Political Science Research on International Law: The State of the Field

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The discipline of political science has developed an active research program on the development, operation, spread and impact of international legal norms, agreements and institutions. Meanwhile, a growing number of public international lawyers have developed an interest in political science research and methods.[2] For more than two decades there have been calls and

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[2] See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 3 (1999); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997); JACK L. GOLDSMITH &

frameworks for international lawyers and political scientists to collaborate.[3] Some prominent collaborations are under way—sharing research methods and insights.[4]

ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STANFORD L. REV. 959 (2000); Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in THE RELEVANCE OF INTERNATIONAL LAW 133 (Karl W. Deutsch & Stanley Hoffmann eds., 1968); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Jutta Brunnée & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105 (2002); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L. L. 384 (1996); Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. (2011, forthcoming); Jonathan B. Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context,* 108 YALE L.J. 677 (1999).

[3] For important work encouraging the collaboration between the two fields, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989) (presenting an overview of international relations theory and discussing legal scholars' approach to it); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda,* 87 AM. J. INT'L. L. 205, 220 (1993) (discussing the changes in the approach of international relations scholars to international law); Robert Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, *in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 3 (Robert J. Beck, Anthony Clark Arend, & Robert Vander Lugt eds., 1996).

Yet the two fields are still notable for their distance.[5] Exchanging insights has been difficult in part because the fields are organized around different objectives and speak to different audiences. Most political science scholarship within international relations is focused on questions—such as on the role of power in the world, how governments cooperate to manage collective problems such as environmental pollution, and the rise and spread of norms that affect political behavior—for which international law is just one of many forces at work. The current generation of political scientists, like scholars across the social sciences, has focused heavily on the role of institutions, but often

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[4] For reviews of the progress of this collaboration, see Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9 (2005); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006); Symposium, *Rational Choice and International Law*, 31 J. LEGAL STUD. 1 (2002); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997) (noting a significant convergence in the research agendas of international relations and international law); Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (reviewing the convergence of international relations and international law scholarship and providing a bibliography of sources); Jeffrey L. Dunoff, *Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas*, 1 J. INT'L L. & INT'L REL. 191 (2005).

[5] Stephen D. Krasner notes that, while international relations scholarship has become increasingly interested in international law, "[t]he term 'international law' still hardly ever occurs in the titles of articles published in the three leading international relations journals, *International Organization, International Studies Quarterly*, and *World Politics*. *What's Wrong with International Law Scholarship?: International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93 (2000), footnote 6. This trend is now shifting. See generally Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship: A Review and Prospectus*, AM. J. INT'L L. (2012, forthcoming).

political science scholarship has not clearly distinguished the roles of customary international law, formal legal agreements such as treaties, and organizations such as tribunals—treating them, instead, as a loosely defined amalgam of "legal institutions." Matters of central importance to public international lawyers, such as the specific procedures for setting and interpreting the content of international treaties, are largely ignored or not understood. The audience mainly has been graduate students in training for careers in academic political science and other like-minded scholars. Most public international lawyers, by contrast, are focused more squarely on law itself. While there are many different traditions in international law,[6] most public international law is concerned about the content of law—such as the reasoning, phrasing and application of legal obligations, exceptions, interpretations and judicial decisions, along with the operation of legal institutions.[7] Their audience mainly consists of legal professionals and policy makers. Such differences in objectives and audiences help explain why scholars from these two fields often study similar phenomena but with quite different research questions, methods and findings.

Despite differences, there are large and growing intersections between the fields. In contrast with two decades ago, when much of international relations focused on interstate cooperation, today's scholarly community is looking at a much wider array of questions that is particularly well-suited to collaboration with international lawyers.[8] For example, both fields are concerned with the design and impact of legal institutions, such as treaties and other forms of international agreements. Research within political science is becoming richer through the awareness of how legal institutions actually function; scholars in international law are gaining from the sophisticated methods for

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[6] See generally Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999).

[7] We thank Ken Abbott for emphasizing this point.

[8] We thank Martha Finnemore for this point.

empirical research and testing of hypotheses that have emerged from political science and other social sciences.

This essay offers a fresh survey of what political science has learned that may be of special interest to international lawyers. More than 20 years have passed since the last large essay of this type.[9] During that interim the field of political science has made substantial progress in some areas and also shifted its focus to new questions. The field is far from unified, and in this essay we help explain some of the major debates. For lawyers who are not familiar with political science scholarship, our aim is to introduce some of the basic concepts and methods that could contribute to their own research. For the growing number of legal scholars already engaged with research in political science and the other social sciences our aim is to offer a roadmap to political science research that might not yet be apparent and suggest some areas where collaboration is likely to be especially fruitful.

Rather than surveying the entire field of political science about international relations we focus on research that is most relevant for what public international lawyers actually do. We concentrate, therefore, on three areas: a) the *design and content* of international legal institutions--not just treaties and non-binding agreements but also the many organizations that interpret and apply international legal content; b) the *evolution and interpretation* of international legal norms,

[9] See Abbott, *supra* note 3. While Abbott's essay was the last major one that took a broad survey of political science that relates to public international law, in the intervening two decades there have been many other essays that also review aspects of political science research for international lawyers as well as points of collaboration between the fields. For a partial update of Abbott's original essay applied to a particular topic--internal conflicts such as civil wars--see Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 362 (1999).

including customary law as well as standards that are written into treaty-based law; and c) the *effectiveness* of legal institutions on the behavior of governments, courts, firms and individuals.

Political scientists see legal institutions and processes through the lens of politics. In Part I, we lay three *building blocks* that are a foundation for most international relations research on politics. The first is *power*. For political scientists this concept is central to explaining which topics are on the agenda and how political processes interact with legal institutions. Second are the *types of problems* that governments and other actors create and also try to manage with international legal agreements. Some problems are marked by strong incentives for countries to skirt their legal agreements while others have a structure that more readily yields international cooperation. One aspect of "problem type" that political scientists usually find important is uncertainty; one of the roles of international institutions is to help provide information that lowers uncertainty and help states manage the effects of uncertainty. A third building block is *domestic politics* – the ways in which the internal political affairs of countries and their systems of government—including judicial processes and jockeying for influence by interest groups—shape how international rules are made, interpreted and applied. These building blocks are at the heart of how most political scientists understand and analyze the design, content and impact of international legal institutions. As in any mature field, political scientists have diverse research agendas; many of those differences trace back to the relative emphasis that different scholars place on these building blocks.

In Part II, we focus on what political scientists have learned about the *design and content* of international agreements that might be of interest to public international lawyers.[10] Much of the political science research in this area has focused on how international institutions, including legal agreements, help lower the "transaction costs" that governments experience when they try to

[10] See, *infra* notes 131 to 184 and corresponding text.

coordinate their behavior. Political scientists have been interested in transaction costs for decades.[11] But over the last decade a coherent body of research has emerged to explain why governments make particular choices when they design international legal institutions—such as the precision and flexibility of agreements, the inclusion of enforcement mechanisms, scope, and the extent to which commitments are legally binding. Another body of research has emerged around the view that this perspective is too narrow. Together, these bodies of research on legal design are one of the prime areas for further collaboration between the fields.

In Part III we review how political scientists have studied the *evolution* of international law, including how legal norms are constructed, interpreted and spread. Of particular relevance to lawyers is the emerging research on courts and judicial decisions as well as scholarship on the development, spread and application of norms.

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[11] See, e.g., ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983). On the role of institutions in lowering transaction costs by reducing uncertainty, see DAVID A. LAKE, ENTANGLING RELATIONS: AMERICAN FOREIGN POLICY IN ITS CENTURY (1999). Attention to transaction costs builds on a large literature, mainly in economics and decision theory, on the role of information in bargaining. On the role of information generally, see ERIC RASMUSEN, GAMES AND INFORMATION (2d ed., 1994). On the problem of uncertainty in multiparty negotiations, see generally HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); David Lax & James K. Sebenius, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, *in* NEGOTIATION ANALYSIS 153 (Peyton Young ed., 1991). On the mechanism by which uncertainty increases transaction costs, see George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION (1975).

In part IV we look at the *effectiveness* of international law. Here, the contributions of political science are not only in revealing when legal institutions actually have a practical impact but also in the methods for measuring and explaining effectiveness. Because governments can select and influence the content of agreements and which agreements they join, formal measures of compliance often don't reveal much about whether legal institutions actually have an effect.[12] Indeed, some of the most effective legal institutions are those whose formal levels of compliance are very low.

Already there are many areas where some scholars collaborate across these two fields, and building a larger and more effective program requires a careful look at the places where gains from collaboration are likely to be greatest. In part V we suggest several such areas. Those include research on the origins and impact of customary international law. There are also large gains from collaboration, we suggest, where the research tools from political science can be combined with the important substantive and procedural expertise of international lawyers—for example, in the design of legal agreements that allow states flexibility in how they implement their legal commitments. And while we will point to many areas for collaboration and learning between the fields, it is also clear that there are some areas where the two fields—because of different research questions and methods—are not primed for collaboration.

Part I: Building blocks

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[12] See George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996); Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998). But see LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979) ("Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

Here we focus on the core concepts that are building blocks for most political science research on international relations: a) power, b) the structure of international cooperation, and c) domestic politics. These building blocks start with power, which has been eternally fundamental to political science; they include structure, which political scientists have long recognized has a large impact on shaping the success of efforts at inter-state cooperation; to these we add domestic politics, for one of the most important frontiers in political science research concerns how the national and international realms interact. These organizing concepts, which are quite distinct from the starting points for most international legal scholarship, help explain the focus of political science research and also areas where collaboration would be most fruitful.

Power

First is power, which is fundamental to how most political scientists study behavior and advance their interests. One of the major distinctions between research in international relations and international law has been that the former usually starts with power whereas most research on public international law, with important exceptions, places relatively little emphasis on power.[13] Most political science research looks first to governments and their ability to coerce other governments as the main type of power at work in international affairs; most public international lawyers, by contrast, look to the authority of legal norms and institutions as independent forces that shape behavior. For many years the emphasis that so-called "realist" political scientists placed on

[13] But see, e.g., Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006); GOLDSMITH & POSNER, *supra* note 2. Other legal scholars emphasize different forms of power that, for example, lead to discrimination against certain groups. See, e.g., Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

state power led to the stereotype that power was a force that worked in opposition to law.[14] Today, very little political science research adopts that simple view of power; it looks, instead, at the ways that power interacts with other forces, including law, to shape outcomes. A central role for power does not make international law irrelevant or imply that international law has no effect on its own. Rather, international law can be a conduit for weak and powerful, alike, to magnify their influence.

Political scientists and other social scientists have found it useful to distinguish power that comes in four "faces."[15] The first is power in its most obvious, blunt form: the ability to coerce.[16] The second "face" is the ability to influence the decision-making agenda and process.[17] The third face is the ability to shape what people want and believe, such as through the spread of norms and

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[14] See KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (arguing that international rules are the pronouncements of powerful states, and are subject to change along with the distribution of state power); John J. Mearsheimer, *The False Promise of International Institutions,* 19 INT'L SECURITY 5 (1994-95) (arguing that international institutions cannot have independent effects on state behavior); HANS MORGENTHAU, LA NOTION DU "POLITIQUE' ET LA THEORIE DES DIFFERENDS INTERNATIONAUX 65-71 (1933) (arguing that international law is biased toward stability). For a review of the influence of realist thought on legal scholarship, see Steinberg & Zasloff, *supra* note 13.

[15] See generally STEVEN LUKES, POWER: A RADICAL VIEW (1981). See also Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39 (2005).

[16] See generally Robert A. Dahl*, The Concept of Power*, 2 BEHAVIORAL SCI. 201 (1957).

[17] See generally Richard McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control,* 12 J. ECON. THEORY 472 (1976); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979); William Riker, *Implications from the Dis-equilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980).

the creation of interests and identities.[18] And a fourth face is discursive, which means that influence stems from the creation and interpretation of systems of knowledge and understandings that form social customs, such as laws and other systems of belief and practice.[19]

The First Face of Power

Power in its most obvious form is the ability to coerce—to get another actor to behave in ways it would not volunteer. Power of this form can be exercised in many forms, notably with positive incentives (also called carrots or inducements) and penalties (often called sticks).

The starting point for some international relations scholarship is to analyze how governments use incentives and penalties to influence each other and how other actors use the same instruments to influence governments. While many governments try to coerce others directly, many international relations scholars see legal institutions playing a major role in shaping how states (and other actors) use their power.[20] Across a wide array of issue-areas scholars have also documented

[18] See, *infra* notes 30 to 43 and corresponding text.

[19] See, *infra* notes 44 to 68 and corresponding text.

[20] For example of work by so-called "realist" scholars on the interaction of state power and international legal institutions, see John G. Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, 23 INT'L SECURITY 43 (1998) (arguing that while state power is a dominant force, the Western order and post-WWII institutions have endured and facilitated cooperation despite changes in the power of their creators); Robert Pape, *Soft Balancing against the United States*, 30 INT'L SECURITY 45 (2005) (arguing that other powers are likely to respond to growing U.S. power using "soft-balancing" non-military tools, including international institutions); Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85 (2004) (arguing that states should deploy a variety of new domestic and international institutional arrangements to govern failed states where there are vacuums in power); and William C. Wohlforth, *The Stability of a Unipolar World*, 24 INT'L SECURITY 1 (1999) (arguing that, as a unipolar power, the U.S. should maintain international security institutions in order to

how state power determines the content and evolution of treaties and other international legal institutions.[21]

The Second Face of Power: Agenda setting

The second face of power is the ability to influence the agenda. That a variety of actors shape the range of choices from which decisions are made is not news to international legal scholars, but political scientists have developed two sets of insights that reveal how power affects agendas. One insight from research that focuses on agenda-setting is that states and other actors frame agendas in predictable ways by linking issues together. Control over linkage can constrain and

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reduce conflict behavior and limit expansion by other major powers); LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS (2000) (focusing on the ability of extremely powerful states to "go it alone" in creating international laws and institutions that mirror their interests at the expense of other states that participate only because they have no better option.)

[21] For example, scholarship on the Nonproliferation Treaty (NPT) has explored how powerful countries mobilized both inducements and penalties in support of the treaty's goals. See Trevor McMorris Tate, *Regime-Building in the Non-Proliferation System*, 27 J. PEACE RESEARCH 399 (1990) (arguing that major powers are keeping the regime's aim global, thereby insulating it from political wrangling both on domestic and international levels); James F. Keeley, *Legitimacy, Capability, Effectiveness and the Future of the Non-Proliferation Treaty*, *in* NUCLEAR NONPROLIFERATION AND GLOBAL SECURITY (David Dewitt ed., 1987) (arguing that certain powerful members are more apt to strengthen or weaken the regime than others); Harald Müller, *Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement*, 7 NONPROLIFERATION REV. 77 (2000) (arguing that in order for the NPT to be effective, powerful states must be able to visibly and effectively sanction violators, or at least delegate sufficient resources and backing to an agent of the regime to do so).

expand the bargaining space, making it harder for outside (unlinked) issues to attract attention.[22] It helps define the issue-area within which legal agreements attempt to regulate behavior. Most scholarship has focused on how governments use linkage to set agendas, but there is growing interest in how international institutions link issues in ways that give them control over agendas and the framing of decisions.[23]

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[22] See generally Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 INT'L ORG. 425 (1979); James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281 (1983); James E. Alt & Barry Eichengreen, *Parallel and Overlapping Games: Theory and Application to the European Gas Trade*, 1 ECON. & POL. 119 (1989); Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 WORLD POL. 357 (1980). Yet linkage is also used strategically by international negotiators to expand their negotiating space. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988). Susanne Lohmann argues that issue linkage fosters cooperation when actors enforce punishments in one policy area for lack of compliance in others. *Linkage Politics*, 41 J. CONFLICT RESOL. 38 (1997). Michael D. McGinnis makes a similar argument, yet notes that the attempts to introduce new issues to be linked are perilous and may result in the breakdown of cooperation. *Issue Linkage and the Evolution of International Cooperation*, 30 J. CONFLICT RESOL. 141 (1986). Christina Davis argues that issue linkage can be particularly useful for overcoming domestic obstacles to cooperation. *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153 (2004).

[23] See Mark Pollack, *Delegation, Agency and Agenda Setting in the European Community*, 51 INT'L ORG. 99 (1997) (arguing that it is important to distinguish between IOs' formal and procedural agenda-setting powers and their informal powers. He argues that the European Commission's formal agenda-setting powers are stronger when a greater number of members of the Council of Ministers must vote to amend an EC proposal than to adopt it). See also George Tsebelis, *The Power of the European Parliament as a Conditional Agenda*

Second, information and expertise can confer agenda-setting power on actors that do not have the material capabilities to use coercive power. For example, networks of academic scientists played a large role in formulating arms control agreements during the Cold War, such as through their command of special knowledge about geology essential for designing legal agreements to regulate nuclear testing.[24] Firms have also been particularly influential where they have had unique expertise, as the chemical industry did in setting the "schedules" of chemicals regulated by the chemical weapons treaty.[25] NGOs have also been influential in a diverse array of efforts—from banning landmines to regulating small arms and protecting wildlife—by working not only as advocates but also in providing information regarding the problem and by framing their favored solutions.[26] In some instances firms have been able to control agendas by shifting regulation from formal intergovernmental bodies to private regulatory systems where they have more control over

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Setter, 88 AM POL. SCI. REV. 128 (1994); Geoffrey Garrett & George Tsebelis, *An Institutional Critique of Intergovernmentalism*, 50 INT'L ORG. 269 (1996); George Tsebelis & Amie Kreppel, *The History of Conditional Agenda-Setting in European Institutions*, 33 EUR. J. POL. RESEARCH 41 (1998).

[24] They also played important roles, in tandem, with lobbying, second-track diplomacy, and consulting for political leaders. See Emanuel Adler, *The Emergence of Cooperation: National Epistemic Communities and the International Evolution of the Idea of Nuclear Arms Control*, 46 INT'L ORG. 101 (1992); HAROLD KARAN JACOBSON & ERIC STEIN, DIPLOMATS, SCIENTISTS, AND POLITICIANS: THE UNITED STATES AND THE NUCLEAR TEST BAN NEGOTIATIONS (1966).

[25] See Amy E. Smithson, *Implementing the Chemical Weapons Convention*, 36 SURVIVAL 80 (1994).

[26] See Diana O'Dwyer, *First Landmines, Now Small Arms? The International Campaign to Ban Landmines as a Model for Small Arms Advocacy*, 17 IRISH STUD. IN INT'L AFF. 77 (2006). See also Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613 (1998). On wildlife, see *infra* note 178.

outcomes.[27] A few studies have looked at how those private regulatory systems, in turn, affect legalization.[28]

The Third Face: Norms and ideas

The third face of power is the ability to shape, through the spread of norms and ideas, what societies see as legitimate and acceptable. Political scientists have long argued that norms have important effects on outcomes in international relations.[29] The most recent research has emphasized that norms have influence independent of the distribution of state power; they shape behavior by providing states and non-state actors with information about interests, and they carry social

[27] See David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. (2008); David Vogel, *The Private Regulation of Global Corporate Conduct*, *in* THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods eds., 2009). One of the frontiers of research in this area concerns how the option of private regulation and the ability of firms to control access to essential information. For a survey of current research on private regulation, including several studies that point to the interplay between private and public regulation, see *Private Regulation in the Global Economy*, special issue of BUS. & POL. (Tim Büthe ed., 2010).

[28] See, e.g., Annegret Flohr, *Hard, Soft or Fuzzy? Corporate Self-Regulation and International Legalization in the Financial Sector*. Dissertation, Technischen Universität Darmstadt (2011).

[29] Earlier political science research on international institutions (called "regimes" in the most influential study on this topic in the early 1980s) included a place for norms, but this was generally limited to facilitating cooperation between similarly self-interested actors or constraining their behavior. See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982); Krasner, *supra* note 11; Keohane, *supra* note 11.

content.[30] For example, norms influence behavior not only by setting standards but also create hierarchies with norm-compliant behavior at the highest level.[31]

This perspective on power is particularly conducive to collaboration between political scientists and international lawyers since legal institutions can have influence by codifying and shaping social norms.[32] Indeed, legal scholars have long examined similar questions, unpacking the normative power of legal institutions.[33] Among the many practical debates that have emerged from

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[30] See Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565 (1993); MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); PETER J. KATZENSTEIN, THE CULTURE OF NATIONAL SECURITY (1996); AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID (1995); YASEMIN NUHOGLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994).

[31] See ANN TOWNS, WOMEN AND STATES: NORMS AND HIERARCHIES IN INTERNATIONAL SOCIETY (2010).

[32] Several legal scholars argued that international law has the power to create and/or change norms and influence state behavior. See, e.g., HENKIN, *supra* note 12; Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997). In recent years political scientists have helped elaborate on those arguments. See, e.g., Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 111 AM. POL. SCI. REV. 573 (2007).

[33] See, e.g., Koh, *supra* note 32 (arguing that a transnational legal process consisting of three phases—interaction, interpretation, internalization— provides the necessary description of how international norms become successfully internalized and state obedience becomes second nature). For similar views, see also CHAYES & CHAYES, *supra* note 12; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Robert Howse, *The Legitimacy of the World Trade Organization*, *in* THE LEGITIMACY OF

scholarship in law and political science, alike, has been the question of whether international institutions suffer in their legitimacy due to a "democratic deficit" that might be addressed, for example, by more formal involvement of civil society groups in the making and implementation of international law.[34]

While the argument that norms matter is not news to legal scholars or political scientists, the focus in political science research in recent years has been much more sharply on the mechanisms by which norms arise, spread and influence behavior.[35] Much of the political science research in this area looks at the particular individuals and organizations that are the agents that craft, interpret and spread ideas along with particular norms—for example, such studies have focused on the roles

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INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001). Many of these process-oriented approaches to studying law build on what is known as the New Haven Approach and resonate with process-oriented theories from political science (i.e., models based on the third and fourth faces of power and rooted in processes such as persuasion and legitimacy). See generally HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY (1992). See also PHILLIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990).

[34] See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1999); Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGES (Ian Shapiro ed., 1999); Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF. 2(2001); Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336 (2004).

[35] Much of that work has been within what political scientists call the "constructivist" paradigm and focused on the social actors and mechanisms within societies that cause change and "construct" meaning and behavior. See Jeffrey Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998).

of international tribunals, advocacy networks (e.g., NGOs), firms, scientists, and arbiters of moral authority such as churches.[36] Such studies usually focus on an array of social processes, not just the law or legal institutions, to explain the rise and impact of norms.[37] An example of just one of many

[36] For a study that focuses on international legal institutions, including international organizations, as agents of norm creation and influence see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998) (arguing that international criminal tribunals decrease violence because prosecutions present and reinforce legal norms providing legally binding judgments about what behavior is acceptable). A similar theory to Goodman and Jinks (*infra* note 54) is proposed in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999). See also Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999) (arguing that the rational-legal authority that IOs embody gives them power independent of the states that created them and channels that power in particular directions. Bureaucracies make rules, but in so doing they also create social knowledge, define shared tasks, create and define new types of actors, create new interests for actors, and transfer models of political organization around the world.)

[37] See Janice Thomson, *State Practices, International Norms, and the Decline of Mercenarism*, 34 INT'L STUD. Q. 23 (1990) (analyzing the role of the behavioral norms around use of mercenaries, although her analysis has implications for legal norms in this area); Kathryn Sikkink, *The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe*, *in* IDEAS AND FOREIGN POLICY (Judith Goldstein and Robert O. Keohane eds., 1993) 139; Kathryn Sikkink, *Human Rights, Principled Issue-Networks and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993); Klotz, *supra* note 29; Audie Klotz, *Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences*, 8 EUR. J. INT'L REL. 49 (2002).

areas where there is a large political science literature is the rights of women—an area where the spread of norms has had a big effect on international law and vice-versa.[38]

Political science research that emphasizes this face of power has helped explain how and when norms diffuse across state borders. One argument is that diffusion is more likely when common social categories construct ties between social entities and when there is a "cultural match" between a norm and a target country.[39] Other arguments focus on the role of activists and other

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[38] See Towns, *supra* note 31; Ann Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below*, INT'L ORG. (forthcoming, 2012). See also Carol Miller, *Women in International Relations? The Debate in Inter-War Britain*, *in* GENDER AND INTERNATIONAL RELATIONS (Rebecca Grant & Kathleen Newland eds., 1991) 64; Carol Miller, *Geneva- the Key to Equality: Inter-War Feminists and the League of Nations*, 3 WOMEN'S HIST. REV. 219(1994); DEBORAH STIENSTRA, WOMEN'S MOVEMENTS AND INTERNATIONAL ORGANISATIONS (1994); SANDRA WHITWORTH, FEMINISM AND INTERNATIONAL RELATIONS. TOWARDS A POLITICAL ECONOMY OF GENDER IN INTERSTATE AND NON-GOVERNMENTAL INSTITUTIONS (1997); NITZA BERKOVITCH, FROM MOTHERHOOD TO CITIZENSHIP. WOMEN'S RIGHTS AND INTERNATIONAL ORGANISATIONS (1999); Bob Reinalda, *The International Women's Movement as a Private Political Actor Between Accommodation and Change*, *in* PRIVATE ORGANISATIONS IN GLOBAL POLITICS (Karsten Roint & Volker Schneider eds., 2000) 165.

[39] See Jeffrey Checkel, *Norms, Institutions, and National Identity in Europe*, 43 INT'L STUD. Q. 83 (1999) (defining cultural match as "a situation where the prescriptions embodied in an international norm are convergent with domestic norms," which are reflected in the legal system and bureaucratic agencies (p.87). He also argues that the mechanism of norm diffusion varies depending on the domestic structure.) See also Amy Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POL. 413 (1999) (arguing that international norms have been crucial in causing changes in Japanese policy toward Korean migrant workers, both through legal action and activist pressure on governments.); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L

norm entrepreneurs—for example in spreading norms against racism that, in turn, affected the legal organization and use of sanctions against apartheid-era South Africa.[40] Most research that has looked closely at the diffusion of legal norms sees an array of factors at work in tandem—such as perceptions of whether new norms are economically beneficial (a factor that helps to spread American law worldwide) along with whether new norms are linguistically and institutionally compatible.[41] Others argue that legitimacy is the key to trans-national norm diffusion; more

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ORG. 633 (2000) (finding that the number of international human rights norms incorporated into international and regional Latin-America law significantly increased between the mid-1970s and 1990s); J.C. Sharman, *Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States*, 52 INT'L STUD. Q. 635 (2008) (using survey and interview data to argue that the recent adoption of anti-money laundering policies by 170 countries represents an example of international norm diffusion caused by "discursively mediated exercises of power", and not by coercion or learning). See also DANIEL THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM (2001).

[40] See Klotz, *supra* note 38 (on the role of activism and transnational movements in norm diffusion). See also Klotz, *supra* note 29 (arguing that norms have a constitutive, rather than solely constraining, effect on interests). The idea that there are norm entrepreneurs of various types has been studied widely, although usually not with much specific focus on the law. See, e.g., Christine Ingebritsen, *Norm Entrepreneurs: Scandinavia's Role in World Politics* 37 COOPERATION & CONFLICT 11 (2002).

[41] See Benjamin Brake & Peter J. Katzenstein, *The Transnational Movement of American Procedural Law: Circulating Legal Norms and Practices*, manuscript, Cornell University (2011) (challenging the conventional idea that legal norms tend to diffuse primarily across similar legal systems and focusing, instead, on linguistic, conceptual and epistemic mechanisms).

legitimate rules give actors an internal sense of obligation and yield higher levels of compliance with international standards.[42]

The Fourth Face: Doxa and the common sense

The fourth face of power is the ability to create "social doxa"—that is, opinions or "sets of belief widely espoused by popular audiences."[43] While the third face of power is based on a notion of real, underlying interests the fourth face concentrates on persuasion and communication as a source of power. This distinction between underlying interests and persuasion reflects the intellectual origins of these two concepts of power—the former rooted in political economy of Marx and the latter in sociology of Foucault who studied the influence of informal social customs and practices.[44]

In the fourth face the source of power arises through control over processes such as acculturation, socialization, debate and persuasion—all processes of growing interest to political

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[42] See Ian Hurd, *Legitimacy and Authority in International Politics*, 52 INT'L ORG. 379 (1999). See also Michael N. Barnett, *Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations*, 49 WORLD POL. 526 (1997). See also Towns, *supra* note 31 (arguing that diffusion of norms is a function of hierarchy where positions within the hierarchy are determined by conformity with norms—leading to diffusion from high position countries to the lesser ranked).

[43] ANDREEA DECIU RITIVOI & PAUL RICOEUR: TRADITION AND INNOVATION IN RHETORICAL THEORY (2006).

[44] See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977); Michel Foucault, *Two Lectures*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 (Colin Gordon ed., Leo Marshall, John Merpham, & Kate Soper trans., 1980); Michel Foucault, *Politics and Ethics*, *in* THE FOUCAULT READER (Paul Rabinow ed., 1984). We thank Ann Towns for making this point.

scientists. In practice, such studies have often combined the third and fourth faces of power because the causal mechanisms they study combine elements of both—for example, acculturation and socialization lead to changes in underlying interests and a process of debate can alter perceptions of legitimacy and influence of legal norms.[45] Accounts of international law and politics of this type are based on the idea that international legal institutions are political creations designed to structure and frame political debates and shape how states use their authority.[46] Legal processes shape which norms are seen as valid and focus debates on areas in which the conditions for compliance are

[45] See, e.g., POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005), at 3 (referring to this as "Productive Power" or "the socially diffuse production of subjectivity in systems of meaning and signification."); Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, *in* Id. (arguing that international organizations have power as a result of the authority conferred on them because of their moral position, rational-legal standing and expertise. This authority takes many forms, including the ability to use productive power to "participate in the production and the constitution of global governance."); Helen M. Kinsella, *Securing the Civilian: Sex and Gender in the Laws of War*, *in* Id. (arguing that the categories of "combatant" and "civilian" embodied in the Geneva Convention are "dependent upon discourses of gender that naturalize sex and sex difference."); Kai Alderson, *Making Sense of State Socialization*, 27 R. INT'L STUD. 415 (2001) (exploring, from a theoretical perspective, how changes in beliefs, political pressure and institutionalization help explain the process of state socialization).

[46] See Christian Reus-Smit, *The Politics of International Law*, *in* THE POLITICS OF INTERNATIONAL LAW (Christian Reus-Smit ed., 2004) Chapter 2 (arguing that institutions are "created by political actors as structuring or ordering devices, as mechanisms for framing politics in ways that enshrine predominant notions of legitimate agency, stabilise individual and collective purposes, and facilitate the pursuit of instrumental goals", p.36).

contested by the followers of a norm.[47] In this process, some studies have focused on how international organizations—not just states—shape outcomes by influencing how problems are framed and discussed.[48] A few studies have focused squarely on how the legal nature of these processes "construct" meaning and shape outcomes—for example because legal argumentation operates by reference to rules and relies heavily on analogy it operates by assigning guilt and focusing praise, and thus concentrates debates on the content of legal norms.[49]

Political science scholarship on the mechanisms of persuasion has focused on the role of rhetorical argument in international relations and on explaining how social processes like persuasion and argumentation differ from other processes that have been the mainstay of political science research, such as strategic bargaining, coercion through inducements, and rule-guided behavior.[50] One of the many points of intersection between this work and legal scholarship is the

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[47] See Antje Wiener, *Contested Compliance: Interventions on the Normative Structure of World Politics*, 10 EUR. J. INT'L REL. 189 (2004) (arguing that a "reflexive" understanding of law helps explain how social practice changes the normative structure of law). See also Antje Wiener, *Contested Meanings of Norms: A Research Framework*, 5 COMPARATIVE EUR. POL. 1 (2007).

[48] See MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE World (2004) (arguing that international organizations have authority in part because they "orient action and create social reality" (p. 6).)

[49] See FRIEDRICH V. KRATOCHWIL, RULES NORMS, AND DECISIONS (1989) (focusing on the style of legal argumentation and the role of legal norms in decision-making—including how they help reduce uncertainty in contracting).

[50] See, e.g., NETA C. CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITICS: ETHICS, DECOLONIZATION, AND HUMANITARIAN INTERVENTION (2002); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000) (claiming that arguing creates common knowledge both about the rules of the game and the definition of the situation and allows actors to seek an optimal solution and common normative framework.) See also Henry Farrell, *Constructing the International*

role of legal rhetoric in determining the range of options available to decision makers—what political scientist Ronald Krebs calls "rhetorical coercion" or "rhetorical entrapment," concepts he has studied by focusing on arguments that the George W. Bush administration used to justify invasion of Iraq and the use of torture following the events of September 11, 2001.[51] Some studies of persuasion also see a large role for social learning.[52] However, there are many disagreements on the points of emphasis and causal mechanisms—or even whether it is useful to describe the process of persuasion in terms of cause and effect.[53]

Foundations of E-Commerce: The EU-U.S. Safe Harbor Arrangement, 57 INT'L ORG. 277 (2003) (examining the preference-changing effects of persuasion.); Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG. 33 (2009((arguing that states' willingness to give up sovereignty to the ICC resulted from persuasion during negotiatins that caused states' interests to change).

[51] See Ronald R. Krebs & Jennifer K. Lobasz, *Fixing the Meaning of 9/11: Hegemony, Coercion, and the Road to War in Iraq*, 16 SECURITY STUD. 409 (2007) (focusing on the role of argumentation in the lead-up to the U.S. invasion of Iraq, arguing that the Bush administration used the "War on Terror" as a means of legitimizing the use of force. While not focused on international law explicitly, this line of argument affected the context in which international legal norms were interpreted and adjusted while inconvenient norms ignored or explained away as not relevant.)

[52] See Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553 (2001).

[53] See, e.g., Rodger A. Payne, *Persuasion, Frames and Norm Construction*, 7 EUR. J. INT'L REL. 31 (2001) (arguing that much of the constructivist literature focuses excessively on persuasion and framing and overlooks the underlying social processes that determine the outcome of highly contested normative struggles); Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric,* 13 EUR. J. INT'L REL. 35 (2008) (emphasizing the role of rhetoric but suggesting that

Legal scholars are working with similar concepts rooted in the same intellectual origins. For example, international lawyers look at the process of acculturation—such as through redefining the orthodoxy and through mimicry—as a way that legal norms and institutions have a force quite distinct from the first three faces.[54] In law and political science alike there has been extensive attention to "deliberative democracy"—that is, democratic ordering through debate and persuasion—as an explanation for legitimacy and effectiveness of legal agreements and policy decisions. That line of logic has been applied in legal scholarship to possible reforms within international organizations such as the United Nations Security Council.[55] In their major new study,

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others have been incorrect in focusing on its role in persuasion rather than coercion); Christian Grobe, *The Power of Words: Argumentative Persuasion in International Negotiations*, 16 EUR. J. INT'L REL. 5 (2010) (bridging persuasion-based arguments with the focus on strategic bargaining found in the rational choice literature, arguing that rational actors will only be receptive to persuasion or argumentation when such communication provides them new causal knowledge that helps alleviate uncertainty—implying that, when bargaining positions change, this is the result of changes in available information rather than changes in preferences.)

[54] See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (2005) (arguing that although most theories attribute state compliance to coercion and persuasion, acculturation is a social mechanism that profoundly affects state behavior and yet has been largely misunderstood or unexplained.)

[55] See IAN JOHNSTONE, THE POWER OF DELIBRATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS (2011) (arguing that the Security Council can address its "deliberative deficit" through a series of procedural reforms that will be politically easier to achieve than other widely discussed reforms such as changes in membership. The reforms he proposes are based on the theory of deliberative democracy).

international lawyers Jutta Brunnée and Stephen Toope argue that specific traits of law help to organize the interactions of actors, shape their interests, and lead to compliance.[56]

One of the many areas where scholars are combining the third and fourth faces of power is in the study of legitimacy. To the extent legitimacy exists it offers a big challenge to traditional ideas that the international system is fully anarchic.[57] Some scholars have explored how legitimacy evolves and spreads and how the type of domestic political system influences the ability to establish norms that are viewed as legitimate. [58] Some look to international organizations as central actors in conferring legitimacy and see conformity of behavior with international norms as necessary for legitimacy.[59] Still others emphasize that legitimacy is less as a matter of moral obligation and more as a point of efficient coordination.[60] Most studies of legitimacy see the concept as a counterpoint

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[56] See JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010) (arguing that the traits of "generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action" (p. 6) generate commitment and compliance with law).

[57] Id. Political scientists of the English School have long made arguments along this line. See, *infra* note 197.

[58] See, e.g., IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY (2005).

[59] See Ward Thomas, *Legitimacy in International Relations: Ten Propositions*, *in* JUSTIFYING WAR? FROM HUMANITARIAN INTERVENTION TO COUNTERTERRORISM (Gilles Andréani & Pierre Hassner eds., 2008) (exploring with anecdotal evidence a variety of propositions regarding the sources and effects of international legitimacy, such as the role of international organizations and also that no single institution has a monopoly on conferring legitimacy).

[60] On the role of Security Council decisions as focal points, rather than moral authorities, see Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527 (2005).

to brute force in international relations.[61] Still other political scientists have explored how norms become legitimate and powerful by being persuasive—a process, rooted in communication.[62]

Of particular interest for legal scholars may be empirical research by political scientists that focuses on how international legal institutions create legitimacy by shaping the process through which actors are socialized and thus influencing how norms and ideas are internalized.[63] For example, some scholars have proposed that human rights agreements change state preferences through the spread of norms and acculturation.[64] Political scientists now have some evidence that joint membership in international organizations is associated with a long-term convergence of state

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[61] See Martha Finnemore, *Legitimacy, Hypocrisy, and the Social Structure of Unipolarity?: Why Being a Unipole Isn't All It's Cracked Up to Be*, 61 WORLD POL. 58 (2009) (arguing that legitimacy imposes significant limitations on power, even to the power of a unipolar actor.)

[62] See FINNEMORE, *supra* note 30; Finnemore & Sikkink, *supra* note 36; MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); Alderson, *supra* note 45; Towns *supra* note 31.

[63] See, e.g., CHRISTIAN REUS-SMIT, AMERICAN POWER AND WORLD ORDER (2004), at 4. Reus-Smit argues "that all political power is deeply embedded in webs of social exchange and mutual constitution; that stable political power … ultimately rests on legitimacy; and that institutions play a crucial role in sustaining such power." See also Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487 (2001). Johnston argues that socialization also takes place in part through persuasion and social influence that inculcates pro-norm behavior by dispensing social rewards, such as status, and punishments, such as exclusion or shaming). See also Anne Sisson Runyan, *Women in the Neoliberal "Frame"*, *in* GENDER POLITICS IN GLOBAL GOVERNANCE (Mary K. Meyer & Elisabeth Prügl eds., 1999) 210; Elisabeth Prügl, *What is a Worker? Gender, Global Restructuring, and the ILO Convention on Homework*, in Id., 197.

[64] See Risse, Ropp, & Sikkink, *supra* note 36.

preferences.[65] Elites working inside these organizations are subject to socialization,[66] a process whose outcome depends on how the elite is embedded within the society as well as the intensity and duration of interaction with other relevant actors.[67]

The third and fourth faces of power, unlike the first two, look far beyond the nation-state as the most important actor international affairs. Because these faces of power are about individuals and perceptions as well as group behavior they necessarily force scholars to borrow concepts from a wide array of disciplines, including sociology and social psychology. One result is that both theories and evidence are often quite complicated and the exact boundaries around the subject are hard to draw with precision. More actors are involved, and the chains of cause and effect are often longer and more complex than in traditional international relations scholarship that until a couple decades ago focused mainly on states.

The "Problem Type"

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[65] See David H. Bearce & Stacy Bondanella, *Intergovernmental Organizations, Socialization, and Member-State Interest Convergence*, 61 INT'L ORG. 703 (2007). Some of the research on global administrative law points to similar observations about convergence but suggests different pathways. See, e.g., Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2004-2005).

[66] See Liesbet Hooghe, *Several Roads Lead to International Norms, but Few Via International Socialization: A Case Study of the European Commission*, 59 INT'L ORG. 861 (2005); Judith Kelley, *International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions*, 58 INT'L ORG. 425 (2004).

[67] See Jan Beyers, *Multiple Embeddedness and Socialization in Europe: The Case of Council Officials*, 59 INT'L ORG. 899 (2005).

A second building block is based on the insight that not all challenges for international cooperation are the same. Most empirical research on international cooperation by political scientists and international lawyers alike is organized by issue-area—such as trade, human rights, arms control or the environment.[68] While each of these areas has its own attributes, the tenor of recent political science research has been to look at the underlying characteristics of the problems—rather than just the issue-area—that have a large impact on form, content and success of international cooperation. We call these characteristics the "type of problem."

Problems vary in many ways, but two are most prevalent in political science research. One is the strategic context—that is, some problems more readily lead to cooperation while others are prone to deadlock. The other is information and uncertainty, as the prospects for cooperation depend, in part, on whether governments (or other actors) understand the problem at hand and can predict the consequences of their actions.

[68] A few legal scholars have also analyzed international cooperation by considering problem types rooted in game theory. See, e.g., GOLDSMITH & POSNER, *supra* note 2; ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008). See also George Norman *&* Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L. L. 541 (2005); William B. T. Mock, *Game Theory, Signaling and International Legal Relations*, 26 GEO. WASH. J. INT'L L. & ECON. 33 (1992); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L. L. 384 (1996); Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993 (2004-2005); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 (2004); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006); Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. (2011, forthcoming).

Research that emphasizes the attributes of problems is usually functional in its orientation—it sees international cooperation stemming from the attributes of the problem that actors are trying to solve. Whether this second building block is actually useful is a matter of intense debate. For many political scientists, this functional approach to studying international institutions focuses on the wrong issues. It assumes that the attributes of problems are fixed and that, based on those problem types, it is possible to identify particular functions that international institutions should perform. For these scholars, most of whom work with the third and fourth faces of power, what is interesting is how actors create problems that require legal responses. They study how problems arise and how the spread of norms and ideas "construct" the policy agenda.[69] This could be a fruitful area for collaboration between political scientists and lawyers since many of these processes for setting agendas and shaping the preferences of actors depend, at least partly, on legal argumentation and institutions. For example, scholarship has shown that some of the central topics in international law on weapons and the use of force—such as regulation of chemical weapons,[70]

[69] For a recent survey of international governance that includes attention to problem construction see WHO GOVERNS THE GLOBE? (Deborah D. Avant, Martha Finnemore, & Susan K. Sell eds, 2010).

[70] See, e.g., Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT'L ORG. 74 (1995) (arguing against scholars who claim that nonuse chemical weapons was rooted in these weapons lack of utility or the fear of reciprocity; instead, Price shows that a norm against these weapons arose and that its stigma was a necessary condition for tacit and formal agreements not to develop and deploy chemical weapons. This taboo reflected that chemical weapons became associated with poison, the use of which has been stigmatized in many cultures.) Although not directly focusing on legal obligations, Price's line of logic helps explain how norms could influence customary international law as well as formal legal obligations related to chemical weapons.

the legality of assassination,[71] anti-personnel land mines,[72] the use of nuclear weapons,[73] and decisions to invade other countries[74]—all depend on norms that have arisen in decentralized social processes based heavily on persuasion, often shaped (and shaping) the content and operation of legal institutions.[75] Indeed, one of the ways that power influences law is that it shapes how

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[71] See, e.g., Ward Thomas, *Norms and Security: The Case of International Assassination*, 25 INT'L SECURITY 105 (2000) (arguing that assassination is a form of interstate violence that is a potential competitor to large-scale war—prohibiting it benefits the great powers that are more likely to be able to deploy other forms of violence. Thomas traces the rise of this as a legal norm and charts its development.)

[72] See, e.g., Price, *supra* note 26 (arguing that transnational civil society, especially NGOs, used moral persuasion and social pressure to perpetuate a norm against anti-personnel land mines).

[73] See, e.g., Nina Tannenwald, *Stigmatizing the Bomb: Origins of the Nuclear Taboo*, 29 INT'L SECURITY 5 (2005) (tracing the evolution of the taboo against the use of nuclear weapons as a result of the global antinuclear weapons movement. She identifies key forces in the rise of this norm, including social groups pressuring leaders to change state policy, attempts to delegitimize certain practices through the use of rhetoric and diplomacy, and the visibility of state leaders who spoke against nuclear weapons for reasons of moral conscience or on the basis of cognitive assumptions. She argues that the norm developed over time through iterated behavior—a process she compares favorably to the emergence of customary international law.) See also Nina Tannenwald, *The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use*, 53 INT'L ORG. 433 (1999).

[74] See Krebs & Lobasz*, supra* note 51.

[75] See also Jeffrey W. Legro, *Culture and Preferences in the International Cooperation Two-Step*, 90 AM. POL. SCI. REV. 118 (1996) (focusing on the rise of norms during the interwar period to stigmatize submarine warfare, aerial bombing of non-military targets, and chemical warfare and arguing that these stigma affected state preferences, partially through changes in bureaucratic culture. This argument he contrasts with more conventional explanations rooted in strategic interaction or the balance of power.) For similar lines of

governments and individuals constitute the problems that are the focus on legal norms and activities.[76]

Nonetheless, functional ideas play a big role in political science, and the building block of "problem type" has been particularly useful for many scholars in that it has helped clarify exactly what actors (especially national governments) expect international legal institutions to do.

Strategic Context

When discussing the prospects for cooperation, many political scientists of the functional persuasion have adopted the terminology and insights of game theory. Game theory helps reveal the *strategy* of international cooperation: how one country behaves depends on its expectations for how other countries would respond. Determining the strategic context requires looking at which individual parties stand to benefit from cooperation as well as the incentives to violate ("defect") from a cooperative agreement.[77] Concepts derived from game theory have been present from the

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argument, see Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INT'L ORG. 31 (1997). See also JEFFREY W. LEGRO, RETHINKING THE WORLD: GREAT POWER STRATEGIES AND INTERNATIONAL ORDER (2005) (arguing that national ideas about how a state should interact with other states result in changes to both national identities and interests). See generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[76] See Barnett and Duvall, *supra* note 45. See generally Alexander Wendt, *Anarchy Is What States Make of It: the Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

[77] More precisely, the strategic context usually begins with three questions (1) which parties stand to benefit from cooperation with each other, and to what extent?; (2) To what extent are the potential benefits from cooperation tangible or intangible?; and (3) once an agreement is put in place, to what extent would actors have an incentive to violate it? On the relationship between game theory and international relations, see

beginning of systematic political science research on how international law and other institutions influence international cooperation.[78] Some legal scholars have also put a central focus on the type of problem in their research.[79] While the full set of strategic contexts is large and complicated, most political science research has concentrated on four in particular.

Collective Action

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generally THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960). For significant applications of game theory to international relations, see, e.g., James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68 (1997); Charles Lipson, *Why Are Some International Agreements Informal? 45* INT'L ORG. 495 (1991); James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 Int'l Org. 269 (1998); Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 *(*1999); Kyle Bagwell & Robert Staiger, *Domestic Policies, National Sovereignty and International Economic Institutions*, 116 Q. J. ECON. 519 *(*2001); Michael J. Gilligan, *Is There a Broader-Deeper Trade-off in International Multilateral Agreements?*, 58 INT'L ORG. 459 (2004).

[78] See generally Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 1 (Kenneth A. Oye ed., 1986); TODD SANDLER, GLOBAL COLLECTIVE ACTION (2004); Abbott, *supra* note 3. .

[79] See GOLDSMITH & POSNER, *supra* note 2; GUZMAN, *supra* note 68; Moshe Hirsch, *Game Theory, International Law and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT'L L. & POL'Y 75 (1998); Brett M. Frichmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679 (2003). See also Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. 285 (2002) (a political scientist applying game theoretic approaches directly to law).

First, the vast majority of literature on the strategic context addresses collective action. In this type of problem, all countries would be better off if they worked together, but individually they have an incentive to renege on their commitments. The most famous illustration of these strategic incentives is the Prisoner's Dilemma, in which two accomplices are held in separate cells, each under interrogation and unable to communicate with the other. If neither confesses then neither can be convicted, but the first to reveal the truth gets a lighter sentence. The collective gains from cooperation (i.e., not confessing) are large, but the two accused nonetheless fail to collude because each knows the other will be tempted to turn state's evidence. This stylized game has attracted a massive literature that is useful for its general insights although, of course, the rigorous conditions of the Prisoner's Dilemma—such as the inability to communicate and contract—are rarely strictly observed in reality.[80]

[80] Not all collective action problems are Prisoner's Dilemmas. Another game scholars often analyze is the "Stag Hunt", in which there are two mutually beneficial outcomes, but one is significantly more so than the other. While players in the Stag Hunt would prefer a more beneficial outcome, they will choose the safer, but less beneficial, outcome unless they can coordinate to both choose the better option. On the Prisoner's Dilemma, see generally WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992) (describing the intellectual history of this problem); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (showing that cooperation can be achieved in a Prisoner's Dilemma game through multiple interactions); Hugh Ward, *Game Theory and the Politics of the Global Commons*, 37 J. CONFLICT RESOL. 203 (1993) (arguing that some global common pool resource issues can be analyzed as Prisoner's Dilemmas); Duncan Snidal, *Coordination vs. Prisoner's Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985) (arguing that coordination problems will lead to different types of solutions than Prisoner's Dilemma problems).

For example, most political science research on arms control proceeds with the assumption that cooperation is difficult because the incentives to defect are severe and countries are particularly averse to policies that might endanger national survival. Countries will be wary about binding themselves to slow or stop development of vital weapons systems when their adversaries might develop weapons in ways that are difficult to detect.[81] Thus arms control, perhaps more than any other issue-area, has seen extreme attention to monitoring and verification of compliance with the aim of detecting and deterring breakouts in a timely way.[82] Similar concepts are often used to explain cooperation in trade agreements when the incentives to defect are often strong.[83] As

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[81] These strategic incentives also explain why so many arms control agreements are rooted in bold aspirations yet struggle to have much real impact on the development and deployment of important weapons systems: it has proved very difficult to monitor and enforce agreements to the standard needed to make countries willing to risk disarmament. See George W. Downs, David M. Rocke, & Randolph M. Siverson, *Arms Races and Cooperation*, *in* Oye, *supra* note 78.

[82] See Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984); John Hart & Vitaly Fedchenko, *WMD Inspection and Verification Regimes: Political and Technical Challenges*, *in* COMBATING WEAPONS OF MASS DESTRUCTION 95 (Nathan E. Busch & Daniel H. Joyner eds., 2009) (arguing that verifiability of compliance is the key to effectiveness for arms control law). Several scholars have noted that technology often limits the ability of inspectors and technical secretariats to verify compliance. See Robert W. Helm & Donald R. Westervelt, *The New Test Ban Treaties: What Do They Mean? Where Do They Lead?*, 1 INT'L SECURITY 162 (1977); Jonathan B. Tucker, *Verifying the Chemical Weapons Ban: Missing Elements*, 37 ARMS CONTROL TODAY 6 (2007).

[83] Nearly all countries, to different degrees, gain from policies that lower the barriers to trade and allow for a more efficient global economy. However, most also face temptations to erect trade barriers that protect their own industry—especially when the interest groups that benefit are well-organized politically and can exert great influence over national policy. For key scholarship on international trade law by political scientists, see,

cooperation deepens and the incentives for shirking rise, so does the need to spot and punish violations. Long ago international relations scholars used this logic to explain why the international trade regime has co-evolved with its enforcement procedures,[84] and that same point has long been familiar to lawyers who have observed both national enforcement of international trade laws and also the emergence of multilateral enforcement.[85]

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e.g., Michael A. Bailey, Judith Goldstein & Barry R. Weingast, *The Origins of American Trade Policy: Rules, Coalitions, and International Politics*, 49 WORLD POL. 309 (1997) (discussing the ways in which domestic law interacts with international law); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007) (arguing that the potential for dispute resolution decisions that create long-term precedents affects state incentives to use these mechanisms); Judith L. Goldstein, Douglas Rivers, & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 737 (2007); Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94*, 57 WORLD POL. 453 (2005) (arguing that the institutional design of the GATT provides the loopholes necessary for strong states to capture the majority of benefits from trade liberalization); Helen V. Milner & B. Peter Rosendorff, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001) (arguing that flexibility is especially beneficial when there is domestic uncertainty); B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389 (2005).

[84] See, e.g., Stein, *supra* note 78.

[85] See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992); Alan O. Sykes, *Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L L. J. 301 (1990). Indeed, trade law and enforcement is an area where political scientists and legal scholars have

Research on international agreements on environmental issues also often begins with similar assumptions—that there are temptations to shirk when managing a common pool resource (CPR) such as fish that live in the high seas.[86] Studies that begin with such assumptions are usually pessimistic about the prospects for cooperation unless strong formal enforcement mechanisms exist. However, in recent decades, as governments craft more demanding agreements they have also given greater attention to a wide array of enforcement mechanisms.[87] In tandem, a body of research has

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already initiated many fruitful collaborations. See, e.g., Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 205 (2002); Andrew Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005); Marc Busch, Eric Reinhardt, & Gregory Shaffer, *Does Legal Capacity Matter?: Explaining Dispute Initiation and Antidumping Actions in the WTO*, ICTSD Project on Dispute Settlement, Series Issue Paper No. 4 (2008).

[86] The hallmarks of a CPR are that it is difficult to exclude other players from using the resource, and when any player uses the resource the amount left for others is diminished. This combination of factors has often led analysts to refer to the problem of CPR regulation as the "Tragedy of the Commons." See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 124 (1968). Most international fisheries are over-depleted, for example, because any fisherman (or his nation) knows that it can easily avoid inconvenient fishing regulations. Long ago, political scientist Arild Underdal called this the "law of the least ambitious program" and showed that, because some fishing nations know that restrictions are hard to enforce, efforts to set and manage fishing quotas are usually not effective in protecting fish. ARILD UNDERDAL, THE POLITICS OF INTERNATIONAL FISHERIES MANAGEMENT: THE CASE OF THE NORTH-EAST ATLANTIC (1980). For the law and economics of a variety of ocean-based CPRs and other cooperation problems, see Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569 (2010).

[87] Often these are not called "enforcement" mechanisms because the political sensitivities to enforcement are acute in most areas of international cooperation. For example, the Montreal Protocol on the Ozone Layer

emerged over the last two decades that shows the conditions under which collective action to manage CPRs is likely to arise even when formal mechanisms for contracting, monitoring and enforcement don't exist.[88]

Asymmetrical Cooperation: Upstream-Downstream Problems

Although the vast majority of political science research on international cooperation is focused on cooperation problems, other problem types also merit attention. A second type of strategic situation arises when cooperation is highly asymmetrical. The starkest examples are "upstream-downstream" problems in which one country exports harm to others. Here, only the downstream country has an interest in cooperation (such as stricter policies to reduce water

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includes a "multilateral consultative process". See David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 137 (David G. Victor, Kal Raustiala, & Eugene Skolnikoff eds., 1998).

[88] Some optimism is also found in the literature on "local" CPRs that finds an abundance of effective collective action in local settings because the players are more likely to know each other and thus it is easier to monitor and punish defectors. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Clark C. Gibson, John T. Williams, & Elinor Ostrom, *Local Enforcement and Better Forests*, 33 WORLD DEV. 273 (2005); OSTROM, ELINOR, ROY GARDNER, & JAMES WALKER, RULES, GAMES, AND COMMON-POOL RESOURCE (1994); MICHAEL D. MCGINNIS, POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS (1999); INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds., 1995). That same logic suggests that there will be more success in managing international common pool resources when the number of parties is smaller, such as the North Pacific Fur Seals Convention. See SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003), Chapter 2.

pollution) and the upstream country is generally indifferent (or even gains, such as by exporting noxious effluents). The standard solution to these problems is a system of incentives, such as payments, that the downstream country organizes to change the behavior of upstream polluters.[89] Examples include the Rhine River for which political science research has shown how these payments are organized and their practical impact on the behavior of polluters.[90] While the most obvious examples of such problems are pollution exports, similar types of asymmetrical cooperation problems arise in human migration, international trafficking in narcotics, small arms and proliferation of weapons of mass destruction—all areas with distinct sources and receptors.[91]

Self-Enforcing Agreements and Coordination

A third kind of international problem arises when agreements do not require formal enforcement. For example, an agreement may require its members to do little or nothing beyond its own self-interest; treaty registers may be filled with such agreements, but they are rarely interesting to scholars who study actual cooperation.[92] Other examples include reciprocal agreements where

[89] This solution has its origins in the insights of economist Ronald Coase. *The Problem of Social Cost*, J.L. & ECON. 1 (1960).

[90] See Thomas Bernauer, *Protecting the Rhine River against Chloride Pollution*, *in* INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE (Robert O. Keohane & Marc A. Levy eds., 1996).

[91] See generally WAYNE A. CORNELIUS, PHILIP L. MARTIN, & JAMES FRANK HOLLIFIELD, CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE (1988); GLOBAL MIGRATION GOVERNANCE (Alexander Betts ed. 2010); O'Dwyer, *supra* note 26; Price, *supra* note 26.

[92] See, *infra* notes 229 to 232 and corresponding text.

two countries' benefits and costs of cooperation are so tightly linked that each country remains faithful to the agreement—often known as self-enforcing agreements.[93]

Some agreements have the characteristics of what political scientists call "pure coordination."[94] In these cases, every country has an interest in coordinating around a single standard. Once the standard—any standard—is in place there is no incentive to defect. Agreements of this type are particularly interesting to scholars who think that the enforcement mechanisms under international law are weak or nonexistent. Pure coordination games have attracted much attention from theorists, but they are probably rare in the real world because important countries and interest groups are usually not indifferent to which standards are adopted. The setting of a standard often defines which firms and countries reap the most benefits from cooperation. And except for the most trivial standards, once a decision has been made for a particular standard there nonetheless can be strong pressures to defect. Among the cases that have been studied carefully by political

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[93] In reciprocal settings enforcement is so straightforward that analysts often consider these as self-enforcing. We are skeptical that these agreements actually exist, but the classic example that many scholars cite is the early cooperation under the GATT. The tariff reductions that one country offered to other GATT members were reciprocal and thus failures to honor those tariff promises could be met with swift, targeted retaliation. In reality, the benefits and costs of participation in tariff reducing agreements are more asymmetrical, enforcement is not costless, and most scholars today view most cooperation on trade as a problem of collaboration. See, *supra* note 83 and corresponding text.

[94] On coordination games, see generally Stein, *supra* note 78; DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969); David Laitin, *The Tower of Babel as a Coordination Game – Political Linguistics in Ghana*, 88 AM. POL. SCI. REV. 622 (1994). Other types of problems are also often considered to be self-enforcing. For example, reciprocity can emerge in cooperation problems with incentives to defect when the actors interact repeatedly. See ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

scientists are those involving the setting of food safety standards[95] and standards in telecommunications[96] that have large impacts on the size of markets and the shape of commercial competition.

Responsibility

A fourth type of problem is what we will call "responsibility problems." These are cases that involve no transfer of tangible externalities. Thus, most basic theories of strategic action do not envision a role for international cooperation. Nonetheless, intangible externalities—such as the moral offense from knowing that unique ecosystems are being lost or human rights are being violated—give rise to a demand for international regulation. Indeed, a large and perhaps growing fraction of examples of international cooperation involve these kinds of intangible externalities.

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[95] For example, a few political scientists have examined the process of setting technical standards within the WTO. When the WTO was created the task of negotiating trade-related standards was delegated to several international bodies—among them the WHO/FAO Codex Alimentarius Commission for food safety standards. In practice, the work of the Codex has become much more politicized now that its standards are more relevant; and even when Codex agrees on standards, such as on the use of hormones in beef, trade disputes still arise because important countries violate those rules. See David G. Victor, *Effective Multilateral Regulation of Industrial Activity*, Ph.D. Dissertation, Massachusetts Institute of Technology (1997); MARK A. POLLACK & GREGORY C. SHAFFER, TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (2001); WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY (Christopher K. Ansell & David Vogel eds., 2006); Tim Büthe, *The Globalization of Health and Safety Standards*, 71 L. & CONTEMP. PROB. 218 (2008).

[96] See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991); Peter Cowhey, *The International Telecommunications Regime: The Political Roots of International Regimes for High Technology*, 44 INT'L ORG. 169 (1990).

Because no tangible externality crosses borders, research on responsibility problems has placed a heavy emphasis on the diffusion of ideas and norms and on the role of non-state actors as conduits for those ideas—the third and fourth faces of power.[97] Responsibility problems are also an area where there is a large and growing body of research by legal scholars whose methods and research questions overlap heavily with those of international relationship scholars.[98] And while a large fraction of the research on responsibility problems emphasizes the third and fourth faces of power, these problems also reveal the other faces of power at work as well—through powerful states that set the agenda, create incentives for compliance, and link topics such as human rights to other areas of international cooperation where enforcement is easier to provide, such as trade.[99]

Uncertainty and Information

In addition to the strategic context, political science research often distinguishes cooperation problems by the availability of information that would be necessary to construct and implement a functional system for international cooperation. Uncertainty has long been part of research by public international lawyers who have focused on questions such as the relationship between ambiguity and compliance,[100] how flexible legal rules can help governments manage different types

[97] See, *supra* notes 30 to 68 and corresponding text. See also Crawford, *supra* note 50 (arguing that foreign policy decisions derive from prior beliefs and the process of ethical argumentation).

[98] See, e.g., Helfer, *supra* note 2; Hathaway, *supra* note 2; Goodman & Jinks, *supra* note 54.

[99] See EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS (2009).

[100] See, e.g., CHAYES & CHAYES, *supra* note 12; C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983).

of uncertainty,[101] and the roles of tribunals in eliciting useful information.[102] Political science research is now unpacking how these and other kinds of uncertainty affect international cooperation generally. Within the political science literature three major types of uncertainty have attracted the most attention.

The first kind of uncertainty is about the credibility of promises. In trade, for example, dense and opaque implementing legislation may make countries unsure whether other countries have honored their commitments to reduce trade barriers. The lack of credible commitments is also often a major aspect of international cooperation on human rights, especially because the most egregious violators tend to limit access to international monitors.[103] In arms control, false trust that other countries will honor their commitments could leave a country's survival in doubt; inability to solve such informational problems may preclude meaningful cooperation or lead to strategies based on tacit cooperation where observable actions play a larger role than formal agreements.[104] This kind

[101] See *infra* notes 180 to 183 and corresponding text.

[102] See, e.g., Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that when there is uncertainty over behavior a tribunal can provide the neutral information necessary to restore inter-state cooperation).

[103] See Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007).

[104] See Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) (arguing that arms control is faced with high costs of betrayal, monitoring problems and the perception of strict competition, thus making cooperation unlikely); Downs, Rocke, & Siverson, *supra* note 81 (arguing that arms races are actually often Deadlock games (rather than Prisoners' Dilemmas) in which actors prefer defection to cooperation, which suggests that the problem cannot be solved using the types of institutions created in other areas);

of uncertainty is the starting point for the Prisoner's Dilemma and its central insight that cooperation easily falters.[105]

Governments are also often uncertain about what they, themselves, can deliver—especially as international cooperation has shifted from areas where states make commitments to regulate their own behavior (e.g., deployment of strategic arms) to a wide range of issues that require efforts by many private actors. Traditionally, human rights problems were viewed through the lens of governments oppressing their citizens and thus human rights agreements focused on changing government behavior.[106] Yet scholars are now increasingly interested in the ways in which international human rights law has attempted to influence private actors such as militias and even the labor practices of firms.[107] Indeed, many human rights abuses arise because governments lack the capacity to control the abusers on their territory.[108] Likewise, traditional arms control agreements now include efforts to regulate private actors that facilitate arms proliferation (e.g., smugglers and scientists), private security firms, and firms that manage so-called "dual use"

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[105] See, *supra* note 80 and corresponding text.

[106] See generally HENKIN, *supra* note 12, chapter 12.

[107] See, e.g., Philip Alston, *Core Labor Standards and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007); Vogel, *supra* note 27. Legal scholars have also explored similar questions. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001-2002); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

[108] See NEIL J. MITCHELL. AGENTS OF ATROCITY: LEADERS, FOLLOWERS, AND THE VIOLATION OF HUMAN RIGHTS IN CIVIL WAR (2004).

technologies that have legitimate commercial purposes that are hard to distinguish from dangerous arms.[109] Related to this are theories that focus on "problem solving capacity."[110]

A second kind of uncertainty is about the state of the world, such as from "exogenous shocks" that arrive unexpectedly and can undermine or enhance cooperation, depending on the circumstances. Often these shocks are rooted in technology or the macroeconomy.[111] For example,

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[109] See, e.g., Richard A. Bitzinger, *The Globalization of the Arms Industry: The Next Proliferation Challenge*, 19 INT'L SECURITY 170 (1994); James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 14 J. CONFLICT & SECURITY L. 401 (2008); Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INT'L ORG. 367 (2007).

[110] See ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE (Edward L. Miles, Arild Underdal, Steinar Andresen & Jorgen Wettestad eds., 2001) (arguing that that problem-solving capacity is a function of three main determinants: the institutional setting, the distribution of power among the actors involved and the skill and energy available for the political engineering of cooperative solutions.) See also LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds, 1995) (arguing that heterogeneity in actor capabilities in both the local and global domains has a large effect on the prospects for cooperation).

[111] For example, the original strategic arms control talks focused on numbers of missiles because those were easier to measure than actual warheads, but technological changes (in part spurred by the existence of arms control treaties) encouraged the U.S. and U.S.S.R. to develop multiple targetable warhead (so-called "MIRV") missiles. Those kinds of changes in technology made both sides wary about making promises to regulate their arms and made it harder to convince skeptical domestic audiences that arms control would improve national security. See TED GREENWOOD, MAKING THE MIRV: A STUDY OF DEFENSE DECISION MAKING (1975); Thomas C. Schelling, *What Went Wrong with Arms Control*, 64 FOREIGN AFF. 219 (1985-1986); Herbert F. York, *ABM, MIRV and the Arms Race*, 169 SCI. 257 (1970). See also Steven E. Miller, *Politics Over Promise: Domestic Impediments to Arms Control*, 8 INT'L SECURITY 67 (1984).

when negotiators set the caps for greenhouse gases in the Kyoto Protocol in 1997 few of them could anticipate that the U.S. economy would expand so rapidly in the late 1990s, and with a stronger economy came higher emissions that made compliance with the Kyoto caps all but impossible.[112] Other examples, such as in nuclear testing, reveal how exogenous changes in technology can expand the prospects for cooperation. Large changes in testing, which were originally impractical partly due to the inability to monitor compliance reliably, became more feasible when new technologies and understanding of geophysics made monitoring much easier.[113]

Third, international institutions must contend with uncertainty about preferences.[114] When governments begin to cooperate they may not know their interests with precision. Indeed, preferences often change—a central point in scholarship that works in the third and fourth faces of power. International institutions, themselves, can contribute to the process of shaping preferences in many ways, such as by drawing attention to problems that can accelerate the diffusion of norms about how best to solve those problems.[115]

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[112] See DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING (2001). See generally Jana von Stein, *The International and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol,* 51 J. CONFLICT RESOL. 243 (2008); William A. Pizer, *The Optimal Choice of Climate Change Policy in the Presence of Uncertainty*, 21 RESOURCE & ENERGY ECON. 255 (1999).

[113] See, e.g., JACOBSON & STEIN, *supra* note 24.

[114] See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

[115] See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 514 (1997); Finnemore & Sikkink, *supra* note 36; Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 INT'L ORG. 1 (2006).

Although there is a range of views, most political scientists see uncertainty in preferences—and in the difficulties in projecting how preferences will evolve—as a factor that impedes international cooperation because it is hard to achieve cooperation when goals are unknown.[116] For example, states vary in the commitments they will accept for treatment of (POWs); dispersion and uncertainty in preferences as well as difficulties in monitoring how states actually treat POWs leads to an international legal system in which violations are punished irregularly and often disproportionately.[117]

Political scientists who focus on the functional motivations for governments to cooperate see uncertainty as a central attribute of the type of problem that governments are trying to manage. Usually they view international legal institutions—such as treaties, custom and organizations that

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[116] See Koremenos, Lipson, & Snidal, *supra* note 114 (arguing that uncertainty about preferences leads to restrictive membership criteria); Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971 (2001); Lisa Martin, INTERESTS, POWER AND MULTILATERALISM, 46 INT'L ORG. 765 (1992). We note, however, that some scholars suggest the opposite: that ignorance about exactly how the world will unfold, including the preferences of key countries, could make it easier for countries to establish institutions that will, in turn, stabilize norms and expectations. See ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979); Joel Sobel, *A Theory of Credibility,* 52 REV. ECON. STUD. 557, 570 (1985) ("Long-term arrangements are of value when there is uncertainty about preferences because past transactions provide relevant information to agents.")

[117] See Morrow, *supra* note 116.

provide functions such as interpreting legal norms—as instruments for reducing uncertainty and managing the effects of these many types of uncertainty.[118]

Domestic Politics

A third major building block in theories of international relations is the role of domestic politics. Until about two decades ago most international relations scholarship focused on the state itself. It looked at how elites influenced government policy and had relatively few systematic insights into how domestic and international politics interact. All that is now changing. Some of those changes have come through scholarship that emphasizes the third and fourth faces of power, which intrinsically look inside state governments to the underlying societies and non-state actors that influence norms and behavior.[119] And some have come by coupling theories of domestic and

[118] How these attributes of problems affect the choice of policy mechanism is a question that has been at the forefront of many disciplines—not just political science but also economics and law. For a review, see Jonathan B. Wiener & Barak D. Richman, *Mechanism Choice, in* PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (reviewing literature from multiple disciplines on the political economy of regulatory instrument choice at the national and international levels). One sign of the central role of transaction costs in the study of contracting is that in a major stocktaking of research on collective action at the local and global domains two leaders in these fields identified transaction costs as one area where scholars agreed that the topic was both important and that much of what mattered for research had already been extensively studied. See also Keohane & Ostrom, *supra* note 110.

[119] See, *supra* notes 30 to 68 and corresponding text. See also BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed. 1995) (including essays analyzing how domestic social movements, private actors, and political institutions affect international relations); Risse, Ropp, & Sikkink, *supra* note 36 (discussing the effects of international human rights norms and transnational advocacy movements on domestic human rights practices).

international politics. One of the original metaphors for this work was "two level games," and over the last decade the large advances in this area have come from figuring out exactly how those games are played at different levels and how outcomes at one level shape those at the other.[120] As research that focuses on "domestic politics" has flourished scholars have worked on three fronts that have large implications for the study of international legal institutions.

First, relying heavily on the work of Helen Milner, many argue that the organization of domestic politics affects the prospects for international cooperation.[121] For example, when government is divided, international cooperation is less likely overall. Moreover, in such situations the content of agreements that the country accepts are more likely to reflect the legislature's preferences because legislative approval is essential to gaining a country's consent. She also finds that the distribution of information within a country affects the prospects for cooperation. In general, highly asymmetric information undermines cooperation, except in cases where information

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[120] See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans, Harold Karan Jacobson, & Robert D. Putnam eds., 1993). These studies build on Thomas Schelling's famous conjecture that actors constrained by third parties will fare better in bargaining situations. Schelling, *supra* note 77.

[121] HELEN MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997). See also Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881 (1978); LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000); Jon C. Pevehouse, Democracy from the Outside-In? International Organizations and Democratization, 56 Int'l Org. 515 (2002); Edward D. Mansfield & Jon C. Pevehouse, *Democratization and the Varieties of International Organizations*, 52. J. CONFLICT RESOL. 269 (2008).

is concentrated in interest groups that favor cooperation. One practical implication is that international institutions can alter the prospects for cooperation by channeling useful information to groups that are well-positioned domestically to advance the argument for cooperation. In tandem with Milner's work on domestic politics, political scientists have been particularly influenced by models developed in international economics that have formally coupled international policy decisions on trade with the structure of the domestic economy and its politics.[122]

Second, some scholars have focused on how domestic politics affect the credibility of international commitments. Comparing the US and Japan, for example, some scholarship suggests the US was a more reliable partner in international agreements because the US electoral system gave politicians more incentives to provide public goods (which included multilateral cooperation whose benefits were broadly distributed) and the transparency of the US system increased the credibility of its promises.[123] Other research has looked at how concerns about credibility that are rooted in domestic politics could affect the design of international commitments—for example, leading to greater use of escape clauses and other types of flexibility that allow governments to better align their formal international commitments with what they can reliably deliver at home.[124]

Third, some studies have tried to link the type of national polity to its behavior towards international commitments. The largest portion of that literature focuses on the effects of democratic decision-making. A general consensus has emerged that democracies are generally more likely to honor international commitments [125], although much work remains to be done on the

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[122] See Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994).

[123] See Cowhey, *supra* note 96.

[124] See Milner & Rosendorff, *supra* note 83.

[125] See Brett Ashley Leeds, *Domestic Political Institutions, Credible Commitments, and International Cooperation*, 43 AM. J. POL. SCI. 979 (1999); Beth. A. Simmons, *International Law and State Behavior:*

direction of causality in this relationship. Several scholars have pointed to the importance of regular elections as the key mechanism because they offer voters an opportunity to punish governments that fail to comply, although the causal logic varies across the studies that have examined this.[126] With respect to human rights, in particular, several scholars have argued that fear of electoral punishment explains why democracies are more likely to follow through on their international commitments.[127] Of particular interest to lawyers are arguments that see the pressure for compliance by democracies rooted in national courts that are predisposed to seek decisions that align with international obligations.[128] A growing number of studies also look at how governments

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Commitment and Compliance in International Monetary Affairs, 94 AM. POL. SCI. REV. 819 (2000); Fiona McGillivray & Alastair Smith, *Trust and Cooperation Through Agent Specific Punishments*, 54 INT'L ORG. 809 (2000); Emilia J. Powell & Sara M. Mitchell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397 (2007).

[126] See Kurt T. Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT'L ORG. 109 (1996); McGillivray & Smith, *supra* note 125; Edward D. Mansfield, Helen V. Milner, & B. Peter Rosendorff, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477 (2002); XINYUAN DAI, INTERNATIONAL INSTITUTIONS AND NATIONAL POLICIES (2007).

[127] See, e.g., Steven Poe, C. Neal Tate, & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global, Cross-National Study Covering the Years 1976-1993*, 43 INT'L STUD Q. 291 (1999);

[128] See, e.g., Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149 (2009) (arguing that understanding the effectiveness of domestic judicial institutions is the key to understanding the relationship between domestic institutions, treaty ratification and treaty compliance). See also Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, manuscript, University of

use the decision to make international commitments as a way to signal to different domestic constituencies. Unstable regimes, especially new democracies, are prone to joining more exacting human rights agreements and institutions so they can lock-in compliance with human rights norms.[129] Legal scholars are exploring similar arguments. For example, international trade law and procedures such as accession to the WTO have caused an array of changes within countries far beyond the core US and European nations that supplied the original visions for global economic liberalization. Those changes have included a reduction in central economic planning, a rise in policy attention to matters such as environmental regulation and protection of intellectual property, and a shift in authority from legislatures to the executive branch and trade ministries that craft most international legal commitments of this type.[130]

PART II: LEGAL DESIGN AND CONTENT

California-San Diego, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876728 (arguing that enforcement of international human rights law by independent domestic courts is only effective for violations subject to low evidence-production costs and low legal standards of proof).

[129] See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INTL ORG. 217 (2000). See also JON PEVEHOUSE, DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION (2005); Emilie M. Hafner-Burton, Edward Mansfield, & Jon Pevehouse, *Sovereignty Costs, Democratization and Human Rights Institutions*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450445. For a similar argument about the effect of international commitments in constraining domestic politics in trade, see Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996).

[130] Notably see Richard H. Steinberg, *International Trade Law as a Mechanism for State Transformation*, Manuscript, UCLA (2011).

Having discussed the building blocks that are typical foundations for political science scholarship on international law, now we turn to the particular findings of that research. In this Part we focus on the design of legal agreements and institutions. In principle, this is an area where political science research should align well with the normative and research interests of public international lawyers. In practice, however, the political science and legal communities have not yet realized the many ways that their research overlaps. The potential for collaboration hasn't been fully realized perhaps because political science research has been viewed as not sufficiently connected to the important practical details of how legal institutions arise and doctrine is crafted.

We begin in this section with political science research that is functional in its orientation—some scholars call it the "rational design" of international commitments that reflects choices that actors make when trying to solve policy problems while advancing their interests.[131] Many of those design choices reflect, in particular, the efforts by actors to manage the effects of uncertainty. However, this perspective isn't the only one. For many scholars, "rational design" of institutions to serve cooperation functions is much too narrow a perspective because it largely overlooks the (arguably more important) processes through which actors set agendas, frame problems and shape how interests are conceived.

Here we organize our review around the main findings from political science research that adopts the rational perspective—for that has been particularly helpful for building and testing theories—and then indicate where other perspectives lead to different findings and directions for research. While the menu of choices for design of international legal institutions that political

[131] See Koremenos, Lipson, & Snidal, *supra* note 114; Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005). The particular term "rational design" is barely a decade old. However, this line of thinking applied to international law is in fact a much older research program. See, e.g., KEOHANE, *supra* note 11.

scientists have studied is long and complex, four topics have commanded most attention and are also the most relevant for legal scholars and lawmakers: the legal status of obligations; precision of commitments; delegation to other bodies such as enforcement mechanisms and tribunals; and membership. We look at each in turn. And then we look at important critiques of the rational design perspective since those critiques suggest many additional areas where political science and legal scholarship can collaborate.

Legal Status of Obligations

First is obligation, which is the extent to which actors are strictly bound by rules or other commitments.[132] Most of this literature has focused on the choice of "hard" (fully binding) versus "soft" (non-binding) legal arrangements. The legal community has long been interested in the choice between hard and soft law,[133] and most scholars and practitioners have long assumed that binding law is best and that non-binding law is an unwelcome stepchild that is tolerated when other options are unattainable.[134] International relations scholars have probably had similar views as

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[132] See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

[133] See, e.g., Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 Int'l & Comp. L.Q. 787 (1986); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999); COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); Daniel E. Ho*, Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647 (2002); COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2003); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

[134] For earlier arguments along these lines, see, e.g., Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977); FRANCK, *supra* note 33.

traditionally there has been a normative bias in most international relations scholarship in favor of institutionalization, and binding agreements are the most visible and studied means of codifying an international institution.[135]

Over the last two decades political science scholars have looked in much more detail at how diplomats select between binding and non-binding legal forms. A central finding from their research is that the choice of soft obligations does not necessarily reflect a failure to craft hard law. Rather, governments often favor soft legal instruments because they are less costly to negotiate, more adaptive in the face of uncertainty, and more readily adjusted to facilitate compromise between actors with differing interests and degrees of power. Indeed, these same factors explain why, looking across many areas of human interaction, contracts are often incomplete.[136] Consequently, in such settings soft legal obligations are not only more convenient but can also be more effective than binding law.[137] For example, political science research on some areas of international environmental cooperation has shown that nonbinding instruments are usually more ambitious and easier to tailor to the interests of the most pivotal countries. Compared with binding treaties, non-binding agreements can be more effective when governments are committed to

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[135] For a similar argument, see George W. Downs, Kyle W. Danish, & Peter N. Barsoom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 46 (2000).

[136] This insight originates with economics research on uncertainty and industrial organization. See, e.g., OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION (1975); Paul L. Joskow, *Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets*, 77 AM. ECON. REV. 168 (1987).

[137] See Lipson, *supra* note 77; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000). But see FRANCK, *supra* note 33.

cooperation but not sure exactly what they can deliver.[138] The direct connection to one of the central features of international lawmaking—the choice of legal form—has made this an area where there are already robust signs of fertilization between legal and political science research.[139]

The choice between binding and non-binding law depends, in part, on domestic politics and the "type" of cooperation problem at hand. Where governments attempt international cooperation problems with strong incentives to defect and where successful cooperation requires that they signal that their commitments are reliable then binding law may be best. The process of formal ratification helps assure other parties that domestic interest groups are supportive, and the binding status helps governments "tie their hands" visibly, which boosts credibility.[140] This helps explain why arms control talks that concern the gravest challenges where governments are most risk averse, such as national survival in a world of nuclear weapons, have been so difficult to craft and relied heavily on

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[138] See, e.g., Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, *in* Victor, Raustiala, & Skolnikoff, *supra* note 87; Jørgen Wettestad, *Participation in NOx Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches, but Similar Results*, *in* Victor, Raustiala, & Skolnikoff, *supra* note 87. For research that makes more general conclusions of this type, see Koremenos, *supra* note 131. For an application to the problem of climate change along with a review of the environmental literature on binding versus nonbinding agreements see DAVID G. VICTOR, GLOBAL WARMING GRIDLOCK: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET (2011).

[139] See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL LEGAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 2000).

[140] See Abbott & Snidal, *supra* note 137; Koremenos, *supra* note 131.

binding law.[141] Binding agreements ratified through highly transparent domestic processes may also be viewed as more legitimate, although that is a proposition that political scientists have not yet tested rigorously. By contrast, when incentives to defect are weaker and uncertainty is higher the flexibility of executive agreements and other nonbinding forms make them a better choice.

Precision and Ambiguity

A second choice of design that political scientists have examined is precision, which is a measure of how clearly and unambiguously the rules define the requirements for compliance.[142] The standard assumption by legal analysts has been that precision yields more effective international legal institutions and rules.[143] Indeed, a prominent legal study of compliance argued that ambiguity is one of the main causes of poor compliance.[144] The central finding of political science research that has examined legal precision is different. Imprecision, as with nonbinding agreements, can lead to more cooperation because it allows for incomplete contracts, which may be unavoidable when interests diverge and uncertainty is high.[145] Ambiguous agreements may also be

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[141] For similar arguments, see Donald G Brennan, *A Comprehensive Test Ban: Everybody or Nobody*, 1 INT'L SECURITY 92 (1976); Joseph Nye, *Maintaining a Nonproliferation Regime*, 35 INT'L ORG. 15 (1981).

[142] Here, too, there are a few inroads of collaboration between law and political science. See, e.g., Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 132 (a joint effort by political scientists and lawyers to study the legalization of international cooperation).

[143] See, e.g., FRANCK, *supra* note 33 (arguing that the extent to which a particular law affects behavior will increase in accordance with the following various factors, including the clarity of the rule's message.) Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use of Force, Cease Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124 (1999).

[144] See CHAYES & CHAYES, *supra* note 12.

[145] See Abbott & Snidal, *supra* note 137; Koremenos, *supra* note 131.

favored in some domestic political settings—for example, some research on international trade suggests unambiguous international obligations can lead to greater political mobilization by domestic groups opposed to trade liberalization.[146]

One of the challenges with imprecise (and nonbinding) agreements is obtaining the advantages of flexibility while still sending credible signals. Imprecision (and other forms of flexibility) must not be so elastic that governments misinterpret short-term variations in behavior as long-run deviation from compliance.[147] In general, where it is possible to arrive at precise contracts, political science research has shown that precision is helpful. For example, studies of preferential trade agreements find that precision decreases cheating by increasing the probability of detection, making it a favored design choice because precision eases the task of resolving conflicts of interpretation and sanctioning deviant behavior. [148] Where the stakes are large and governments are highly risk averse, such as in arms control, concerns about mistaken signals and imperfect enforcement lead governments to avoid vague agreements.

Delegation and Enforcement

A third aspect of legal design that political science scholars have tried to explain is delegation, which varies widely across the many areas of international cooperation. [149] At one

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[146] See Judith Goldstein & Lisa Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000).

[147] See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477 (2008).

[148] See James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000).

[149] See generally DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson & Michael J. Tierney eds., 2006); Kenneth W. Abbott & Duncan Snidal,

extreme there is no delegation, as is the case with all of the major strategic arms control agreements. At the other extreme, notably in trade, is extensive delegation to bodies such as the WTO's Dispute Settlement Mechanism (hereinafter "DSM"). (International relations scholars see the European Union as a special case of delegation so extreme that it is not comparable with all other areas of international cooperation.) In general, delegation is high where many countries are involved, disputes are complex and where trust in delegated institutions has been built through decades of experience. Indeed, the DSM offers a rich vein of empirical material for political science scholars that have sought to explain why governments delegate authority and how those delegated institutions actually function.[150]

For scholars rooted in the first face of power—who have tended to focus on how governments themselves use incentives to alter international outcomes—the decision to assign responsibilities to international organizations rather than retain those functions themselves and keep them under tighter national control is a puzzle. For many decades political scientists have known that international institutions offer general advantages, such as efficiency in cooperation and contracting under conditions of incomplete information that make states willing to delegate authority to interpret, elaborate and enforce international rules. Only over the last decade, however,

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Why States Act Through Formal International Organizations, 42 J. CONFLICT RESOL. 3 (1998); Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 132; Koremenos, Lipson, & Snidal, *supra* note 114 (referring to delegation as "centralization" but exploring similar ideas).

[150] See, e.g., Rosendorff, *supra* note 83; Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2001); Busch, *supra* note 83; Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

that research program—conducted in close alliance with international lawyers—has delved into the details of when and how delegation occurs. [151]

Among lawyers there is a wide range of opinions on the merits of delegation.[152] The political science literature on delegation could help resolve some of these debates, notably with three main findings.

One finding is that governments delegate when it is efficient. When compared with the formal treaty-making process, for example, delegated bodies can incorporate new information quickly and efficiently. For example, the Montreal Protocol on the ozone layer delegates to an expert body the task of deciding which uses of chemicals will be exempt from regulation because their use is essential and adequate substitutes do not yet exist.[153] This expert-controlled safety valve has played a central role in allowing governments to set strict limits on the use of ozone-depleting chemicals without worrying that regulations would accidentally cause undue hardship. The general

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[151] See, e.g., Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution*, 54 INT'L ORG. 457 (2000) (discussing three dimensions of delegation to international judicial institutions).

[152] See, e.g., Posner & Yoo, *supra* note 102 (arguing that independent tribunals can make decisions that violate state interests, which makes them less effective than dependent tribunals, which take those interests into account) ; Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (arguing that independent courts are more effective, in part, because they enhance the credibility of state commitments). See also Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1 (2005).

[153] See EDWARD PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY (2003). For a recent assessment, see DAVID G. VICTOR, GRIDLOCK ON GLOBAL WARMING (2011), chapter 7.

finding is that as international cooperation becomes more demanding and complex, the costs of organizing and sustaining cooperation rise sharply—delegation to a central body can help manage such costs while amplifying the benefits of cooperation.[154] States delegate authority to international dispute resolution bodies, for example, because they can resolve disputes efficiently while also setting norms for acceptable behavior that can deepen cooperation in the future.[155] Efficiency can rise, as well, when states delegate authority to international institutions that can provide information, such as on levels of compliance and policy alternatives.[156]

Political science research that focuses on the ways that governments attempt to reduce the cost of cooperation generally leads to the conclusion that delegation can enhance cooperation. However, a standard problem whenever authority is delegated is how to keep the "agents" to whom authority is delegated under control. [157] Delegation may not enhance cooperation when important

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[154] This line of argument builds on the literature from economics about the role of institutions in reducing transaction costs. See generally KEOHANE, *supra* note 11; Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INT'L SECURITY 39 (1995).

[155] See, *supra* notes 149 to 150 and corresponding text.

[156] See MILNER, *supra* note 121; David A. Lake & Mathew D. McCubbins, *The Logic of Delegation to International Organizations*, *in* Hawkins, Lake, Nielson, & Tierney, *supra* note 149; LAKE, *supra* note 11. Often the function of delegated enforcement takes the form of providing information rather than actually meting out punishment. See, e.g., James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971 (2001) (on how delegation reduced uncertainty and made decentralized enforcement easier.)

[157] The beneficiaries of this delegation, known by the awkward term "principal," must find ways to entice the agent to reliably do their business. On principal-agent relationships in politics, see generally Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF

states do not have confidence that the agents to whom they have delegated authority will remain faithful to their wishes.[158] Concerns about excessive delegation to uncontrolled agents can create a backlash that makes cooperation harder to sustain.[159]

Second, political science research has focused on how delegation can help governments solve domestic political problems that impede international cooperation. Examples include the problems that arise due to "time-inconsistency." Even when sustaining cooperation is in the long-term interest of key actors, more immediate pressures imposed by well-organized political groups can preclude cooperation. Such troubles may be especially likely in democracies where government policy is open to many immediate influences. By delegating authority to an international institution, governments can "tie their hands" and reduce the temptation to defect.[160]

DELEGATION (1991); Gary J. Miller, *The Political Evolution of Principal-Agent Models,* 8 ANN. REV. POL. SCI. 203 (2005). As delegation rises so must attention to monitoring and control of agents. For some of the many applications, see Hawkins, Lake, Nielson, & Tierney, *supra* note 149; Pollack, *supra* note 23; Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

[158] See generally Hawkins, Lake, Nielson, & Tierney, *supra* note 149.

[159] See Goldstein & Martin, *supra* note 146.

[160] See Mansfield & Pevehouse, *supra* note 121. On time-inconsistency problems, see generally Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: the Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977); Avner Greif, Paul Milgrom, & Barry Weingast, *Coordination, Commitment and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Robert Barro & David Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983).

For example, submitting to the oversight and conditionality of the International Monetary Fund has allowed states to make more credible commitments to repay their loans.[161]

Third, political scientists have started focusing on how delegated bodies—including international tribunals and courts—actually function. The most visible vein of this research focuses on the WTO's DSM.[162] Some studies have also explored how the function of enforcement has de facto been delegated in cases where no formal enforcement mechanisms exist. For example, even when international human rights organizations don't have formal enforcement procedures of their own they can at times rely on national courts in some countries to apply these standards—not just within their jurisdictions but in some cases with extraterritorial application as well. International legal scholarship has long made such arguments; political science research has now been able to measure such enforcement effects systematically and provide evidence.[163] The delegation to international enforcement tribunals and to domestic courts is an area ripe for more collaboration between legal and political science scholarship, some of which is under way.[164]

Membership

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[161] See RANDALL W. STONE, LENDING CREDIBILITY: THE INTERNATIONAL MONETARY FUND AND THE POST-COMMUNIST TRANSITION (2002).

[162] See, *supra* notes 149 to 150 and corresponding text.

[163] See Powell & Staton, *supra* note 128; BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

[164] See, e.g., Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009); Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, 41 N.Y.U. J. INT'L L. & POL'Y 931 (2009); Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT'L ORG. 563 (2010).

The fourth aspect of legal design that political scientists have studied is membership. A common assumption in the literature on public international law is that membership should be as broad as possible—an assumption that is particularly strong in policy-oriented legal literature.[165] Indeed, across a wide range of issue-areas—such as human rights, arms control and the environment—the last few decades have seen a push for agreements with universal membership.[166] The logic for universalism is often rooted in the idea that broader memberships are more representative and thus legitimate.[167]

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[165] See, e.g., Markus Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 377, 402 (2002) (arguing "that the final aim of the [Montreal] Protocol can only be achieved with a universal membership."); Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 310 (2007) (arguing that "[t]o advance the complete elimination of a class or type of weapon, multinational disarmament regimes strive to achieve universal membership and attract nonstate parties that are acting in conformity with the regime's obligations."); Arsalan M. Suleman, *Bargaining in the Shadow of Violence: The NPT, IAEA, and Nuclear Non-Proliferation Negotiations*, 26 BERKELEY J. INT'L L. 206, 229 (2008) (arguing, with respect to the NPT, that "[t]he lack of universal membership, particularly with regard to the four of nine states that possess nuclear weapons, and the system's lack of symmetry between its goals and its oversight, monitoring, and implementation mechanisms are two serious shortfalls in need of significant attention.")

[166] See Laurence R. Helfer, *Symposium: Public International Law and Economics: Nonconsensual International Lawmaking*, U. ILL. L. REV. 71, 86 (2008) (noting that "[i]n the six decades since the Second World War, global and regional human rights treaties have, for the most part, overcome international law's participation deficit. Many of these treaties now have large numbers of states parties, with a few agreements approaching universal membership.")

[167] See FRANCK, *supra* note 33.

Most political science research views membership as just one of the strategic choices in the design of international agreements. Membership comes at a cost, and restricted membership can lead to more effective agreements for two reasons. One is enforcement; in cases where enforcement is important and difficult there may be gains to working with a small group while preventing potential free-riders from joining.[168] The other advantage is in contracting. When it is difficult to determine the preferences and capabilities of important members in advance those members may restrict membership to make it easier to negotiate and maintain agreements.[169] For example, NATO's restrictive membership criteria—such as the requirement of democratization, civilian control over the military and the resolution of border disputes—helps constrain membership to countries whose preferences are more likely to be supportive of the institution.[170]

The central finding from empirical research by political scientists is that membership is a tradeoff. Large memberships create potential gains from a wider application of common rules but generate complexity and uncertainty. Research on international environmental cooperation, for example, generally points to the conclusion that institutions that start with small membership and

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[168] On small groups and clubs, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). For applications to international cooperation, see David G. Victor, *How to Slow Global Warming*, 34 NATURE 451 (1991); Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM (Robert B. Porter, Pierre Sauvé, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001); Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681 (1992).

[169] See, *infra* notes 86 to 88 and corresponding text.

[170] See Kydd, *supra* note 116. Similar logic is explored with respect to the international system for managing prisoners of war (POWs). See Morrow, *supra* note 116.

have the opportunity to work in small groups on complex problems are more effective than those that operate with much larger memberships.[171] In human rights, several scholars have argued that conditional membership structures that limit participation are the most effective because they can more credibly create incentives for states to comply with human rights norms. For example, preferential trade agreements that make trade benefits conditional upon the protection of human rights lead some repressive states to improve their human rights practices more than does membership in universal human rights treaties.[172] Similarly, political scientists who study trade

[171] Indeed, international environmental agreements may have the greatest variation in terms of membership of all the issue-areas we review in this article and are a terrific laboratory for studying membership effects—something that few scholars have done in detail. While some underlying problems are generally perceived as global, most practical experience with international environmental cooperation relates to problems that have a narrower geographical focus. Variations in membership have been extensive, and that has offered a rich field for political scientists to examine. Scholars looking at the North Sea have shown that explicit efforts to exclude the least ambitious governments made it possible to gain agreement on stronger and more effective commitments. See Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, *in* Victor, Raustiala, & Skolnikoff, *supra* note 87. These insights build on earlier work that shows, using the example of fisheries, that agreements are prone to reflect the interests of the least ambitious actor. See ARILD UNDERDAL, THE POLITICS OF INTERNATIONAL FISHERIES MANAGEMENT: THE CASE OF THE NORTH-EAST ATLANTIC (1980). See also BARRETT, *supra* note 88. But see PETER M. HAAS, SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION (1990) (on the case of the Mediterranean Action Plan, arguing that large membership made the institution more effective from the outset.)

[172] See Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005). For example, the Council of Europe is able to improve the behavior of states with initially low human rights compliance by offering the benefit of being

have shown that large-scale membership can increase the variation in costs that governments face at home and potentially also the uncertainty in outcomes.[173] This, in turn, may decrease the effectiveness of international institutions.[174] The different memberships of overlapping institutions can give states the ability to vary the effect of trade rules, such as through "forum shopping,"[175] a concept widely familiar to lawyers who study the choice of legal forum at the domestic level.[176]

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incorporated into the EU as contingent upon efforts to uphold the 13 protocols of the European Convention on Human Rights. See Pamela Jordan, *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*, 25 HUMAN RIGHTS Q. 660 (2003). Moreover, some scholars have also looked at the dynamic influence of membership, showing that certain transitional states that sign universal human rights agreements without intending to comply are sometimes later induced to comply. See Simmons, *supra* note 163.

[173] See Milner & Rosendorff, *supra* note 83. A few legal scholars have also examined the ways in which domestic politics influence international trade law negotiations. See, e.g., Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999); Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 43 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Trade Rules*, 41 AUSSENWIRTSCHAFT 405 (1986), *reprinted in* 1 THE WORLD TRADING SYSTEM 121 (Robert Howse ed., 1998).

[174] A few studies have turned this question around and looked at the benefits that accrue to non-members as well as how benefits are timed with the decision to become a member. See, e.g., Goldstein, Rivers, & Tomz, *supra* note 83.

[175] See Busch, *supra* note 83. Trade economists have examined similar questions about forum shopping, animated especially by the fact that the WTO (which has nearly universal membership) must contend with the rise of many smaller regional free trade agreements (FTAs). Most economics research sees FTAs as

Design, Content and the Building Blocks of Political Science Research

For political scientists, the design of legal commitments—that is, the legal status, precision, delegation and membership—reflects a series of political choices. How these choices get made depends on which of the building blocks political scientists think are most important.

For political scientists who rely heavily on the first face of power, design choices—like all political decisions—reflect the underlying patterns of state power and interests. States with the ability to coerce have a larger impact on legal design and content than those who are vulnerable to coercion. For example, the decisions to delegate authority to a strong, independent inspection agency to prevent countries from obtaining nuclear weapons under the nuclear nonproliferation treaty reflected the interests of the most powerful states in keeping other countries out of the "nuclear club." Those same powerful states blocked efforts that would have created an equally powerful mechanism for checking progress toward disarmament.[177]

For political scientists inclined to the third and fourth faces of power, legal designs reflect the work of non-state actors and entrepreneurs who carry ideas from one area of legal practice to another. Scholarship on international wildlife law, for example, has focused on the role of environmental NGOs in setting the agenda for which species and habitats are protected.[178] The

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diversionary and argues for stronger WTO oversight of these agreements. See, e.g., Jeffrey J. Schott, *Free Trade Agreements*: *Boon or Bane* of the World Trading System?, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES (Jeffrey J. Schott ed., 2004).

[176] See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987).

[177] See, *supra* note 21.

[178] See Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT'L AFF. 881 (2006); Peter Sand, *Commodity or Taboo?: International Regulation of Trade in Endangered Species*, *in* GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND

perspective of the third and fourth faces of power has also focused on the implications for democratic accountability of delegating large amounts of authority to international institutions—a topic also of keen interest to international lawyers concerned with the "democratic deficit" that may exist in international institutions.[179]

Political scientists who take a functional perspective see design choices as a function of the "type" of cooperation problem—both the strategic context and the availability of information. For example, problems of the prisoners' dilemma type create cooperation challenges that governments can solve only with a large role for enforcement. Political scientists have placed heavy emphasis on the availability of information as a factor that determines legal design. Wary of finding themselves constrained in unwanted ways, governments will demand more flexibility when uncertainties and the risks of exogenous shocks are high. Detailed studies, many by lawyers, have looked at this issue not only in trade[180] but also arms control[181] and human rights.[182] Armed with a growing body

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DEVELOPMENT (Helge Ole Bergesen & Georg Parmann eds., 1997); ROBERT L. FREIDHEIM, TOWARD A SUSTAINABLE WHALING REGIME (2001); POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES (Oran Young & Gail Osherenko eds., 1993).

[179] See Robert O. Keohane, *Governance and Legitimacy*, Keynote Speech Held at the Opening Conference of the Research Center (SFB) 700 (with comments by Fritz W. Scharpf), SFB-Governance Lecture Series, No. 1, DFG Research Center (SFB) 700, Berlin, (2007); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

[180] See, *supra* notes 146 to 147 and corresponding text. But see Smith, *supra* note 148 (arguing that flexibility and opt-out clauses decrease the effectiveness of the WTO and its dispute settlement system. He also argues that the institution is more effective when the DSM is used to validate the use of the opt-out clause or interpret any flexibility).

[181] See Kenneth Abbott, *Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993). Because governments are acutely concerned

about survival, there is less experience in arms control with designing flexibility measures such as opt-out procedures, derogations and such for fear that other members of the agreement will use them to undercut the effectiveness of the treaty. Instead, much of the experience with flexibility arises through interpretation of agreements, imperfect enforcement, and ultimately through membership. See Chamundeeswari Kuppuswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. CONFLICT & SECURITY L. 141 (2006).

[182] See, e.g., legal research in Joan Fitzpatrick, *States of Emergency in the Inter-American Human Rights System*, *in* THE INTERAMERICAN SYSTEM OF HUMAN RIGHTS 371 (David J. Harris & Stephen Livingstone eds., 1998); Jaime Oraá, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992); Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 430 (2004); OREN GROSS & FIONNUALA D. NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006). New empirical political science research shows that most derogating countries are stable democracies. See, e.g., Emilie M. Hafner-Burton, Laurence R. Helfer, & Christopher J. Fariss, *Emergency and Escape: Explaining Derogation from Human Rights Treaties*, INT'L ORG., forthcoming. That conclusion is consistent with the fact that democracies are more likely than other regimes to file reservations when they join human rights treaties. See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005). States use these flexibility tools to respond to domestic political uncertainty. Derogations enable some governments facing threats at home to buy time and legal breathing space to confront crises while, at the same time, signaling to concerned domestic audiences that rights suspensions are temporary and lawful. For a legal point of view on denunciations, see Helfer, *supra* note 2; Laurence R. Helfer, *Exiting Treaties*, 91 VIRGINIA L. REV. 1579 (2005). Even so, the operation of that system is hardly perfect, not the least because non-democratic states can derogate freely without incurring real costs. And autocracies increase violations of most rights covered by human rights treaties during emergencies. See Eric Neumayer, *Do Governments Mean Business When They Derogate? Human Rights Violations During Declared States of Emergency*,

of empirical evidence, political scientists generally conclude that formal flexibility is often preferable to renegotiation because it defines legal standards for deviation, which makes it easier to distinguish flexibility from abuse that leads to long-term deviations, and provides limits on retaliation.[183]

For political scientists who see domestic politics as a driving force for political behavior, design choices offer a way to manage the complexity of domestic forces. Most studies of that type point to the ways that governments use flexibility in their international commitments as a way to accommodate uncertainty about what they can implement reliably at home. That insight explains why most political scientists are inclined to see flexibility provisions as a way to enhance cooperation whereas many legal scholars are skeptical of flexibility that can be used as a cover for deviation from obligations.[184]

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unpublished manuscript, *available at* http://personal.lse.ac.uk/neumayer. This suggests an opportunity to redesign derogations clauses and other treaty flexibility tools in ways that enhance rather than undermine compliance with international law.

[183] See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477 (2008). So far, there is very little research comparing the types of flexibility systems across types of agreements—a topic to which we return in Part V of this essay.

[184] Many legal scholars stress the potential for abuse of escape clauses. In the area of human rights, for example, they argue that derogations can undermine the *raison d'être* of human rights treaties and should be subject to strict international standards and monitoring mechanisms. See, e.g., SARAH JOSEPH, JENNY SCHULTZ, & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 824 (2005); OREN GROSS & FIONNUALA D. NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006). Others have argued that the escape clause provisions in the GATT/WTO should be scaled back. See Patrizio Merciai, *Safeguard Measures in GATT,* 15 J. WORLD TRADE L. 41 (1981); J. David Richardson, *Safeguards Issues in the Uruguay Round and*

Important Critiques of the "Rational Design" and Functionalist Perspectives

The functional perspective in studying international cooperation has been a productive way to generate hypotheses and focus empirical research on particular, practical aspects of international cooperation—including on how the design of legal procedures and organizations affects outcomes. However, for many political scientists (and lawyers alike) this perspective is too narrow. The critique has been rooted in four lines of argument. First is that states create institutions and choose institutional designs for many reasons beyond just furthering their interests. These choices depend in part on the arguments that are seen as appropriate and legitimate, not just in line with rational cost-benefit calculations.[185]

Beyond, *in* ISSUES IN THE URUGUAY ROUND 24 (ROBERT E. BALDWIN AND J. DAVID RICHARDSON eds., 1988). But see Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 43 (JAGDEEP S. BHANDARI & ALAN O. SYKES eds., 1997) (arguing that the WTO rules provide insufficient flexibility); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

[185] Notably see the critique by Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, 55 INT'L ORG. 1019 (2001). See also John S. Duffield, *The Limits of "Rational Design"*, 57 INT'L ORG. 411(2003) (arguing that important institutional forms, such as informal institutions, tacit bargaining and inter-subjective institutions often arise from processes other than agreement; he also argues that political science studies on "rational design" and "legalization" have ignored important independent variables such as interests, power/capabilities, institutional path-dependence, and the role of ideas.)

A second line of critique suggests that a focus on concepts such as "obligation," "precision," "enforcement," and "membership" is overly bureaucratic. Those criteria may matter, but the law's role in world politics goes far beyond the public international legal bureaucracy.[186]

A third critique, related to the others, is that legal designs are often not purely intentional. Instead, they are the result of prior historical choices and they emerge in part through path dependence—early choices constrain later ones.[187] Indeed, there is a large and growing community of "historical institutionalist" scholars—working in international relations and comparative politics as well as law and blurring the lines between all these fields—that aims to explain the path dependence of institutions, including legal institutions.[188]

Fourth, some scholars see the efforts to understand design of legal institutions and the process of legalization as missing important variables. Notably, the concept of "obligation" has proved highly contentious since the notion of obligation—and more generally of authority—is central to many visions why and how law has influence. Scholars working with the third and fourth faces of power as the key building blocks in politics have been especially critical and argued that

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[186] See generally Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2000). See also Reus-Smit, *supra* note 46.

[187] See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); Mark Axelrod, *Saving Institutional Benefits: Path Dependence in International Law*, Ph.D. Dissertation, Duke University (2008); Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115 (2010).

[188] We thank Marty Finnemore for this point. For an illustration of this convergence see generally Henry Farrell, THE POLITICAL ECONOMY OF TRUST: INSTITUTIONS, INTERESTS, AND INTER-FIRM COOPERATION IN ITALY AND GERMANY (2011).

"obligation" must be unpacked to include how ideas, persuasion, notions of legitimacy and learning affect the actual authority of law.[189]

Part III: Legal Evolution and Interpretation

Political scientists have also explored various factors that explain legal evolution and interpretation. Here we identify five, starting with perspectives that draw on different faces of power and then shifting to other building blocks that political science research has emphasized. One of lessons from this research is that clear causal theories of change are important because many factors are often at work. One of the contributions of political science research in this area, especially empirical studies, has been to parse the effects of underlying changes in interests, power and ideas from the specific roles of international institutions in shaping the evolution of international legal commitments. The work by political scientists that is perhaps of greatest relevant to international lawyers are studies that have examined how the delegation of functions to enforcement bodies and courts affects the evolution in how legal commitments are interpreted and

[189] See Finnemore & Toope, *supra* note 186 (arguing that studies of legalization and rational design have been overly vague in their assumptions about the role of "obligation" and ignored the importance of legitimacy); Duffield *supra* note 185 (arguing that other missing variables include specificity); Christian Brütsch & Dirk Lehmkuhl, *Complex Legalization and the Many Moves to Law*, *in* LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS (Christian Brütsch & Dirk Lehmkuhl eds., 2007) Chapter 2 (arguing that political science research on legalization has ignored political agency and identity; moreover, such studies have ignored the social fabric within which states make choices such as those surrounding legalization and the design of legal institutions); Mathias Albert, *Beyond Legalization: Reading the Increase, Variation and Differentiation of Legal and Law-Like Arrangements in International Relations through World Society Theory*, in Id. Chapter 10 (arguing that legalization is part of a broader process of the evolution of the international system rather than simply a mechanism for ordering particular political affairs).

applied. Thus in our review we devote the largest space to that topic. However, much of the relevant political science research in this area does not focus just on the legal institutions themselves—instead, it looks at an array of other, exogenous factors and at how they interact with legal institutions.

Power and Interests

Power and interests shape the interpretation and development of legal institutions in important ways. Most studies start with resources that are available to states because those define the inducements the state can offer and the penalties it can threaten as well as the ability it has to set agendas and decide who sets and interprets rules for international cooperation. Resources include options, and having a large number of outside options (i.e., alternative laws or alternatives to laws) can make any state (or actor) more powerful.[190] For example, the United States is the only actor in the U.N. Security Council with a large array of options outside the Security Council, such as working with NATO or even pursuing inconvenient wars unilaterally. Those outside options magnify U.S. influence within the Security Council.[191]

Because coercive power depends on alternative options, seemingly weaker actors are often able to amplify their influence over legal processes by controlling the options. In institutions that

[190] See Emilie M. Hafner-Burton, Miles Kahler & Alexander H. Montgomery, *Network Analysis For International Relations*, 63 INT'L ORG 2009); Emilie M. Hafner-Burton & Alexander H. Montgomery, *Centrality in Politics: How Networks Confer Influence*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594386 (explaining how having a large number of outside options gives an actor direct access to other important actors and decreases their dependency on any one actor).

[191] See Erik Voeten, *Outside Options and the Logic of Security Council Action*, 95 AM. POL. SCI. REV. 845 (2001).

require universal adherence to norms, for example, defection by even the smallest countries can undermine the goals of the agreement and thus amplify the power of weaker governments—a pattern that may explain why the Nuclear Nonproliferation Treaty, after years of support by the most powerful states, seems to be waning in influence.[192] Similarly, when agreements are sensitive to free riders – that is, to states that accrue the benefits of legal institutions without making a contribution – then even very powerful states can find it hard to get their way. For example, the international accords on the ozone layer would not have much effect without the participation of major developing countries. Their refusal to join allowed them to demand a special fund—created by the U.S. and other large industrial countries that had the strongest interests in protecting the ozone layer—to pay them the full extra cost of compliance.[193]

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[192] See Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337 (2006). Indeed, many security agreements are sensitive to a cascading effect, which gives disproportionate power over legal content and impact to the first domino that falls or window that breaks; governments keen on security cooperation and mindful of those cascades, become especially attentive to weak links in the system. See Amy E. Smithson, *Implementing the Chemical Weapons Convention*, 36 SURVIVAL 80 (1994) (arguing that if treaties are to be effective in stopping a domino effect of countries arming themselves—either because the treaty is not respected or because states try to protect themselves from their neighbors—universal adherence is eventually necessary); Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) (arguing that when states observe defection, they defect themselves because their security is threatened by that defection, not because of a lack of respect for the rules. Thus, even a weak state can cause defections by more powerful states).

[193] See Elizabeth R. DeSombre & Joanne Kaufman, *The Montreal Protocol Multilateral Fund: Partial Success Story*, *in* Keohane & Levy, *supra* note 90.

Most international relations scholarship focuses on state coercive power—the first face of power—because usually it is only governments have the incentive and ability to mobilize and manage resources such as the sanctions that support the NPT or the cash payments that comprise the ozone fund. However, international organizations often exert an effect by mobilizing and channeling that state power in ways that reinforce international standards.[194] For example, the WTO's dispute resolution system makes it easier for governments to retaliate against countries that are deemed not in compliance while raising the costs of unauthorized retaliation.[195] Similarly, tribunals in other areas—such as human rights—can help focus state power on activities that promote adherence to international standards.[196]

Diffusion of Ideas and Norms

In addition to studies that emphasize change in power and interests—which lie at the core of American political science and are the heart paradigms that emphasize state power as a central arbiter of international relations—other intellectual traditions have also spawned active research programs. These place less emphasis on state coercive power and a greater role for other forces such as non-state actors, ideas and discursion that are more representative of the third and faces of

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[194] See Ruggie, *supra* note 29 (arguing that International economic regimes provide a permissive environment for the emergence of specific kinds of international transaction flows that actors take to be complementary to the particular fusion of power and purpose that is embodied within those regimes; Goldstein, *supra* note 129 (arguing that international institutions can and do directly constrain domestic policy. She argues that, in its resolution of disputes, despite possessing no formal authority over US domestic law, the Free Trade Agreement panel effectively changed ITC and ITA interpretations of rules regarding anti-dumping and countervailing duty sanctions).

[195] See, *supra* notes 205 to 207 and corresponding text.

[196] See, *supra* notes 201 to 216 and corresponding text.

power. Indeed, the central goal of political science research that emphasizes these building blocks has been to explain how norms and ideas spread and drive changes in social behavior.[197]

For several decades political scientists have looked at how the evolution of content in international institutions depends on their ability to mobilize expertise and administrative competence. Scholarship on the effectiveness of environmental cooperation has examined the role of epistemic communities—that is, networks of experts who are well-connected to governments—that often play a role when regulation is complex and shrouded in uncertainty about the extent of environmental damage and the real options and costs for controlling it.[198] One insight from this research is that these actors are less important when the chief barrier to cooperation is not lack of knowledge about the underlying problem and solutions.[199] In tandem, a body of legal research emerged that examined how transnational legal networks—including courts—were influencing international coordination.[200]

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[197] See, *supra* notes 30 to 43 and corresponding text. Perhaps the most prominent intellectual tradition in international relations outside the United States is the English School, which holds that the international system is a society of states that is reflected in the institutions created to regulate state behavior, including international legal institutions. See generally HEDLEY BULL, THE ANARCHICAL SOCIETY (1977); MARTIN WIGHT, INTERNATIONAL THEORY (1991); BARRY BUZAN, FROM INTERNATIONAL TO WORLD SOCIETY?: ENGLISH SCHOOL THEORY AND THE SOCIAL STRUCTURE OF GLOBALISATION (2004).

[198] See HAAS, *supra* note 171; Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 INT'L ORG. 187 (1992).

[199] See M. J. Peterson, *Whalers, Cetologists, Environmentalists, and the International Management of Whaling*, 46 INT'L ORG. 147 (1992) (arguing that most of the time the influence of cetologists was outweighed by that of other groups, such as industry groups and, later, environmentalists).

[200] See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

Delegation and International Courts

Political scientists have recently analyzed several ways in which delegation to international courts shapes legal evolution.[201] A key insight is that the extent of delegation to an international dispute resolution body varies along two dimensions related to the design of courts: judicial independence (which depends on the selection method and tenure of judges) and access.[202] A key claim of this literature—which resonates with work done by lawyers on the impact of independent tribunals[203]--is that access for private non-state litigants and compulsory jurisdiction both contribute to international judicial independence.[204]

Focusing on the WTO, political scientists have explained why some disputes are brought and settled while others stay dormant. One insight is that democracies are more likely to settle disputes with each other at the consultation stage.[205] Others find that in "low-velocity" industries

[201] For additional commentary and review, see Shaffer & Ginsburg, *supra* note 5.

[202] See Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution*, 54 INT'L ORG. 457 (2000).

[203] See, e.g., Posner & Yoo, *supra* note 102; Helfer & Slaughter, *supra* note 152; Klerman & Mahoney, *supra* note 152.

[204] See Karen J. Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22 (2006) (finding that, while older international courts (such as the ICJ) lacked private rights of action and compulsory jurisdiction, newer courts often incorporate these design elements. Alter argues that this trend is likely to lead to a greater number of private actors claiming their rights in international courts, but she notes that these developments mostly apply to Europe).

[205] See Marc L. Busch, *Democracy, Consultation, and the Paneling of Disputes under GATT*, 44 J. CONFLICT RESOL. 425 (2000) (arguing that this occurs because democracies are better able to credibly commit to negotiated settlements. He further argues that this finding indicates democracies use the WTO dispute

with relatively few product lines and low turnover early settlement is less likely—perhaps because vested interests are greater and the costs of delay are less onerous when compared with more vibrant industries.[206] A final key finding is that developing countries tend not to bring cases to the WTO's system because these involve high startup costs.[207] While political scientists have keenly explored how the internal characteristics of countries and industries explains WTO enforcement behavior, relatively little such research has focused on questions that have dominated the legal literature on the WTO's enforcement system—notably, how prior cases have influenced the interpretation of WTO obligations. WTO enforcement is one of the areas where political scientists and lawyers have studied the same institutions but with radically different foci because the motivations of scholars in the two fields are so different.

Perhaps the most important set of questions regarding political science research on international tribunals revolves around the extent to which international judges are free to draw their own interpretations. Some argue that international judges are a type of agent, to whom national governments delegate important, but limited authority.[208] Others argue that international judges

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resolution process not to ensure adherence to international legal norms, but as a mechanism for tying their hands).

[206] See Christina L. Davis & Yuki Shirato, *Firms, Governments, and WTO Adjudication: Japan's Selection of WTO Disputes*, 59 WORLD POL. 274 (2007).

[207] See Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033 (2009).

[208] See Geoffrey Garrett & Barry Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market*, *in* IDEAS AND FOREIGN POLICY, *supra* note 37; Geoffrey Garrett, Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52

should be thought of as "trustees", meaning that they have substantial independent powers because their authority derives from sources other than delegation from national governments.[209] These different views imply distinctly different explanations for the evolution of legal doctrine—one rooted in state interest and the other in independent judicial interpretation.

Much of the recent work that has attempted to shed light on this debate has sought to incorporate insights from the study of domestic judicial behavior, looking at questions such as the causes and effects of judicial decisionmaking.[210] Studies looking at the European Court of Human Rights (ECtHR), for example, find that some judges are more "activist" than others.[211] Empirical research on other international tribunals has explored similar issues, such as strategic behavior by judges. [212] Some research—based in theory as well as empirical study of the International Criminal Court (ICC)—suggests that discourse and persuasion explain why countries, over time,

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INT'L ORG. 149 (1998); Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. POL. 669 (2005); Hawkins, Lake, Nielson, & Tierney, *supra* note 149.

[209] See Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L REL. 33 (2008). See also Karen J. Alter, *Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice*. 52 INT'L ORG. 121 (1998).

[210] See generally Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, INT'L ORG., forthcoming (2011).

[211] See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007). See also Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

[212] See Clifford J. Carrubba, Matthew Gabel, & Charles Hankla, *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 109 AM. POL. SCI. REV. 435 (2008). For an argument regarding the ways in which the WTO DSM acts strategically, see Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT'L ORG. 257 (2010).

became more willing to join its founding statute and cede authority to the ICC. Such research is rooted in the fourth face of power and looks more to persuasion as a driving force for cooperation rather than the structure of the problem or narrow calculations of state interest. [213]

A few political scientists are also studying the content of international judicial decisions, such as evident in patterns of legal citation. [214] This work may be of interest to lawyers because it can glean some of the underlying causes of international norm diffusion.[215] For example, an important question recently analyzed by political scientists is why the ECtHR cites significant amounts of its own case precedent (despite the absence of a norm of *stare decisis* in international law) and why the tendency to cite precedents varies widely across cases. Such research sees citation to precedents as a strategic effort to legitimize decisions and maximize the likelihood that domestic courts will comply with judgments—a finding that suggests that judges are not simply trustees insulated from pressure by domestic governments but are constrained in what they can achieve by domestic courts and other important external audiences.[216]

These studies suggest that neither the agent nor trustee view of international judges is complete. In some settings international judges find ways to strategically manage their relationship

[213] See Deitelhoff, *supra* note 50.

[214] See Erik Voeten, *Borrowing and Non-Borrowing Among International Courts*, J. LEGAL STUD. (2010).

[215] Legal scholars have already paid significant attention to similar questions, such as the use of foreign law in domestic courts. See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 112 AM. J. INT'L L. 241 (2008).

[216] See Yonatan Lupu & Erik Voeten, *Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, forthcoming, BRITISH J. POL SCI. For a related argument regarding the political constraints in the WTO system, see Steinberg, *supra* note 150.

with domestic governments in order to maximize compliance with their decisions—a process that shapes how international law evolves through interpretation and enforcement.

Learning

Fourth, legal evolution also occurs because key actors can obtain new information that changes the terms of cooperation. Put differently, key actors—such as diplomats who negotiate agreements as well as nonstate actors who play a role in the process and in implementation—can learn new ways to advance their goals through cooperation.[217]

There is relatively little research in political science on learning as it affects international cooperation. However, empirical studies suggest at least one line of analysis that has been promising: learning, along with other sources of new information, help transform the strategic context for cooperation. By changing the "problem type" cooperation can improve—a pattern evident in international cooperation on the ozone layer, the Rhine River and other cases.[218] (The same logic could undermine the prospects for cooperation, but most empirical research reflects a bias that scholars tend to study cases where cooperation has been successful.)

Linkages and Scope

Fifth, one way that legal institutions evolve is that the scope of their coverage changes. Indeed, the boundaries around a problem are often malleable, allowing entrepreneurial countries

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[217] See Checkel, supra note 52; Peter M. Haas & Ernst B. Haas, *Learning to Learn: Improving International Governance*, 1 GLOBAL GOVERNANCE 255 (1995).

[218] On the Montreal Protocol generally, see David G. Victor, *Enforcing International Law: Implications for an Effective Global Warming Regime*, 10 DUKE ENVTL. L. & POL'Y F. 147 (1999) (showing that diplomats focused, first, on the easiest areas of agreement). On the Rhine River, see Bernauer, *supra* note 90 (showing that as the Netherlands learned how to make financial incentives conditional upon French behavior it became easier to achieve deep reductions in pollution from French industrial sources).

and other actors to link issues in ways that alter the strategic context of a negotiation by changing the scope of bargaining. Research by political scientists has led to two insights about issue-linkage and the scope of legal institutions that will be of interest to scholars in public international law.

First, drawing on the second face of power, issue-linkage is a way to shape agendas and thus guide the evolution and interpretation of legal commitments along some pathways but not others. For example, the boundaries around the topic of "international trade" have greatly expanded over time—a topic of interest to political scientists and legal scholars alike.[219] The scholarship on which actors have the ability to make these agenda-setting linkages varies with the building blocks that scholars think are most important. For example, drawing on the first face of power, studies note that powerful states have put on the international trade agenda topics of great interest to some of their well-organized interest groups—such as rules on intellectual property (of value to western pharmaceutical and entertainment companies).[220] Other studies look to the third face of power—to entrepreneurial interest groups working transnationally, for example—to explain why international

[219] See, e.g., Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001); Jose E. Alvarez, *The Boundaries of the WTO*, 96 AM. J. INT'L L. 146 (2002). These linkages are often framed and created by international organizations, such as discussed by Barnett & Finnemore, *supra* note 48. See also Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79 (2006) (arguing that the WTO itself plays a key role in setting boundaries but not giving much attention to the underlying interests of key members of the WTO).

[220] See SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST (1998); Susan K. Sell, *Intellectual Property Rights*, *in* GOVERNING GLOBALIZATION: POWER AUTHORITY AND GLOBAL GOVERNANCE (David Held & Anthony McGrew eds., 2002).

legal institutions on the protection of biological diversity were expanded to include complicated schemes to protect developing countries against "biopiracy" of their natural assets.[221]

Second, studies on the scope of legal commitments are now leading to insights into a topic that has long been a concern of international lawyers: whether the many different layers of institutions yield conflicts and forum shopping that can produce gridlock or whether institutional diversity can offer outcomes that are less perverse.[222] Here, a collaboration between the fields of international law and political science can help identify when a high density of overlapping and linked institutions impede or advance international cooperation.

Political scientists are now trying to explain why in some issue-areas the legal landscape is dominated by legal regimes that are focused on an integrated legal structure, usually centered on a core treaty and organized hierarchically; in other areas the legal landscape is more of a decentralized "regime complex" of laws and institutions.[223] In many areas evidence abounds that

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[221] See Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

[222] See Victor, *supra* note 175.

[223] The early research on these questions focused on hierarchical legal systems—so-called nested regimes. See INSTITUTIONAL DESIGNS FOR A COMPLEX WORLD: BARGAINING LINKAGES, AND NESTING (Vinod K. Aggarwal ed., 1998). For other work looking at more fragmented outcomes, see, e.g., Raustiala & Victor, *supra* note 221; Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362 (2006). For recent reviews, see Karen J. Alter & Sophie Meunier, *Symposium: The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POL. 13 (2009); Frank Biermann, Philipp Pattberg, Harro van Asselt, & Fariborz Zelli, *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, 9 GLOBAL ENVT'L POL. 14 (2009). Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD L. REV. (2007) (arguing that fragmentation is the result of a strategic effort by powerful

hierarchical legal forms are impractical and they undercut experimentation and learning that are crucial in the early stages of developing useful law around cooperation problems where the best solutions are difficult to identify at the outset.[224]

Part IV: The Effectiveness of Legal Agreements and Institutions

A large fraction of political science scholarship on international legal institutions is ultimately concerned with whether and how international institutions have influence.[225] While similar debates have unfolded in the legal literature,[226] the political science literature is distinguished by two important insights. The first is that compliance rates are subject to "selection effects" and therefore must be analyzed with methodological care and substantive attention to states' decisions to commit to international law.[227] The second key insight is that compliance, alone, is often an incomplete concept for analyzing the effects of international law on state behavior.[228]

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states to give themselves autonomy in part because weaker states have a harder time engaging with fragmented legal systems.) For similar discussions by political scientists who study local (i.e, not international) common pool resources see POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES (Michael D. McGinnis ed., 1999).

[224] See Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7-23 (2011).

[225] See generally Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010).

[226] See, e.g., INIS CLAUDE, SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATION (1958); HENKIN, *supra* note 12; FRANCK, *supra* note 33; CHAYES & CHAYES, *supra* note 12. For a discussion that incorporates arguments from law and political science, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse, & Beth A. Simmons eds., 2002).

[227] In recent years, this insight has been adopted in the legal literature as well, including in collaborations between political scientists and lawyers or by scholars trained in both fields. See, e.g., Kal Raustiala, *The*

Methodological Issues: Selection Effects and Compliance

Research on whether an international legal agreement has had an effect on state behavior often probes whether party states comply with the terms of the agreement more often than non-parties. While such comparisons between parties and non-parties are useful they can also be misleading without a full account for the underlying causes of treaty commitment. In many cases, governments select the treaties they join because they would honor them anyway or because they are sure they can comply.[229] In other cases, governments might join treaties they do not intend to honor, knowing that no other actor will be able to enforce compliance.[230] Ignoring such motivations can lead to the erroneous conclusion that compliance—whether high or low—is linked to the law itself. Instead, selection effects are at work.

Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 VA. J. INT'L L. 1 (2002); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000); Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties*, 51 J. CONFLICT RESOL. 588 (2007); Ho, *supra* note 133; David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limit's of International Law*, 34 GA. J. INT'L & COMP. L. 333 (2006); Symposium, *How Are Nations Behaving?*, 96 AM. SOC'Y INT'L L. PROC. 205 (2002).

[228] Several studies by legal scholars have also reached similar conclusions. See, e.g., Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991); Martti Koskenniemi, *Book Review*, 86 AM. J. INT'L L. 175, 177 (1992); KOSKENNIEMI, *supra* note 13; Benedict Kingsbury, *Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1997); Goodman & Jinks, *supra* note 54; Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matte*rs, 1 GLOBAL POL'Y 127 (2010).

[229] See Downs, Rocke, & Barsoom, *supra* note 12.

[230] See, e.g., Hathaway, *supra* note 2.

The claim that selection effects explain compliance is often (and mistakenly) associated with a skeptical view of the influence of international law. In fact, compliance rates can be quite meaningful, but only when understood in the right context.[231] Political scientists have debated these methodological issues for nearly two decades, and one outcome of those debates is that the study of compliance requires sophisticated methods that allow for valid inference.[232] Accounting for selection effects is a crucial first step in studying the impact of international law, but it is also important to understand the mechanisms that explain why countries join treaties. Some of those mechanisms lead to skepticism about the import of international law while others do not.

Success in this research starts with definitions. Should the effect of an international agreement be measured by looking at *compliance* or at some other measure? If we assume that the effects of international law are concentrated only on regulated state activities then perhaps compliance captures all of the law's impact. However, most political science research now looks beyond compliance at the causal mechanisms that link law to changes in behavior. Many political scientists call this "influence" or "effectiveness." The study of effectiveness, rather than

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[231] But see Lisa Martin, *Against Compliance*, working paper, University of Wisconsin-Madison (arguing that political scientists should abandon the study of compliance altogether).

[232] See Beth A. Simmons & Daniel J. Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 AM. POL. SCI. REV. 623 (2005); Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611 (2005); Yonatan Lupu, *The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects*, manuscript, University of California-San Diego (2011). For a methodological discussion of the problem selection effects pose for attempts to make causal inference from data, see JUDEA PEARL, CAUSALITY: MODELS, REASONING, AND INFERENCE (2000). For a more detailed review of empirical research rooted in these debates, see Shaffer & Ginsburg, *supra* note 5.

compliance, corresponds more closely to the forces social scientists now study, which are those that explain human and social behavior. However, effectiveness is hard to measure because in most settings it requires a counterfactual – if the law had not been in place, what would have happened?[233] An agreement has been effective if it has induced some change in behavior that is beyond what would have happened without the agreement and consistent with the broader goals of cooperation.

The realization that counterfactuals are an essential part of determining the effectiveness of international institutions has made research in this area much more complicated and contentious. The difficulty in measuring the counterfactual and the impact of an institution arises because human behavior responds to many forces and because the counterfactual is never actually observed. The area where political science has advanced the most in measuring the effects of international institutions and addressing the problem of counterfactuals is trade. The central conclusion from that research is that the GATT/WTO system has been associated with higher flows of trade and greater economic efficiency for only some members, but the debate is far from fully settled.[234] Research on international environmental cooperation has had a particularly difficult time identifying and

[233] See generally James D. Fearon, *Counterfactuals and Hypothesis Testing in Political Science*, 43 WORLD POL. 169 (1991); Gary King, Robert O. Keohane, & Sidney Verba, *The Importance of Research Design in Political Science*, 89 AM. POL. SCI. REV. 475 (1995).

[234] See, e.g., Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94*, 57 WORLD POL. 453 (2005); Goldstein, Rivers, & Tomz, *supra* note 83. But see Andrew K. Rose, Do *We Really Know that the WTO Increases Trade?*, 94 AM. ECON. REV. 98 (2004) (arguing that the WTO has not caused an increase in trade levels).

measuring the counterfactual because behavior and environmental quality are affected by so many factors.[235]

Interestingly, while most research has sought to explain positive effectiveness—that is, the institution leads to more cooperation—some institutions have "negative" effectiveness. They make matters worse. For example, some institutions can create a backlash in domestic politics that undermines willingness to cooperate—a topic that both political scientists and lawyers have studied.[236]

Substantive Issues: Why Does Law Have an Effect?

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[235] See Thomas Bernauer, *The Effect of International Environmental Institutions: How We Might Learn More*, 49 INT'L ORG. 351 (1995) (arguing that the right measure of effectiveness should be the solution to underlying environmental problems). See also Ronald B. Mitchell, *Evaluating the Performance of Environmental Institutions: What to Evaluate and How to Evaluate It?*, *in* INSTITUTIONS AND ENVIRONMENTAL CHANGE: PRINCIPAL FINDINGS, APPLICATIONS, AND RESEARCH FRONTIERS 79 (Oran R. Young, Heike Schroeder, & Leslie A. King eds., 2008).

[236] See Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*?, 84 WASH. U. L. REV. 777 (2006) (on how criminal tribunals can undermine cooperation by targeting actors whose participation in the peace process is vital.) Oona Hathaway argued several years ago that commitment to several human rights treaties was associated with higher levels of human rights abuses. Hathaway, *supra* note 2. That finding spawned a significant body of research among political scientists. See, e.g., Jay Goodliffe & Darren G. Hawkins, *Explaining Commitment: States and the Convention Against Torture*, 68 J. POL. 358 (2006); James Raymond Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008); James R. Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance*, *available at* http://iserp.columbia.edu/files/iserp/Rosendorff--CUIPS%20Paper.pdf.

What looks like effectiveness or compliance might be caused by something else. The job of the analyst who is measuring the effect of an agreement is to separate its impact from the noise of those many other forces. In principle, that research should be working with a single body of theories that is tested with data across many different issue-areas. In practice, sifting the effect of international law from other influences on behavior is so complex that essentially all of the political science insights about the causal mechanisms at work are tailored to specific issue-areas where analysts are experts. Very few scholars work across different issue-areas. Here we briefly examine the key insights by looking across studies that have examined cause and effect in environment and in human rights – we choose these issues because they are among the most heavily studied by political scientists today.[237] That research, while difficult to summarize because it addresses so many topics, point to four kinds of cause and effect mechanisms.

The first line of argument sees effectiveness as the result of incentives that interact with the type of cooperation problem that governments are trying to solve. Traditionally, international relations looked to incentives offered by dominant states—the first face of power—to explain which international agreements are most effective. Studies on the international whaling regime, for example, have pointed to the dominant role of the United States in using the threat of trade sanctions to encourage whaling nations to change their behavior. The countries that are most vulnerable to sanctions—such as Iceland, which depended heavily on exports of fish products that were easily sanctioned at little cost by the United States—were most likely to change their behavior.[238] Although this strand of research concentrates on the first face of power it also sees a role for international institutions in helping powerful countries to mobilize sticks and carrots and in

[237] For an in-depth review of recent empirical scholarship on other issue areas by the legal community, see Shaffer & Ginsburg, *supra* note 5.

[238] See ROBERT L. FREIDHEIM, TOWARD A SUSTAINABLE WHALING REGIME (2001).

making it easier for like-minded countries and NGOs to mobilize around the same goals.[239] Political science research has less to say about when states select positive or negative incentives (carrots or sticks). However, there is a long tradition of research on international sanctions that generally concludes that sanctions are usually not effective,[240] and thus as a practical matter studies that focus on incentives from international institutions usually look at positive inducements—such as special funds that help governments comply with international obligations—and at withdrawal of those incentives as a penalty.[241]

Today, many analysts have shifted their focus to concentrate on how international incentives affect domestic politics. For example, the international regime to regulate oil pollution from tankers was highly influential because international rules created a strong incentive for insurance companies and port state governments to require that tanker operators comply.[242] And much of the research on human rights now focuses on how international institutions cause changes in behavior by working

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[239] See, *supra* note 21.

[240] See, e.g., LISA L. MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS (1992); Edward D. Mansfield, *Review: International Institutions and Economic Sanctions*, 47 WORLD POL. 575 (1995); Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When is Cooperation Counterproductive?*, 54 INT'L ORG. 73 (2000); Navin A. Bapat & T. Clifton Morgan, *Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data*, 53 INT'L STUD. Q. 1075 (2009).

[241] See, *supra* note 89; Hafner-Burton, *supra* note 172.

[242] See Ronald Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT'L ORG. 425 (1994).

through domestic institutions such as courts and by mobilizing domestic pressure groups that, in turn, induce governments to change policy and behavior.[243]

A second line of argument stands in stark contrast. Instead of looking to inducements and penalties, this line of thinking starts with the third and fourth faces of power. It sees international institutions, as well as particular agreements such as treaties, as having an effect through persuasion and legitimacy—usually working through domestic pressure groups such as NGOs, churches and elites. For example, many studies of international environmental cooperation ultimately point to these agreements as focal points for growing concern about environmental problems.[244] In the international agreements on acid rain in Europe, for example, NGOs within important polluting countries became convinced that acid rain was an important issue and then used internationally agreed emission targets as a way to pressure their governments to change—most famously in the case of the United Kingdom which went from being the "dirty man of Europe" to a reliable leader on environmental issues over the space of a generation.[245] Many scholars have looked at how international human rights agreements accelerate the diffusion of norms within countries, resulting

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[243] See Neumayer, *supra* note 182; Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005). For studies by legal scholars that look at similar issues, see, e.g., Hathaway, *supra* note 2.

[244] See, e.g., Arild Underdal, *Determining the Causal Significance of Institutions: Accomplishments and Challenges*, in INSTITUTIONS AND ENVIRONMENTAL CHANGE: PRINCIPAL FINDINGS, APPLICATIONS, AND RESEARCH FRONTIERS 49 (Oran R. Young, Heike Schroeder, & Leslie A. King eds., 2008).

[245] See Marc A. Levy, *European Acid Rain: The Power of Tote-Board Diplomacy*, *in* INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter M. Haas, Robert O. Keohane & Marc A. Levy eds., 1993).

in changes to how human rights plays out in domestic politics and institutions such as courts.[246] For example, membership in international organizations (including those not explicitly addressing human rights) is associated with the international diffusion of human rights practices.[247] Other scholars have looked at the role of legal institutions as focal points for persuasion.[248] Still others criticize these perspectives drawn from the third and fourth faces of power for focusing on the wrong subnational processes and failing to appreciate the driving role of forces such as race and gender.[249] Several legal scholars have emphasized similar themes.[250]

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[246] See Finnemore & Sikkink, *supra* note 36. See also Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 111 AM. POL. SCI. REV. 573 (2007). This type of argument has also been made by several legal scholars. See, e.g., HENKIN, *supra* note 12; Koh, *supra* note 32. Drawing on sociology, some scholars have studied the propensity of nations to join international commitments because that is part of being a member in good standing in the international community. See, e.g., John W. Meyer, John Boli, George M. Thomas, & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOCIOLOGY 144 (1997). Similarly, political scientist Krasner argues that, among other reasons, states often sign these agreements "to follow the script of modernity." STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999), at 121. A similar logic has been extended to explain why so many firms join voluntary codes of conduct. Firms seek safety in numbers. See Vogel, *supra* note 27.

[247] See Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT'L STUD. Q. 127 (2010).

[248] See Deitelhoff, *supra* note 50.

[249] This "critical" perspective covers a broad array of studies that do not fit well under any simple label. See, e.g., ADRIANA SINCLAIR, INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW: A CRITICAL APPROACH (2010).

A third line of argument looks at how the effectiveness of international institutions depends on their ability to mobilize expertise and administrative competence—a topic covered in more detail earlier.[251]

A fourth line looks at delegation—in particular, the impact of courts. Much of this work, like all international relations scholarship on courts, has focused on European courts and mainly in the area of human rights. An important test of effectiveness is whether courts can get governments to comply with costly rulings. The literature has focused on the European Court of Justice (ECJ). Early work argued that because the ECJ did not have enforcement powers, the national governments could ignore it.[252] Other scholars suggest that the effectiveness of the ECJ has come through co-

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[250] Many of these views are rooted in critical legal studies. See, e.g., DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) (arguing that there are no objective standards of justice in international society); KOSKENNIEMI, *supra* note 13 (arguing that international law, coming largely from the western liberal tradition, has not succeeded in its goals of creating a system based on sovereignty and consent. The result, he concludes, is a European, Christian developed country bias in the international legal system.) See also HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000) (offering a feminist approach to international law and arguing that the legal order places insufficient emphasis on women's economic and social rights); Charlesworth, Chinkin, & Wright, *supra* note 13 (pointing to the notion that the primary subjects of international law are states and international organizations and that leadership in both under-represents women). Another branch of legal scholarship focuses on race. See, e.g., Ediberto Roman, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519 (1999) (arguing that most international legal scholarship marginalizes race).

[251] See also, *supra* note 24 and corresponding text; *supra* notes 108 to 110 and corresponding text.

[252] See Garrett & Weingast, *supra* note 208; Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995). See also Downs, Rocke, & Barsoom, *supra* note 12.

option of national courts,[253] and thus the question of ECJ became, in time, synonymous with the impact of national courts.[254] Still others—a collaboration of lawyers and political scientists—suggested that the ECJ actually had an effect because it masked the political implications of its rulings in legal discourse and because the countries subject to the ECJ all adhered to norms of judicial independence and the rule of law.[255] Empirical studies on the effect of courts have also looked to the third face of power and demonstrated how ECtHR rulings have empowered social actors and other European bodies, thus diminishing the ability of national governments to control the direction of European law.[256] Recent formal modeling has also focusing on how courts affect the perceived legitimacy of international commitments and levels of compliance with ECJ decisions.[257]

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[253] See Alter, *supra* note 209.

[254] Several of these scholars have since moderated their positions. See, e.g., Geoffrey Garrett, Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998) (noting that, in some instances, domestic governments would comply with decisions they would prefer to ignore); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2002) (noting that governments might ignore ECJ rulings, but argued that in many cases the legitimacy cost of doing so would prevent such non-compliance).

[255] See Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT'L ORG. 1 (1995).

[256] See, e.g., Rachel A. Cichowski, *Courts, Rights, and Democratic Participation*, 39 COMP. POL. STUD. 50. (2006).

[257] See, e.g., Clifford J. Carrubba, *The European Court of Justice, Democracy, and Enlargement*, 4 EUR. UNION POL. 75 (2003). See generally Clifford J. Carrubba, *Courts and Compliance in International*

All four of these lines of research point to cause and effect mechanisms that are familiar to international lawyers. The main contribution of political science has been one of emphasis and evidence. All of the lines of cause and effect research point to the conclusion that causation is highly complex and often indirect. And the tenor of political science research has been to emphasize that except in rare areas where international institutions are highly developed and powerful, much of the effect of international institutions is through the domestic political process and institutions such as national courts.[258]

Part V. Opportunities for Collaboration

Political scientists have built a large and productive program studying international legal institutions. Already, political scientists and international lawyers are aware of research developments across these two fields and, in some areas, have developed research partnerships. Looking to the future, we see at least three main areas where scholars in these two fields could collaborate to yield important insights about international legal institutions, processes and outcomes.

First is empirical research on enforcement and flexibility. In theory, these concepts are two sides of the same coin because the enforcement mechanisms that a country is willing to tolerate are related to the options it thinks it will have when it faces inconvenient commitments.[259] Yet the

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Regulatory Regimes, 67 J. POL. 669 (2005); Michael Gilligan, Leslie Johns & B. Peter Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 J. CONFLICT RESOL. 5 (2010). See also, *supra* notes 142 to 148 and corresponding text.

[258] See, e.g., TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY (2005) (arguing that human rights agreements mostly exert influence on government behavior indirectly.)

[259] See Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 132; Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES (Eyal Benvenisti & Moshe Hirsch eds., 2004)

actual experience with these mechanisms varies markedly. Over the last 15 years the design and operation of enforcement mechanisms in international trade law—notably in the WTO—has been a central topic for research. In most areas of international law—such as in environment, security and human rights covering a wide span of problem types—there are few or no formal enforcement mechanisms. Meanwhile, flexibility provisions are commonplace in trade and human rights agreements yet rare in most of the flagship international environmental and security agreements. Collaborative empirical research could help explain the observed patterns in enforcement as well as how enforcement and flexibility interact in ways that influence the effectiveness of legal agreements.[260]

Progress in studying enforcement and flexibility would help address important debates that have opened in both fields. For political scientists, one of the main insights from scholarship on the "rational design" of international institutions is that uncertainty can lead to large amounts of delegation and that one of the chief functions of delegated bodies is to help states manage the practical and political problems associated with enforcement.[261] Yet outside the WTO relatively little is known about how enforcement really works. And the rational design framework developed by political scientists has not gained much traction in the international legal community—probably because its empirical projections are not fine-grained enough to be relevant to the practical work of public international law. For public international lawyers, progress in this area will help address the

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(on different pathways through which states can obtain flexibility needed to promote deeper cooperation); Victor, *supra* note 153 (on how flexibility could help address the particular challenges of global climate change); RICHARD BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981) (on the special role of soft law as a source of flexibility).

[260] See, e.g., Hafner-Burton, Helfer, & Fariss, *supra* note 182.

[261] See Koremenos, Lipson, & Snidal, *supra* note 114.

question of whether flexibility undermines or enhances cooperation—including whether the proliferation of many, flexible international institutions will lead to forum shopping and a gridlock of conflicting legal interpretations.[262]

Second, scholarship on private actors—that is, actors other than governments and their officials—has exploded within both fields. Most scholars agree that private actors play instrumental roles yet there remains relatively little collaboration between lawyers and political scientists on exactly when and how non-state actors have a practical effect on legal institutions and outcomes. For the last two decades both fields have devoted substantial attention to NGOs as important private actors—especially public interest pressure groups such as organizations that have mobilized transnationally to press for arms control (e.g., the ban on landmines), protection of human rights (e.g., rights of women) and all manner of environmental goals. [263] We are concerned that this focus—which arises in part because many scholars working in these areas are also normatively committed to the ideals of the most active NGOs—has been prone to over-state the importance of NGOs.

A particular blind spot, especially among political scientists, is firms. While transnational firms were central to much earlier work,[264] the more recent literature tends to looks at firms as having limited roles, such as performing functions that are delegated to them by governments.[265]

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[262] See, *supra* notes 175 to 176 and corresponding text.

[263] See, *supra* notes 26 to 27 and corresponding text.

[264] See, e.g., RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971).

[265] See, e.g., THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods eds., 2009). But see Layna Mosley, *Private Governance for the Public Good? Exploring Private Sector Participation in Global Financial Regulation*, *in* POWER, INTERDEPENDENCE AND NON-STATE ACTORS IN WORLD POLITICS (Helen

And most studies also see firms as an interest group that is usually keen to oppose regulation and prone, when regulation is inevitable, to favor private regulation that industry can control more readily.[266] The study of firms appears to play a more central role in legal scholarship on international law.[267]

A sharper collaborative focus on how firms actually behave in international law is overdue—especially one that is empirically oriented to explain the kinds of regulation that firms actually favor and how they organize to influence the content of such rules. We note that the

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Milner & Andrew Moravcsik eds., 2009); RONIE GARCIA-JOHNSON, EXPORTING ENVIRONMENTALISM: U.S. MULTINATIONAL CHEMICAL CORPORATIONS IN BRAZIL AND MEXICO (2000).

[266] See JOHN BRAITHWAITE & PÉTER DRAHOS, GLOBAL BUSINESS REGULATION (2009); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler, & Tony Porter eds., 2005); Phillip Pattberg, *Institutionalization of Private Governance*, 18 GOVERNANCE 589 (2005). Research on private regulation has also overlapped with the study of corporate social responsibility and debates over whether firms will (and should) self-regulate in ways that may be immediately contrary to their particular financial interests. See, e.g., David P. Baron*, Morally Motivated Self-Regulation*, 100 AMER. ECON. REV. 1299 (2010).

[267] See, e.g., JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006); Larry Cata Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here*, 19 CONN. J. INT'L L. 1 (2003-2004); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2004-2005); GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC PRIVATE PARTNERSHIPS IN W.T.O. LITIGATION (2003)*;* Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147 (2009).

histories of many international regulatory agreements, such as on intellectual property under the WTO[268] and on regulation of ozone-depleting chemicals under the Montreal Protocol on the Substances that Deplete the Ozone Layer,[269] reveal key firms organizing to push for stronger public regulation. Long ago the field of industrial organization focused on regulation as a strategic tool available to firms; few of the insights from the study of national regulation and firms have been applied to the international level.[270]

Third, there are potentially large gains from collaboration in the study of customary international law. A large fraction of the work in public international law focuses on the role of custom. Important debates over the sources and impacts of customary international law—including whether countries can even exit from some customary obligations—have long been a staple of legal

[268] See PETER DRAHOS & JOHN BRAITHWAITE INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2007); Sell, *Intellectual Property Rights*, *supra* note 220; Jon Aaronson, *International Intellectual Property Rights in a Networked World, in* POWER, INTERDEPENDENCE AND NON-STATE ACTORS IN WORLD POLITICS (Helen Milner & Andrew Moravcsik eds., 2009).

[269] On the ozone layer, see generally EDWARD PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY (2003). On firms, see James Maxwell & Forrest Briscoe, *There's Money in the Air: The CFC Ban and DuPont's Regulatory Strategy*, 6 BUS. STRATEGY & ENVIRONMENT 276 (1998); DAVID LEVY & PETER NEWELL, THE BUSINESS OF GLOBAL ENVIRONMENTAL GOVERNANCE (2006); Horst Albach, Ellen Krupa & Dieter Koster, *Entry, Entry-Deterrence and Exit: A Study of the Market for CFCs*, 51 KYKLOS 469 (1998).

[270] See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON & MGMT. SCI. 3 (1971); A READER ON REGULATION (Robert Baldwin, Colin Scott, & Christopher Hood eds., 1998).

writing.[271] Political scientists have been almost completely absent from this debate, and a large swath of political scientists drawn to the first face of power are also inclined to view as unimportant legal norms that don't emanate from the interests of powerful states.[272] For most public international lawyers customary international law is omnipresent; for most political scientists it is rarely considered.

The shift in emphasis within international relations over the last two decades has led to much more sophisticated theories about how forces within states interact with international politics. This research has relied on building blocks from the third and fourth faces of power and domestic politics. The field has put much greater emphasis on general norms—including how norms come to be viewed as legitimate and how processes of persuasion shape how norms spread.[273] That puts political science in a good position to contribute to the legal debates over customary international law. In particular, the methods for empirical research that are standard in political science can help address questions such as how customary norms spread and when they have an independent effect on behavior.

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[271] See, e.g., Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); Theodor Meron, *The Continuing Role of Custom in International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000); GOLDSMITH & POSNER, *supra* note 2; John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J. L. & PUB. POL'Y 7 (2006); Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century, in* PROGRESS IN INTERNATIONAL ORGANIZATION (Rebecca Bratspies & Russell A. Miller eds., 2007); Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. (2010).

[272] See, *supra* note 14 and corresponding text.

[273] See Johnston, *supra* note 63, at footnote 45.

Part VI. Conclusion

Two decades have passed since the last large review of international relations scholarship was written for legal audiences.[274] Since then, collaborations between international lawyers and political scientists have increased. And in tandem the field of political science has shifted to focus on new topics.

Debates that used to rage within the field of political science about international law are no longer relevant. Notably, very few political scientists see law as an unimportant force in world politics. Essentially all international relations scholars find that international law, along with other international institutions, plays a substantial role in ordering relations between countries. Most research is now focused on specific mechanisms that explain how law influences outcomes. Perhaps the largest contributions of international relations in the last two decades have come in the ways that political scientists have mobilized evidence to test hypotheses. Many new datasets and empirical studies have appeared.

Here we have suggested a framework for understanding the development of political science research related to public international law. Our approach is to emphasize that political science, broadly, rests on three main building blocks—with different scholars varying which blocks they emphasize. Those blocks help explain why some studies focus on state power and coercion as a dominant force affecting the content and operation of legal institutions while others look to the spread of global norms or the forces within countries. Those blocks also help explain the particular approaches that political scientists have taken when studying the design and operation of legal institutions—an area where political science research, in theory, should overlap heavily with the work of public international lawyers yet actual collaborations still remain remarkably scarce.

[274] See Abbott, *supra* note 3.

We have also suggested three areas where new collaborations could be particularly fruitful. Successful collaboration will require clarity in where the two fields have overlaps in interest as well as where they have relatively little to say to each other. Some of the opportunities for collaboration are in areas where political scientists and lawyers are already working together, such as on the study of flexibility measures in treaties. Others are areas, such as customary international law, where the questions of central interest to both fields will be hard to answer satisfactorily until scholars collaborate more fully.