 2009. "Institutions and Civil Society Organizations in the EU's Multi-Level System," in Jutta Joaquim and Birgit Locher (eds.), *Transnational Activism in the UN and EU*. London: Routledge, 93–104; Gordon, Joy. 2006. "Accountability and Global Governance: The Case of Iraq," *Ethics & International Affairs* 20(1): 79–98.

the vast majority of positions in the secretariat.¹⁴⁰ By 2005, about a decade after the World Bank became the first IGO to adopt a meaningful public information policy, more than 40 IGOs had also implemented similar policies.¹⁴¹

This trend of increased transparency of IGO work and, more broadly, of bureaucratic oversight in IGOs has been paralleled by continuing efforts to maintain staff autonomy in such organizations. By now, the balance between IGO bureaucracies' ability to restrain egregious member-state actions through such organization and the ability of other actors and groups of actors to restrain IGO bureaucracies, appears to have moved closer to the one in domestic governmental institutions.

Conclusions: comparing the evolution of IGO secretariats to domestic government bureaucracies

This last section sums up the answers to the same questions addressed in the other two empirical chapters: What types of international institutional restraints developed? Who supported or opposed the institutional restraints? How (and why) did international institutional restraints emerge and evolve? In answering these questions, I assess the plausibility of A1–A6 as applied to the international secretariats as forms of restraints on concentrated power.

What types of international institutional restraints developed?

IGO bureaucracies have acted as relatively weak restraints on the actions of powerful groups, as expected based on A1. However, the same is generally true of domestic government bureaucracies. Indeed, compared to the restraints that courts and assemblies have often placed on the most powerful groups, bureaucracies do not appear to have been as influential in curtailing actions of government leaders or powerful states. In part, this is due to the fact that the checks on power through the “fourth branch of government”¹⁴² are not formal and its power and ability to restrain is generally far less visible than through the formal branches of government.

The relative lack of visibility of bureaucracies' actions, of course, leads to methodological problems. The advice they offer G_1 and G_2 both in domestic and international institutions and that may curb the violent use of power is generally

¹⁴⁰ Grigorescu, Alexandru. 2008. “Horizontal Accountability in Intergovernmental Organizations,” *Ethics & International Affairs* 22(3): 285–308.

¹⁴¹ Grigorescu, Alexandru. 2007. “Transparency of Intergovernmental Organizations: The Roles of Member-States, International Bureaucracies and Non-Governmental Organizations,” *International Studies Quarterly* 51(3): 625–48.

¹⁴² E.g., Smith, Kevin B. and Michael J. Licari. 2006. *Public Administration: Power and Politics in the Fourth Branch of Government*. New York: Oxford University Press.

given behind closed doors and rarely remain part of formal records that can be accessed later by researchers. In part, that is why the best examples of G_4 's restraining actions are those where officials from government institutions or IGOs broke from their direct principals (be they top government officials or powerful states) and made information public. Yet, the shaming of G_1 and G_2 is risky for G_4 actors and has been used sporadically. Individuals who made information about the US war in Vietnam public or who revealed Nixon's actions in the Watergate scandal did so at great risk to themselves. Similarly, UN weapons inspectors in Iraq or the UN human rights experts who wrote the report on US actions at the Abu Ghraib prison risked the superpower's ire and the potential loss of their jobs.¹⁴³

Despite such methodological problems (discussed more broadly in the concluding chapter 7), the above narrative offers evidence for two important developments. First, there were indeed instances when IGO officials took positions counter to the interests of great powers. For example, the activist role that Drummond took after Japan's invasion of Manchuria made it more difficult for this rising G_2 state to continue its military actions. Similarly, UN experts eroded the legitimacy of US actions in Iraq making it more difficult for the G_1 state to take some of the actions it had planned to take. In such cases, and other similar ones, as A1 posits, the restraints on power did not involve *stopping* G_1 and G_2 from taking certain actions, they simply made it *more difficult* to do so.

Second, although it is problematic to gauge the degree to which IGO bureaucracies actually restrained the actions of powerful states, this chapter has shown that G_4 's autonomy vis-à-vis top government and intergovernmental officials, overall increased across time, just as domestic government bureaucracies became more autonomous over the past two centuries. However, there also have been periods of reversal mirroring those experienced by domestic government institutions, especially at times when the relative power parity ended. With greater expertise and autonomy, both domestic and international bureaucracies have become important checks on powerful actors' arbitrary actions. The evidence of the institutional changes that have established such *deterrents* are as important for the present study as the one for *actual* instances of bureaucrats stepping in to restrain G_1 and G_2 .

If anything, the evolution of international restraints through bureaucracies has often followed *too* closely the patterns we observed in the domestic realm to allow for clear evidence of the "within-level" mechanisms from Figure 1.1. Indeed, many of the institutions established to offer bureaucracies autonomy and to later control them have been based on domestic models, hence on cross-level mechanisms. Thus, while the need for such institutions may have also been due to within-level mechanisms, it is much more difficult to differentiate between the two types of

¹⁴³ For example, UN weapons inspectors had to tread very carefully in their actions for fear of how their actions may lead to the destruction of their careers. For a comprehensive discussion of how the politically-charged atmosphere before the US-led invasion of Iraq constrained the inspectors' actions see Blix, Hans. 2004. *Disarming Iraq*. New York: Pantheon Books.

processes in Figure 1.1 when it comes to those involving bureaucracies, compared to those in the evolution of courts and assemblies.

Who supported or opposed the institutional restraints?

The above narrative includes multiple instances in the evolution of international secretariats that offer support for A2. While G_1 and G_2 states were generally behind the establishment of international institutions with increasingly large secretariats, they were less likely than G_3 states to support the autonomy of IGO bureaucracies and, consequently, their ability to function as restraints on power. However, when G_3 states came to have greater control over IGO secretariats (as in many international public unions), they too often opposed staff autonomy. This was also noticeable in the post-Cold War era when the US was seeking to establish greater oversight over an increasingly powerful international civil service that generally came from G_3 states.

Also, as expected, the increased ability of international secretariats to act as restraints on power was in great part due to the efforts of G_4 itself. As A4 suggests, bureaucracies within IGOs, like their domestic counterparts, acquired greater expertise and formed an increasingly cohesive (and powerful) group that eventually garnered power and came to challenge the actions even of the most powerful states.

This chapter has shown that virtually all IGOs discussed were formed due to the interests (or, at minimum, the acceptance) of great powers. Early on, member-states formally had almost complete control over the individual officials working in the first IGOs, the river commissions. In fact, by the mid-1800s, such officials were generally supposed to represent the states that named them to the position. However, as A4 predicts, the commissioners from CCNR and CED formed a collegial and coherent group that often challenged the member-states. Also, as A3 posits, the CCNR offered more or less autonomy to its commissioners at times of power parity or power disparity, respectively, among the dominant member-states.

In the late nineteenth century, as the secretariats of IGOs grew in size, member-states only named the top officials and allowed these to deal with most lower-level staffing decisions. This evolution, involving the emergence of the two separate groups in IGO secretariats, represented by two rectangles that are part of G_4 in Figure 6.1, followed a similar pattern to domestic systems where, early on, kings knew all their administrators personally but, as institutions grew in size, they needed to rely on their top officials to appoint lower-level ones.

It should also be noted that the majority of the international public unions that emerged in the late nineteenth century and early twentieth century were headquartered in G_3 states and, because of that, were staffed primarily with nationals from these smaller states. This was due to the fact that in the first IGO with broad

membership, the ITU, the relative power parity between the Germans and French, the two dominant states promoting the establishment of the IGO, led them to choose a “neutral” solution: Switzerland. This outcome supports A3. Once the first international public union was headquartered there, others later simply preferred being in cities where other IGOs already existed. These decisions were especially important at times when governments had almost complete control over their nationals working in IGOs. Indeed, the G_3 states that controlled the early IGO bureaucracies did not promote staff autonomy.

When the League was established, the two countries vying at that time for the G_1 position, the UK and US, both accepted a good degree of staff autonomy, as A3 would predict. Smaller states supported autonomy at that time as well because they had little influence over G_4 .

Because of the relative agreement among member-states to increase staff autonomy in the League, the most important differences regarding this question were primarily between proposals made by British officials coming from distinct parts of their government. Hankey had been part of the highest echelons of the British national civil service. Not surprising, his proposal established a form of control over the League through top government institutions. By contrast, Salter had been part of a lower-level government bureaucracy focusing on more technical issues. His plan promoted an important role for the lower level national G_4 . Finally, Drummond’s proposal for the League secretariat called for much greater autonomy of the IGO’s staff (the international G_4), thus giving him more control over the organization. While the present study considers all bureaucracies (both domestic and international) as potentially part of a broader group of international and transnational civil servants with relatively common interests (all considered to be part of G_4), the developments leading to the establishment of the League remind us that the various subgroups making up the international G_4 may often have differing interests.

Overall, the developments in 1919 in the League support A4, suggesting that an increasingly powerful domestic bureaucracy came to identify itself with the plight of the international one. In the ILO, the connections between the IGO’s G_4 and domestic G_4 s (especially labor unions) were particularly important, leading to the empowerment of ILO staff union and to greater autonomy of staff. However, these events also suggest a more complex process involving G_4 empowerment than those found in the previous chapters.

In the 1930s, when rising G_2 states such as Germany, Italy, and Japan accused League staff of being influenced by great powers (especially the UK and France), they took actions to garner as much control as possible over the IGO’s secretariat. At that time, the UK and France began promoting greater staff autonomy. This reaction is expected based on A3, as the years before World War II were ones of relative power parity (as Figure 2.2 indicates) and of increased uncertainty.

When the UN was established, the US, the clear G_1 state immediately after WWII, was the main opponent of administrative tribunals that protect IGO staff from upper-administration control, as we would expect based on A2. The US relented in its opposition to the UNAdT and, more broadly, to staff autonomy as the USSR was rising (as A3 suggests). This change in US position was especially significant, considering that it came around the time when the UN Secretary-General had fired some US nationals from the Secretariat. Through its relative silence, the State Department broke with the US Senate that had spearheaded the investigations against the Americans who had been fired. The support the Americans received at that time from the staff association and from the ICJ reflects the cohesion of G_4 in the UN, an aspect emphasized by A4.

UN staff became more autonomous of great powers and of top-level administrators throughout the Cold War due to developments that support both A2 and A4. In part, this resulted from the increase in number and power of G_3 states in the early 1960s. These smaller states sought greater presence of their nationals in the UN secretariat. They were successful when they used the GA to introduce quota systems for staffing the IGO. The growing specialization of UN staff and the consolidation of IGO institutions protecting such staff also contributed to increased autonomy throughout the Cold War.

With the end of the Cold War, the reduced tensions between great powers led IGOs to become more active. Consequently, their now fairly autonomous secretariats became more influential, often leading to accusations of democratic deficit. The US spearheaded the establishment of institutions that would control the power of G_4 .

Table 6.1 summarizes the above findings regarding the role played by the main groups in shaping international secretariats. It confirms that various moments in the evolution of IGOs support A2–A5. It also shows that there were instances when G_1 and G_2 preferences were altered (as A3 suggests) and that, at such times, G_3 and G_4 were given greater roles (as A5 suggests). The table includes examples of the four groups seeking to alter IGO staff autonomy and the ability of IGO secretariats to act as a restraint on powerful states.

How (and why) did international institutional restraints emerge and evolve?

Despite some reversals, IGO secretariats tended to become more powerful as their staff came to be increasingly autonomous of the top-level IGO officials. They also tended to become more autonomous of G_1 and G_2 as more G_3 nationals were represented in IGO secretariats. The evolution of such autonomy followed similar

Table 6.1 Preferences and roles of main groups in shaping IGO Secretariats.

Group	G ₁	G ₂	G ₃	G ₄
Types of actors making up group (with examples)	Most powerful state (UK and US in global institutions; Prussia in CCNR)	Second-tier states (3-4 next most powerful states)	Weak states; international civil society	Top-level and lower-level IGO officials
Expected support for institutional restraints in “normal” conditions (argument)	Almost always opposes restraints (A2)	Ambiguous in its support for restraints (A2)	Almost always supports restraints (A2)	Almost always supports restraints (A2)
Examples of support for or opposition to institutional restraints on power	G ₁ states supported the founding of IGOs with secretariats but sought to weaken them early on; UK and US acquiesced to an autonomous bureaucracy in the League; US opposed the establishment of the UNAdT and an autonomous staff in the UN; US led the efforts to restrain IGO staff in the post-Cold War era	Secondary powers supported the founding of IGOs with secretariats; France & Italy supported more autonomous staff in AMTC than US and UK; second-ranked powers supported the UNAdT and a more autonomous staff in the UN; G ₂ states opposed balanced hiring practiced across states in League and UN; they were less likely to support autonomous staff in IGOs compared to G ₃ states	G ₃ supported IGO staff autonomy when they had little control over secretariats; small states consistently vied for greater presence of their nationals in IGO secretariats and for greater autonomy of staff from powerful states but opposed increased IGO oversight in post-Cold War era; other G ₃ actors (e.g., NGOs and press) supported it Exceptions: G ₃ states did not support bureaucratic autonomy when they controlled secretariats in IGOs such as the ITU or UPU	IGO officials vied for greater autonomy; G ₄ was more complex in cases discussed here, with different preferences for upper-level and lower-level staff; G ₄ officials from domestic and international (e.g., ICJ) institutions often supported greater autonomy of lower-level IGOs staff

Continued

Table 6.1 *Continued*

Group	G ₁	G ₂	G ₃	G ₄
Expected change in preferences and roles under specific conditions (argument)	When G ₁ 's relative power is low and declining it may support restraints (A3)	When G ₁ 's relative power is low and declining it is more likely to support restraints (A3)	Changes in power parity between G ₁ and G ₂ may lead to a greater role, but not change in preferences (A5)	Changes in power parity between G ₁ and G ₂ may lead to a greater role (A5); in time its support increases due to vested interests (A4)
Examples of changes in preferences or roles of groups	Prussia supported greater autonomy of commissioners in CCNR when France became powerful; opposed it when it became clear dominant state in the IGO once more; UK and US promoted League staff autonomy at time of relative power parity; UK sought greater staff autonomy in League when rising Germany and Italy sought to control staff; US more likely to accept institutions to protect UN staff once USSR became more powerful; it then sought to increase staff oversight when it remained the sole superpower	Originally, G ₂ states joined G ₁ in securing the greatest number of positions for their nationals both in League and UN Secretariats; they did not promote staff autonomy at that time; when rising Germany and Italy sought to control their nationals in the secretariat in the inter-war era, the other G ₂ states pushed for greater autonomy of staff	At times of power parity G ₃ states gained greater control over IGO Secretariats (as in the ITU or in UN after 1960); at such times they were less likely to promote staff autonomy from higher Secretariat echelons, but they continued to promote increased staff autonomy from great powers.	In virtually all IGOs, lower-level staff slowly became more autonomous and powerful from member-states and from top-level officials; some changes in autonomy were due to states' decisions; in other instances, IGO staff was helped by G ₄ actors from IGOs (e.g., judges on the ICJ) or from domestic systems (as in the case in the ILO)

patterns and phases as in domestic institutions: emergence, change, and consolidation, mentioned earlier, as A6 posits. Table 6.2 builds on Table 3.2, offering examples of developments from these phases.

In the emergence phase, from the end of the Napoleonic wars to the end of World War I, the first IGOs were staffed with individuals who were appointed by national governments and who generally maintained their allegiance to their home states, not to the organizations themselves. While states, especially powerful ones, felt that such organizations would better resolve their collective problems than the separate national institutions that were in place, they were not prepared initially to give the burgeoning secretariats much freedom of action.

IGO staff almost immediately sought to shake off the tight control imposed on it. CCNR and CED commissioners formed a united front within each of these respective IGOs and sometimes took actions without even consulting with their home governments. Member-states tolerated such behavior for a while but, especially when one of them became much more powerful than the others, they imposed tighter control over the IGO bureaucracy. These early developments reflect state cost-benefit calculations consistent with rational choice institutionalist expectations. The events discussed in this chapter do not offer examples of sociological institutional processes in the emergence phase, not even any cross-level ones as in the previous two chapters.

As IGOs grew in membership and staff throughout the second half of the nineteenth century, governments had a more difficult time controlling entire IGO secretariats. In the League of Nations, they resolved this problem by adopting a compromise: on the one hand, they selected the top officials and made sure they came from (and, to some degree even represented) the most powerful states; on the other hand, they ceded much of their control over the lower echelons of the IGO bureaucracies to the top-level officials.

In this phase of “change,” the shift to a more indirect form of control was also possible due to the emergence of an international G_4 , but one that originated from multiple already powerful, experienced, and fairly unified domestic G_4 s from powerful member-states (especially the powerful British civil service). This process was consistent with A4 but would probably not have unfolded without powerful states allowing it. Indeed, at a time of relative power parity, the UK (the former G_1) and the US (the new G_1) acquiesced to this solution as neither one wanted an IGO secretariat that could potentially be dominated by the other (or by rising challengers) in the future.

This compromise between staff autonomy and government control represented a change from the very intergovernmental positions that the UK and US had taken just a few years earlier, when establishing the AMTC. At that time, they both opposed offering any form of staff autonomy, as their G_2 partners, France, and Italy, had proposed. In sum, at the establishment of the League of Nations, the two most powerful states took a first important step towards establishing

Table 6.2 Evolution of institutional restraints through international assemblies/parliaments.

Phase	1) Emergence of international secretariats with some restraints built in	2) Changes to autonomy of international secretariats and of their ability to act as restraints	3) Consolidation of institutional restraints through international secretariats
Main groups involved in phase (argument underlying expectations)	G ₁ and most of G ₂	G ₁ and most of G ₂ (A3)	G ₃ and especially G ₄ (A5 and A4)
Expectations for the international realm	International institutions emerge primarily due to great powers' interests in controlling collective response to problems	International institutions are altered during times of potential power transitions; when dominant state becomes more powerful restraints are eroded.	Small states, NGOs, and IGO officials maintain important roles after being empowered in phase 2; IGO officials become more autonomous and powerful and seek to strengthen institutional restraints further
Examples of international developments in phase	Great powers sought to establish IGOs to solve collective action problems starting with river commissions; they allowed IGOs to acquire staff but initially opposed autonomy; they began losing control of staff when IGOs grew, starting with the ITU and, especially, the League.	The differentiation between top and lower-level IGO officials led powerful states to only have indirect control over international secretariat officials; in times of power parity, some dominant states accepted more staff autonomy (in CCNR, League and UN); they later sought to erode it as G ₃ gained more control over G ₄ .	Established practices did not allow IGOs to erode staff autonomy too much (as when UN was established); domestic and international officials who had an affinity with IGO G ₄ actors bolstered staff autonomy.

potential institutional restraints through a more autonomous staff. This development, in turn, allowed the League secretariat (as well as the ILO) to begin taking an important fairly autonomous role. This second phase, of change, was thus characterized by actions that are expected based on the logic underlying rational choice institutionalism. Additionally, Drummond's promotion of staff autonomy at the establishment of the League was partly based on a norm of civil service autonomy that had developed in the domestic realm and that he (and others) now promoted to the international one, an action consistent with those emphasized by sociological institutionalism (but ones that emphasize, yet again, cross-level processes rather than within-level ones).

The consolidation phase in the evolution of international secretariats came after World War II. Immediately after the war, the US was the clear G_1 . Not surprising, it sought to limit the power of the UN's bureaucracy in order to have greater control over the new IGO. However, the former League staff, that had developed into a coherent and powerful G_4 throughout the inter-war era, was able to promote similar autonomy in the new IGO, as A4 suggests. It pushed for an organization with similar rules and institutions as the League. This inertia, emphasized by historical institutionalism, was most evident in the ILO reviving the League's administrative tribunal and, by doing so, pressuring the US and other great powers to establish the UNAdT.

The US relented in its efforts to erode UN staff autonomy in the 1950s, when the USSR emerged as a challenger, during a time of relative power parity when, according to A3, we should expect great powers to accept more meaningful institutional restraints. Also, the powerful domestic norms of bureaucratic autonomy impacted US actions in the UN during the McCarthy era. The strong analogy between developments involving domestic and international bureaucracies allowed for such actions that are consistent with the sociological institutional approach (as applied to cross-level processes).

In the 1960s, the US and other great powers also acquiesced to a greater role for G_3 states in the secretariat. The quota systems that were introduced at that time were due to the increased number and power of such small states in the UN, especially in the GA. Not only was the GA the UN organ where G_3 states had greater influence, it was also the one entrusted with staffing issues (because they were seen as related to the UNGA's budgetary role). The empowerment of G_3 in its control over the secretariat was a somewhat unexpected development that can, however, be accounted for through path-dependence explanations characteristic of historical institutional approaches and similar to the ones discussed in the previous chapter that focused on the rise of the GA in its relationship with the UNSC. It can also be accounted for by the strong norm of fair representation in the UN secretariat at a time when the number of states with little or no nationals in the UN civil service had increased substantially. This development is consistent with the sociological institutionalist approach as applied to cross-level processes.

Immediately after the fall of the Soviet Union, the US (the G_1 state) began taking steps to rein in the now very powerful G_4 in the UN and other IGOs. It did so by promoting across IGOs public information policies and internal oversight institutions based on its experiences with similar domestic institutions that had been adopted several decades earlier to restrain an increasingly powerful federal bureaucracy. In its efforts to introduce such oversight, once more it made use of the powerful norms that had developed across states during the Third Wave of Democracy, an outcome that can best be explained by sociological institutionalism (applied to cross-level processes). US efforts were challenged by many G_3 states that now felt that their increased control over the secretariat would be eroded if G_4 was weakened through internal oversight mechanisms.

In sum, the above narrative offers numerous instances supporting A6. The slow evolution of IGO secretariats generally (but not always) moving towards more autonomy and a more meaningful role, including one of sometimes restraining great powers, followed similar patterns to those of domestic bureaucracies, starting with the earliest ones in the Middle Ages. The three forms of institutionalism can all contribute in different ways to explaining developments in the three phases of the evolution of institutional restraints on power.

Summing up

The three previous chapters offered evidence for the main arguments of the present study: A1-A6. They suggest that the development of international institutions (international law and courts, international assemblies, and international secretariats) have led to similar *types* of restraints as early domestic institutional restraints (A1), involved similar *preferences* and *roles* of the four main groups involved in international interactions (A2, A3, A4, and A5), and evolved in similar *ways* (A6). Overall, these chapters confirm the main argument of this book, that there were important similarities in the dynamics shaping domestic and international institutional restraints on concentrated power.

In the first section of this concluding chapter, I summarize these findings emphasizing similarities between the international and domestic realms. In a second section, I discuss the usefulness of the three institutional approaches, rational choice, sociological, and historical, in accounting for the evolution of international institutional restraints. I do so by building upon the findings involving each of these institutional restraints over the past two centuries. I show that the three approaches complement each other, much as the literature suggests they should. Specifically, each appears to be better suited in accounting for developments in one or two of the three evolutionary phases of institutional restraints (emergence, change, and consolidation) than in others.

Next I identify a series of *differences* between the evolution of institutional restraints in the domestic and international realms, in contrast to the similarities discussed in the rest of the book. I explain these differences and their potential relevance, focusing especially on those that have led to the long-time gap between the development of domestic and international institutional restraints on power.

In the last section of this chapter, I address the all-important “so what” question. I consider both practical and theoretical implications of my findings. I add to the long-term practical aspects that are more apparent throughout the book several short-term implications. In theoretical terms I consider both how my arguments and findings can contribute to a broader “Lockean” liberal account of IR, one that subsumes previous liberal IR approaches, and how understanding developments in IR and domestic politics can be mutually beneficial, helping political science cross the domestic–international divide more effectively.

Support for arguments A1–A6 in the empirical chapters

The nature of international institutional restraints (assessing A1)

The previous chapters have shown that international law, courts, assemblies, and secretariats have offered increasingly important institutional restraints on concentrated power, similar to the institutional restraints developed in medieval times in some European states. As the first argument (A1) states, international institutional restraints that have emerged cannot outright stop the most powerful international groups from doing as they please when the stakes are high for them, just as dominant rulers in the Middle Ages could not be stopped from taking the most important actions they wished to take. However, chapters 4–6 offered multiple examples, across many different time periods, of how international institutions limit the ability of powerful states to take the actions that they please or, at least, to delay such actions.

Indeed, the United States and other P5 states have lost more PCIJ and ICJ cases than they have won. Some of the newest international judicial institutions, such as the ICC and WTO Appellate Body, adopted decisions running counter to great power interests almost immediately after they were established.

The League Assembly took a stand against Japan when the Council did not act during the Manchurian crisis. It was also the IGO body that adopted economic sanctions against Italy after that country's invasion of Abyssinia. During the Cold War, the UNGA adopted resolutions that ran counter to the interests of both the United States (as in 1971 when it formally recognized the People's Republic of China as the country's only legitimate representative) and the Soviet Union (as in the case of the 1950 Uniting for Peace resolution).

Similarly, in 1952 the UN Administrative Tribunal reinstated the Americans from the UN Secretariat who had invoked the Fifth Amendment during their testimonies to the US Senate's Internal Security Sub-committee, thus thwarting US efforts to gain greater influence over the UN Secretariat. In 1986, IAEA staff pressured the Soviet Union to reveal the true impact of the Chernobyl disaster.

The previous three chapters offered other examples of how, although still weak, the institutional restraints on power in the international realm have become increasingly relevant. They are generally comparable to the early ones in the domestic realm that existed well before institutional "checks and balances" *between* branches of government were developed in the eighteenth and nineteenth centuries in Western democracies to prevent the most dominant groups from arbitrarily using the coercive power of the state.

Indeed, as stated in the second part of A1, existing international restraints do not rely on checks between various institutions. There are a few exceptions, especially those that have emerged within the EU (where the Council, Commission, and Parliament function according to rules that allow them to check each other's

actions). There were also some early attempts (virtually all unsuccessful) to have the UN organs function as mutual restraints on each other.¹ While, in time, the UNSC, UNGA, and ICJ have come to sometimes clash, neither one of them (and especially the UNSC) is truly restrained in its actions by the other two, certainly not to the same extent as domestic branches of democratic governments restrain each other. Overall, the types of international institutional restraints that exist right now function within individual organizations, as international judges, members of international assemblies or parliaments, or members of the secretariats, are increasingly able to challenge the actions of the most powerful states through IGOs.

The similarities between the domestic and international realms can be better understood if we note that restraints on power even in democracies that have been long considered “consolidated” may not be completely effective, as the January 6, 2021 events in the US reminded us. Of course, current authoritarian and semi-authoritarian domestic political systems around the world have weak institutional restraints on power in place, comparable to those in the international realm. This broader understanding of institutional restraints, as specified in A1 (rather than a narrow understanding based on contemporary experiences from the most advanced democracies), allows us to compare developments in domestic and international politics.

The positions and roles of the four groups (assessing A2, A3, A4, and A5)

The previous chapters also offer evidence for the expectations regarding the different positions the four groups have had with regard to institutional restraints. As a reminder, A2, the baseline argument focusing on preferences under “normal” conditions, posits that the more powerful groups (G_1 and even G_2) are more likely to oppose institutional restraints than less powerful ones (G_3 and G_4).

I found strong evidence for this argument. G_1 only very rarely supported institutional restraints. Although more ambiguous in its preferences than G_1 , G_2 also generally opposed restraints. Nevertheless, there are important exceptions to A2. Indeed, if G_1 and G_2 would *always* oppose institutional restraints, these would probably never exist. Therefore, several additional arguments seek to explain such exceptions and, by doing so, delineate the scope conditions of the baseline argument A2.

¹ Paulus, Andreas L. 2009. “The International Legal System as a Constitution.” Chapter. In Jeffrey L. Dunoff and Joel P. Trachtman (ed.). *Ruling the World?: Constitutionalism, International Law, and Global Governance*. Cambridge: Cambridge University Press, 77.

First, G_1 and many G_2 states were generally the motors behind the establishment of IGOs. Small states usually accepted their leadership. That did not mean that the powerful states originally wanted the international institutions to act as restraints *against them*, just as kings (and even powerful nobles) in the Middle Ages saw judicial institutions, assemblies, and civil servants as nothing more than tools for projecting their power, not restraining it. And yet, the earliest international institutions of the nineteenth century (such as the CCNR, PCA, ITU, and UPU) promoted international laws and rules, eventually developed some inclusive forums, or created the first international bureaucracies, that planted the seeds for institutional restraints on power in those specific IGOs and, later, in many others.

Second, G_1 states and many of the G_2 states came to support institutional restraints on power at times when a challenger (usually from among G_2 states) was rising and vying for the G_1 position. At such times, even G_1 acted from fear of power being concentrated, albeit in another's hands, not its own. Such exceptions to A2 are captured by A3.

As I noted throughout the previous chapters, small states (G_3) sought a greater role for themselves as early as the Concert of Europe and, in doing so, promoted institutional restraints that would level the playing field, at least to some degree. G_3 states, as well as many G_3 non-state actors, have continued to support such institutions since then, as A2 posits.

There were, nevertheless, some exceptions. Early on, when some small states (such as Switzerland) had control over the bureaucracies of IGOs headquartered on their territory, they understandably did not want to allow such incipient secretariats to become autonomous entities that could check member-states' actions. They preferred that their governments continue exercising powerful control over the international civil servants. Such examples were discussed primarily in chapter 6, on international secretariats. There were also some other exceptions, presented in chapter 5, in instances of small states not supporting a more powerful European Parliament. In that case, the exception was a reflection of the interests that governments of those states had in securing control over their countries' representation in the IGO and not sharing it with relatively autonomous nationals seated in the EP.

Similarly, G_4 , made up of officials from international institutions (judges in international courts, civil servants in the international secretariats, and even some members of international parliaments), has steadfastly supported stronger institutional restraints on power, as A2 posits. Like G_3 , the other weak group, it has done so to avoid too much power concentration for fear that this could lead to a situation in which one or a small handful of states would dictate its day-to-day work and fate. However, in addition to this "baseline" interest in supporting institutional restraints, in time, G_4 also developed vested interests in stronger international courts, assemblies, or secretariats for professional reasons, rather than fear.

Specifically, individuals that are part of G_4 have pursued greater autonomy in order to achieve their immediate goals more easily and, even though it may not have always been their main intention, their actions bolstered restraints. In time, these actors became part of a broader G_4 , one that did not only include officials from within one specific international institution (e.g., judges in the PCIJ, members of the European Parliament—EP, or staff from within the League of Nations), but, rather, those from multiple international *and* domestic institutions. Thus, PCIJ, ICJ, and ECJ judges have, on occasion, supported the empowerment of their respective IGO assemblies and secretariats and even the independence of judges in other IGOs and states. Members of the EP have been strong supporters of increasingly powerful parliamentary assemblies in other IGOs. Similarly, judges from national courts, have been among the strongest proponents of independent international courts and judges. As their vested interests in strengthening their own institutions developed, they became even more active in supporting institutional restraints, as A4 posits. This argument adds to the expected G_4 support for institutional restraints based only on A2.

Not surprising, however, G_4 has often opposed international institutional restraints on *its own* power. Indeed, as shown in chapter 6, when international secretariats became more specialized, autonomous, and, consequently, more powerful, states sought institutions to promote international civil servants' accountability. The greatest opposition to such restraints often came from international civil servants themselves and from small states that, by now, had many nationals in IGO secretariats. They felt that some of their ability to restrain actions of powerful states through secretariats was being eroded. In sum, this was an instance where G_4 and even G_3 opposed the empowerment of institutional restraints because, of course, these were restraints on them or on their nationals, respectively.

Last, but not least, one should note the often-ambiguous positions of top IGO officials with regard to the autonomy of civil servants. While some, such as Albert Thomas, the first director general of the ILO, pushed for a great deal of bureaucratic autonomy, others, such as Trygve Lie, the first UN Secretary-General sought to have civil servants in the Secretariat almost entirely subservient to government interests. Many others, such as Eric Drummond, the first Secretary-General of the League, have sought a balance between, on the one hand, G_4 autonomy and, on the other, G_1 and G_2 control. This ambiguity may not be an exception to A4 because top IGO officials can be understood as political appointees, similar to the top government agency officials in domestic systems. As Figure 6.1 suggests, such officials have a different status than both regular G_4 staff and G_1 , G_2 , and G_3 . Therefore, they often need to find the middle ground between the different interests of these groups. This ambiguous status can also explain why, at times, different officials from the same state could offer divergent organizational solutions for international institutions. For example, Drummond, Hankey, and

Salter, three high-ranking British civil servants, who arguably all sought to bolster UK international interests immediately after World War I, supported different structures for the League's Secretariat, ones that derived from their different experiences within the British civil service (G_4). However, in the end, top-level British government officials, as well as top-level officials from the other powerful states, selected the solution that best fit their interests. Similarly, in the early 1950s, US officials from the State Department (part of the domestic G_4) sought a middle ground between the UN Secretariat's push for autonomy (the international G_4) and US Senate pressures to hold American nationals in the UN accountable directly to the US government (to G_1).

Despite these potential exceptions (or, rather, these instances requiring a more fine-tuned understanding of the four groups' compositions and interests), overall, the vast majority of cases in the three empirical chapters clearly supported A2. The groups' preferences were summarized in Tables 4.1, 5.1, and 6.1. I compile the information from the three tables in Table 7.1. The shaded rows list in chronological order cases supporting the arguments as well as the exceptions, separating them by semicolons among the three types of institutional restraints on power.

The table shows that, despite the few exceptions, G_3 and G_4 maintained their preference for institutional restraints over the entire period covered in the book. As A3 posits, the same has not been true for G_1 and G_2 . G_2 states have been particularly fickle in their approach to restraints. They would often oppose them, colluding with G_1 , to assure their continued dominant roles in controlling IGOs. The structures of many IGOs such as the League, UN, or World Bank, where the most powerful states have carved out a special status for themselves (often in the form of permanent seats with special prerogatives), reflect such collusion. However, when G_2 states feared that G_1 was becoming too powerful to control outside of international institutions, they supported further restraints. In fact, that was also true of G_1 states in numerous instances, as some G_2 states (such as Germany, Italy, and Japan in the 1930s or the USSR in the 1950s) came to be seen as increasingly dangerous challengers for their positions. It was at such moments that, not only did powerful states support some institutional restraints, but they also sought help from G_3 and G_4 , empowering them for what they considered to be only a short period. They were especially likely to give G_3 and G_4 more important roles at times when these groups were already somewhat more powerful and, therefore, they benefited from partnerships with them.

Indeed, such moments of potential power transitions and of greater uncertainty about the future were responsible for the important changes in actors' preferences (as A3 posits) and roles (as A5 posits). Table 7.1 shows that there were numerous such instances where G_1 and G_2 altered their positions and G_3 and G_4 came to play more significant roles.

Table 7.1 Preferences and roles of main groups in shaping international institutional restraints.

Group	G ₁	G ₂	G ₃	G ₄
Types of international actors in group	Most powerful state	Second-tier states	Weak states, international civil society	International judges, parliamentarians, and civil servants
Expected support in “normal” conditions (argument)	Almost always opposes restraints (A2)	Ambiguous in its support for restraints (A2)	Almost always supports restraints (A2)	Almost always supports restraints (A2)
Evidence	ITU, UPU, PCIJ, ICJ, ICC, ITLOS; Concert of Europe, Assemblies of ITU, UPU, League and UN, PACE, EP; League and UN secretariats	PCA; PCIJ, ICJ, ICC; Concert of Europe, IPU, ITU, UPU, League Assembly, UNGA, EP; AMTC, League and UN secretariats	Small states and NGOs supported restraints in virtually all IGOs; Exceptions: Some small states opposed independent EP and autonomous staff in ITU and UPU; many small states opposed internal oversight in UN	International and domestic judges supported judicial independence in many IGOs and increased roles for League Assembly, UNGA, and EP; IGO staff sought greater autonomy in virtually all instances. Exceptions: International civil servants opposed restraints on their own power; top level G ₄ often sided with G ₁ and G ₂ rather than with lower-level G ₄
Expected change in interests and roles under specific conditions (argument)	When G ₁ ’s relative power is low and declining it may support restraints (A3)	When G ₁ ’s relative power is low and declining G ₂ is more likely to support restraints (A3)	Changes in power parity between G ₁ and G ₂ may lead to a greater role (A5), but no change in its preferences	Changes in power parity between G ₁ and G ₂ may lead to a greater role (A5); in time its support increases due to vested interests (A4)
Evidence	PCA, WTO Appellate Body; League Assembly, UNGA, EP; CCNR, League & UN secretariats	PCA, WTO Appellate Body; League Assembly, UNGA; League and UN secretariats	PCA, PCIJ, ICC; ITU, League Assembly UNGA; secretariats of virtually all IGOs	PCIJ, ICJ, ICC; EP; virtually all IGO secretariats

The three phases in the evolution of international institutional restraints (assessing A6)

Table 7.2 summarizes the findings represented in Tables 4.2, 5.2, and 6.2, regarding the evolution of international institutional restraints. It brings together the evidence in support of A6 from all three empirical chapters. Specifically, it shows that the evolution of international institutional restraints on power experienced three different phases, where the “normal” conditions inferred in A2 are not necessarily present, and where different groups played the principal roles. During the emergence, change, and consolidation phases, specific additional factors led to different preferences and roles for G_1 , G_2 , G_3 , and G_4 than during normal times and, therefore, to different evolutionary dynamics. In each cell of the shaded row (titled “evidence”), I separate the examples from international law and courts, international assemblies, and international secretariats, respectively, with semicolons, as in Table 7.1. Those cells suggest that we can find evidence of the argument across all three types of institutional restraints. It should be noted that developments leading to the emergence of PACE and EP in two regional organizations sometimes exhibited slightly different patterns and are noted in the table as possible exceptions to the general trends.

Also, it is worth mentioning that, while developments involving international courts appear to have unfolded primarily in a handful of IGOs (with others following their examples much later), those affecting secretariats have taken place in virtually all IGOs and spread much faster. Of course, this is in great part due to the fact that there are relatively few international courts compared to the larger population of IGOs that, by definition, all have some form of secretariat.

These last two observations lead to the broader questions of whether there are any differences in the evolution of the three different types of institutional restraints on power.

The most important difference was noted earlier in the study and needs to be reiterated here: as the evolution of domestic institutional restraints through autonomous government bureaucracies is relatively recent, the changes in international secretariats appear to have been inspired more directly from state-level analogies than those involving international courts or assemblies. In other words, many (but not all) of the changes leading to more autonomous IGO staff and then, later, to institutions holding such international civil servants more accountable, were the result of cross-level processes, rather than within-level ones. This “contagion effect” (across the domestic–international divide) is also likely to be the main factor leading to the rapid spread of changes and consolidation of institutional restraints through international secretariats, compared to the slower one through international courts mentioned above.

However, the evidence suggests that states most often sought to apply domestic analogies to IGO bureaucracies when it gave them an advantage and to refute

Table 7.2 Evolution of international institutional restraints

Phase	1) Emergence of institutions with some restraints built in	2) Changes to institutional restraints	3) Consolidation of institutional restraints
Main groups involved in phase (argument)	G ₁ and most of G ₂	G ₁ and most of G ₂ (A3)	G ₃ and especially G ₄ (A5 and A4)
Expectations for the international realm	International institutions emerge primarily due to great powers' interests in controlling collective response to problems	International institutions are altered during times of potential power transitions; when dominant state becomes more powerful restraints are eroded	Small states, NGOs, and IGO officials maintain important roles after being empowered in phase 2; IGO officials become more autonomous and powerful and seek to strengthen institutional restraints further
Examples	International law and IGOs of 19th century; ITU and UPU assemblies; staff rules in 19th century IGOs. <u>Possible exceptions:</u> PACE & ECSC	PCA, PCIJ, ICJ, WTO Appellate Body; League Assembly, UNGA, EP; staff rules in virtually all IGOs	PCIJ, ICJ, ICC, ECJ; League Assembly, UNGA, EP; continued staff autonomy in virtually all IGOs
Main institutional approaches explaining developments	Rational Choice	Rational Choice	Sociological and Historical

the analogies when they led to developments running counter to their interests. For example, even though the UK sought to apply its own model of bureaucracy to the League Secretariat, it did not embrace many of the domestic mechanisms that gave civil servants more autonomy, such as competitive recruitment examinations. Similarly, the US promoted greater transparency and accountability in IGOs when the Secretariat was composed mainly from individuals coming from G₃ states (especially in the UN) and less in those in which its own nationals occupied more secretarial positions (as the IMF).² Overall, even when there is evidence that cross-level processes contributed to the shaping of international institutional restraints on power, they were often accompanied by within-level dynamics that resulted from fear of concentrated power at the international level.

A second difference in the evolution of the three types of international institutional restraints on power is that, although the emergence of international law and courts and of assemblies was sometimes driven by the processes emphasized by sociological institutionalism, the emergence of international secretariats appears to have been the result solely of processes which can be accounted for by rational choice institutionalism. This is, of course, due at least in part to the fact that secretariats are necessary elements of all IGOs and their emergence is more difficult to associate with any norms, as is the case of international law and courts (promoted through “rule of law” norms) or international parliaments (supported through “fair representation” norms). The lack of normative arguments for the initial emergence of international secretariats suggests, yet again, that this form of institutional restraint on power does not always share the same characteristics as the other two. However, this last particular difference, regarding the sociological institutionalist account of the emergence of restraints, is not truly relevant for the purpose of the present study, as it does not focus on within-level processes involved in the evolution of institutions. Indeed, the norms-based mechanisms that led the first international laws and courts and the first international assemblies and parliaments were the product of cross-level developments.

In sum, the differences in the evolution of the three different types of restraints appear to be minimal and not directly related to the main arguments of the book. This finding appears to offer support for the original research design, involving an analysis of all three of these international institutional restraints, considering them sufficiently comparable to each other.

More broadly, this section also serves as a reminder that there are some potential exceptions to the arguments of this book. As mentioned above, such exceptions are likely to be explained by considering additional factors that can lead to different outcomes. For instance, I noted in chapter 4 that US support for a stronger judicial system dealing with international trade, compared to the one dealing with

² For a comparison of IGO transparency see Grigorescu, Alexandru. 2007. “Transparency of Intergovernmental Organizations: The Roles of Member-States, International Bureaucracies and Non-Governmental Organizations,” *International Studies Quarterly* 51(3): 625–48.

the law of the sea or crimes of war, reflects important differentiations with regard to perceptions of power (and interests) in various issue-areas. The more rapid development of an autonomous bureaucracy in the ILO compared to the one in the League is also the result of differentiation of the issue (and type of G_4) involved. At the same time, what makes the ILO stand out among other international institutions is its hybrid intergovernmental–nongovernmental status. The role of the IPU was also somewhat different, perhaps also due to its status as an international organization that reflected the broader interests of parliamentarians from around the world (G_4) but also one that sought to present itself as separate from government interests (as part of G_3). The study has also noted some important differences between the evolution of regional IGOs (especially the EU) and global ones. Such additional factors (as issue-area, nature of G_4 , regional/global focus, or degree to which the IGO is also nongovernmental in nature) deserve further attention. Future research may seek to explain when and how such factors also impact the dynamics leading to international institutional restraints on power.

Potential methodological difficulties in assessing the arguments

Before concluding this section summarizing the findings of the three empirical chapters, it is important to note some potential methodological difficulties that need to be taken into account. First, as mentioned in the introductory chapter and reiterated in this one, distinguishing between the two paths leading to similar domestic and international institutions is difficult. I expected to identify the cross-level processes (the white arrow in Figure 1.1) by seeking rhetoric from leaders acknowledging the adoption of domestic institutional models for international institutions. However, the simple *lack* of rhetoric involving the import of domestic models to the international realm is not sufficient evidence that the within-level process occurred and that the cross-level one did not. Leaders may adopt such domestic models without explicitly promoting them publicly. Indeed, chapters 4–6 identify multiple instances where the rules setting up or altering international courts, assemblies, and secretariats were not accompanied by rhetoric emphasizing the domestic–international analogy. Nevertheless, we are not *certain* that there was no cross-level process involved.

Additionally, I sought instances where the groups promoting international institutional restraints publicly expressed their fear of concentrated power. However, in many other instances, such groups did not express such fear openly, perhaps because they expected retaliation. This risk of retaliation was reflected, for example, in the objections of small states to the exclusionary nature of the Concert of Europe and the threats they triggered.

Related to the above observation, as mentioned earlier, within-level processes can often be accompanied by cross-level ones. One does not rule out the other. When fear of concentrated power leads to the development of institutional

restraints, international decision-makers can look to existing models, including domestic ones, for inspiration. This study has sought to overcome this problem of discerning between simultaneous pathways connecting domestic and international developments by considering institutional restraints that developed in domestic institutions a long time ago, not just in recent times. The distance in time between developments leading to domestic and international developments suggests that the cross-level process was less likely to have an important impact because the domestic institutions that are analogous to the international ones, such as the Curia Regis, Parlement, or Estates General, have been greatly forgotten by now.

A second methodological issue we need to consider when studying the varied interests and roles of the four groups, is that it is more difficult to determine their nature for G_4 than for other groups. Civil servants and judges, whether in domestic government institutions or in IGOs, are formally agents of all three other groups and need to be impartial. They are less likely to discuss openly their support for any one of those groups and reveal their real preferences and goals. Indeed, as mentioned, some of the best-known actions of G_4 in seeking to restrain actions of G_1 or G_2 (whether in the Watergate scandal or in challenging US information on Iraqi weapons of mass destruction) could have led to significant repercussions against the individuals involved in making the information public. This observation suggests that it is especially difficult to assess A4.

To be clear, this is not a methodological problem only for the present study. All social science research struggles with assessing the true intentions of actors. Moreover, research on all bureaucracies, domestic or international, is confronted with similar problems of identifying the interests of civil servants who, at least in theory, should not side with one political group or another. However, for the present study, this issue becomes more important because the previous chapters were intended, in part, to compare developments involving three different types of institutional restraints. By missing more of “the story” involving the development of international institutional restraints through secretariats (and, to some degree, even international courts), we may reach incomplete conclusions regarding the ease with which these three types of restraints evolve and matter. Therefore, one should consider this observation more of a caution for interpreting the findings because, after all, there are no easy solutions to resolving this potential methodological problem.

The three forms of institutionalism

Observers have noted that, since the 1980s, three different forms of institutionalism have developed in the study of domestic politics. What they all have in common is that they consider the impact of institutional structures on the choices

and actions of individuals. For the purposes of this study, all three forms of institutionalism are important because they offer accounts for how institutions are established and later change.³

The three also feature different causal mechanisms and emphasize different aspects of the evolution of institutions. These differences are in great part the result of the approaches having developed separately, originating in different analytical traditions, themselves offering an interesting yet unexplored example of the processes emphasized by historical institutionalism.

Rational choice institutionalism

Rational choice institutionalism focuses primarily on actors' strategic calculations. They see individuals and groups as utility-maximizing and having clear intentions. Interestingly, this approach tends to emphasize more than others how actors seek to manage uncertainty.⁴ This question is, of course, essential to one of the main arguments of this book, that international institutional restraints on power are likely to emerge in times of power transitions, when uncertainty about the future is highest.

The main problem that critics of rational choice institutionalists have noted is that the actors portrayed in this approach have fixed preferences when in reality preferences are shaped by the institutions in which interactions take place. However, one can expect that the earliest institutions were not as "thick" as the present ones and, therefore, that rational choice institutionalism is less likely to be inaccurate when explaining the *emergence* of the first institutions. The present study has indeed found that the emergence of international institutional restraints on power can be explained by strategic calculations that powerful states make, primarily G_1 , but also G_2 . The earliest IGOs, most of them technical in nature, were intended to allow powerful states to lead the efforts for resolving collective action problems such as those involving communications and transportation.

The literature has noted that rational choice institutionalism is particularly helpful in explaining changes to institutions.⁵ Indeed, the empirical chapters of the present study have identified multiple moments when great powers have sought to develop international institutional restraints at times of relative power parity

³ Among the first and best-known studies contrasting the three forms of "new institutionalism" see Hall and Taylor, 1996; also Koelble, Thomas A. 1995. "The New Institutionalism in Political Science and Sociology," *Comparative Politics* 27(2): 231–43.

⁴ E.g., Hall, Peter A. and Rosemary C. R. Taylor. 1996. "Political Science and the Three New Institutionalisms," *Political Studies* 44 (5): 945 and 951; Shepsle, Kenneth A. 1992. "Institutional Equilibrium and Equilibrium Institutions," in Herbert F. Weisberg (ed.), *Political Science: The Science of Politics*. New York: Agathon.

⁵ Hall, Peter A. and Rosemary C. R. Taylor. 1996. "Political Science and the Three New Institutionalisms," *Political Studies* 44 (5): 952.

between G_1 and one or more G_2 states (as A3 posits). Figure 2.2 suggests that such moments came at the end of the nineteenth century (when the PCA was established and when the ITU allowed for an inclusive assembly), in the inter-war era (when the League allowed for a greater role for the PCIJ, for the Assembly, and promoted more autonomy for Secretariat staff), and in the 1950s (when the US supported a greater role for the UNGA and some more autonomy for the UN Secretariat). The mid-1990s, when the WTO Appellate Body was established, also represented an interesting moment because, according to Figure 2.2, it was also a time of power parity (although G_1 was not declining relative to G_2 at that time). However, there were important differences between US support for the WTO (in the economic realm) and opposition to the ICC and ITLOS where security concerns were dominant. Chapters 4–6 also identified multiple cases when G_1 sought to erode the international institutional restraints once its relative power increased yet again (as immediately after World War I and World War II). In sum, the rational calculations of the various groups offer good explanations for both the emergence and the changes in many international institutional restraints.

However, as also expected based on the literature, the rational choice institutional approach seldom offered convincing explanations for the persistence of institutional restraints in the consolidation stage. It is based on the expectation that, when exogenous shocks (such as changes in global power structures) alter the existing preference equilibria among actors or groups, institutions will change or even disappear.⁶ The previous chapters have nevertheless shown that, despite G_1 's and sometimes G_2 's efforts to eliminate institutional restraints that were strengthened during times of power parity, they were rarely, if ever, completely successful. It is important therefore to note that, although rational choice institutionalism is useful in explaining some developments in the consolidation stage, it primarily accounts for the attempts to *reduce* power restraints. It has less to say about the actual *persistence* of institutional restraints, the main characteristic of the consolidation stage.

Sociological institutionalism

Sociological institutionalism emphasizes that individuals and groups act based on a logic of appropriateness, and not just on the logic of expected consequences.⁷ Such appropriateness, in turn, is based on past practices and actors' perceived

⁶ E.g., Rixen, Thomas, and Lora Anne Viola. 2016. "Historical institutionalism and international relations: Towards explaining change and stability in international institutions." In Rixen, Thomas, Lora Anne Viola, and Michael Zürn (eds.). *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics*. Oxford; New York: Oxford university Press, 7.

⁷ See, e.g., March, James G. and Johan P. Olsen. 1998. "The Institutional Dynamics of International Political Orders," *International Organization* 52(4): 943–69.

identities. Institutions that generate rules, norms, and practices, shape what is perceived to be appropriate by actors and, therefore, *in time*, they come to influence their behavior. In other words, we expect sociological institutionalism to have little to say about the emergence of (or even the change in)⁸ institutional restraints on power. Once the rules and norms are established, the logic of appropriateness will eventually act upon groups to maintain existing practices. The logic will therefore be relevant primarily in explaining the preservation of institutions, in the consolidation phase.

While the above arguments are supported in the domestic realm, in the international one there are some exceptions. Indeed, as discussed throughout the book, there have been multiple instances when the pressures leading to the establishment of and change in international institutional restraints on power were due, at least in part, to norms that already existed. Norms, such as those of equality of states before the law, fair representation in IGO assemblies, or bureaucratic autonomy, all derived from domestic projections to the international realm through cross-level processes. For example, in 1919, democratic norms (based on a Wilsonian worldview) contributed to the acceptance of the principle of judicial independence in the PCIJ. After World War II, norms of representation led to the creation of Parliamentary Assembly in the Council of Europe as a way to assert its Western identity. Post-Cold War norms of accountability contributed to the development of internal oversight mechanisms in many IGOs.

However, in all such instances, the explanations for the emergence and change in international institutional restraints reflect cross-level pathways rather than within-level ones. These do not have a real equivalent in the domestic realm and are specific only to the international one.⁹ Such cross-level dynamics based on the export of norms have been widely discussed in the literature and therefore do not need to be emphasized in the present book.

Within-level processes based on mechanisms that are consistent with those described by sociological institutionalism unfolded in the consolidation phase of international institutional restraints. Indeed, norms of judicial independence or bureaucratic autonomy based on past practices *within* IGOs (rather than imported from the domestic realm) made it difficult for powerful states to erode institutional restraints once they were introduced. Once the principles of equality before the law was enshrined in the PCA and of judicial independence was applied in the PCIJ, later courts could not completely eradicate them. Practices that gave small

⁸ For the argument that sociological institutionalism has difficulties explaining change in organizations see, e.g., Powell, Walter W. and Paul J. DiMaggio. 1991. *The New Institutionalism in Organizational Analysis*. Chicago, IL: University of Chicago Press.

⁹ It is important therefore to note that a significant difference between the evolution of institutional restraints in the domestic realm and in the international one is that in the former, sociological institutionalism can explain multiple types of developments in the emergence and change phases, while in the latter it can only account for *cross-level* processes in these two phases, not for *within-level* ones, the focus of the present book.

states a role in the assemblies of the ITU and UPU could not be easily altered in the new League Assembly. Similarly, even though powerful states sought a smaller role for the UN Secretariat and UNGA, existing norms and practices embraced in the League could not be completely erased after World War II.

Historical institutionalism

Historical institutionalism draws both from the logic of expected consequences that underlies rational choice institutionalism and the logic of appropriateness emphasized by sociological institutionalism. What unifies virtually all scholarship relying on historical institutionalism is its focus on path dependence, critical junctures, and sequencing in seeking to show how past decisions and their institutionalization impacts current decisions.¹⁰ Thus, like sociological institutionalism, but even more so, it emphasizes that “history matters” and that explanations for how actors and groups interact can at least partially be explained by the evolution of the institutions across time.

Of course, this suggests that historical institutionalism has little to say about the emergence of the very first institutions of a certain type. Judicial, parliamentary, and bureaucratic domestic institutions may each influence the later evolution of similar institutions. However, the first councils and assemblies (such as the Curia Regis), the first judges appointed by kings at their courts, or the first civil servants were much more the result of decisions based on calculations specific to that moment than of past developments. In sum, it is not surprising that chapters 4–6 did not offer examples of historical institutionalist explanations of incipient international institutional restraints. In fact, there were no clear examples of this approach offering explanations in the change stage of institutional evolution either.¹¹ Indeed, the changes I discussed generally took place as a result of exogenous shocks triggered by shifts in power structures altering group preferences or of cross-level processes that can be accounted for by sociological institutionalist explanations. Of course, the ability of such groups to make any changes they wished was limited by existing institutions. For example, when the US sought to empower the UNGA through the Uniting for Peace resolution, it had to work within the confines of the existing UN Charter. Similarly, the push for judicial independence in the PCIJ and many other later international courts was contingent on the lack of compulsory jurisdiction of such institutions. Thus, while the historical institutionalist approach can offer explanations for the *degree* to which

¹⁰ See, e.g., Hall, Peter A. and Rosemary C. R. Taylor. 1996. “Political Science and the Three New Institutionalisms,” *Political Studies* 44 (5): 938–40.

¹¹ It should be noted, however, that recent historical institutionalist literature has emphasized that the approach can explain both states and change. See, e.g., Mahoney, James. 2000. “Path Dependence in Historical Sociology,” *Theory and Society* 29(4): 507–48, 508–9.

change took place within international institutions, it has little to say regarding the reason behind and even timing of such changes.

The historical institutionalist approach is more useful in explaining the consolidation stage in the evolution of institutional restraints, after institutions have been created and functioned for some time. Its focus on the “stickiness” of institutions is particularly useful in accounting for the ability of such restraints to remain in place even when the exogenous conditions leading to change (i.e., power parity) have receded.

Historical institutionalist emphasis of path dependence has generally been associated with “self-reinforcing” dynamics. Perhaps most important, institutions, including the IGOs discussed in chapters 4–6, create vested interests. Such interests are especially pertinent for actors who depend on the organization for their immediate career goals (G_4), as A4 noted. Indeed, once international courts were established, the newly emergent group of international judges developed a vested interest in sustaining the new institution. Similarly, international civil servants in the League and ILO sought greater autonomy for themselves (through the establishment of IGO unions and administrative tribunals) in order to gain greater stability for their future. In addition, members of the EP came to forge common (transnational) interests in empowering their own institution. They were increasingly successful in transforming the EP into a meaningful body, especially as, starting in 1979, they gained greater autonomy from governments through direct elections. All such G_4 actors sought alliances with various other groups to maintain their relevance in IGOs. Their actions were due both to their interests in gaining greater influence in IGOs and to their baseline fear for the concentration of power in others’ hands through IGOs. The two causes overlap considerably and are often difficult to distinguish. However, historical institutionalism can account for the incremental processes through which such G_4 actors develop greater expertise and influence within their IGOs and develop *even stronger* interests in promoting institutional restraints than those that drive their actions in the early years of the organization.

Self-reinforcing mechanisms are not limited to *direct* vested interests, such as those of G_4 actors. *Indirect* vested interests may develop in time among actors and groups external to the organization (G_1 , G_2 , and G_3).¹² For example, once small states were included in IGOs, starting in the late nineteenth century, their ability to empower institutional restraints, especially through assemblies (but also through courts and bureaucracies) gradually increased. This was particularly true as their number increased (especially during the decolonization period), leading G_3 states

¹² For differentiation between direct and indirect vested interests see Zürn, Michael. 2016. “Historical Institutionalism and International Relations—Strange Bedfellows?,” in Rixen, Thomas, Lora Anne Viola, and Michael Zürn (eds.). *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics*. Oxford: Oxford University Press, 199–228, 206.

to acquire a majority of votes in the assemblies. G_1 and G_2 states found it difficult to sway sufficient other small states to support their positions. This process of institutional consolidation is similar to the ones through which representatives of the general public were initially given formal membership (with very little influence) in the earliest national assemblies, about one thousand years ago, and later gained real institutional power as the number of their representatives swelled, in the eighteenth and nineteenth centuries.

Yet another mechanism mentioned by historical institutionalism as preserving (and empowering) existing institutions, even when actors' and groups' interests in altering the organization are strong, derives from the fact that the costs of renegotiating and replacing institutions are usually high. For example, the many and diverse post-World War II efforts of the winning military coalition did not encourage government representatives to seek completely new rules and norms for the new UN. They preferred maintaining many of the same structures and rules from the League of Nations (including some involving institutional restraints on power), as flawed as that organization appeared to have been. Overall, historical institutionalism offers multiple possible accounts for the consolidation of international institutional restraints on power although it has little to contribute to our understanding of the emergence of the very first such restraints and even of the later developments in the change phase.

It should be noted that the literature has pointed out some reasons why historical institutionalism is less likely to offer the same degree of analytical leverage in the international realm as in the domestic realm. While some cross-level differences exist for all three types of institutionalism, historical institutionalism is more likely to be singled out for such differences. This is in great part due to the understanding that IGOs are usually smaller than domestic government structures (because the former are more likely to delegate tasks to domestic institutions). Therefore direct vested interests (those of G_4), are likely to have a smaller effect in the international realm and, consequently, the "stickiness" of international institutional restraints should not be as great as for those in domestic systems.¹³ The multiple examples I offered of historical institutionalist mechanisms in chapters 4–6 suggest, nevertheless, that if self-reinforcing mechanisms are indeed weaker than in the domestic realm, this is, at most, a question of degree rather than of complete dissimilarity.

In sum, the present study offers evidence that much of the evolution of international institutional restraints can be explained through existing institutionalist approaches that were originally applied to the study of domestic politics. Thus, as mentioned in the introductory chapter of this book, the emphasis of this study is to

¹³ For this argument see, e.g., Zürn, Michael. 2016. "Historical Institutionalism and International Relations—Strange Bedfellows?" in Rixen, Thomas, Lora Anne Viola, and Michael Zürn. *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics*. Oxford: Oxford University Press, 206.

show that similar dynamics unfold in both the domestic and international realms and, consequently, similar analytical approaches can be applied to understand such dynamics. In other words, there is no clear reason to develop yet another additional theoretical approach that is applicable solely to IR, in order to explain the evolution of international institutional restraints on power. Moreover, the above discussion also suggests that the three types of institutionalism indeed may combine and complement one another, as the literature has often emphasized.¹⁴ This is especially the case when considering various phases in the evolution of institutional restraints. By combining these three approaches, we can offer more complete accounts of political interactions.

Differences in evolution of institutional restraints in the domestic and international realms

The literature on differences between dynamics in the two realms

The above example of the literature questioning the degree to which we can apply (or reap the benefits from applying) historical institutionalism to international institutions is a reminder of the broader question regarding the differences between the domestic and international realms and, consequently, between the evolution of institutional restraints on power within states and those in interactions among states. The present book has emphasized the *similarity* between dynamics in the two realms. It has done so because of the relative paucity of meaningful comparisons across the domestic–international divide in the literature and the scholarship’s focus on differences. However, it is important at this point to also consider when and why the interactions between groups in domestic and international politics are more likely to differ.

Indeed, the literature has long noted multiple possible differences between domestic and international politics. Thomas Hobbes famously argued that the domestic state of nature is more insecure than the international one because even powerful individuals live under constant danger as they can easily be killed by the weak when taken by surprise. Moreover, the power imbalance between individuals in the state of nature is not as great as the one between states in the international realm.¹⁵ Of course, with the advent of nuclear weapons even smaller states such as North Korea, and certainly second-ranked powers such as China and Russia, can

¹⁴ E.g., Hall, Peter A. and Rosemary C. R. Taylor. 1996. “Political Science and the Three New Institutionalisms”. *Political Studies* 44 (5): 936–57.

¹⁵ Hobbes, Thomas. 2017. *Leviathan*. Harmondsworth, Middlesex: Penguin Books, chapter XXX, paragraph 12; Pangle, Thomas L. and Peter J. Ahrensdoerf. 1999. *Justice among Nations: On the Moral Basis of Power and Peace*. Lawrence, Kansas: The University Press of Kansas, 152.

inflict tremendous harm and even destroy (albeit also assuring their own destruction) the most powerful state, thus suggesting that the international system may be faced with similar levels of insecurity as those among individuals in the state of nature.¹⁶

Since Hobbes, a broad body of scholarship has pointed to other problems of adopting domestic–international analogies.¹⁷ For example, law in the international realm is more difficult to impose than in the domestic realm due to the lack of a global government. Members of IGO assemblies generally do not represent the public from their respective states, as members of parliament do in domestic democratic systems, but rather the governments. And yet, such differences are significant when one compares *current* domestic politics to international politics, not developments from a thousand years ago, as this study has done. After all, international law can be imposed on the weak when the most powerful states wish to do so (as the examples of the tribunals in Nuremberg and Tokyo, or the ones for the former Yugoslavia or Rwanda, suggest), just as domestic laws in the Middle Ages were only imposed on the weak if the monarch or powerful nobles sought to do so. Similarly, representatives of the early national assemblies were selected by the monarch and only very indirectly represented “the masses” or even the nobility, just like representatives of IGO assemblies are selected by their governments.

More recently, the literature has noted specific differences between the two realms that are relevant when comparing international institutions (the main focus of the present study) to domestic ones. For example, the principal-agent literature has shown that in international relations agents (most obviously, officials working in IGOs) have greater autonomy than those in the domestic realm. According to that literature, this derives from the fact that, in international institutions there are multiple principals (states) while in the domestic one there is only one government and one head of government. Also, the sheer distance and many intermediaries between IGOs and governments makes the chains of delegation longer. Therefore, it is more difficult to control international institutions than domestic ones. Third,

¹⁶ E.g., Deudney, Daniel H. 2007. *Bounding Power: Republican Security Theory from the Polis to the Global Village*, Princeton University Press.

¹⁷ For a comprehensive discussion of such analogies and their flaws see, e.g., Suganami, Hidemi. 2008. *The Domestic Analogy and World Order Proposals*. Cambridge: Cambridge University Press. Some of the most comprehensive discussions of differences between domestic and international politics were presented by English School scholars who have also drawn upon the Hobbesian notion of the state of nature but distinguished its application to domestic and international politics, reaching different conclusions than realism. Proponents of this theoretical approach to IR have pointed out that, in fact, Hobbes purposefully did not seek to extend the solution of a Leviathan to the anarchy of the international realm. Scholars such as Bull and Vincent argued that this was due to Hobbes’s understanding that, although international relations were indeed anarchic, they were not really close to the state of nature among individuals. Bull, Hedley. 1977. *The Anarchical Society*. London: Macmillan; Bull, Hedley. 1977. “Hobbes and the International Anarchy,” *Social Research* 41: 717–38; Vincent, John. 1981. “The Hobbesian Tradition in Twentieth-Century International Thought,” *Millennium* 10: 91–110.

there are fewer “third parties” (such as NGOs, think tanks, an attentive press, etc.) that can signal to principals instances of agency slack.¹⁸

Similar arguments about differences can also be found in the more specific literature comparing IGO bureaucracies to domestic ones. For example, this latter body of literature points to the fact that domestic bureaucracies are controlled not only by the executive branch (that is generally seen as the only one truly overseeing international civil servants, moreover, in an indirect way), but also by legislative branches. With very few exceptions, international bureaucracies are, at best, held accountable by officials from executive branches of government.

Also, IGOs tend to be more fragmented in their work than domestic government institutions which are often required to work together under the umbrella of one single government office (at minimum a president or prime minister). This literature also notes that international bureaucracies tend to have smaller staffs and budgets and be characterized by greater degrees of cultural heterogeneity than their domestic counterparts.¹⁹

In terms of the present study, most of these differences refer to the potential role that G_4 can play, rather than the role of the other groups. However, it should be noted that some of the differences mentioned in the scholarship may lead to *stronger* restraints on power (especially the factors that imply greater slack on the part of IGO officials) while others to *weaker* ones (such as the small size of bureaucracies and the heterogeneity of IGO officials). In fact, much of the same literature drawing attention to such contrasts acknowledges that, at most, they reflect differences in degree rather than in kind.²⁰ Indeed, the actions of a government agency in a democratic state are under the scrutiny of multiple officials from the executive branch, hundreds of legislators with oversight obligations, and even the press and public opinion, that is, of multiple principals, just as in the case of IGOs. Conversely, in authoritarian systems, besides a handful of government officials, other domestic actors and groups (i.e., the “third parties”) have little information about the work of the agency and no real role in shaping it, just as in the case of many IGOs. Also, the number of international NGOs that can act as important third party actors in transmitting to governments information about

¹⁸ For a useful summary of such differences see Lake, David A. and Mathew D. McCubbins. 2006. “The Logic of Delegation to International Organizations,” in Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney (eds.), *Delegation and Agency in International Organizations*, Cambridge: Cambridge University Press, 341–68, especially 360–67.

¹⁹ E.g., Bauer, Michael W. and Ege, Jörn. 2017. “A Matter of Will and Action: The Bureaucratic Autonomy of International Public Administrations,” in Bauer, M., C. Knill, and S. Eckhard (eds.), *International Bureaucracy: Public Sector Organizations*. London: Palgrave Macmillan, 13–41, especially 18–21; Zürn, Michael. 2016. “Historical Institutionalism and International Relations—Strange Bedfellows?” in Rixen, Thomas, Lora Anne Viola, and Michael Zürn. *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics*. Oxford: Oxford University Press, 199–228.

²⁰ Bauer, Michael and Ege, Jörn. 2016. “Bureaucratic autonomy of international organizations’ secretariats,” *Journal of European Public Policy* 23(7):1019–37.

the slack in IGOs has grown considerably over the past few decades.²¹ There is also a vast body of literature noting how domestic government institutions often do not coordinate with each other, just as international institutions often do not work together.²² A well-known example of this lack of coordination at the domestic level came to light after the 9/11 attacks in the United States, leading to the establishment of the Department of Homeland Security in 2002, to bring together the various domestic institutions that needed to work more closely together, such as the Customs Service, Immigration and Naturalization Service, and Transportation Security Administration.²³

Overall, virtually all of the scholarly arguments regarding differences between domestic and international institutions (including those that restrain concentrated power) can be presented as questions of degree. If we were to place the number and influence of principals, the ability of such principals to gain information from institutions, or the coordination between institutions on *continuums* rather than treat them as *dichotomies*, we could generate meaningful comparisons between the developments in the two realms, ones where dynamics in individual domestic and international institutions would each fall almost across the entire spectrum of the dimensions we consider, rather than having the former clustered on one end and the latter on the other. Of course, the comparability of developments in the two realms is even more meaningful if we consider domestic institutions and actions from long ago and recent international ones.

Causes for different timeframes in the evolution of institutional restraints on power

Despite my overall approach, emphasizing similarities between domestic and international institutions, the main arguments of this study rely on an essential difference between evolutions in the two realms: the very long time-gap between the similar dynamics that took place in the emergence, change, and consolidation of domestic vs. international institutional restraints on power. How can we explain the difference in historical timing of the evolution of domestic and international institutions? In other words, why do we sometimes need to go back a thousand years to find domestic dynamics comparable to those involved in the recent evolution of international institutional restraints on power?

²¹ E.g., Tallberg, Jonas, Thomas Sommerer, Theresa Squatrito, and Christer Jonsson. 2013. *The Opening Up of International Organizations: Transnational Access in Global Governance*. Cambridge: Cambridge University Press.

²² See, e.g., Peters, B. Guy. 2018. "The Challenge of Policy Coordination," *Policy Design and Practice* 1(1): 1–11.

²³ See, e.g., Maxwell, Bruce. 2004. *Homeland Security: A Documentary History*. Washington, DC: CQ Press.

First, the emergence of international institutions should be expected to begin much later than domestic institutions, for similar reasons that social organization evolved first from families to tribes, then to villages and cities, and, finally, to states. Cities were organized only about 12,000 years ago.²⁴ The first states, in turn, appeared around important rivers as the Euphrates and Tigris in Babylon, Ganges in India, or the Nile in Egypt, 5,000–6,000 years ago.²⁵ In both cases the shift to larger social units took place, at least in part, due to advances in transportation and communication. Not only did collective problems come to extend across larger areas of land but the ability of individuals and groups to come together and resolve these problems increased. To illustrate this argument, it is worth noting that in the specific cases from the Middle Ages, discussed in chapter 3, I noted how the literature had argued that national institutions generally emerged in England before they were established in France or other European states because the geography of the island was more conducive to faster communication and transportation.²⁶

While states interacted with each other through wars and trade almost from the very beginnings of their existence, international relations have been considered truly global only starting with the second wave of colonialism, that began in the nineteenth century, one in which many ordinary individuals (and not just state representatives) began traveling across borders with greater ease.²⁷ With the increase in international and transnational interactions came the need for resolving collective problems such as those involving river navigation, telegraph and postal services, or containing the spread of diseases and, consequently, led to the establishment of international institutions.²⁸ In fact, the difficulties of bringing together representatives of states from all around the world even in the early twentieth century (many of whom traveled for several weeks to arrive for international meetings), illustrates why it took so much longer for states to establish international institutions and, consequently, international institutional restraints, compared to the time it took to form domestic institutions.

The problems of interstate communications paralleled those of interstate travel. With the lack of such communication, it was also more difficult for states to identify the benefits of collaboration compared to those that derive from domestic

²⁴ E.g., Bairoch, Paul. 1988. *Cities and Economic Development: From the Dawn of History to the Present*. Chicago, IL: University of Chicago Press.

²⁵ Daniel, Glyn E. 2003. *The First Civilizations: The Archaeology of their Origins*. London: Phoenix.

²⁶ Turner, Ralph. 2009. *King John: England's Evil King?* Stroud, UK: History Press; for a more extended discussion of how physical distance between the actors making up groups impacted the ability of domestic institutions to form, see Stasavage, David. 2010. "When Distance Mattered: Geographic Scale and the Development of European Representative Assemblies," *The American Political Science Review*, 104(4): 625–43.

²⁷ Osterhammel, Jürgen, and Niels P. Petersson. 2009. *Globalization: a short history*. Princeton, NJ: Princeton University Press, 15 and 98.

²⁸ See, e.g., Manulak, Michael W. and Duncan Snidal. 2021. "The Supply of Informal International Governance: Hierarchy plus Networks in Global Governance," in Michael N. Barnett, Jon C. W. Pevehouse, and Kal Raustiala (eds.). *Global Governance in a World of Change* Cambridge: Cambridge University Press, 182–213.

collaboration. For example, it was only in the late nineteenth century that workers, employers, and governments began gathering comparable labor data and information about labor legislation in other states.²⁹ This information was crucial for the cooperation intended to level the playing field for production costs. Similarly, states came to share health information starting in the second half of the nineteenth century, after the increase in transborder travel led to a more rapid spread of diseases across states.³⁰ Only when such information became available were states able to assess the true nature of their collective problems and begin considering how they could come together to address them.

The change phase is also expected to take longer to unfold in the international realm compared to the domestic realm. The reason is that shifts in relative power among domestic groups have generally taken place faster, compared to those between states. First, the larger number of individuals who make up G_1 and G_2 in the domestic realm allows for many more reorganizations of the power distribution among them. For example, when some nobles from the king's inner circle decided to join the group of nobles challenging the monarch, the domestic system experienced a moment of relative power parity. In democracies, the political parties in power or vying for power alternate even faster between the G_1 and G_2 positions than the groups from medieval times, leading to many more opportunities for shifts in relative power and, consequently, for more opportunities to empower institutional restraints.³¹

Perhaps even more important, the comparative politics literature notes that one of the most important causes of G_1 's decline relative to other groups in domestic systems is its clashes with foreign foes. Interstate wars, in particular, have led to rulers reaching out to G_2 , G_3 , and G_4 for greater domestic support and, when doing so, have often strengthened institutional restraints on power. However, this particular type of cause of domestic power parity is important because it has no real equivalent at the international level (except, perhaps, for those leading to regional IGOs such as NATO or even the EU). This difference between domestic and international developments suggests that there are even fewer moment 4 opportunities in the international realm because the power fluctuations are not as common (and abrupt) as those in the domestic realm where external foes can cause rapid decline in the power of the domestic G_1 .

The above suggest that, overall, there are fewer instances in the international realm when G_1 is likely to accept changes empowering institutional restraints, as

²⁹ E.g., Grigorescu, Alexandru. 2020. *The Ebb and Flow of Global Governance: Intergovernmentalism versus Nongovernmentalism in World Politics*. Cambridge: Cambridge University Press, chapter 3.

³⁰ Charnovitz, Steve. 1997. "Two Centuries of Participation: NGOs and International Governance," *Michigan Journal of International Law* 18(2): 188.

³¹ E.g., Stasavage, David. 2016. Representation and Consent: Why They Arose in Europe and Not Elsewhere. *Annual Review of Political Science* 19(1): 145–62; Evrigenis Ioannis D. 2008. *Fear of Enemies and Collective Action*. Cambridge: Cambridge University Press.

A3 posits. Indeed, in the past more than two centuries, there was only one transition of power from a G_1 state to another (towards the end of the nineteenth century, from the UK to the US). Additionally, there were several more moments when G_2 challengers came to be perceived as sufficiently threatening by G_1 to lead to some empowerment of institutional restraints (Germany, Italy, and Japan in the interwar era, the USSR in the 1950s, and China over the past two or three decades). Thus, the moments when conditions allowed for changes to international institutional restraints on power were few.³² By contrast, in these two hundred years, there were dozens of power transitions and many more moments of perceived potential transitions in most states, from one individual leader to another, and from one political party to another. Multiple potential and actual power transitions also took place in states in the Middle Ages, a period I consider as exhibiting many similarities to dynamics in the international realm.

Last but not least, there is a reason to expect slower consolidation processes of institutional restraints in the international realm, compared to the domestic realm. An important reason for this argument is that G_3 , one of the two groups most active in the process of consolidation, is more heterogenous in the international realm compared to the domestic realm. That is because, the national differences among individuals making up this groups add to the usual differences among individuals who make up G_3 in the domestic realm.³³

The same is expected to be true for the actors who make up G_4 , the second main group involved in the consolidation stage. As mentioned throughout the

³² The above argument, of course, begs the question of expectations for the future evolution of international institutional restraints on power. In answering such a question, it is important to take into account the advent of nuclear weapons. On the one hand, the gradual proliferation of such destructive weapons may have already allowed G_1 and G_2 states to establish important *noninstitutional* restraints on each other. Therefore, one may argue that they are less inclined to develop further restraints through institutions. On the other hand, as the likelihood that states will actually use such weapons are expected to be extremely small (unless their most vital interests are at stake), institutional restraints still remain necessary. Additionally, if we consider that nuclear weapons are "the great equalizer" (and do not fit neatly into our overall measures of material capabilities), there may be more moments of perceived power parity in the future and, consequently, a greater likelihood that institutional restraints will be acceptable to great powers. Indeed, powerful states have sought with varied success multilateral restraints to deal with nuclear weapons through the Baruch Plan or Nonproliferation Treaty and bilateral ones through SALT and START treaties. For a somewhat similar discussion, see Deudney, Daniel H. 2015. "Hegemony and Nuclear Weapons," in G. John Ikenberry (ed.), *Hegemony and International Order*. Cambridge: Cambridge University Press, 195–232.

³³ Such differences do not only refer to those between the many small states that make up the international G_3 . They are also pertinent to the many transnational nongovernmental groups that make up "global civil society." Perhaps the best-known example of the divisions that were brought about by strong national tensions within groups that otherwise were very cohesive in international institutions is the Second International (an international nongovernmental organization) in 1914, when World War I began, thus missing an opportunity to restrain great powers from using force against each other. See, e.g., Milner, Susan. 1991. *The Dilemmas of Internationalism: French Syndicalism and the International Labour Movement 1900–1914*. Oxford: Berg Publishers. It is noteworthy however that recent literature has noted that nongovernmental groups now are more likely to organize better and become more homogenous due to the global information revolution brought about by the internet. In other words, just like the telegraph and trains made it easier for intergovernmental organizations to come into existence, the internet has allowed global civil society to flourish. See, e.g., Manulak, Michael W.,

book, international judges and civil servants are likely to be fairly heterogeneous in their beliefs and preferences. They are usually selected from individuals who have already been socialized in national judiciary systems and bureaucracies. Therefore, the organizational norms that they bring to IGOs may differ considerably. The problems in forging a united G_4 was reflected in developments in the first years of the League of Nations. Even when seeking to maintain a more homogeneous staff by including almost only nationals from European states in the League Secretariat, it quickly became apparent that the staff in the organization often continued to embrace their national norms and allegiances, rather than those of and to IGOs (especially in the case of Italian and German officials). Although, to some degree, even domestic G_4 actors may be heterogeneous, coming from different parts of the country, from different ethnic or racial groups, different socio-economic backgrounds, and embracing very different identities, international G_4 individuals also differ with regard to their very distinct national experiences, *in addition* to the many dissimilarities existing between civil servants within the same state.

In sum, both groups that are most active in the consolidation stage have generally been weaker in the international realm than in the domestic one. In contrast, G_1 , the group that is most likely to seek a return to weak institutional restraints, and thus oppose consolidation, is made up primarily of individuals from one single state and is therefore more homogenous than G_3 and G_4 (and even than G_2). Consequently, those who oppose the institutional restraints can roll them back further in the international realm, making consolidation of institutional restraints on power more difficult than for domestic political systems.³⁴

In addition to all the above explanations for a slower evolution of international institutional restraints on power, it is important to note two factors that may, at first sight, *speed up* international processes, compared to those in the domestic realm. First, as seen in several instances discussed in chapters 4–6, international G_4 actors may be, in fact, supported in their endeavors by some of the G_4 actors in the domestic realm with which there is a strong sense of solidarity. Most important, the independence of international judges was greatly impacted by pressures from domestic judges. Similarly, some of the most important institutional developments leading to international staff autonomy (such as the creation of staff unions in IGOs and of administrative tribunals) were spurred by officials in the ILO who had strong connections with domestic labor groups. Therefore, one can expect that the consolidation stage in the international realm may receive a boost from

and Duncan Snidal. 2021. "The Supply of Informal International Governance: Hierarchy plus Networks in Global Governance." In Michael N. Barnett, Jon C. W. Pevehouse, and Kal Raustiala (eds.), *Global Governance in a World of Change* Cambridge: Cambridge University Press, 182–213.

³⁴ This last argument suggests not only that the evolution of international institutional restraints on power is slower than of domestic restraints, but that it may not be able to attain similar levels as those that have emerged in contemporary democracies, at least not for a very long time.

additional domestic actors. However, external actors—whether from institutions in other states or from IGOs—can also support domestic consolidation processes. It is difficult to therefore to assess whether, overall, such support for consolidation is greater or smaller than in the international institutions.

A second factor that may spur the evolution of institutional restraints on power in the international realm, both in the change and consolidation stages, is the availability of existing models for such institutions in the domestic realm. This observation requires a clarification. Models of an autonomous judiciary, meaningful assemblies and parliaments, and institutions protecting civil servants' autonomy or seeking to hold them accountable have existed for a long time and have also been available for many states that have only recently embraced institutional restraints on power. In other words, while the first democracies initially struggled (and took longer) to find the right balance in shaping their institutional restraints on power, the most recent democratic polities have benefitted from existing models as much as, if not more than, IGOs.

This section thus suggests that, on balance, the factors that appear to differ in the two realms lead to expectations for a more recent and drawn-out evolution of institutional restraints on power in the international politics compared to those in domestic politics. However, in essence, *the nature* of the dynamics at the two levels remains very similar, as this book has emphasized from the start.

Implications of the findings

Practical implications

The process that has shaped our current institutional restraints on power in the domestic realm has been a slow one that began more than a thousand years ago. As the above section suggested, there are reasons why international institutional restraints are taking even longer to emerge, change, and consolidate than the domestic ones. In addition, as in the domestic realm, the empowerment of institutions has often been followed by reversals even if such setbacks rarely erased the advances completely. While there does not appear to be a clear reason to expect institutional restraints to *continuously* become stronger, so far, the broad trends both in domestic and international realms appear to have been towards more restraints, at least if we compare the current status to the one from hundreds of years ago.

The present study has suggested an explanation for the general trend towards greater empowerment of institutional restraints, whether in domestic or international systems. At times when G_1 and G_2 needed support from G_3 and G_4 , they sought to temporarily empower these weaker groups and, by doing so, often allowed for stronger institutional restraints. After the powerful groups did not need

G₃ and G₄ support any more, they found that it was difficult to dismantle the new institutions completely, especially because the weaker groups now had some control over judicial, consultative, and bureaucratic institutions. This argument offers yet another reminder that more complete explanations of international developments require that we take into account the interests and actions of weaker actors and groups and not just of the powerful ones, as IR has often done.

This observation as well as the previous chapters suggest that those who seek to improve institutional restraints should not expect to reproduce the achievements of comparable *current* domestic laws and courts, legislative bodies, and bureaucracies. With the possible exception of the institutions making up the EU, virtually all other IGOs are still far from being able to fully restrain powerful states. While it is important to think far into the future and make plans for meaningful restraints through new institutions, as much of the global constitutionalism literature tends to do, it may be just as useful, if not more so, to focus on the smaller steps that can lead to *some* additional restraints on powerful groups and actors now.

Clearly, powerful states like the United States, China, and most visibly right now, Russia, are still in a position where institutional restraints have little impact on their most important plans. However, they are not completely impervious to the existing options offered by international institutions to those who want to check their actions. The recent brutal Russian invasion of Ukraine and even the US-led invasion of Iraq, based on faulty intelligence, are stark reminders of this fact.

As discussed in chapter 6, the acting UN High Commissioner for Human Rights reported in 2004 on the US human rights abuses in Iraq, especially on those in the Abu Ghraib prison. Similarly, UN weapons inspectors publicly disagreed with US officials over the claim that Iraq was still developing weapons of mass destruction. Such declarations had a delegitimizing effect on the US government, both internationally and domestically and led to greater costs in its war against Iraq and, later, in controlling the country.

Although Russia's invasion of Ukraine in 2022 was decried by numerous groups of international lawyers not only as illegal but, more broadly, as eroding the post-World War II international legal order,³⁵ even this seemingly unrestrained great power acknowledged that international law (at least formally) limits its actions.³⁶

³⁵ E.g., Sayapin, Sergey. 2022. "Thou Shalt not Distort the Language of International Law," *Opinio Juris*, March 7, 2022, available at <http://opiniojuris.org/2022/03/07/thou-shalt-not-distort-the-language-of-international-law>.

³⁶ For example, in March 2022, Vladimir Putin explained that any Ukrainians who would surrender "should be treated in accordance with international conventions." See CNN, April 22, 2022, "What we know about the situation in Mariupol," available at www.cnn.com/europe/live-news/russia-ukraine-war-news-04-22-22/h_a85512a9152d4da8d24e34cf4fb6ea3

In addition, the UN General Assembly condemned the Russian invasion.³⁷ If nothing else, the UNGA resolutions have made it more difficult for Putin to present to his own citizens the military actions in Ukraine as ones that are intended to bring about peace.³⁸ While Russian public opinion and domestic support may still favor Putin, international resolutions such as those adopted by important global institutions and even those adopted by far less powerful ones (such as the International Olympics Committee that banned Russian athletes from competing in sporting events³⁹) have made it more difficult for the government to control the domestic narrative.

To be sure, these international restraints are still weak compared to those that exist at the state level in democratic political systems. However, as this book has emphasized, they are comparable to those that were in place hundreds of years ago within states that nevertheless influenced actions of domestic G_1 and G_2 . The recent checks on powerful states such as the US and Russia remind us of the slow and deliberate pace the Parlement took to restrain Philip V's rash retributions against his foes in early fourteenth century France. They are also similar to the newly expanded English Parliament that needed to accept the costs of Henry III's military campaigns in the later thirteenth century.

In sum, in practical terms, it is important to be aware that some restraints, as weak as they may seem, do exist in the international realm. Promoters of such restraints need to understand how best to use what they have at their disposal now (something that the soft balancing literature has discussed in great detail). Of course, that should not preclude them from also considering possible long-term plans for strengthening the restraints further and creating new ones.

The present study offers a set of arguments that should be of interest to those seeking more meaningful restraints, not least by highlighting the existence of windows of opportunity (during times of power parity) that allow for further development of institutional restraints on power.⁴⁰ Perhaps most important, G_1 states need to be reminded that power shifts eventually come. Therefore, they should consider the long-term benefits of developing stronger institutional restraints even at times when their relative power is high and/or increasing (that is, in points 1, 2, or 3 in Figure 2.1). If they wait until it becomes too clear that they will be replaced by a G_2

³⁷ See, e.g., Ramsden, Michael. 2022. "Uniting for Peace: The Emergency Special Session on Ukraine," *Harvard International Law Journal*, April 2022, available at <https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/>

³⁸ As this volume is undergoing final edits, in March 2023 the ICC has issued an arrest warrant for Putin. While it is difficult to assess now the degree to which this action will impact public opinion in Russia and the war in Ukraine, the court's action can indeed be seen as yet another step towards meaningful future restraints on all heads of state.

³⁹ International Olympic Committee. 2022. "IOC EB recommends no participation of Russian and Belarusian athletes and officials," February 28, 2022, available at <https://olympics.com/ioc/news/ioc-eb-recommends-no-participation-of-russian-and-belarusian-athletes-and-officials>

⁴⁰ As mentioned early in this book, I do not take for granted that restraints on power are always "good." Yet, we can benefit from understanding the long-term evolution of such institutions.

state vying for the G_1 position, this book has shown that the resulting institutional restraints are weak. Indeed, while the uncertainty of the future leads to the adoption of some restraints supported both by G_1 and G_2 , neither side is sufficiently *convinced* that such restraints will be beneficial to them in the long run. Therefore, they will likely prefer weaker restraints to stronger ones. G_1 , however, is in a position to impose stronger restraints at the peak of its power. As mentioned, some of the existing literature has argued that the US has indeed done so, seeking after major wars important “constitutional bargains” that offered predictable and legitimate international orders in exchange for accepting some restraints on the use of its power.⁴¹ Yet chapters 4–6 suggest that such restraints were in fact very weak. After World War I, the US Senate rejected the restraining institutions that came with the League Covenant negotiated by Woodrow Wilson. After World War II, the US led the way in establishing international courts, such as the ones in Nuremberg and Tokyo, that imposed decisions solely on the defeated powers through judges who were not truly independent of their governments. The US also pushed for the most powerful states to acquire unrestricted veto power in the UNSC and sought a weak UNGA and Secretariat. If anything, the previous chapters have indicated that when G_1 was at the peak of its power (such as after victorious major wars), it sought to *erode* existing institutional restraints and rarely to *promote* them, as existing literature has suggested.⁴² In the future, policymakers from G_1 may wish to consider not only the costs but also the long-term benefits of furthering institutional restraints at times of peak power for their state.⁴³

Implications for the International Relations and Comparative Politics literatures

The above section reiterates the main argument of this book. By analyzing developments in the domestic realm, especially those from long ago, we can understand better the evolution of international institutional restraints in recent times.

In this context, perhaps the most important contribution of the present study to both the IR and Comparative Politics literatures is that it answers a long-standing call for comparisons between dynamics in domestic and international politics. The

⁴¹ Ikenberry, G. John. 2001. *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars*. Princeton: Princeton University Press, 56–7.

⁴² An interesting exception is the US-initiated Baruch Plan. The plan involved the US decommissioning its atomic weapons and transferring nuclear technology. All other states were to pledge not to produce such weapons. The agreement was to be overseen by an IGO whose decisions could not be overruled by a veto in the UNSC. The Soviet Union rejected the plan. See, e.g., Gerber, Larry G. 1982. “The Baruch Plan and the Origins of the Cold War,” *Diplomatic History* 6(4): 69–96.

⁴³ This argument overlaps with an important one made by Deudney: “Appropriately configured authoritative international organs are not threats to republican sovereignty, but rather serve its security needs.” Deudney, Daniel H. 2007. *Bounding Power: Republican Security Theory from the Polis to the Global Village*. Princeton University Press, 272.

similarities I find in the two realms are not just “interesting;” they confirm that our usual comparisons of institutions and events *either* within states *or* among them, can be extended to those crossing the International Relations–Comparative Politics subfields. In other words, our “N”—the number of cases we can consider in our studies of institutions—is greater than many may have initially thought. Consequently, future analyses of such institutions may be more rigorous if we assess the validity of our arguments both in domestic and international politics.

More specifically, the strong similarities that I find across domestic and international institutions suggest that the IR literature would benefit from a closer examination of the ideas that developed around the time when domestic institutional restraints came to be empowered. Conversely, comparative politics, and especially the study of authoritarian systems (with similarly weak institutional restraints on power), could benefit from comparisons to developments in the international realm over the past century or two.

Just as important, as mentioned in chapter 2, the similarities between institutional restraints on power in the domestic and international realms suggest that the IR literature could draw from classical liberalism, particularly from the work of John Locke. I showed that IR theory has almost entirely neglected Locke’s work and, instead, has built upon the work of Smith, Kant, and Rawls.

Applying a Lockean version of liberalism to IR would allow us to complement existing liberal approaches. A Lockean form of IR liberalism would recover the important element of restraints on concentrated power and combine it with the ubiquitous theme of cooperation highlighted by existing forms of liberalism in IR. It would thus offer a more complete approach that allows us to draw the kind of parallels between domestic and international developments discussed in this book.

Of course, by applying Lockean liberalism to IR, an important consequence is that the emphasis would not only be on the most powerful states (G_1 and G_2), as in the case of most existing IR theoretical approaches (starting with the dominant realist one). As the book has shown, a complete discussion of the evolution of international institutions also needs to consider the role of small states and even nongovernmental groups (G_3). Locke and other classical liberal writers indeed paid a great deal of attention to weaker groups of domestic actors. Of all the advantages of applying his work to IR, this emphasis on the importance of (and opportunities available to) small states may be the most significant.

Overall, the main takeaway of this study, both in practical and theoretical terms, is that the evolution of international relations has followed patterns similar to domestic politics, at least when it comes to institutional restraints on power. The argument made by Morgenthau and early post-World War II IR scholars, that international relations needs to be part of the broader field of political science, is supported by my findings. We can identify the same types of power dynamics as in the domestic realm among similar groups of actors based on their relative power.

However, where the present book differs from the Morgenthau's argument, cited on the very first page, is that his assumption about politics being about *acquiring* power is incomplete. I do not deny that for the small number of powerful actors this argument is important. However, the same actors, *as well as* the many weak ones, are also driven by fear of concentrated power. Therefore, politics is just as much, if not more, about the need to *restrain* the power of others. This goal is common to all groups in domestic and international politics, while the goal of continuously acquiring power is much more relevant for the dominant groups than others. In other words, the emphasis on restraints on power offers a more inclusive approach to IR, one that looks at all states, just like Lockean liberalism shifted attention from only the rulers of the "leviathan" to all individuals within a state.

Index

For the benefit of digital users, indexed terms that span two pages (e.g., 52–53) may, on occasion, appear on only one of those pages.

- Abu Ghraib, 6, 256, 261, 298
Act of Settlement, 77–8
Administrative Tribunal of the International Labour Organization, 246, 249
African Development Bank, 257
Allied Maritime Transport Council, 231–2, 265, 267, 277
AMTC (*see* Allied Maritime Transport Council)
Arendt, Hannah, 8
Avenol, Joseph, 239, 242
- balance of power, 2, 38–40, 42, 52, 123
Balfour, Arthur, 230, 234, 241, 244
 Balfour Report, 234–5, 241, 244
Barbosa, Ruy, 135–6
Bodin, Jean, 24, 26–8, 31
Borel, Eugène, 227–8
budgetary (or financial) matters
 of intergovernmental organizations, 105, 144, 170, 186, 194, 201, 204–7, 209, 211, 214, 229, 235–7, 242, 252–3, 258, 269, 291
 of national governments, 7, 69, 81, 85, 87, 105, 170
bureaucracies
 autonomy of
 domestic institutions, 8, 16, 30–1, 33–4, 49, 60, 73, 93–4, 97–9, 103, 106–7, 110, 114–5, 219, 271
 international institutions, 5–6, 14, 16, 21, 60, 106, 109, 114, 172, 221, 223–73, 277, 280–1, 284–5, 287, 296–7
 patronage system and, 34, 55, 91–2, 94–6, 220
 selection process of, 34, 91–3, 96, 108, 235, 237, 252
 specialization of, 34, 49, 93, 106, 114, 243, 264, 275
Burke, Edward, 127
- Calvo, Carlos, 128, 135
Cecil, Robert, 136, 179, 182, 185
Central American Court of Justice, 134
Central Commission for the Navigation of the Rhine, 125, 156, 172–3, 201, 211, 221–6, 228, 231–2, 262, 266, 268, 274, 277
Chemical Weapons Convention, 5, 200–1, 209
China, 43, 45, 90–1, 120, 141, 147, 151–2, 161, 163, 188–90, 195, 200, 255, 272, 289, 295, 298
Churchill, Winston, 139, 152
Coke, Edward, 76
Committee of Thirteen, 240–1, 244
Concert of Europe, 5, 21, 50, 55, 123–4, 126, 131–2, 154, 156, 159, 168, 171–2, 174, 181, 212, 274, 277
constructivism, 10, 22
Council of Europe, 12, 171, 202–3, 207, 211, 213, 216–7, 278–9, 285
 Parliamentary Assembly of, 202–3, 207, 211, 213, 216–7, 278–9
cross-level dynamics, 15–6, 18–9, 22, 162, 216–7, 261, 267, 269, 278, 280–2, 285–6, 288
Curia Regis, 4, 69, 75, 80, 88, 115, 170, 172, 282, 286
- Deudney, Daniel, 26, 44, 290, 295, 300
di Calboli, Giacomo Paulucci, 240–1
Drummond, Eric, 230–6, 238, 240–3, 261, 263, 269, 275
- East India Company, 93–4
Edward III, 82, 207, 110
England, 3, 4, 7, 17, 18, 20, 24, 31–2, 42, 65, 67–73, 75–84, 86, 90–1, 93–5, 99, 105, 107, 109–10, 114, 123–8, 130–3, 136, 138, 140, 142, 145, 147, 151, 153, 156–8, 163–4, 168, 170, 172, 174–5, 177, 182, 189, 196–7, 200, 202–3, 211, 213, 215–6, 225, 230–1, 235, 238, 242, 252, 263–7, 276, 280, 293, 299
European Bank for Reconstruction and Development, 259
European Coal and Steel Community, 153, 202–4, 211, 215–7, 279

- European Union
 European Commission, 153, 159, 205, 207, 210–1, 214–5, 257, 259, 272
 European Court of Justice, 152–4, 158–9, 161, 163, 165, 275, 279
 European Parliament, 7, 18, 180, 201–12, 218, 274–5, 278, 287
- FAO (*see* Food and Agriculture Organization)
 fear of concentrated power, 2, 7, 20, 23–9, 51–2, 56, 59, 110, 114, 255, 280–1, 302
- Food and Agriculture Organization, 192, 249
- France, 3, 4, 7, 20, 24, 27, 67, 69, 70–4, 80, 84–6, 89–90, 96–7, 99, 105, 107, 123, 126, 128, 133, 136–7, 139, 142, 146, 153, 157, 161, 163–4, 171–2, 174, 176, 179, 181, 195, 200–2, 205, 209, 211, 214, 223, 234–6, 251, 263, 266–77
- Francis I, 89
- Frederick the Great, 92
- Germany, 79, 84, 98, 125, 128–9, 133, 136, 139–140, 146, 153–5, 161, 164, 174, 179, 201, 210, 239–40, 244, 263, 266, 276, 295
- global constitutionalism, 40–1, 44, 298
- Gordon, Scott, 1, 22, 30–1, 47, 49–50
- Great Britain (*see* England)
- groups
 classification, 53–60
 examples of, 53–60, 63, 108, 115, 163–4, 171, 220, 265, 267
- Hague Conferences, 156, 159
 1899 conference, 130–3, 160
 1907 conference, 134–5, 138
- Hammarskjöld, Dag, 248
- Hankey, Maurice, 231, 275
- Hatch Act, 100
- hegemon, 9, 43, 52, 56, 58, 123, 131–2, 194, 225
- Henry III, 17, 71–2, 81, 113
- Henry IV, 82
- Hobbes, Thomas, 10, 23–6, 58, 289–90
- horizontal accountability, 101–3, 258
- ICC (*see* International Criminal Court)
- IAEA (*see* International Atomic Energy Agency)
- Ikenberry, John, 42–5, 51
- ILO (*see* International Labour Organization)
- ILOAT (*see* Administrative Tribunal of the International Labour Organization)
- IMF (*see* International Monetary Fund)
- institutionalism
 historical 14, 21, 114, 115–7, 168, 217–8, 269, 271, 279, 283, 286–289
 rational choice 14, 21, 114–6, 162, 166, 168, 217, 267, 269, 279, 280, 283–4, 286
 sociological 14–5, 114–6, 162, 166, 168, 216, 267, 269–70, 271, 279, 280, 284–6
- International Atomic Energy Agency, 6, 259, 272
- International Court of Justice 55, 119, 138, 140–3, 148, 157–8, 161, 163–5, 167–9, 193, 198, 212–3, 215, 217, 249, 251, 264–6, 272–3, 275, 277, 279
 statute 141–2
- International Criminal Court, 13, 21, 119, 143–152, 154, 158, 161–5, 169, 272, 277, 279, 284
 Rome Conference 146–8
 Statute 145–9
 US position on, 149–51
- International Criminal Tribunal for Rwanda, 13, 144–6, 167, 290
- International Criminal Tribunal for the former Yugoslavia, 13, 143–6, 167, 290
- International Labour Office (*see* International Labour Organization)
- International Labour Organization 21, 186, 192, 216, 230, 235, 237–9, 243, 246–7, 249, 259, 263, 269, 269, 275, 281, 287, 296
 Conference, 243
 Governing Body, 192, 243
- international law, 5, 7, 11–2, 18, 20–1, 36, 39–42, 46, 119–69, 271–2, 274, 278, 280, 290, 298
 natural law, 121–2, 126–7, 129
 positivism, 122–3, 127–8, 132, 156
- International Law Commission, 146
- International Monetary Fund, 193, 207, 257, 280
- International Organization for Migration, 259
- International Telegraph Union, 125, 156, 173–6, 182, 209, 211, 226–8, 265–6, 268, 277, 279, 284, 286
- International Tribunal of the Law of the Sea, 151–2, 154, 163, 284
- Interparliamentary Union, 130, 177–9, 184, 208, 213, 281
- IPU (*see* Interparliamentary Union)
- Iraq War, 6, 45, 255–6, 261, 282, 298
- Italy, 129, 173, 181–2, 187, 190–2, 209, 211, 231, 233, 239–42, 244, 263, 266–7, 272, 276, 295–6
- ITLOS (*see* International Tribunal of the Law of the Sea)
- ITU (*see* International Telegraph Union)

- Japan, 91, 95, 99, 103, 139–40, 188–190, 192, 209, 211, 233, 241–2, 261, 263, 272, 276, 295
- John, King of England, 48, 70–1, 81, 83, 107
- judicial independence
 domestic realm, 30–1, 40, 68–9, 72–8, 105, 111, 114–5, 161, 168, 275
 international realm, 13, 18–9, 40, 114, 135, 137–41, 146–50, 153–4, 157, 160–1, 163, 166–8, 192, 217, 275, 285, 296–7, 300
- Kant, Immanuel, 11, 22, 36–7, 301
- Keohane, Robert O., 14, 37, 42, 117
- League of Nations
 Administrative Tribunal of, 239, 246, 249
 Assembly, 181–92, 194, 209, 211, 213–5, 272, 277, 279, 286
 Council, 137–8, 171, 181–92, 209
 Italian invasion of Abyssinia, role in, 190–2, 242, 272
 Manchurian Crisis, role in, 188–90, 217, 241–2, 261, 272
 Paris Peace Conference, 182–3, 230, 233
 Secretariat, 230–43, 265, 296
- Liberalism
 classical, 20, 23, 26–9, 36–7, 51, 301–2
 in international relations, 10, 23, 26, 36–7, 301–2
- Lie, Trygve, 247–52, 275
- Locke, John, 11, 22, 25–9, 36–40, 47, 58, 271, 301–2
- Magna Carta, 4, 6–7, 48, 70–73, 76, 81, 107–8, 110, 113, 115, 157
- Mainz Convention, 223
- Mannheim Treaty, 5, 224
- McCarran, Patrick, 248, 250
- McCarthy, Joseph, 247–8, 250
- Milner, Helen, 10–2
- “moment 4” situations, 58, 60–1, 66–8, 77, 80, 96, 147, 199, 217, 294
- Monnet, Jean, 203, 231
- Morgenthau, Hans, 1–2, 6, 10, 38–9, 301–2
- neoliberal institutionalism, 14, 37, 117
- NATO (see [North Atlantic Treaty Organization](#))
- Noblemaire Committee, 235, 241, 244
- norms, 15, 19, 62, 73, 112, 116, 119–20, 129, 137, 148, 155–6, 162, 168, 184–5, 201, 216–7, 231, 269–70, 280, 285–6, 288, 296
- North Atlantic Treaty Organization, 144–5, 294
- Northcote–Trevelyan report, 94–5, 108
- Nuremberg Tribunal, 138–40, 144, 290, 300
- Octroi Convention on the Navigation of the Rhine, 222–3
- OIOS (see [United Nations Office for Internal Oversight](#))
- Organization of American States, 257–8
- Parliament (English), 17–8, 24, 31, 75–8, 81–4, 94–5, 107–10, 114–5, 176–7, 299
- Parlement of Paris, 4, 69, 72–5, 78, 80, 86, 88–90, 105, 108–110, 114–5, 157, 170, 229, 282, 299
- Pendleton Act, 95, 108
- Permanent Court of Arbitration, 21, 119, 129, 132–5, 137, 141, 154, 157, 159–60, 163–9, 179, 181, 210, 274, 277, 279, 284–5
- Permanent Court of International Justice, 55, 119, 136–8, 141–3, 160, 163–9, 179, 181, 186, 192, 210, 272, 275, 277, 279, 284–6, 279
- phases in evolution of institutional restraints
 emergence, 20, 111–2, 115–6, 118, 120–2, 129, 162, 165, 168, 174, 212, 215–6, 221, 267–8, 271, 278–9, 280, 283–6, 288, 292–4
 change, 20, 111, 113–6, 118, 129, 136, 162, 165–6, 192, 201, 212, 215–7, 230, 267–9, 271, 278–9, 283, 285–8, 292, 294, 297
 consolidation, 20, 111, 113–5, 117–8, 136, 162, 165, 192, 201, 211, 215, 218, 243, 267–9, 271, 278, 284–5, 287–8, 292, 295–7
- Philip V, 73, 299
- Philip the Fair, 69, 74, 85, 88, 110
- Porter Convention, 5, 135, 165
- principal–agent theory, 31, 34–5, 48, 290
- Prussia, 5, 91–3, 95, 123, 125–6, 172, 223–4
- public access to information, 8, 16, 26, 102–3, 108, 219, 229, 259–60, 270
- Rajchman, Ludwig, 242
- Rawls, John, 22, 28–9, 36–7, 301
- realism, 6, 10–11, 36, 39, 44, 51, 141, 168, 290, 193, 301
- Rockefeller Foundation, 242
- Roosevelt, Franklin D., 152, 244–5, 250
- Root, Elihu, 127–8, 134–5, 138, 160
- Russia, 5–6, 28, 39, 45, 123, 126, 130, 132–3, 139, 141, 143, 149, 151, 159–61, 164, 166–7, 179, 184, 192, 194–5, 198–201, 209, 214, 217, 244–5, 248, 250, 255–6, 264, 266, 269–70, 272, 276, 289, 295, 298–9

- Salter, Arthur, 231–3, 239, 263, 276
 separation of powers, principle, 25–7, 47, 49, 78
 Shklar, Judith, 26, 28–9
 Smith, Adam, 22, 36, 301
 soft balancing, 22, 45, 47, 50–3, 55, 106, 201, 209, 255–6, 299
 Soviet Union (*see* Russia)
 Stalin, Joseph, 28, 139
 Stokes, John, 225–6
 Switzerland, 130, 151, 173, 227–8, 235, 263, 274
- Thomas, Albert, 238, 243, 275
 Thornburgh, Richard, 258
 Tokyo Tribunal, 139–40, 144, 188, 290, 300
- Ukraine war, 198–9, 298–9
 UNAdT (*see* United Nations Administrative Tribunal)
 UNESCO (*see* United Nations Educational, Scientific and Cultural Organization)
 United Kingdom (*see* England)
 United Nations
 Economic and Social Council, 180, 193
 General Assembly, 5, 18, 141, 146, 176, 181, 192–201, 202, 209–15, 217, 246, 249, 251–2, 269, 272–3, 277, 279, 284–6, 299
 Uniting for Peace Resolution, 194–9, 209, 211, 217, 272, 286
 Oil-for-Food Program, 259
 Secretary-General, 55, 244–9, 252–3, 258, 264, 275
 Security Council, 13, 45, 140–2, 144, 147–9, 161, 168, 171, 179, 193–9, 209–10, 212, 217, 245, 252, 257, 269, 273, 300
 United Nations Administrative Tribunal, 245–50, 264–5, 269, 272
- United Nations Educational, Scientific and Cultural Organization, 249, 251
 United Nations High Commissioner for Human Rights, 6, 298
 United Nations Office for Internal Oversight, 258
 United States, 31, 44, 54, 78, 90, 97–8, 103, 125, 130, 133–6, 142, 149–50, 163–4, 166, 173–4, 174, 177, 182–3, 189, 195–6, 198, 201–2, 211, 213–5, 241–51, 255, 258, 264–5, 272, 276, 292, 298
 Universal Postal Union, 173–6, 182, 185, 209, 211, 221, 227–8, 265–6, 274, 277, 279, 286
 UPU (*see* Universal Postal Union)
 USSR (*see* Russia)
- Vienna, Congress of, 123–4, 175, 185, 221, 224
- Waltz, Kenneth, 7, 10, 20, 39
 Wendt, Alexander, 6, 11
 whistle-blower policies, 16
 Wilson, Woodrow, 49, 101, 136, 160, 182–4, 216, 230, 285, 300
 Witan, 6, 79, 85, 105, 115, 170, 175
 within-level dynamics, 15–6, 18–9, 162, 216–7, 261, 269, 278, 280–1, 285
 World Bank, 21, 46, 55, 181, 193, 207–8, 257–60, 276
 World Meteorological Organization, 259
 World Trade Organization, 151–2, 154, 158, 161, 163–5, 181, 207–8, 257, 259, 272, 277, 279, 284
 Appellate Body, 151–2, 154, 158, 263, 272, 277, 279, 284
 Seattle riots, 259
 WTO (*see* World Trade Organization)
 Wu of Han, emperor, 90–2