

POLITICAL SCIENCE RESEARCH ON INTERNATIONAL LAW: THE STATE OF THE FIELD

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The discipline of political science has developed an active research program on the development, operation, spread, and impact of international legal norms, agreements, and institutions. Meanwhile, a growing number of public international lawyers have developed an interest in political science research and methods.¹ For more than two decades, scholars have been calling for international lawyers and political scientists to collaborate, and have suggested possible

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¹ Some of these legal works that draw, in part, on political science methods and concepts look across many substantive areas of law and focus on topics such as the role of law in managing economic relations, the effectiveness of law, legitimacy, and game-theoretic perspectives. See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 3 (1999); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959 (2000) (book review); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT’L L. 545 (2004); Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS 133 (Karl W. Deutsch & Stanley Hoffmann eds., 1968); JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139 (1996); Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869 (2011). Some legal studies, drawing on political science methods and concepts, examine the functioning of legal machinery. See, e.g., John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997). A large and growing body of legal literature, drawing from political science, focuses on particular issue areas, most notably human rights. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 135 (2002); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002). In addition, a large literature addresses the environment. See, e.g., Jutta Brunnée & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT’L L.J. 105 (2002); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AJIL 384 (1996); Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677 (1999). Trade law is one among various other areas drawing on political science scholarship. See, e.g., G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

frameworks for doing so.² Some prominent collaborations are under way—sharing research methods and insights.³

Yet the two fields are still notable for their distance.⁴ Exchanging insights has been difficult, in part, because the fields are organized around different objectives and speak to different audiences. Most political science scholarship within international relations (IR) is focused on questions such as the role of power in the world, how states cooperate to manage collective problems such as environmental pollution, and the rise and spread of norms that affect political behavior. In this context, international law is just one of many forces at work. The current generation of political scientists, like scholars across the social sciences, has focused heavily on the role of institutions, but often political science scholarship has not clearly distinguished the roles of customary international law, formal legal agreements such as treaties, and organizations such as tribunals. Instead, these phenomena are treated as a loosely defined amalgam of “legal institutions.” IR scholarship largely ignores or does not understand some matters of central importance to public international lawyers, such as the specific procedures for setting and interpreting the content of international treaties. Whereas the audience for political science research has mainly been graduate students in training for careers in academic political science and other like-minded scholars, the audience for public international lawyers consists mainly of legal professionals and policymakers, who are more squarely focused on the law itself. Despite the many different traditions in international law,⁵ most public international law is concerned about the content of law—such as its reasoning, the phrasing and application of legal obligations and exceptions, and judicial decisions and interpretations, along with the operation of legal institutions.⁶ In sum, such differences in objectives and audiences help explain why scholars from these two fields often study similar phenomena but with quite different research questions, methods, and findings.

² For important work encouraging the collaboration between the two fields, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989) (overview of international relations (IR) theory and legal scholars' approaches); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205, 220 (1993) (discussing the changes in the approach of IR scholars to international law); and Robert Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 3 (Robert J. Beck, Anthony Clark Arend & Robert Vander Lugt eds., 1996).

³ For reviews of the progress of this collaboration, see Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9 (2005); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (book review); Symposium, *Rational Choice and International Law*, 31 J. LEGAL STUD. S1 (2002); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997) (noting a significant convergence in the research agendas of IR and international law); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998) (reviewing the convergence of IR and international legal scholarship and providing a bibliography of sources); and Jeffrey L. Dunoff, *Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas*, 1 J. INT'L L. & INT'L REL. 191 (2005).

⁴ Stephen D. Krasner notes that, while IR scholarship has become increasingly interested in international law, the “term ‘international law’ still hardly ever occurs in the titles of articles published in the three leading international relations journals, *International Organization*, *International Studies Quarterly*, and *World Politics*.” *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 95 n.6 (2000). This trend is now shifting. See generally Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship: A Review and Prospectus*, 106 AJIL 1 (2012).

⁵ See generally Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AJIL 291 (1999).

⁶ We thank Ken Abbott for emphasizing this point.

Nevertheless, there are large and growing intersections between the fields. In contrast to two decades ago, when much of IR focused on interstate cooperation, today's scholarly community is looking at a much wider array of questions that are especially well suited to collaboration with international lawyers.⁷ For example, both fields are concerned with the design and impact of legal institutions, such as treaties and other forms of international agreements. Research within political science is becoming richer through the awareness of how legal institutions actually function, and scholars in international law are gaining from the sophisticated methods for empirical research and for testing of hypotheses that have emerged from political science and other social sciences.

This essay offers a fresh survey of what political science has learned that may be of special interest to international lawyers. More than twenty years have passed since the last large essay of this type.⁸ In the interim the field of political science has substantially progressed in some areas and also shifted its focus to new questions. The field is far from unified, and in this essay we help explain some of the major debates. For lawyers who are not familiar with political science scholarship, our aim is to introduce some of the basic concepts and methods that could contribute to their own research. For the growing number of legal scholars already engaged with research in political science and the other social sciences, our aim is to offer a roadmap to political science research that might not yet be apparent, and suggest some areas where collaboration is likely to be especially fruitful.

Rather than surveying the entire field of political science about international relations, we focus on research that is most relevant for what public international lawyers actually do. We concentrate, therefore, on three areas: (1) the *design and content* of international legal institutions—not only treaties and nonbinding agreements, but also the many organizations that interpret and apply international legal content; (2) the *evolution and interpretation* of international legal norms, including customary law and the standards that are written into treaty-based law; and (3) the *effectiveness* of legal institutions in affecting the behavior of states, courts, firms, and individuals.

Political scientists see legal institutions and processes through the lens of politics. In part I, we lay three *building blocks* that are a foundation for most IR research on politics. The first is *power*. For political scientists this concept is central to explaining which topics are on the agenda and how political processes interact with legal institutions. Second are the *types of problems* that states and other actors create and also try to manage with international legal agreements. Some problems are marked by strong incentives for states to skirt their legal agreements, whereas others have a structure that more readily yields international cooperation. One aspect of *problem type* that political scientists usually find important is uncertainty; one of the roles of international institutions is to provide information that lowers uncertainty and to help states manage the effects of uncertainty. A third building block is *domestic politics*—the ways in which

⁷ We thank Martha Finnemore for this point.

⁸ See Abbott, *supra* note 2. While Abbott's essay was the last major one that took a broad survey of political science that relates to public international law, in the intervening two decades many other essays have reviewed aspects of political science research for international lawyers, as well as points of collaboration between the fields. For a partial update of Abbott's original essay applied to a particular topic—internal conflicts such as civil wars—see Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361, 362 (1999).

the internal political affairs of states and their systems of government, including judicial processes and the behavior of interest groups, shape how international rules are made, interpreted, and applied. These building blocks are at the heart of how most political scientists understand and analyze the design, content, and impact of international legal institutions. As in any mature field, political scientists have diverse research agendas; many of those differences trace back to the relative emphasis that different scholars place on the respective building blocks.

In part II we focus on what political scientists have learned about the *design and content* of international agreements.⁹ Much of the political science research in this area has focused on how international institutions, including legal agreements, help lower the *transaction costs* that states experience when they try to coordinate their behavior. Political scientists have been interested in transaction costs for decades.¹⁰ But over the last decade a coherent body of research has emerged to explain why states make particular choices when they design international legal institutions—such as the scope, precision, and flexibility of agreements, the inclusion of enforcement mechanisms, and the extent to which commitments are legally binding. Another body of research has coalesced around the view that the perspective just described is too narrow. Together, these bodies of research on legal design constitute prime areas for further collaboration between the fields.

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

In part IV we look at the *effectiveness* of international law. Here, the contributions of political science are twofold, resulting in assessments of the practical impact of particular legal institutions and in the development of methods for measuring and explaining effectiveness. Because states can select and influence the content of agreements and which agreements they join, formal measures of compliance often do not reveal much about whether legal institutions actually have an effect.¹¹ Indeed, some of the most effective legal institutions are those whose formal levels of compliance are very low.¹²

⁹ See *infra* part II.

¹⁰ See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983). On the role of institutions in lowering transaction costs by reducing uncertainty, see DAVID A. LAKE, *ENTANGLING RELATIONS: AMERICAN FOREIGN POLICY IN ITS CENTURY* (1999). Attention to transaction costs builds on a large literature, mainly in economics and decision theory, on the role of information in bargaining. On the role of information generally, see ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (2d ed. 1994). On the problem of uncertainty in multiparty negotiations, see generally HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982), and David Lax & James K. Sebenius, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, in *NEGOTIATION ANALYSIS* 153 (H. Peyton Young ed., 1991). On the mechanism by which uncertainty increases transaction costs, see George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970), and OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* (1975).

¹¹ See George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996); Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998). *But see* LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) ("[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

¹² See *infra* note 136 and accompanying text.

Scholars in these two fields already collaborate on some topics; building a larger and more effective program requires a careful look at the places where gains from collaboration are likely to be greatest. In part V we suggest several such areas. Research on the origins and impact of customary international law is one area. Large gains from collaboration are also likely where the research tools from political science can be combined with the important substantive and procedural expertise of international lawyers—for example, in the design of legal agreements that allow states flexibility in how they implement their legal commitments. We also pay some attentions to the limits of collaboration and learning between the fields; because of different research questions and methods, some areas cannot be expected to be ripe for collaboration.

I. BUILDING BLOCKS

Here we focus on the core concepts that are building blocks for most political science research on IR: (1) power, (2) the types of international cooperation problems, and (3) domestic politics. These building blocks start with power, which has been eternally fundamental to political science. They also include structure, which political scientists have long recognized has a large impact on shaping the success of efforts at interstate cooperation. To those two we add domestic politics, for one of the most important frontiers in political science research concerns how the national and international realms interact. These organizing concepts help explain the focus of political science research and also areas where collaboration would be most fruitful.

Power

First is power, which is fundamental to how most political scientists study behavior and how particular actors advance their interests. One 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.¹³ Most political science research looks first to states and their ability to coerce other states as the main type of power at work in international affairs. By contrast, most public international lawyers look to the authority of legal norms and institutions as independent forces that shape behavior. For many years the emphasis that so-called realist political scientists placed on state power led to the stereotype that power was a force that worked in opposition to law.¹⁴ Today, very little political science research adopts that simple view of power; it looks, instead, at the ways that power interacts with other forces, including law, to shape outcomes. Seeing power as having

¹³ *But see, e.g.*, Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AJIL 64 (2006); GOLDSMITH & POSNER, *supra* note 1. Other legal scholars emphasize different forms of power that, for example, lead to discrimination against certain groups. *See, e.g.*, Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL 613 (1991); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

¹⁴ *See* KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (arguing that international rules are the pronouncements of powerful states and are subject to change along with the distribution of state power); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY, Winter 1995, at 5 (arguing that international institutions cannot have independent effects on state behavior); HANS MORGENTHAU, *LA NOTION DU "POLITIQUE" ET LA THÉORIE DES DIFFÉRENDS INTERNATIONAUX* 65–71 (1933) (arguing that international law is biased toward stability). For a review of the influence of realist thought on legal scholarship, see Steinberg & Zasloff, *supra* note 13.

a central role does not make international law irrelevant or imply that international law has no effect on its own. Rather, international law can be a conduit for both the weak and the powerful to magnify their influence.

Political scientists and other social scientists have found it useful to distinguish four distinct “faces” of power.¹⁵ The first is power in its most obvious, blunt form: the ability to coerce.¹⁶ The second is the ability to influence the decision-making agenda and process.¹⁷ The third is the ability to shape what people want and believe, such as through the spread of norms and the creation of interests and identities.¹⁸ The fourth face is discursive, which means that influence stems from the creation of systems of knowledge and social customs and from the ways that those phenomena shape laws and other systems of belief and practice.¹⁹

The first face of power: coercion. Power in its most obvious form is the ability to coerce—to get another actor to behave contrary to what it would do voluntarily. Power of this form can be exercised in many forms—notably, with positive incentives (also called carrots or inducements) and penalties (often called sticks).

The starting point for some IR scholarship is to analyze how states use incentives and penalties to influence each other and how other actors use the same instruments to influence states. While many states try to coerce others directly, many IR scholars see legal institutions playing a major role in shaping how states (and other actors) use their power.²⁰ Across a wide array of issue areas, scholars have also documented how state power determines the content and evolution of treaties and other international legal institutions.²¹

¹⁵ See generally STEVEN LUKES, *POWER: A RADICAL VIEW* (2d ed. 2005); see also Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT’L ORG. 39 (2005).

¹⁶ See generally Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. & L. 201 (1957).

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

¹⁸ See *infra* notes 29–42 and accompanying text.

¹⁹ See *infra* notes 43–65 and accompanying text.

²⁰ For example of work by so-called realist scholars on the interaction of state power and international legal institutions, see G. John Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, 23 INT’L SECURITY, Winter 1999, at 43 (arguing that while state power is a dominant force, the Western order and post-WWII institutions have endured and facilitated cooperation despite changes in the power of their creators); Robert Pape, *Soft Balancing Against the United States*, 30 INT’L SECURITY, Summer 2005, at 45 (arguing that other powers are likely to respond to growing U.S. power using “soft-balancing,” nonmilitary tools, including international institutions); Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT’L SECURITY, Fall 2004, at 85 (arguing that states should deploy a variety of new domestic and international institutional arrangements to govern failed states that have left vacuums in power); William C. Wohlforth, *The Stability of a Unipolar World*, 24 INT’L SECURITY, Summer 1999, at 5 (arguing that, as a unipolar power, the United States should maintain international security institutions to reduce conflict behavior and limit expansion by other major powers); and LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000) (focusing on the ability of extremely powerful states to “go it alone” in creating international laws and institutions that mirror their interests at the expense of other states that participate only because they have no better option).

²¹ For example, scholarship on the Treaty on the Non-proliferation of Nuclear Weapons (NPT), July 1, 1968, 21 UST 483, 729 UNTS 161, has explored how powerful states mobilized both inducements and penalties in support of the Treaty’s goals. See Trevor McMorris Tate, *Regime-Building in the Non-proliferation System*, 27 J. PEACE RESEARCH 399 (1990) (arguing that major powers are keeping the regime’s aim global, thereby insulating it from political wrangling on both domestic and international levels); James F. Keeley, *Legitimacy, Capability, Effectiveness and the Future of the Non-proliferation Treaty?*, in *NUCLEAR NON-PROLIFERATION AND GLOBAL SECURITY* (David Dewitt ed., 1987) (arguing that certain powerful members are more apt to strengthen or weaken the regime than others); Harald

The second face of power: agenda setting. The second face of power is the ability to influence the agenda. That a variety of actors shapes the range of choices from which decisions are made is not news to international legal scholars, but political scientists have developed two sets of insights that reveal how power affects agendas. One insight from research that focuses on agenda setting is that states and other actors frame agendas in predictable ways by linking issues together. Control over linkage can constrain and expand the bargaining space, making it harder for unlinked (exogenous) issues to attract attention.²² It helps define the issue area within which legal agreements attempt to regulate behavior. Most scholarship has focused on how states use linkage to set agendas, but interest is growing in how *international institutions* link issues in ways that give them control over agendas and the framing of decisions.²³

A second insight is that information and expertise can confer agenda-setting power on actors that do not have the material capabilities to use coercive power. For example, networks of academic scientists played a large role in formulating arms control agreements during the Cold War, such as through their command of special knowledge about geology essential for designing legal agreements to regulate nuclear testing.²⁴ Firms have been influential where they have had unique expertise, as the chemical industry did in setting the “schedules” of chemicals regulated by the chemical weapons treaty.²⁵ Nongovernmental organizations (NGOs) have been influential in a diverse array of efforts—from banning land mines to regulating small arms and protecting wildlife—not only by working as advocates but also by providing information regarding the particular problem in question and by framing their favored solutions.²⁶ In some

Müller, *Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement*, 7 NONPROLIFERATION REV., Summer 2000, at 77 (arguing that for the NPT to be effective, powerful states must be able to sanction violators visibly and effectively or at least to delegate sufficient resources and backing to an agent of the regime to do so).

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

²³ See Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community*, 51 INT’L ORG. 99, 101–02 (1997) (arguing that in some circumstances the European Commission’s ability to set agendas has a large impact on the decisions taken by the Council of Ministers); see also George Tsebelis, *The Power of the European Parliament as a Conditional Agenda Setter*, 88 AM. POL. SCI. REV. 128 (1994); Geoffrey Garrett & George Tsebelis, *An Institutional Critique of Intergovernmentalism*, 50 INT’L ORG. 269 (1996); George Tsebelis & Amie Kreppel, *The History of Conditional Agenda-Setting in European Institutions*, 33 EUR. J. POL. RES. 41 (1998).

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

²⁵ See Amy E. Smithson, *Implementing the Chemical Weapons Convention*, 36 SURVIVAL, Spring 1984, at 80.

²⁶ See Diana O’Dwyer, *First Landmines, Now Small Arms? The International Campaign to Ban Landmines as a Model for Small-Arms Advocacy*, 17 IRISH STUD. INT’L AFF. 77 (2006); see also Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT’L ORG. 613 (1998). On wildlife, see *infra* note 177.

instances firms have been able to control agendas by shifting regulation from formal intergovernmental bodies to private regulatory systems, where they have more control over outcomes.²⁷ A few studies have looked at how those private regulatory systems, in turn, affect legalization.²⁸

The third face: norms and ideas. The third face of power is the ability to shape, through the spread of norms and ideas, what societies see as legitimate and acceptable. Political scientists have long argued that norms have important effects on outcomes in IR.²⁹ The most recent research has emphasized that norms have influence independent of the distribution of state power; they shape behavior by providing states and nonstate actors with information about interests, and they carry social content.³⁰ For example, norms influence behavior not only by setting standards but also in creating expectations and social pressures that encourage compliance.³¹

This perspective on power is especially conducive to collaboration between political scientists and international lawyers since one way in which legal institutions influence behavior is by codifying and shaping social norms.³² Once codified, such norms not only set clearer standards for behavior but also make it easier to mobilize state resources—including through coercion—to promote compliance. Indeed, legal scholars have long examined such questions, unpacking the normative power of legal institutions.³³ Among the many practical debates that have emerged from scholarship in both law and political science has been the question of whether international institutions suffer in their legitimacy due to a *democratic deficit* that

²⁷ See David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261 (2008); David Vogel, *The Private Regulation of Global Corporate Conduct*, in THE POLITICS OF GLOBAL REGULATION 151 (Walter Mattli & Ngaire Woods eds., 2009). One of the frontiers of research in this area concerns the option of private regulation and the ability of firms to control access to essential information. For a survey of current research on private regulation, including several studies that point to the interplay between private and public regulation, see Tim Büthe, *Private Regulation in the Global Economy*, 12 BUS. & POL. (Tim Büthe ed., 2010) (special issue), available at <http://www.bepress.com/bap/vol12/iss3/art1>.

²⁸ See, e.g., Annegret Flohr, *Hard, Soft or Fuzzy? Corporate Self-Regulation and International Legalization in the Financial Sector* (2011) (unpublished Ph.D. dissertation, Technischen Universität Darmstadt) (on file with authors).

²⁹ Earlier political science research on international institutions (called *regimes* in the most influential study on this topic in the early 1980s) included a place for norms, but in this research, “norms” were generally limited to facilitating cooperation between similarly self-interested actors or to constraining their behavior. See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982); INTERNATIONAL REGIMES, *supra* note 10; KEOHANE, *supra* note 10.

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

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

³² Several legal scholars have argued that international law has the power to create or change norms and influence state behavior. See, e.g., HENKIN, *supra* note 11; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review). In recent years political scientists have helped elaborate on those arguments. See, e.g., Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 633 (2000); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573 (2007).

³³ See, e.g., Koh, *supra* note 32, at 2602 (arguing that a transnational legal process consisting of three phases—interaction, interpretation, and internalization—provides the necessary description of how international norms become successfully internalized and how state obedience becomes second nature). For similar views, see also CHAYES & CHAYES, *supra* note 11; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS

might be addressed, for example, by more formal involvement of civil society groups in making and implementing international law.³⁴

While the argument that norms matter is not news to legal scholars or political scientists, political science research has recently focused more sharply on the mechanisms by which norms arise, spread, and influence behavior.³⁵ Much of this research looks at the particular individuals and organizations that are the agents that craft, interpret, and spread ideas and also particular norms. For example, studies have focused on the roles of international tribunals, advocacy networks (such as those involving NGOs), firms, scientists, and arbiters of moral authority (such as churches).³⁶ These studies usually focus on an array of social processes, not just the law or legal institutions, to explain the rise and impact of norms.³⁷ One of the many areas having a large political science literature is the rights of women—an area where the spread of norms has had a significant effect on international law and vice versa.³⁸

(1990); and Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 355 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001). Many of these process-oriented approaches to studying law build on what is known as the New Haven approach and resonate with process-oriented theories from political science (that is, models based on the third and fourth faces of power and rooted in processes such as persuasion and legitimacy). See generally HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* (1992); see also PHILLIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (1990).

³⁴ See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1998); Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); Joseph S. Nye Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF., July/August 2001, at 2; Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336 (2004).

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

³⁶ For a study that focuses on international legal institutions, including international organizations, as agents of norm creation and influence, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 888 (1998) (describing the origins of norms, how they exercise influence, and the conditions for that influence). A theory similar to that presented by Ryan Goodman and Derek Jinks, see *infra* note 54, is proposed in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen Ropp & Kathryn Sikkink eds., 1999). See also Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999) (arguing that the rational-legal authority that international organizations embody gives them power independent of the states that created them, and channels that power in particular directions; also that bureaucracies make rules but in so doing create social knowledge, define shared tasks, develop and define new types of actors, create new interests for actors, and transfer models of political organization around the world).

³⁷ See Janice E. Thomson, *State Practices, International Norms, and the Decline of Mercenarism*, 34 INT'L STUD. Q. 23 (1990) (analyzing the role of the behavioral norms around use of mercenaries, although her analysis has implications for legal norms in this area); Kathryn Sikkink, *The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 139 (Judith Goldstein and Robert O. Keohane eds., 1993); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993); KLOTZ, *supra* note 30; Audie Klotz, *Transnational Activism and Global Transformations: The Anti-apartheid and Abolitionist Experiences*, 8 EUR. J. INT'L REL. 49 (2002).

³⁸ See TOWNS, *supra* note 31; Ann Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion “from Below,”* 66 INT'L ORG. (forthcoming 2012); see also Carol Miller, *Women in International Relations? The Debate in Inter-war Britain*, in *GENDER AND INTERNATIONAL RELATIONS* 64 (Rebecca Grant & Kathleen Newland eds., 1991); Carol Miller, “Geneva—the Key to Equality”: *Inter-war Feminists and the League of Nations*, 3 WOMEN'S HIST. REV. 219 (1994); DEBORAH STIENSTRA, *WOMEN'S MOVEMENTS AND INTERNATIONAL ORGANISATIONS* (1994); SANDRA WHITWORTH, *FEMINISM AND INTERNATIONAL RELATIONS: TOWARDS A POLITICAL ECONOMY OF GENDER IN INTERSTATE AND NON-GOVERNMENTAL INSTITUTIONS* (1994); NITZA BERKOVITCH, *FROM MOTHERHOOD TO CITIZENSHIP. WOMEN'S RIGHTS AND INTERNATIONAL*

Political science research that emphasizes this face of power has helped explain how and when norms diffuse across state borders. One argument is that diffusion is more likely when common social categories construct ties between social entities and when there is a *cultural match* between a norm and a target state.³⁹ Other arguments focus on the role of activists and other norm entrepreneurs—for example, in spreading norms against racism that, in turn, affected the legal organization and use of sanctions against apartheid-era South Africa.⁴⁰ Most research that has looked closely at the diffusion of legal norms sees numerous factors at work—for example, that new norms are perceived as economically beneficial (a factor that helps to spread American law worldwide) or that norms are linguistically and institutionally compatible.⁴¹ Others argue that legitimacy is the key to transnational norm diffusion; when persons see international standards as legitimate, they are more likely to experience an internal sense of obligation that leads to higher levels of compliance.⁴²

The fourth face: doxa and the common sense. The fourth face of power is the ability to create *social doxa*—that is, widely held beliefs or opinions.⁴³ Whereas the third face of power is based on a notion of real, underlying interests, the fourth face concentrates on persuasion and communication as the source of its power. This distinction between underlying interests and persuasion reflects the intellectual origins of these two concepts of power—the former rooted in

ORGANIZATIONS (1999); Bob Reinalda, *The International Women's Movement as a Private Political Actor Between Accommodation and Change*, in PRIVATE ORGANIZATIONS IN GLOBAL POLITICS 165 (Karsten Ronit & Volker Schneider eds., 2000).

³⁹ See Jeffrey T. Checkel, *Norms, Institutions, and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 87 (1999) (defining cultural match as "a situation where the prescriptions embodied in an international norm are convergent with domestic norms," which are reflected in the legal system and bureaucratic agencies, and arguing that the mechanism of norm diffusion varies depending on the domestic structure); see also Amy Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POL. 413, 415 (1999) (arguing that international norms have been crucial in causing changes in Japanese policy toward Korean migrant workers, both through legal action and activist pressure on governments); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 640 (2000) (finding that the number of international human rights norms incorporated into international and regional Latin American law significantly increased between the mid-1970s and 1990s); J. C. Sharman, *Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States*, 52 INT'L STUD. Q. 635, 636 (2008) (using survey and interview data to argue that the recent adoption of anti-money laundering policies by 170 states represents an example of international norm diffusion caused by "discursively mediated exercises of power," and not by coercion or learning); DANIEL C. THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* (2001).

⁴⁰ See Klotz, *supra* note 37 (on the role of activism and transnational movements in norm diffusion); see also Klotz, *supra* note 30 (arguing that norms have a constitutive, rather than solely constraining, effect on interests). The idea that there are norm entrepreneurs of various types has been studied widely, although usually not with much specific focus on the law. See, e.g., Christine Ingebritsen, *Norm Entrepreneurs: Scandinavia's Role in World Politics*, 37 COOPERATION & CONFLICT 11 (2002).

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

⁴² See Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999); see also Michael N. Barnett, *Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations*, 49 WORLD POL. 526 (1997) (book review); TOWNS, *supra* note 31 (arguing that diffusion of norms is a function of hierarchy when positions within the hierarchy are determined by conformity with norms—leading to diffusion downward from high-position states).

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

the political economy of Marx and the latter in the sociology of Foucault, who studied the influence of informal social customs and practices.⁴⁴

In the fourth face the source of power arises through control over processes such as acculturation, socialization, debate, and persuasion—all processes of growing interest to political scientists. In practice, such scholarship has often combined the third and fourth faces of power because the causal mechanisms being studied combine elements of both—for example, acculturation and socialization lead to changes in underlying interests, and a process of debate can alter perceptions of legitimacy and influence of legal norms.⁴⁵ Such accounts of international law and politics are based on the idea that international legal institutions are political creations designed to structure and frame political debates and to shape how states use their authority.⁴⁶ Legal processes shape which norms are seen as valid, and focus debate on areas where norms are contested.⁴⁷ In this process, some studies have focused on how international organizations—not just states—shape outcomes by influencing how problems are framed and discussed.⁴⁸ A few studies have focused squarely on how the legal nature of these processes “construct” meaning and shape outcomes. For example, because legal argumentation operates by reference to rules and relies heavily on analogy, it operates by assigning guilt and focusing praise, thereby concentrating debates on the content of legal norms.⁴⁹

Political science scholarship on the mechanisms of persuasion has focused on the role of rhetorical argument in IR and on explaining how social processes like persuasion and argumentation differ from other processes that have been the mainstay of political science research, such

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

⁴⁵ See, e.g., *POWER IN GLOBAL GOVERNANCE 3* (Michael Barnett & Raymond Duvall eds., 2005) (referring to this process as *productive power*, or “the socially diffuse production of subjectivity in systems of meaning and signification”); Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, in *POWER IN GLOBAL GOVERNANCE*, *supra*, at 161 (arguing that the power of international organizations results from the authority conferred on them because of their moral position, rational-legal standing, and expertise, and that this authority takes many forms, including the ability to use productive power to “participate in the production and the constitution of global governance,” Michael Barnett & Raymond Duvall, *Power in Global Governance*, in *POWER IN GLOBAL GOVERNANCE*, *supra*, at 1, 28); Helen M. Kinsella, *Securing the Civilian: Sex and Gender in the Laws of War*, in *POWER IN GLOBAL GOVERNANCE*, *supra*, at 31 (arguing that the categories of combatant and civilian embodied in the Geneva Convention are “dependent upon discourses of gender that naturalize sex and sex difference”); Kai Alderson, *Making Sense of State Socialization*, 27 *REV. INT’L STUD.* 415 (2001) (exploring from a theoretical perspective how changes in beliefs, political pressure, and institutionalization help explain the process of state socialization).

⁴⁶ See Christian Reus-Smit, *The Politics of International Law*, in *THE POLITICS OF INTERNATIONAL LAW* 14, 36 (Christian Reus-Smit ed., 2004) (arguing that institutions are “created by political actors as structuring or ordering devices, as mechanisms for framing politics in ways that enshrine predominant notions of legitimate agency, stabilise individual and collective purposes, and facilitate the pursuit of instrumental goals”).

⁴⁷ See Antje Wiener, *Contested Compliance: Interventions on the Normative Structure of World Politics*, 10 *EUR. J. INT’L REL.* 189, 190 (2004) (arguing that a “reflexive” understanding of law helps explain how social practice changes the normative structure of law); see also Antje Wiener, *Contested Meanings of Norms: A Research Framework*, 5 *COMP. EUR. POL.* 1 (2007).

⁴⁸ See MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 6 (2004) (arguing that international organizations have authority in part because they “orient action and create social reality”).

⁴⁹ See FRIEDRICH V. KRATOCHWIL, *RULES NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* (1989) (focusing on the style of legal argumentation and the role of legal norms in decision making—including how they help reduce uncertainty in contracting).

as strategic bargaining, coercion through inducements, and rule-guided behavior.⁵⁰ One of the many points of intersection between this work and legal scholarship is the role of legal rhetoric in determining the range of options available to decision makers—what political scientist Ronald Krebs calls *rhetorical coercion* or *rhetorical entrapment*. Krebs has studied these concepts by focusing on arguments that the George W. Bush administration used to justify invasion of Iraq and the use of torture following the events of September 11, 2001.⁵¹ Some studies of persuasion also see a large role for social learning.⁵² Many disagreements arise, however, concerning exactly which causal mechanisms have the most effect; some writers even question whether it is useful to describe the process of persuasion in terms of cause and effect.⁵³

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

⁵⁰ See, e.g., NETA C. CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITICS: ETHICS, DECOLONIZATION, AND HUMANITARIAN INTERVENTION (2002); Thomas Risse, "Let's Argue!": *Communicative Action in World Politics*, 54 INT'L ORG. 1, 2 (2000) (claiming that arguing creates common knowledge about both the rules of the game and the definition of the situation, and that it allows actors to seek an optimal solution and common normative framework); see also Henry Farrell, *Constructing the International Foundations of E-Commerce—The EU-U.S. Safe Harbor Arrangement*, 57 INT'L ORG. 277 (2003) (examining the preference-changing effects of persuasion); Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG. 33, 35 (2009) (arguing that states' willingness to give up sovereignty to the International Criminal Court resulted from persuasion during negotiations that caused states' interests to change).

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

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

⁵³ See, e.g., Rodger A. Payne, *Persuasion, Frames and Norm Construction*, 7 EUR. J. INT'L REL. 37, 39 (2001) (arguing that much of the constructivist literature focuses excessively on persuasion and framing, and overlooks the underlying social processes that determine the outcome of highly contested normative struggles); Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT'L REL. 35, 36–37 (2007) (emphasizing the role of rhetoric but suggesting that others have been incorrect in focusing on its role in persuasion rather than coercion); Christian Grobe, *The Power of Words: Argumentative Persuasion in International Negotiations*, 16 EUR. J. INT'L REL. 5, 6 (2010) (bridging persuasion-based arguments through a focus on strategic bargaining found in the rational choice literature, arguing that rational actors will be receptive to persuasion or argumentation only when such communication provides new causal knowledge that helps alleviate uncertainty, and implying that bargaining positions change only because of changes in available information, rather than changes in preferences).

⁵⁴ See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2005) (arguing that, although most theories attribute state compliance to coercion and persuasion, acculturation is a social mechanism that profoundly affects state behavior yet remains poorly understood).

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

their major new study, international lawyers Jutta Brunnée and Stephen Toope argue that traits of law help to organize the interactions of actors in distinctive ways, to shape their interests, and to promote compliance.⁵⁶

One of the many areas where scholars are combining the third and fourth faces of power is in the study of legitimacy. The notion of legitimacy presents a challenge to traditional ideas that the international system is fully anarchic.⁵⁷ Some scholars have explored how legitimacy evolves and spreads and how the type of domestic political system influences the ability to establish norms that are viewed as legitimate.⁵⁸ Some look to international organizations as central actors in conferring legitimacy and see conformity of behavior with international norms as necessary for legitimacy.⁵⁹ Still others emphasize that legitimacy is less a matter of moral obligation and more a point of efficient coordination.⁶⁰ Most studies of legitimacy see the concept as a counterpoint to brute force in IR.⁶¹ Still other political scientists have explored how norms become legitimate and powerful by being persuasive—a process that is rooted in communication.⁶²

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

⁵⁶ See BRUNNÉE & TOOPE, *supra* note 1, at 6 (arguing that the traits of “generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action” generate commitment and can help promote compliance).

⁵⁷ *Id.* Political scientists of the English School have long made arguments along this line. See *infra* note 196.

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

⁵⁹ See Ward Thomas, *Legitimacy in International Relations: Ten Propositions*, in JUSTIFYING WAR? FROM HUMANITARIAN INTERVENTION TO COUNTERTERRORISM (Gilles Andréani & Pierre Hassner eds., 2008) (exploring with anecdotal evidence a variety of issues related to the sources and effects of international legitimacy, including the role of international organizations, and noting that no single mechanism or institution has a monopoly on conferring legitimacy).

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

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

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

⁶³ See, e.g., CHRISTIAN REUS-SMIT, AMERICAN POWER AND WORLD ORDER 4 (2004). Reus-Smit argues “that all political power is deeply embedded in webs of social exchange and mutual constitution; that stable political power . . . ultimately rests on legitimacy; and that institutions play a crucial role in sustaining such power.” *Id.* at 41; see also Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT’L STUD. Q. 487 (2001) (arguing that socialization also takes place, in part, through persuasion and social influence that inculcate pro-norm behavior by dispensing social rewards, such as status, and punishments, such as exclusion or shaming); Anne Sisson Runyan, *Women in the Neoliberal “Frame,”* in GENDER POLITICS IN GLOBAL GOVERNANCE 210 (Mary K. Meyer & Elisabeth Prügl eds., 1999); Elisabeth Prügl, *What Is a Worker? Gender, Global Restructuring, and the ILO Convention on Homework*, in GENDER POLITICS IN GLOBAL GOVERNANCE, *supra*, at 197.

⁶⁴ See POWER OF HUMAN RIGHTS, *supra* note 36.

long-term convergence of state preferences.⁶⁵ Elites working inside these organizations are subject to socialization,⁶⁶ a process whose outcome depends on how the elite is embedded within the society and also on the intensity and duration of interaction with other relevant actors.⁶⁷

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

The Problem Type

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

Historically, political scientists have focused most attention on two kinds of characteristics that define problem type. One involves strategic context; that is, it is easier to reach and maintain international cooperation on some particular topics, whereas others are prone to deadlock. The other characteristic of problems involves information and uncertainty, as the prospects for cooperation depend, in part, on whether states (or other actors) understand the particular problem at hand and can predict the consequences of their actions.

Research that emphasizes the underlying attributes of problems is usually functional in its orientation. It sees international cooperation stemming from the attributes of the problem that

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

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

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

⁶⁸ A few legal scholars have also analyzed international cooperation by considering problem types rooted in game theory. See, e.g., GOLDSMITH & POSNER, *supra* note 1; ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); see also George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541 (2005); William B. T. Mock, *Game Theory, Signalling and International Legal Relations*, 26 GEO. WASH. J. INT'L L. & ECON. 33 (1992); Benvenisti, *supra* note 1; Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993 (2005); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 (2004); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006); Ohlin, *supra* note 1.

actors are trying to solve. Whether this second building block is actually useful is a matter of intense debate. For many political scientists, this functional approach to studying international institutions focuses on the wrong issues by assuming that the attributes of problems are fixed. For these scholars, most of whom work with the third and fourth faces of power, what is interesting is how actors create problems that require legal responses. They study how problems arise and how the spread of norms and ideas “construct” the policy agenda.⁶⁹ This line of research could be a fruitful one for collaboration between political scientists and legal scholars since the processes for setting agendas and shaping the preferences of actors often heavily depend on legal argumentation and institutions. For example, scholarship has shown that some of the central topics in international law on weapons and the use of force—such as regulation of chemical weapons,⁷⁰ the legality of assassination,⁷¹ anti-personnel land mines,⁷² the use of nuclear weapons,⁷³ and decisions to invade other states⁷⁴—depend on norms that have arisen in decentralized social processes based heavily on persuasion, and that have often shaped, and are continuing to shape, the content and operation of legal institutions.⁷⁵ Indeed, one of the

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

⁷⁰ See, e.g., Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT’L ORG. 73 (1995). Price argues against scholars who claim that the nonuse of chemical weapons was rooted in their lack of utility or in the fear of reciprocity. He shows, instead, that a norm against these weapons arose and that its stigma was a necessary condition for the emergence of tacit and formal agreements not to develop and deploy chemical weapons. In particular, chemical weapons came to be associated with poison, the use of which has been stigmatized in many cultures. Price’s line of argument, though not directly focusing on legal obligations, helps explain how norms could influence customary international law and also formal legal obligations related to chemical weapons.

⁷¹ See, e.g., Ward Thomas, *Norms and Security: The Case of International Assassination*, 25 INT’L SECURITY, Summer 2000, at 105, 121–22 (arguing that assassination is a form of interstate violence that is a potential competitor to large-scale war, that prohibiting it benefits the major powers (which are more likely to be able to deploy other forms of violence), and, in tracing the rise and development of this legal norm, that “the norm itself served a legitimizing function, reinforcing institutional changes by providing them with a normative foundation based on natural law principles of justice and honor”); WARD THOMAS, *THE ETHICS OF DESTRUCTION: NORMS AND FORCE IN INTERNATIONAL RELATIONS* (2001).

⁷² See, e.g., Price, *supra* note 26 (arguing that transnational civil society, especially nongovernmental organizations, used moral persuasion and social pressure to perpetuate a norm against antipersonnel land mines).

⁷³ See, e.g., Nina Tannenwald, *Stigmatizing the Bomb: Origins of the Nuclear Taboo*, 29 INT’L SECURITY, Spring 2005, at 5. In tracing the evolution of the taboo against the use of nuclear weapons as a result of the global antinuclear weapons movement, Tannenwald identifies key forces in the rise of this norm—including social groups pressuring leaders to change state policy, rhetoric and diplomacy intended to delegitimize practices such as possessing nuclear weapons and threatening to them, and the visibility of state leaders who spoke against nuclear weapons for reasons of moral conscience or on the basis of particular cognitive assumptions. She argues, in particular, that this norm developed through actual practice—a process that, she suggests, confers a status to the norm akin to customary international law. See also Nina Tannenwald, *The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-use*, 53 INT’L ORG. 433 (1999).

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

⁷⁵ See also Jeffrey W. Legro, *Culture and Preferences in the International Cooperation Two-Step*, 90 AM. POL. SCI. REV. 118 (1996). Focusing on the rise of norms during the interwar period to stigmatize submarine warfare, aerial bombing of nonmilitary targets, and chemical warfare, Legro argues that these stigmata affected state preferences, partially through changes in bureaucratic culture. He contrasts this argument with more conventional explanations rooted in strategic interaction or the balance of power. Legro uses similar lines of argument in addressing other issues. See Jeffrey W. Legro, *Which Norms Matter? Revisiting the “Failure” of Internationalism*, 51 INT’L ORG. 31 (1997); see also JEFFREY W. LEGRO, *RETHINKING THE WORLD: GREAT POWER STRATEGIES AND INTERNATIONAL ORDER* (2005) (arguing that national ideas about how a state should interact with other states result in changes to both national identities and interests); JEFFREY W. LEGRO, *COOPERATION UNDER FIRE: ANGLO-GERMAN RESTRAINT DURING WORLD WAR II* (1995); see generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003).

ways that power influences law is that it shapes how states and individuals define and conceptualize the problems that are the focus of legal norms and activities.⁷⁶

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

Strategic context. When discussing the prospects for cooperation, many political scientists of the functional persuasion have adopted the terminology and insights of game theory, which helps reveal the *strategy* of international cooperation; that is, how one state behaves depends on its expectations for how other states would respond. Determining the strategic context requires that one identify both which individual parties stand to benefit from cooperation and what incentives they have to violate (“defect from”) a cooperative agreement.⁷⁷ Concepts derived from game theory have been present from the beginning of systematic political science research on how international law and other institutions influence international cooperation.⁷⁸ Some legal scholars have also put a central focus on the type of problem in their research.⁷⁹ While the full set of strategic contexts is large and complicated, most political science research has concentrated on four, in particular.

First, the vast majority of literature on the strategic context addresses *collective action*. In this type of problem, all states would be better off if they worked together, but individually they have an incentive to renege on their commitments. The most famous illustration of these strategic incentives is the prisoner’s dilemma, in which two accomplices are held in separate cells, each under interrogation and unable to communicate with the other. If neither confesses, both receive light sentences. The collective gains from cooperation (that is, not confessing) are large, but the two accused nonetheless fail to achieve that gain because each is better off by confessing, no matter what the other person does. This stylized game has attracted a massive literature that is useful for its general insights even though the rigorous conditions of the

⁷⁶ See POWER IN GLOBAL GOVERNANCE, *supra* note 45; see generally Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992).

⁷⁷ More precisely, the strategic context usually begins with three questions: (1) Which parties stand to benefit from cooperation, and to what extent? (2) To what extent are the potential benefits from cooperation tangible or intangible? (3) Once an agreement is put in place, to what extent would actors have an incentive to violate it? On the relation between game theory and IR, see generally THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960). For significant applications of game theory to IR, see, for example, James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68 (1997); Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT’L ORG. 495 (1991); James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT’L ORG. 269 (1998); Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999); Kyle Bagwell & Robert W. Staiger, *Domestic Policies, National Sovereignty, and International Economic Institutions*, 116 Q. J. ECON. 519 (2001); and Michael J. Gilligan, *Is There a Broader-Deeper Trade-Off in International Multilateral Agreements?*, 58 INT’L ORG. 459 (2004).

⁷⁸ See generally Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT’L ORG. 299 (1982); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 1 (Kenneth A. Oye ed., 1986); TODD SANDLER, *GLOBAL COLLECTIVE ACTION* (2004); Abbott, *supra* note 2.

⁷⁹ See GOLDSMITH & POSNER, *supra* note 1; GUZMAN, *supra* note 68; Moshe Hirsch, *Game Theory, International Law, and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT’L L. & POL’Y 75 (1998); Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679 (2003); see also Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. 285 (2002) (a political scientist applying game-theoretic approaches directly to law).

prisoner's dilemma—such as the inability to communicate and contract—are rarely fully present under the actual conditions of IR.⁸⁰

For example, most political science research on arms control assumes that cooperation is difficult for three reasons: the incentives to defect are severe, adversaries find it difficult to communicate accurate signals about their real intentions and behavior, and states are averse to policies that might endanger national survival. States will be wary about binding themselves to slow or stop development of weapons systems needed to deter or defend against attack if it might be difficult to detect whether their adversaries are developing new weapons systems.⁸¹ Consequently, in arms control, perhaps more than any other issue area, parties have given extreme attention to monitoring and verification of compliance, all in an effort to detect and deter breakouts in a timely way.⁸² Cooperation in trade agreements, where the incentives to defect may be strong, is often analyzed along similar lines.⁸³ As cooperation deepens and the incentives for shirking rise, so does the need to spot and punish violations. Long ago, IR scholars

⁸⁰ Not all collective action problems are helpfully analyzed in terms of the prisoner's dilemma. Another game that scholars often use for analysis is the *stag hunt*, in which two mutually beneficial outcomes are available, but one is significantly more so than the other. While players in the stag hunt would prefer a more beneficial outcome, they will choose the safer, but less beneficial, outcome unless they can coordinate and both choose the better option. On the prisoner's dilemma, see generally WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* (1992) (describing the intellectual history of this problem); AXELROD, *supra* note 78 (showing that cooperation can be achieved in a prisoner's dilemma game through multiple interactions); Hugh Ward, *Game Theory and the Politics of the Global Commons*, 37 J. CONFLICT RESOL. 203 (1993) (arguing that some issues concerning global common-pool resources can be analyzed as prisoners dilemmas); and Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985) (arguing that coordination problems will lead to different types of solutions than prisoner's dilemma problems).

⁸¹ These strategic incentives also explain why so many arms control agreements are rooted in bold aspirations yet struggle to have much real impact on the development and deployment of important weapons systems; it has proved difficult to monitor and enforce agreements with the precision needed to make states willing to risk disarmament. See George W. Downs, David M. Rocke & Randolph M. Siverson, *Arms Races and Cooperation*, in COOPERATION UNDER ANARCHY, *supra* note 78, at 118.

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

⁸³ Nearly all states, to different degrees, gain from policies that lower the barriers to trade and allow for a more efficient global economy. Most also face temptations, however, to erect trade barriers that protect their own industries—especially when the interest groups that benefit are well organized politically and can exert great influence over national policy. For key scholarship on international trade law by political scientists, see, for example, Michael A. Bailey, Judith Goldstein & Barry R. Weingast, *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 WORLD POL. 309 (1997) (discussing the ways in which domestic law interacts with international law); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007) (arguing that the potential for dispute resolution decisions that create long-term precedents affects state incentives to use the mechanisms in question); Judith L. Goldstein, Douglas Rivers & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37 (2007); Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950–94*, 57 WORLD POL. 453, 459–62 (2005) (arguing that the institutional design of the General Agreement on Tariffs and Trade (GATT) provides the loopholes necessary for strong states to capture the majority of benefits from trade liberalization); B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001) (arguing that flexibility is especially beneficial in the context of domestic uncertainty); and B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389 (2005).

used this logic to explain why the international trade regime has co-evolved with its enforcement procedures,⁸⁴ and this same point has long been familiar to lawyers who have observed national enforcement of international trade laws and the emergence of multilateral enforcement.⁸⁵

Research on international agreements on environmental issues also often begins with similar assumptions—in particular, that parties have incentives to violate agreements concerning the management of a common-pool resource (CPR), such as fish that live in the high seas.⁸⁶ Studies that begin with such assumptions are typically pessimistic about the prospects for cooperation unless strong, formal enforcement mechanisms are in place. In recent decades, however, as states craft more demanding agreements, they have given greater attention to enforcement mechanisms.⁸⁷ In tandem, a body of research has emerged that identifies the conditions under which collective action to manage CPRs is likely to arise even in the absence of formal mechanisms for contracting, monitoring, and enforcement.⁸⁸

⁸⁴ See, e.g., Stein, *supra* note 78.

⁸⁵ See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y INT'L BUS. 263 (1992); Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301 (1990). Indeed, trade law and enforcement is an area where political scientists and legal scholars have already initiated many fruitful collaborations. See, e.g., Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. S205 (2002); Andrew Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005); Marc Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter?: Explaining Dispute Initiation and Antidumping Actions in the WTO* (International Centre for Trade and Sustainable Development, Programme on Dispute Settlement, Issue Paper No. 4, 2008), at http://ictsd.org/downloads/2009/02/legal_capacity1.pdf.

⁸⁶ The hallmarks of a CPR are that it is difficult to exclude other players from using the resource, and when any player uses the resource, the amount left for others is diminished. This combination of factors has often led analysts to refer to the problem of CPR regulation as the *tragedy of the commons*. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 124 (1968). Most international fisheries, for example, are depleted because any fishermen or their states know that they can easily avoid inconvenient fishing regulations. Long ago, political scientist Arild Underdal referred in this context to the *law of the least ambitious program* and showed that, because some fishing nations know that restrictions are hard to enforce, efforts to set and manage fishing quotas are usually not effective in protecting fish. ARILD UNDERDAL, *THE POLITICS OF INTERNATIONAL FISHERIES MANAGEMENT: THE CASE OF THE NORTHEAST ATLANTIC* 36 (1980). For the law and economics of a variety of ocean-based CPRs and other cooperation problems, see Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AJIL 569 (2010).

⁸⁷ The term *enforcement mechanism* is often not used since the political sensitivities to enforcement are acute in most areas of international cooperation. For example, the Montreal Protocol on Substances That Deplete the Ozone Layer, 26 ILM 1550 (1987), includes a "multilateral consultative process." See David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-compliance Procedure*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 137 (David G. Victor, Kal Raustiala & Eugene Skolnikoff eds., 1998).

⁸⁸ Some optimism is also found in the literature on "local" CPRs, which finds an abundance of effective collective action in local settings because the players are more likely to know each other, making it easier to monitor and punish defectors. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); Clark C. Gibson, John T. Williams & Elinor Ostrom, *Local Enforcement and Better Forests*, 33 WORLD DEV. 273 (2005); ELINOR OSTROM, ROY GARDNER & JAMES WALKER, *RULES, GAMES, AND COMMON-POOL RESOURCES* (1994); MICHAEL D. MCGINNIS, *POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS (1999)*; LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds., 1995). That same logic suggests that the management of international common-pool resources will be more successful when the number of parties is smaller, as in the Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, 314 UNTS 105. See SCOTT

Although the vast majority of political science research on international cooperation is focused on cooperation problems, other problem types also merit attention. A second type of strategic situation arises in cases of *asymmetrical cooperation*. The starkest examples are *upstream-downstream* problems in which one state exports harm to others. Here, only the downstream state has an interest in cooperation (such as stricter policies to reduce water pollution); the upstream state is generally indifferent or even gains, such as by exporting noxious effluents. The standard solution to these problems is for the downstream state to establish a system of incentives, such as payments, that change the behavior of upstream polluters.⁸⁹ A notable example involves the Rhine River: political science research has shown how states have organized actual payment schemes, and has also explored the practical impact of these schemes on the behavior of polluters.⁹⁰ Although the most obvious examples of such problems are pollution exports, similar types of asymmetrical cooperation problems arise in human migration, international trafficking in narcotics and small arms, and proliferation of weapons of mass destruction—all areas with distinct sources and receptors.⁹¹

A third type of strategic situation arises in cases of *self-enforcing agreements*—that is, when agreements do not require formal enforcement. For example, an agreement may require its members to do little or nothing beyond what is required by their own self-interest. Although treaty registers may be filled with such agreements, they are rarely interesting to scholars who study actual cooperation.⁹² Another, more interesting example of a self-enforcing agreement is one where two states' benefits and costs of cooperation are so tightly linked that each state remains faithful to the agreement.⁹³ Still other such agreements have the characteristics of what political scientists call *pure coordination*.⁹⁴ In these cases, every state has an interest in coordinating around a single standard. Once the standard—any standard—is in place, there is no incentive to defect. Agreements of this type are especially interesting to scholars who think that the enforcement mechanisms under international law are weak or nonexistent. Pure coordination games have attracted much attention from theorists, but they are probably rare in the real world because important states and interest groups are usually not indifferent to which

BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 19–48 (2003).

⁸⁹ This solution has its origins in the insights of economist Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁹⁰ See Thomas Bernauer, *Protecting the Rhine River Against Chloride Pollution*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE 201 (Robert O. Keohane & Marc A. Levy eds., 1996).

⁹¹ See generally CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE (Wayne A. Cornelius, Philip L. Martin & James Frank Hollifield eds., 1988); GLOBAL MIGRATION GOVERNANCE (Alexander Betts ed., 2011); O'Dwyer, *supra* note 26; Price, *supra* note 26.

⁹² See *infra* notes 224–227 and accompanying text.

⁹³ In reciprocal settings, enforcement is so straightforward that analysts often consider the agreements as self-enforcing. We are skeptical that these agreements actually exist, but the classic example that many scholars cite is the early cooperation under the GATT. The tariff reductions that one state offered to other GATT members were reciprocal, with the consequence that failures to honor those tariff promises could be met with swift, targeted retaliation. In reality, the benefits and costs of participation in tariff-reducing agreements are more asymmetrical; enforcement is not costless; and most scholars today view most cooperation on trade as a problem of collaboration. See *supra* note 81 and accompanying text.

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

standards are adopted. The setting of a standard often defines which firms and states reap the most benefits from cooperation. And except for the most trivial standards, once a decision has been made for a particular standard, strong pressures to defect may nonetheless come into play. Among the cases most carefully studied by political scientists are those involving the setting of food safety standards⁹⁵ and standards in telecommunications⁹⁶—both of which significantly affect the size of markets and the shape of commercial competition.

A fourth type of strategic situation involves what we will call *responsibility problems*. Since these cases involve no transfer of tangible externalities from one state to another, the need for international cooperation does not directly arise. Nonetheless, intangible externalities—such as the moral offense created when a state's activities destroy unique ecosystems or violate human rights—give rise to a demand for international cooperation in setting and imposing norms and in regulating behavior. Indeed, a significant and perhaps growing proportion of examples of international cooperation involve these kinds of intangible externalities.

Because no tangible externality crosses borders, research on responsibility problems has emphasized the diffusion of ideas and norms, along with the role of nonstate actors as conduits for those ideas—the third and fourth faces of power.⁹⁷ This area of research is one in which the methods and research questions addressed in the large, growing body of research by legal scholars substantially overlap with those of IR scholars.⁹⁸ And while a large fraction of the research on responsibility problems emphasizes the third and fourth faces of power, these problems also reveal the other faces of power at work—through powerful states that set the agenda, create incentives for compliance, and link issues such as human rights to other areas of international cooperation in which enforcement is easier, such as trade.⁹⁹

Uncertainty and information. In addition to the strategic context, political science research often distinguishes cooperation problems by the utility of available information. Designing and implementing an effective system for international cooperation often requires huge amounts of information—on the behavior that states seek to reward or discourage, on the level of regulation needed, on compliance, and so on. Likewise, uncertainty has long been part of research by public international lawyers who have focused on questions such as the relation

⁹⁵ For example, a few political scientists have examined the process of setting technical standards within the WTO. When the WTO was created, the task of negotiating trade-related standards was delegated to several international bodies—among them the WHO/FAO Codex Alimentarius Commission for food safety standards. In practice, the work of the Codex has become much more politicized now that its standards are more relevant, and even when Codex agrees on standards, such as on the use of hormones in beef, trade disputes still arise because important states violate the rules. See David G. Victor, *Effective Multilateral Regulation of Industrial Activity* (1997) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with authors); TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (Mark A. Pollack & Gregory C. Shaffer eds. 2001); WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY (Christopher K. Ansell & David Vogel eds., 2006); Tim Büthe, *The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization*, 71 L. & CONTEMP. PROBS. 218 (2008).

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

⁹⁷ See *supra* notes 29–65 and accompanying text; see also CRAWFORD, *supra* note 50 (arguing that foreign policy decisions derive from prior beliefs and the process of ethical argumentation).

⁹⁸ See, e.g., Helfer, *supra* note 1; Hathaway, *supra* note 1; Goodman & Jinks, *supra* note 54.

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

between ambiguity and compliance,¹⁰⁰ the usefulness of flexible legal rules in helping states to manage different types of uncertainty,¹⁰¹ and the role of tribunals in eliciting information that helps reduce uncertainties and that can also make it easier to avoid and resolve conflicts.¹⁰² Political science research is now unpacking how these and other kinds of uncertainty affect international cooperation generally. Within the political science literature, three major types of uncertainty have attracted the most attention.

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

States are also often uncertain about what they themselves can deliver—especially as international cooperation has shifted from areas where states make commitments to regulate their own behavior (for example, deployment of strategic arms) to a wide range of issues that require efforts by many private actors. Traditionally, since human rights problems were viewed through the lens of states oppressing their citizens, human rights agreements focused on changing state behavior.¹⁰⁵ Scholars are now increasingly interested, however, in the ways in which international human rights law has attempted to influence private actors such as militias and even the labor practices of firms.¹⁰⁶ Indeed, many human rights abuses arise because states lack the capacity to control the abusers on their territory.¹⁰⁷ By the same token, arms control agreements now include efforts to regulate private actors who facilitate arms proliferation (for example, smugglers and scientists), private security firms, and firms that manage so-called dual-use

¹⁰⁰ See, e.g., CHAYES & CHAYES, *supra* note 11; C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

¹⁰¹ See *infra* notes 179–83 and accompanying text.

¹⁰² See, e.g., Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that when behavior is uncertain, a tribunal can provide the neutral information necessary to restore interstate cooperation).

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

¹⁰⁴ See Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) (arguing that arms control is faced with high costs of betrayal, monitoring problems, and the perception of strict competition, thus making cooperation unlikely); Downs et al., *supra* note 81 (arguing that arms races are actually often “deadlock” games (rather than prisoner’s dilemmas), in which actors prefer defection to cooperation, which suggests that the problem cannot be solved using the types of institutions created in other areas).

¹⁰⁵ See generally HENKIN, *supra* note 11, at 228–40.

¹⁰⁶ See, e.g., Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457 (2004); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AJIL 819 (2007); Vogel, *supra* note 27. Legal scholars have explored similar questions. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AJIL 901 (2003).

¹⁰⁷ See NEIL J. MITCHELL, *AGENTS OF ATROCITY: LEADERS, FOLLOWERS, AND THE VIOLATION OF HUMAN RIGHTS IN CIVIL WAR* (2004).

technologies whose use for legitimate commercial purposes is difficult to distinguish from their use for weapons.¹⁰⁸ Indeed, some IR scholarship has looked closely at how *problem-solving capacity* influences when and how states are able to develop and maintain international collective action.¹⁰⁹

A second kind of uncertainty is about the *state of the world*, such as from *exogenous shocks* that arrive unexpectedly and can undermine or enhance cooperation, depending on the circumstances. Often these shocks are rooted in technology or the macroeconomy.¹¹⁰ For example, when negotiators set the caps for greenhouse gases in the Kyoto Protocol in 1997, few of them could anticipate that the U.S. economy would expand so rapidly in the late 1990s, generating higher emissions that made compliance with the Kyoto caps all but impossible.¹¹¹ Other examples, such as in nuclear weapons testing, reveal how exogenous changes in technology can expand the prospects for cooperation. Advances in technology and also in geophysics made it much easier to monitor compliance—which assuaged states' concerns that they would be the victims of cheating.¹¹²

Third, international institutions must contend with uncertainty about *preferences*.¹¹³ When states begin to cooperate, they may not know their interests with precision. Indeed, preferences often change—a central point in scholarship that works with the third and fourth faces of power. International institutions themselves can help shape preferences in many ways. For example, they can draw attention to problems and create focal points around which NGOs and other actors mobilize public concern and resources.¹¹⁴

¹⁰⁸ See, e.g., Richard A. Bitzinger, *The Globalization of the Arms Industry: The Next Proliferation Challenge*, 19 INT'L SECURITY, Autumn 1994, at 170; James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. CONFLICT & SECURITY L. 401 (2008); Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INT'L ORG. 367 (2007).

¹⁰⁹ See EDWARD L. MILES, ARILD UNDERDAL, STEINAR ANDRESEN & JORGEN WETTESTAD, ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE (2001) (arguing that problem-solving capacity is a function of three main determinants: the institutional setting, the distribution of power among the actors involved, and the skill and energy available for the political engineering of cooperative solutions); see also LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds., 1995) (arguing that heterogeneity in actor capabilities in both the local and global domains has a large effect on the prospects for cooperation).

¹¹⁰ For example, the original strategic arms control talks focused on numbers of missiles because those were easier to measure than actual warheads, but technological changes (in part spurred by the existence of arms control treaties) encouraged the United States and Soviet Union to develop multiple independently targetable reentry vehicles (MIRVs). Those kinds of changes in technology made both sides wary about making promises to regulate their arms and made it harder to convince skeptical domestic audiences that arms control would improve national security. See TED GREENWOOD, MAKING THE MIRV: A STUDY OF DEFENSE DECISION MAKING (1975); Thomas C. Schelling, *What Went Wrong with Arms Control?*, 64 FOREIGN AFF. 219 (1985); Herbert F. York, *ABM, MIRV and the Arms Race*, 169 SCI. 257 (1970); see also Steven E. Miller, *Politics over Promise: Domestic Impediments to Arms Control*, 8 INT'L SECURITY, Spring 1984, at 67.

¹¹¹ See DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING (2001); see generally Jana von Stein, *The International Law and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol*, 52 J. CONFLICT RESOL. 243 (2008); William A. Pizer, *The Optimal Choice of Climate Change Policy in the Presence of Uncertainty*, 21 RESOURCE & ENERGY ECON. 255 (1999).

¹¹² See, e.g., JACOBSON & STEIN, *supra* note 24.

¹¹³ See Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

¹¹⁴ See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 514 (1997); Finnemore & Sikkink, *supra* note 36; Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 INT'L ORG. 1 (2006).

Most, though not all, political scientists see uncertainty in preferences—and in the difficulty of projecting how preferences will evolve—as a factor that impedes international cooperation because it is hard to achieve cooperation when goals are unknown.¹¹⁵ For example, states vary in the restrictions that they will accept regarding the treatment of prisoners of war. Moreover, they cannot be sure, whether a treaty is in place or not, how their own nationals are likely to be treated if captured by states and interred as prisoners. This uncertainty in preferences, as well as problems in monitoring and enforcing compliance, can lead to an international legal regime in which violations are punished irregularly and often disproportionately.¹¹⁶

Political scientists who focus on the functional motivations for states to cooperate see uncertainty as a central attribute of the types of problem that states are trying to manage. Usually they view international legal institutions—such as treaties, custom, and organizations that, among other things, interpret legal norms—as having an important role in reducing uncertainty and managing the effects of the diverse types of uncertainty.¹¹⁷

Domestic Politics

A third major building block in theories of IR is the role of domestic politics. Until about two decades ago, most IR scholarship focused on the state itself; looking primarily at how elites influenced state policy, earlier scholarship had relatively few systematic insights into how domestic and international politics interact. All that is now changing. Some of those changes have resulted from scholarship that emphasizes the third and fourth faces of power, which intrinsically look inside national governments to the underlying social processes and nonstate actors that influence norms and behavior.¹¹⁸ And some have resulted from coupling theories of domestic and international politics. One of the original metaphors for this work held that

¹¹⁵ See Koremenos et al., *supra* note 113 (arguing that uncertainty about preferences leads to restrictive membership criteria); Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971 (2001); Lisa Martin, *Interests, Power, and Multilateralism*, 46 INT'L ORG. 765 (1992). We note, however, that some scholars suggest the opposite—namely, that ignorance about exactly how the world will unfold, including the preferences of key states, could make it easier for states to establish institutions that would, in turn, stabilize norms and expectations. See ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979); Joel Sobel, *A Theory of Credibility*, 52 REV. ECON. STUD. 557, 570 (1985) (“Long-term arrangements are of value when there is uncertainty about preferences because past transactions provide relevant information to agents.”).

¹¹⁶ See Morrow, *supra* note 115, at 971–72.

¹¹⁷ How these attributes of problems affect the choice of policy mechanism is a question that has been at the forefront of many disciplines—not just political science, but also economics and law. For a review, see Jonathan B. Wiener & Barak D. Richman, *Mechanism Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 363 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (reviewing literature from multiple disciplines on the political economy of regulatory-instrument choice at the national and international levels). One sign of the central role of transaction costs in the study of contracting is that, in a major stocktaking of research on collective action at the local and global domains, two leaders in the study of IR and common-pool resources identified transaction costs as one area where scholars agreed both that the topic was important and that much of what mattered for research had already been extensively studied. See LOCAL COMMONS AND GLOBAL INTERDEPENDENCE, *supra* note 109.

¹¹⁸ See *supra* notes 29–65 and accompanying text; see also BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995) (including essays analyzing how domestic social movements, private actors, and political institutions affect IR); POWER OF HUMAN RIGHTS, *supra* note 36 (discussing the effects of international human rights norms and transnational advocacy movements on domestic human rights practices).

analysts needed to think in terms of a two-level game, and over the last decade major advances have come from describing the games played at different levels and how outcomes at one level shape those at the other.¹¹⁹ Scholars working in the flourishing field of domestic politics have worked on three fronts, each with important implications for the study of international legal institutions.

First, relying heavily on the work of Helen Milner, many argue that the *organization of domestic politics* affects the prospects for international cooperation.¹²⁰ For example, when state authority is allocated over different branches of government—rather than unified within a single authority—international cooperation is less likely overall. Moreover, in such situations the agreements that the state accepts are likely to reflect the legislature's preferences since legislative approval is essential to gaining a state's consent. Milner also finds that the distribution of information within a state affects the prospects for cooperation. Highly asymmetric information generally undermines cooperation unless the information is concentrated in interest groups that favor cooperation. One practical implication is that international institutions can alter the prospects for cooperation by channeling useful information to groups that are well positioned domestically to advance the argument for cooperation. In tandem with Milner's work on domestic politics, political scientists have been influenced by international economic models that have formally coupled international policy decisions on trade with the structure and politics of the domestic economy.¹²¹

Second, some scholars have focused on *how domestic politics affect the credibility of international commitments*. Comparing the United States and Japan, for example, some scholarship suggests that the United States has been a more reliable partner in international agreements because the U.S. electoral system gives politicians more incentives to provide public goods (which includes multilateral cooperation whose benefits are broadly distributed) and the transparency of the U.S. system increases the credibility of its promises.¹²² Other research has looked at how concerns about credibility that are rooted in domestic politics could affect the design of international commitments—for example, by leading to greater use of escape clauses and through other types of flexibility that allow states to better align their formal international commitments with what they can reliably deliver at home.¹²³

Third, some studies have tried to link the *type of national polity* to states' behavior toward international commitments. Much of that literature focuses on the effects of democratic decision making. The hypothesis that democracies are generally more likely to honor international

¹¹⁹ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993). These studies build on Thomas Schelling's famous conjecture that actors constrained by third parties will fare better in bargaining situations. SCHELLING, *supra* note 77.

¹²⁰ HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997); see also Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881 (1978); LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000); Jon C. Pevehouse, *Democracy from the Outside-In? International Organizations and Democratization*, 56 INT'L ORG. 515 (2002); Edward D. Mansfield & Jon C. Pevehouse, *Democratization and the Varieties of International Organizations*, 52 J. CONFLICT RESOL. 269 (2008).

¹²¹ See Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994).

¹²² See Cowhey, *supra* note 96.

¹²³ See Rosendorff & Milner, *supra* note 83.

commitments is gaining some support,¹²⁴ although much work remains to be done on the direction of causality in this relationship. Several scholars have pointed to the importance of regular elections as the key mechanism because they offer voters an opportunity to punish states that fail to comply, although the causal logic varies across the studies that have examined this question.¹²⁵ With respect to human rights, in particular, several scholars have argued that fear of electoral punishment explains why democracies are more likely to follow through on their international commitments.¹²⁶ Of particular interest to lawyers are arguments that see the pressure for compliance by democracies rooted in national courts that are predisposed to seek decisions that align with international obligations.¹²⁷ A growing number of studies also look at how states use their decisions to make international commitments as signals to different domestic constituencies. For example, unstable regimes, especially new democracies, are prone to join more exacting human rights agreements and institutions so that they can lock in compliance with human rights norms.¹²⁸ Legal scholars are exploring similar arguments. For example, international trade law and procedures such as accession to the World Trade Organization (WTO) have caused an array of changes within states far beyond the core nations that supplied the original vision for global economic liberalization. Those changes have included a reduction in central economic planning, a rise in policy attention to matters such as environmental regulation

¹²⁴ See Brett Ashley Leeds, *Domestic Political Institutions, Credible Commitments, and International Cooperation*, 43 AM. J. POL. SCI. 979 (1999) (finding that democratic states or autocratic states are more likely to cooperate with other states in the same category than in mixed combinations); Beth. A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000) (examining extent to which domestic factors, including rule of law and electoral democracy, shape reputation for fulfilling commitments); Fiona McGillivray & Alastair Smith, *Trust and Cooperation Through Agent-Specific Punishments*, 54 INT'L ORG. 809 (2000) (using game-theoretic model to explore when democratic leaders accountable to their own people are more likely to cooperate); see also Michael W. Doyle & Geoffrey S. Carlson, *Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant & Locke*, 46 COLUM. J. TRANSNAT'L L. 648 (2008) (surveying recent literature on whether democratic states are more likely than other regime types to choose their commitments carefully and to live up to the ones that they have accepted); cf. Emilia Justyna Powell & Sara McLaughlin Mitchell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397, 407–11 (2007) (examining democracy as potentially correlated with willingness to undertake and maintain commitments, in context of studying whether civil law, common law, or Islamic law states are relatively more likely to accept ICJ jurisdiction).

¹²⁵ See Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT'L ORG. 109 (1996); McGillivray & Smith, *supra* note 124; Edward D. Mansfield, Helen V. Milner & B. Peter Rosendorff, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477 (2002); XINYUAN DAI, INTERNATIONAL INSTITUTIONS AND NATIONAL POLICIES (2007).

¹²⁶ See, e.g., Steven C. Poe, C. Neal Tate & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global, Cross-national Study Covering the Years 1976–1993*, 43 INT'L STUD. Q. 291 (1999).

¹²⁷ See, e.g., Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149, 150–51 (2009) (arguing that understanding the effectiveness of domestic judicial institutions is the key to understanding how domestic institutions, treaty ratification, and treaty compliance are related); see also Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements* (Aug. 26, 2011), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876728 (arguing that enforcement of international human rights law by independent domestic courts is effective only for violations subject to low evidence-production costs and low legal standards of proof).

¹²⁸ See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000); see also JON C. PEVEHOUSE, DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION (2005); Emilie Marie Hafner-Burton, Jon Pevehouse & Edward Mansfield, *Human Rights Institutions, Sovereignty Costs, and Democratization* (2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450445. For a similar argument about the effect of international commitments in constraining domestic politics in trade, see Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996).

and protection of intellectual property, and a shift in authority from legislatures to the executive branch and trade ministries that craft most international legal commitments of this type.¹²⁹

II: LEGAL DESIGN AND CONTENT

Having discussed the building blocks that are typical foundations for political science scholarship on international law, we now turn to the particular findings of that research. In this part we focus on the design of legal agreements and institutions. In principle, this area is one in which political science research should align well with the normative and research interests of public international lawyers. In practice, however, the political science and legal communities have not yet recognized the many ways that their research overlaps, and the potential for collaboration has not been fully realized. Perhaps the central problem is that the legal community has perceived political science research as not sufficiently connected to the practical details of how legal institutions arise and doctrine is crafted.

We begin by considering political science research that is functional in its orientation—that is, research that focuses on what some scholars call the *rational design* of international commitments. Research of this type is based on the assumption that actors think principally about advancing their own interests when they make choices about the design of international institutions.¹³⁰ Many of these design choices reflect, in particular, the efforts by actors to manage the effects of the uncertainty that arises when addressing policy problems that require collective action. This perspective, however, is not the only one. For many scholars, the rational design perspective is much too narrow because it largely overlooks the (arguably more important) processes through which actors set agendas, frame problems, and shape how interests are conceived.

Here we organize our review around the main findings from political science research that adopts the rational-design perspective since that approach has been especially helpful for building and testing theories. We will also indicate where other perspectives lead to different findings and directions for research. Among the many problems that political scientists have studied concerning the design of international legal institutions, four have commanded the most attention and are also the most relevant for legal scholars and lawmakers: the legal status of obligations; precision of commitments; delegation to other bodies such as enforcement mechanisms and tribunals; and membership. After reviewing each of these topics, we look at important critiques of the rational-design perspective since those critiques suggest many additional areas where political scientists and legal scholars can collaborate.

Legal Status of Obligations

The first issue, obligation, concerns the extent to which actors are strictly bound by rules or other commitments.¹³¹ Most of this literature has focused on the choice of *hard* (fully binding)

¹²⁹ Notably, see Richard H. Steinberg, *International Trade Law as a Mechanism for State Transformation* (2011) (unpublished manuscript) (on file with authors).

¹³⁰ See Koremenos et al., *supra* note 113; Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005). The particular term *rational design* is barely a decade old. As represented in international law, this type of analysis has a much older pedigree. See, e.g., KEOHANE, *supra* note 10.

¹³¹ See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

versus *soft* (nonbinding) legal arrangements. The legal community has long been interested in the choice between hard and soft law,¹³² and most scholars and practitioners have long assumed that binding law is best and that nonbinding law is an unwelcome stepchild that is tolerated when other options are unattainable.¹³³ IR scholars have probably had similar views, given the traditional normative bias in most IR scholarship in favor of institutionalization, and binding arrangements are the most visible and studied means of codifying expectations into legal agreements.¹³⁴

Over the last two decades, political scientists have looked in much more detail at how diplomats choose between binding and nonbinding agreements. A central finding from their research is that the choice of soft law does not necessarily reflect a failure to agree on hard law. Rather, states often favor soft law because it is less costly to negotiate, more adaptive in the face of uncertainty, and more readily adjusted to facilitate compromise between actors with differing interests and degrees of power. Indeed, these same factors explain why, looking across many areas of human interaction, contracts are often incomplete.¹³⁵ Consequently, in such settings, soft law instruments not only are more convenient but can also be more effective than binding agreements.¹³⁶ For example, political science research on some areas of international environmental cooperation has shown that nonbinding instruments are usually more ambitious and easier to tailor to the interests of the most pivotal states. Compared to binding treaties, nonbinding agreements can be more effective when states are committed to cooperation but not sure exactly what they can deliver.¹³⁷ The direct connection to one of the central features of international lawmaking—the choice of legal form—has made this area one in which cross-fertilization between legal and political science research already appears to be robust.¹³⁸

¹³² See, e.g., Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999); COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647 (2002); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AJIL 291 (2006).

¹³³ For earlier arguments along these lines, see, for example, Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296 (1977), and FRANCK, *supra* note 33.

¹³⁴ For a similar argument, see George W. Downs, Kyle W. Danish & Peter N. Barsoom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465 (2000).

¹³⁵ This insight originates with economics research on uncertainty and industrial organization. See, e.g., WILLIAMSON, *supra* note 10; Paul L. Joskow, *Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets*, 77 AM. ECON. REV. 168 (1987).

¹³⁶ See Lipson, *supra* note 77; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000). *But see* FRANCK, *supra* note 33.

¹³⁷ See, e.g., Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, in IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS, *supra* note 87; Jørgen Wettestad, *Participation in NOx Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches, but Similar Results*, in IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS, *supra* note 87. For research that reaches more general conclusions of this type, see Koremenos, *supra* note 130. For an application to the problem of climate change, along with a review of the environmental literature on binding versus nonbinding agreements, see DAVID G. VICTOR, *GLOBAL WARMING GRIDLOCK: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET* (2011).

¹³⁸ See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581 (2005); ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 2000).

The choice between binding and nonbinding law depends, in part, on domestic politics and the type of cooperation problem at hand. When states are addressing international cooperation problems that present strong incentives to defect, and when successful cooperation requires that they signal that their commitments are reliable, then binding law may be best. The process of formal ratification helps assure other parties that domestic interest groups are supportive, and the binding status helps states “tie their hands” visibly, which boosts credibility.¹³⁹ These dynamics help explain why some types of agreements—for example, those involving matters, such as nuclear weapons, that potentially threaten the state’s existence or other fundamental interests—have been so difficult to craft and have relied heavily on hard law.¹⁴⁰ Binding agreements ratified through highly transparent domestic processes may also be viewed as more legitimate, although this proposition is one that political scientists have not yet tested rigorously. By contrast, when incentives to defect are weaker and uncertainty is higher, the flexibility of executive agreements and other nonbinding forms makes them a better choice.

Precision and Ambiguity

A second element of design that political scientists have examined is precision, which is a measure of how clearly and unambiguously the agreement defines what is required for compliance.¹⁴¹ The standard assumption by legal analysts has been that precision yields more effective international legal institutions and rules.¹⁴² Indeed, a leading legal study of compliance argued that ambiguity is one of the main causes of poor compliance.¹⁴³ The central finding of political science research that has examined legal precision is different. Imprecision, as with nonbinding agreements, can lead to more cooperation because it allows for incomplete contracts, which may be unavoidable when interests diverge and uncertainty is high.¹⁴⁴ Ambiguous agreements may also be favored in some domestic political settings. For example, some research on international trade suggests that unambiguous international obligations can lead to greater political mobilization by domestic groups opposed to trade liberalization.¹⁴⁵

One of the challenges with imprecise agreements (and nonbinding agreements, too) is to obtain the advantages of flexibility while still sending credible signals. Imprecision and other forms of flexibility must not be so elastic that states misinterpret short-term variations in behavior as long-run deviations from compliance.¹⁴⁶ In general, when it is possible to arrive at precise contracts, political science research has shown that precision is helpful. For example, studies

¹³⁹ See Abbott & Snidal, *supra* note 136; Koremenos, *supra* note 130.

¹⁴⁰ For similar arguments, see Donald G Brennan, *A Comprehensive Test Ban: Everybody or Nobody*, 1 INT’L SECURITY, Summer 1976, at 92, and Joseph S. Nye, *Maintaining a Nonproliferation Regime*, 35 INT’L ORG. 15 (1981).

¹⁴¹ Here, too, little collaboration has occurred between law and political science. See, e.g., Abbott et al., *supra* note 131 (a joint effort by political scientists and lawyers to study the legalization of international cooperation).

¹⁴² See, e.g., FRANCK, *supra* note 33 (arguing that the extent to which a particular law affects behavior depends upon the clarity of the law, among other factors); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use of Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AJIL 124 (1999).

¹⁴³ See CHAYES & CHAYES, *supra* note 11.

¹⁴⁴ See Abbott & Snidal, *supra* note 136; Koremenos, *supra* note 130.

¹⁴⁵ See Judith Goldstein & Lisa Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603 (2000).

¹⁴⁶ See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT’L ORG. 477 (2008).

of preferential trade agreements find that precision decreases cheating by increasing the probability of detection, making it a favored design choice because precision eases the task of resolving conflicts of interpretation and sanctioning deviant behavior.¹⁴⁷ When the stakes are large and states are highly risk averse, such as in arms control, concerns about mistaken signals and imperfect enforcement lead states to avoid vague agreements (just as they avoid, as noted earlier, soft law agreements).

Delegation and Enforcement

A third element of legal design that political scientists have tried to explain is delegation, which varies widely across the many areas of international cooperation.¹⁴⁸ At one extreme, there is no delegation, as is the case with all of the major strategic arms control agreements. At the other extreme, notably in trade, there is extensive delegation to bodies such as the WTO's dispute settlement mechanism (DSM). (IR scholars see the European Union as a special case of delegation, one so extreme that it should not be compared to any other areas of international cooperation.) In general, delegation is high when many states are involved, disputes are complex, and mechanisms have gained trust through decades of exercising delegated authority. The DSM has provided rich empirical material for political scientists interested in why states delegate authority and how delegated institutions actually function.¹⁴⁹

For scholars looking primarily at the first face of power—who have tended to focus on how states themselves use incentives to alter international outcomes—it is puzzling why states sometimes delegate responsibilities to international organizations rather than retain those functions themselves and keep them under tighter national control. For many decades political scientists have recognized that international institutions offer general advantages, such as efficiency in contracting under conditions of incomplete information, that lead states to delegate authority to interpret, elaborate, and enforce international rules. It is only in the last decade, however, that this research program—conducted in close alliance with international lawyers—has focused on when and how delegation occurs.¹⁵⁰

Lawyers differ widely in their views on the merits of delegation.¹⁵¹ The political science literature on delegation could help resolve some of these debates. Three findings are especially noteworthy in this context.

¹⁴⁷ See James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000).

¹⁴⁸ See generally DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson & Michael J. Tierney eds., 2006); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998); Abbott et al., *supra* note 132; Koremenos et al., *supra* note 113 (referring to delegation as “centralization” but exploring similar ideas).

¹⁴⁹ See, e.g., Rosendorff, *supra* note 83; Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2001); Busch, *supra* note 83; Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004).

¹⁵⁰ See, e.g., Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000) (discussing three dimensions of delegation to international judicial institutions).

¹⁵¹ See, e.g., Posner & Yoo, *supra* note 102 (arguing that independent tribunals have the capacity to make decisions that violate state interests, which makes them less effective than dependent tribunals, which take those interests into account); Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (arguing that independent courts are more effective, in part because they enhance the credibility of state commitments).

First, states delegate when it is efficient. Compared to the formal treaty-making process, delegated bodies can incorporate new information quickly and efficiently. For example, the Montreal Protocol on the ozone layer delegates to an expert body the task of deciding which uses of chemicals will be exempt from regulation because their use is essential and adequate substitutes do not yet exist.¹⁵² This expert-controlled safety valve has played a central role in allowing states to set strict limits on the use of ozone-depleting chemicals without worrying that regulations would accidentally cause undue hardship. The general finding is that as international cooperation becomes more demanding and complex, the costs of organizing and sustaining cooperation rise sharply; delegation to a central body can help manage such costs while amplifying the benefits of cooperation.¹⁵³ States delegate authority to international dispute resolution bodies, for example, because they can resolve disputes efficiently while also setting norms for acceptable behavior that can deepen cooperation in the future.¹⁵⁴ Efficiency can also increase when states delegate authority to international institutions that can provide information—for example, on levels of compliance and on policy alternatives.¹⁵⁵

Political science research that focuses on how states attempt to reduce the cost of cooperation generally shows that delegation can enhance cooperation. A standard problem whenever authority is delegated, however, is how to keep the “agents” to whom authority is delegated under control.¹⁵⁶ Delegation may not enhance cooperation when important states do not have confidence that those agents will remain faithful to their wishes.¹⁵⁷ Concerns about the actions of uncontrolled agents can create a backlash that makes cooperation harder to sustain.¹⁵⁸

Second, political scientists have investigated how delegation can help states solve domestic political problems that impede international cooperation. Examples include the problems that arise due to *time inconsistency*. Even when cooperation is in the long-term interest of key actors, more immediate pressures imposed by well-organized political groups can preclude cooperation. Such troubles may be especially likely in democracies, where state policy is open to many

¹⁵² See Montreal Protocol on Substances That Deplete the Ozone Layer, *supra* note 87; EDWARD PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY (2003). For a recent assessment, see DAVID G. VICTOR, GRIDLOCK ON GLOBAL WARMING: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET 203–40 (2011).

¹⁵³ This line of argument builds on the literature from economics about the role of institutions in reducing transaction costs. See generally KEOHANE, *supra* note 10; Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SECURITY, Summer 1995, at 39.

¹⁵⁴ See *supra* notes 145–47 and accompanying text.

¹⁵⁵ See MILNER, *supra* note 120; David A. Lake & Mathew D. McCubbins, *The Logic of Delegation to International Organizations*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 148; LAKE, *supra* note 10. Often the function of delegated enforcement takes the form of providing information rather than actually meting out punishment. See, e.g., Morrow, *supra* note 115 (on how delegation reduced uncertainty and made decentralized enforcement easier).

¹⁵⁶ The beneficiaries of this delegation, known by the awkward term *principal*, must find ways to entice the agent to do business reliably. On principal-agent relationships in politics, see generally Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991); and Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005). As delegation rises, so must attention to monitoring and control of agents. For some of the many applications, see DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 149; Pollack, *supra* note 23; and Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

¹⁵⁷ See generally DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 148.

¹⁵⁸ See Goldstein & Martin, *supra* note 145.

immediate influences. By delegating authority to international institutions, states can “tie their hands” (especially in relation to domestic political pressures) and reduce the temptation to defect.¹⁵⁹ For example, submitting to the oversight and conditionality of the International Monetary Fund has allowed states to make more credible commitments to repay their loans.¹⁶⁰

Third, political scientists have started focusing on how delegated bodies—including international tribunals and courts—actually function. The most visible vein of this research focuses on the WTO’s DSM.¹⁶¹ Some studies have also explored how the enforcement function has de facto been delegated in cases where no formal enforcement mechanisms exist. For example, even when international human rights organizations have no formal enforcement procedures of their own, they can sometimes use national courts to apply these standards—and not just within their own jurisdictions, but in some cases with extraterritorial application as well. International legal scholarship has long been aware of such phenomena; political scientists have now been able to confirm the existence of these phenomena and to measure their enforcement effects systematically.¹⁶² The delegation to international enforcement tribunals and to national courts is an area ripe for more collaboration between legal scholars and political scientists, and some such research is already under way.¹⁶³

Membership

The fourth element of legal design that political scientists have studied is membership. A common assumption in the literature on public international law is that membership should be as broad as possible—an assumption that is particularly strong in policy-oriented legal literature.¹⁶⁴ Indeed, across a wide range of issue areas—such as human rights, arms control, and

¹⁵⁹ See Mansfield & Pevehouse, *supra* note 120. On time-inconsistency problems, see generally Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977); Avner Greif, Paul Milgrom & Barry Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); and Robert J. Barro & David B. Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983).

¹⁶⁰ See RANDALL W. STONE, *LENDING CREDIBILITY: THE INTERNATIONAL MONETARY FUND AND THE POST-COMMUNIST TRANSITION* (2002).

¹⁶¹ See *supra* notes 145–47 and accompanying text.

¹⁶² See Powell & Staton, *supra* note 127; BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

¹⁶³ See, e.g., Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT’L L. 59 (2009); Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability, and Global Governance*, 41 N.Y.U. J. INT’L L. & POL’Y 931 (2009); Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT’L ORG. 563 (2010).

¹⁶⁴ See, e.g., Markus Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 377, 402 (2002) (arguing “that the final aim of the [Montreal] Protocol can only be achieved with a universal membership”); Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AJIL 271, 309 (2007) (arguing that to “advance the complete elimination of a class or type of weapon, multinational disarmament regimes strive to achieve universal membership and attract nonstate parties that are acting in conformity with the regime’s obligations”); Arsalan M. Suleman, *Bargaining in the Shadow of Violence: The NPT, IAEA, and Nuclear Non-proliferation Negotiations*, 26 BERKELEY J. INT’L L. 206, 229 (2008) (arguing, with respect to the NPT, that the “lack of universal membership, particularly with regard to the four of nine states that possess nuclear weapons, and the system’s lack of symmetry between its goals and its oversight, monitoring, and implementation mechanisms are two serious shortfalls in need of significant attention”).

the environment—the last few decades have seen a push for agreements to have universal membership.¹⁶⁵ The logic for universalism is often rooted in the idea that broader memberships are more representative and thus legitimate.¹⁶⁶

Most political science research views membership as just one of the strategic choices in the design of international agreements. Membership comes at a cost, and restricted membership can lead to more effective agreements for two reasons. One is enforcement. In cases where enforcement is important and difficult, gains may accrue from working with a small group while excluding potential free riders—that is, by focusing cooperation, at least initially, on states that are most likely to comply and for which enforcement is less challenging.¹⁶⁷ As the benefits from cooperation and the capability of international institutions grow, membership can be expanded to other states whose potential free riding might initially prove difficult to manage. The other advantage is in contracting. When it is difficult to determine the preferences and capabilities of important members in advance, those members may restrict membership to make it easier to negotiate and maintain agreements.¹⁶⁸ For example, NATO's restrictive membership criteria—requiring, for example, democratization, civilian control over the military, and the resolution of border disputes—help to limit membership to states whose preferences are most likely to be supportive of the organization.¹⁶⁹

The central finding—from empirical research by political scientists—is that membership involves a tradeoff. Large memberships create potential gains from a wider application of common rules but generate complexity and uncertainty. Research on international environmental cooperation, for example, generally indicates that institutions that start with small memberships and have the opportunity to work in small groups on complex problems are more effective than those that operate with much larger memberships.¹⁷⁰ In human rights, several scholars

¹⁶⁵ See Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 86 (noting that in “the six decades since the Second World War, global and regional human rights treaties have, for the most part, overcome international law’s participation deficit. Many of these treaties now have large numbers of states parties, with a few agreements approaching universal membership.”).

¹⁶⁶ See FRANCK, *supra* note 33.

¹⁶⁷ On small groups and clubs, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). For applications to international cooperation, see David G. Victor, *How to Slow Global Warming*, 349 NATURE 451 (1991); Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264 (Robert B. Porter Pierre Sauv e, Arvind Subramanian & Americo Beviglia Zampetti eds., 2001); and Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT’L ORG. 681 (1992).

¹⁶⁸ See *supra* notes 85–86 and accompanying text.

¹⁶⁹ See Kydd, *supra* note 115. Similar logic is explored with respect to the international system for managing prisoners of war. See Morrow, *supra* note 115.

¹⁷⁰ Indeed, the membership of international agreements concerning the environment may vary more than in any of the other issue areas that we review in this article. Those agreements are consequently a terrific laboratory for studying membership effects—something that few scholars have done in detail. While some underlying problems are generally perceived as global, in practice most international environmental cooperation relates to problems having a narrower geographical focus. Scholars looking at membership effects have shown that explicit efforts to exclude the least ambitious governments made it possible to gain agreement on stronger and more effective commitments pertaining to the North Sea. See Jon Birger Skj erseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, in IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS, *supra* note 87. These insights build on earlier work that shows, using the example of fisheries, that agreements are prone to reflect the interests of the least ambitious actor. See UNDERDAL, *supra* note 86; see also BARRETT, *supra* note 88. But see PETER M. HAAS, *SAVING THE MEDITERRANEAN: THE*

have argued that conditional membership structures that limit participation are the most effective because they can more credibly create incentives for states to comply with human rights norms. For example, preferential trade agreements that make trade benefits conditional upon protecting human rights sometimes have more impact on the human rights practices of repressive states than does membership in universal human rights treaties.¹⁷¹ Similarly, political scientists who study trade have shown that large-scale membership can lead to greater variation in the difficulties that states face in implementing agreements at home and also to greater uncertainty in the practical outcomes from treaty membership for all countries;¹⁷² that variability and uncertainty, in turn, may decrease the effectiveness of international institutions.¹⁷³ The different memberships of overlapping institutions can also give states the ability to vary the effect of trade rules, such as through forum shopping,¹⁷⁴ a concept widely familiar to lawyers who study the choice of legal forum at the domestic level.¹⁷⁵

Design, Content, and the Building Blocks of Political Science Research

For political scientists, the above elements involved in the design of legal commitments—that is, legal status, precision, delegation, and membership—are tied in political choices. How these choices get made depends on which building blocks particular political scientists see as most important.

For political scientists who rely heavily on the first face of power, design choices—like all political decisions—reflect the underlying patterns of state power and interests. States with the ability to coerce have a larger impact on legal design and content than those that are vulnerable to coercion. For example, under the Nuclear Non-proliferation Treaty, authority was delegated to a strong, independent inspection agency to prevent states from obtaining nuclear

POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION (1990) (on the case of the Mediterranean Action Plan, arguing that large membership made the institution more effective from the outset).

¹⁷¹ See Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005). For example, the European Union is able to improve the behavior of prospective member states with initially low human rights compliance by making entry contingent upon efforts to uphold the thirteen protocols of the European Convention on Human Rights. See Pamela A. Jordan, *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*, 25 HUM. RTS. Q. 660 (2003). Moreover, some scholars have looked at the dynamic influence of membership, showing that certain transitional states that sign universal human rights agreements without intending to comply are sometimes later induced to comply. See SIMMONS, *supra* note 162.

¹⁷² See Rosendorff & Milner, *supra* note 83. A few legal scholars have also examined the ways in which domestic politics influence international trade law negotiations. See, e.g., Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999); Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 43 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the "Domestic Policy Functions" of International Trade Rules*, 41 AUSSENWIRTSCHAFT 405 (1986), reprinted in 1 THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY 121 (Robert Howse ed., 1998).

¹⁷³ A few studies have turned this question around and looked at the benefits that accrue to nonmembers as well as at the timing of benefits in relation to the decision to become a member. See, e.g., Goldstein et al., *supra* note 83.

¹⁷⁴ See Busch, *supra* note 83. Trade economists have examined similar questions about forum shopping, especially given that the WTO, which has nearly universal membership, must contend with the rise of many smaller regional free trade agreements. Most economics research sees those smaller agreements as diversionary and argues for stronger WTO oversight of those agreements. See, e.g., Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System?*, in FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 3 (Jeffrey J. Schott ed., 2004).

¹⁷⁵ See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987).

weapons. This decision reflected the interests of the most powerful states in keeping other states out of the “nuclear club,” and those same powerful states blocked efforts that would have created an equally powerful mechanism to verify whether nuclear states were making progress toward disarmament.¹⁷⁶

For political scientists inclined to the third and fourth faces of power, legal designs reflect the work of nonstate actors and entrepreneurs that carry ideas from one area of legal practice to another. Scholarship on international wildlife law, for example, has focused on the role of environmental NGOs in setting the agenda for which particular species and habitats are protected.¹⁷⁷ The perspective of the third and fourth faces of power has also focused on the implications for democratic accountability of delegating large amounts of authority to international institutions—a topic also of keen interest to international lawyers concerned with the democratic deficit that may exist in international institutions.¹⁷⁸

Political scientists who take a functional perspective see design choices as a function of the type of cooperation problem—both the strategic context and the availability of information. For example, problems involving variations of the prisoner’s dilemma create cooperation challenges that states can solve only by placing a strong emphasis on enforcement. Political scientists have also emphasized the availability of information as a factor in legal design. Wary of finding themselves constrained in unwanted ways, states will demand more flexibility when uncertainties and the risk of exogenous shocks are high. Detailed studies, many by lawyers, have looked at this issue not only in trade¹⁷⁹ but also in arms control¹⁸⁰ and human rights.¹⁸¹

¹⁷⁶ See *supra* notes 20–21 and accompanying text.

¹⁷⁷ See Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT’L AFF. 881 (2006); Peter H. Sand, *Commodity or Taboo?: International Regulation of Trade in Endangered Species*, in GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 19 (Helge Ole Bergesen & Georg Parmann eds., 1997); ROBERT L. FREIDHEIM, *TOWARD A SUSTAINABLE WHALING REGIME* (2001); POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES (Oran R. Young & Gail Osherenko eds., 1993).

¹⁷⁸ See Robert O. Keohane, *Governance and Legitimacy*, Keynote Speech at the Opening Conference of the Research Center (SFB) 700, Freie Universität Berlin (Feb. 23, 2007) (with comments by Fritz W. Scharpf), at http://www.sfb-governance.de/en/publikationen/sfbgov_ls/index.html; Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

¹⁷⁹ See *supra* notes 145–46 and accompanying text. *But see* Smith, *supra* note 147, at 138–39, who argues that flexibility and opt-out clauses decrease the effectiveness of the WTO and its dispute settlement mechanism (DSM). He also argues that the WTO is more effective when its DSM is invoked to validate the use of the opt-out clauses or other mechanisms that states use to obtain flexibility in their WTO commitments. *Id.* at 143–50.

¹⁸⁰ See Kenneth W. Abbott, “Trust but Verify”: *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT’L L.J. 1 (1993). Because governments are acutely concerned about survival, it is uncommon for arms control agreements to incorporate flexibility measures such as opt-out procedures, derogations, and such, lest other parties use them to undercut the agreement’s effectiveness. Instead, much of the experience with flexibility arises through interpretation of agreements, imperfect enforcement, and ultimately through membership. See Chamundeewari Kuppaswamy, *Is the Nuclear Non-proliferation Treaty Shaking at Its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. CONFLICT & SECURITY L. 141 (2006).

¹⁸¹ See, for example, the legal research by Joan Fitzpatrick in *States of Emergency in the Inter American Human Rights System*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 371 (David J. Harris & Stephen Livingstone eds., 1998), by Jaime Oraá in HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992), by Dominic McGoldrick in *The Interface Between Public Emergency Powers and International Law*, 2 INT’L J. CONST. L. 430 (2004), and by Oren Gross and Fionnuala Ní Aoláin in LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006). New empirical political science research shows that most derogating states are stable democracies. See, e.g., Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT’L ORG. 673 (2011). That conclusion is consistent with the fact that democracies are more likely than other regimes to file reservations when they join human rights treaties. See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human*

Armed with a growing body of empirical evidence, political scientists generally conclude that formal flexibility is often preferable to renegotiation because it defines legal standards for deviation. These standards make it easier to distinguish flexibility from abuse that leads to long-term deviations, and provide limits on retaliation.¹⁸²

For political scientists who see domestic politics as driving political behavior, design choices offer a way to manage the complexity of domestic forces. Most studies of that type focus on how states use flexibility in their international commitments as a way to accommodate uncertainty about what they can implement reliably at home. That insight explains why most political scientists are inclined to see flexibility provisions as a way to enhance cooperation, whereas many legal scholars are skeptical of flexibility that can be used as a cover for deviation from obligations.¹⁸³

Important Critiques of the Rational Design and Functionalist Perspectives

The functional perspective in studying international cooperation has been a productive way to generate hypotheses and focus empirical research on particular, practical aspects of international cooperation—including how the design of legal procedures and organizations affects outcomes. As noted earlier, however, for many political scientists (and lawyers alike) this perspective is too narrow. The critique is rooted in four lines of argument. First is that states create institutions and choose institutional designs for many reasons beyond just furthering their interests. These choices depend, in part, on other factors that are seen as appropriate and legitimate, and not simply on rational, cost-benefit calculations.¹⁸⁴

Rights?, 49 J. CONFLICT RESOL. 925 (2005). States use these flexibility tools to respond to domestic political uncertainty. Derogations enable some governments facing threats at home to buy time and legal breathing space to confront crises while, at the same time, signaling to concerned domestic audiences that rights suspensions are temporary and lawful. For a legal perspective on denunciations, see Helfer, *supra* note 1, and Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005). Even so, the use of derogations is hardly perfect, not the least because nondemocratic states can derogate freely without incurring real costs. Likewise, during emergencies, autocracies increase violations of most rights covered by human rights treaties. See Eric Neumayer, *Do Governments Mean Business When They Derogate? Human Rights Violations During Declared States of Emergency* (Sept. 2011) (unpublished manuscript), available at <http://www2.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Derogations.pdf>. What these writings suggest is that derogations clauses and other treaty flexibility tools need to be redesigned in ways that enhance, rather than undermine, compliance with international law.

¹⁸² See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477 (2008). So far, little research has compared the types of flexibility systems across types of agreements—a topic to which we return in part V of this article.

¹⁸³ Many legal scholars stress the potential for abuse of escape clauses. In the area of human rights, for example, scholars argue that derogations can undermine the *raison d'être* of human rights treaties and should be subject to strict international standards and monitoring mechanisms. See, e.g., SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 824 (2d ed. 2005); GROSS & NÍ AOLÁIN, *supra* note 181. Others have argued that the escape-clause provisions in the GATT/WTO should be scaled back. See Patrizio Merciai, *Safeguard Measures in GATT*, 15 J. WORLD TRADE 41 (1981); J. David Richardson, *Safeguards Issues in the Uruguay Round and Beyond*, in *ISSUES IN THE URUGUAY ROUND* 24 (Robert E. Baldwin & J. David Richardson eds., 1988). *But see* Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 43 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) (arguing that WTO rules provide insufficient flexibility); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

¹⁸⁴ Notably, see the critique by Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, 55 INT'L ORG. 1019 (2001). See also John S. Duffield, *The Limits of "Rational Design,"* 57 INT'L ORG. 411 (2003) (arguing that important institutional forms, such as informal institutions, tacit bargaining, and intersubjective institutions often arise from processes other than agreement, and that political science studies

A second critique suggests that a focus on concepts such as obligation, precision, delegation, and membership is overly bureaucratic. Those criteria may matter, but the law's role in world politics goes far beyond the public international legal bureaucracy.¹⁸⁵

A third critique, related to the others, is that legal designs are often not purely intentional. Instead, they result from prior historical choices and emerge, in part, through path dependence; that is, early choices constrain later ones.¹⁸⁶ Indeed, a large, growing community of *historical institutionalist* scholars—working in IR and comparative politics, as well as law, and blurring the lines between all these fields—aims to explain the path dependence of institutions, including legal institutions.¹⁸⁷

A fourth critique is that, in the view of some scholars, functionalist efforts to understand the design of legal institutions and the process of legalization are neglecting important variables. Notably, the concept of obligation has proved highly contentious since it, as well as, more generally, the concept of authority, is central to many visions of why and how law has influence. Scholars working with the third and fourth faces of power as the key building blocks in politics have been especially critical and argued that obligation must be unpacked to include how ideas, persuasion, notions of legitimacy, and learning affect the actual authority of law.¹⁸⁸

III: LEGAL EVOLUTION AND INTERPRETATION

Political scientists have also explored various factors that explain legal evolution and interpretation. Here we identify five such factors, starting with perspectives that draw on different faces of power and then shifting to other building blocks that political science research has emphasized. One lesson from this research is that clear causal theories of change are important because many factors are often at work. Some substantial progress has been made, especially through empirical studies, in disentangling the effects of international institutions on behavior from the effects of other factors such as interests, power, knowledge, social norms, and ideas. The political science research that is perhaps of greatest relevance to international lawyers is the

on rational design and legalization have ignored important independent variables such as interests, power/capabilities, institutional path dependence, and the role of ideas).

¹⁸⁵ See generally Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2001); see also Reus-Smit, *supra* note 46.

¹⁸⁶ See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); Mark Axelrod, *Saving Institutional Benefits: Path Dependence in International Law* (2008) (unpublished Ph.D. dissertation, Duke University) (on file with the authors); Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115 (2010).

¹⁸⁷ We thank Marty Finnemore for this point. For an illustration of this convergence, see generally HENRY FARRELL, *THE POLITICAL ECONOMY OF TRUST: INSTITUTIONS, INTERESTS, AND INTER-FIRM COOPERATION IN ITALY AND GERMANY* (2011).

¹⁸⁸ See Finnemore & Toope, *supra* note 185 (arguing that studies of legalization and rational design have been too vague in their assumptions about the role of "obligation" and ignored the importance of legitimacy); Duffield, *supra* note 184, at 415–16 (arguing that other missing variables include specificity); Christian Brütisch & Dirk Lehmkuhl, *Complex Legalization and the Many Moves to Law*, in *LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS* 9 (Christian Brütisch & Dirk Lehmkuhl eds., 2007) (arguing that political science research on legalization has ignored political agency and identity and that such studies have ignored the social fabric within which states make choices such as those surrounding legalization and the design of legal institutions); Mathias Albert, *Beyond Legalization: Reading the Increase, Variation and Differentiation of Legal and Law-Like Arrangements in International Relations Through World Society Theory*, in *LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS*, *supra*, at 185 (arguing that legalization is part of the international system's broader evolutionary processes rather than simply a mechanism for ordering particular political affairs).

work examining how the delegation of functions to enforcement bodies and courts affects the evolution of how legal commitments are interpreted and applied. For that reason, we will give extensive attention to this topic. Much of the relevant political science research, rather than looking at the legal institutions in isolation, examines how these institutions interact with other exogenous factors.

Power and Interests

Power and interests shape the interpretation and development of legal institutions in important ways. Most studies start by examining the resources that are available to states; these resources determine the inducements that a state can offer, the penalties that it can threaten, and its ability to set agendas and to decide who sets and interprets rules for international cooperation. Resources include the availability of options, and having a large number of outside options (that is, alternative laws or alternatives to laws) can make any state (or actor) more powerful.¹⁸⁹ For example, the United States is the only actor in the UN Security Council with a large array of options outside the Security Council, such as working with NATO or even pursuing wars unilaterally. Those outside options magnify U.S. influence within the Security Council itself.¹⁹⁰

Because coercive power may thus depend, in part, on the availability of options, seemingly weaker actors are often able to amplify their influence over legal processes by controlling the options. In institutions that require universal adherence to norms, for example, defection by even the smallest states can undermine the goals of the agreement and thus amplify the power of weaker states—a pattern that may explain why the Nuclear Non-proliferation Treaty, after years of support by the most powerful states, seems to be waning in influence.¹⁹¹ Similarly, when agreements are sensitive to free riders, then even very powerful states can find it hard to get their way. For example, the international accords on the ozone layer would not have much effect without the participation of major developing states. Their refusal to join allowed them to demand a special fund—created by the United States and other large industrial states that had the strongest interests in protecting the ozone layer—to pay them the full cost of compliance.¹⁹²

¹⁸⁹ See Emilie M. Hafner-Burton, Miles Kahler & Alexander H. Montgomery, *Network Analysis For International Relations*, 63 INT'L ORG. 559 (2009); Emilie Marie Hafner-Burton & Alexander H. Montgomery, *Centrality in Politics: How Networks Confer Influence*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594386 (explaining how the availability of diverse outside options gives actors direct access to other important actors and decreases their dependency on any one actor).

¹⁹⁰ See Erik Voeten, *Outside Options and the Logic of Security Council Action*, 95 AM. POL. SCI. REV. 845 (2001).

¹⁹¹ See Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337 (2006). Indeed, many security agreements are sensitive to a cascading effect, which gives disproportionate power over legal content and impact to the first domino that falls or window that breaks; governments keen on security cooperation and mindful of those cascades become especially attentive to weak links in the system. See Smithson, *supra* note 25 (arguing that if treaties are to be effective in stopping a domino effect of states arming themselves—either because the treaty is not respected or because states try to protect themselves from their neighbors—universal adherence is eventually necessary); Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) (arguing that when states observe defection, they defect themselves because their security is threatened by that defection, not because of a lack of respect for the rules, with the consequence that that even a weak state can cause defections by more powerful states).

¹⁹² See Elizabeth R. DeSombre & Joanne Kaufman, *The Montreal Protocol Multilateral Fund: Partial Success Story*, in INSTITUTIONS FOR ENVIRONMENTAL AID, *supra* note 90.

Most IR scholarship focuses on state coercive power—the first face of power—because usually it is only states that have the incentive and ability to mobilize and manage resources such as the sanctions that support the Nuclear Non-proliferation Treaty or the cash payments that go into the ozone fund. International organizations often exert an effect, however, by mobilizing and channeling that state power in ways that reinforce international standards.¹⁹³ For example, the WTO's DSM makes it easier for states to retaliate against states that are deemed not in compliance, while also raising the costs of unauthorized retaliation.¹⁹⁴ Similarly, tribunals in other areas—such as human rights—can help focus state power on activities that promote adherence to international standards.¹⁹⁵

Diffusion of Ideas and Norms

Although studies emphasizing changes in power and interests are the central core of much of IR scholarship, other perspectives have also spawned active research programs. In placing less emphasis on state coercive power, these alternative perspectives within the field of IR see a greater role for other forces such as nonstate actors, ideas, and discursion that are more representative of the third and fourth faces of power. Indeed, the central goal of political science research that emphasizes these building blocks has been to explain how norms and ideas spread and how they drive changes in social behavior.¹⁹⁶

For several decades political scientists have looked at how international institutions mobilize expertise and administrative competence that help shape the content and interpretation of international law. For example, research on the effectiveness of environmental cooperation has examined the role of epistemic communities—that is, networks of experts who are well connected to states—which often play a role when regulation is complex and the extent of environmental damage, along with options and costs for controlling it, is uncertain.¹⁹⁷ One insight from this research is that these networks of experts are less important when the chief barrier to cooperation is not the lack of knowledge about the underlying problem and solutions.¹⁹⁸ A

¹⁹³ See Ruggie, *supra* note 29 (arguing that international economic regimes provide a permissive environment for the emergence of specific kinds of international transaction flows that actors take to be complementary to the particular fusion of power and purpose that is embodied within those regimes); Goldstein, *supra* note 128 (arguing that international institutions can and do directly constrain domestic policy, and that, in its resolution of disputes, despite possessing no formal authority over U.S. domestic law, the North American Free Trade Agreement panel effectively changed International Trade Commission and International Trade Administration interpretations of rules regarding antidumping and countervailing duty sanctions).

¹⁹⁴ See *infra* notes 204–06 and accompanying text.

¹⁹⁵ See *infra* notes 201–15 and accompanying text.

¹⁹⁶ See *supra* notes 29–42 and accompanying text. Perhaps the most prominent intellectual tradition in IR outside the United States is the English School, which holds that the international system is a society of states that is reflected in the institutions created to regulate state behavior, including international legal institutions. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); MARTIN WIGHT, *INTERNATIONAL THEORY: THE THREE TRADITIONS* (1991); BARRY BUZAN, *FROM INTERNATIONAL TO WORLD SOCIETY?: ENGLISH SCHOOL THEORY AND THE SOCIAL STRUCTURE OF GLOBALISATION* (2004).

¹⁹⁷ See HAAS, *supra* note 170; Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone*, 46 INT'L ORG. 187 (1992).

¹⁹⁸ See M. J. Peterson, *Whalers, Cetologists, Environmentalists, and the International Management of Whaling*, 46 INT'L ORG. 147 (1992) (arguing that the influence of cetologists was usually outweighed by that of other groups, such as industry groups and, later, environmentalists).

parallel body of legal research has examined how transnational legal networks—including courts—influence international coordination.¹⁹⁹

Delegation and International Courts

Political scientists have recently analyzed several ways in which delegation of problems and conflicts to international courts shapes legal evolution.²⁰⁰ One important finding is that the extent of such delegation increases with two variables relating to the design of courts: judicial independence (which depends on the selection method and tenure of judges) and access.²⁰¹ Another important finding—which resonates with work done by lawyers on the impact of independent tribunals²⁰²—is that access for private, nonstate litigants and compulsory jurisdiction both contribute to judicial independence.²⁰³

Focusing on the WTO, political scientists have explained why some disputes are brought and settled, whereas others stay dormant. One finding is that democracies are more likely to settle disputes with each other at the consultation stage.²⁰⁴ Another is that in “low-velocity” industries with relatively few product lines and low turnover, early settlement is less likely—perhaps because vested interests are greater and the costs of delay are less onerous than in more vibrant industries.²⁰⁵ Yet another result is that developing states tend not to bring cases to the WTO’s system, because of high startup costs in pursuing such legal action.²⁰⁶ Although political scientists have explored how the internal characteristics of states and industries explain WTO enforcement behavior, relatively little such research has focused on questions that have dominated the legal literature on the WTO’s enforcement system—notably, how prior cases have influenced the interpretation of WTO obligations. WTO enforcement is one of the areas where political scientists and lawyers have studied the same institutions but with radically different foci since the motivations of scholars in the two fields are so different.

Perhaps the most important set of questions regarding political science research on international tribunals revolves around the extent to which international judges are free to draw their own interpretations. Some argue that international judges are a type of agent, to whom national governments delegate important, but limited, authority.²⁰⁷ Others argue that

¹⁹⁹ See, e.g., SLAUGHTER, *supra* note 75.

²⁰⁰ For additional commentary and review, see Shaffer & Ginsburg, *supra* note 4.

²⁰¹ See Keohane et al., *supra* note 150.

²⁰² See, e.g., Posner & Yoo, *supra* note 102; Helfer & Slaughter, *supra* note 151.

²⁰³ See Karen J. Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22 (2006). Alter finds that, while older international courts (such as the International Court of Justice) lacked private rights of action and compulsory jurisdiction, newer courts often incorporate these design elements. She argues that this trend is likely to lead to a greater number of private actors claiming their rights in international courts, but she notes that these developments mostly apply to Europe. *Id.* at 23.

²⁰⁴ See Marc L. Busch, *Democracy, Consultation, and the Paneling of Disputes Under GATT*, 44 J. CONFLICT RESOL. 425, 426–27 (2000) (arguing that these settlements occur because democracies are better able to credibly commit to negotiated settlements, and that this finding indicates that democracies use WTO’s DSM not to ensure adherence to international legal norms, but to tie the hands of other parties).

²⁰⁵ See Christina L. Davis & Yuki Shirato, *Firms, Governments, and WTO Adjudication: Japan’s Selection of WTO Disputes*, 59 WORLD POL. 274 (2007).

²⁰⁶ See Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033 (2009).

²⁰⁷ See Geoffrey Garrett & Barry Weingast, *Ideas, Interests and Institutions: Constructing the EC’s Internal Market*, in IDEAS AND FOREIGN POLICY, *supra* note 37; Geoffrey Garrett, Daniel Kelemen & Heiner Schulz, *The European*

international judges should be thought of as “trustees,” meaning that they have substantial independent powers because their authority derives from sources other than delegation from national governments.²⁰⁸ These different views imply distinctly different explanations for the evolution of legal doctrine—one rooted in state interest and the other in independent judicial interpretation.

Much of the recent political science research that has attempted to shed light on this debate has sought to incorporate insights from the study of domestic judicial behavior, looking at questions such as the causes and effects of judicial decision making.²⁰⁹ Studies looking at the European Court of Human Rights, for example, find that some judges are more “activist” than others.²¹⁰ Empirical research on other international tribunals has explored similar issues, such as strategic behavior by judges.²¹¹ Some research—based both on theory and on empirical study of the International Criminal Court—suggests that discourse and persuasion explain why states, over time, became more willing to ratify the Court’s Statute and cede authority to the Court. Such research, rooted in the fourth face of power, looks to persuasion as a driving force for cooperation, rather than to the structure of a problem or narrow calculations of state interest.²¹²

A few political scientists are also studying the content of international judicial decisions—for example, as evident in patterns of legal citation.²¹³ This work may be of interest to lawyers because it might identify some of the underlying causes of international norm diffusion.²¹⁴ An important question recently analyzed by political scientists is why the European Court of Human Rights cites its own precedents so extensively (despite the absence of a norm of *stare decisis* in international law) and why the Court’s tendency to cite precedents varies widely across cases. Such research sees citation to precedents as a strategic effort to legitimize decisions and maximize the likelihood that domestic courts will comply with judgments. This finding suggests that judges are not simply trustees insulated from pressure exerted by domestic governments but are constrained in what they can achieve by domestic courts and other important external audiences.²¹⁵

Court of Justice, National Governments and Legal Integration in the European Union, 52 INT’L ORG. 149 (1998); Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. POL. 669 (2005); DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 148.

²⁰⁸ See Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT’L REL. 33 (2008); see also Karen J. Alter, *Who Are the “Masters of the Treaty”? European Governments and the European Court of Justice*, 52 INT’L ORG. 121 (1998).

²⁰⁹ See generally Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 INT’L ORG. 553 (2011).

²¹⁰ See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT’L ORG. 669 (2007); see also Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

²¹¹ See Clifford J. Carrubba, Matthew Gabel & Charles Hankla, *Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 435 (2008). For an argument regarding the ways in which the WTO’s DSM operates strategically, see Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT’L ORG. 257 (2010).

²¹² See Deitelhoff, *supra* note 50.

²¹³ See Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. LEGAL STUD. 547 (2010).

²¹⁴ Legal scholars have already paid significant attention to similar questions, such as the use of foreign law in domestic courts. See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

²¹⁵ See Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, BRIT. J. POL. SCI. (forthcoming 2012). For a related argument regarding the political constraints in the WTO system, see Steinberg, *supra* note 149.

These studies suggest that neither the agent nor trustee view of international judges is complete. In some settings international judges find ways to manage their relationship with domestic governments strategically in order to maximize compliance with court decisions—a process that shapes how international law evolves through interpretation and enforcement.

Learning

Legal evolution also occurs because key actors can obtain new information that changes the terms of cooperation. Put differently, these actors—such as diplomats who negotiate agreements and nonstate actors that play a role in the process and in implementation—can learn new ways to advance their goals through cooperation.²¹⁶

The political science research on learning as it affects international cooperation is relatively sparse. Empirical studies suggest, however, at least one promising line of analysis: learning, along with other sources of new information, helps transform the strategic context for cooperation. By changing the problem type, cooperation can improve; this pattern is evident in international cooperation on the ozone layer, the Rhine River, and other cases.²¹⁷ (A change in problem could also, of course, undermine the prospects for cooperation, but most empirical research reflects the bias that scholars tend to study cases where cooperation has been successful.)

Linkages and Scope

One way that legal institutions evolve is through changes in their scope of the coverage. Since the boundaries around a problem are often malleable, entrepreneurial states and other actors have the potential to link issues in ways that change the scope of bargaining, thereby altering the strategic context of a negotiation. Political science research has generated two insights about issue linkage and the scope of legal institutions that should be of interest to scholars in public international law.

Drawing on the second face of power, issue linkage is a way to shape agendas and thus guide the evolution and interpretation of legal commitments along some pathways rather than others. For example, the boundaries around the topic of international trade have greatly expanded over time—a topic of interest to political scientists and legal scholars alike.²¹⁸ Depending upon which building blocks particular political scientists believe to be most important, the focus of their research varies, singling out specific agenda-setting linkages. For example, drawing on the first face of power, some studies note that powerful states have influenced the international

²¹⁶ See Checkel, *supra* note 52; Peter M. Haas & Ernst B. Haas, *Learning to Learn: Improving International Governance*, 1 GLOBAL GOVERNANCE 255 (1995).

²¹⁷ On the Montreal Protocol generally, see David G. Victor, *Enforcing International Law: Implications for an Effective Global Warming Regime*, 10 DUKE ENVTL. L. & POL'Y F. 147 (1999) (showing that diplomats initially focused on the easiest areas of agreement). On the Rhine River, see Bernauer, *supra* note 90 (showing that as the Netherlands learned how to make financial incentives conditional upon French behavior, it became easier to achieve deep reductions in pollution from French industrial sources).

²¹⁸ See, e.g., José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001); José E. Alvarez, *The WTO as Linkage Machine*, 96 AJIL 146 (2002). These linkages are often framed and created by international organizations, such as discussed in Barnett & Finnemore, *supra* note 48. See also Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79 (2006) (arguing that the WTO itself plays a key role in setting boundaries, though without giving much attention to the underlying interests of key WTO members).

trade agenda to include topics of interest to their well-organized interest groups—such as rules on intellectual property (of value to Western pharmaceutical and entertainment companies).²¹⁹ Other studies, looking to the third face of power, see the influence of entrepreneurial interest groups working transnationally as explaining why international legal institutions on the protection of biological diversity were expanded to include complicated schemes to protect developing states against “biopiracy” of their natural assets.²²⁰

Studies on the scope of legal commitments are now beginning to illuminate a topic that has long been a concern of international lawyers: whether the many different layers of international legal institutions lead to conflicts and forum shopping that can produce gridlock, or whether that institutional diversity might actually facilitate more effective cooperation.²²¹ Here, a collaboration between political science and international law could help identify when a high density of overlapping and linked institutions impedes, and when it advances, international cooperation.

Political scientists are now trying to explain why in some issue areas, the legal landscape is dominated by legal regimes that are focused on an integrated legal structure, usually centered on a core treaty and organized hierarchically, whereas in other areas, the legal landscape is more of a decentralized *regime complex* of laws and institutions.²²² In many areas, evidence abounds that hierarchical legal forms are impractical and that they undercut the experimentation and learning that are crucial in the early stages of developing useful law around cooperation problems; the best solutions are typically difficult to identify at the outset.²²³

IV: THE EFFECTIVENESS OF LEGAL AGREEMENTS AND INSTITUTIONS

A large fraction of political science scholarship on international legal institutions is ultimately concerned with whether and how international institutions have influence.²²⁴ While similar debates have unfolded in the legal literature,²²⁵ two insights from the political science

²¹⁹ See SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* (1998); Susan K. Sell, *Intellectual Property Rights*, in *GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE* 171 (David Held & Anthony McGrew eds., 2002).

²²⁰ See Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

²²¹ See Victor, *supra* note 152.

²²² The early research on these questions focused on hierarchical legal systems—so-called nested regimes. See INSTITUTIONAL DESIGNS FOR A COMPLEX WORLD: BARGAINING LINKAGES, AND NESTING (Vinod K. Aggarwal ed., 1998). For other work looking at more fragmented outcomes, see, for example, Raustiala & Victor, *supra* note 220, and Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362 (2006). For recent reviews, see Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POL. 13 (2009); Frank Biermann, Philipp Pattberg, Harro van Asselt & Fariborz Zelli, *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, 9 GLOBAL ENV'T'L POL., Nov. 2009, at 14; and Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. (2007) (arguing that fragmentation results from a strategic effort by powerful states to achieve greater autonomy—a strategy built, in part, on weaker states' relative difficulty engaging with fragmented legal systems). For similar discussions by political scientists who study local (that is, not international) common-pool resources, see POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS (Michael D. McGinnis ed., 1999).

²²³ See Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7 (2011).

²²⁴ See generally Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010).

²²⁵ See, e.g., INIS L. CLAUDE JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANISATION* (1959); HENKIN, *supra* note 11; FRANCK, *supra* note 33; CHAYES & CHAYES, *supra*

literature are especially noteworthy. The first is that compliance rates are subject to *selection effects* (see text below) and therefore must be analyzed with methodological care and substantive attention to states' decisions to commit to international law.²²⁶ The second is that compliance alone is often an incomplete concept for analyzing the effects of international law on state behavior.²²⁷

Methodological Issues: Selection Effects and Compliance

Research on whether an international legal agreement has had an effect on state behavior often probes whether state parties comply with the terms of the agreement more often than nonparties. While such comparisons between parties and nonparties are useful, they can also be misleading without a full account for the underlying causes of treaty commitment. In many cases, states select treaties to join because they would honor them anyway or because they are sure they can comply.²²⁸ In other cases, states might join treaties that they do not intend to honor, knowing that no other actor will be able to enforce compliance.²²⁹ Ignoring such motivations can lead to the erroneous conclusion that compliance—whether high or low—is linked to the law itself. Instead, selection effects are at work.

The claim that selection effects explain compliance is often (and mistakenly) associated with a skeptical view of the influence of international law. In fact, compliance rates can be informative, but only when understood in the right context.²³⁰ Political scientists have debated these methodological issues for nearly two decades, and one outcome of those debates is that the study of compliance requires sophisticated methods that allow for valid inference.²³¹ Taking selection effects into account is a crucial first step in studying the impact of international

note 11. For a discussion that incorporates arguments from law and political science, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002).

²²⁶ In recent years, this insight has also been adopted in the legal literature, including in collaborations between political scientists and lawyers or by scholars trained in both fields. See, e.g., Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000); Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007); Ho, *supra* note 132; David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333 (2006); Symposium, *How Are Nations Behaving?*, 96 ASIL PROC. 205 (2002).

²²⁷ Several studies by legal scholars have also reached similar conclusions. See, e.g., Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991); Martti Koskenniemi, Book Review, 86 AJIL 175, 177 (1992); KOSKENNIEMI, *supra* note 13; Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998); Goodman & Jinks, *supra* note 54; Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y, May 2010, at 127.

²²⁸ See Downs et al., *supra* note 11.

²²⁹ See, e.g., Hathaway, *supra* note 1.

²³⁰ *But see* Lisa Martin, *Against Compliance* (2011) (unpublished manuscript) (arguing that political scientists should abandon the study of compliance altogether) (on file with authors).

²³¹ See Beth A. Simmons & Daniel J. Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 AM. POL. SCI. REV. 623 (2005); Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611 (2005); Yonatan Lupu, *The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects* (2011) (unpublished manuscript) (on file with authors). For a methodological discussion of the problem that selection effects pose for attempts to make causal inference from data, see JUDEA PEARL, *CAUSALITY: MODELS, REASONING, AND INFERENCE* (2000). For a more detailed review of empirical research rooted in these debates, see Shaffer & Ginsburg, *supra* note 4.

law, but it is also important to understand the mechanisms that explain why states join treaties. Some of those mechanisms lead to skepticism about the import of international law, whereas others do not.

Success in this research starts with definitions. Should the effect of an international agreement be measured by looking at compliance or at some other measure? If we assume that the effects of international law are concentrated only on regulated state activities, then perhaps compliance captures all of the law's impact. Most political science research, however, now looks beyond compliance to the causal mechanisms that link international law to changes in behavior. Many political scientists call this *influence* or *effectiveness*. The study of effectiveness, rather than compliance, corresponds more closely to the forces that social scientists now study, which are those that explain human and social behavior. Effectiveness is difficult to measure, however, because in most settings it requires the analysis of a counterfactual: if the law had not been in place, what would have happened?²³² An agreement has been effective if it has induced some change in behavior that is beyond what would have happened without the agreement and that coheres with the overarching goals of cooperation.

The realization that counterfactuals are an essential part of determining the effectiveness of international institutions has made research in this area much more complicated and contentious. The difficulty in measuring the counterfactual and the impact of an institution arises because human behavior responds to many forces and because the counterfactual is never actually observed. The area where political science has advanced the most in measuring the effects of international institutions and addressing the problem of counterfactuals is trade. The central conclusion from that research is that the General Agreement on Tariffs and Trade/WTO system has been associated with higher flows of trade and greater economic efficiency for only some members, but the debate is far from settled.²³³ In another area, international environmental cooperation, researchers have had an especially difficult time identifying and measuring the counterfactual because behavior and environmental quality are affected by so many factors.²³⁴

Interestingly, while most research has sought to explain positive effectiveness—that is, situations in which an institution leads to more cooperation; some institutions have “negative” effectiveness. They make matters worse. For example, some institutions can create a backlash in domestic politics that undermines the willingness to cooperate, which is a topic that both political scientists and lawyers have studied.²³⁵

²³² See generally James D. Fearon, *Counterfactuals and Hypothesis Testing in Political Science*, 43 *WORLD POL.* 169 (1991); Gary King, Robert O. Keohane & Sidney Verba, *The Importance of Research Design in Political Science*, 89 *AM. POL. SCI. REV.* 475 (1995).

²³³ See, e.g., Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950–94*, 57 *WORLD POL.* 453 (2005); Goldstein et al., *supra* note 83. But see Andrew K. Rose, *Do We Really Know That the WTO Increases Trade?*, 94 *AM. ECON. REV.* 98 (2004) (arguing that the WTO has not caused an increase in trade levels).

²³⁴ See Thomas Bernauer, *The Effect of International Environmental Institutions: How We Might Learn More*, 49 *INT'L ORG.* 351 (1995) (arguing that the right measure of effectiveness should be the actual solution of underlying environmental problems); see also Ronald B. Mitchell, *Evaluating the Performance of Environmental Institutions: What to Evaluate and How to Evaluate It?*, in *INSTITUTIONS AND ENVIRONMENTAL CHANGE: PRINCIPAL FINDINGS, APPLICATIONS, AND RESEARCH FRONTIERS* 79 (Oran R. Young, Heike Schroeder & Leslie A. King eds., 2008).

²³⁵ See Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 *WASH. U. L. REV.* 777 (2006) (arguing that criminal tribunals can undermine cooperation by targeting actors

Substantive Issues: Why Does Law Have an Effect?

What looks like effectiveness or compliance might be caused by something else. The job of the analyst who is measuring the effect of an agreement is to separate its impact from the noise of those many other forces. In principle, that research should be working with a single body of theories that is tested with data across many different issue areas. In practice, sifting the effect of international law from other influences on behavior is so complex that essentially all of the political science insights about the causal mechanisms at work are tailored to the particular issue areas where the analysts in question are experts. Very few scholars work across different issue areas.

Here we briefly look at studies examining cause and effect in relation to the environment and human rights—areas chosen because they are both representative of this field of research and among the most heavily studied by political scientists today.²³⁶ That research, while difficult to summarize, points to four kinds of cause-and-effect mechanisms.

The first line of argument sees effectiveness as resulting from incentives that interact with the type of cooperation problem that states are trying to solve. Traditionally, IR looked to incentives offered by dominant states—the first face of power—to explain which international agreements are most effective. Studies on the international whaling regime, for example, have pointed to the United States' dominant role in using the threat of trade sanctions to encourage whaling nations to change their behavior. The states that were most vulnerable to sanctions—such as Iceland, which depended heavily on exports of fish products that were easily sanctioned at little cost by the United States—were most likely to change their behavior.²³⁷ Although this strand of research concentrates on the first face of power, it also sees a role for international institutions in helping powerful states to mobilize sticks and carrots and in making it easier for likeminded states and NGOs to mobilize around the same goals.²³⁸ Political science research has less to say about when states select positive or negative incentives (carrots or sticks). A long tradition of research on international sanctions, however, generally concludes that sanctions are usually not effective²³⁹ and thus that, as a practical matter, studies focusing on incentives from international institutions usually look at positive inducements—such as special funds that help states comply with international obligations—and at withdrawal of those incentives as a penalty.²⁴⁰

whose participation in the peace process is vital). Oona Hathaway argued several years ago that commitment to several human rights treaties was associated with higher levels of human rights abuses. Hathaway, *supra* note 1. That finding spawned a significant body of research among political scientists. See, e.g., Jay Goodliffe & Darren G. Hawkins, *Explaining Commitment: States and the Convention Against Torture*, 68 J. POL. 358 (2006); James Raymond Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008); James R. Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-compliance*, Q. J. POL. SCI. (forthcoming).

²³⁶ For an in-depth review of recent empirical scholarship on other issue areas by the legal community, see Shaffer & Ginsburg, *supra* note 4.

²³⁷ See ROBERT L. FREIDHEIM, TOWARD A SUSTAINABLE WHALING REGIME (2001).

²³⁸ See *supra* note 20.

²³⁹ See, e.g., LISA L. MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS (1992); Edward D. Mansfield, *International Institutions and Economic Sanctions*, 47 WORLD POL. 575 (1995) (book review); Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 INT'L ORG. 73 (2000); Navin A. Bapat & T. Clifton Morgan, *Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data*, 53 INT'L STUD. Q. 1075 (2009).

²⁴⁰ See *supra* note 87; Hafner-Burton, *supra* note 171.

Today, many analysts have shifted their focus to concentrate on how international incentives affect domestic politics. For example, the international regime to regulate oil pollution from tankers was highly influential because international rules created a strong incentive for insurance companies and port states to require that tanker operators comply.²⁴¹ Similarly, much of the research on human rights now focuses on how international institutions cause changes in behavior by working through domestic institutions such as courts and by mobilizing domestic pressure groups that, in turn, induce governments to change policy and behavior.²⁴²

A second line of argument stands in stark contrast. Instead of looking to inducements and penalties, this line of thinking starts with the third and fourth faces of power. It sees international institutions, as well as particular agreements such as treaties, as having an effect through persuasion and legitimacy—usually working through domestic pressure groups such as NGOs, churches, and elites. Many studies of international environmental cooperation ultimately point to these agreements providing the means through which to express growing concern about environmental problems.²⁴³ For example, in the international agreements on acid rain in Europe, NGOs within important polluting states used internationally agreed emission targets as a way to pressure their governments to change; most notably, in the space of a generation, the United Kingdom went from being the “dirty man of Europe” to a reliable leader on environmental issues.²⁴⁴ Many scholars have looked at how international human rights agreements accelerate the diffusion of norms within states, producing changes in how human rights play out in domestic politics and institutions such as courts.²⁴⁵ For example, membership in international organizations (including those not explicitly addressing human rights) is associated with the international diffusion of human rights practices.²⁴⁶ Other scholars have looked at the role of legal institutions as focal points for persuasion.²⁴⁷ Still others criticize these perspectives drawn from the third and fourth faces of power for focusing

²⁴¹ See Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT’L ORG. 425 (1994).

²⁴² See Neumayer, *supra* note 181; Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005). For studies by legal scholars that look at similar issues, see, for example, Hathaway, *supra* note 1.

²⁴³ See, e.g., Arild Underdal, *Determining the Causal Significance of Institutions: Accomplishments and Challenges*, in INSTITUTIONS AND ENVIRONMENTAL CHANGE, *supra* note 234.

²⁴⁴ See Marc A. Levy, *European Acid Rain: The Power of Tote-Board Diplomacy*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 75 (Peter M. Haas, Robert O. Keohane & Marc A. Levy eds., 1993).

²⁴⁵ See Finnemore & Sikkink, *supra* note 36; see also Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 633 (2000); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573 (2007). This type of argument has also been made by several legal scholars. See, e.g., HENKIN, *supra* note 11; Koh, *supra* note 32. Drawing on sociology, some scholars have studied the propensity of nations to join international commitments because that is part of being a member in good standing in the international community. See, e.g., John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997). Similarly, political scientist Krasner argues that, among other reasons, states often sign these agreements “to follow the script of modernity.” STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 121 (1999). A similar logic has been extended to explain why so many firms join voluntary codes of conduct. Firms seek safety in numbers. See Vogel, *supra* note 27.

²⁴⁶ See Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT’L STUD. Q. 127 (2010).

²⁴⁷ See Deitelhoff, *supra* note 50.

on the wrong subnational processes and failing to appreciate the driving role of forces such as race and gender.²⁴⁸ Several legal scholars have emphasized similar themes.²⁴⁹

A third line of argument looks at how the effectiveness of international institutions depends on their ability to mobilize expertise and administrative competence—a topic covered in detail earlier.²⁵⁰

A fourth line of argument looks at delegation—in particular, the impact of courts. Much of this work, like all IR scholarship on courts, has focused on European courts, mainly in the area of human rights. An important test of effectiveness is whether courts can get governments to comply with costly rulings. The literature has focused on the Court of Justice of the European Communities (ECJ). Early work argued that because the ECJ did not have enforcement powers, national governments could ignore it.²⁵¹ Other scholars suggest that the ECJ has achieved its effect by co-opting national courts,²⁵² with the consequence that question of the ECJ's impact became, in time, synonymous with that of determining the impact of national courts.²⁵³ Still other scholarship—a collaboration of lawyers and political scientists—suggests that the ECJ has actually achieved its effect by masking the political implications of its rulings in legal discourse, with binding impact on the states subject to the ECJ, all of which adhered to norms of judicial independence and the rule of law.²⁵⁴ Empirical studies on the effect of courts have also looked to the third face of power and demonstrated how rulings by the European Court of Human Rights have empowered social actors and other European bodies, thus diminishing the ability of national governments to control the direction of European law.²⁵⁵

²⁴⁸ This “critical” perspective covers a broad array of studies that do not fit well under any simple label. See, e.g., ADRIANA SINCLAIR, *INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW: A CRITICAL APPROACH* (2010).

²⁴⁹ Many of these views are rooted in critical legal studies. See, e.g., DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987) (arguing that there are no objective standards of justice in international society). KOSKENNIEMI, *supra* note 13, argues that international law, coming largely from the Western liberal tradition, has not succeeded in its goals of creating a system based on sovereignty and consent. The result, he concludes, is a European, Christian, developed-state bias in the international legal system. See also HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000) (offering a feminist approach to international law and arguing that the legal order places insufficient emphasis on women's economic and social rights); Charlesworth et al., *supra* note 13 (pointing to the notion that the primary subjects of international law are states and international organizations, and that leadership in both underrepresents women). Another branch of legal scholarship focuses on race. See, e.g., Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519 (1999) (arguing that most international legal scholarship marginalizes race).

²⁵⁰ See also *supra* notes 23, 109–10, and accompanying text.

²⁵¹ See Garrett & Weingast, *supra* note 207; Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995); see also Downs et al., *supra* note 11.

²⁵² See Alter, *Who Are the “Masters of the Treaty”? European Governments and the European Court of Justice*, *supra* note 208.

²⁵³ Several of these scholars have since moderated their positions. See, e.g., Geoffrey Garrett, Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998) (noting that in some instances domestic governments comply with decisions that they would prefer to ignore); KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001) (noting that governments would sometimes prefer to ignore ECJ rulings but that in many cases the potential legitimacy cost of doing so prevents such noncompliance).

²⁵⁴ See Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT'L ORG. 183 (1995).

²⁵⁵ See, e.g., Rachel A. Cichowski, *Courts, Rights, and Democratic Participation*, 39 COMP. POL. STUD. 50 (2006).

Recent formal modeling has focused on levels of compliance with ECJ decisions and on how courts, more generally, affect the perceived legitimacy of international commitments.²⁵⁶

All four of these lines of research point to cause-and-effect mechanisms that are familiar to international lawyers. The main contribution of political science has been one of emphasis and evidence. All four lines point to the conclusion that causation is highly complex and often indirect. Moreover, except in rare areas where international institutions are highly developed and powerful, much of the effect of international institutions is through the domestic political process and through institutions such as national courts.²⁵⁷

V. OPPORTUNITIES FOR COLLABORATION

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

First is empirical research on enforcement and flexibility. In theory, these concepts are two sides of the same coin because the enforcement mechanisms that a state is willing to tolerate are related to the options it thinks that it will have when it faces inconvenient commitments.²⁵⁸ Yet the actual experience with these mechanisms varies markedly. Over the last fifteen years, the design and operation of enforcement mechanisms in international trade law—notably, in the WTO—have been central topics for research. In most areas of international law, such as in environment, security, and human rights, the enforcement mechanisms are often minimal. Likewise, though flexibility provisions are commonplace in trade and human rights agreements, they are rare in most of the flagship international environmental and security agreements. Collaborative empirical research could help explain the observed patterns in enforcement and also how enforcement and flexibility interact in ways that influence the effectiveness of legal agreements.²⁵⁹

Progress in studying enforcement and flexibility would help address important debates that have opened in both fields. For political scientists, one of the main insights concerning the rational design of international institutions is that uncertainty can lead to substantial delegation and that one of the chief functions of delegated bodies is to help states manage the practical and political problems associated with enforcement.²⁶⁰ Except for the WTO, however, relatively little is known about how enforcement actually works. The rational-design framework

²⁵⁶ See, e.g., Clifford J. Carrubba, *The European Court of Justice, Democracy, and Enlargement*, 4 EUR. UNION POL. 75 (2003); see generally Carrubba, *supra* note 207; Michael Gilligan, Leslie Johns & B. Peter Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 J. CONFLICT RESOL. 5 (2010).

²⁵⁷ See, e.g., TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* (2005) (arguing that human rights agreements mostly exert influence on government behavior indirectly).

²⁵⁸ See Abbott et al., *supra* note 131; Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 50 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (exploring different pathways through which states can obtain flexibility needed to promote deeper cooperation); VICTOR, *supra* note 152 (explaining how flexibility could help address the particular challenges of global climate change); RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* (1981) (analyzing the special role of soft law as a source of flexibility).

²⁵⁹ See, e.g., Hafner-Burton et al., *supra* note 181.

²⁶⁰ See Koremenos et al., *supra* note 113.

developed by political scientists has not gained much traction in the international legal community—probably because its empirical projections are not sufficiently fine grained to inform the practical work of public international law. For public international lawyers, progress in this area would help address the question of whether flexibility undermines or enhances cooperation—including whether the proliferation of many, flexible international institutions will lead to forum shopping and to a gridlock of conflicting legal interpretations.²⁶¹

A second area of potentially productive collaboration concerns private actors—that is, those other than states and their officials. Scholars in both political science and international law generally agree that private actors play important roles, yet the collaboration between political scientists and lawyers might generate much greater insight into when and how nonstate actors have a practical effect on legal institutions and outcomes. For the last two decades, both fields have devoted substantial attention to NGOs as important private actors, and especially to public interest groups that have mobilized transnationally to press for arms control (for example, the ban on land mines), protection of human rights (for example, the rights of women), and all manner of environmental goals.²⁶² We are concerned that this focus—which arises in part because many scholars working in these areas are also normatively committed to the ideals of the most active NGOs—has been prone to overstate the importance of NGOs.

A particular blind spot, especially among political scientists, relates to firms. While transnational firms were central to much earlier work,²⁶³ the more recent literature tends to assume that the roles of firms in international cooperation are limited to a few tasks, such as performing functions that are delegated to them by governments.²⁶⁴ Most studies also see firms as an interest group that is usually keen to oppose regulation and that is prone, when regulation is inevitable, to favor private regulation (which industry has more capacity to control).²⁶⁵ The study of firms appears to play a more central role in legal scholarship on international law.²⁶⁶

²⁶¹ See *supra* note 174 and accompanying text.

²⁶² See *supra* notes 25–26 and accompanying text.

²⁶³ See, e.g., RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971).

²⁶⁴ See, e.g., THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods eds., 2009). But see Layna Mosley, *Private Governance for the Public Good? Exploring Private Sector Participation in Global Financial Regulation*, in POWER, INTERDEPENDENCE AND NONSTATE ACTORS IN WORLD POLITICS (Helen V. Milner & Andrew Moravcsik eds., 2009); RONIE GARCIA-JOHNSON, *EXPORTING ENVIRONMENTALISM: U.S. MULTINATIONAL CHEMICAL CORPORATIONS IN BRAZIL AND MEXICO* (2000).

²⁶⁵ See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2009); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 2005); Philip Pattberg, *Institutionalization of Private Governance*, 18 GOVERNANCE 589 (2005). Research on private regulation has also overlapped with the study of corporate social responsibility and with debates over whether firms will (and should) self-regulate in ways that may be immediately contrary to their particular financial interests. See, e.g., David P. Baron, *Morally Motivated Self-Regulation*, 100 AMER. ECON. REV. 1299 (2010).

²⁶⁶ See, e.g., JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* (2006); Larry Cata Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005); GREGORY C. SHAFER, *DEFENDING INTERESTS: PUBLIC PRIVATE PARTNERSHIPS IN W.T.O. LITIGATION* (2003); Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147 (2009).

A sharper collaborative focus on how firms actually behave in international law is overdue—especially one that is empirically oriented to explain what kinds of regulation firms actually favor and how they organize to influence the content of such rules. We note that the histories of many international regulatory agreements, such as those on intellectual property under the WTO²⁶⁷ and on regulation of ozone-depleting chemicals under the Montreal Protocol on Substances That Deplete the Ozone Layer,²⁶⁸ reveal key firms organizing to push for stronger public regulation. Long ago the field of industrial organization focused on regulation as a strategic tool available to firms; few of the insights from the study of national regulation and firms have been applied to the international level.²⁶⁹

The third area of potentially productive collaboration relates to customary international law. A significant amount of scholarly work in public international law focuses on the role of custom. Important debates over the sources and impact of customary international law—including whether states can even exit from some customary obligations—have long been a staple of legal writing.²⁷⁰ Political scientists have been almost completely absent from this debate, and many political scientists drawn to the first face of power are also inclined to view customary norms as unimportant since they may be unlikely to reflect directly or principally the interests of powerful states.²⁷¹ Thus, for most public international lawyers, customary international law is omnipresent; for most political scientists, it is rarely considered.

The shift in emphasis within IR over the last two decades has led to much more sophisticated theories about how forces within states interact with international politics. Relying on building blocks from the third and fourth faces of power and from domestic politics, the field has put much greater emphasis on general norms—including how norms come to be viewed as legitimate and how processes of persuasion shape how norms spread.²⁷² That puts political science in a good position to contribute to the legal debates over customary international law. In particular, the methods for empirical research that are standard in political science can help address questions such as how customary norms spread and when they have an independent effect on behavior.

²⁶⁷ See PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002); *Intellectual Property Rights*, *supra* note 219; Jon Aaronson, *International Intellectual Property Rights in a Networked World*, in *POWER, INTERDEPENDENCE AND NONSTATE ACTORS*, *supra* note 264.

²⁶⁸ *Supra* note 87. On the ozone layer, see generally PARSON, *supra* note 152. On firms, see James Maxwell & Forrest Briscoe, *There's Money in the Air: The CFC Ban and DuPont's Regulatory Strategy*, 6 *BUS. STRATEGY & ENVIR.* 276 (1997); DAVID L. LEVY & PETER J. NEWELL, *THE BUSINESS OF GLOBAL ENVIRONMENTAL GOVERNANCE* (2004); and Horst Albach, Ellen Krupa & Dieter Koster, *Entry, Entry-Deterrence and Exit: A Study of the Market for CFCs*, 51 *KYKLOS* 469 (1998).

²⁶⁹ See Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON & MGMT. SCI.* 3 (1971); *A READER ON REGULATION* (Robert Baldwin, Colin Scott & Christopher Hood eds., 1998).

²⁷⁰ See, e.g., Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 *WASH. L. REV.* 971 (1986); Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 *AJIL* 238 (1996); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 *VA. J. INT'L L.* 449 (2000); GOLDSMITH & POSNER, *supra* note 1; John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 *HARV. J. L. & PUB. POL'Y* 7 (2006); Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, in *PROGRESS IN INTERNATIONAL LAW* (Russell A. Miller & Rebecca Bratspies eds., 2008); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 *YALE L.J.* 202 (2010).

²⁷¹ See *supra* note 13 and accompanying text.

²⁷² See, e.g., Johnston, *supra* note 63; see also *supra* notes 29–65 and accompanying text.

VI. CONCLUSION

Two decades have passed since the last large review of IR scholarship was written for legal audiences.²⁷³ Since then, collaborations between international lawyers and political scientists have increased, while the field of political science itself has shifted to focus on new topics.

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

Here we have suggested a framework for understanding the development of political science research related to public international law. Our approach is to emphasize that political science rests on three main building blocks—with the balance among the blocks differing from one scholar to another. Those blocks help to explain why some studies focus on state power and coercion as a dominant force affecting the content and operation of legal institutions, whereas others look to the spread of global norms or the forces within states. The blocks also help to explain the particular approaches that political scientists have taken when studying the design and operation of legal institutions. This area is one where political science research, in theory, should overlap heavily with the work of public international lawyers, but actual collaborations remain scarce.

We have suggested three areas where collaboration between political scientists and international lawyers could be especially fruitful. Successful collaboration will require clarity as to where, in particular, the two fields have common interests and goals, and where they do not. On some issues, such as those concerning the flexibility and enforcement of treaties, collaborations are already well under way. On other issues, such as those concerning customary international law, questions that are of central interest to both fields will be difficult to answer satisfactorily until scholars collaborate more fully.

²⁷³ See Abbott, *supra* note 2.