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Jeffrey L. Dunoff
Temple University - James E. Beasley School of Law
Harvard Law School

Mark A. Pollack
Temple University - Department of Political Science

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Jeffrey L. Dunoff
Laura H. Carnell Professor of Law
Director, Institute for International Law & Public Policy
Temple University Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122
E-mail: jeffrey.dunoff@temple.edu

Mark A. Pollack
Professor of Political Science and Jean Monnet Chair
Temple University
Department of Political Science
461 Gladfelter Hall
Philadelphia, PA 19122
United States of America
E-mail: mark.pollack@temple.edu

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Jeffrey L. Dunoff[*]

Mark A. Pollack[**]

International Relations (IR) has long enriched itself by drawing conceptual and methodological ideas from cognate disciplines – with one glaring exception. International relations is centrally concerned with the causes and consequences of international cooperation and, increasingly, international legalization. International lawyers share these scholarly preoccupations, and so one might imagine that scholars from international law (IL) and IR would share overlapping research interests and scholarly agendas, and commonly draw upon insights from the other field. In fact, however, the two disciplines were estranged for much of the 20th century, and developed along parallel but rarely intersecting paths. Although the mutual neglect among international law and politics began to ebb with the end of the cold war, and a vibrant IL/IR literature has emerged in the past two decades, the intellectual terms of trade in this literature have been strikingly asymmetrical. Specifically, most IL/IR writings involve the application of IR theories and methods to the study of international legal phenomena, with little or no attention to the potential contribution of international legal scholarship.

To the extent that IR scholars consider international legal theory at all, it is primarily to dismiss it as unhelpful, either because it is unduly narrow in its focus upon the language of international

[*] Laura H. Carnell Professor of Law and Director, Institute for International Law & Public Policy, Temple University Beasley School of Law.

[**] Professor of Political Science and Jean Monnet Chair, Temple University Department of Political Science.

legal instruments; politically naïve in devoting substantial attention to unenforceable legal rules but failing adequately to account for power; or methodologically suspect, as legal writings are often normative (urging reform of legal rules or institutions) but rarely positivist (generating and empirically testing causal claims about the world). In short, legal scholarship is seen as excessively formalist, and legal thought is condemned for paying undue attention to the language of legal rules and insufficient attention to the practical realities of how the world of international affairs works. Reading IR scholarship, one might conclude that international legal theory has about as much to contribute to our understanding of international affairs as phrenology – a 19th century pseudo-science that that involved feeling the bumps a person's skull to determine that person's personality – can contribute to our understanding of human behavior.

Ironically, by ignoring what lawyers know about how international law operates, IR scholars themselves unwittingly fall prey to a type of formalism that is insufficiently attentive to the practical realities of how the international legal order works. For example, contemporary IR accounts of international law-making are dominated by a rational design approach that focuses almost exclusively on treaties and formal institutions. This approach has generated important insights, but has drawn attention away from the processes of law-making, including the means by which states yield power in treaty negotiations; overlooks important law-making fora, such as the push and shove of customary international law formation; and elides the varied roles of non-state actors in emerging soft-law processes. Similarly, IR analyses of international legal interpretation focus almost exclusively on international courts, misleadingly overlooking the numerous other sites where interpretation and application occurs, including committees, councils, and other subsidiary treaty bodies. Such studies also tend to reduce international judicial behavior to a single dimension of dispute settlement – does the court rule for or against state *x*? – and ignore the role of courts in shaping the development of international law over time. Finally, IR studies of compliance typically assume that legal texts are unambiguous and that international law's effects are most relevantly measured in terms of state behavior that is (or is not) consistent with the terms of international agreements. But this formalist view of international

law fails to account for the wide variety of ways in which, and the processes through which, international law influences both states and non-state actors.

In short, viewed from a perspective informed by current international legal thought, IR accounts of international law-making, interpretation, and compliance are notable for their significant and persistent blind spots. As a result, IR scholars utilize a skewed picture of IL, which necessarily produces a partial and misleading understanding of law and its effects on states and the international order. Happily, IR scholars can remedy these defects by drawing upon the theoretical frameworks and empirical analyses of their counterparts in law.

The purpose of this paper is to begin a process of enriching IR understandings, by exploring what the discipline of international relations can learn from the discipline of international law. To do so, this essay proceeds in three parts. Part I provides a thumbnail history of the relationship between the disciplines. As is well known, the two fields were once in close dialogue, but became estranged during the post-War era. Understanding what triggered this estrangement, and the nature of the recent rapprochement, sets the stage for our discussion of how IR scholars can benefit from engaging with traditional and new thinking in international law.

Part II sets out a brief primer on the leading approaches to international law, with particular emphasis on the most influential theoretical approaches developed in the past half-century. This primer is designed to be a user-friendly introduction to the major strands of international law thinking and the work of its leading contributors, demonstrating that the common image of international legal scholarship as overly formalistic and blind to political realities is simply incorrect, and that IL scholarship offers important insights into issues that political scientists care about.

Part III turns more directly to how international legal thought can advance IR thinking. We identify several concepts – which we call *process*, *power*, *pluralism*, and *normativity* – that are central to legal analysis but often overlooked or treated differently in IR scholarship. Next, by way of example, we highlight three broad areas of inquiry – the making, interpretation, and enforcement of international law – where international law approaches can make a distinctive contribution to IR scholarship.

International relations scholars should thus understand this paper as a "prospectus," or as an introduction and invitation to use international law theory, in much the same way that a previous "prospectus" in a leading legal journal famously introduced IR theory to international law scholars more than two decades ago (Abbott 1989; in the same spirit, see Hafner-Burton, Victor and Lupu 2012). Our hope is that this introduction will entice IR scholars to treat international legal thought less like phrenology and more like the cognate fields of economics and psychology, and thereby deepen our understanding the causes and consequences of international cooperation.

I. TRACING THE DISCIPLINARY ARC: BREAK AND RAPPROCHEMENT

At the outset, it is worth highlighting how curious it is that international relations scholarship devotes so little attention to international legal thought. After all, scholars in the two disciplines tend to cover much the same intellectual territory, and international lawyers are generally well acquainted with the dominant conceptual approaches used in IR writings. Why are IR scholars, in general, not similarly familiar with leading conceptualizations of the international legal order used by legal scholars? To address this question, it is necessary quickly to review the trajectory of relations between the two disciplines.[1]

Responses to the Realist Challenge

During IR's early years in the first half of the 20th century, the disciplines of international law and international relations overlapped substantially. Leading scholars in both fields championed the spread of democracy and the development of international institutions as strategies for replacing power politics with something akin to the international rule of law. However, the cataclysm of World War II brought this era of disciplinary convergence to an abrupt end. The war led many leading political

[1] For fuller accounts of this history, see Slaughter 1993: Keohane 1997.

scientists to reject the "idealism" associated with inter-war scholarship (Carr 1939; Kennan 1951: 95). These so-called "realists" argued that, in the absence of centralized enforcement mechanisms, it was folly to believe that international agreements could meaningfully constrain state action (Morgenthau 1958). As this realist approach gained dominance within political science, the study of international law was marginalized within the field, leading to a decades-long mutual estrangement between the two disciplines.[2]

Ironically, realism's ascendance eventually triggered the intellectual developments that would lead each discipline to "rediscover" the other, albeit decades later. Within international law, the realist critique powerfully challenged international law's *raison d'être*. In response, international lawyers developed new approaches designed to demonstrate international law's practical relevance to international affairs. In Part II of this paper, we review several of the most influential and enduring of these responses. For now, we note that all of these responses reconceived, in various ways, the relationship between international law and politics. As Slaughter explains, these efforts involved three central analytic moves: "First, all [the efforts] sought to relate law more closely to politics . . . . Second, as part of this mission, all redefined the form of law, moving in some measure from rule to process. Third, all reassessed the primary functions of law. Whereas rules guide and constrain behavior, . . . processes perform a wider range of functions: communication, reassurance, monitoring and routinization" (Slaughter 1993: 209).

Realist claims also triggered a series of developments in political science. One important development came from the subfield of international organizations. Over time, scholars in this area shifted their attentions from the formal features of international bodies to overall patterns of influence that shaped organizational outcomes (Kratochwil and Ruggie 1986). Eventually, the field morphed into the study of "international regimes," understood as "sets of implicit or explicit principles, norms, rules and decision-

[2] The disciplinary estrangement was not as pronounced in the United Kingdom, where an influential "English school" highlighted law's importance in international affairs (Bull 1977).

making procedures around which actor expectations converge in a given issue-area" (Krasner 1982: 185).

Roughly contemporaneously, Robert Keohane and others began to draw on rational-choice premises to develop a "functional" theory that understood regimes as a product of states' rational pursuit of their own self-interests (Keohane 1984). This institutionalist approach argued that regimes enhance the likelihood of inter-state cooperation by reducing transaction costs, generating information, reducing uncertainty, and increasing expectations of compliance.

Kratochwil and Ruggie's (1986) focus on the intersubjective understandings associated with international regimes sparked approaches that were more sociological and contextual, and less materialistic and strategic. Eventually, a constructivist school emerged, which viewed international law as shaping understandings of interests, perceptions of legitimate behavior, and the nature of justificatory discourse in international affairs (Ruggie 1998; Wendt 1999; Brunnée and Toope 2000; Reus-Smit 2004). Moreover, by the early 1990s, liberalism had emerged as a distinctive and coherent theory of international relations (Moravcsik 1997). This approach focuses "on the demands of individual social groups, and their relative power in society, as a fundamental force driving state policy and, ultimately, world order" (Moravcsik 2012).

Hence, by the turn of the century, a series of analytic developments internal to each field created the conceptual tools and intellectual space for scholars in each discipline to draw upon insights associated with the other. At roughly the same time, external events – in particular the end of the Cold War and the apparent revitalization of many international legal norms and institutions – raised numerous research questions of interest to scholars from both fields, resulting in several high-visibility calls for interdisciplinary IL/IR research.

Forging an Interdisciplinary Dialogue

Kenneth Abbott's *Modern International Relations Theory: A Prospectus* (1989) launched the current interdisciplinary dialogue. This paper argued that the ascendance of regime theory and related theories of international cooperation "offers a long-

overdue opportunity to re-integrate IL and IR" (p. 338). Abbott introduces international lawyers to key IR concepts, including collective action problems and economic and political market failures. He urges international lawyers to use these conceptual tools to become "functionalists" rather than "formalists," to better understand international cooperation. Four years later, Anne-Marie Slaughter (Burley) echoed Abbott's call in *International Law and International Relations Theory: A Dual Agenda* (1993), published in the AMERICAN JOURNAL OF INTERNATIONAL LAW, perhaps the field's preeminent journal. The article reviews in considerable detail the post-war trajectory of the two disciplines summarized above, and then invites international lawyers to apply "institutionalist" and "liberal" IR approaches to international legal phenomena.

On the IR side, IL/IR arrived via a special symposium issue of INTERNATIONAL ORGANIZATION devoted to "*Legalization and World Politics*" (Abbott et al. 2000). Unlike the seminal articles in legal journals, the *Legalization* volume is not an explicit call for others to engage in interdisciplinary work. However, the prominence of the authors and journal clearly signaled to political scientists that international legal phenomena were worthy of sustained scholarly attention.

Notably, these publications – along with virtually all of the early IL/IR writings – employ a very particular form of interdisciplinarity. For example, although the *Prospectus* claims that "IL and IR have much to contribute to each other," it quickly becomes clear that the two disciplines' respective contributions are quite distinct: "The opportunity to integrate IL and IR stems… from the analytical approaches, insights and techniques of modern IR theory, which can readily be applied to a variety of legal norms and institutions. . . . For its part, IL can offer modern IR scholars an immense reservoir of information about legal rules and institutions, the raw material for growth and application of the theory" (339-340). Slaughter presents much the same argument. Although the term "dual agenda" might suggest a two-way street in which scholars from both fields learn from each other, in fact both elements of the "dual agenda" run in one direction – from IR to IL. The paper urges lawyers to pursue both "the Institutionalist road to interdisciplinary collaboration" and "the application of 'Liberal'

international relations theory to law within and among nations" (206-207).

The structure of the argument in the *Legalization* volume is substantially similar. The volume's organizers claim that their framework is "able to unite perspectives developed by political scientists and international legal scholars and engage in a genuinely collaborative venture" (387). Yet, once again, to be "collaborative" is not necessarily to contribute equally. The volume's introduction notes that international law has "chronicled and categorized th[e] 'move to law' but has largely failed to evaluate or challenge it." The authors claim that "approaches from political science should be more helpful in explaining the puzzle of uneven legalization" (388) and the volume's contributors provide political science-based explanations of international legalization.

In short, in each of these canonical statements – and, to a large extent, in the subsequent literature – the intellectual terms of trade are highly unequal, consisting primarily of the application of the theories and methods of political science as a *discipline* to the study of international law as a *subject*. Indeed, it is striking that the most recent, authoritative review of IL/IR scholarship is framed as "a fresh survey of what political science has learned that may be of special interest to international lawyers" (Hafner-Burton, Victor and Lupu 2012).

Given this framing of the IL/IR project, it is not surprising that IR scholars have largely ignored international legal scholarship, or that the intellectual terms of trade between the disciplines have been highly asymmetrical. Thus, while IL/IR scholarship has been highly influential, by ignoring fruitful conceptual approaches developed by international lawyers, it has operated at a self-imposed handicap. Parts II and III of this paper should be understood as an effort to begin a process that, over time, might produce a rise in the value of international law's conceptual currency, in turn generating more balanced interdisciplinary terms of trade.

II. A VERY BRIEF INTRODUCTION TO INTERNATIONAL LEGAL THEORY AND METHODS

Nearly a half-century ago, LSE Professor Martin Wight famously asked why there was no international theory (1966). Posing this question today is virtually unimaginable; in the intervening years, philosophers and political theorists have vigorously debated questions of transnational and global politics, and IR theorists have generated "theories of every conceivable variety" addressing "a broad range of topics, from epistemology to ontology, methodology and, not least, the realities of world politics" (Snidal and Wendt 2009: 4).

That said, the lack of virtually any discussion of *international legal theory* in IR writings on international law could prompt political scientists, paraphrasing Wight, to ask why there is no international legal theory. In fact, however, when applied to international law the question is as misguided as when applied to contemporary international relations. As explained below, international legal scholars have produced a rich and sophisticated theoretical literature. These writings address foundational issues, including the nature of law, whether international law is truly "law," and how law binds states and other actors and alters their behavior.

It is not possible to summarize all of the major theoretical approaches in this short essay; instead we focus on a handful of the most influential and enduring approaches. We begin with short discussions of two of the oldest and most important approaches to international law (and law generally), natural law and positivism. We then briefly describe a handful of approaches that have become prominent in recent decades, including the New Haven School; international legal process; rationalist approaches (including law and economics and IL/IR); critical schools; and a trio of emerging descriptive and normative approaches.

Before doing so, a few disclaimers are necessary. First, we present only a partial account of international legal thinking. In particular, we limit our focus to what might be considered mainstream international legal scholarship published in leading U.S. and European journals. Moreover, given space constraints, we necessarily summarize large bodies of thought rather rapidly and breathlessly, doubtless shearing them in the process of many of

their strengths and subtleties. Although we present the various approaches in rough chronological order, we do not mean to suggest that the various traditions represent a linear development, or even a sequence of different periods that neatly follow one another. In fact, today the traditions outlined below co-exist, if sometimes uneasily, and many scholars draw insights from several approaches.

Finally, and perhaps most importantly, we note that with few exceptions legal scholars are not positivists in the social-scientific sense. Most mainstream legal scholarship has three primary aims. One is "rationalization," or demonstrating that international law-making and application occurs in a coherent and rational way. Work in this vein includes summarizing case law, unveiling common underlying elements in apparently disparate collections of legal materials, harmonizing apparent doctrinal inconsistencies, and the like. A second common aim consists of "justification," or the demonstration that legal doctrines or decisions are related to some plausible conception of the good. Third, traditional legal scholarship is often "prescriptive." That is, most mainstream legal scholarship analyzes existing legal practice to identify its shortcomings, and proposes doctrinal or institutional reforms designed to improve practice.

Hence, positing and testing causal claims is not a primary aim of traditional legal scholarship. Even "realist" scholars who view legal doctrine as rooted in larger social phenomena rarely adopt a logical positivist epistemology common to social science, and virtually all contemporary legal theorists combine descriptive empirical aims with normative critique and/or advocacy. Thus, many of the approaches reviewed below never attempt the kind of empirical testing of claims that are the epistemological standard for much, but not all, of the IR field. Nevertheless, for reasons explained more fully below, we believe that they offer IR scholars significant conceptual, empirical and normative insights.

A. Natural Law Theory

Although most ancient civilizations, including China, India, Egypt and Assyria, produced rules of inter-state conduct, "modern" international law is generally considered to have emerged in the

aftermath of the Thirty Years War, which ended with the 1648 Peace of Westphalia**.** The "classical" writers of this era – such as Vitoria, Gentili, Grotius, and Pufendorf – devoted substantial energies to conceptualizing and justifying the emerging "law of nations." In general, these writers argued that rules governing relations between states were based on natural law, or fundamental principles of right and wrong that can be derived from "right reason;" in Grotius's words, "the law of nature is a dictate of right reason" (1625). For many of the early writers, these fundamental principles were derived from moral philosophy and theology, and in particular from early and medieval Christian thought.

Over time, natural law thinking fell into disfavor. In part, this shift reflects a broader displacement of religion as a source of authority. But in large part it reflects the abstract nature and malleability of natural law principles. For example, Grotius argued that freedom of the seas was a basic principle of natural law; roughly contemporaneously, John Selden published a famous natural law defense of the closed sea. Centuries later, natural law would be invoked on both sides of debate over the legality of slavery. Natural law's indeterminacy proved its undoing: "the vagueness of the principles which naturalists deduced from their premises and sources was found ultimately to lead to the downfall of this method. It did not take statesmen and the naturalists employed by them long to reduce international law to an ideology of *raison d'etat* . . ." (Schwartzenberger 1965).

Despite the general repudiation of natural law approaches, elements of natural law reasoning remain relevant today. As Murphy (2006) notes, many of international law's most fundamental norms – such as *pacta sunt servanda* (treaties must be performed in good faith) and *jus cogens* norms such as the ban on genocide or torture – seem to be grounded on something akin to natural law principles. And many modern treaty provisions – such as the UN Charter's general prohibition on the use of force, and the Geneva Convention rules against the mistreatment of civilians – find roots in theological concepts that date from the natural law era. Finally, a type of natural law thinking is sometimes invoked to fill gaps in the law or decide cases that rules do not seem to reach. As one commentator notes, "[l]ike a modern constitution, the international legal order comprises not only principles and rules, but also basic values which permeate its entire texture, capable of

indicating the right direction when new answers have to be sought for new problems" (Tomuschat 2001). Thus, even contemporary international law contains various traces of its natural law heritage.

B. Legal Positivism

Natural law approaches were eventually supplanted by legal positivism, which holds that "international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent" (Ratner and Slaughter 1999: 293). Under this approach, states create international law through their affirmative (or "positive") acts, and international legal norms are binding upon states because states have consented to those norms (Murphy 2006). The positivist view is well captured in a passage from the Permanent Court of International Justice's decision in the *Lotus* case:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

For positivists, then, international law is a system of rules that sovereign and equal states develop to regulate interactions among themselves. Thus, unlike natural law discourse, positivist analysis has little to do with philosophy or theology, but instead largely consists of the elaboration, analysis and critique of authoritative legal texts.

The positivist understanding suggests what we might call an "internal" approach to understanding law. In this understanding, the careful and sustained study of legal text is sufficient to provide an adequate understanding of law, and hence there is little need for knowledge or skills from other disciplines, such as the social

sciences. The internalist perspective also implies that "the very point of studying law is to further the enterprise of deciding cases and justifying legal doctrines . . . . [T]he goal is to move the enterprise of law forward" (Balkin and Levinson 2006: 162). Thus, much positivist analysis offers recommendations or prescriptions to judges, legislators, and other legal actors. This is particularly true in the international field, where it is broadly understood that a principal task of "the invisible college of international lawyers" is to advance "*la conscience juridique*" and to strengthen the role of international law in pursuit of its goals of international peace and justice (Schachter 1977).

C. The Legal Realist Critique

While jurisprudential debates between natural law theorists and positivists persist, many legal scholars, including most international law scholars, have moved well beyond these approaches. In part, the impetus for this movement came from a series of critiques that so-called "legal realist" scholars launched against the positivist focus on rules and legal text.[3] Echoing a charge originally made against natural law approaches, the legal realists argued that positivist legal rules are often too indeterminate to generate particular results in specific disputes; in Oliver Wendell Holmes's famous articulation, "General propositions do not decide concrete cases." The legal realists argued that legal rules are *rationally* indeterminate, first, because they do not cover all fact patterns, and obviously cannot determine judicial decisions in areas they do not reach. Second, rules inevitably contain gaps and lacunae. And third, many legal standards are sufficiently ambiguous or abstract ("act in a reasonable manner") that they admit of various applications in any particular circumstance. Legal realists also claimed that the law is *causally* or explanatorily indeterminate; precisely because the law is rationally indeterminate, legal reasoning cannot explain why courts decide cases the way they do. As a result, realists claimed, it is necessary to look beyond the law itself to explain judicial decisions. For these, and related reasons, legal scholars began to shift from a focus on law as rules to law as a series of decision-making procedures.

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[3] For an excellent history of the American legal realist movement, see Horwitz 1992; for an application to international law, see Nourse and Shaffer 2009.

International law scholars developed two significant process-based approaches, the New Haven School and international legal process. Although there are important differences between these two approaches, both direct our attention to the myriad processes and fora through which transnational actors assert international legal claims. Both schools teach that, through these iterative processes, international norms and claims of legal authority are brought to bear on transnational actors' behavior.

D. The New Haven School

The New Haven school was founded by two Yale professors: Myres McDougal, a lawyer, and Harold Lasswell, a political scientist. It has since been elaborated and developed by a number of prominent practitioners and scholars, including W. Michael Reisman and Dame Rosalyn Higgins, a former judge on the International Court of Justice. Yale Law School was the intellectual home of legal realism, and the New Haven School adopted core legal realist insights, including "its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form . . . into a comprehensive framework of inquiry" (Falk 1995). Like their domestic realist counterparts, the New Haven scholars intended to criticize positivist understandings, and the formalistic textual approaches associated with it. In its place, this approach developed "a functional critique of international law in terms of social ends . . . that shall conceive of the legal order as a process and not as a condition" (Pound 1932). Moreover, the New Haven approach broke with positivism's "internalist" sensibility by explicitly analyzing international law using tools from political science and other disciplines, and by expressly locating international law within larger social and political processes.

New Haven scholars thus focus less on rules than on process; McDougal and Lasswell "consistently argued that international law is not just a body of rules, but a process of authoritative decisionmaking" (Koh 2007). Within that decisionmaking process, McDougal and Lasswell wrote, "our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions" (McDougal and Lasswell 1959). Years later, Reisman would claim that international law is a

"process of communication" and argue that this communications model "liberates the inquirer from the . . . distorting model of positivism, which holds that law is made by the legislature." For Reisman, "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking" (Reisman 1981).

For New Haven scholars, international law's processes were connected to a set of normative values, including respect, power, enlightenment, well-being, wealth, skill, affection and rectitude. International rules and institutions could thus be evaluated and criticized with respect to "the basic values of human dignity or a free society," in order to advance "a more peaceful, abundant, and just world – a world community of human dignity" (Chen 1989: 210).

While the New Haven approach has been criticized for insufficiently distinguishing law from politics, and for its occasionally dense terminology, it continues to exert an important influence on international legal scholars. A recent symposium explored whether there is a "new" New Haven School, and how the original McDougal and Lasswell framework can be fruitfully applied to contemporary developments, such as the increasing role of non-state actors (Dickinson 2006) and the emerging transnational dialogue among various international and domestic courts (Waters 2005; Ahdieh 2004).

E. International Legal Process

The New Haven School conceptualized international law as part of larger social and political processes; at roughly the same time a competing school emerged which also viewed international law as process, but with a focus on the "international *legal* process." Pioneered by Harvard Law School Professor and former Acting State Department Legal Adviser Abram Chayes, along with Thomas Ehrlich and Andreas Lowenfeld, the international legal process school sought to determine "[h]ow – and how far – do law, lawyers, and legal institutions operated to affect the course of international affairs? What is the legal process by which interests are adjusted and decisions are reached on the international scene?" (Chayes, Erlich and Lowenfeld 1968: xi).

The intellectual roots of this approach can be found in a branch of domestic legal process thinking associated with Henry Hart and Albert Sachs, of Harvard, and Herbert Wechsler, of Columbia Law School. This branch of legal process theory focuses primary attention on who is, or ought to be, empowered to render a given legal decision, and how that decision is, or ought to be, made (Amar 1989). In domestic law, these questions would revolve around whether a particular question is properly resolved by the federal or the state governments; whether it should be resolved by courts, legislatures, or executive officials; and so on. Under this approach, legal analysis focuses less on what the substantive rule governing behavior is or should be, and more on how substantive rules shape, and in turn are shaped by, the rules, structures, and jurisdiction of different institutions. In short, legal process scholars argued that the substantive rules so central to positivist approaches resulted from interactions between actors, institutions, and procedures.

The international legal process school similarly focused on the allocation of decision-making authority across different institutions. Thus, Chayes produced a classic study of the roles international law played in U.S. government decision-making processes during the Cuban Missile Crisis (Chayes 1974) while others produced similar works focused on other international crises. More broadly, the international legal process scholars produced empirically based materials that cut across international law's traditional doctrinal categories – arms control, international business, international organizations, etc. – and that illustrated international law's various roles in different dimensions of international affairs. These works illustrate how "the legal process allocates decisionmaking competence between national and international decisionmakers, specifies particular regulatory arrangements for particular subject matters, restrains and organizes national and individual behavior, and interacts with the political, economic, and cultural setting (Koh 1997: 2619). As Chayes (1974: 7) noted, the international legal process approach emphasizes that international law acts "[f]irst, as a constraint on action; second, as the basis of justification or legitimation for action; and third, as providing organizational structures, procedures, and forums" within which political and legal decisions are made.

F. Critical Approaches

The critical "new stream" is yet another approach that builds upon legal realist insights. This approach seeks to uncover and understand "the hidden ideologies, attitudes and structures of international law, so as to expose contradictions or antinomies" of legal doctrine (Murphy 2006:15). Early works in this vein were strongly influenced by deconstruction and other linguistic and literary theories. Thus, David Kennedy produced an important work that focused on the "semiotics" of legal argument, and identified certain "recurring rhetorical structures" or patterns within which legal argumentation takes place, leading to a "grammar" of legal argument (Kennedy 1987). Other contributions in this school highlight fundamental and enduring contradictions within the international legal system, such as its apparently inevitable oscillation between "apology" – defending and justifying state action – and "utopia" – setting forth aspirational norms for state conduct but lacking the institutional infrastructure to actualize these norms (Koskenniemi 2005).

These new stream works opened up space for other critical approaches, such as feminism and third world approaches to international law (TWAIL). Many feminist scholars examine how international legal norms and structures reflect male dominance in the international system. Although these scholars are often particularly interested in questions of women's rights, they also seek to uncover and undermine deep structural elements of international law that are insufficiently attentive to the rights and interests of women (Charlesworth et al. 1991; Charlesworth and Chinkin 2000). TWAIL brings a decidedly post-colonial perspective into the scholarly dialogue. These scholars, often hailing from former colonial countries, highlight the ways in which contemporary international law reflects the deep injustices associated with the colonial system, and often advance ideas for addressing North-South imbalances. Early work in this vein focused on sovereignty over natural resources, but more recent work has explored numerous other issues, including North-South dimensions of international environmental, trade, and financial law (Matua 2000).

G. Rationalist Approaches

In various guises, the legal process approaches outlined above have been a dominant influence on post-war international legal scholarship. However, during the past two decades, two prominent rationalist strands have emerged. Since these approaches share much with dominant IR approaches, our discussion of them is relatively brief. The first is "law and economics." As in its domestic variant, the international law version of law and economics (L&E) consists of the application of economic theories and methodologies to legal issues. One influential application of L&E argued that transactions in international relations are analogous to transactions in private markets (Dunoff and Trachtman 1999). The assets traded in these international "markets" are not the goods and services traded in private markets, but rather assets peculiar to states: components of power and authority, including jurisdiction to prescribe (regulate), jurisdiction to adjudicate (use domestic court proceedings) and jurisdiction to enforce. International law can be understood as focusing largely on the definition, exchange, and pooling of this authority (id.). Although L&E approaches have not been nearly as influential in international law scholarship as they have been in domestic legal scholarship, important L&E writings have applied game theoretic insights and public choice theory to questions of treaty law, customary international law, regulation of commons areas such as the atmosphere, and regulatory jurisdiction (Trachtman 2008; Goldsmith and Posner 2005).

The other rationalist strand has already been mentioned: international law and international relations (IL/IR). Abbott's and Slaughter's calls for IL/IR research struck a responsive chord, and in the past two decades have witnessed a wealth of IL/IR writings from both lawyers and political scientists. Among other developments, this scholarship has highlighted questions regarding compliance with international legal norms, the stability and effectiveness of legal institutions, and the causal mechanisms through which international influences (or fails to influence) international actors. A forthcoming edited volume of essays by leading scholars in the field takes stock of this scholarship (Dunoff and Pollack 2012; c.f. Hafner-Burton, Victor and Lupu 2012). As noted above, however, much of this literature follows Abbott and

Slaughter in applying the theory and methods of IR to the study of IL, whereas our aim in this article is to focus on the other direction of influence – namely what IL can add to the study of IR – and so we retain our focus here in the further development of international legal theory.

H. Newly Emerging Approaches

Within the past decade, legal scholars have developed three new conceptual frameworks – global administrative law, international constitutionalism, and global legal pluralism – for understanding and critiquing international law. The first approach, global administrative law (GAL), argues that much modern global governance takes the form of regulation and administration that occurs outside of high-profile diplomatic conferences or treaty negotiations and in less visible settings that constitute a "global administrative space." GAL describes these little known international, transnational and domestic processes, and urges that they be reformed along lines that advance transparency, consultation, participation, and reasoned decision-making (Kingsbury, Krisch and Stewart 2005).

GAL offers an intriguing challenge to conventional ways of understanding the international legal system. Conventional approaches rest on certain fundamental dichotomies – such as the distinctions between international and domestic law, and between public and private governance – that GAL problematizes. GAL scholars highlight the ways that different types of actors and different layers of governance together "form a variegated 'global administrative space' that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects" and that transcend the traditional distinctions between public and private, and national and international (Kingsbury 2009). Through their richly textured analysis of many little-known international legal processes and their impressive conceptualization of a diverse set of practices across a wide range of otherwise disparate areas of global governance, the GAL scholars have already made important contributions to our understanding of current governance regimes.

International constitutionalists present an alternative approach that urges the application of constitutional principles to improve the effectiveness and fairness of the international legal order (Peters 2009; Tomuschat 1997). Constitutionalist approaches vary widely in the scope of their ambitions; the most far-reaching of the constitutionalist visions attempt to set out a fully justified global order (de Wet 2006). However, even in its more modest guises, the constitutionalist turn can be understood as an effort to give the largely unstructured and historically accidental order of global governance a rational, justifiable shape (Dunoff and Trachtman 2009a).

Within this rapidly growing literature several strands have emerged. One is "functional constitutionalism" which focuses on "secondary rules" of international law, or rules that enable or constrain the creation of international law (Dunoff and Trachtman 2009b). This functionalist approach joins a "normative" constitutionalist approach that emphasizes human rights and judicial review in international institutions (Petersmann 2008), and more ambitious approaches that call for a legalization of transnational politics (Held and Kumm 2004), or set out visions of a global order governed by an identifiable constitutional text (Fassbender 2009).

A third emerging conceptual approach to international law is global legal pluralism. This approach is the intellectual heir to earlier sociological and anthropological examinations of the legal pluralism that resulted from the interactions between official and non-official law, often in colonial settings. In its more recent international law iterations, legal pluralism highlights the simultaneous existence of numerous semi-autonomous global and regional functional legal orders. Thus, pluralism recognizes the coexistence of multiple official systems of law, all potentially applicable to any particular international transaction, and the dialogues among judicial and non-judicial actors within these systems (Berman 2012).

Legal scholars have just begun to explore the relative merits of these approaches (Dunoff 2010; Krisch 2010), and a comparative analysis is beyond the scope of this paper. For current purposes, it is sufficient to note that each of the emergent approaches captures and subjects to sustained examination subjects that are largely

ignored by political scientists, or examined from very different perspectives.

With this thumbnail presentation of major schools of international legal thought concluded, we turn to some concrete illustrations of how international relations can benefit from engaging with international legal thought.

III. USING INTERNATIONAL LAW APPROACHES TO ENRICH UNDERSTANDINGS OF INTERNATIONAL RELATIONS

IR writings typically conceptualize international law as a set of treaty-based substantive rules, primarily made by – and governing relations among – states. This understanding leads quite naturally to the inquiries that have been prominent in IR research into international law, including writings on the design of international agreements, the delegation of lawmaking authority to IOs, the nature and extent of international judicial autonomy, and the factors that drive treaty compliance. International lawyers are, of course, interested in similar inquiries, and these topics have prompted very productive IL/IR collaborations and dialogue (Dunoff and Pollack 2012).

However, as suggested by the thumbnail accounts presented above, lawyers conceptualize international law in a number of different ways, many of which complement, or compensate for blind spots in, IR approaches. In addition to understanding law as *process* as discussed above, substantial literatures conceptualize international law:

- in terms of *international institutions*, with a particular focus on functional relationships between international bodies and states, and the details of institutional membership, design, and decision-making procedures;
- as a distinctive and privileged form of *social discourse* marked by particular argumentative forms and rhetorical strategies;
- as a *culture*, or set of sensibilities, traditions and conceptual frameworks that constitute the projects and practices that international lawyers engage in;
- as a *language of critique* that redescribes individuals and groups as bearers of rights or beneficiaries of legal entitlements and

that seeks to imagine international affairs as a domain where public authority is exercised in predictable and non-arbitrary ways and is accountable to the global community.

As a result of these diverse understandings – and the wide variety of conceptual approaches reviewed above – international legal scholars focus on a series of topics and pose a set of questions that tend not to receive sustained attention in IR writings, or to be addressed in very different ways. Four key concepts that inform much international legal thought are ***process***, ***power***, ***pluralism***, and ***normativity***. In the paragraphs that follow, we first explain some of the ways that international lawyers conceptualize each of these concepts, and then outline some of the ways in which greater attention to these issues can advance IR scholars' understanding of the making, interpretation, and compliance with international law.

Process. As noted above, the shift from understanding law as rules to an emphasis on law as process was a central analytic move in post-war international legal thought. Process-based approaches offer IR scholars new ways of thinking, and new questions to ask, about international legal rules and institutions. Consider, for example, the WTO's highly legalized dispute settlement mechanism, which has attracted substantial attention from both IR and international law scholars. IR writings tend to focus on issues like which parties participate as complainants and respondents, what types of cases settle before panel reports are issued, what types of issues get litigated, and which actors benefit from WTO dispute settlement (Busch and Reinhardt 2002; Guzman and Simmons 2005). However, the impressive advances in this scholarship teach little about numerous other critical issues, such as why particular parties file certain cases, what theories they choose to litigate and which they abandon, why disputes are resolved on one ground rather than another, and why decisions are articulated in broad or narrow terms. Process-based inquiries that explore, for example, rules on who has standing to bring claims, which party bears the burden of proof, which actors are allowed to participate, the role of precedent, the function of judicial economy, and what remedies are available, can provide substantial purchase on questions of interest to IR scholars, including who participates in WTO proceedings and who prevails.

Hence, while IR scholars might consider process-based inquiries to be of minor significance, legal scholarship highlights their importance in the resolution of concrete controversies. Moreover, international law scholars use process-based approaches to explore broader theoretical questions of interest to IR scholars, such as whether and how legalized processes can contribute to the perceived legitimacy of international rules (Kumm 2004; Franck 1990), and whether international law degrades, or enhances, fundamental notions of democratic rule (Wheatley 2010). Of perhaps even greater interest to political scientists, legal scholarship devotes substantial energies to uncovering how different legal processes serve different political ends, and highlights the critical importance of identifying the political values that any particular process serves (Dickinson 2002).

Power is, of course, a central concern of political scientists. Realists, institutionalists, liberals and constructivists might not agree on much, but all agree that power matters – although what exactly power consists of remains elusive and contested. IR scholarship often presumes that legal writings pay insufficient attention to the role of power in international affairs. As one recent paper notes, "[o]ne of the major distinctions between research in IR and international law has been that the former usually starts with power, whereas most research on public international law, with important exceptions, places its emphasis elsewhere." (Hafner-Burton, Victor and Lupu 2012: 51). In fact, however, virtually all of the leading schools of international legal thought foreground the importance of power in international legal affairs.

For example, the concept of power is integral to the New Haven School's conception of international law; for this approach, law is a process of *authoritative decision-making* grounded in *effective power*. According to one leading New Haven scholar, lawyers should analyze power by examining "the ways in which resources (material and symbolic) are manipulated, or the strategies used by different participants involve the management of resources aimed at optimizing preferred outcomes. Strategic modes are considered along a persuasive-coercive continuum. They include diplomatic, propagandistic, economic, and military techniques in varying ensembles" (Reisman 2007: 578). Note here the emphasis, not just on power as a set of capabilities, but also on the "strategies" and "techniques" whereby states employ different power resources

in international legal fora – an approach which contemporary IR theory, with its emphasis on correlational (and often statistical) analysis, has largely lost (see below).

Power is likewise central to the other schools surveyed above. Thus, for example, the seminal feminist work in international law argues that "[t]he phenomenon of male dominance over women is above all one of power" (Chinkin, Wright and Charlesworth 1991: 632), and various critical approaches emphasize how power manifests itself in substantive treaty and customary rules, in procedural mechanisms, and in institutional designs. Moreover, many of the critical schools foreground not only state power, but also the power of privileged groups, and identify how that power is inscribed into the fabric of international law. In this sense, critical legal approaches share common ground with Gramscian and other critical IR approaches, in which international law represents a dominant, naturalized discourse that constitutes actors and renders some options legitimate or unthinkable, without any overt exercise of power (Barnett and Duvall 2005).

A recent essay comprehensively surveys the broad range of theorizing in international legal writings about power's role in international law, including analyses of "how power constrains international law . . . , how the powerful can harness international law to their ends, and how international law may autonomously reconfigure power in its own right" (Steinberg and Zasloff 2006). To be sure, many of these writings draw upon analyses familiar to IR scholars. But several strands of legal scholarship extend IR insights in new directions. For example, power in the legal sphere can result not only from aggregate economic or military might, but also from legal expertise, staffing, and sophistication. In the WTO context, diplomats and activists point to the sheer volume of WTO rules, coupled with the ever-increasing complexity of cases and the now-considerable body of case law, and ask whether a lack of legal capacity disempowers developing states. In response, international lawyers (sometimes working with political scientists) have produced a large literature examining whether limitations in legal capacity have impacted developing state participation in WTO disputes, and proposing reforms (Shaffer, Sanchez and Rosenberg 2008; Shaffer and Melélendez-Ortiz 2010). Other scholars have extended this analysis and examined how limitations in human and

financial resources constrain developing country participation across international tribunals (Romano 2002). The limited point for these purposes is *not* whether developing states are in fact underutilizing international courts, but that contemporary international legal theory offers nuanced understandings of the various ways in which international law can reflect, entrench and extend unequal power relations, or alternatively serve as a site of contestation within which the weak can challenge the powerful. In doing so, moreover, international legal scholars, with their detailed understanding of international rules and processes, may enjoy a comparative advantage over scholars in other disciplines.

Pluralism. While much IR scholarship retains a traditional state-centric ontology, international lawyers increasingly agree that a single minded focus on state-to-state interactions and state-generated law inadequately describe the contemporary international legal order. One result is that international lawyers increasingly invoke pluralist notions of law. The international legal version of pluralism has focused on several features of the international legal order in particular, including the participants in the law-making process; the sources of law; and the number of, and relationships among, bodies of law applicable to particular interactions (Berman 2009).

Thus, for example, international legal theorists influenced by pluralism devote substantial attention to the role of non-state actors. To be sure, constructivists and other IR scholars recognize that non-state actors *influence* international lawmaking but have been relatively slow to acknowledge a fact which New Haven scholars highlighted decades ago: non-state actors, including NGOs, firms and individuals, do not merely exert influence on lawmaking processes but in fact are "participants" in "the world constitutive process" (McDougal, Lasswell & Reisman 1967: 267-75). This insight suggests that private parties constitute law-making processes and make law themselves – and international legal scholars have detailed how private parties make law across numerous domains, ranging from low-profile but commercially important areas such as trade finance and export credits (Levit 2008; 2004), to politically salient issues such as climate change (Osofsky and Levit 2008), and more generally to what Abbott and Snidal (2009) call "regulatory standard-setting" schemes, in which international norms are established by various combinations of public (state) and private

(firm and NGO) actors. It follows, of course, that states hold no monopoly on law-making.

Moreover, contemporary legal scholarship is "pluralist" in the sense that it highlights the ways in which international law-making is disaggregated into multiple, sometimes overlapping fora. In the IR literature, this phenomenon has been studied under the label "regime complexity," and these writings explore regime complexity encourages or elicits opportunistic state behavior such as form shopping and creating strategic inconsistencies in the law (Alter and Meunier 2009). Similar issues are analyzed by international lawyers under the terms "fragmentation" and "regime interaction." As this different vocabulary suggests, lawyers highlight different features of international law's decentralized law-making apparatus, ask different questions, and generate different insights into this phenomena. Thus, while IR scholars have often focused on issues surrounding law-making, lawyers have focused on law-interpretation, with particular attention to the effects of fragmentation on the integrity of the international legal order, and the dilemmas posed in particular for international tribunals called upon to adjudicate in the presence of multiple bodies of law (International Law Commission 2006). There is a sophisticated and growing legal literature on these latter questions, from which political scientists could learn and benefit much.

Normativity. In many IR writings, international law is conceived as a distinctive institutional form, but one that shares common elements with other institutional arrangements. Thus, the *Legalization* volume views law as the "continuation of political intercourse, with the addition of other means" (Abbott et al. 2000: 419). Much legal scholarship, on the other hand, is centrally concerned not only with the relationships between law and politics, but also with establishing the distinctiveness and (relative) autonomy of law from politics (Brunnée and Toope 2010).

Law's normativity refers to the sense of obligation said to inhere in law; that rule "X" is the law provides a reason to obey the rule independent of the rule's content or consequences. Law's normativity underlies the notion that compliance is obligatory, and the foundational international legal rule of *pacta sunt servanda*, or treaty obligations must be fulfilled in good faith. In stark contrast with rationalist IR perspectives holding that "international legality

does not impose any moral obligations" of compliance (Goldsmith and Posner 2005: 197), many international lawyers are committed to the idea (Koskenniemi 1990: 8) that

> Law should be applied regardless of the political preference of legal subjects. It should not just reflect what states do but should be critical of state policy. In particular, it should be applicable even against a state which opposes its application to itself. … [L]egal rules whose content or application depends on the will of the legal subject for whom they are valid, are not proper legal rules at all but apologies for the legal subject's political interest.

International legal scholarship also tends to be normative in the sense of advocating for reform of legal doctrines or institutions (Dunoff and Pollack 2012). A leader of the New Haven School recently declared that "our loyalty is to the values of human dignity and our goal is a world order producing and distributing those values" (Reisman 2007: 582), and similarly explicit value commitments are commonly found in scholarship informed by the other approaches reviewed in part II above.

While international legal theory's normativity has traditionally rendered it less useful, or even suspect, to positive IR scholars, recent developments in IR heighten the opportunities for dialogue with normative legal scholarship. Within IR, Steve Smith (1992) argues that the end of the Cold War coincided with the end of what he calls "forty-years detour," in which normative ethical concerns had largely been driven out of mainstream IR scholarship. The field has only recently begun to recover from this detour and has rediscovered normative international political theory. This new "ethics and IR" literature addresses many themes that implicitly or explicitly implicate law, such as the justice of the international economic order (largely codified in international law and institutions) and the balance between state sovereignty and human rights, but the distinctly legal components of these issues, and the long discussions in the legal community over them, are largely ignored.[4] In these, and other normative debates that receive attention from IR scholars, there is an as yet unexploited opportunity for dialogue and debate between IL scholars and ethics and IR scholars.

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[4] See e.g. *Ethics and International Affairs*, a journal established in 1987 and now in its 25th year of publication.

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Not surprisingly, most international law writings do not explicitly isolate their discussions of process, power, normativity or pluralism. Rather, these framing concepts inform both the subject of inquiry and the lines of argument developed. To illustrate the potential promise of these legal insights, the paragraphs that follow discuss just a few ways in which legal concepts, and international legal thought more generally, can inform and illuminate IR analysis of international law-making, interpretation, and compliance and effectiveness, respectively.

A. International Law Making

International law-making processes involve not simply the drafting and ratification of treaties, but also the creation and evolution of customary international law and soft law. Describing and analyzing the law-making process might be considered a natural area of strength for political science, with its externalist approach to the law, yet recent developments in IR have moved decidedly away from process in favor of a rational-design approach that begins with environmental conditions as independent variables and seeks to explain the design features of international treaties as a dependent variable (Koremenos 2012; Koremenos, Lipson and Snidal 2001). This approach has made great strides in explaining a variety of design features such as exit clauses, safeguard clauses, and dispute resolution provisions (Koremenos 2007; Rosendorff and Milner, 2001; Helfer 2012), yet in doing so rational design theory, together with the increasing use of quantitative empirical analyses to test the resulting hypotheses, has led IR scholars to black-box the actual processes through which international law is made, either in inter-state negotiations, or through the claim and counter-claim of customary international law, or though new processes of norm- and standard-setting that implicate international organizations, NGOs, firms, and other non-state actors, all of which have been the subject of extensive scholarly inquiry in the legal academy.

First, any comprehensive understanding of international law-making requires an accurate assessment of contemporary law-

making methods. To date, when IR scholars analyze law-making, they focus almost exclusively on treaties. Ironically in so doing IR scholars effectively adopt the same kind of formalist approach to law that they have long associated with international lawyers! As a result, the IR literature virtually ignores other forms of lawmaking, most notably including customary international law, soft law and global administrative law. In each of these areas, international legal scholarship has made significant descriptive, conceptual and normative contributions.

A large literature explores and analyzes the processes through which these non-treaty forms of law are created. For example, Michael Reisman (2003: 82) and other process-based theorists have captured the dynamism implicit in the making of customary international law:

> International law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral. Claims to change . . . [any] part of the law, ignite a process of counterclaims, responses, replies, and rejoinders until stable expectations of right behavior emerge. Since every legal regime perforce benefits some actors more than others, no sooner does a new normative arrangement stabilize than it, too, comes under stress from new claims for change, in an ongoing bargaining process between sometimes rapidly shifting coalitions. Hence the ceaseless dialectic of international law: Whether by diplomatic communication or state behavior, one state claims from others acquiescence in a new practice. Insofar as that new practice is accepted in whole or in part, the practice becomes part of the law. . . .

IR scholars who turn their attention to this theoretically intriguing form of international law will find a large legal literature that explores how custom operates as law, its legitimacy, whether it serves efficiency or competing values, and its democratic accountability. The most recent scholarly debate centers on whether states can or should be able unilaterally to withdraw from international custom (Bradley and Gulati 2010) – a question that should be of interest to IR scholars given their focus on flexibility and escape mechanisms in treaties.

Moreover, the pluralist strand of international legal theory suggests the need to expand our focus on law-makers beyond the state and IOs. Fully appreciating non-state actors as lawmakers suggests the need for a "bottom-up" view of law-making. Thus, for example, Janet Levit has detailed how many of the rules in the WTO's Agreement on Subsidies predate, by decades, the WTO's founding and "are the fruits of secretive, club-like, cocktail napkin

agreements among private parties and low-level technocrats" (Levit 2007: 408). Nongovernmental standard setting bodies, from Underwriters Laboratories which tests electrical equipment, to ICANN, which administers the internet domain name system, create normative systems that have the effect of law (Abbott and Snidal 2009).

International lawyers have also combined, perhaps more effectively than most recent political science scholarship, a focus on both power *and* process, exploring empirically *how* power is wielded by states to secure international agreement on their preferred terms. Richard Steinberg (2002), for example, has examined the negotiation of the 1994 Uruguay Round agreements that created the WTO, chronicling how great powers such as the US and the EU were able to dominate "green room" negotiations of states-parties, and how those same players were able to utilize the "single undertaking" of the agreement to offer an effective "take it or leave it" offer to the less powerful members. Moving from treaty law to soft law, other legal scholars have examined how weak states have attempted to use legal forums to promote new legal norms and undermine existing, hegemonic norms (Helfer 2004), or alternatively how powerful states have utilized their extensive legal capacity and/or privileged institutional positions (such as in the permanent five members of the UN Security Council, or weighted voting power in international financial institutions) to secure the primacy of their own preferred norms (Shaffer and Pollack 2010). Increasingly, IL scholars have also focused on understanding the dynamic effects of subtle changes in state power on the negotiation and design of new legal agreements. One recent work argues that, in the presence of shifting power, stable legal rules are not distributionally neutral, and explores how shifting bargaining power creates different incentives for ascending and declining states when negotiating both substantive rules and exit clauses (Meyer 2010). Another line of thought explores whether the codification of customary laws is designed to clarify these rules or to capture distributional gains, and how efforts to codify custom might increase the fragmentation of international law (Meyer 2012).

In short, international legal writings describe and analyze a number of forms of international law-making that are "hidden in plain sight," and that, to date, have been relatively neglected in the

IR literature (Johnstone 2012). Increased attention to these types of law-making is particularly apt given the difficulties encountered in recent efforts at multilateral treaty-making such as the climate change and trade negotiations. A greater awareness of these forms of international governance can challenge and enrich perceptions of international law-making dominant in IR scholarship.

B. Interpreting International Law

IR scholars generally approach international judicial decision-making through the lens of judicial behavior and judicial independence, coding international court rulings as favoring one or another state and seeking to determine whether particular environmental or institutional factors correlate with these rulings. Once again, this literature has generated important insights, but it largely overlooks how the international judicial process constrains states, delegitimates naked appeals to power and forces states to argue in the language of law. Furthermore, the dominant quantitative analysis of international judicial decisions ignores almost completely the process of legal reasoning and argumentation of judges, their interpretive choices, the role of courts in developing international legal doctrine (as opposed to their role in resolving disputes) and the judicial dialogues that increasingly take place between and among international and domestic courts (most strikingly in the European context).

These are all areas where international legal scholarship can be instructive; due to space constraints a few examples will suffice. First, while IR scholars debate whether international courts are truly independent, international lawyers resist adoption of a dichotomous approach to the question, and develop theoretically rich accounts of the various ways that states can enhance or constrain judicial independence. Thus, for example, Richard Steinberg has generated a nuanced account of how the WTO Appellate Body's discretion is bounded by three nested factors: the nature of WTO legal discourse, the constitutional constraints imposed by the WTO's Dispute Settlement Understanding; and the ability of states to influence the selection (or reselection) of Appellate Body members, to defy politically painful judgments, and to change DSU rules (Steinberg 2004). Laurence Helfer has developed a more general analysis of the limits of judicial discretion that details the formal, structural, political and discursive control mechanisms that states can employ

(Helfer 2006) – resulting in a much richer and more nuanced analysis than that generated by principal-agent models prevalent in IR (Hawkins et al. 2006). And Joost Pauwelyn and Manfred Elsig have recently argued that the variation in interpretative strategies found among international tribunals is a function of the interpretative space provided by the relevant treaty and the varied incentives facing judges on different courts (Pauwelyn and Elsig 2012).

Lawyers have also devoted substantial attention to what is sometimes called transjudical dialogue. To be sure, scholars from both disciplines have explored this theme, most frequently in the context of understanding ECJ decision-making and dialogues with domestic courts (Alter 2001; Mattli and Slaughter 1998; Stone Sweet and Brunell 1998; Weiler 1994). However, the legal literature pursues these themes well beyond the European context, including analysis of the relationships between domestic courts and the ICJ, the WTO's Appellate Body, and human rights courts (Slaughter 2004). More importantly, the legal literature moves well beyond the positive and causal inquires found in IR literature and explores a variety of normative issues raised by transjudicial dialogues, including whether domestic court use of international law conflicts with democratic principles (Koh 2004; Neuman 2004; Alford 2004) and the legitimacy of domestic courts developing international norms (Waters 2007; Dunoff 2008).

One could argue further that, despite its indisputable rigor in coding and analyzing judicial behavior, IR scholarship is generally characterized by an impoverished view of the function of international judges and courts, which are generally reduced to settling disputes in favor of one party or the other, with even the most sophisticated IR analysis analyzing international judicial decisions along a single dimension, namely whether the court in question ruled in favor or against a given state (see e.g. the otherwise diverse studies by Carrubba, Gabel and Hankla 2008; Stone Sweet and Brunnell 1998; Voeten 2008). The prospect that international judges might also be involved in interpreting and developing law, or even making new law, is largely absent from IR scholarship. International legal scholarship, in contrast, is often much more interested in the nature and impact of a court's or a judge's jurisprudence. Thus, legal writings often emphasize a

court's role in developing international legal doctrine, as opposed to its dispute resolution role, or analyze the judicial and scholarly writings of international judges not to unveil voting patterns, but rather to unearth the underlying vision of international law that drives their opinions (Mendlovitz 1997; Scobbie 1997; Spiermann 2007). Many lawyers believe that identifying these underlying normative commitments is a powerful tool for not only explaining a judge's past votes, but for predicting how she will resolve issues in future disputes.

Finally – and here is another irony, to sit alongside IR's formalist approach to law as written treaties – international relations scholars have thus far focused their analysis of international legal interpretation almost exclusively on courts and judges, effectively ignoring the large number of other quasi-judicial or non-judicial actors who interpret international law on a regular basis. A legal scholar, Cesare P.R. Romano (2011), has catalogued the full range of international legal interpretation bodies, noting that in many areas, the law is interpreted not by international courts (which may be absent or lack compulsory jurisdiction in a given case) but by other bodies such as treaty secretariats or the various human rights and other committees that interpret and apply – often quite controversially – the text of international legal agreements. Indeed, many legal scholars go further, noting that international law is also interpreted and applied actively by *domestic* actors, including national governments (which feature centrally in the ILP and New Haven approaches discussed above) and increasingly domestic courts which are called upon to interpret, apply, and internalize international law in domestic legal systems (Conant 2012; Sloss et al. 2011). Strikingly, this broader canvas reveals that much of the work of legal interpretation is carried out not by judicial but by *political* bodies, the analysis of which might be seen as a comparative advantage for political science scholars; thus far, however, the work of these bodies has been examined almost exclusively by legal scholars.

C. Compliance and Effectiveness

The issue of compliance with, and effectiveness of, international law has long been of common interest to IR and IL scholars, yet here again, different approaches to the nature and purpose of law drive different research agendas. The political

science literature typically approaches international law as a relatively straightforward and largely determinate set of rules, and measures compliance in terms of behavioral conformity to those rules. From this perspective, relevant questions include how best to measure and monitor compliance, and how to determine the optimal level of compliance. However, international lawyers argue that the concept of compliance does not, and cannot, have meaning except as a function of a logically prior theory of the nature and purpose of law (Kingsbury 1998). As already noted, "law as rules" hardly exhausts the ways that international lawyers conceptualize the nature and purpose of international law. Different conceptions of law direct attention to different effects that law has on both states and non-state actors, which a narrow focus on compliance is likely to miss.

This difference manifested itself early on in the so-called "management vs. enforcement" debate, pitting a team of international legal scholars (Chayes and Chayes 1993, 1995) against skeptical political scientists (Downs, Rocke and Barsoom 1996). The Chayeses set out a "managerial" theory of compliance premised on the assumption that states have a propensity to comply with their legal obligations. This assumption rests on the claims that (i) since the international system is voluntaristic, states will not join treaty regimes that contain rules they do not wish to follow; (ii) once a complex bureaucracy decides to join a treaty regime, ongoing compliance is bureaucratically efficient; and (iii) accepting legal norms induces a sense of obligation to comply. The Chayeses argued that most cases of noncompliance are inadvertent, and result from ambiguous treaty language, incapacity or resource constraints, or unavoidable time lags between commitment and compliance. The managerial school argues that sanctions are less useful than non-coercive managerial strategies in promoting compliance. Downs, Rocke, and Barsoom, by contrast, argued that high levels of compliance with treaty norms simply reveal the "shallowness" of many international agreements. They claimed that as regimes deepen and the gains from cooperation grow, so too do the incentives to defect. Thus, deeper agreements require correspondingly harder enforcement mechanisms.

A common perception among political scientists is that the management vs. enforcement debate was essentially "won" by the

enforcement side, which demonstrated the limited use of management techniques in precisely those situations where compliance was most problematic – as well as the naiveté of IL scholars. As Alexander Thompson (2012) has recently argued, however, the "debate" formulation of the literature creates a tendency "to overlook the extent to which these arguments are complementary."

The enforcement school assumes that violations occur as a result of cheating, whereas managerialists see noncompliance as largely unintentional. This stark dichotomy, which implies very different responses to noncompliance, is less useful in practice. The motivation behind noncompliance is often difficult to discern and, in any case, most instances of noncompliance occur for a combination of reasons. This explains why so many regimes in fact *combine* a management approach to noncompliance with an enforcement approach. In the ozone regime, the Montreal Protocol establishes a procedure for working with noncompliant parties to develop a "compliance plan," but the same parties are simultaneously barred from receiving funding from the Global Environment Facility until their compliance plan is approved.

The European Union compliance system operates similarly, with a non-confrontational "management" stage focusing on "reasoned opinions" and consultation between the executive Commission and the non-complying member state, followed occasionally by a second "enforcement" stage of legal proceedings before the European Court of Justice (Tallberg 2002). For this reason, the debate between the management and enforcement schools, and the implication that one must choose between the insights of legal and political science scholars, is a false one.

Looking beyond the management vs. enforcement debate, legal scholars have long anticipated constructivist arguments that international legal norms, by virtue of the normative character described above, exert a "compliance pull" independent of their instrumental value to states (Franck 1990; von Stein 2012), in many cases becoming "internalized" into the domestic political and legal order (Koh 1996, 1998-99). For example, Harold Koh's transnational legal process approach highlights the roles played by coercion, self-interest, rule-legitimacy, communitarianism, and internalization of rules in promoting compliance. Unlike international legal process scholars, who focus largely on horizontal

interactions between states, Koh focuses more broadly on the mechanisms of "vertical domestication" whereby international norms "trickle down" and become incorporated into domestic legal systems (Koh 1996; 1998-99). Although some IR scholars have criticized Koh's work for failing to sufficiently differentiate the different pathways by which compliance can occur and for selection bias (Keohane 1998), it is clear that his approach has had some influence in political science, including on Beth Simmons's recent work on the effectiveness of human rights law (Simmons 2009). Similarly, Ryan Goodman and Derek Jinks (2004) have developed a theory of compliance that turns on the concept of acculturation, an approach that draws upon but also significantly extends IR theory.

More broadly, international lawyers invite IR scholars to move beyond a narrow focus on behaviorial compliance with rules. Given their rich understanding of the ways law works, lawyers have long argued that rule-compliance does not fully capture law's effects. In a recent paper, international legal scholars Robert Howse and Ruti Teitel enumerate some of international law's effects beyond inducing behavioral compliance, including:

- international legal norms and institutions may shift decision-making, interpretative, and legitimating power from one set of actors or institutions to another;

- international legal norms can impact the ways that policy makers and other elites understand particular problems and conflicts, such as whether an issue involves conflicting interests or claims of right;

- international legal norms may provide benchmarks for a wide range of private actions, including by multinationals and other transnational actors, even when the relevant norms are not formally addressed to private action;

- international legal norms may impact domestic legal developments, even when the international norms are not directly binding, by influencing the interpretation of domestic law;

- international legal norms may influence the outcomes of bargaining among public and/or private actors (Howse and Teitel 2010).

In each instance, Howse and Teitel argue, international law matters in ways that impact a diverse range of actors, all of which would be missed by a simple focus on compliance as the correspondence of behavior and rules. These claims may sound deceptively similar to those made by political scientist Lisa Martin in her recent essay *Against Compliance* (Martin 2012). Martin argues that political scientists have paid too much attention to compliance, which may or may not be behaviorally significant, and as a result have paid insufficient attention to international law's effectiveness. Hence, like Howse and Teitel, Martin argues that the focus on compliance is misplaced. However, Howse and Teitel go much further than Martin; rather than being *against* compliance they urge us to move *beyond* compliance, focusing on the multiple potential effects of law on a broad range of legislative, executive, judicial, and private actors.

CONCLUSION

IL scholars have learned much from IR theory; the importation of insights and methods from IR over the past two decades has significantly advanced the discipline. To date, however, the direction of intellectual influence between these two disciplines has been largely in one direction. The burden of this paper has been to outline why it is time for the intellectual influence to run in both directions. We believe that IR scholars can learn much from IL theory, and that doing so can promote a variety of scholarly undertakings. Through the language it uses, the questions it asks, and the conceptual understandings it brings to bear, international legal theory can open up new and fruitful lines of theoretical and empirical research. In particular, IL approaches provide both a critical stance and a means or reinterpreting and reformulating IR understandings of the causes and consequences of international cooperation. We hope this brief introduction to international legal thought will contribute to the pursuit of these inquiries.

References

Kenneth W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', *Yale Journal of International Law* 14, no. 2 (1989): 335-411.

Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalization', *International Organization* 54, no. 3 (2000): 401-19.

Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', *International Organization* 54, no. 3 (2000): 421-56.

Kenneth W. Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in *The Politics of Global Regulation*, eds. Walter Mattli and Ngaire Woods (Princeton: Princeton University Press, 2009), 44-88.

Robert B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', *New York University Law Review* 79, no. 6 (2004): 2029-163.

Roger P. Alford, 'Misusing International Sources to Interpret the Constitution', *American Journal of International Law* 98, no. 1 (2004): 57- 69.

Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (New York: Oxford University Press, 2001).

Karen J. Alter and Sophie Meunier, 'The Politics of International Regime Complexity', *Perspectives on Politics* 7, no. 1 (2009): 13-24.

Akhil Reed Amar, 'Law Story', *Harvard Law Review* 102, no. 3 (1989): 688-720

Jack M. Balkin and Sanford Levinson, 'Law and the Humanities: An Uneasy Relationship', *Yale Journal of Law and the Humanities* 18, no. 2 (2006): 155-86.

Michael Barnett and Raymond Duvall, eds., *Power in Global Governance* (New York: Cambridge University Press, 2005).

Paul Schiff Berman, 'The New Legal Pluralism', *Annual Review of Law and Social Science* 5 (2009): 225-42.

Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (New York: Cambridge University Press, 2012).

Curtis A. Bradley and Mitu Gulati, 'Withdrawing from International Custom', *Yale Law Journal* 120, no. 2 (2010): 202-75.

Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', *Columbia Journal of Transnational Law* 39, no. 1 (2000): 19-74.

Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010).

Marc L. Busch and Eric Reinhardt, 'Testing international trade law: Empirical studies of GATT/WTO dispute settlement', in *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, eds. Daniel L. M. Kennedy and James D. Southwick (Cambridge: Cambridge University Press, 2002), 457-81.

E. H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (London: Palgrave, 1939; London: Palgrave, 2001).

Clifford J. Carrubba, Matthew Gabel, and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', *American Political Science Review* 102, no. 4 (2008): 435-52.

Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law', *American Journal of International Law* 85, no. 4 (1991): 613-45.

Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', *British Year Book of International Law* 56, (1985): 1-24.

Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974).

Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

Abram Chayes and Antonia Handler Chayes, 'On Compliance', *International Organization* 47, no. 2 (1993): 175-205.

Lisa Conant, 'Whose Agents? The Interpretation of International Law in National Courts', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Erika De Wet, 'The International Constitutional Order', *International and Comparative Law Quarterly* 55, no. 1 (2006): 51-76.

Laura A. Dickinson, 'Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law', *Southern California Law Review* 75, no. 6 (2002): 1407-92.

George W. Downs, David M. Rocke, and Peter N. Barsoom, 'Is the Good News about Compliance Good News about Cooperation?', *International Organization* 50, no. 3 (1996): 379-406.

Jeffrey L. Dunoff, 'International Legal Scholarship at the Millennium', *Chicago Journal of International Law* 1, no. 1 (2000): 85-92.

Jeffrey L. Dunoff, 'Less Than Zero: The Effects of Giving Domestic Effect to WTO Law', Loyola University Chicago International Law Review 6, no. 1 (2008): 279-310.

Jeffrey L. Dunoff, 'International Law In Perplexing Times', *Maryland Journal of International Law* 25, no. 1 (2010): 11-36.

Jeffrey L. Dunoff and Mark A. Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Jeffrey L. Dunoff and Joel P. Trachtman, 'A Functional Approach to International Constitutionalization', in *Ruling the World? Constitutionalism, International Law, and Global Governance*, eds. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 3-36.

Richard A. Falk, 'Casting the Spell: The New Haven School of International Law', *Yale Law Journal* 104, no. 7 (1995): 1991-2008.

Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order', in *Ruling the World: Constitutionalism, International Law and Global Governance*, eds. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 133-48.

Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law', *Duke Law Journal* 54, no. 3 (2004): 621-703.

Hugo Grotius, *The Law of War and Peace* (1625).

Andrew T. Guzman and Beth A. Simmons, 'Power Plays and Capacity Constraints: the Selection of Defendants in World Trade Organization Disputes', *Journal of Legal Studies* 34, no. 2 (2005): 557-98.

Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney, eds., *Delegation and Agency in International Organizations* (New York: Cambridge University Press, 2006).

Laurence R. Helfer, 'Why States Create International Tribunals: A Theory of Constrained Independence', in *International Conflict*

Resolution, eds. Stefan Voigt, Max Albert, and Dieter Schmidtchen (Tubingen: Mohr Siebeck, 2006), 255-76.

Laurence R. Helfer, 'Flexibility in International Agreements', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992).

Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', *Global Policy* 1, no. 2 (2010): 127-36.

International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682 (2006).

Ian Johnstone, 'Lawmaking by International Organizations: Perspectives from IL/IR Theory', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship* (New York: Cambridge University Press, forthcoming 2012).

George F. Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, 1951).

David Kennedy, *International Legal Structures* (Baden Baden: Nomos, 1987).

Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

Robert O. Keohane, 'International Relations and International Law: Two Optics', *Harvard International Law Journal* 38, no. 2 (1997): 487-502.

Robert O. Keohane, 'When Does International Law Come Home?', *Houston Law Review* 35, no. 3 (1998): 699-713.

Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', *Michigan Journal of International Law* 19, no. 2 (1998): 345-72.

Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law', *European Journal of International Law* 20, no. 1 (2009): 23-57.

Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems* 68, no. 3-4 (2005): 15-61.

Harold Hongju Koh, 'International Law as Part of Our Law', *American Journal of International Law* 98, no. 1 (2004): 43-57.

Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?', *Yale Journal of International Law* 32, no. 2 (2007): 559-73.

Barbara Koremenos, 'Institutionalism and International Law', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (2012).

Barbara Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?', *Journal of Legal Studies* 36, no. 1 (2007): 189-212.

Barbara Koremenos, Charles Lipson, and Duncan Snidal 'The Rational Design of International Institutions', *International Organization* 55, no. 4 (2001): 761-99.

Martti Koskenniemi, 'The Politics of International Law', *European Journal of International Law* 1, no. 1 (1990): 4-32.

Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', *European Journal of International Law* 8, no. 2 (1997): 215-63.

Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005)

Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization* 36, no. 2 (1982):185-205.

Friedrich Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art on an Art of the State', *International Organization* 40, no. 4 (1986): 753-75.

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

Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', *European Journal of International Law* 15, no. 5 (2004): 907-31.

Janet Koven Levit 'The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits', *Harvard International Law Journal* 45, no. 1 (2004): 65-182.

Janet Koven Levit, 'Bottom-up International Lawmaking: Reflections on the New Haven School of International Law, *Yale Journal of International Law* 32, no. 2 (2007): 393-420.

Janet Koven Levit, 'Bottom-up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit', *Emory Law Journal* 57, no. 5 (2008): 1147-226.

Lisa L. Martin, 'Against Compliance', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Walter Mattli and Anne-Marie Slaughter 'Revisiting the European Court of Justice', *International Organization* 52, no. 1 (1998): 177–209.

Makau Matua, 'What Is TWAIL?', *Proceedings of the American Society of International Law*, (2000): 31-8.

Myres S. McDougal and Harold D. Lasswell 'The Identification and Appraisal of Diverse Systems of Public Order', *American Journal of International Law* 53, no. 1 (1959): 1-29.

Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, 'The World Constitutive Process of Authoritative Decision', *Journal of Legal Education* 19, no. 3 (1967): 253-300.

Saul Mendlovitz and Merav Datan, 'Judge Weeramantry's Grotian Quest', *Transnational Law & Contemporary Problems* 7, no. 2 (1997): 401-27.

Timothy Meyer, 'Power, Exit Costs, and Renegotiation in International Law', *Harvard International Law Journal* 51, no. 2 (2010): 379-425.

Timothy Meyer, 'Codifying Custom', *University of Pennsylvania Law Review* 160, no. X (2012).

Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization* 51, no. 4 (1997): 513-53.

Andrew Moravcsik, 'Liberal Theories of International Law', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: McGraw-Hill, 1948).

Sean D. Murphy, *Principles of International Law* (St. Paul, MN: Thomson/West, 2006).

Gerald L. Neuman, 'The Uses of International Law in Constitutional Interpretation', *American Journal of International Law* 98, no. 1 (2004): 82-90.

Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954).

Victoria Nourse and Gregory Shaffer, 'Varieties of Legal Realism: Can a New World Order Prompt a New Legal Theory?', *Cornell Law Review* 95, no. 1 (2009): 65-137.

Hari M. Osofsky and Janet Koven Levit, 'The Scale of Networks?: Local Climate Change Coalitions', *Chicago Journal of International Law* 8, no. 2 (2008): 409-36.

Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Anne Peters, 'The Merits of Global Constitutionalism', *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 397-411.

Ernst-Ulrich Petersmann, 'Judging Judges: From "Principal-Agent Theory" to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens', *Journal of International Economic Law* 11, No. 4 (2008): 827-84.

Roscoe Pound, 'Philosophical Theory and International Law', in *Bibliotheca Visseriana*, (1923): 71-90.

Steven R. Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', *American Journal of International Law* 93, no. 2 (1999): 291-423.

W. Michael Reisman, 'International Lawmaking: A Process of Communication', *Proceedings of the American Society of International Law* 75, (1981): 101-20.

Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004).

Cesare P. R. Romano, 'International Justice and Developing Countries (Continued): A Qualitative Analysis', *Law and Practice of International Courts and Tribunals* 1, no. 3 (2002): 539-611.

Cesare P. R. Romano, 'A Taxonomy of International Rule of Law Institutions', *Journal of International Dispute Settlement* 2, no. 1 (2011): 241-77.

B. Peter Rosendorff and Helen V. Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape', *International Organization* 55, no. 4 (2001): 829-57.

John Gerard Ruggie, 'What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge', *International Organization* 52, no. 4 (1998): 855–85.

Oscar Schachter, 'The Invisible College of International Lawyers', *Northwestern University Law Review* 72, no. 2 (1977): 217-26.

Georg Schwartzenberger, *The Inductive Approach to International Law* (London: Stevens & Sons, 1965).

Iain G. M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', *European Journal of International Law* 8, no. 2 (1997): 264-98.

Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).

Gregory C. Shaffer and Ricardo Meléndez-Ortiz, eds., *Dispute Settlement at the WTO: The Developing Country Experience* (New York: Cambridge University Press, 2010).

Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', *Minnesota Law Review* 94, no. 3 (2010): 706-98.

Gregory C. Shaffer, Michelle Ratton Sanchez, and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success', *Cornell International Law Journal* 41, no. 2 (2008): 383–501.

Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', *American Journal of International Law* 87, no. 2 (1993): 205-39.

David L. Sloss, Michael D. Ramsey, and William S. Dodge, eds., *International Law in the U.S. Supreme Court: Continuity and Change* (New York: Cambridge University Press, 2011).

Steve Smith, 'The Forty Years' Detour: The Resurgence of Normative Theory in International Relations', *Millennium*, Vol. 21, No. 3 (1992), pp. 489-506.

Duncan Snidal and Alexander Wendt 'Why there is *International Theory* now', *International Theory* 1, no. 1 (2009): 1-14.

Ole Spiermann, 'Judge Max Huber at the Permanent Court of International Justice', *European Journal of International Law* 18, no. 1 (2007): 115-133.

Ted L. Stein, 'The Approach of the Different Drummer: The Principle of Persistent Objection in International Law', *Harvard International Law Journal* 26, no. 2 (1985): 457-82.

Richard H. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization* 56, no. 2 (2002): 339-74.

Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', *American Journal of International Law* 98, no. 2 (2004): 247-75.

Richard H. Steinberg and Jonathan M. Zasloff, 'Power and International Law', *American Journal of International Law* 100, no. 1 (2006): 64-87.

Alec Stone Sweet and Thomas L. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review* 92, no. 1 (1998): 63–81.

Jonas Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', *International Organization* 56, no. 3 (2002): 609-43.

Alexander Thompson, 'Coercive Enforcement of International Law', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Christian Tomuschat, 'International Law as the Constitution of Mankind', in *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* (New York: United Nations), 37-50.

Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of A New Century', in *Recueil des Cours de l'Academie Droit International* 281 (Leiden: Martinus Nijhoff Publishers, 2001), 9-438.

Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', *American Political Science Review* 102, no. 4 (2008): 417-33.

Jana von Stein, 'The Engines of Compliance', in *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship*, eds. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2012).

Melissa A. Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law', *Georgetown Law Journal* 93, no. 2 (2005): 487-574.

J. H. H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies* 26, no. 4 (1994): 510–34.

Alexander Wendt, *Social Theory of International Politics* (New York: Cambridge University Press, 1999).

Martin Wight, 'Why is there no International Theory', in *Diplomatic Investigations: Essays in the Theory of International Politics*, eds. Herbert Butterfield and Martin Wight (London: Allen & Unwin, 1966), 17-34.