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Guy Fiti Sinclair

State Formation, Liberal Reform, and the Growth of International Organizations

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STATE FORMATION, LIBERAL REFORM, AND THE GROWTH OF INTERNATIONAL ORGANIZATIONS

By Guy Fiti Sinclair*

Abstract

This article argues that the growth of international organizations (IOs) over the past century has been imagined and carried out as necessary to making modern states on a broadly Western model. The proliferation of IOs and expansion of their legal powers, through both formal and informal means, raise profound questions regarding the relationship between international law's reforming promise and its imperialist perils. The article proposes a new analytic framework for understanding these phenomena, focussing on the rationalities of IO powers and the technologies through which they are made operable. It argues that both the growth of IOs and the cultural processes of state formation are impelled by a particular dynamic of liberal reform that is at once internal and external to law. That dynamic and the analytic framework proposed here are both illustrated and exemplified through an analytical account of the emergence of IOs in the 19th century.

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1. Introduction

International law is a discipline, discourse, and practice of reform. It tells a story of its own progressive self-improvement, and of its prominent role in the betterment of others. As the creatures, instruments and, increasingly, originators of international law, international organizations (IOs) incarnate and epitomize its transformative potential. They intervene in its name and subject themselves to its improving influence. And they are themselves the objects of continuous reform efforts, both from within and from outside by states and non-state actors.

This article proposes a new analytic framework for understanding the remarkable expansion of powers exercised by IOs over the past century. Today, hundreds of global and regional IOs operate in myriad fields of activity, including peace and security, social and economic development, environmental protection and resource management, trade and finance. Together, they exercise far-reaching powers – including the ability to make law and capabilities of military, financial, economic, political, social, and cultural intervention – that impact directly and indirectly upon the lives of millions of people around the world.[1] Indeed, perhaps the most common outcome of reform efforts directed at IOs has been their assumption of additional powers and expansion into new arenas of activity.[2]

At one level, this trend raises important issues concerning the legality of international action. Under international law, IOs are created through written agreements between sovereign states.[3] These agreements – termed constitutive instruments, founding treaties, or charters – define their objects and purposes, enumerate their powers, and prescribe formal amendment processes through which they can, among other things, legitimately set themselves new goals and acquire new legal powers. More frequently than is usually acknowledged, however, IOs come to exercise new powers – that is, powers that were neither specifically contemplated at the time of their creation nor explicitly mandated in their founding treaties – through informal processes of discourse, practice, and (re)interpretation, not involving

[1] See J. E. Alvarez, *International Organizations as Law-makers* (2006).
[2] Of course, IOs have not always and everywhere expanded their powers; certainly many counter-examples could be cited. Where this phenomenon does exist, however, I argue that it raises a particular set of legal and political questions that demand careful consideration by international lawyers.
[3] See H. G. Schermers and N. M. Blokker, *International Institutional Law* ¶33 (4th rev. ed., 2003).

amendment of their constitutive instruments. In this mode, IO growth prompts uncomfortable questions about whether certain powers exercised by IOs are ultra vires or otherwise fail to comply with basic principles of the rule of law.[4]

At a more profound level, the phenomenon of IO growth raises questions regarding international law's perennial promise of reform. IOs are important sites of struggle over the meaning of international law and its potential for creating a better world. Yet a burgeoning literature has demonstrated that IOs frequently fail to act in accordance with the principles they espouse, and that many of their activities have had far-reaching, negative effects on the states and populations in which they intervene.[5] As a consequence, these organizations have often ended up promoting forms of international intervention that look a lot like the extension of deep-rooted relationships of colonial domination.[6] The proliferation of IOs and expansion of their legal powers accordingly raises the troubling possibility that international law's impulse to reform is indistinguishable from its originary "civilizing mission", which supplied a pretext and justification for violent intervention in the colonial encounter between different peoples and cultures.[7] A basic puzzle, therefore, is to understand the relationship between international law's reforming promise and its imperialist perils.

In seeking to unlock that puzzle, I argue that IO growth has been imagined and carried out as necessary to the ongoing process of making modern states on a broadly Western model. The article thus offers an unusual perspective on the relationship between states and IOs. In most mainstream views of international law and international relations (IR), sovereign states create IOs and strive, more or less successfully, to exploit their benefits and restrain their pathological tendencies. But these accounts overlook the fact that the vast majority of states recognized as

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[4] See, e.g., Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *Am. J. Int'l L.* 239 (1983). "IO growth" and other similar expressions used in this article are intended to capture the expansion of IOs through the informal assumption of new powers, as well as through more formal means.

[5] Of a vast literature see, e.g., R. Peet, *Unholy Trinity: The IMF, World Bank and WTO* (2nd ed, 2009); Mégret and Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities ', 25 *Hum. Rts. Qtly* 314 (2003); and K. Danaher and M. Yunus (eds), *Fifty Years is Enough: The Case Against the World Bank and the International Monetary Fund* (1994).

[6] See S. Pahuja, *Decolonising International Law* (2011); and A. Orford, *International Authority and the Responsibility to Protect* (2011).

[7] See M. Koskenniemi, *The Gentle Civilizer of Nations* (2001); and A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

independent today were not acknowledged as such in 1919, or even in 1945. Most IOs and states were born and grew up together during the past century; it might seem equally plausible, then, to think of IOs as shaping states.[8] Accordingly, it would be overly simplistic to assume that IO growth has necessarily resulted in a loss of sovereignty by states. To the contrary, I contend that IO growth is intimately bound up with the creation of states, the construction of state powers, and the very constitution of modern statehood.

None of this is intended to suggest that every instance of IO growth is directed towards a unitary, monolithic program of state formation, nor to endorse the notion that IOs are agents for the diffusion of a putative "world culture".[9] Rather, IO growth should be understood as a highly contested, always-provisional, and never-ending process involving interaction of numerous, varied and frequently conflicting projects of reform, resistances, failures and, importantly, counter-reforms aimed at reshaping international law and institutions. The participants in this process include states, IOs, and an array of other non-state actors. Each is influenced by a divergent set of personal, professional, practical, and political factors; nevertheless, they often join forces in their efforts to reform each other. Picturing IO growth in this way, as a dynamic process of reiterative, reciprocal reform among a multiplicity of actors, permits an adequate account of resistance and the agency of movements 'from below',[10] without losing sight of the asymmetries of global power and relations of domination in the world. It also supports the more holistic view that the nation-state and international community emerged together as complementary imaginaries;[11] that states and IOs are continually co-constituted; and that the phenomenon of IO growth can best be understood today in light of its critical role in the production of different modes of governing in the decolonized world.

Moreover, the parallel, mutually reinforcing processes of IO growth and state formation have helped in turn to shape international law itself. From an early stage, the

[8] See, e.g., M. Finnemore, *National Interests in International Society* (1996).
[9] *Cf.*, e.g., Meyer *et al*, 'World Society and the Nation-State', 103 *Am. J. Soc.* 144 (1997); and C. L. McNeely, *Constructing the Nation-State* (1995).
[10] See B. Rajagopal, *International Law from Below* (2003).
[11] *Cf.* Malkki, 'Citizens of Humanity: Internationalism and the Imagined Community of Nations', 3 *Diaspora* 41, 62 (1994) ('[I]magining the political community of the nation always necessitates – and even presupposes – the imagining of an international community').

growth of IOs came to be understood and advocated in terms drawn from specific national experiences – in particular, the growth of state bureaucracies and legal reform in Europe and North America during the 19th century – and applied by analogy to the international realm. A rich repertoire of conceptual tools, borrowed from Western traditions of public law, could thereby be incorporated into international legal thinking about the growth of IOs. The activities of international bodies came to be seen as a form of administration, parallel to and intricately interconnected with the growth of state bureaucracies in Europe, North America, and their colonial territories. The law that IOs created, and which regulated their activities, could be considered a species of administrative law. The constitutive instruments of IOs were comparable to states' constitutions. The hermeneutic doctrines and techniques that had been developed for the interpretation of the latter were applicable to the former. Both were expected to undergo similar processes of 'constitutional transformation',[12] often imagined in organic terms, but capacious enough of a concept to embrace notions of emergency powers, necessity and exception. It thus became possible, at different times and in shifting circumstances, to imagine and legitimate radical change in the governing practices of both IOs and states simultaneously.

A detailed account of all of these complexities is not possible here.[13] Instead, this article focuses on articulating the relationship between state formation and IO growth in general analytical terms, and on identifying a particular dynamic of liberal reform, at once internal and external to law, that impels those interlinked processes. Part 2 begins by situating the article's overall argument and methodology in relation to the existing scholarship on IO powers. In part 3, I introduce the theoretical framework of state formation as a cultural process, and delineate the article's core claims. Part 4 illustrates and exemplifies those claims through an analytical account of the emergence of IOs in the 19th century. That story is well known to international lawyers; however, I seek to reimagine and recast its familiar details in a new light, demonstrating the profound interrelations between IO growth, state formation, and the dynamic of liberal reform.

[12] *Cf.* Jellinek, 'Constitutional Amendment and Constitutional Transformation', in A. J. Jacobson and B. Schlink (eds), *Weimer: A Jurisprudence of Crisis* 54 (2000).
[13] See generally G. F. Sinclair, *To Reform the World: The Legal Powers of International Organizations and the Making of Modern States* (unpublished doctoral thesis, 2013).

Finally, part 5 concludes with some reflections on how the analytic framework set out in this article can illuminate a series of questions and concerns in IO studies.

2. Rethinking the Powers of IOs

The central claim advanced in this article requires rethinking standard approaches to the powers of IOs under international law. Inquiring into how IOs have facilitated and legitimated modern state formation calls for an interpretive methodology that can provide a sociologically grounded, thick historical account of the conditions that have made it possible to conceive, effect, and justify IO growth in particular cases. More specifically, it demands a focus on the discursive and material practices of IOs, the interaction of legal and other kinds of expertise in those practices, the historical circumstances in which they have emerged, and the forms of intervention that have resulted. In this part of the article, I offer a brief critical sketch of recent scholarship on the legal powers of IOs, before outlining the distinctive features of an alternative methodology.

A. Theoretical Perspectives on IO Growth and Reform

We can usefully begin with the most traditional, "doctrinal" stream of IO scholarship. Over the past century, the sub-discipline of international institutional law (IIL) has developed around the central enterprise of defining, conceptualizing, and applying a set of norms concerning the powers of IOs: the principle of attribution,[14] the related principle of speciality,[15] the doctrine of implied powers,[16] and so on. As critical scholars have argued, however, IIL is far from determinate, coherent, or conclusive in its approach to the issue.[17] The doctrinal orientation of ILL has also led it to focus almost exclusively on a restricted set of legal materials, comprised of the constitutive

[14] See Schermers and Blokker, *supra* note 3, at ¶209 ('A rule of thumb is that... [IOs] are competent to act only as far as powers have been attributed to them by states... [IOs] may not generate their own powers, they are not competent to determine their own competence.').
[15] See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶25 (8 July).
[16] See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, at 182-183 (April 11) (holding that the UN 'must be deemed to have those powers which, although not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties').
[17] See Alvarez, *supra* note 1, at 82-100; and J. Klabbers, *An Introduction to International Institutional Law* 53-73 (2nd ed., 2009).

instruments of IOs, the relatively few judgments and advisory opinions of a handful of international (and some national) courts and tribunals, and the draft articles and reports of the International Law Commission.[18] As a result, IIL scholarship frequently fails to connect with the shared assumptions, discourses, and practices of reform within organizations, which shape and give impetus to IO growth on a daily basis. To the extent that it considers the issue at all, traditional IIL scholarship reflexively adopts the functionalist assumption that any expansion of IO powers and activities is designed to meet the common needs of states, and therefore must be a good thing.[19]

The flourishing literature on law and governance reflects a rather more sophisticated appreciation of IO powers.[20] Drawing heavily on IR scholarship, this literature has cast enormous light on the diverse and expanding range of activities undertaken by IOs within the complex mesh of forces comprising contemporary global governance.[21] Very often, however, its analytical insights are tightly interwoven with proposals for institutional reform; indeed, particular kinds of reform proposals are often implicit in the very terms of analysis. It is thus exceedingly difficult for scholarship in this genre to reflect dispassionately upon the extent to which it is itself caught up in the reforming dynamic of international law. Moreover, much of this scholarship is premised upon a particular kind of progress narrative that assumes (though without necessarily explicitly asserting) the steady decline of states, their marginalization and substitution by 'governance without government'.[22] Yet states clearly remain centrally important actors on the global stage, in addition to coordinating and legitimizing the work of other

[18] Even critical approaches to IIL rely overwhelmingly on these sources: see Klabbers, *supra* note 17.
[19] Most IIL scholarship reflexively adopts an eclectic mix of assumptions, rarely made explicit, from functionalist, rational choice, and realist IR theory. On the origins of functionalist thought in ILL, see Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', 25 *EJIL* 2014. For a recent rational choice perspective on IOs, see Andrew Guzman, 'International Organizations and the Frankenstein Problem', 24 *EJIL* 999 (2013).
[20] See, e.g., Koh, 'Why Do Nations Obey International Law?' 106 *Yale L.J.* 2599 (1997); A.-M. Slaughter, *A New World Order* (2004); Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' 17 *EJIL* 1 (2006); and de Búrca, Keohane and Sabel, 'Global Experimentalist Governance', 44 *Brit. J. Pol. Sci.* 477 (2014).
[21] See, e.g., Abbott and Snidal, 'International Regulation without International Government: Improving IO Performance through Orchestration', 5 *Rev. Int'l Orgs.* 315 (2010); A. von Bogdandy *et al* (eds), *The Exercise of Public Authority by International Institutions* (2010); and Kingsbury and Casini, 'Global Administrative Law Dimensions of International Organizations Law', 6 *Int'l Org. L. Rev*. 319 (2009).
[22] J. N. Rosenau and E. O. Czempiel (eds), *Governance without Government* (1992). Also see, e.g., K. Ohmae, *The End of the Nation State* (1995); and S. Strange, *The Retreat of the State* (1996).

bodies carrying out governance functions.[23] The growth of governance powers exercised "beyond the state" can therefore only be fully understood in light of the ideas and practices of state power as they have emerged and changed over time.

A less sanguine perspective on the possibility of reform can be found in the "critique of ideology" approach that is popular among many critics of international law on the political left.[24] Scholars adopting that perspective contend that international law is itself "part of the problem" and that IOs perform an ideological function in legitimizing the policy preferences of powerful states or capitalist interests. Of course law can be, and often is, used as an instrument of domination, helping to disguise, naturalise, and legitimise the preferences of the powerful through an array of authoritative symbols, metaphors, and narratives.[25] But law does not simply mystify and apologize for power: it also provides occasions and a vocabulary for contestation and resistance.[26] Rather than assume that the reforming promise of IOs is a falsehood, deception, or illusion, then, it is most important to take seriously that promise as an object of study in itself – indeed, to see the promise of reform as central to how the rule of international law works.[27]

The recent "institutional turn" in international legal historiography suggests that a more complicated view of IO growth may be appropriate. In this vein, scholars have examined the powers and activities of IOs in a range of temporal settings, most notably in the interwar experiences of the League of Nations and its associated institutions; in the emergence of an international development apparatus in the decades immediately following World War II; and in the "neoliberal" turn by IOs towards the end of the 20th century.[28] These studies have usefully drawn attention to the complex roles of IOs in colonization and decolonization. Traditional accounts of the history of IOs, in contrast, usually trace their origins to what were essentially regional, intra-European

[23] See Weiss, 'Globalization and National Governance: Antinomy or Interdependence?' 25 *Rev. Int'l Stud.* 59 (1999).
[24] See S. Marks (ed), *International Law on the Left* (2008).
[25] See S. Marks, *The Riddle of All Constitutions* 18-22 (2000).
[26] See M. Koskenniemi, *From Apology to Utopia* (rev. ed., 2005).
[27] *Cf.* P. W. Kahn, *The Cultural Study of Law* 105 (1999) ('This entire, repetitive cycle of debate – reform proposal, counter-proposal, balance – is internal to law's rule. The reform of law is a program essentially tied to the rule of law.').
[28] See, e.g., Anghie, *supra* note 7; Rajagopal, *supra* note 10; Pahuja, *supra* note 6; Orford, *supra* note 6; and M. Fakhri, *Sugar and the Making of International Trade Law* (2014).

arrangements that were extended only secondarily and unevenly beyond that continent.[29] What is lacking is an account that explains the emergence and initial growth of these early or proto-IOs that helps to make sense of their activities in both European states and their imperial domains.

Finally, a number of recent studies from constructivist and historical-institutionalist IR perspectives provide subtle analyses of the dynamics of growth in IOs and offer important insights about the place of legal-rational authority in IO decision-making.[30] These studies' conception of law is impoverished, however, by being excessively centred on rules; they are much less attentive to the importance of legal standards, principles, analogies, and metaphors in shaping actors' beliefs, outlooks and expectations. For all their interest in the normative dimensions of IO behaviour, moreover, these studies have relatively little to say about how international law, specifically, contributes to IO growth.

B. Theoretical Perspectives on IO Growth and Reform

Each of the streams of scholarship surveyed above makes a significant contribution to our understanding of international law's relationship to IO growth. Building on those contributions, the approach proposed in this article makes three key methodological moves: from doctrine to practice; from contemporary global governance to a history of the present; and from critique to analysis of IO powers.

In the first place, then, I advocate a broad view of law as a variable discourse and practice that can assume an array of forms in different contexts.[31] Adopting a broader perspective of international legal practice thus aims to de-centre, rather than displace, the traditional IIL emphasis on the work of international courts and publicists – neither discounting their importance nor mistaking them for the totality of international law. Instead of seeking to uncover some overlooked doctrinal unity underlying and explaining all instances of IO growth, the goal is to uncover the ways in which legal doctrine has emerged and evolved with the changing discourse and practices of IOs in particular historical contexts, and to highlight the wider social, cultural, and political

[29] See, e.g., B. Reinalda, *Routledge History of International Organizations* (2009).
[30] See, e.g., Finnemore, *supra* note 8; M. Barnett and M. Finnemore, *Rules for the World* (2004); D. D. Avant, M. Finnemore, S. K. Sell (eds), *Who Governs the Globe?* (2010).
[31] *Cf.* P. Nonet and P. Selznick, *Toward Responsive Law* 8-9 (2001).

dimensions of both doctrine and practice in shaping how power is exercised and people are governed in 'most of the world'.[32]

Second, inquiring into how international law has made IO growth possible and legitimate demands sensitivity to contingency, contestation, and change over time. The aim here is to contribute towards writing a kind of "history of the present" of international law and institutions – to try, in other words, to trace the emergence and legitimization of some of the most significant techniques of international intervention that have helped to shape our social and political world, and which continue to be exercised today. To the extent that this may be described as a critical historical approach, it is not intended to reject IOs or their efforts to reform the world. Rather, the intention is to problematize those efforts so as to cultivate 'an empirically informed kind of theoretical imagination under the conditions of perceived danger';[33] to illuminate the present by identifying the historical and social conditions of possibility for certain central practices of IOs; to suggest that contemporary forms of international intervention are less inevitable than they may currently appear; and to open up spaces for thinking differently about the possibilities and perils of international law.[34]

Third and most distinctively, I propose an integration of history or genealogy narrative with an analytics, rather than a critique, of law's relationship with power. Regarding law as a variable discourse and practice makes it possible to distinguish an array of characteristic configurations in the relationship between law and power. In one modality, law operates as a tool of repression and coercion; in another, it serves as an autonomous apparatus for taming and restraining the repressive tendencies of governments; in yet another, it becomes a responsive, adaptive, and purposive instrument of social welfare.[35] Rather than providing a ready-made template, such typologies point to the need for a more careful analysis of the diverse ways in which law, in its many forms, joins up with, constitutes and counters particular modes of power.

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[32] See P. Chatterjee, *The Politics of the Governed* (2004).
[33] Geuss, 'Genealogy as Critique', 10 *Eur. J. Phil.* 209, 213 (2002).
[34] See generally Castel, '"Problematization" as a Mode of Reading History', in J. Goldstein (ed), *Foucault and the Writing of History* (1994); Bevir, 'Rethinking Governmentality: Towards Genealogies of Governance', 13 *Eur. J. Soc. Theory* 423 (2010); and C. Koopman, *Genealogy as Critique* (2013).
[35] See Nonet and Selznick, *supra* note 31.

Such analysis would necessarily entail an investigation in two overlapping domains simultaneously.[36] In the first place, it calls for inquiry into the diverse rationalities of the powers exercised by IOs. This involves reconstructing the broader discourses, working social categories, and vocabularies connected with the use of those powers in the "official" discourse of IOs, practicing international lawyers and others closely associated with IO growth. By engaging at this discursive level, the aim is to make intelligible the systems of thought and forms of moral and scientific truth through which key actors in and around IOs have conceptualized, reflected on, and rationalized their exercise of power.[37] The second line of investigation concerns the particular technologies through which power is made operable. Each act of intervention by an IO can be understood as a complex assemblage, made possible only by an extensive network of often heterogeneous and ill-fitting elements – such as existing bureaucratic systems and procedures, pragmatic instruments of observation and measurement, methods of notation and calculation, architectural plans and arrangements of space, physical mechanisms and devices, and actors who may have their own, quite distinct goals.[38] Such assemblages are inherently fragile and require continuous work to maintain; the goal of analysis here is to show what linkages and relays enable that work to be carried out. In what follows, I develop the argument that a careful analysis of the rationalities and technologies of IO power will reveal profound interconnections with the processes of modern state formation.

3. State Formation and the Dynamic of Liberal Reform

This part of the article introduces a new and innovative body of scholarship, the theoretical insights of which have not been brought into conversation with international legal scholarship before now, which defines "the state" in nominalist terms and sees state formation as a cultural process.[39] It then outlines the claim that the interlinked processes of IO growth and modern state formation are sustained by a logic of liberal

[36] See generally Rose and Miller, 'Political Power beyond the State: Problematics of Government', 43 *Brit. J. Sociology* 173 (1992).
[37] See M. Foucault, *The Birth of Biopolitics* 2 (Burchell trans., 2008).
[38] See Dean, 'Putting the Technological into Government', 9 *Hist. Hum. Sci.* 47 (1996).
[39] See, e.g., G. Steinmetz (ed), *State/Culture* (1999); T. B. Hansen and F. Stepputat (eds), *States of Imagination* (2001); and A. Sharma and A. Gupta (eds), *The Anthropology of the State* (2006).

reform that continually redefines what it means for a state to be "modern", and which is at once internal and external to the law.

A. State Formation as Cultural Process

Conventional approaches to the state in political science treat it as an objective fact. In this view, which is reflected in most international law scholarship, the state is a 'distinct, fixed and unitary entity':[40] a centralized set of institutions wielding coercive authority over a particular territory and population.[41] This article rejects such a static and objectivized understanding of states, stressing instead the great variability in their meaning, forms, and powers. From this perspective, "the state" has no essence and is not a self-producing source of power.[42] To treat state formation as a cultural process, then, is to direct attention to the specific assemblage of rationalities and technologies – the 'practices, techniques, programmes, knowledges, rationales and interventions'[43] – that make up a state at any particular time.

As a growing number of scholars in diverse fields recognize, the functions and powers exercised by states are historically contingent and have emerged over a lengthy period of time. The work of sociologist Michael Mann, for example, depicts the gradual displacement of 'despotic' by 'infrastructural' state powers, the latter consisting of the state's 'institutional capacity... to penetrate its territories and logistically implement decisions... [a] collective power, "power through" society, coordinating social life'.[44] Moreover, these infrastructural powers grew out of and built upon a diversity of diffuse governing practices. Philip Gorski has thus demonstrated that the 'infrastructure of governance' underlying state bureaucracies, armies, and schools can be traced back to religious roots, in the emergence of 'a network of practices and institutions' during the

[40] Sharma and Gupta, 'Introduction: Rethinking Theories of the State in an Age of Globalization', in Sharma and Gupta, *supra* note 39, 1 at 8.
[41] *Cf.* Montevideo Convention on Rights and Duties of States 1933, art. 1 ('The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.').
[42] See Foucault, *supra* note 37, at 77.
[43] P. Miller, 'On the Interrelations between Accounting and the State', 15 *Accounting, Orgs & Soc'y* 315, 317 (1990).
[44] M. Mann, 2 *The Sources of Social Power* 59 (1993).

Protestant Reformation.[45] From the eighteenth century onward, these diverse elements were gradually united under more or less centralized control, as European states

> increasingly made their power visible... through the gradual extension of "officialising" procedures that established and extended their capacity in many areas. They took control by defining and classifying space, making separations between public and private spheres; by recording transactions such as the sale of property; by counting and classifying their populations, replacing religious institutions as the registrar of births, marriages, and deaths; and by standardizing languages and scripts.[46]

The rationales and techniques of power that constituted early modern states were made possible by novel regimes of power and knowledge, linked to the emergence of new forms of scientific truth and expertise.[47] A century ago, Max Weber drew attention to the importance of techniques such as double-entry book-keeping and filing systems in the construction of rational-legal authority in modern Western states.[48] Some of the most important practices associated with the construction of the centralized bureaucratic and military apparatuses of early modern states (such as Frederick the Great's Prussia and pre-revolutionary France) were what Michel Foucault called the 'disciplines':[49] those microtechnologies that work in a molecular way, shaping individual subjectivities through subtle, repeated procedures of discipline and normalization, such as enclosure and surveillance, partitioning and ranking, drills and examinations.[50] Other technologies of state power emerging during the same period operated in a more molar or holistic manner, aiming to regulate the large processes of life by acting upon populations through macroeconomic and demographic techniques of intervention.[51] And related techniques of 'state simplification' – maps, censuses, cadastral surveys, title

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[45] P. Gorski, *The Disciplinary Revolution* xvi (2001).
[46] B. S. Cohn, *Colonialism and Its Forms of Knowledge* 3 (1996).
[47] See generally M. Foucault, *Power/Knowledge* (Gordon ed, 1980).
[48] See M. Weber, 1 *Economy and Society* 92-93 (Roth and Wittich eds, 1978); and M. Weber, 2 *Economy and Society* 956*ff*. (Roth and Wittich eds, 1978).
[49] See T. Mitchell, 'Society, Economy, and the State Effect', in Steinmetz (ed), *supra* note 39, 76 (ch 2) at 90.
[50] See M. Foucault, *Discipline & Punish* 141-156, 171-192 (Sheridan trans., 1977); and C. Dandeker, *Surveillance, Power & Modernity* (1990).
[51] See M. Foucault, 1 *The History of Sexuality* 139 (Hurley trans., 1978); and Rabinow and Rose, 'Biopower Today', 1 *Biosocieties* 195 (2006).

deeds, and standard units of measurement – were used to reduce a large and complex reality to 'schematic categories' that would facilitate legibility, comparison, and governmental action.[52]

It is useful, therefore, to think of the "state" as a kind of superstructure or codification of powers that is formed by the 'gradual, piecemeal, but continuous takeover by the state of a number of practices, ways of doing things, and, if you like, governmentalities'.[53] Embodying these various techniques and rationales of state power, contemporary states are the composite structural effects of repeated practices and representations that produce an appearance of solidity and "thingness". The appearance of "external" state structures depends upon the 'repetitive re-enactment of everyday practices' and an array of images and discourses about the state that create a sense of continuity and coherence.[54] "The state" is produced and reproduced imaginatively by the banal and technical routines of bureaucracies; by everyday representations in newspapers, in government reports, and on television;[55] by mundane procedures that establish territorial boundaries, such as immigration applications, passport inspections, and fencing;[56] and by the aggregation of manifold dealings and exchanges in multiple settings that generate a 'powerful, apparently metaphysical effect'.[57] The meaning and limits of the state continue to be constructed and contested on a daily basis in an ongoing and disorderly process of social interaction, all of which paradoxically reinforces the sense of the state's "reality".

So understood, state formation includes the construction of systems of rule in colonial territories, the creation of "new" states at independence, and their ongoing formation and reformation thereafter. This line of argument builds upon a growing literature that highlights the formative experience of European imperialism in the creation of modern states. As several studies have shown, European imperial expansion supplied highly productive "laboratories" for experimentation with new practices of government, including the creation of large-scale bureaucracies and a whole range of

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[52] J. C. Scott, *Seeing Like a State* 77 (1998). Also see Mitchell, *The Rule of Experts* (2002).
[53] Foucault, *supra* note 37, at 77.
[54] Sharma and Gupta, *supra* note 40, at 13, 19.
[55] See Ferguson and Gupta, 'Spatializing States: Toward an Ethnography of Neoliberal Governmentality', 29 *Am. Ethnologist* 981 (2002).
[56] *Cf.* W. Brown, *Walled States, Waning Sovereignty* (2010).
[57] Mitchell, *supra* note 49, at 89.

administrative techniques such as surveying, mapping, collecting, counting, recording, and standardizing.[58] Far from being a one-way imposition, the rationalities and technologies of colonial government were often first tested in overseas colonies and then repatriated and applied in metropolitan states.[59] Moreover, the world-wide diffusion of such practices established the infrastructures of state power that made universal sovereignty – a central feature of the present-day multilateral liberal international order, but only recently achieved through the efforts of anti-colonial movements after World War II – at least imaginable if not welcomed by European state officials.

B. Liberal Reform and IOs

As the discussion above suggests, the process of state formation is profoundly shaped by a complex and ever-evolving web of global forces. Thinking of state formation in this way makes it possible to identify a number of major transnational configurations or "forms" of the state – associated with absolutism, laissez-faire liberalism, colonialism, Keynesian welfarism, post-colonial developmentalism, neoliberalism, and so on – each of them viewed as "modern" in their own time and place. Of course, listing a series of major state forms in a putatively chronological order runs the risk of both reifying those forms and implying the existence of a singular path of modernization determined by the historical experience of particular Western societies. Both would be mistaken. Instead, the key to understanding the shifting definition of what makes a state "modern" is the diffusion and adoption of a particular problematic that demands constant adjustments to the practices of state power.

As a critical ethos and practice that defines modern state rule, liberalism is constantly concerned with the problem of 'governing too much'.[60] Taking individual freedom as the principle and limit of governmental action, liberalism posits a number of domains of liberty – including civil society, the market, economy, and family – which are subject to their own "natural" laws and dynamics, and with which the state should

[58] See, e.g., Cohn, *supra* note 46; Appadurai, 'Number in the Colonial Imagination', in C. A. Breckenridge and P. Van der Veer (eds), *Orientalism and the Postcolonial Predicament* 314 (1993); Scott, 'Colonial Governmentality', 43 *Social Text* 191 (1995); Kalpagam, 'The Colonial State and Statistical Knowledge', 13 *Hist. Hum. Sci.* 37 (2000); and S. Legg, *Spaces of Colonialism* (2007).
[59] See generally Cohn, *supra* note 46, at 3-4.
[60] M. Foucault, *Security, Territory, Population* 385 (Burchell trans., 2007).

interfere to the least extent possible.[61] Paradoxically, however, liberalism also endorses and legitimizes numerous interventions at the level of both society and the individual. On the one hand, certain compensatory mechanisms of "security" – such as health insurance schemes, old age pensions, public health and hygiene programmes – are seen as necessary to ensure and support individual freedom in the face of a whole range of risks inherent in modern life. On the other hand, freedom itself cannot be exercised unless individuals have acquired the capacities for autonomous action and self-mastery. Where such capacities are lacking they must be instilled through the application of appropriate disciplinary techniques, even to the point of requiring interventions that would otherwise be considered despotic or authoritarian.[62] This tension is present in that key text of liberalism, John Stuart Mill's On Liberty:[63]

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children... For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. ... Despotism is a legitimate mode of government in dealing with barbarians, provided that the end be their improvement...

Together, these contradictory pulls – requiring the state to assume additional powers in order to govern more, to provide greater social security and to create the preconditions for freedom; while also demanding that it intervene less, relinquish its powers, or devolve them to other, non-state actors – produce the endlessly recursive, reiterative dynamic of liberal reform. What counts as a "modern" state, then, depends largely upon a continual (re)definition of 'what should or should not fall within the state's domain, what is public and what private, what is and is not within the state's competence'.[64] Nor do these definitions "evolve" along a discernible trajectory: ideas and practices that are rejected as being overly interventionist at one time may be retrieved, reconfigured and put to use again at a later date; and techniques of government that may be considered

[61] See generally N. Rose, *Powers of Freedom* (1999); and P. Miller and N. Rose, *Governing the Present* (2008).
[62] *Cf.* Valverde, '"Despotism" and Ethical Liberal Governance', 25 *Econ'y & Soc'y* 3 (1996); and Hindess, 'The Liberal Government of Unfreedom', 26 *Alternatives* 93 (2001).
[63] J. S. Mill, *On Liberty* 81 (Bromwich and Kateb eds., 2003).
[64] Foucault, *supra* note 60, at 109.

inappropriate in "advanced" states may be justified simultaneously as necessary for the tutelage of "backward" or "infantile" societies.[65]

The dynamic of liberal reform is deeply embedded in the language and categories of law. As a fundamental feature of liberal thought and practice, legal-rational authority has been closely associated with modern, Western government since at least the 19th century.[66] Law not only enables sovereign power in an overall sense, but also places limits upon that power, defines the boundaries between state and the several domains of liberty mentioned above, delineates institutional architectures, and assigns specific powers to different state organs. Disciplinary institutions such as schools, prisons, and hospitals are all supported and interpenetrated by a latticework of legal rules. All mechanisms of "security" likewise rest upon a framework of empowering legislation and are checked and controlled by a complex set of administrative regulations. Any perceived imbalance between freedom, discipline, and security requires a corresponding adjustment in law. Public law has accordingly developed a sophisticated variety of principles and doctrines – the rule of law, Rechtsstaat, limited powers, individual rights, prerogative powers, and so on – which supply a technical vocabulary for debates over whether there is too much law, not enough law, or the wrong kind of law.[67] And each of these concepts has been applied, at one time or another, to the realm of international law and the activities of IOs.

The larger argument being advanced here, then, is that much of IO growth can be seen as supporting, and gaining social legitimacy from its support of, a dynamic of liberal reform that continually redefines what it means for a state to be "modern". Appearing at the precise historical moment that the liberal ethos took hold, IOs were from the start understood to be necessary adjuncts to the promotion and consolidation of liberal government within states. To be clear, this is not yet another version of the old functionalist argument that IOs are created and evolve to meet state needs. Rather, it is an interpretive claim about the web of meanings – the background assumptions, beliefs, and discourses – that are embodied in and make sense of institutional practices. To describe those practices and meanings is not to endorse them. It is to seek a fuller

[65] This helps to explain how imperialism may be seen as internal to liberalism: *Cf.* U. S. Mehta, *Liberalism and Empire* 20, 31-33 (1999).
[66] See Weber, *supra* note 48 [Vol. 1], at 215*ff.*
[67] See M. Loughlin, *Foundations of Public Law* (2010).

understanding of the motivations, and thereby a better explanation of the actions, giving rise to IO growth.[68] The next part of this article begins the task of illustrating and exemplifying this claim by considering the birth and growth of the earliest IOs as auxiliaries to projects of liberal reform and European state-building, both at home and overseas, during the 19th century.

4. A New Global Rationality: IOs and State Formation in the 19th Century

The general story of the emergence of IOs in the 19th century is well known to international lawyers.[69] In most tellings, the first IOs (or proto-IOs)[70] – river commissions, public international unions, and international administrative unions – were established in Europe to solve problems and meet the functional and technical needs of European states.[71] Few such accounts relate this phenomenon to the remarkable upsurge in state (not to mention empire) building during the same period.[72] By re-examining the activities of the earliest IOs in the wider context of state formation and liberal reform, however, new light may be cast on the dynamics of IO growth and the rationalities and technologies of IO power more generally. This part of the article considers those activities in three broad clusters: bolstering the new liberal political economy that shaped states in the first half of the century; reforming the ideas and practices of government in response to the social problems arising out of rapid industrialization and urbanization; and constructing systems of colonial rule. In doing so, this part of the article is intended to demonstrate that the dynamic of liberal reform is congenital to IOs – not as functional need or goal, but as a problematic that has structured their growth ever since.

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[68] See Bevir and Rhodes, 'Defending Interpretation', 5. *Eur. Pol. Sci.* 69 (2006)

[69] See Kennedy, 'The Move to Institutions', 8 *Cardozo L. Rev.* 841 (1987); G. J. Mangone, *A Short History of International Organization* (1954); I. L. Claude, *Swords into Plowshares* (4th ed, 1971)

[70] Not all of these organizations would meet the definition of an IO under ILL today; several would be classed as hybrid public-private regulatory bodies, and treated as a distinct class of 'global administration': see Krisch and Kingsbury, *supra* note 20, at 17. For the sake of brevity, however, and at the risk of over-simplification, all such bodies are referred to here as IOs.

[71] See, e.g., Mangone, *supra* note 69, at 67-97; and Claude, *supra* note 69, at 21-40.

[72] See, e.g., Peters and Peter, 'International Organizations: Between Technocracy and Democracy', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* ch 7 (2012). For an excellent exception, see C. N Murphy, *International Organization and Industrial Change* 46- 118 (1994).

A. *Liberal Political Economy*

The early 19th century was a period of transition from one set of ideas and practices of state power, to another, quite different rationality of government. The former was associated with the policies of self-sufficiency prescribed by raison d'état: the maintenance of European equilibrium through the organization of a permanent military-diplomatic apparatus, famously described by Vattel as having made Europe into a 'kind of republic';[73] mercantilist strategies for maximalizing state wealth by ensuring a trade surplus, maintaining gold and silver reserves, and increasing the size of the population; and the cameralists' ever-expanding science of public administration (Polizeiwissenschaft), which sought to safeguard the welfare of the state through the detailed regulation and supervision of every aspect of its subjects' lives.[74] The 'new form of political calculation on an international scale' that replaced these older ideas linked together liberal political economy, growing industrialization, and the potential for unlimited commercial expansion by European states.75

The practical corollaries of the new rationality were a policy of governmental restraint, a rejection of the overreaching regulatory ambitions of cameralism and Polizei, and economic laissez-faire.76 Building on the free-trade philosophy of the French physiocrats whilst rejecting their belief that agriculture was the only productive sector, Adam Smith and his followers sought to demonstrate that markets – and civil society more broadly – had their own intrinsic, 'natural' processes and regularities, which could be neither completely understood or nor directed.[77] Immanuel Kant gave hopeful expression to a similar notion in his assurance that the ultimate guarantee of Perpetual Peace was nature itself, which 'visibly exhibit[ed] the purposive plan of producing concord among men' through the power of the world-spanning 'spirit of

[73] E. de Vattel, *The Law of Nations* 496 (Kapossy and Whatmore eds., 2008).
[74] See Tribe, 'Cameralism and the Sciences of the State', in M. Goldie and R. Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* ch 18 (2006).
[75] Foucault, *supra* note 37, at 58.
[76] See Neocleous, 'Policing and Pin-making: Adam Smith, Police and the State of Prosperity', 8 *Policing & Soc'y* 425 (1998).
[77] Smith's *Inquiry into the Nature and Causes of the Wealth of Nations* was first published in 1877; its insights were later systematized and promoted in David Ricardo's *On the Principles of Political Economy and Taxation* was first published (1817), and by Richard Cobden and others. See Rothschild, 'Political Economy', in G. S. Jones and G. Claeys (eds), *The Cambridge History of Nineteenth-Century Political Thought* ch 22 (2011).

commerce', finance, and 'mutual self-interest'.[78] A corresponding movement in European legal thought, equally hostile to the absolutist state, emerged around the same time: in Germany, jurists developed the concept of Rechtsstaat in an effort to reconcile the competing demands of state power and modern liberty,[79] and the growth of legal codification and constitutionalism throughout the 19th and early 20th centuries 'gradually transform[ed] national systems of rule' worldwide.80

Paradoxically, the practical implementation of liberal political economic ideas was made possible by an enormous growth in the legislative and administrative capacities of European states. Led by the work of manifold expert-led reform movements, the necessity of constructing and extending commercial markets resulted in an 'explosion of governmental intervention'.[81] As Karl Polanyi put it: 'There was nothing natural about laissez-faire; free markets could never have come into being merely by allowing things to take their course.'[82] It was only through a significant expansion of the state that "free trade" could be constructed.[83]

Novel technologies of inter-state coordination reinforced the growth of national administrations to support these new directions. Like municipal law, international law became increasingly codified throughout the century, in the writings of "positivist" theorists from von Martens onwards and in a proliferation of multilateral treaties;[84] and the 'new global rationality'[85] was also embodied in some of the earliest formal IOs. Following the end of the Napoleonic Wars, the Congress of Vienna (1814-15) inaugurated the Concert of Europe, condemned slavery, and ushered in a new era of modernity in European culture, sciences, and diplomatic relations.[86] Consistent with the liberal spirit of the age, a committee was formed at Vienna to negotiate terms for the freedom of navigation, commerce and trade on European rivers. The Final Act of the

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[78] H. *Reiss (ed), Kant: Political Writings 108, 114 (2nd ed., 1991).*
[79] Loughlin, *supra* note 67, at 318.
[80] Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', 51 *Int'l Org*. 555, 577. Also see Loughlin, *supra* note 67, at chs 10-11.
[81] MacLeod, 'Introduction', in R. MacLeod (ed), *Government and Expertise* 1, 9 (1988).
[82] K. Polanyi, *The Great Transformation* 139 (1957).
[83] *Id*.
[84] See Koskenniemi, 'Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law' 15 *Constellations* 189 (2008); and Reus-Smit, *supra* note 81, at 578. Recall that the term "international law" was only coined by Bentham in 1780: see Armitage, 'Globalizing Jeremy Bentham', 32 *Hist. Pol. Thought* 63, 72-73 (2011).
[85] Foucault, *supra* note 37, at 56.
[86] See P. Johnson, *The Birth of the Modern* (1991).

Congress established a Central Commission for the Navigation of the Rhine to achieve those purposes,[87] and several other similar commissions were created in subsequent years.[88]

These new organizations linked up with and augmented the work of national administrative bodies to create an infrastructure for the continued expansion of European markets. One of the most important in this respect was the International Telegraph Union (ITU), created by the International Telegraph Convention of 1865.[89] First installed in the late 1830s along railway lines, commercial telegraphy served both to improve the efficiency of that transport system – including, importantly, the transportation of commercial goods – and to provide a new, almost instantaneous mechanism for financial transactions.[90] Telegraph companies were among the first organizations to develop complex bureaucratic management structures, and had already started to build a far-flung network with trained managers supervising local telegraph offices.[91] Established to connect and regulate the separate networks being created by private telegraph companies, the ITU helped to construct an integrated system for rapid exchange of communications and capital, described at the time as replacing 'the old local and national seclusion and self-sufficiency' with 'intercourse in every direction, universal interdependence of nations'.[92] As Paul Reinsch wrote in 1911, discussing the 'new internationalism' exemplified by the ITU:[93]

> The ideal of the civilized world with respect to economic relations is that the entire surface of the globe should be rendered readily accessible to the enterprise of any individual, and that rapid and uninterrupted communication should make possible a uniform management and control of the natural resources which humanity has inherited.

[87] See Reinalda, *supra* note 29, at 28-30.
[88] See Mangone, *supra* note 69, at 68-73.
[89] See generally G. A. Codding Jr, *The International Telecommunication Union* (1972).
[90] See Reinalda, *supra* note 29, at 85.
[91] See Barry, 'Lines of Communication and Spaces of Rule', in A. Barry, T. Osborne and N. Rose (eds), *Foucault and Political Reason* 123, 136 (1996); and A. D. Chandler, Jr., *The Visible Hand* (1977).
[92] K. Marx and F. Engels, *The Communist Manifesto* 8 (1998 [1848]).
[93] P. Reinsch, *Public International Unions* 3 (1911). On Reinsch's contribution to a 'functionalist' approach in IIL, see Klabbers, *supra* note 19.

An assortment of new IOs pursued the same ideal. The Universal Postal Union (UPU, established in 1874), the International Association of Railway Congresses (1885), the Central Office for International Railway Transport (1890), and the Radiotelegraph Union (1906) further supported the international circulation of capital, goods, and ideas. The International Unions for the Protection of Industrial Property (1883) and of Literary and Artistic Works (1886), together with and the Hague Conference on Private International Law (1893), sought to regularize the intellectual and other property rights that lay at the foundation of the new global economy. The International Bureau of Weights and Measures (1875) and the International Bureau of Commercial Statistics (1913) drew on the new social sciences linked to political economy to aim at a greater degree of uniformity and legibility in international trade, 'so that commercial transactions [could] be carried on conveniently and honestly'.[94] And organizations such as the International Union for the Publication of Customs Tariffs (1890) and the "Sugar Union" (1902) institutionalized the principle of free trade by making state subsidies and surcharges visible to their members.[95] The structure of the ITU – comprising two organs, a conference and bureau, whose functions were set out in a Convention and supplementary règlement – established a general model for these other IOs.[96] While some variability persisted, then, their general form – constituted by formal legal agreements and set up as legal-rational bureaucratic entities – reflected the new liberal ideology, no less than their particular goals and activities.

B. The Social Question

A range of problematic conditions accompanied the expansion of European commercial activity. Population growth, spreading industrialization and urbanization in Europe were attended by mounting anxieties regarding the "social question". Pictured as a realm of disorder located "between" the economy and the state, "the social" was associated with multiple interlinked problems connected to a large, underemployed proletariat: 'economic crisis, mass poverty, disease, pestilence, decay,

[94] Moreau, 'The Genesis of the Metric System and the Work of the International Bureau of Weights and Measures', 30 *J. Chem. Educ.* 3, 3 (1953).
[95] See Fakhri, 'The Institutionalisation of Free Trade and Empire: A Study of the 1902 Brussels Convention', *2 London Rev. Int'l L.* 1 (2014)
[96] See L. Woolf, *International Government* 157, 164, 205-208 (1916).

crime, immorality... urbanization, and unprecedented geographic mobility'.[97] These conditions, in turn, provided an array of productive rationales for governmental action.[98]

The social was thus already constituted as an object of intervention in the first half of the 19th century. The decades immediately following the Congress of Vienna witnessed a dramatic increase in the use of expert technologies to widen and deepen the powers of European states. Disciplinary techniques that had developed over prior centuries – now linked up with the emergence of new human sciences such as clinical medicine, psychology, penology, and criminology – were marshalled to manage and control the proletariat in factories, prisons, schools, and professional armies.[99] Utopian socialist thinkers, claiming to have invented a 'new science of man and society', generated all manner of experimental, technocratic schemes to achieve that end.[100] Meanwhile, European governments sought to master the new technologies of demography and economics, establishing centralized offices to collect statistics on all aspects of society, and resulting in an 'avalanche of printed numbers' in the years 1820-40.[101]

As the century progressed, a rising concern with social welfare gave further impetus to the expansion of administrative states.[102] Traumatic upheavals all around the world – including colonial wars and rebellions, civil wars, wars of national independence, and working class insurrections – marked the century's midpoint, and were followed by the reconstitution and consolidation of state power to an unprecedented degree.[103] That reaction included massive public works schemes such as Baron Haussman's redevelopment of Paris, which emphasized 'simplification, legibility, straight lines, central management, and a synoptic grasp of the ensemble', both to

[97] G. Steinmetz, *Regulating the Social* 57 (1993).
[98] See Rose, *supra* note 61, at ch 3 (titled 'The Social').
[99] *Cf.* Foucault, *supra* note 50, at 209-228.
[100] Picon, 'Utopian Socialism and Social Science', in T. M. Porter and D. Ross (eds), 7 *Cambridge History of Social Science* 71 (ch 5) (2003).
[101] See I. Hacking, *The Taming of Chance* 27-34 (1990). Also see generally T. M. Porter, *The Rise of Statistical Thinking 1820-1900* (1986); and A. Desrosieres, *The Politics of Large Numbers* (1998).
[102] See generally J. Donzelot, *The Policing of Families* (1977).
[103] See Maier, 'Leviathan 2.0: Inventing Modern Statehood', in E. Rosenberg (ed), *A World Connecting* 29 (ch 1), 69-170 (2012).

improve public health and to secure the city against social disorder and insurrections.[104] But it also included a range of other reforms. Spurred on by the continent-wide revolutions of 1848, the European response to laissez-faire liberalism was, as Polanyi shows, the spontaneous introduction of legislation on a wide range of issues, including 'public health, factory conditions, ... public utilities, trade associations, and so on'.[105] Each of these legislative measures in turn introduced a new technology of "social" government: workmen's compensation, factory inspections, vaccination programs, and eventually social insurance, most notably in Bismarck's Germany.[106]

By the century's end, the social comprised a central feature of the 'transnational legal consciousness'.[107] As legislation and state bureaucracies grew haphazardly to address the manifold problems associated with industrialization, population growth, and urbanization, administrators began to see themselves as the active agents of reform, culminating in a 'revolution in government'.[108] Reacting to the vast social disruptions wrought by industrialization and urbanization, progressive legal thinkers in both Europe and North America promoted a flexible, 'living' conception of law that would permit adaptation, social legislation, and reform.[109] The idea of social solidarity – associated in France with the sociology of Émile Durkheim, the jurisprudence of Léon Duguit, and the politics of Léon Bourgeois – grounded the state's legitimacy in laws that guaranteed social security, public health, employment, and individual development, and assumed a dominant position as the 'official social philosophy' of the Third Republic.[110] Similar ideas, steering a middle path between individualist laissez-faire liberalism and revolutionary socialism, were espoused by the progressive movement in the United

[104] Scott, *supra* note 52, at 59-61.
[105] Polanyi, *supra* note 83, at 147. Also see generally D. Roberts, *Victorian Origins of the British Welfare State* (1960).
[106] See Steinmetz, *supra* note 98; and Dahl, 'State Intervention and Social Control in Nineteenth-Century Europe', 1 *Contemp. Crises* 163 (1977).
[107] See Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development* 19 (ch 2), 37-42 (2006).
[108] See MacDonagh, 'The Nineteenth-Century Revolution in Government: A Reappraisal', 1 *Hist. J.* 52 (1958).
[109] See Kennedy, *supra* note 107.
[110] See Hayward, 'The Official Social Philosophy of the French Third Republic: Léon Bourgeois and Solidarism', 6 *Int'l Rev. Soc. Hist.* 19 (1961); Hayward, 'Solidarity: The Social History of an Idea in Nineteenth Century France', 4 *Int'l Rev. Soc. Hist.* 261 (1959); and P. Rabinow, *French Modern* 184-195 (1989).

States, the New Liberals in England, and comparable movements elsewhere in Europe.[111]

Coordination through IOs facilitated transnational diffusion of the rationalities and technologies of social government. Concerned with 'all that relates to the moral and physical amelioration of prisoners', the International Penitentiary Commission (1875) enabled its members to share the latest methods of 'prison administration, penal law, prevention of crime, and juvenile delinquencies'.[112] The International Office of Public Hygiene (1907) and the International Association of Public Baths and Cleanliness (1912) encouraged governments to take on greater responsibility for public health problems that were especially linked to the working classes, and promoted techniques for their more effective management. Further promoting the refinement of state infrastructural powers aimed at regulating populations and disciplining individuals, the International Institute of Administrative Sciences (1910) circulated information about 'the most efficient ways to carry out and further extend the expanding functions of the state'.[113] As contemporary observers noted, all of this burgeoning international activity, far from detracting from state sovereignty, directly bolstered and extended it:[114]

> The process of international organization frequently favors the expansion of the sphere of the national government. When interests are organized upon an international basis, the persons and associations concerned begin to see more clearly how their purposes may be furthered through state action. They consequently demand new legislation as well as the expansion of the administrative sphere... [I]n every way the state is encouraged to make the fullest use of its powers.

Most significant of all in this regard was the International Labour Office. Established in 1903 as a secretariat to the International Association for Labour Legislation (IALL), a semi-official body that was partly government-funded and included a number of well-known European public figures and politicians, the IALL represented a model of social

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[111] See D. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (1998); J. T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (1986); and Freeden, *The New Liberalism: An Ideology of Social Reform* (1978).
[112] Reinsch, *supra* note 93, at 56-57.
[113] Murphy, *supra* note 72, at 100.
[114] Reinsch, *supra* note 93, at 140.

reform that promoted social legislation as an alternative to violent revolution; its most notable successes were in producing the 1906 conventions that prohibited night work for women and the use of white phosphorous in the manufacture of matches. The Office supported the IALL's work, carrying out inquiries into specific issues relating to working conditions, especially in factories.[115] Later serving as a prototype for the International Labour Organization, the Office exemplified the internationalisation of concerns regarding the security of individual freedom in the conditions of modern, industrial society.[116]

C. Colonial Government

Finally, IOs were seen as vital instruments for the extension of liberal government to territories and populations outside Europe, as well as within it. International law in the 19th century was understood to apply to a limited 'family of nations' which met a 'standard of civilization' defined by European values and governmental practices.[117] The new 'international administrative unions' established in the same century were distinctive, however, in admitting members from outside that 'family', including colonies and so-called 'semi-civilised states' such as Turkey and China.[118] In these territories, as in Europe, IOs undertook a wide range of activities that reflected the contradictory demands of liberalism, pursuing reforms to enable the construction of "free" commercial markets, the disciplining of individuals, the mitigation of social problems, and the regulation of populations affected by them.

Europe's borderlands were particular sites of experimentation with regulatory forms of power relating to 'the calculated management of life'.[119] One such experiment arose from the threat of 'devastating invasions of epidemic diseases', like plague and cholera, from the East.[120] The fear of such 'Asiatic invasions' led European states to institute a series of international organs, whose functions were to establish sanitary and

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[115] See J. W. Follows, *Antecedents of the International Labour Organization* 157-176 (1951); and Delevingne, 'The Pre-War History of International Labor Legislation', in J. T. Shotwell (ed), 1 *Origins of the International Labor Organization* ch 2 (1934).
[116] See generally Sinclair, *supra* note 13, at Ch 2.
[117] See Koskenniemi, *supra* note 7, at 49*ff*.; and Anghie, *supra* note 7, at 35, 59*ff*.
[118] See Howland, 'An Alternative Mode of International Order: The International Administrative Union in the Nineteenth Century', *Rev. Int'l Stud*. FirstView Article (May 2014).
[119] Foucault, *supra* note 51, at 140.
[120] Woolf, *supra* note 97, at 222.

quarantine measures at key oriental capitals along trade and Islamic pilgrimage routes: the Conseil supérieur de Santé, created in 1838 at Constantinople; the Conseil sanitaire, maritime, et quarantenaire d'Egypte (1881), which was to 'act as an international guard' at the Suez Canal, 'that dangerous passage for disease between Asia and Europe'; and similar councils at Alexandria and Teheran.[121] Putting European scientific knowledge to work for modern state formation, the Sanitary Councils introduced and applied disciplinary techniques of separation, inspection, and surveillance,[122] at once to enhance the welfare of local populations and to defend European civilization at its frontiers.[123]

These Councils were part of a larger European effort to reform and modernize the administration of countries in the Near East. Modernization meant more centralized institutions, standardized practices, professionalization and legalization: the work of "civilizing" meant 'structuring and establishing what was perceived to be a "European-style" order'.[124] At around the same time, Saint-Simonist and Benthamite reformers were enthusiastically disseminating a range of utopian technocratic schemes, including disciplinary institutions modelled on Bentham's Panopticon, to places like India, the Ottoman Empire, and Egypt.[125] But reforms such as these were not simply top-down, European projects of civilization; they were embraced and led by local elites who adopted similar values and seized the opportunity to consolidate power and advance their own national projects.[126]

IOs more generally came to be seen as vehicles for administrative reform in non-European societies, and for the projection of European rationales and techniques of government as universally normative. In 'countries with inefficient or backward governments', IOs were given substantial powers of control over local situations to ensure that they were administered appropriately.[127] The Danube Commission, for example, was established in the aftermath of Crimean War to ensure the necessary

[121] *Id*. at at 223, 231.
[122] See, e.g., F. B. Sayre, *Experiments in International Administration* 54 (1919) (stating that the Sanitary Council at Alexandria 'exercises a permanent surveillance over the public health of Egypt').
[123] Also see N. Howard-Jones, *The Scientific Background of the International Sanitary Conferences 1851-1938* (1975).
[124] Chahrour, '"A Civilizing Mission"? Austrian Medicine and the Reform of Medical Structures in the Ottoman Empire, 1838-1850', 38 *Stud. Hist. Phil. Biol. & Biomed. Sci.* 38, 39 (2007).
[125] See T. Mitchell, *Colonising Egypt* x, 16, 35 (1991).
[126] See L. Kuhnke, *Lives at Risk: Public Health in Nineteenth-Century Egypt* (1990).
[127] Sayre, *supra* note 122, at 14.

dredging and improvement of the river mouths, 'which could never have been expected under Turkish rule'.[128] Granted significant powers by a Public Act, the Commission fixed and collected tolls, licensed vessels, imposed fines and penalties, exercised complete control over the port at Sulina, and even established and managed two hospitals there.[129]

As European state administrations followed their national commercial concerns overseas, existing IO models were adapted to serve as supplementary mechanisms of indirect rule in their growing formal and informal empires. European creditor nations formed international commissions to address cases of 'serious disorganization in the financial system of the state' in Egypt (1878) and Turkey (1880), and similar systems were instituted to reform the financial affairs of Greece (1897) and Macedonia (1906).[130] The General Act of the Berlin Congress (1885) authorized the creation of an International Commission, based explicitly on the model of the Rhine and Danube commissions, to guarantee equal rights of commerce the Congo and the Niger rivers; and like commissions were constituted to govern the use of the Suez Canal and the Huangpu River in China.[131]

IOs exercising less overt control over territory and populations also aided in universalizing Western models of administration while extending European state power. Postal agencies in the most significant overseas colonies and dependencies of the Great Powers, for example, were integrated into the UPU by being granted separate membership and representation on its committees – a move which simultaneously gave the metropolitan states significantly greater voting power within the organization.[132] Seen as effective means of colonial government "at a distance", a global postal and telegraph service, promoted by the UPU and ITU respectively, permitted a mode of surveillance that could help to safeguard the political security of European states and their empires.[133] The telegraph, in particular, 'minimize[d] the need for the physical

[128] *Id*. at 40. Also see generally Krehbiel, 'The European Commission of the Danube: An Experiment in International Administration', 33 *Pol. Sci. Qtly* 38 (1918).
[129] See *Id*. at 41-45.
[130] Reinsch, *supra* note 93, at 75.
[131] See Sayre, *supra* note 122, at 68-79 and 84-91.
[132] See Woolf, *supra* note 96, at 199-200. Under the General Act of the Berlin Conference, for example, the UPU Convention was specifically applied to the Congo: see art. 7.
[133] See Barry, *supra* note 91, at 137-138.

presence of the police or the military', and allowed them to be used economically.[134] In establishing international standards to ensure the integrity of communications, therefore, these IOs facilitated the development of specifically liberal technologies of empire.[135]

Finally, IOs became part of the repertoire of authority and influence exercised by a formerly colonized country and rising great power outside Europe. For most of the 19th century, the United States remained on the periphery of the new European mechanisms for international cooperation, probably because the construction of an administrative state at the federal level only began as a 'patchwork' process towards the end of that period.[136] The first IO that the U.S. joined was the International Commission for the Cape Spartel Light, established in 1865 to manage a lighthouse on the Moroccan Coast, at the Straits of Gibraltar.[137] But its most significant engagement was in the International Union of American Republics (1889), which led to the creation of an International Bureau of the American Republics and was the forerunner of the present-day Organization of American States (1948). Undoubtedly, the Union offered a convenient tool for the U.S. to extend its influence and commercial interests in South America.[138] It is noteworthy, however, that the Union's existence was also legitimated by broader goals of national state formation, making the Bureau 'an efficient agent in assisting the internal development of the American republics',[139] including through the sponsorship of a Pan-American Sanitary Bureau.[140] As elsewhere, that 'internal development' was defined by reference to the values and goals of liberal government.[141]

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[134] *Id*. at 138.
[135] *Id*. Also see D. R. Headrick, *The Invisible Weapon* ch 4 (1991).
[136] See Herren, 'Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century', in M. H. Geyer and J. Paulmann (eds), *The Mechanics of Internationalism* 121 (ch 5), 135-136 (2001); S. Skowronek, *Building a New American State* (1982); and M. G. Hannah, *Governmentality and the Mastery of Territory in Nineteenth-Century America* (2000).
[137] See Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', 36 *Va. J. Int'l L.* 276 (1996).
[138] See Reinsch, *supra* note 93, at 85. Any suspicion that this was the case could only have been strengthened after the Spanish-American War of 1898 and the U.S. annexation of overseas colonies in Puerto Rico, the Philippines, and elsewhere.
[139] Reinsch, *supra* note 93, at 99.
[140] See B. J. Lloyd, 'The Pan American Sanitary Bureau', 20 *Am. J. Pub. Health* 925.
[141] See *Id*. at 77*ff*.

5. Conclusion

In this article, I have argued that the growth of IOs can best be understood in light of their role in the formation of modern states. Both processes, I have suggested, are impelled by a dynamic of liberal reform which, by seeking to maximize liberty, requires constant fine-tuning of state institutions, individuals, and society. The article offers a preliminary illustration and substantiation of these claims with an analysis of the activities of the earliest IOs in the 19th century. In doing so, it attempts to shed light on the promise and perils of reform in international law.

Picturing IO growth as contributing to state formation and driven by the demands of liberal governmental practice offers a productive framework for re-theorising change within IOs. The 20th-century 'move to institutions'[142] is usually depicted as a series of great waves following traumatic upheavals in international politics, such as the two World Wars, the global shocks of the 1970s, and the end of the Cold War. While not discounting the significance of such founding moments, this article suggests that it might be at least as fruitful to focus attention on the ongoing, informal expansion of powers exercised by IOs at other times. Rational choice theorists regard such change as driven by exogenous factors, in particular the strategic behaviour of states (assumed to be self-interested and exhibiting relatively stable preferences); neo-functionalists and constructivists focus on endogenous factors, such as the culture and ideology of IO officials.[143] By giving priority to one or the other, all three approaches overlook those socio-legal discourses and practices that operate internally and externally at once, and thus constitute both endogenous and exogenous drivers of change in IOs. In contrast, attending to the dynamic of liberal reform allows us to see change in IOs as the outcome of an ongoing and disorderly process of struggle over meaning in a variety of settings, national and transnational, legal and political.

This analytic framework casts light on other theoretical questions as well. As I show, formal inter-governmental institutions first emerged as auxiliaries to the interlinked projects of European state- and empire-building. Linking liberal reform to state formation gives specific content to the civilizing mission of IOs and international

[142] See Kennedy, *supra* note 69.
[143] See Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO', 59 *Vand. L. Rev*. 649, 657-671 (2006).

law more generally from the 19th century onwards. At the same time, it highlights to important continuities between the rationales and techniques of governance in metropolitan, colonial, and decolonized states. It aids in understanding how the concerns motivating the establishment of the earliest IOs – communications and transport, trade and property, public administration and good governance – remain central in the activities of IOs and global governance today. And it helps to explain the puzzling, seemingly contradictory goals and purposes pursued by IOs, such as the "neoliberal" policy prescriptions of the World Trade Organization, International Monetary Fund and World Bank, on the one hand, and the more socially-oriented programmes of the International Labour Organization and United Nations Development Program, on the other.[144]

The dynamic model of state formation and IO growth outlined here thus draws attention to the undercurrents of debate, contestation, and experimentation within each "era", making visible similarities in the patterns of thought and practice from "civilization" to "modernization" to "globalization", from post-war 'embedded liberalism'[145] to turn-of-century "neoliberalism", and from state-centred development to global governance. It reveals that the ideal of modern government has always involved efforts to reform individual character, desires, and attitudes, and culture, no less than the structures of society as a whole. It implies that the "new" forms of governance emerging at the turn of the twenty-first century may not be so new after all. It makes more intelligible long-term 'geological' shifts in the practices and structures of global governance.[146] Finally, it establishes a firm analytical basis for a separate and no less important task: the evaluation and critique of the ever-expanding range of powers exercised by IOs.

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[144] See, e.g., Joshi and O'Dell, 'Global Governance and Development Ideology: The United Nations and the World Bank on the Left-Right Spectrum', 19 *Global Governance* 249 (2013). Also *cf*. Guzman, *supra* note 19 (using rational choice premises to explain the large number and variety of IOs).

[145] See Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', 36 *Int'l Org*. 379 (1982).

[146] Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *ZAÖRV* 547 (2004).

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