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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 international institutions. Among its top ranks are scholars who study the development, operation, spread and impact of international legal doctrine and organizations – also matters of great interest to the legal community. Meanwhile, a growing number of public international lawyers have developed an interest in political science research and methods.² For more than two decades there have been calls and frameworks for international lawyers and political scientists to collaborate.³ Some prominent collaborations are under way—sharing research methods and insights.⁴

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² See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 3 (1999) (arguing that international law scholarship often includes "unfounded prescription"); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545 (2004); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STANFORD L. REV. 959 (2000); Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133 (Karl W. Deutsch & Stanley Hoffmann eds., 1968); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Jutta Brunnée & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105 (2002); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384 (1996); Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. (2011, forthcoming)

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

Yet the two fields are still notable for their distance.⁵ Exchanging insights has been difficult in part because the fields are organized around different objectives and speak to different audiences. For the bulk of political science, the main research objective is to discover the underlying causes and effects of political behavior, such as why governments promote international trade, allow abuses of human rights or regulate firms that pollute the environment. Within that broader goal political scientists have attempted to explain the design and content of international treaties, legal norms and institutions, often viewing them as one of many other instruments that governments and non-state actors use in their effort to influence political outcomes. While issues like the design of international legal instruments, the spread of legal norms and delegation to international institutions have been of general interest to political scientists, matters of central importance to public international lawyers, such as the specific procedures for setting and interpreting the content of international treaties, are largely ignored or not understood. The audience mainly has been graduate students in training for academic careers and other like-minded scholars. Most public international lawyers, by contrast, are focused more squarely on law itself. They are concerned about the content of law, such as the reasoning, phrasing and application of legal obligations, exceptions, interpretations and judicial decisions, along with the operation of legal institutions.⁶ Their audience is more practical and mainly consists of legal professionals and policy makers. Such differences in objectives and audiences help explain why scholars from these two fields often study similar phenomena but with quite different research questions, approaches and findings.

AND INTERNATIONAL RELATIONS 3 (Robert J. Beck, Anthony Clark Arend, & Robert Vander Lugt eds., 1996).

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

⁵ Stephen D. Krasner notes that, while international relations scholarship has become increasingly interested in international law, this is a relatively new development. He notes that "[t]he term 'international law' still hardly ever occurs in the titles of articles published in the three leading international relations journals, *International Organization*, *International Studies Quarterly*, and *World Politics*. In the period 1973-1979 there were three articles in these journals with international law in the title, from 1980 through 1989 there were none, and in the period 1990 through the middle of 1999 there were two." *What's Wrong with International Law Scholarship?: International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93 (2000), footnote 6.

⁶ We are thankful to Ken Abbott for emphasizing this point.

Despite these differences, there are large and growing intersections between the fields. For example, both fields are concerned with the design and impact of legal institutions, such as treaties and other forms of international agreements. The growing number of collaborations reflects that many research questions require the skills and insights from both fields. Research within political science has become richer through the awareness of how legal institutions actually function; scholars in international law have gained from the sophisticated methods for empirical research and testing of hypotheses that have emerged from political science and other social sciences.

This essay offers a fresh survey of what political science has learned that may be of special interest to international lawyers. More than 20 years have passed since the last large essay of this type.⁷ During that interim the field of political science has made substantial progress in some areas and also shifted its focus to new questions. 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 international relations we focus on the findings that are most relevant for what public international lawyers actually do. We concentrate, therefore, on three areas: a) the *design and content* of international legal institutions, such as treaties and non-binding agreements; b) the *evolution and interpretation* of international legal institutions, including both customary and treaty-based law; and c) the *effectiveness* of legal institutions on the behavior of governments, courts, firms and individuals.

Political scientists see legal institutions and processes through the lens of politics. In Part I, we lay three *building blocks* that are a foundation for most international relations research on politics. The first is *power*. For political scientists this concept is central to explaining which interests have the largest impact. Political scientists have studied the ways that power affects political agendas, the design and content of international legal

⁷ See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989). While Abbott's essay was the last major one that took a broad survey of political science that relates to public international law, in the intervening two decades there have been many other essays that also review aspects of political science research for international lawyers as well as points of collaboration between the fields. See, *supra*, note [TBD]. For a partial update of Abbott's original essay applied to a particular topic--internal conflicts such as civil wars--see Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 Am. J. Int'l L. 361, 362 (1999).

institutions, their interpretation and decisions about which rules are enforced, by whom and through what path. Second are the *types of problems* that governments and other actors try to manage with international legal agreements. Some problems are marked by strong incentives for countries to skirt their legal agreements while others have a structure that more readily yields international cooperation. One aspect of “problem type” that political scientists usually find important is uncertainty for one of the roles of international institutions is to help provide information that lowers uncertainty and help states manage the effects of uncertainty. A third building block is *domestic politics* – the ways in which the internal political affairs of countries and their systems of government—including judicial processes and jockeying for influence by interest groups—shape how international rules are made, interpreted and applied. These building blocks are at the heart of how political scientists understand and analyze the design, content and impact of international legal institutions. As in any mature field, political scientists have diverse research agendas; many of those differences trace back to the relative emphasis that different scholars place on these building blocks.

In Part II, we focus on what political scientists have learned about the *design and content* of international agreements that might be of interest to public international lawyers.⁸ Much of the political science research in this area has focused on how international institutions, including legal agreements, help lower the “transaction costs” that governments experience when they try to coordinate their behavior. Political scientists have been interested in transaction costs for decades.⁹ But over the last decade a coherent body of research has emerged to explain why governments make particular choices when they design international legal institutions—such as the precision and flexibility of agreements, the inclusion of enforcement mechanisms, scope, and the extent to which commitments are legally binding. This work on legal design is one of the prime areas for further collaboration between the fields.¹⁰

In Part III we review how political scientists have studied the *evolution* of international law, including how legal norms are interpreted and spread. The most important insights from this research concern why and how international legal doctrine changes dynamically over time and with experience. Of particular relevance to lawyers may be the emerging research on courts and judicial decisions as well as scholarship on the development, spread and application of norms.

⁸ See, *infra*, notes [x] to [y] and accompanying text (Part II).

⁹ See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

¹⁰ See, *infra*, notes [x] to [y] and accompanying text (section on collaboration).

In part IV we look at the *effectiveness* of international law. Here, the contributions of political science are not only in revealing when legal institutions actually have a practical impact but also in the methods for studying and measuring effectiveness. Because governments can select and influence the content of agreements and which agreements they join, formal measures of compliance often don't reveal much about whether legal institutions actually have an effect.¹¹ Indeed, some of the most effective legal institutions are those whose formal levels of compliance are very low.

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

Part I: Building blocks

Here we focus on the core concepts that are building blocks for most political science research on international relations: a) power, b) the structure of problems, and c) domestic politics. Many of the insights from political science research on international legal institutions stem from the relative emphasis that scholars place on these different building blocks. These concepts, which are quite distinct from the starting points for most international legal scholarship, help explain the focus of political science research and also areas where collaboration would be most fruitful.

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) ("Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

Power

First is power, which is fundamental to how most political scientists study behavior and how they think about interests. One of the major distinctions between research in international relations and international law has been that the former often starts with power whereas most research on public international law places relatively little emphasis on power.¹² Most political science research looks first to governments and their ability to coerce other governments as the main type of power at work in international affairs; most public international lawyers, by contrast, looks to the authority of legal norms and institutions as an independent force that shapes 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.¹³ However, today, almost all political science research does not adopt that simple view of power and looks, instead, at the ways that power interacts with other forces to shape outcomes. A central role for power does not make international law irrelevant or imply that international law has no effect on its own. Rather, international law can be a conduit for weak and powerful, alike, to magnify their influence.

Political scientists and other social scientists have found it useful to distinguish power that comes in four “faces.”¹⁴ The first is power in its most obvious, blunt form: the ability to coerce.¹⁵ The second “face” is the ability to influence the decision-making agenda and process.¹⁶ The third face is the ability to shape what people want and believe, such as through the spread of norms and the creation of interests and identities.¹⁷ And a fourth face

¹² But see, e.g., Richard H. Steinberg and Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

¹³ See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (arguing that international rules are the pronouncements of powerful states, and are subject to change along with the distribution of state power); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5 (1994-95) (arguing that international institutions cannot influence state behavior); HANS MORGENTHAU, *LA NOTION DU "POLITIQUE" ET LA THEORIE DES DIFFERENDS INTERNATIONAUX* 65-71 (1933) (arguing that international law is biased toward stability); GEORG SCHWARZENBERGER, *POWER POLITICS* 199 (3d ed. 1964) (arguing that the purpose of international is to "assist in maintaining the supremacy of force and the hierarchies established on the basis of power.") For a review of the influence of realist thought on legal scholarship, see Richard H. Steinberg and Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006).

¹⁴ See generally STEVEN LUKES, *POWER: A RADICAL VIEW* (1981). See also Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39 (2005).

¹⁵ See generally Robert A. Dahl, *The Concept of Power*, 2 BEHAVIORAL SCI. 201 (1957).

¹⁶ See generally Richard McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979); William Riker, *Implications from the Dis-equilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980).

¹⁷ See, *infra*, notes [x] to [y] and accompanying text (section on third face).

is discursive, which means that influence stems from the creation and interpretation of systems of knowledge and understandings that form social customs, such as laws and other systems of belief and practice.¹⁸

The First Face of Power

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

The starting point for most international relations scholarship is to analyze how governments use inducements and penalties to influence each other and how other actors use the same instruments to influence governments. While many governments try to coerce others directly, most international relations scholarship sees legal institutions playing a major role in shaping how states (and other actors) use their power.¹⁹ 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.²⁰

¹⁸ See, *infra*, notes [x] to [y] and accompanying text (section on fourth face).

¹⁹ For example, here are four studies by so-called “realist” scholars working in four distinct areas—all concluding that while state power is a dominant force international institutions have played central roles: (1) John G. Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, 23 INT’L SECURITY 43 (1998) (arguing that neorealism doesn’t fully explain why the Western order and post-WWII institutions have endured. Ikenberry also argues that traditional hegemonic theory does not take into account the liberal nature of American hegemony and the role of institutions in facilitating cooperation); (2) Robert Pape, *Soft Balancing against the United States*, 30 INT’L SECURITY 45 (2005) (arguing that other powers are likely to respond to growing U.S. power using “soft-balancing” non-military tools, including international institutions); (3) Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT’L SECURITY 85 (2004) (arguing that states should deploy a variety of new domestic and international institutional arrangements to govern failed states); and (4) William C. Wohlforth, *The Stability of a Unipolar World*, 24 INT’L SECURITY 1 (1999) (arguing that, as a unipolar power, the U.S. should maintain international security institutions in order to reduce conflict behavior and limit expansion by other major powers). A theme running through all this work is the use of state power as a force in shaping international institutions, often with powerful states working through coalitions of other states. A few scholars have taken the logic further, 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. The losers can either join the new, unsatisfying regime or be barred altogether. See, e.g., LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000).

²⁰ Scholars studying the Nonproliferation Treaty (NPT), for example, have shown that major powers have largely defined the content of that agreement so that it mirrored their central goals (less nuclear proliferation) and helped them send credible signals about those goals to other countries. In shaping the

The Second Face of Power: Agenda setting

The second face of power is the ability to influence the agenda. That a variety of actors shape the range of choices from which decisions are made is not news to international legal scholars, but political scientists have developed two sets of insights that reveal how power affects agendas. That research is making it possible to anticipate both who sets agendas and how agenda setting influences behavior.

One insight from research that focuses on agenda-setting is that states and other actors frame agendas in predictable ways by linking issues together. When topics are linked, it is much harder for outside (unlinked) issues to attract attention. Control over linkage can constrain and expand the bargaining space.²¹ It helps define the issue-area within which legal agreements attempt to regulate behavior. And while most scholarship has focused on how states use linkage to set agendas, there is growing interest in how

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

²¹ See generally Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 INT'L ORG. 425 (1979); James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281 (1983); James E. Alt & Barry Eichengreen, *Parallel and Overlapping Games: Theory and Application to the European Gas Trade*, 1 ECON. & POL. 119 (1989). International relations theory has long held that governments recognize the natural linkages across issues and that this results in the formation of international regimes. See Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 WORLD POL. 357 (1980). Yet linkage is also used strategically by international negotiators to expand their negotiating space. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988). Susanne Lohmann argues that issue linkage fosters cooperation when actors enforce punishments in one policy area for lack of compliance in others. *Linkage Politics*, 41 J. CONFLICT RESOL. 38 (1997). Michael D. McGinnis makes a similar argument, yet notes that the attempts to introduce new issues to be linked are perilous and may result in the breakdown of cooperation. *Issue Linkage and the Evolution of International Cooperation*, 30 J. CONFLICT RESOL. 141 (1986). Christina Davis argues that issue linkage can be particularly useful for overcoming domestic obstacles to cooperation. *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153 (2004).

international institutions link issues in ways that give them control over agendas and the framing of decisions.²²

Second, information and expertise can confer agenda-setting power on actors that do not have the material capabilities to use coercive power. For example, networks of academic scientists played a large role in formulating arms control agreements during the Cold War, such as through their command of special knowledge about geology essential for designing legal agreements to regulate nuclear testing.²³ Firms have also been particularly influential where they have had unique expertise, as the chemical industry did in setting the “schedules” of chemicals regulated by the chemical weapons treaty.²⁴ NGOs have also been influential in a diverse array of efforts—from banning landmines to regulating small arms and protecting wildlife—by working not only as advocates but also in providing information regarding the problem and by framing their favored solutions.²⁵ In some instances firms have also had a large framing impact, often by shifting regulation from formal intergovernmental bodies to private regulatory systems where they have more control over outcomes.²⁶

²² See Mark Pollack, *Delegation, Agency and Agenda Setting in the European Community*, 51 INT'L ORG. 99 (1997) (arguing that it is important to distinguish between IOs' formal and procedural agenda-setting powers and their informal powers. He argues that the European Commission's formal agenda-setting powers are stronger when a greater number of members of the Council of Ministers must vote to amend an EC proposal than to adopt it). See also George Tsebelis, *The Power of the European Parliament as a Conditional Agenda Setter*, 88 AM POL. SCI. REV. 128 (1994); Geoffrey Garrett & George Tsebelis, *An Institutional Critique of Intergovernmentalism*, 50 INT'L ORG. 269 (1996); George Tsebelis & Amie Kreppel, *The History of Conditional Agenda-Setting in European Institutions*, 33 EUR. J. POL. RESEARCH 41 (1998).

²³ They also played important roles, in tandem, with lobbying, second-track diplomacy, and consulting for political leaders. See Emanuel Adler, *The Emergence of Cooperation: National Epistemic Communities and the International Evolution of the Idea of Nuclear Arms Control*, 46 INT'L ORG. 101 (1992); HAROLD KARAN JACOBSON & ERIC STEIN, *DIPLOMATS, SCIENTISTS, AND POLITICIANS: THE UNITED STATES AND THE NUCLEAR TEST BAN NEGOTIATIONS* (1966).

²⁴ See Amy E. Smithson, *Implementing the Chemical Weapons Convention*, 36 SURVIVAL 80 (1994).

²⁵ See Diana O'Dwyer, *First Landmines, Now Small Arms? The International Campaign to Ban Landmines as a Model for Small Arms Advocacy*, 17 IRISH STUD. IN INT'L AFF. 77 (2006). See also Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613 (1998). On wildlife see, *infra*, notes [x] to [y] and accompanying text.

²⁶ David Vogel has argued that many of the shortcomings of global economic governance are due to the political influence of global firms that, while often agreeing to adopt voluntary standards, have typically opposed stronger international treaties, extra-territorial business regulations, and links between trade liberalization and labor, environmental, and human rights practices. By controlling the range of regulatory options and the forums in which regulation is developed, such firms have created private international standards for many processes and products; they have forced Western governments to take more responsibility for the conduct of their global firms outside their borders; and they have enabled Western activists to bypass the governments of developing countries, many of which have been unable or unwilling to regulate the conduct of global firms within their borders. See David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. (2008); David Vogel, *The Private Regulation of Global Corporate*

The Third Face: Norms and ideas

The third face of power is the ability to shape what societies see as legitimate and acceptable through the use of norms and ideas. One source of ready confusion is that political science research on “norms” adopts a broad definition of the concept that does not align perfectly with the concept of a norm established through custom, which is the bedrock for legal scholarship on customary international law. Legal institutions can have influence by codifying and shaping social norms.²⁷ But political science research has also looked to other institutions and actors that also play a role. Political scientists have long argued that norms have important effects on outcomes in international relations.²⁸ The most recent research has emphasized that norms have influence independent of the distribution of state power; they shape cooperation by providing states and non-state actors with information about interests, and they carry social content.²⁹

Legal scholars have long examined similar questions, unpacking the normative power of legal institutions.³⁰ Among the many practical debates that have emerged from

Conduct, in *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., 2009). One of the frontiers of research in this area concerns how the option of private regulation and the ability of firms to control access to essential information by participating directly in the regulatory process help shape the form and content of government regulation. For a survey of current research on private regulation, including several studies that point to the interplay between private and public regulation, see *Private Regulation in the Global Economy*, special issue of *BUS. & POL.* (Tim Büthe ed., 2010).

²⁷ Long ago several scholars argued that international law has the power to create and/or change norms, and see, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979); Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997). In recent years political scientists have helped elaborate on those arguments. See, e.g., Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 *INT'L ORG.* 633 (2000); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 111 *AM. POL. SCI. REV.* 573 (2007).

²⁸ Earlier neoliberal theories of cooperation and also international institutions (called “regimes” in the most influential study on this topic in the early 1980s) had all included a place for norms, but this was generally limited to facilitating cooperation between similarly self-interested actors or constraining their behavior (e.g., Ruggie 1982, Krasner 1983, Keohane 1984).

²⁹ See Finnemore 1993, 1996; Katzenstein 1996; Klotz 1995; Soysal 1994; Strang and Change 1993.

³⁰ See, e.g., Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). Koh (1997) agrees with Chayes & Chayes and Franck that “voluntary obedience” based on the internalization of international norms is more effective than “coerced compliance” (p. 2645). Yet he argues that they leave out the vital element of process. In other words, in order to argue that norms, legitimacy and identity cause states to *obey* international law, it is imperative to know *how* they cause this. Koh argues that a transnational legal process consisting of three phases—interaction, interpretation, internalization— provides the necessary description of how international norms become successfully

scholarship in law and political science, alike, has been the question of whether international institutions suffer in their legitimacy due to a “democratic deficit” that might be addressed, for example, by more formal involvement of civil society groups in the international law-making and implementation process—a topic that both international relations scholars and lawyers have addressed.³¹

While the argument that norms matter is not news to legal scholars or political scientists, the focus on political science research in recent years has been much more sharply on the mechanisms by which norms influence international legal issues.³² Much of the political science research in this area has also focused on individuals and organizations that are the agents that diffuse ideas and establish norms—such as international tribunals, advocacy networks (e.g., NGOs), firms, scientists, and arbiters of moral authority such as churches.³³

The insights from this political science begin with explanations for 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

internalized and state *obedience* becomes second nature. See also Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

³¹See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1999); Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* (Ian Shapiro ed., 1999); Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF. 2(2001); Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336 (2004).

³² Jeffrey Checkel (1998) argues that cohesive theory based on the logic of social construction should include three parts. First, it must explain how and why social construction occurs. Second, it must identify the social actors and mechanisms that cause change. Third, it must identify the scope conditions under which these actors and mechanisms operate, including how these conditions vary across countries. Jeffrey Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998).

³³ Finnemore and Sikkink argue that international criminal tribunals decrease violence because prosecutions present and reinforce legal norms providing legally binding judgments about what behavior is acceptable. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998). A similar theory to Goodman and Jinks (supra) is proposed by Risse et al., who argue that international human rights law changes preferences via a socialization process. They argue that socialization occurs via three casual mechanisms: (1) instrumental adaptation and strategic bargaining, (2) moral consciousness-raising, argumentation, dialogue and persuasion and (3) institutionalization and habitualization. *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999). Barnett and Finnemore argue that the rational-legal authority that IOs embody gives them power independent of the states that created them and channels that power in particular directions. Bureaucracies make rules, but in so doing they also create social knowledge. They define shared tasks, create and define new types of actors, create new interests for actors, and transfer models of political organization around the world. Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999).

"cultural match" between a norm and a target country.³⁴ Others argue that legitimacy is the key to trans-national norm diffusion. A key argument in this literature is that legitimacy can lead to compliance with international standards by giving an actor an internal sense of obligation to do so—quite independently of whether coercion or self-interest also play a role.³⁵ In addition, to the extent legitimacy exists in the international system, the system cannot be described as fully anarchic in the traditional sense.³⁶ 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.³⁷ Still others emphasize that legitimacy is less as a matter of moral persuasion and more as a point of efficient coordination.³⁸ Most studies of legitimacy see the concept as a counterpoint to brute force in international relations.³⁹

³⁴ Jeffrey Checkel defines cultural match as "a situation where the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system (constitutions, judicial codes, laws), and bureaucratic agencies (organizational ethos and administrative procedures." (p. 87) He continues to build his argument by arguing that the mechanism of norm diffusion varies depending on whether the domestic structure fits one of the following four categories: liberal, corporatist, statist and state-above-society. In the liberal structure, the mechanism for norm diffusion is societal pressure on elites. In the corporatist structure, it is primarily societal pressure on elites and secondarily elite learning. In the statist structure, the mechanism is primarily elite learning and secondarily societal pressure on elites. Finally, in the state-above-society structure, it is only elite learning. Jeffrey Checkel, *Norms, Institutions, and National Identity in Europe*, 43 INT'L STUD. Q. 83 (1999). See also Amy Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POL. 413 (1999) (arguing that international norms have been crucial in causing changes in Japanese policy toward Korean migrant workers, both through legal action and activist pressure on governments.); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 51 INT'L ORG. 633 (2000) (finding that the number of international human rights norms incorporated into international and regional Latin-America law significantly increased between the mid-1970s and 1990s); J.C. Sharman, *Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States*, 52 INT'L STUD. Q. 635 (2008) (using survey and interview data to argue that the recent adoption of anti-money laundering policies by 170 countries represents an example of international norm diffusion caused by "discursively mediated exercises of power", and not by coercion or learning).

³⁵ See Ian Hurd, *Legitimacy and Authority in International Politics*, 52 INT'L ORG. 379 (1999). Hurd further argues that accounting for the role of legitimacy in international requires explaining how it works, what its genealogy is in a particular case and its effect on theory-building. See also Michael N. Barnett, *Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations*, 49 WORLD POL. 526 (1997).

³⁶ Id. Political scientists of the English School have long made arguments along this line. See, *infra*, note [x].

³⁷ Ian Clark provides a three-part argument regarding the role of legitimacy. First, he argues that when governments acknowledge norms of acceptable behavior they provide evidence that legitimacy matters. Second, he argues that, while the standard of legitimate behavior generally evolves over time, it is often fixed during peace settlements and after major wars. Finally, he argues that legitimacy is more difficult to achieve today because there is an increasing number of democracies (although he is very unclear on his rationale for this point). IAN CLARK, *LEGITIMACY IN INTERNATIONAL SOCIETY* (2005).

³⁸ Erik Voeten builds off the earlier legitimacy literature when he asks why states behave as if the UN Security Council confers legitimacy upon the use of force. He argues that when states and other actors look to the UNSC for legitimacy, they are not seeking a moral judgment on the appropriateness of the use of force. Instead, UNSC decisions create accepted focal points on whether particular uses of force go beyond

In tandem with legitimacy, political scientists studying international relations have also built a literature to explain the process of persuasion. The touchstone for much of the persuasion literature is the argument that norms become powerful by being persuasive.⁴⁰ This claim has resulted in a scholarship that focuses on the mechanism of persuasion and the role of rhetorical argument in international relations. Risse (2000), for example, focuses on explaining how social processes like persuasion and argumentation differ from processes that have drawn greater attention from political scientists—such as strategic bargaining, coercion through inducements, and rule-guided behavior.⁴¹ He argues that arguing creates common knowledge both about the rules of the game and the definition of the situation. In addition, arguing allows actors to seek an optimal solution and common normative framework. Arguments generate useful information, such as by making it easier for actors to explore which norms and identities are valid. Some studies of persuasion also point to processes for social learning.⁴² However, there are many disagreements on the

a limit that should be defended. These focal points then become important in collaboration and coordination faced by states attempting to limit U.S. power. Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG. 527 (2005).

³⁹ For example, Martha Finnemore argues that legitimacy imposes significant limitations on power, even to the power of a unipolar actor. She argues that unipolar actors must legitimate their use of power in order to use it more effectively. Otherwise, they will be limited to inefficient uses of power that require no legitimacy. "Using power as more than a sledgehammer requires legitimation, and legitimation makes the unipole dependent, at least to some extent, on others." (p. 60). To be efficient, the unipole's actions are therefore limited in two ways. First, they must be deemed legitimate domestically. Second, they must appeal to leaders or other actors in other states. 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).

⁴⁰ See MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

⁴¹ In a similar spirit, Henry Farrell explains why new forms of global governance have emerged to regulate electronic commerce. He argues that these result from the effect of e-commerce on interdependence. New forms of technology do not involve the loss power, but rather difficulty in coordinating international solutions that prevent or limit the spillover of regulations beyond a state's borders. Interdependence involves not only coordination problems, or conflicts of interests, but also clashes between fundamental social norms. His argument is that approaches such as bargaining theory cannot account for the preference-changing effects of persuasion. He proposes a three-part test to determine whether persuasion has resulted in changed preferences: (1) has a communicative action apparently aimed at persuading others taken place?; (2) has this communicative action appreciably changed actors' beliefs?; and (3) has this change involved beliefs regarding the underlying parameters of action, or the disclosure of new possibilities of action that were previously unrecognized by actors? Henry Farrell, *Constructing the International Foundations of E-Commerce: The EU-U.S. Safe Harbor Arrangement*, 57 INT'L ORG. 277 (2003).

⁴² Jeffrey Checkel provides an argument that explains compliance with norms based on persuasion as a mechanism of social learning. He argues that social learning occurs not only through a process of obtaining new information (as many rationalists have argued) but through argumentative persuasion. Based on work by sociologists and psychologists, he argues that argumentative persuasion is likely to be more effective in five situations: (1) when the actor being persuaded is in a new and uncertain environment; (2) when the actor being persuaded has few prior beliefs that are inconsistent with the message; (3) when the persuader is an authoritative member of a group to which the actor being persuaded wants to belong; (4)

points of emphasis and causal mechanisms—or even whether it is useful to describe the process of persuasion in terms of cause and effect.⁴³

The Fourth Face: Doxa and the common sense

The fourth face of power is especially relevant for public international law. It is the ability to create “social doxa”—that is, opinions or “sets of belief widely espoused by popular audiences.”⁴⁴ Most of the ideas about how the fourth face operates are drawn originally from sociologists who study the influence of informal social customs and practices.⁴⁵ Already, international lawyers look at the process of acculturation—such as through redefining the orthodoxy and through mimicry—as a way that legal norms and institutions have a force quite distinct from the first three faces.⁴⁶

when the persuader acts out principles rather than lecture or demand; and (5) when interactions occur in less politicized and more private settings. Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553 (2001).

⁴³ See, e.g., Rodger A. Payne, *Persuasion, Frames and Norm Construction*, 7 EUR. J. INT'L REL. 31 (2001) (arguing that much of the constructivist literature on persuasion focuses excessively on persuasion and framing. He further argues that, instead, outcomes of highly contested normative struggles can only be understood by studying the underlying social processes, rather than the more psychologically oriented arguments such as framing and persuasion); Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT'L REL. 35 (2008) (emphasizing the role of rhetoric like the papers discussed above, but argue that others have been incorrect in focusing on its role in persuasion. They argue, instead, that the primary mechanism by which rhetoric operates is coercion); Christian Grobe, *The Power of Words: Argumentative Persuasion in International Negotiations*, 16 EUR. J. INT'L REL. 5 (2010) (bridging persuasion-based arguments with the focus on strategic bargaining found in the rational choice literature. He argues that rational actors will only be receptive to persuasion or argumentation when such communication provides them new causal knowledge that helps alleviate uncertainty. This implies that, when bargaining positions change, this is the result of changes in available information rather than changes in preferences.)

⁴⁴ [Quote from: Andreea Deciu Ritivoi, *Paul Ricoeur: Tradition and Innovation in Rhetorical Theory*. SUNY Press, 2006).]

⁴⁵ 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).

⁴⁶ Goodman and Jinks argue that although most theories attribute state compliance to coercion and persuasion, acculturation is a social mechanism that profoundly affects state behavior and yet has been largely misunderstood or unexplained. They define acculturation from an interdisciplinary perspective including social psychology theory and provide an argument as to why acculturation effects should be applied to states and not just individuals. Acculturation refers to “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture” (638). It occurs because of the social-psychological pressure to assimilate. Acculturation consists of orthodoxy, mimicry and status maximization micro-processes. Orthodoxy and mimicry develop when actors identify with a reference group. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (2005). [NEED TO ADD CITATIONS TO THE ORIGINAL SOCIOLOGY]

Processes such as acculturation and socialization have become a subject of growing interest for political scientists and has combined the third and fourth faces of power.⁴⁷ Of particular interest for legal scholars may be empirical research by political scientists that focuses on how international legal institutions create legitimacy by shaping the process through which actors are socialized and thus influencing how norms and ideas are internalized.⁴⁸ For example, some scholars have proposed that human rights agreements change state preferences through the spread of norms and acculturation.⁴⁹ Political scientists now have some evidence that joint membership in international organizations is associated with a long-term convergence of state preferences.⁵⁰ Elites working inside these organizations are subject to socialization,⁵¹ and socialization in turn depends on how the actor is embedded within the society, the intensity and duration of interaction with other relevant actors.⁵² Moreover, membership in international organizations (including those

⁴⁷ See, e.g., *POWER IN GLOBAL GOVERNANCE* (Michael Barnett & Raymond Duvall eds., 2005), at 3 (referring to this as "Productive Power" or "the socially diffuse production of subjectivity in systems of meaning and signification."); Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, in *Id.* (arguing that international organizations have power as a result of the authority conferred on them because of their moral position, rational-legal standing and expertise. This authority takes many forms, including the ability to use productive power to "participate in the production and the constitution of global governance."); Helen M. Kinsella, *Securing the Civilian: Sex and Gender in the Laws of War*, in *Id.* (arguing that the categories of "combatant" and "civilian" embodied in the Geneva Convention are "dependent upon discourses of gender that naturalize sex and sex difference.")

⁴⁸ See, e.g., CHRISTIAN REUS-SMIT, *AMERICAN POWER AND WORLD ORDER* (2004), at 4. Reus-Smit argues "that all political power is deeply embedded in webs of social exchange and mutual constitution; that stable political power—the sort that escapes the short-term vagaries of coercion and bribery to assume a structural, taken-for-granted form—ultimately rests on legitimacy; and that institutions play a crucial role in sustaining such power." See also Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 *INT'L STUD. Q.* 487 (2001). Johnston argues that socialization also takes place in part through processes that do not require internalization: persuasion (convincing actors that their interests align with the hegemon's) and social influence (inculcating pro-norm behavior by dispensing social rewards, such as status, and punishments, such as exclusion or shaming).

⁴⁹ See *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999).

⁵⁰ 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, Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *L. & CONTEMP. PROBS.* 15 (2004-2005).

⁵¹ 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).

⁵² See Jan Beyers, *Multiple Embeddedness and Socialization in Europe: The Case of Council Officials*, 59 *INT'L ORG.* 899 (2005).

not explicitly addressing human rights) is associated with the international diffusion of human rights practices.⁵³

The third and fourth faces of power, unlike the first two, look far beyond the nation-state as the most important actor international affairs. One result is that theories and evidence-gathering by studies that place heavy emphasis on these building blocks are often quite complicated. More actors are involved, and the chains of cause and effect are long and complex. And these theories are particularly prone to overlap with other social sciences, such as sociology and psychology, that have historically focused on individuals and group behavior, in contrast with most international relations scholarship that has historically concentrated on states.

The “Problem Type”

A second building block is based on the insight that not all challenges for international cooperation are the same. For most political scientists the form, content and success of international cooperation depend on the type of underlying problem that governments and other actors are trying to solve. 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.⁵⁴ While each of these areas has its own attributes, the tenor of recent political science research has been to look at the underlying characteristics of the problems—rather than the issue-area—that define possibility, content and results of cooperation. We call these characteristics the “type of problem.” Research that emphasizes the attributes of problems is usually functional in its orientation—it sees international cooperation stemming from the functional attributes of the problem at hand.

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

⁵³ See Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT'L STUD. Q. 127 (2010).

⁵⁴ A few legal scholars have also analyzed international cooperation by considering problem types. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

Strategy of Cooperation

When discussing the prospects for cooperation, many political scientists have adopted the terminology and insights of game theory. Game theory helps reveal the *strategy* of international cooperation: how one country behaves depends on its expectations for how other countries would respond. Determining the strategic context requires looking at which individual parties stand to benefit from cooperation as well as the incentives to violate (“defect”) from a cooperative agreement.⁵⁵ 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.⁵⁶ Some legal scholars have also put a central focus on the type of problem in their research.⁵⁷ While the

⁵⁵ More precisely, the strategic context usually begins with three questions (1) which parties stand to benefit from cooperation with each other, and to what extent?; (2) To what extent are the potential benefits from cooperation tangible or intangible?; and (3) once an agreement is put in place, to what extent would actors have an incentive to violate it? On the relationship between game theory and international relations, see generally THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1960). For significant applications of game theory to international relations, see, e.g., James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68 (1997); Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT’L ORG. 495 (1991); James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 Int’l Org. 269 (1998); Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999); Kyle Bagwell & Robert Staiger, *Domestic Policies, National Sovereignty and International Economic Institutions*, 116 Q. J. ECON. 519 (2001); Michael J. Gilligan, *Is There a Broader-Deeper Trade-off in International Multilateral Agreements?*, 58 INT’L ORG. 459 (2004). Several legal scholars have also adopted game-theoretic approaches. See, e.g., George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541 (2005); William B. T. Mock, *Game Theory, Signaling and International Legal Relations*, 26 GEO. WASH. J. INT’L L. & ECON. 33 (1992); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT’L L. 384 (1996); Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. (2011, forthcoming).

⁵⁶ 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); Todd SANDLER, *GLOBAL COLLECTIVE ACTION* (2004); TODD SANDLER, *COLLECTIVE ACTION: THEORY AND APPLICATIONS* (1992); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989).

⁵⁷ See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. 285 (2002); Moshe Hirsch, *Game Theory, International Law and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT’L L. & POL’Y 75 (1998); Brett M. Frichmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679 (2003).

full set of strategic contexts is large and complicated,⁵⁸ most political science research has concentrated on four in particular.

Collaboration

First, the vast majority of literature on the strategic context addresses collective action. In this type of problem, all countries would be better off if they worked together, but individually they have an incentive to renege on their commitments. The most famous illustration of these strategic incentives is the Prisoner's Dilemma, in which two accomplices are held in separate cells, each under interrogation and unable to communicate with the other. If neither confesses then neither can be convicted, but the first to reveal the truth gets a lighter sentence. The collective gains from cooperation (i.e., not confessing) are large, but the two accused nonetheless fail to collude because each knows the other will be tempted to turn state's evidence. This stylized game has attracted a massive literature that is useful for its general insights although, of course, the rigorous conditions of the Prisoner's Dilemma—such as the inability to communicate and contract—are rarely strictly observed in reality. Political scientists often refer to cooperation marked by strong incentives to defect as “collaboration.”⁵⁹

⁵⁸ See See, e.g., Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982); Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 1 (Kenneth A. Oye ed., 1986).

⁵⁹ Not all collaboration games can be characterized as Prisoner's Dilemmas. Another game scholars often analyze is the "Stag Hunt", in which there are two mutually beneficial outcomes, but one is significantly more so than the other. While players in the Stag Hunt would prefer to more beneficial outcome, their individual incentives lead them to defect and reach the less beneficial outcome. On collaboration and other problem types, see generally 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); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 311-16 (1982) (describing the ways in which collaboration differs from other problem types); Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 1 (Kenneth A. Oye ed., 1986) (arguing that collaboration is possible under certain conditions). On the Prisoner's Dilemma, see generally WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992) (describing the intellectual history of this problem); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (showing that cooperation can be achieved in a Prisoner's Dilemma game through multiple interactions); Hugh Ward, *Game Theory and the Politics of the Global Commons*, 37 J. CONFLICT RESOL. 203 (1993) (arguing that some global common pool resource issues can be analyzed as Prisoner's Dilemmas); Duncan Snidal, *Coordination vs. Prisoner's Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985) (arguing that coordination problems will lead to different types of solutions than Prisoner's Dilemma problems).

For example, most political science research on state arms control proceeds with the assumption that collaboration is difficult because the incentives to defect are severe and countries are particularly averse to policies that might endanger national survival. Countries will be wary about binding themselves to slow or stop development of vital weapons systems when their adversaries might develop weapons in ways that are difficult to detect.⁶⁰ Thus arms control, perhaps more than any other issue-area, has seen extreme attention to monitoring and verification of compliance with the aim of detecting and deterring breakouts in a timely way.⁶¹ Similar concepts are often used to explain cooperation in trade agreements when the incentives to defect are often strong.⁶² As

⁶⁰ These strategic incentives also explain why so many arms control agreements are rooted in bold aspirations yet struggle to have much real impact on the development and deployment of important weapons systems: it has proved very difficult to monitor and enforce agreements to the standard needed to make countries willing to risk disarmament. See George W. Downs, David M. Rocke, & Randolph M. Siverson, *Arms Races and Cooperation*, in COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986); Robert Jervis, *Security Regimes*, 36 INT'L ORG. 357 (1982).

⁶¹ See Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984); John Hart & Vitaly Fedchenko, *WMD Inspection and Verification Regimes: Political and Technical Challenges*, in COMBATING WEAPONS OF MASS DESTRUCTION 95 (Nathan E. Busch & Daniel H. Joyner eds., 2009) (arguing that verifiability of compliance is the key to effectiveness for arms control law). Several scholars have noted that technology often limits the ability of inspectors and technical secretariats to verify compliance. See Robert W. Helm & Donald R. Westervelt, *The New Test Ban Treaties: What Do They Mean? Where Do They Lead?*, 1 INT'L SECURITY 162 (1977); Jonathan B. Tucker, *Verifying the Chemical Weapons Ban: Missing Elements*, 37 ARMS CONTROL TODAY 6 (2007).

⁶² Indeed, most international arrangements on trade also reflect the hallmarks of collaboration. Nearly all countries, to different degrees, gain from policies that lower the barriers to trade and allow for a more efficient global economy. However, most also face strong temptations to erect trade barriers that protect their own industry—especially when the interest groups that benefit are well-organized politically and can exert great influence over national policy. For key scholarship on international trade law by political scientists, see, e.g., Michael A. Bailey, Judith Goldstein, & Barry R. Weingast, *The Origins of American Trade Policy: Rules, Coalitions, and International Politics*, 49 WORLD POL. 309 (1997) (discussing the ways in which domestic law interacts with international law); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2001); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007) (arguing that the potential for dispute resolution decisions that create long-term precedents affects state incentives to use these mechanisms); Judith L. Goldstein, Douglas Rivers, & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 737 (2007); Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94*, 57 WORLD POL. 453 (2005) (arguing that the institutional design of the GATT provides the loopholes necessary for strong states to capture the majority of benefits from trade liberalization); Helen V. Milner & B. Peter Rosendorff, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001) (arguing that flexibility is especially beneficial when there is domestic uncertainty); B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389 (2005). Most political science research on trade has followed the development of the world trading system—in particular the evolution of the GATT and WTO. In the early decades of the GATT it was relatively easy for a small number of countries to craft agreements, and the reciprocal nature of trade meant that most of those agreements were self-enforcing. As trade commitments have become more demanding and membership has grown so have the dangers of defection; in response, in the mid-1990s members of the WTO created an enforcement system much stronger than the one that existed under the earlier GATT system. With that new system, political science research has shifted to focus on how enforcement really

collaboration deepens and the incentives for shirking rise, so does the need to spot and punish violations. Long ago international relations scholars used this logic to explain why the international trade regime has co-evolved with its enforcement procedures,⁶³ and that same point has long been familiar to lawyers who have observed both national enforcement of international trade laws and also the emergence of multilateral enforcement.⁶⁴

Research on international agreements on environmental issues also often begin with similar assumptions—that there are temptations to shirk when managing a common pool resource (CPR) such as fish that live in the high seas.⁶⁵ Studies that begin with such

operates. This 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. 205 (2002); Andrew Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005); Marc Busch, Eric Reinhardt, & Gregory Shaffer, *Does Legal Capacity Matter?: Explaining Dispute Initiation and Antidumping Actions in the WTO*, ICTSD Project on Dispute Settlement, Series Issue Paper No. 4 (2008).

⁶³ See, e.g., Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982).

⁶⁴ See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992); Alan O. Sykes, *Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L J. 301 (1990).

⁶⁵ Typically political scientists have analyzed many environmental problems by starting with the assumption that they have similar strategic characteristics—that is, the prospect of large gains from cooperation but replete with incentives to defect and free ride—because they involve the management of a common pool resource (CPR). 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. Many legal scholars are no doubt familiar with the often-made distinction between private goods and public goods. CPRs can be thought of as a hybrid of these two types of goods. CPRs are like private goods in the sense that they come in a limited supply (i.e., they are rival goods), but they are like public goods because actors cannot be prevented from accessing them (i.e., they are non-excludable). 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). On the differences between types of goods, see Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954); HAL R. VARIAN, *MICROECONOMIC ANALYSIS* (3d ed., 1992); Ronald Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974). These characteristics of CPRs explain why so many are badly managed when institutions are weak. Perhaps the most often-analyzed example of a CPR is a fishery; it is hard to prevent others from fishing, but caught fish will not be available for others to enjoy as well. See H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954). Most international fisheries are over-depleted, for example, because any fisherman (or his nation) knows that it can easily avoid inconvenient fishing regulations. Long ago, political scientist Arild Underdal called this the "law of the least ambitious program" and showed that, because some fishing nations know that restrictions are hard to enforce, efforts to set and manage fishing quotas are usually not effective in protecting fish. ARILD UNDERDAL, *THE POLITICS OF INTERNATIONAL FISHERIES MANAGEMENT: THE CASE OF THE NORTH-EAST ATLANTIC* (1980). A raft of studies on fisheries and other common pool resources confirms that pessimism. See, e.g., Jill M. Casey & Ransom A. Myers, *Near Extinction of Large, Widely Distributed Fish*, 281 SCI. 690 (1998); Jeremy B. C. Jackson, et al., *Historical Overfishing and the Recent Collapse of Coastal Ecosystems*, 293 SCI. 629 (2001); Julian K. Baum, et al., *Collapse and Conservation of*

assumptions are usually pessimistic about the prospects for cooperation unless strong formal enforcement mechanisms exist. However, in recent decades, as governments craft more demanding agreements they have also given greater attention to a wide array of enforcement mechanisms.⁶⁶ In tandem, a body of research has emerged over the last two decades that shows the conditions under which collective action to manage CPRs is likely to arise even when formal mechanisms for contracting, monitoring and enforcement don't exist.⁶⁷

Asymmetrical Collaboration: Upstream-Downstream Problems

Although the vast majority of political science research on international cooperation is focused on collaboration problems, there are other problem types that also merit attention. A second type of strategic situation arises when cooperation is highly

Shark Populations in the Northwest Atlantic, 299 SCI. 389 (2003); Ransom A. Myers & Boris Worm, *Rapid Worldwide Depletion of Predatory Fish Communities*, 423 NATURE 280 (2003).

⁶⁶ Often these are not called “enforcement” mechanisms because the political sensitivities to enforcement are acute in most areas of international cooperation. For example, the Montreal Protocol on the Ozone Layer 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). Even where political scientists agree on how some strategic contexts create a need for enforcement, one of the areas of intense disagreement concerns which kinds of enforcement mechanisms are most effective. Some scholars, especially those focused on trade, have looked to formal international mechanisms to which the task of enforcement has been delegated—such as the WTO's dispute settlement system. Others look to private enforcement mechanisms and to the incorporation of international obligations into domestic law as more powerful forces to assuring that countries honor their international obligations.

⁶⁷ Some optimism is also found in the literature on “local” CPRs that finds an abundance of effective collective action in local settings because the players are more likely to know each other and thus it is easier to monitor and punish defectors. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); Clark C. Gibson, John T. Williams, & Elinor Ostrom, *Local Enforcement and Better Forests*, 33 WORLD DEV. 273 (2005); OSTROM, ELINOR, ROY GARDNER, & JAMES WALKER, *RULES, GAMES, AND COMMON-POOL RESOURCE* (1994); MICHAEL D. MCGINNIS, *POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS* (1999); INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds., 1995). That same logic suggests that there will be more success in managing international common pool resources when the number of parties is smaller. In these situations, it is easier to monitor and enforce regulations, and each party, individually, has a stronger incentive to cooperate. The North Pacific Fur Seals Convention, for example, successfully managed the size of the seal population when only four countries were involved and then unraveled as new countries sought to join. Treaty for the Preservation and Protection of Fur Seals, July 7, 1911, 37 STAT. 1542. This treaty was superseded by the Interim Convention on Conservation of North Pacific Fur Seals, Oct. 14, 1957, 8 U.S.T. 2284, 314 U.N.T.S. 105. See SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING* (2003), Chapter 2.

asymmetrical. The starkest examples are “upstream-downstream” problems in which one country exports harm to others. Here, only the downstream country has an interest in cooperation (such as stricter policies to reduce water pollution) and the upstream country is generally indifferent (or even gains, such as by exporting noxious effluents). The standard solution to these problems is a system of incentives, such as payments, that the downstream country organizes to change the behavior of upstream polluters.⁶⁸ Most political science research has focused on the political processes that govern how these incentives are organized and their practical impact on the behavior of polluters. Examples include river basins that have commanded detailed research by political scientists who have shown how the upstream-downstream nature of the problem has determined how countries can structure effective legal agreements—such as in the Rhine River.⁶⁹ While the most obvious examples of such problems may be in environmental pollution, others include migration as well as international trafficking in narcotics, small arms and proliferation of weapons of mass destruction.⁷⁰

Coordination

A third kind of international cooperation arises when agreements are self-enforcing. Many kinds of agreements might have this attribute. For example, an agreement may require its members to do little or nothing beyond its own self-interest; treaty registers may be filled with such agreements, but they are rarely interesting to scholars who study actual cooperation.⁷¹ Other examples include reciprocal agreements where two countries’ benefits and costs of cooperation are so tightly linked that each country remains faithful to the

⁶⁸ This solution has its origins in the insights of economist Ronald Coase. *The Problem of Social Cost*, J.L. & ECON. 1 (1960). Coase’s insight was that it was often just as efficient for the polluted to pay polluters to change their behavior than for polluters to pay. The same logic has been used, also originally by economists, to explain why countries that gain the most from alliances are often willing to take on a disproportionate share of the cost.

⁶⁹ The international negotiations over the protection of the Rhine River from chloride pollution provide a useful example. While the countries through which the Lower Rhine flowed were concerned that chloride damaged their crops and water systems, the upstream countries that created this pollution did not face this problem and did little to reduce pollution. The ultimate solution hinged, in part, on the Netherlands (the country most damaged from chloride pollution) paying France and other polluters for infrastructure projects that cut the effluent. Thomas Bernauer argues that this problem had many characteristics that could have led to a quick solution, including that the countries had the financial capacity to implement a solution and that the issue was framed narrowly. Yet, he notes that after sixty years of effort the solution reached was “too little, too late,” in part because the asymmetric interests in cooperation prolonged the bargaining process. Thomas Bernauer, *Protecting the Rhine River against Chloride Pollution*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE (Robert O. Keohane & Marc A. Levy eds., 1996).

⁷⁰ [add cites]

⁷¹ See, supra, notes [x] to [y] and accompanying text (section on selection effects).

agreement.⁷² Some research on self-enforcing agreements has focused on what political scientists call “pure coordination.”⁷³ In these cases, every country has an interest in coordinating around a single standard. Once the standard—any standard—is in place there is no incentive to defect.

Agreements of this type are particularly interesting to scholars who think that the enforcement mechanisms under international law are weak or nonexistent. Pure coordination offers the possibility of international cooperation without the challenge of enforcement.⁷⁴ Pure coordination games have attracted much attention from theorists, but they are probably rare in the real world because important countries and interest groups are usually not indifferent to which standards are adopted. The setting of a standard often defines which firms and countries reap the most benefits from cooperation. And except for the most trivial standards, once a decision has been made for a particular standard there nonetheless can be strong pressures to defect. Among the cases that have been studied carefully by political scientists are those involving the setting of food safety standards⁷⁵ and

⁷² In reciprocal settings enforcement is so straightforward that analysts often consider these as self-enforcing. We are skeptical that these agreements actually exist, but the classic example that many scholars cite is the early cooperation under the GATT. The tariff reductions that one country offered to other GATT members were reciprocal and thus failures to honor those tariff promises could be met with swift, targeted retaliation. In reality, the benefits and costs of participation in tariff reducing agreements are more asymmetrical, enforcement is not costless, and most scholars today view most cooperation on trade as a problem of collaboration. See, *supra*, notes [x] to [y] and accompanying text (section on trade).

⁷³ On coordination games, see generally Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 311-16 (1982); DAVID LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969); David Laitin, *The Tower of Babel as a Coordination Game – Political Linguistics in Ghana*, 88 AM. POL. SCI. REV. 622 (1994). Other types of problems are also often considered to be self-enforcing. For example, reciprocity can emerge in cooperation problems with incentives to defect when the actors interact repeatedly. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

⁷⁴ For example, international standards for the use of radio frequencies help increase the benefits to all countries because the electromagnetic spectrum is not plagued by interference. With common standards equipment manufacturers can market to a larger world market, which helps lower the cost for consumers. Similar benefits arise from coordination of rules on civil aviation, such as common rules on altitudes, routes, coordination of flight plans and weather. Because such standards are self-enforcing and often do not involve large political controversies, the task of setting them is delegated to technical bodies such as the international telecommunications union (ITU), the international civil aviation organization (ICAO), the world meteorological organization (WMO). The ranks of international organizations also include bodies that had prized positions in setting standards for technologies and industries that are less pivotal today thanks to technological change—such as the universal postal union (UPU). Until political scientists began systematic research on the logic and organization for international cooperation in the early 1980s when interest in “international regimes” arose, a large part of the field’s empirical research on international cooperation focused on these kinds of standards setting bodies.

⁷⁵ For example, a few political scientists have examined the process of setting technical standards within the WTO. When the WTO was created the task of negotiating trade-related standards was delegated to several international bodies—among them the WHO/FAO Codex Alimentarius Commission for food safety standards. In practice, the work of the Codex has become much more politicized now that its standards are more relevant; and even when Codex agrees on standards, such as on the use of hormones in beef, trade disputes still arise because important countries violate those rules. See David G. Victor, *Effective*

standards in telecommunications⁷⁶ that have large impacts on the size of markets and the shape of commercial competition.

Responsibility

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

Because no tangible externality crosses borders, research on responsibility problems has placed a heavy emphasis on the diffusion of ideas and norms and on the role of non-state actors as conduits for those ideas.⁷⁷ By far, the issue-area with these attributes that has attracted scholarly research has been the protection of human rights. And this may help explain why the field of human rights is one where the third and fourth faces of power—which emphasize diffusion of norms, dialogue and socialization rather than coercion and overt control over agendas—are particularly prominent in political science scholarship.⁷⁸ Responsibility problems are also an area where there is a large and growing body of research by legal scholars whose methods and research questions overlap heavily with those of international relationship scholars.⁷⁹ And while a large fraction of the research on responsibility problems emphasizes the third and fourth faces of power, these problems also reveal the other faces of power at work as well—through powerful states that set the agenda, create incentives for compliance, and link topics such as human rights

Multilateral Regulation of Industrial Activity, Ph.D. Dissertation, Massachusetts Institute of Technology (1997); MARK A. POLLACK & GREGORY C. SHAFFER, *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* (2001); WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY (Christopher K. Ansell & David Vogel eds., 2006); Tim Büthe, *The Globalization of Health and Safety Standards*, 71 L. & CONTEMP. PROB. 218 (2008).

⁷⁶ See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991); Peter Cowhey, *The International Telecommunications Regime: The Political Roots of International Regimes for High Technology*, 44 INT'L ORG. 169 (1990).

⁷⁷ See, *infra*, notes [x] to [y] and accompanying text (section on norm diffusion).

⁷⁸ See, *infra*, notes [x] to [y] and accompanying text (sections on 3rd and 4th faces of power).

⁷⁹ See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (2005).

to other areas of international cooperation where enforcement is easier to provide, such as trade.⁸⁰

Uncertainty and Information

In addition to the strategic context, political science research often distinguishes cooperation problem by the availability of information that would be necessary to construct and implement a functional system for international cooperation. Uncertainty has long been part of research by public international lawyers who have focused on questions such as lack of information about whether or not states have complied with international legal obligations,⁸¹ ambiguity about legal requirements⁸², or the flexibility of legal rules.⁸³ Political science research is now unpacking how these and other kinds of uncertainty affect international cooperation generally. Three major types of uncertainty have attracted the most attention.

The first kind of uncertainty, and perhaps the most familiar one to most legal scholars, is about the credibility of promises. In trade, for example, countries may be unsure whether other countries have honored their commitments to reduce trade barriers or, instead, have buried these mechanisms in dense legislation. The lack of credible commitments is also often a major aspect of international cooperation on human rights, especially because the most egregious violators tend to limit access to international monitors. This uncertainty, in turn, makes governments skittish about making promises that could be particularly costly if they cannot confirm that others are living up to their obligations.⁸⁴ In arms control, false trust that other countries will honor their commitments

⁸⁰ SEE EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* (2009).

⁸¹ See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

⁸² See, e.g., C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983).

⁸³ See, e.g., Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993). See also, *infra*, notes [x] to [y] and accompanying text (section on flexibility).

⁸⁴ See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that when there is uncertainty over behavior a tribunal can provide the neutral information necessary to restore inter-state cooperation); B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389 (2005) (arguing that this type of uncertainty is a key problem with respect to international trade law); Helen

could leave a country's survival in doubt.⁸⁵ This kind of uncertainty is the starting point for the Prisoner's Dilemma and its central insight that cooperation easily falters.⁸⁶

Governments are also often uncertain about what they, themselves, can deliver. In traditional state-to-state agreements such as arms control agreements governments are the key actors in negotiating, joining and implementing international agreements. Negotiators often have a clear idea about what they can implement because the only actor whose behavior must change during implementation is the government itself. Over the last few decades, however, international cooperation has shifted to a wide range of issues that require efforts by many actors who are not the government itself. Traditionally, human rights problems were viewed through the lens of governments oppressing their citizens and thus human rights agreements focused on changing government behavior.⁸⁷ Yet scholars are now increasingly interested in the ways in which international human rights law has attempted to influence private actors such as militias and even the labor practices of firms.⁸⁸ Likewise, traditional arms control agreements focused on state procurement and operation of weapons systems such as intercontinental ballistic missiles; since the early 1970s attention has shifted to examine, as well, efforts to regulate private actors that facilitate arms proliferation (e.g., smugglers and scientists), private security firms, and firms that

V. Milner & B. Peter Rosendorff, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001) (arguing that flexible rules are especially beneficial when there is domestic uncertainty);

⁸⁵ 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); George W. Downs, David M. Rocke, & Randolph M. Siverson, *Arms Races and Cooperation*, in COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986) (arguing that arms races are actually often Deadlock games (rather than Prisoners' Dilemmas) in which actors prefer defection to cooperation, which suggests that the problem cannot be solved using the types of institutions created in other areas);

⁸⁶ See, *supra*, notes [x] to [y] and accompanying text (section on collaboration).

⁸⁷ See generally LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979), chapter 12.

⁸⁸ See, e.g., Philip Alston, *Core Labor Standards and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am. J. Int'l L. 819 (2007); David Vogel, *The Private Regulation of Global Corporate Conduct*, in THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods eds., 2009). Legal scholars have also explored similar questions. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001-2002); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

manage so-called “dual use” technologies that have legitimate commercial purposes that are hard to distinguish from dangerous arms.⁸⁹

A second kind of uncertainty is about the state of the world or the “exogenous shocks”—that is, unpredictable changes in circumstances caused by external factors. Such shocks can undermine or enhance cooperation, depending on the circumstances. The original strategic arms control talks focused on numbers of missiles because those were easier to measure than actual warheads, but technological changes (in part spurred by the existence of arms control treaties) encouraged the U.S. and U.S.S.R. to develop multiple targetable warhead (so-called “MIRV”) missiles. Those kinds of changes in technology made both sides wary about making promises to regulate their arms and made it harder to convince skeptical domestic audiences that arms control would improve national security.⁹⁰ Similarly, 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 that its emissions would be much higher than expected. That higher baseline, along with somewhat unexpected political shifts in the U.S., meant that the U.S. could easily refuse to ratify the Kyoto Protocol. In 2001 when the question of ratification finally arose, it was all but impossible to comply.⁹¹ For political scientists, this outcome driven, in part, by the changing state of the world was predictable. By contrast, in nuclear testing, partially exogenous changes in technology had the opposite effect—making original goals for deep reductions in testing and in the size of tests feasible because new technologies and understanding of geophysics made it possible to monitor underground weapons tests more reliably.⁹²

⁸⁹ See, e.g., Richard A. Bitzinger, *The Globalization of the Arms Industry: The Next Proliferation Challenge*, 19 INT'L SECURITY 170 (1994); James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 14 J. CONFLICT & SECURITY L. 401 (2008); Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INT'L ORG. 367 (2007).

⁹⁰ For these insights, we look to a wider background than just political science because so much of the research and practice of arms control is done by people with technical backgrounds and some by economists interested in the strategy of cooperation. See TED GREENWOOD, *MAKING THE MIRV: A STUDY OF DEFENSE DECISION MAKING* (1975); Thomas C. Schelling, *What Went Wrong with Arms Control*, 64 FOREIGN AFF. 219 (1985-1986); Herbert F. York, *ABM, MIRV and the Arms Race*, 169 SCI. 257 (1970). See also Steven E. Miller, *Politics Over Promise: Domestic Impediments to Arms Control*, 8 INT'L SECURITY 67 (1984).

⁹¹ See DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001). See generally Jana von Stein, *The International and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol*, 51 J. CONFLICT RESOL. 243 (2008); William A. Pizer, *The Optimal Choice of Climate Change Policy in the Presence of Uncertainty*, 21 RESOURCE & ENERGY ECON. 255 (1999).

⁹² See, e.g., HAROLD KARAN JACOBSON & ERIC STEIN, *DIPLOMATS, SCIENTISTS, AND POLITICIANS: THE UNITED STATES AND THE NUCLEAR TEST BAN NEGOTIATIONS* (1966).

Third, international institutions must contend with uncertainty about preferences.⁹³ When governments begin to cooperate they may not know their interests with precision. Moreover, preferences often change.⁹⁴ International institutions can contribute to the process of shaping preferences in many ways, such as by drawing attention to problems that can accelerate the diffusion of norms about how best to solve those problems.⁹⁵

Most political scientists see uncertainty in preferences—and in the difficulties in projecting how preferences will evolve—as a factor that impedes international cooperation.⁹⁶ For example, states vary in terms of their preferred methods for treaties on prisoners of war (POWs), creating uncertainty about preferences; combined with uncertainty about how states actually treat POWs leads to an international legal system in which violations are punished irregularly and often disproportionately.⁹⁷

Most political scientists view international institutions—such as treaties and organizations—as instruments for helping governments manage the effects of uncertainty. They help stabilize expectations about behavior. Obligations to report information, which are common in regulatory treaties, help create transparency. Lowering uncertainty helps to reduce the “transaction costs” that states incur as they attempt to cooperate. In turn, the

⁹³ See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); William A. Pizer, *The Optimal Choice of Climate Change Policy in the Presence of Uncertainty*, 21 RESOURCE & ENERGY ECON. 255 (1999).

⁹⁴ Indeed, the uncertainty of preferences is an area where the “rational” design of international institutions has much in common with so-called “constructivist” research programs. Few of the scholars who adopt a rationalist approach to studying international institutions have a theory that explains where preferences originate. And scholars who adopt a constructivist approach have had a hard time explaining which forces that could alter preferences are most influential.

⁹⁵ See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 514 (1997); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 INT'L ORG. 1 (2006).

⁹⁶ See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001) (arguing that uncertainty about preferences leads to restrictive membership criteria); Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971 (2001); Lisa Martin, INTERESTS, POWER AND MULTILATERALISM, 46 INT'L ORG. 765 (1992). We note, however, that some scholars suggest the opposite: that ignorance about exactly how the world will unfold, including the preferences of key countries, could make it easier for countries to establish institutions that will, in turn, stabilize norms and expectations. See ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979); Joel Sobel, *A Theory of Credibility*, 52 REV. ECON. STUD. 557, 570 (1985) (“Long-term arrangements are of value when there is uncertainty about preferences because past transactions provide relevant information to agents.”)

⁹⁷ James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971 (2001).

outcome is more demanding and effective international cooperation—including international legal agreements—because governments are better able to make credible promises and therefore to trust each other's promises.⁹⁸

Domestic Politics

A third major building block in theories of international relations is the role of domestic politics. Until about two decades ago most international relations scholarship focused on the state itself. It looked at how elites influenced government policy and had relatively few systematic insights into how domestic and international politics interact. All that is now changing. Some of those changes have come through scholarship that emphasizes the third and fourth faces of power, which intrinsically look inside state governments to the underlying societies and non-state actors that influence norms and behavior.⁹⁹ And some have come by coupling theories of domestic and international politics. One of the original metaphors for this work was “two level games,” and over the last decade the large advances in this area have come from figuring out exactly how those games are played at different levels and how outcomes at one level shape those at the other.

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As research that uses “domestic politics” as a building block has flourished scholars have worked on three fronts that have large implications for international cooperation generally and international legal institutions in particular.

⁹⁸ The key work in political science examining how institutions can reduce transaction costs in international cooperation is ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984). On the role of institutions in lowering transaction costs by reducing uncertainty, see DAVID A. LAKE, *ENTANGLING RELATIONS* (1999). Attention to transaction costs builds on a large literature, mainly in economics and decision theory, on the role of information in bargaining. On the role of information generally, see ERIC RASMUSEN, *GAMES AND INFORMATION* (2d ed., 1994). On the problem of uncertainty in multiparty negotiations, see generally HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); David Lax & James K. Sebenius, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, in *NEGOTIATION ANALYSIS* 153 (Peyton Young ed., 1991). On the mechanism by which uncertainty increases transaction costs, see George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* (1975).

⁹⁹ See, *supra*, notes [x] to [y] and accompanying text (sections on third and fourth faces of power).

¹⁰⁰ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans, Harold Karan Jacobson, & Robert D. Putnam eds., 1993). [mention and cite the Schelling conjecture.]

First, relying heavily on the work of Helen Milner, many argue that domestic politics affect the prospects for cooperation.¹⁰¹ Her starting point is that differences in how domestic politics are organized affect the probability of successful cooperation. For example, when government is divided, international cooperation is less likely overall. Moreover, in such situations the content of agreements that the country accepts are more likely to reflect the legislature's preferences because legislative approval is essential to gaining a country's consent. She also finds that the distribution of information within a country affects the prospects for cooperation. In general, highly asymmetric information undermines cooperation, but in cases where information is concentrated in interest groups that favor cooperation—for example, a coalition of firms that strongly favor more liberal trade policies—then the outcome can be more cooperation than even would be expected if perfect information were widely available. 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.

Research of this type has devoted particular attention to explaining the interplay between domestic politics and international policies on trade.¹⁰² Many of these studies, including Milner's, predict that the openness of the economy is a principal determinant of preferences. Thus preferences are partially endogenous: groups that benefit from openness favor policies that lead to more openness, and the effects of trade bolster these groups' position within the economy.¹⁰³ Political scientists have been particularly influenced by models developed in international economics that have formally coupled international policy decisions on trade with the structure of the domestic economy and its politics.¹⁰⁴

Second, some scholars have focused on how domestic politics affect the credibility of international commitments. Comparing the US and Japan, for example, some scholarship suggests the US was able a more reliable partner in international agreements because the US electoral system gave politicians more incentives to provide public goods (which included multilateral cooperation whose benefits were broadly distributed) and the transparency of the US system increased the credibility of its promises.¹⁰⁵ One practical

¹⁰¹ HELEN MILNER, *INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS* (1997)

¹⁰² [cite other studies on two level games and trade.]

¹⁰³ [add explanatory citation to other “domestic” factors that explain cooperation—such as the earlier “small states” arguments; cite also Gourevitch]

¹⁰⁴ [cite here grossman and helpman, unless we decide to make a separate section on all that.]

¹⁰⁵ See Peter Cowhey, *The International Telecommunications Regime: The Political Roots of International Regimes for High Technology*, 44 INT'L ORG. 169 (1990).

implication of this approach is that by influencing credibility, domestic politics and political institutions could shape which international agreements are most effective. Another implication is that the design of international commitments could help governments make more credible commitments. For example, when the array of domestic political forces could lead a government to renege on its international commitments it may demand escape clauses and other types of flexible international commitments with the goal of better aligning its formal international commitments with what it is sure it can deliver at home.¹⁰⁶

Third, some studies have tried to link the type of national polity to its behavior towards international commitments. The largest portion of that literature focuses on the effects of democratic decision-making. A general consensus has emerged that democracies are generally more likely to honor commitments of various types.¹⁰⁷ Several scholars have pointed to the importance of regular elections in democracies as the key mechanism for encouraging compliance with international commitments as elections offer voters an opportunity to punish governments that fail to comply.¹⁰⁸ With respect to human rights, in particular, several scholars have argued that democracies are more likely to follow through on their international commitments because otherwise domestic constituents who care about human rights will punish leaders electorally.¹⁰⁹ Of particular interest to lawyers are

¹⁰⁶ See Helen V. Milner & B. Peter Rosendorff, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001). Further, Rosendorff (2006) lays out a model that makes several important predictions regarding international trade cooperation. First, democracies have a greater tendency towards unilateral liberalization. Second, democracy affects the abilities of governments to improve on this reversion point. Third, Democracies are more likely to cooperate in the form of PTAs. Fourth, concessions are most likely in a democracy-democracy dyad. The latter point builds on the argument by Mansfield et al. (2002) that more democratic states are more likely to conclude trade agreements. Pahre (2006) conducts an empirical test using a model similar to Rosendorff's. He finds that ratification of negotiated agreements has rarely been a problem for states, suggesting that the two-level theories over-emphasize this problem (although he notes that the rare occurrence of ratification failure could be a result of selection). Pahre also finds that, under divided government, the outcome partly depends on whether the executive or legislature controls the agenda establishing the reversion point. If the executive does, this increases likelihood of cooperation because the executive can threaten an outcome the legislature will not accept

¹⁰⁷ Brett Ashley Leeds, *Domestic Political Institutions, Credible Commitments, and International Cooperation*, 43 AM. J. POL. SCI. 979 (1999); Beth. A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000); Fiona McGillivray & Alastair Smith, *Trust and Cooperation Through Agent Specific Punishments*, 54 INT'L ORG. 809 (2000); Emilia J. Powell & Sara M. Mitchell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397 (2007).

¹⁰⁸ (Gaubatz 1996; McGillivray and Smith 2000; Mansfield et al. 2002). The causal logics that lead to compliance vary widely. Dai (2007) provides some of the most specific reasoning behind why democracies are more likely to comply with international legal commitments. She argues that treaty bodies and monitoring inform and empower domestic voters to punish governments. When (1) a pro-compliance constituency is relatively large; and (2) a treaty provides important new information regarding the government's record of compliance, then the government will have a strong incentive to honor its commitments.

¹⁰⁹ (Poe, Tate, and Keith 1999; Keith 1999, 2002; Poe and Tate 1994).

arguments that see the pressure for compliance by democracies rooted in domestic institutions, notably courts, that are predisposed to seek decisions that align with international obligations.¹¹⁰

Studies that look at the type of polity have also explored how governments use the decision to join international commitments as a way to signal to different domestic constituencies. Some scholars have argued that authoritarian regimes join human rights treaties then conspicuously fail to comply as a way to signal to opposition groups the extent of the actions they are willing to take to remain in power.¹¹¹ Unstable regimes, especially new democracies, are prone to joining human rights agreements and institutions so they can lock-in compliance with human rights norms.¹¹² More specifically, governments in these countries are particularly concerned with preventing domestic oppression. Because domestic institutions are weak or unstable, they join international institutions in order to reduce domestic political uncertainty and secure their commitments. And joining international institutions can help leaders solve domestic political problems by constraining other domestic actors in ways that allow leaders to move domestic policy toward their preferred outcome.¹¹³ Thus, not only can domestic politics constrain leaders' choices in international lawmaking, but international commitments can also be used to constrain domestic politics.

¹¹⁰ Others argue that the explanation for democratic compliance with human rights treaties lies in effective domestic institutions that can enforce international legal commitments (Neumayer 2005; von Stein 2008). Powell and Staton (2009) recently provided an interesting model that builds on this work. They argue that understanding the effectiveness of domestic judicial institutions is the key to understanding the relationship between domestic institutions, treaty ratification and treaty compliance. They argue that states with more effective domestic courts are less likely ratify human rights agreements and later violate them – and this is because effective courts will be able to impose costs on leaders who violate human rights agreements. On the other hand, states with ineffective courts will be more likely to ratify, but not comply with, human rights treaties.

¹¹¹ See James R. Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance*, available at <http://iserp.columbia.edu/files/iserp/Rosendorff--CUIPS%20Paper.pdf>.

¹¹² See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INTL ORG. 217 (2000). See also JON PEVEHOUSE, *DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION* (2005); Emilie M. Hafner-Burton, Edward Mansfield, & Jon Pevehouse, *Democratization and Human Rights Institutions*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450445.

¹¹³ See Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996).

Part II: Legal Design and Content

The building blocks discussed in the last part help explain the fundamental factors that political scientists typically consider when analyzing legal institutions. Now we turn to the particular implications of political science research for scholarship in international law. In this section we focus on the architecture of legal agreements and institutions. In principle, this is an area where political science research on why certain designs are selected and on which designs have the most practical effect should align well with the normative and research interests of public international lawyers. In practice, however, the political science and legal communities have not yet realized the many ways that their research overlaps—in part because political science research has been viewed as too broad and not sufficiently connected to the important practical details of how legal doctrine is crafted. Here we suggest some of the connections that could be made between the fields.

The dominant perspective in political science research is functional—the design of international commitments reflects choices that actors make when trying to solve policy problems while advancing their interests. Put differently, those commitments reflect a “rational design.”¹¹⁴ Many of those design choices reflect, in particular, the efforts by actors to manage the effects of uncertainty. But that perspective isn’t the only one. A looser collection of studies sees international design choices as the effect of path dependence—early choices constrain later ones.¹¹⁵ And as more scholars have looked to the third and fourth faces of power as driving forces in politics a literature on how ideas, persuasion, notions of legitimacy and learning shape international commitments has also emerged.¹¹⁶

Here we organized our remarks around the main findings from research that adopts the rational perspective—for that has been particularly helpful for building and testing theories—and then indicate where other perspectives lead to different findings and directions for research. While the menu of choices for design of international legal institutions that political scientists have studied is long and complex, four topics have commanded most attention and are also the most relevant for legal scholars and lawmakers: the legal status of obligations; precision of commitments; delegation to other

¹¹⁴ See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001); Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005). The particular term “rational design” is barely a decade old. However, this line of thinking applied to international law is in fact a much older research program. See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984)

¹¹⁵ [add cites to path dependence studies here]

¹¹⁶ [infra cite to learning discussion]

bodies such as enforcement mechanisms and tribunals; and membership. We look at each in turn.

Legal Status of Obligations

First is obligation, which is the extent to which actors are strictly bound by rules or other commitments.¹¹⁷ Most of this literature has focused on the choice of “hard” (fully binding) versus “soft” (non-binding) legal arrangements. The legal community has long been interested in the choice between hard and soft law,¹¹⁸ and most scholars and practitioners have long assumed that binding law is best and that non-binding law is an unwelcome stepchild that is tolerated when other options are unattainable.¹¹⁹ International relations scholars have probably had similar views as traditionally there has been a normative bias in most international relations scholarship in favor of institutionalization, and binding agreements are the most visible and studied means of codifying an international institution.¹²⁰

Over the last two decades political science scholars have looked in much more detail at how diplomats select between binding and non-binding legal forms. A central finding from their research is that the choice of soft obligations does not necessarily reflect a failure to craft hard law. Rather, governments often choose soft legal instruments because they are less costly to negotiate, more adaptive in the face of uncertainty, and more readily adjusted to facilitate compromise between actors with differing interests and degrees of power. Indeed, these same factors explain why, looking across many areas of human interaction,

¹¹⁷ See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

¹¹⁸ See, e.g., Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 Int'l & Comp. L.Q. 787 (1986); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999); COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647 (2002); COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2003).

¹¹⁹ For earlier arguments along these lines, see, e.g., Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). Today this view has waned a bit, but the primacy of binding treaty law over less binding other forms of agreements remains. [cites]

¹²⁰ For a similar argument, see George W. Downs, Kyle W. Danish, & Peter N. Barsoom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 46 (2000). Some political science research has suggested areas where legalization is excessive. We think that empirical research is where this field is likely to make its biggest advances, although we note that more theory is still yielding important insights. Formal modelers, for example, have identified many settings where less legalization could lead to more cooperation, but most other scholars of international relations have ignored these results.

contracts are often incomplete.¹²¹ Consequently, in such settings soft legal obligations are not only more convenient but can also be more effective than binding law.¹²² For example, a few studies by political scientists on international environmental cooperation have compared binding and non-binding instruments side-by-side. They show that nonbinding instruments are usually more ambitious and easier to tailor to the interests of the most pivotal countries, making them more effective when governments are committed to cooperation but not sure exactly what they can deliver.¹²³ The direct connection to one of the central features of international lawmaking—the choice of legal form—has made this an area where there are already robust signs of fertilization between legal and political science research.¹²⁴

The choice between binding and non-binding law depends, in part, on domestic politics and the “type” of cooperation problem at hand. Where governments are managing collaboration problems with strong incentives to defect and where successful cooperation requires that they signal that their commitments are reliable then binding law may be best. The process of formal ratification helps assure other parties that domestic interest groups are supportive, and the binding status helps governments “tie their hands” visibly, which boosts credibility. In areas of cooperation where parties are extremely risk averse, the prospect of incomplete contracting is extremely unattractive.¹²⁵ This helps explain why arms control talks that concerned the gravest consequences, such as national survival in a

¹²¹ This insight originates with economics research on uncertainty and industrial organization. See, e.g., OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* (1975); Paul L. Jaskow, *Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets*, 77 *AM. ECON. REV.* 168 (1987).

¹²² See Charles Lipson, *Why Are Some International Agreements Informal?* 45 *INT'L ORG.* 495 (1991); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 421 (2000). [But see—add citation to human rights scholarship that argues that soft law is less effective.]

¹²³ See, e.g., Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (David G. Victor, Kal Raustiala, & Eugene Skolnikoff eds., 1998); Jørgen Wettestad, *Participation in NO_x Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches, but Similar Results*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (David G. Victor, Kal Raustiala, & Eugene Skolnikoff eds., 1998). For research that makes more general conclusions of this type see Barbara Koremenos, *Contracting Around International Uncertainty*, 99 *AM. POL. SCI. REV.* 549 (2005). 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).

¹²⁴ See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT'L L.* 581 (2005); *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL LEGAL ACCORDS* (Edith Brown Weiss and Harold K. Jacobson eds., 2000). [consult Dan Bodansky on outcome of his survey of soft law literature.]

¹²⁵ See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 421 (2000); Barbara Koremenos, *Contracting Around International Uncertainty*, 99 *AM. POL. SCI. REV.* 549 (2005).

world of nuclear weapons, required such huge resources and took so long to craft.¹²⁶ Binding agreements ratified through highly transparent domestic processes may also be viewed as more legitimate, although that is a proposition that political scientists have not yet tested rigorously. By contrast, when incentives to defect are weaker and uncertainty is higher the flexibility of executive agreements and other nonbinding forms make them a better choice.

Precision and Ambiguity

A second choice of design that political scientists have examined is precision, which is a measure of how clearly and unambiguously the rules define the requirements for compliance.¹²⁷ The standard assumption by legal analysts has been that precision can only improve the strength and impact of international legal institutions and rules.¹²⁸ Indeed, a prominent legal study of compliance argued that ambiguity is one of the main causes of poor compliance.¹²⁹ The central finding of political science research that has examined legal precision is more nuanced.

Imprecision, as with nonbinding agreements, can help parties with different interests reach agreement and manage various types of uncertainty.¹³⁰ For example, in international trade, precise rules can lead to greater activism by domestic groups that are particularly sensitive to imports, thus leading to less national support for international agreements that could liberalize trade.¹³¹ Because so much of international cooperation on trade has looked at ways to make agreements flexible and adaptive—topics we address

¹²⁶ For similar arguments, see Donald G Brennan, *A Comprehensive Test Ban: Everybody or Nobody*, 1 INT'L SECURITY 92 (1976); Joseph Nye, *Maintaining a Nonproliferation Regime*, 35 INT'L ORG. 15 (1981).

¹²⁷ Here, too, there are a few inroads of collaboration between law and political science. See, e.g., Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000) (a joint effort by political scientists and lawyers to study the legalization of international cooperation).

¹²⁸ See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (arguing that the extent to which a particular law affects behavior will increase in accordance with the following four factors: (1) “determinacy,” or the clarity of the rule’s message; (2) “symbolic validation,” or the extent to which historical rules have influenced the rule-making process; (3) “coherence,” or the connection between the rule and rational principles; and (4) “adherence,” or the breadth and depth of the system created to interpret the rule.); Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use of Force, Cease Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124 (1999).

¹²⁹ See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

¹³⁰ See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549 (2005).

¹³¹ See Judith Goldstein & Lisa Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000).

again later—it is not surprising that political scientists who study trade have seen some merit in ambiguity.

One of the challenges with imprecise (and nonbinding) agreements is obtaining the advantages of flexibility while still sending credible signals. Imprecision (and other forms of flexibility) must not be so elastic that governments misinterpret short-term variations in behavior as long-run deviation from compliance.¹³² In general, where it is possible to arrive at precise contracts, political science research has shown that precision is helpful. For example, studies of preferential trade agreements find that precision decreases cheating by increasing the probability of detection, making it a favored design choice because precision eases the task of resolving conflicts of interpretation and sanctioning deviant behavior.¹³³ Where the stakes are larger and governments are more risk averse, such as in arms control, political science research has shown that governments try to avoid vague agreements.

Delegation and Enforcement

A third aspect of legal design that political science scholars have tried to explain is delegation.¹³⁴ Delegation has been interesting to political scientists not just because it is

¹³² See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477 (2008).

¹³³ See James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000).

¹³⁴ On the logic of delegation generally see DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006). They argue that there are several aspects to delegation of responsibilities by states to international law and institutions. The first is the extent to which the institution has the discretion to create rules, as opposed to states writing all of the rules. Secondly, institutions vary in the ways states require them to report information. Third, they note that the extent of delegation determines the extent to which institutions have the power to select leaders and staff. Fourth, states can create checks and balances to limit the freedom of action of international institutions. This is sometimes done by creating overlapping institutions that check and balance each other. Finally, states can set up mechanisms to sanction institutions that do not meet their expectations, such as reducing their budgets. In addition, Abbott and Snidal argue that delegation to centralized international organizations can "increase the efficiency of collective activities and enhance the organization's ability to affect the understandings, environment and interests of states" (p. 4-5). Centralization, they argue, allows for a stable forum (reducing transaction costs), enhanced iterations (longer shadow of the future) and higher quality reputational effects (information). Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998). Finally, Koremenos et al. argue that four factors cause states to design more centralized institutions: (1) enforcement problems; (2) a large number of participating states; (3) uncertainty about state behavior; and (4) uncertainty about future changes to the world or state interests. Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). Political scientists have used different terms for delegation of functions. Koremenos et al. (2001) refer to it as "centralization". Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001). Abbott et al. refer to this as "delegation". Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

important but also because it varies widely across the many areas of international cooperation. At one extreme there is no delegation, as is the case with all of the major strategic arms control agreements.¹³⁵ Toward the middle of the spectrum, states have delegated some authority to international human rights courts such as the European Court of Human Rights and Inter-American Court Human Rights. By contrast, delegation to bodies such as the WTO's Dispute Settlement Mechanism (hereinafter "DSM") is much more extensive in trade--where many more countries are involved, disputes are much more complex and where trust in delegated institutions has been built through decades of experience. Indeed, the DSM offers a rich vein of empirical material for political science scholars that have sought to explain why governments delegate authority and how those delegated institutions actually function.¹³⁶

For scholars rooted in the first face of power—who have tended to focus on how governments themselves use incentives to alter international outcomes—the decision to assign responsibilities to other parties such as international organizations rather than retain those functions themselves and keep them under tighter control is a puzzle. For many decades political scientists have known that international institutions offer general advantages, such as efficiency in cooperation and contracting that make states willing to delegate authority. Only over the last decade, however, that research program has delved into the details of when and how delegation occurs and offered theories to explain delegated outcomes. The general need for delegation is widely familiar to all scholars who study contracts, many of which are incomplete due to lack of information. Incomplete contracts require mechanisms for interpretation, elaboration and enforcement as events unfold.

For lawyers, research by political scientists on delegation can offer some theories on how delegation affects legal content and the efficiency of legal institutions. To date, there hasn't been a guiding theory on legal delegation, with the result that there is a wide range of

¹³⁵ For example, an international institution created without a governing organization but instead relying on a process of renegotiation among state representatives is one with a low level of delegation. Keohane et al. (2000) argue that there are three dimensions of delegation with respect to international judicial institutions. The first, independence, refers to the extent to which formal legal arrangements ensure that adjudication can be rendered impartially. Second, the degree of access to the institution refers to the ease with which parties other than the states can influence the court's agenda. Finally, international judicial bodies vary along a dimension of embeddedness, or the extent to which dispute resolution decisions can be implemented without governments taking actions to do so. Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution*, 54 INT'L ORG. 457 (2000).

¹³⁶ See, e.g., B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389 (2005); 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); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007).

opinions among legal scholars on the merits of delegation.¹³⁷ The political science literature on delegation could help resolve some of these debates, notably with three main findings.

One finding is that governments delegate when it is efficient. When compared with the formal treaty-making process, for example, delegated bodies can incorporate new information quickly and efficiently. For example, the Montreal Protocol on the ozone layer includes a safety valve that exempts governments from regulating ozone-depleting substances that are “essential” and don’t yet have substitutes.¹³⁸ An expert panel reviews those exemptions every year in light of progress in the search for substitutes and makes case-by-case assessments. Delegation also arises because the exact commitments may need to be interpreted in light of unpredictable or highly uncertain events.¹³⁹ Delegation is important because where extensive use is made of delegation it is those bodies that, in effect, determine how legal obligations are interpreted and how they evolve over time. Early in the history of the Montreal Protocol the central obligations of the treaty could be fathomed by looking at the treaty itself. But as governments tightened those obligations they also relied more heavily on expert bodies to determine which activities would be regulated. Indeed, as international cooperation becomes more demanding and complex, the costs of organizing and sustaining cooperation rise rapidly. Delegation to a central body can help manage those costs while amplifying the benefits of cooperation.¹⁴⁰ 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

¹³⁷ For example, Posner and Yoo argue that independent tribunals make decisions that violate state interests, which makes them less effective than dependent tribunals, which take those interests into account. States will comply with a tribunal’s assessment of the cooperation problem when: (1) all states implied in the dispute gain more from compliance than from noncompliance or retaliation, (2) the dispute occurred because of asymmetric information; each involved state has private information about the conflict (because that information may be complemented and clarified by the information provided by the tribunal) and (3) the tribunal provides unbiased information. Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005). By contrast, Helfer and Slaughter argue that independent courts are more effective because states: (1) prefer independent tribunals for dispute resolution and establish them in order “to enhance the credibility of their commitments” (p. 4), and (2) create “structural, political and discursive mechanisms to ensure” (p. 4) that the legal and political authority of independent judges is adequately constrained. Increased precision encourages quick dispute resolution and allows judges less room for textual interpretation, while reservations from treaties or tribunal procedures offer reluctant states more control of the court’s jurisdiction. Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005). See also Daniel M. Klorman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1 (2005).

¹³⁸ See EDWARD PARSON, *PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY* (2003).

¹³⁹ See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001); *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006).

¹⁴⁰ This line of argument builds on the literature from economics about the role of institutions in reducing transaction costs. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT’L SECURITY 39 (1995).

cooperation in the future.¹⁴¹ Efficiency can rise, as well, when states delegate authority to international institutions that can provide information, such as on levels of compliance and policy alternatives.¹⁴²

Political science research that focuses on the efficiency of delegation generally leads to the conclusion that delegation enhances cooperation. However, a standard problem whenever authority is delegated is how to keep the “agents” to whom authority is delegated under control.¹⁴³ Delegation may not enhance cooperation when important states do not have confidence that the agents to whom they have delegated authority will remain faithful

¹⁴¹ See, e.g., Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007); DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006).

¹⁴² See HELEN MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997); David A. Lake & Mathew D. McCubbins, *The Logic of Delegation to International Organizations*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006). The provision of information is an area where delegation can provide large positive externalities and thus is likely to be efficient. See HELEN MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997); DAVID A. LAKE, ENTANGLING RELATIONS: AMERICAN FOREIGN POLICY IN ITS CENTURY (1999). For similar lines of argument, see Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (arguing that when there is imperfect information a tribunal can provide the neutral information necessary to restore inter-state cooperation). Often the function of enforcement takes the form of providing information rather than actually meting out punishment. For example, Maggi argues that the WTO DSM can create information for the third party so that it can coordinate punishment. Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999). Most of this research has focused on international economic institutions. However, Morrow (2001) extends the argument about the benefits of delegation in providing information with an analysis of the laws of war. He argues that “uncertainty about behavior affects the problem of uncertainty about preferences. A government at war attempts to judge its opponent’s preferences—that is, whether the opponent intends to honor its treaty obligations—by observing the opponents behavior. Uncertainty about another’s behavior can make it difficult to do this” (p. 215). These problems can be overcome “by designating a neutral actor to collect and disseminate information.” (p. 214). In the case of the POW system, Morrow argues the member states have designated the International Committee of the Red Cross (ICRC) as such a neutral actor. James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971 (2001).

¹⁴³ The beneficiaries of this delegation, known by the awkward term “principal,” must find ways to entice the agent to reliably do their business. The study of principal-agent relationships is an old one in economics and political science and it is evolving. It has been used to explore how voters control their elected representatives, shareholders control the leaders of companies that deploy their capital, and many other arms length relationships where principals and agents may not have exactly the same information and incentives. On principal-agent relationships in politics, see generally Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION* (1991); Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005). As delegation rises so must attention to monitoring and control of agents. For some of the many applications see DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006; Mark Pollack, *Delegation, Agency and Agenda Setting in the European Community*, 51 INT'L ORG. 99 (1997); Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

to their wishes.¹⁴⁴ Concerns about excessive delegation can create a backlash that affects the domestic political forces that determine when states support international institutions. For example, scholars who are attentive to domestic politics have suggested that increased delegation may cause firms to oppose trade institutions on the fear that their voice in international institutions is not nearly as powerful as when those institutions are under tighter government control.¹⁴⁵

Second, political science research has focused on how delegation can help governments solve domestic political problems that impede international cooperation. Examples include the problems that arise due to "time-inconsistency": even when sustaining cooperation is in the long-term interest of key actors, over the short-term there are many well-organized interest groups that would gain from violating international norms. By delegating authority to an international institution, governments can "tie their hands" and reduce the temptation to defect.¹⁴⁶ 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.¹⁴⁷

Third, political scientists have started focusing on how delegated bodies—including international tribunals and courts—actually function. A growing body of research has focused on enforcement, notably through the dispute resolution system of the WTO, because political scientists who are attentive to the first face of power and to the strategy of cooperation have been particularly focused on how international institutions rise to the challenge of enforcement.¹⁴⁸ Some studies have also explored how the function of enforcement has de facto been delegated in cases where no formal enforcement mechanisms exist. Studies on human rights have shown that even when international organizations don't have formal enforcement procedures of their own they can often rely on national courts in some countries to apply these standards—in effect, a way of channeling

¹⁴⁴ See generally DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006). See also, *infra*, notes [x] to [y] and accompanying text (section on principal-agent relationships).

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

¹⁴⁶ 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); Hilton Root, *Tying the King's Hands: Credible Commitments and Royal Fiscal Policy during the Old Regime*, 1 RATIONALITY & SOC. 240 (1989); Alan Drazen, *POLITICAL ECONOMY IN MACROECONOMICS* (2000), Chapter 4; Avner Greif, Paul Milgrom, & Barry Weingast, *Coordination, Commitment and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Robert Barro & David Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983). See also Edward D. Mansfield & Jon C. Pevehouse, *Democratization and the Varieties of International Organizations*, 52. J. CONFLICT RESOL. 269 (2008).

¹⁴⁷ See RANDALL W. STONE, *LENDING CREDIBILITY: THE INTERNATIONAL MONETARY FUND AND THE POST-COMMUNIST TRANSITION* (2002).

¹⁴⁸ [cites to studies on WTO enforcement]

national judicial resources in support of international legal doctrine, usually within their jurisdictions but in some cases with extraterritorial application as well. International legal scholarship has long made such arguments; political science research has now been able to measure such enforcement effects systematically and provide evidence.¹⁴⁹ The delegation to international enforcement tribunals and to domestic courts is an area ripe for more collaboration between legal and political science scholarship, some of which is under way.¹⁵⁰

Membership

The fourth aspect of legal design that political scientists have studied is membership. A common assumption in the literature on public international law is that membership should be as broad as possible—an assumption that is particularly strong in policy-oriented legal literature.¹⁵¹ Indeed, across a wide range of issue-areas—such as human rights, arms control and the environment—the last few decades have seen a push for agreements with universal membership.¹⁵² The logic for universalism is often rooted in the idea that broader memberships are more representative and thus legitimate.¹⁵³ The

¹⁴⁹ Several scholars have argued that when international law is incorporated into domestic law the probability of domestic enforcement increases in states with independent judiciaries. See Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149 (2009); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

¹⁵⁰ 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).

¹⁵¹ See, e.g., Markus Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 377, 402 (2002) (arguing "that the final aim of the [Montreal] Protocol can only be achieved with a universal membership."); Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 310 (2007) (arguing that "[t]o advance the complete elimination of a class or type of weapon, multinational disarmament regimes strive to achieve universal membership and attract nonstate parties that are acting in conformity with the regime's obligations."); Arsalan M. Suleman, *Bargaining in the Shadow of Violence: The NPT, IAEA, and Nuclear Non-Proliferation Negotiations*, 26 BERKELEY J. INT'L L. 206, 229 (2008) (arguing, with respect to the NPT, that "[t]he lack of universal membership, particularly with regard to the four of nine states that possess nuclear weapons, and the system's lack of symmetry between its goals and its oversight, monitoring, and implementation mechanisms are two serious shortfalls in need of significant attention.")

¹⁵² See Laurence R. Helfer, *Symposium: Public International Law and Economics: Nonconsensual International Lawmaking*, U. ILL. L. REV. 71, 86 (2008) (noting that "[i]n the six decades since the Second World War, global and regional human rights treaties have, for the most part, overcome international law's participation deficit. Many of these treaties now have large numbers of states parties, with a few agreements approaching universal membership.")

¹⁵³ See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

central findings from political science literature on membership are that legitimacy does not flow only from membership, that legitimacy is highly incomplete as an explanation for when international agreements are influential, and that the importance of legitimacy is prone to over-statement.

Universal membership comes at a cost, and decisions about membership are important strategic choices in the design of international agreements. Restricted membership can lead to more effective agreements for two reasons. One is enforcement; in cases where enforcement is important and difficult there may be gains to working with a small group while preventing potential free-riders from joining.¹⁵⁴

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 find and maintain agreements.¹⁵⁵ By contrast, when issues are plagued by severe problems of deciding how to allocate benefits and costs, important states will create institutions with inclusive membership in order to spread those costs and benefits of cooperation more broadly and evenly.¹⁵⁶ For example, they have shown that NATO's restrictive membership criteria—such as the requirement of democratization, civilian control over the military and the resolution of border disputes—helps constrain membership to countries whose preferences are more likely to be supportive of the institution.¹⁵⁷

There is a large and growing array of political science research that looks empirically at how strategic choices about managing membership can influence the effectiveness of international institutions. The central finding from that research is that membership is a tradeoff. Large memberships create potential gains from a wider

¹⁵⁴ On small groups and clubs see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). For applications to international cooperation see David G. Victor, *How to Slow Global Warming*, 34 *NATURE* 451 (1991); Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM* (Robert B. Porter, Pierre Sauvé, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001); Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 *INT'L ORG.* 681 (1992).

¹⁵⁵ See, *infra*, notes [x] to [y] and accompanying text (sections on club goods and local commons).

¹⁵⁶ The logic for membership choices here follows Koremenos et al. (2001). Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 *INT'L ORG.* 761 (2001). See also George W. Downs, David M. Rocke, & Peter N. Barsoom, *Managing the Evolution of Multilateralism*, 52 *INT'L ORG.* 387 (1998) (discussing the benefits of more or less inclusive membership in international institutions).

¹⁵⁷ See Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 *INT'L ORG.* 801 (2001). Similar logic is explored in many other cases. For example, the international system for managing prisoners of war (POWs), which consists largely of the Geneva Conventions, is restrictive in its membership criteria. These restrictions result from, among other factors, states' lack of information about whether other states have a true preference to engage in the treatment of POWs prescribed in the Conventions and to have their soldiers treated likewise by other states. James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 *INT'L ORG.* 971 (2001).

application of common rules but generate complexity and uncertainty; forum shopping creates the opportunity for governments to manage the political effects of cooperation (which can make international cooperation more stable and credible) but also the risk of deleterious shopping for the least demanding rules. Research on international environmental cooperation, for example, generally points to the conclusion that institutions that start with small membership and have the opportunity to work in small groups on complex problems are more effective than those that start with much larger memberships.¹⁵⁸ In human rights, several scholars have argued that conditional membership structures that limit participation are the most effective because they can more credibly create incentives for states to comply with human rights norms. For example, preferential trade agreements that make trade benefits conditional upon the protection of human rights lead some repressive states to improve their human rights practices more

¹⁵⁸ Indeed, international environmental agreements may have the greatest variation in terms of membership of all the issue-areas we review in this article and are a terrific laboratory for studying membership effects—something that few scholars have done in detail. While some underlying problems are generally perceived as global, most practical experience with international environmental cooperation relates to problems that have a narrower geographical focus. Variations in membership have been extensive, and that has offered a rich field for political scientists to examine. Scholars looking at the North Sea have shown that explicit efforts to exclude the least ambitious governments made it possible to gain agreement on stronger and more effective commitments. See Jon Birger Skjærseth, *The Making and Implementation of North Sea Commitments: The Politics of Environmental Participation*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (David G. Victor, Kal Raustiala, & Eugene Skolnikoff eds., 1998). These insights build on earlier work that shows, using the example of fisheries, that agreements are prone to reflect the interests of the least ambitious actor. See ARILD UNDERDAL, *THE POLITICS OF INTERNATIONAL FISHERIES MANAGEMENT: THE CASE OF THE NORTH-EAST ATLANTIC* (1980). A few legal scholars have also examined the effects of a wide array of strategies to alter membership. Reeve and Sand argue that CITES developed a Standing Committee of regional representatives that acts like a mini conference of parties (COP), meets more frequently than COP and has made CITES more effective by dealing with compliance and implementation issues. Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT'L AFF. 881 (2006); Peter Sand, *Commodity or Taboo?: International Regulation of Trade in Endangered Species*, in *GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT* (Helge Ole Bergesen & Georg Parmann eds., 1997). The tenor of such research is that smaller groups allow more focus and ambition; economists working on the strategy of cooperation echo these findings. For example, Barrett argues the North Pacific Fur Seal Treaty worked because every country was sure to do much better with the treaty and each had a strong incentive to participate, given that all others participated. The treaty deterred entry by non-parties through banning imports of non-authenticated seal-skins which was possible because the entire pelagic harvest of sealskins was processed and sold in London. SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING* (2003), Chapter 2. Not all political science literature extols the virtues of limiting membership—especially when the main mechanism for an agreement's impact is by engaging actors within a large number of diverse countries and when the ultimate goal is widespread diffusion of new ideas. (However, the gains from that diffusion must be balanced against the cost of higher complexity and uncertainty.) For example, Haas argues that in the case of the Mediterranean Action Plan, increasing the membership made the institution more effective. In that case, he argues, the international cooperation process and outcomes did not merely mimic preexisting international political and economic conditions. Instead, governments learned to apply new patterns of reasoning to the formulation of environmental policy, which led to a successful response to the Mediterranean Sea pollution problem. PETER M. HAAS, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* (1990).

than does membership in universal human rights treaties.¹⁵⁹ Similarly, political scientists who study trade also have given extensive attention to the effects of membership. They have shown that large-scale membership can have an impact on domestic politics by increasing the variation in the costs that governments face at home and potentially also the uncertainty in outcomes.¹⁶⁰ This, in turn, may decrease the effectiveness of international institutions.¹⁶¹ Such research also finds that the different memberships of overlapping trade institutions can give states the ability to vary the effect of trade rules, such as through “forum shopping,”¹⁶² mirroring the concept that is familiar to many lawyers who study the choice of legal forum at the domestic level.¹⁶³

Design, Content and the Building Blocks of Political Science Research

For political scientists, the design of legal commitments reflects the outcome of a series of political choices. How these choices get made depends on which of the building blocks political scientists think are most important.

¹⁵⁹ See Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005). For example, the Council of Europe is able to improve the behavior of states with initially low human rights compliance by offering the benefit of being incorporated into the EU as contingent upon efforts to uphold the 13 protocols of the European Convention on Human Rights. See Pamela Jordan, *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*, 25 HUMAN RIGHTS Q. 660 (2003). Moreover, some scholars have also looked at the dynamic influence of membership, showing that certain transitional states that sign universal human rights agreements without intending to comply are sometimes later induced to comply. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

¹⁶⁰ See Helen V. Milner & B. Peter Rosendorff, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001). A few legal scholars have also examined the ways in which domestic politics influence international trade law negotiations. See, e.g., Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999); Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 43 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Trade Rules*, 41 *AUSSENWIRTSCHAFT* 405 (1986), reprinted in 1 *THE WORLD TRADING SYSTEM* 121 (Robert Howse ed., 1998).

¹⁶¹ A few studies have turned this question around and looked at the benefits that accrue to non-members as well as how benefits are timed with the decision to become a member. See, e.g., Judith L. Goldstein, Douglas Rivers, & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 737 (2007).

¹⁶² See Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007). Trade economists have examined similar questions about forum shopping, animated especially by the fact that the WTO (which has nearly universal membership) must contend with the rise of many smaller regional free trade agreements (FTAs). Most economics research sees FTAs as diversionary and argues for stronger WTO oversight of these agreements. See, e.g., Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System?*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* (Jeffrey J. Schott ed., 2004).

¹⁶³ See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987).

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

For political scientists inclined to the third and fourth faces of power, legal designs reflect the work of non-state actors and entrepreneurs who carry ideas from one area of legal practice to another. Scholarship on international wildlife law, for example, has focused on the role of environmental NGOs in setting the agenda for which species and habitats are protected.¹⁶⁴ In some cases, such groups don’t just set the agenda but they also have substantial delegated authority to collect information on how countries are implementing their wildlife commitments.¹⁶⁵ 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.¹⁶⁶

For 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. Problems of the prisoners’ dilemma type create cooperation problems that governments can solve only with a large role for enforcement. Indeed, this functional perspective has been one area where political scientists and public international lawyers already do work where there are substantial overlaps because they draw on a similar body of insights that stem, originally, from economics and game theory. That work has examined, for example, why international institutions in the area of trade have evolved

¹⁶⁴ See Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT’L AFF. 881 (2006); Peter Sand, *Commodity or Taboo?: International Regulation of Trade in Endangered Species*, in GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT (Helge Ole Bergesen & Georg Parmann eds., 1997); ROBERT L. FREIDHEIM, TOWARD A SUSTAINABLE WHALING REGIME (2001); *Polar Politics: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES* (Oran Young & Gail Osherenko eds., 1993).

¹⁶⁵ Experts on international wildlife law have written more about delegation to NGOs (or quasi NGOs, as institutions such as the IUCN have memberships that span NGOs and states) than have political scientists. [cite to Peter Sand Int’l Wildlife Law] [DGV to add cites by political scientists.]

¹⁶⁶ See Robert O. Keohane, *Governance and Legitimacy*, Keynote Speech Held at the Opening Conference of the Research Center (SFB) 700 (with comments by Fritz W. Scharpf), SFB-Governance Lecture Series, No. 1, DFG Research Center (SFB) 700, Berlin, (2007); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

to include strong, independent enforcement mechanisms that help reduce the incentives for defection.¹⁶⁷ It also explains why strategic arms control agreements where the prisoners' dilemma characteristics are even more severe—the temptation to defect are stronger and the consequences for national survival grave—hinge to an even greater degree on precision of commitments and the strength of enforcement.¹⁶⁸

Political scientists have placed heavy emphasis on the availability of information as a factor that determines legal design. Wary of finding themselves constrained in unwanted ways, governments will demand more flexibility when uncertainties and the risks of exogenous shocks are high.¹⁶⁹ Detailed studies, many by lawyers, have looked at this issue not only in trade¹⁷⁰ but also arms control¹⁷¹ and human rights.¹⁷² Armed with a growing

¹⁶⁷ See, e.g., Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (arguing that a certain degree of "justified disobedience" from the rules should be tolerated in order to maintain the institution in the long run). In addition to such normative arguments, several studies—mostly by trade lawyers—confirm that a large measure of flexibility is, indeed, in place. See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 3 (1999). See also Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992); Alan O. Sykes, *Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L L. J. 301 (1990)

¹⁶⁸ See, supra, notes [x] to [y] and accompanying text (section on delegation).

¹⁶⁹ We have focused here on shocks and uncertainty as the main reasons for flexibility. But scholars have also looked at other reasons. For example, when the distributions of costs and capabilities vary over time, flexibility can help facilitate compliance by states that suffer from membership over the short-term but wish to participate in the agreement in the long-run. Examples include the Montreal Protocol on the Ozone Layer, which includes a special mechanism that allows countries to avoid, for a period, commitments that they can't plausibly implement. See Edward Parson, *Protecting the Ozone Layer*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter M. Haas, Robert O. Keohane, & Marc A. Levy eds., 1993).

¹⁷⁰ See, supra, notes [x] to [y] and accompanying text (sections on trade and flexibility). But see James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000) (arguing that flexibility and opt-out clauses decrease the effectiveness of the WTO and its dispute settlement system. He also argues that the institution is more effective when the DSM is used to validate the use of the opt-out clause or interpret any flexibility).

¹⁷¹ In arms control, although exogenous shocks are rampant the stakes are much higher. This creates a strong demand by states to reserve the right to respond to the exigencies of current circumstance, what legal scholar Ken Abbott calls "defensive defection." Kenneth Abbott, *Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993). Because governments are acutely concerned about survival, there is less experience in arms control with designing flexibility measures such as opt-out procedures, derogations and such for fear that other members of the agreement will use them to undercut the effectiveness of the treaty. Instead, much of the experience with flexibility arises through interpretation of agreements, imperfect enforcement, and ultimately through membership. See 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). As arms control agreements have become more complex a wider array of functions has been delegated to expert bodies—such as inspection panels—that have a measure of flexibility in how they interpret agreements.

body of empirical evidence, political scientists generally conclude that formal flexibility is often preferable to renegotiation because it defines legal standards for deviation, which makes it easier to distinguish flexibility from abuse that leads to long-term deviations, and provides limits on retaliation.¹⁷³

For political scientists who see domestic politics as a driving force for political behavior, design choices offer a way to manage the complexity of domestic forces. Most studies of that type point to the ways that governments use flexibility in their international commitments as a way to accommodate uncertainty about what they can implement reliably at home. That insight explains why most political scientists are inclined to see flexibility provisions as a way to enhance cooperation whereas many legal scholars are skeptical of flexibility that can be used as a cover for deviation from obligations.¹⁷⁴

¹⁷² Crises, which are not always exogenous shocks, breed human rights violations, especially the restriction of individual liberties. International law scholars have long recognized that “[t]he response of a state to a public emergency is an acid test of its commitment to the effective implementation of human rights.” DOMINIC MCGOLDRICK, FROM ‘9-11’ TO THE ‘IRAQ WAR 2003’: INTERNATIONAL LAW IN AN AGE OF COMPLEXITY (2004), at 388. Several major human rights agreements aim to strengthen these commitments by allowing states to “escape” from some of their treaty commitments when they confront crises. Legal research describes these flexibility provisions and some examples of their use. See, e.g., Joan Fitzpatrick, *States of Emergency in the Inter-American Human Rights System*, in THE INTERAMERICAN SYSTEM OF HUMAN RIGHTS 371 (David J. Harris & Stephen Livingstone eds., 1998); Jaime Oraá, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992); Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT’L J. CONST. L. 430 (2004); OREN GROSS & FIONNUALA D. NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006). The political science research, by contrast, explains them and their effects on international law. New research shows that most derogating countries are stable democracies. See Emilie M. Hafner-Burton, Laurence R. Helfer, & Christopher J. Fariss, *Emergency and Escape: Explaining Derogation from Human Rights Treaties*, INT’L ORG., forthcoming. That conclusion is consistent with the fact that democracies are more likely than other regimes to file reservations when they join human rights treaties. See Eric Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, 49 J. CONFLICT RESOL. 925 (2005). States use these flexibility tools to respond to domestic political uncertainty. Derogations enable some governments facing threats at home to buy time and legal breathing space to confront crises while, at the same time, signaling to concerned domestic audiences that rights suspensions are temporary and lawful. For a legal point of view on denunciations, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Laurence R. Helfer, *Exiting Treaties*, 91 VIRGINIA L. REV. 1579 (2005). Even so, the operation of that system is hardly perfect, not the least because non-democratic states can derogate freely without incurring real costs. And autocracies increase violations of most rights covered by human rights treaties during emergencies. See Eric Neumayer, *Do Governments Mean Business When They Derogate? Human Rights Violations During Declared States of Emergency*, unpublished manuscript, available at <http://personal.lse.ac.uk/neumayer>. This suggests an opportunity to redesign derogations clauses and other treaty flexibility tools in ways that enhance rather than undermine compliance with international law.

¹⁷³ See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT’L ORG. 477 (2008). So far, there is very little research comparing the types of flexibility systems across types of agreements—we return to that topic later.

¹⁷⁴ Many legal scholars stress the potential for abuse of escape clauses. In the area of human rights, for example, they argue that derogations can undermine the *raison d’être* of human rights treaties and should

Part III: Legal Evolution and Interpretation

Political scientists have also developed a body of literature to explain how institutions change over time. Depending on which of the building blocks emphasized, different political scientists look to different factors as the driving force for legal evolution and interpretation. Here we identify five, starting with perspectives that draw on different faces of power and then shifting to other perspectives. One of lessons from this research is that clear causal theories of change are important because many factors are often at work. One of the contributions of political science research in this area, especially empirical studies, has been to parse the effects of underlying changes in interests, power and ideas from the specific roles of international institutions in shaping the evolution of international legal commitments. The work by political scientists that is perhaps of greatest relevant to international lawyers are studies that have examined how the delegation of functions to enforcement bodies and courts affects the evolution in how legal commitments are interpreted and applied. Thus in our review we devote the largest space to that topic. However, understanding the wide range of factors that could explain legal evolution is important because much of the relevant political science research in this area looks at those exogenous factors and at how they interact with legal institutions, rather than focusing just on the legal institutions themselves.

Power and Interests

Power and interests shape the interpretation and development of legal institutions in important ways. Most studies start with resources that are available to states because those define the inducements the state can offer and the penalties it can afford to give out but also the ability it has to set agendas and decide who sets and interprets rules for international cooperation. Sometimes, having a large number of outside options (i.e., alternative laws or alternatives to laws) can make any state (or actor) more powerful.¹⁷⁵

be subject to strict international standards and monitoring mechanisms. See, e.g., SARAH JOSEPH, JENNY SCHULTZ, & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 824 (2005); OREN GROSS & FIONNUALA D. NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006). Others have argued that the escape clause provisions in the GATT/WTO should be scaled back. See Patrizio Merciai, *Safeguard Measures in GATT*, 15 J. WORLD TRADE L. 41 (1981); J. David Richardson, *Safeguards Issues in the Uruguay Round and Beyond*, in *ISSUES IN THE URUGUAY ROUND* 24 (ROBERT E. BALDWIN AND J. DAVID RICHARDSON eds., 1988). But see Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 43 (JAGDEEP S. BHANDARI & ALAN O. SYKES eds., 1997) (arguing that the WTO rules provide insufficient flexibility); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

¹⁷⁵ See Emilie M. Hafner-Burton & Alexander H. Montgomery, *Centrality in Politics: How Networks Confer Influence*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594386 (explaining

For example, the United States is the only actor in the U.N. Security Council with a large array of options outside the Security Council, such as working with NATO or even pursuing inconvenient wars unilaterally. Those outside options magnify U.S. influence within the Security Council.¹⁷⁶

Because coercive power depends on alternative options, seemingly weaker actors are often able to amplify their influence over legal processes by controlling the options. In institutions that require universal adherence to norms, for example, defection by even the smallest countries can undermine the goals of the agreement and thus amplify the power of weaker governments—a pattern that may explain why the Nuclear Nonproliferation Treaty, after years of support by the most powerful states, seems to be waning in influence.¹⁷⁷ Similarly, when agreements are sensitive to free riders – that is, to states that accrue the benefits of legal institutions without making a contribution – then even very powerful states can find it hard to get their way. For example, the international accords on the ozone layer would not have much effect without the participation of major developing countries. Their refusal to join allowed them to demand a special fund to pay them the full extra cost of compliance. The states with the biggest resources and the strongest interest in protecting the ozone layer—the U.S. and other large western industrial nations—had no choice but to pay the full cost of the fund.¹⁷⁸ Once the basic deal with developing countries was codified then the evolution of the Montreal Protocol commitments hinged on the supply of funds to these countries. Each round of negotiations began with an assessment (delegated to

how having a large number of outside options gives an actor direct access to other important actors and decreases their dependency on any one actor).

¹⁷⁶ See Erik Voeten, *Outside Options and the Logic of Security Council Action*, 95 AM. POL. SCI. REV. 845 (2001) (arguing that because it lacks enforcement capabilities, the Security Council's leverage resides almost entirely in the perceived legitimacy of its decisions to allow forceful actions. He also argues that the Security Council provides a focal solution that has the characteristics of an elite pact: an agreement among a select set of actors that seeks to neutralize threats to stability by institutionalizing non-majoritarian mechanisms for conflict resolution).

¹⁷⁷ See Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337 (2006). Indeed, many security agreements are sensitive to a cascading effect, which gives disproportionate power over legal content and impact to the first domino that falls or window that breaks; governments keen on security cooperation and mindful of those cascades, become especially attentive to weak links in the system. See Amy E. Smithson, *Implementing the Chemical Weapons Convention*, 36 SURVIVAL 80 (1994) (arguing that if treaties are to be effective in stopping a domino effect of countries arming themselves—either because the treaty is not respected or because states try to protect themselves from their neighbors—universal adherence is eventually necessary); Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) (arguing that when states observe defection, they defect themselves because their security is threatened by that defection, not because of a lack of respect for the rules. Thus, even a weak state can cause defections by more powerful states). See also, *supra*, notes [x] to [y] and accompanying text (section on broken windows effect).

¹⁷⁸ See Elizabeth R. DeSombre & Joanne Kaufman, *The Montreal Protocol Multilateral Fund: Partial Success Story*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE 89 (Robert O. Keohane & Marc A. Levy eds., 1996).

experts) that helped set priorities for regulation of ozone-depleting substances and also the cost that industrialized countries would need to pay.¹⁷⁹

Most international relations scholarship focuses on state coercive power because usually it is only governments have the incentive and ability to mobilize and manage resources such as the sanctions that support the NPT or the cash payments that comprise the ozone fund. However, international organizations often exert an effect by mobilizing and channeling that state power in ways that reinforce international standards.¹⁸⁰ For example, the dispute resolution system of the GATT/WTO relies mainly on governments to apply retaliatory tariffs to enforce the GATT/WTO obligations. That enforcement system makes it easier for governments to retaliate against countries that are deemed not in compliance while raising the costs of unauthorized retaliation.¹⁸¹ Similarly, tribunals in other areas—such as human rights—can help focus state power on activities that promote adherence to international standards.¹⁸²

While all of this essay is focused on areas where political science research is generating insights and opportunities for collaboration with international lawyers, it is worth mentioning one area where political science research long ago was thought to have offered insights about international cooperation that, today, are no longer viewed as so profound. One of the earliest results at the intersection of economics and political science of games was that iteration – repeated interactions – made cooperation more likely. When players knew they would encounter each other repeatedly they were more cooperative.¹⁸³ In reality, one-shot games don't much exist in the real world. All cooperation, to different degrees, is iterated and repeated.

¹⁷⁹ See EDWARD PARSON, *PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY* (2003); Elizabeth R. DeSombre & Joanne Kaufman, *The Montreal Protocol Multilateral Fund: Partial Success Story*, in *INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE* 89 (Robert O. Keohane & Marc A. Levy eds., 1996).

¹⁸⁰ See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INT'L ORG.* 379 (1982) (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; Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 *INT'L ORG.* 541 (1996) (arguing that international institutions can and do directly constrain domestic policy. She argues that, in its resolution of disputes, despite possessing no formal authority over US domestic law, the Free Trade Agreement panel effectively changed ITC and ITA interpretations of rules regarding anti-dumping and countervailing duty sanctions).

¹⁸¹ See, *infra*, notes [x] to [y] and accompanying text (section on GATT/WTO enforcement).

¹⁸² See, *supra*, notes [x] to [y] and accompanying text (section on delegation to international courts).

¹⁸³ See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

Diffusion of Ideas and Norms

Studies that emphasize change in power and interests lie at the core of American political science. They are the heart of the so-called “realist” paradigm that emphasizes state power as a central arbiter of international relations. Under that conceptual umbrella, international institutions also play an important role—though in ways that are constrained by and focused on the interests of dominant state powers. The intellectual traditions of scholars in other countries are different, however—typically with less emphasis on state power and a greater role for other forces such as non-state actors, ideas and discursion that are more representative of the third and fourth faces of power.¹⁸⁴

One of the puzzles for scholars who study the impact of norms and ideas is how they spread.¹⁸⁵ For several decades political scientists have looked at how the evolution of content in international institutions depend on their ability to mobilize expertise and administrative competence. Scholarship on the effectiveness of environmental cooperation has examined the role of epistemic communities—that is, networks of experts who are well-connected to governments—that often play a role when regulation is complex and shrouded in uncertainty about the extent of environmental damage and the real options and costs for controlling it. They help explain the emergency and evolution of legal regimes aimed at managing pollution of the Mediterranean Sea¹⁸⁶ and depletion of the ozone layer.¹⁸⁷

Research that has focused on experts and bureaucrats as the conduit for ideas has led to the insight that these actors are less important when the chief barrier to cooperation is not knowledge about the underlying problem and solutions.¹⁸⁸ Related to this are causal

¹⁸⁴ Perhaps the most prominent intellectual tradition in international relations outside the United States is the English School. A key tenet of the English School is that the international system is a society of states that is reflected in the institutions created to regulate state behavior, including international legal institutions. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977); MARTIN WIGHT, *INTERNATIONAL THEORY* (1991); BARRY BUZAN, *FROM INTERNATIONAL TO WORLD SOCIETY?: ENGLISH SCHOOL THEORY AND THE SOCIAL STRUCTURE OF GLOBALISATION* (2004). Some in the English School argue that international society should allow for as much independence as possible for states in order to reflect the diversity of states' linguist, ethnic and religious traditions. See, e.g., ROBERT JACKSON, *THE GLOBAL COVENANT* (2001). Others argue that world society should be more interventionist, actively promoting respect for human rights across the globe. See, e.g., NICHOLAS WHEELER, *SAVING STRANGERS* (2000).

¹⁸⁵ See, *supra*, notes [x] to [y] and accompanying text (section on third face).

¹⁸⁶ See PETER M. HAAS, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* (1990).

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

¹⁸⁸ For example, the information problems and strategic behavior that are associated with distributional bargaining over exchanges can seriously hamper international cooperation and reduce joint gains. This

theories that focus on “problem solving capacity.”¹⁸⁹ Many areas of international cooperation require governments with highly sophisticated administrative systems to craft and implement regulatory commitments, and the effectiveness of international institutions hinges on these national capabilities. For example, many human rights abuses arise because governments lack the capacity to control the abusers on their territory.¹⁹⁰

Delegation and International Courts

Political scientists have recently analyzed several ways in which delegation to international courts leads to legal evolution and how that process depends on the design of courts. A key insight is that the extent of delegation to an international dispute resolution body varies along two dimensions: judicial independence (which depends on the selection method and tenure of judges) and access.¹⁹¹ This line of argument resonates with work done by lawyers who have analyzed international courts using these two dimensions significantly more so than political scientists.¹⁹² A key claim of this literature is that access for private non-state litigants and compulsory jurisdiction both contribute to international judicial independence.¹⁹³ The effects of these design features inform much of the political science research on international courts.

type of situation is one in which an epistemic community that provides information is thought to be crucial in assisting cooperation. See Thomas Bernauer, *Protecting the Rhine River against Chloride Pollution, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE* (Robert O. Keohane & Marc A. Levy eds., 1996). Finally, whaling and the institutions established for its management would seem to be an issue and a policy arena in which an epistemic community of relevant experts enjoys great influence over policy. Yet the epistemic community of conservation-minded cetologists only briefly enjoyed predominant influence over policy. Most of the time, the influence of cetologists was outweighed by that of other groups: the industry managers until the mid-1960s and the environmentalists after the mid-1970s. See M. J. Peterson, *Whalers, Cetologists, Environmentalists, and the International Management of Whaling*, 46 INT'L ORG. 147 (1992).

¹⁸⁹ Problem-solving capacity can be conceived of as 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 ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE (Edward L. Miles, Arild Underdal, Steinar Andresen, & Jorgen Wettstad eds., 2001).

¹⁹⁰ See NEIL J. MITCHELL, *AGENTS OF ATROCITY: LEADERS, FOLLOWERS, AND THE VIOLATION OF HUMAN RIGHTS IN CIVIL WAR* (2004).

¹⁹¹ See Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution*, 54 INT'L ORG. 457 (2000).

¹⁹² See, e.g., Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005); Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1 (2005).

¹⁹³ See Karen J. Alter, *Private Litigants and the New International Courts*, 39 Comp. Pol. Stud. 22 (2006) (finding that, while older international courts (such as the ICJ) lacked private rights of action and compulsory jurisdiction, newer courts often incorporate these design elements. Alter argues that this trend

Focusing on the WTO, political scientists have explained why some disputes are brought, some settled, and others left dormant. One insight is that democracies are more likely to settle disputes with each other at the consultation stage.¹⁹⁴ Others find that in "low-velocity" industries with relatively few product lines and low turnover, there is a greater likelihood of WTO adjudication, perhaps because of the length of WTO proceedings.¹⁹⁵ A final key finding is that developing countries tend not to bring cases to the GATT/WTO dispute resolution bodies because these involve high startup costs. When a developing country has already been involved in a dispute, the odds rise that it will initiate a new dispute.¹⁹⁶ While political scientists have keenly explored how the internal characteristics of countries and industries explains WTO enforcement behavior, relatively little such research has focused on questions that have dominated the legal literature on the WTO's enforcement system—notably, how prior cases have influenced the interpretation of WTO obligations. WTO enforcement is one of the areas where political scientists and lawyers have studied the same institutions but with radically different foci because the motivations of scholars in the two fields are so different.

Perhaps the most important set of questions regarding international tribunals revolves around the extent to which international judges are free to draw their own interpretations. A key question in the political science research is the extent to which governments can influence international judicial decisions. Some argue that international judges are a type of agent, to whom national governments delegate important, but limited authority.¹⁹⁷ Others argue that international judges should be thought of as "trustees", meaning that they have substantial independent powers because their authority derives

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).

¹⁹⁴ See Marc L. Busch, *Democracy, Consultation, and the Paneling of Disputes under GATT*, 44 J. CONFLICT RESOL. 425 (2000) (arguing that this occurs because democracies are better able to credibly commit to negotiated settlements. He further argues that this finding indicates democracies use the WTO dispute resolution process not to ensure adherence to international legal norms, but as a mechanism for tying their hands).

¹⁹⁵ See Christina L. Davis & Yuki Shirato, *Firms, Governments, and WTO Adjudication: Japan's Selection of WTO Disputes*, 59 WORLD POL. 274 (2007).

¹⁹⁶ See Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033 (2009).

¹⁹⁷ See Geoffrey Garrett & Barry Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market*, in IDEAS AND FOREIGN POLICY (Judith Goldstein and Robert O. Keohane eds., 1993); 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); Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. POL. 669 (2005); DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake., Daniel L. Nielson, & Michael J. Tierney eds., 2006).

from sources other than delegation from national governments.¹⁹⁸ These different views imply distinctly different explanations for the evolution of legal doctrine.¹⁹⁹

Much of the recent work that has attempted to shed light on this debate has sought to incorporate insights from the study of domestic judicial behavior, looking at questions such as the causes and effects of judicial decisionmaking.²⁰⁰ Studies looking at the European Court of Human Rights (ECtHR), for example, find that some judges are more "activist" than others—a variation that isn't due to differences in legal cultures or levels of human rights compliance in their home countries. Instead, member-states that aspire to join the EU as well as EU member-states that are pro-integration tend to appoint more activist judges (who, in turn, expand the role of the Court).²⁰¹ Research in this vein has offered many other rich insights into judicial behavior.²⁰²

¹⁹⁸ See Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L REL. 33 (2008) (arguing that we should view international courts and judges as trustees rather than as agents. Alter points to three important differences between trustees and agents. First, trustees are selected because of their personal reputations and professional norms. Second, trustees have independent authority (and not only authority granted by the principal) to make decisions. Third, trustees are empowered to act on behalf of a beneficiary (rather than a principal)). 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).

¹⁹⁹ Perspectives that see states as the primary actors, even in supposedly independent tribunals, typically also see the possibilities of non-compliance and exit imposing significant constraints on the relevance of decisions by international courts. See, e.g., Clifford J. Carrubba, *The European Court of Justice, Democracy, and Enlargement*, 4 EUR. UNION POL. 75 (2003). By contrast, if international judges act as trustees, then, although they are not unconstrained, they will have significant leeway to interpret founding documents in ways that impose new obligations on states. See, e.g., Karen J. Alter, *Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998).

²⁰⁰ See generally Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, INT'L ORG., forthcoming (2011).

²⁰¹ See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007).

²⁰² For example, one study shows that ECtHR judges are politically motivated, but not in the sense that they are biased for or against certain countries. Rather, they have policy preferences with respect to the application of human rights law and attempt to further these preferences in their decision-making. See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008). Research focused on the European Court of Justice suggests that judges behave strategically in three ways. The first is that when the European Council makes more credible threats of overriding the court's decision, the ECJ is less likely to rule against a government. Second, the more opposition a government has from other governments, the more likely the court is to rule against that government. Third, the relationship posited in the second claim is weaker in preliminary rulings than in direct actions. See Clifford J. Carrubba, Matthew Gabel, & Charles Hankla, *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 109 AM. POL. SCI. REV. 435 (2008). For an argument regarding the ways in which the WTO DSM acts strategically, see Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT'L ORG. 257 (2010).

In addition to voting behavior by judges, a few political scientists are now studying the content of international judicial decisions, such as patterns of legal citation. Those studies suggest that judges on international courts cite other international courts for three reasons. First, they may be interested in encouraging other courts to reciprocally follow (and cite) their own decisions. Second, citations to other courts may offer the benefit of being persuasive to certain types of state parties, especially new or unstable democracies.²⁰³ This work may be of interest to lawyers because it addresses some of the underlying causes of international norm diffusion, which can be studied by looking at citation patterns.²⁰⁴ Along related lines, an important question recently analyzed by political scientists is why ECtHR cite significant amounts of their own case precedent (despite the absence of a norm of *stare decisis* in international law) and why the tendency to cite precedents varies so 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 its decisions—a finding that suggests that judges are not simply trustees insulated from pressure by domestic governments but are constrained in what they can achieve by domestic courts and other important external audiences.²⁰⁵

These studies suggest that neither the agent not trustee view of international judges is complete. International judges face significant enforcement problems, and in some settings they find ways to strategically manage their relationship with domestic governments in order to maximize compliance with their decisions. This process has important and observable effects on judicial behavior and the evolution of international law.

Learning

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

²⁰³ See Erik Voeten, *Borrowing and Non-Borrowing Among International Courts*, J. LEGAL STUD. (2010). Legal scholars have already paid significant attention to similar questions, such as the use of foreign law in domestic courts. See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 112 AM. J. INT'L L. 241 (2008).

²⁰⁵ See Yonatan Lupu & Erik Voeten, *Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643839.

There is relatively little research on learning as it affects international cooperation. However, empirical studies suggest at least one line of analysis that has been promising: learning, along with other sources of new information, help transform the strategic context for cooperation. By changing the “problem type” cooperation can improve. (The same logic could undermine the prospects for cooperation, but most empirical research reflects a bias that scholars tend to study cases where cooperation has been successful.)

Two examples from international environmental cooperation are illustrative. In the early days of international talks to protect the ozone layer proposals to eliminate ozone-depleting substances made little headway because they would have required many countries to adopt costly policies that would be hard to monitor and enforce. By reframing the plan and adopting more modest goals, negotiators in effect shifted from a hard collaboration problem to one where regulations were much less costly to implement and incentives for defection were more modest. As the negotiators learned more about the cost and performance of new technologies and improved the system for enforcing obligations on reluctant countries it became possible to tackle the more difficult task of true collaboration.²⁰⁶ Similarly, early efforts to address chloride pollution in the Rhine River were plagued by the structure of the upstream-downstream problem. Upstream polluters (notably France) had little interest in the plight of downstream countries that suffered the pollution (notably the Netherlands). As the Netherlands learned how to make financial incentives conditional upon French behavior, and as both countries became members of the European Community (and thus faced the need to cooperate on many other topics) the strategic context changed in ways that made cooperation easier.²⁰⁷

Linkages and Scope

Fifth, one way that legal institutions evolve is that the scope of their coverage changes. Indeed, the boundaries around a problem are often malleable, allowing entrepreneurial countries and other actors to link issues in ways that alter the strategic context of a negotiation by changing the scope of bargaining. Research by political scientists has led to two insights about issue-linkage and the scope of legal institutions that will be of interest to scholars in public international law.

²⁰⁶ 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); Elizabeth R. DeSombre & Joanne Kaufman, *The Montreal Protocol Multilateral Fund: Partial Success Story*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE 89 (Robert O. Keohane & Marc A. Levy eds. 1996); EDWARD PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY (2003).

²⁰⁷ See Thomas Bernauer, *Protecting the Rhine River against Chloride Pollution*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE (Robert O. Keohane & Marc A. Levy eds., 1996).

First, drawing on the second face of power, issue-linkage is a way to shape agendas and thus guide the evolution and interpretation of legal commitments along some pathways but not others. For example, the boundaries around the topic of “international trade” have greatly expanded over time—a topic of interest to political scientists and legal scholars alike.²⁰⁸ The scholarship on which actors have the ability to make these agenda-setting linkages varies with the building blocks that scholars think are most important. For example, drawing on the first face of power, studies note that powerful states have put on the international trade agenda topics of great interest to some of their well-organized interest groups—such as rules on intellectual property (of value to western pharmaceutical and entertainment companies) or limits on the ability to use trade rules to undercut environmental standards (of keen interest to environmental groups).²⁰⁹ Other studies look to the third face of power—to entrepreneurial interest groups working transnationally, for example—to explain why international legal institutions on the protection of biological diversity were expanded to include complicated schemes to protect developing countries against “biopiracy” of their natural assets.²¹⁰ The role of issue-linkage as a way to set the agenda and alter the prospects for successful bargaining is long familiar in the formal study of negotiations, and some scholars with that background have looked in depth at the negotiations leading to major international legal agreements.²¹¹

Second, studies on the scope of legal commitments are now leading to insights into a topic that has long been a concern of international lawyers: whether the many different layers of institutions yield conflicts and forum shopping that can produce gridlock or whether institutional diversity can offer outcomes that are less perverse.²¹² Here, a collaboration between the fields of international law and political science can help identify when a high density of overlapping and linked institutions impede or advance international collaboration.²¹³

²⁰⁸ See, e.g., Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001); Jose E. Alvarez, *The Boundaries of the WTO*, 96 AM. J. INT'L L. 146 (2002). See also Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79 (2006) (arguing that the WTO itself plays a key role in setting boundaries but not giving much attention to the underlying interests of key members of the WTO).

²⁰⁹ [Cites]

²¹⁰ See Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

²¹¹ For a similar argument drawn from the experience of the Law of the Sea by a scholar trained, in part, in decision theory and negotiation, see JAMES SEBENIUS, *NEGOTIATING THE LAW OF SEA* (1984) (arguing that issues and parties in international negotiation are typically subject to strategic manipulation);

²¹² See, e.g., Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007).

²¹³ For a notable exception, see Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999).

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 in other areas the legal landscape is more of a decentralized “regime complex” of laws and institutions.²¹⁴ This research is also chipping away at the normative bias in the literature in favor of hierarchical legal regimes, which exists because scholars and diplomats believe that such arrangements yield the greatest clarity, are most like national law and thus most likely to be effective.²¹⁵ In many areas evidence abounds that those legal forms are impractical and they undercut experimentation and learning that are crucial in the early stages of developing useful law around cooperation problems where the best solutions are difficult to identify at the outset.²¹⁶

Part IV: The Effectiveness of Legal Agreements and Institutions

A large fraction of political science scholarship on international legal institutions is ultimately concerned with whether and how international institutions have influence.²¹⁷ While similar debates have unfolded in the legal literature,²¹⁸ the political science literature is distinguished by two important insights. The first is that compliance rates are subject to “selection effects” and therefore must be analyzed with methodological care and

²¹⁴ The early research on these questions focused on hierarchical legal systems—so-called nested regimes. See INSTITUTIONAL DESIGNS FOR A COMPLEX WORLD: BARGAINING LINKAGES, AND NESTING (Vinod K. Aggarwal ed., 1998). For other work looking at more fragmented outcomes, see, e.g., Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277 (2004); Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL’Y 362 (2006). For recent reviews, see Karen J. Alter & Sophie Meunier, *Symposium: The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POL. 13 (2009); Frank Biermann, Philipp Pattberg, Harro van Asselt, & Fariborz Zelli, *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, 9 GLOBAL ENV’T’L POL. 14 (2009).

²¹⁵ A few scholars have also explored whether integrated regimes or fragmented regimes affect the ability of states to influence outcomes. Benvenisti and Downs, for example, argue that fragmentation is the result of a strategic effort by powerful states to give themselves autonomy in part because weaker states have a harder time engaging with fragmented legal systems. Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD L. REV. (2007).

²¹⁶ See Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, PERSPECTIVES ON POL. (2010, forthcoming).

²¹⁷ See generally Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010).

²¹⁸ See, e.g., INIS CLAUDE, *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATION* (1958); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995). 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).

substantive attention to states' decisions to commit to international law. The second key insight is that compliance, alone, is often an incomplete concept for analyzing the effects of international law on state behavior.

Methodological Issues: Selection Effects and Compliance

Research on whether an international legal agreement has had an effect on state behavior often probes whether party states comply with the terms of the agreement more often than non-parties. While such comparisons between parties and non-parties are useful they can also be misleading without a full account for the underlying causes of treaty commitment. In many cases, governments select the treaties they join because they would honor them anyway or because they are sure they can comply.²¹⁹ In other cases, governments might join treaties they do not intend to honor, knowing that no other actor will be able to enforce compliance. 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. Compliance rates can be quite meaningful, but only when understood in the right context.²²⁰ Political scientists have debated these methodological issues for nearly two decades, and the outcome of those debates have one central implication. Making the study of compliance meaningful requires sophisticated methods that allow for valid inference.²²¹ Accounting for selection effects is a crucial first step in studying the impact of international law, but the next steps are even more important. Those next steps include mechanisms that explain why countries join treaties and how membership influences behavior. Countries may join treaties only when the costs of compliance are low or zero. Alternatively, they may join when they want to change their behavior; the process of joining might even trigger such changes. Some of those mechanisms lead to skepticism about the import of international law; others do not.²²²

²¹⁹ See George W. Downs, David M. Roake, & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996).

²²⁰ But see Lisa Martin, *Against Compliance*, working paper, University of Wisconsin-Madison (arguing that political scientists should abandon the study of compliance altogether).

²²¹ See Beth A. Simmons & Daniel J. Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 AM. POL. SCI. REV. 623 (2005); Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611 (2005); Yonatan Lupu, *The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects*, manuscript, University of California-San Diego (2010). For a methodological discussion of the problem selection effects pose for attempts to make causal inference from data, see JUDEA PEARL, *CAUSALITY: MODELS, REASONING, AND INFERENCE* (2000).

²²² One argument is that the presence of international legal institutions changes how governments view their interests and makes them more likely to join agreements because joining is part of being a good standing member of the international community. See MARGARET E. KECK & KATHRYN SIKKINK,

Success in this research starts with definitions. Should the effect of an international agreement be measured by looking at *compliance* or at some other factors? If we assume international law can only impact the extent to which states conduct the activities it prohibits or requires, then perhaps compliance captures all of the law's impact. However, most political science research now looks beyond compliance at the causal mechanisms that link law to changes in behavior. Many political scientists call this "influence" or "effectiveness." The study of effectiveness, rather than compliance, corresponds more closely to the forces social scientists study, which are those that explain human and social behavior.

Effectiveness is not the same as compliance. Effectiveness is hard to measure because in most settings it requires a counterfactual – if the law had not been in place, the situation would have been better or worse?²²³ An agreement has been effective if it has induced some change in behavior that is beyond what would have happened without the agreement. And the change in behavior must conform to the broader goals of cooperation.

The realization that counterfactuals are an essential part of determining the effectiveness of international institutions has made research in this area much more complicated and contentious. The counterfactuals that matter most are those related to human behavior. The difficulty in measuring the counterfactual and the impact of an institution arises because human behavior responds to many forces and because the counterfactual is never actually observed. The area where political science has advanced the most in measuring the effects of international institutions and addressing the problem of counterfactuals is trade. The central conclusion from that research is that the GATT/WTO system has been associated with higher flows of trade and greater economic efficiency for only some members.²²⁴ However, that debate is far from fully settled.²²⁵ Research on

ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998). Drawing on sociology, some scholars have studied the propensity of nations to join international commitments because that is part of being a member in good standing in the international community. See, e.g., John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOCIOLOGY 144 (1997). Similarly, political scientist Krasner argues that, among other reasons, states often sign these agreements "to follow the script of modernity." STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999), at 121. A similar logic has been extended to explain why so many firms join voluntary codes of conduct. Firms seek safety in numbers. See David Vogel, *The Private Regulation of Global Corporate Conduct*, in *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., 2009).

²²³ 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).

²²⁴ 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); Judith L. Goldstein, Douglas Rivers, & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 737 (2007). 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).

international environmental cooperation has had a particularly difficult time identifying and measuring the counterfactual because behavior and environmental quality are affected by so many factors.²²⁶

Interestingly, while most research has sought to explain positive effectiveness—that is, the institution leads to more cooperation—some institutions have “negative” effectiveness. They make matters worse. For example, some institutions cause a backlash

²²⁵ Trade flows are not everything in trade law, and some scholars argue that the effectiveness of any particular institution must be examined in the larger context; many trade institutions work in tandem toward the same goals, making it hard to assess the effectiveness of any particular institution. As trade institutions become more complicated with the proliferation of FTAs in tandem with the core WTO/GATT regime these measurement problems are becoming more difficult. Goldstein et al. argue that many institutions overlap with the goals of the GATT/WTO and parsing out the effect of any particular institution requires examining the impacts of all. Judith L. Goldstein, Douglas Rivers, & Michael Tomz, *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 737 (2007). Similarly, Kucik and Reinhardt argue that effectiveness means (a) increased probability of joining the GATT/WTO; (b) increase in cuts agreed to at GATT/WTO accession; and (c) increase in cuts agreed to in future negotiations. Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT'L ORG. 477 (2008). Political scientists have also found it hard to measure the effect of the WTO's most salient institutional feature: its enforcement system through dispute settlement. The impact of enforcement systems is hard to measure because they could be perfectly effective by deterring all violations (e.g., nuclear deterrence) or effective by encouraging parties to identify and prosecute violations. Guzman and Simmons argue that effectiveness should not be equated to simply preventing disputes entirely, but encouraging their resolution before a dispute panel is convened to handle the problem. Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 205 (2002). Busch argues that the effectiveness of an institution depends in part on countries' choice to use it to settle disputes. Dispute settlement is already an area where there has been substantial fertilization between political science and law—in part because most disputes arise with a claim of noncompliance and are judicial in their operation. Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007). For example, among legal scholars Shaffer argues that the increased legalization of trade dispute settlement under the WTO has created strong incentives for well-placed private actors to engage in public legal processes. GREGORY SHAFFER, *THE CHALLENGES OF WTO LAW: STRATEGIES FOR DEVELOPING COUNTRY ADAPTATION* (2006).

²²⁶ Most political science literature in this area is ultimately concerned with whether cooperative institutions actually solve the environmental problem at hand. In practice, however, the state of the environment depends on a wide array of factors that are beyond human control, and sifting that natural variation from impacts that humans influence is difficult. Moreover, the goals for environmental protection often change as well. See Ronald Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT'L ORG. 425 (1994). Thus nearly all research in this area uses a behavioral counterfactual—it looks at the behavior (e.g., the level of pollution) that would have occurred in the absence of international institutions and then traces the effect of the institution. A few scholars have also tried to examine whether environmental regimes are efficient—that is, whether the resources they mobilize, such as money and political effort, are minimized while the impact on environmental management is maximized—but such work is extremely difficult and in its infancy. See, e.g., 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).

in domestic politics that make countries even less willing to cooperate, for example, are an example of negative effectiveness.²²⁷

Substantive Issues: Why Does Law Have an Effect?

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

The first line of argument sees effectiveness as the result of incentives. Governments design international agreements in ways that encourage favorable changes in behavior. The incentives that analysts think matter most depend heavily on which of the building blocks discussed in part I they think are most important. Traditionally, international relations looked to incentives offered by dominant states—the first face of power—to explain which international agreements are most effective. Studies on the international whaling regime, for example, have pointed to the dominant role of the United States in using the threat of trade sanctions to encourage whaling nations to change their behavior. The countries that are most vulnerable to sanctions—such as Iceland, which depended heavily on exports of fish products that were easily sanctioned at little cost by the United States—were most likely to change their behavior.²²⁸ Although this strand of research concentrates on the first face of power it also sees a role for international

²²⁷ A few legal scholars have looked at negative effectiveness as well. Julian Ku and Jide Nzelibe, for example, argue that international criminal tribunal (ICT) prosecution may exacerbate atrocities in some countries because: (1) it targets actors whose participation in peace processes is likely to be vital in weak states, and (2) it eliminates incentives of state actors to create institutions that constrain future actors from committing atrocities by offering the ICT as an ineffective substitute. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006). Oona Hathaway argued several years ago that commitment to several human rights treaties was associated with higher levels of human rights abuses. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). That finding spawned a significant body of research among political scientists. See, e.g., Jay Goodliffe & Darren G. Hawkins, *Explaining Commitment: States and the Convention Against Torture*, 68 J. POL. 358 (2006); James Raymond Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008); James R. Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance*, available at <http://iserp.columbia.edu/files/iserp/Rosendorff--CUIPS%20Paper.pdf>.

²²⁸ See ROBERT L. FREIDHEIM, *TOWARD A SUSTAINABLE WHALING REGIME* (2001).

institutions in helping powerful countries to mobilize sticks and carrots and in making it easier for like-minded countries and NGOs to mobilize around the same goals.²²⁹ Political science research has less to say about when states select positive or negative incentives (carrots or sticks). However, there is a long tradition of research on international sanctions that generally concludes that sanctions are usually not effective,²³⁰ and thus as a practical matter studies that focus on incentives from international institutions usually look at positive inducements—such as special funds that help governments comply with international obligations—and at withdrawal of those incentives as a penalty.

Today, many analysts have shifted their focus to concentrate on how international incentives affect domestic politics. For example, the international regime to regulate oil pollution from tankers was highly influential because international rules created a strong incentive for insurance companies and port state governments to require that tanker operators comply.²³¹ And 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.²³²

A second line of argument stands in stark contrast. Instead of looking to inducements and penalties, this line of thinking starts with the third and fourth faces of power. It sees international institutions, as well as particular agreements such as treaties, as having an effect through persuasion and legitimacy—usually working through domestic pressure groups such as NGOs, churches and elites. For example, many studies of international environmental cooperation ultimately point to these agreements as focal

²²⁹ See, *supra*, notes [x] to [y] and accompanying text (NPT discussion).

²³⁰ See, e.g., LISA L. MARTIN, *COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS* (1992); Edward D. Mansfield, *Review: International Institutions and Economic Sanctions*, 47 *WORLD POL.* 575 (1995); Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When is Cooperation Counterproductive?*, 54 *INT'L ORG.* 73 (2000); Navin A. Bapat & T. Clifton Morgan, *Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data*, 53 *INT'L STUD. Q.* 1075 (2009).

²³¹ Unlike rules on how tanker operators behaved at sea (which were hard to enforce) these technology standards were much easier to implement, and once a tanker had installed the better technology that decision was irreversible. See Ronald Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 *INT'L ORG.* 425 (1994). Others have argued that the contractual environment is also especially important. See *INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION* (Peter M. Haas, Robert O. Keohane, & Marc A. Levy eds., 1993).

²³² Both Neumayer and Hafner-Burton and Tsutsui have shown that treaties can influence human rights behaviors, but mainly by mobilizing NGOs and local human rights advocates to lobby the government. Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 *J. CONFLICT RESOL.* 925 (2005); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 *AM. J. SOC.* 1373 (2005). For studies by legal scholars that look at similar issues, see, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002).

points for growing concern about environmental problems.²³³ In the international agreements on acid rain in Europe, for example, NGOs within important polluting countries became convinced that acid rain was an important issue and then used internationally agreed emission targets as a way to pressure their governments to change—most famously in the case of the United Kingdom which went from being the “dirty man of Europe” to a reliable leader on environmental issues over the space of a generation.²³⁴ Scholars who start with the third and fourth faces of power see domestic pressure groups as a driver for that change, although some also see important roles for elites such as Margaret Thatcher. Many scholars have looked at how international human rights agreements accelerate the diffusion of norms within countries, resulting in changes to how human rights plays out in domestic politics and institutions such as courts.²³⁵ For example, membership in international organizations (including those not explicitly addressing human rights) is associated with the international diffusion of human rights practices.²³⁶

A third line of argument looks at how the effectiveness of international institutions depends on their ability to mobilize expertise and administrative competence—a topic covered in more detail earlier.²³⁷

A fourth line looks at delegation—in particular, the impact of courts. Much of this work, like all international relations scholarship on courts, has focused on European courts and mainly in the area of human rights. An important test of effectiveness is whether courts can get governments to comply with costly rulings. The literature has focused on the European Court of Justice (ECJ). Early work argued that because the ECJ did not have

²³³ See, e.g., Arild Underdal, *Determining the Causal Significance of Institutions: Accomplishments and Challenges*, in INSTITUTIONS AND ENVIRONMENTAL CHANGE: PRINCIPAL FINDINGS, APPLICATIONS, AND RESEARCH FRONTIERS 49 (Oran R. Young, Heike Schroeder, & Leslie A. King eds., 2008).

²³⁴ See Marc A. Levy, *European Acid Rain: The Power of Tote-Board Diplomacy*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter M. Haas, Robert O. Keohane, & Marc A. Levy eds., 1993).

²³⁵ For example, new norms can lead to new interpretations by courts and the more effectively mobilized domestic interest groups that pressure for change. Finnemore and Sikkink argue that international criminal tribunals decrease violence because prosecutions present and reinforce legal norms providing legally binding judgments about what behavior is acceptable. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998). See also Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 111 AM. POL. SCI. REV. 573 (2007). This type of argument has also been made by several legal scholars. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979); Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

²³⁶ See Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT'L STUD. Q. 127 (2010).

²³⁷ See also, *supra*, notes [x] to [y] and accompanying text (section on epistemic communities and problem solving capacity).

enforcement powers, the domestic governments could ignore it.²³⁸ Others—a collaboration of lawyers and political scientists—suggested that the ECJ actually had an effect because it masked the political implications of its rulings in legal discourse and because the countries subject to the ECJ all adhered to norms of judicial independence and the rule of law.²³⁹ Other scholars suggest that the effectiveness of the ECJ has come through co-option of national courts,²⁴⁰ and thus the question of ECJ became, in time, synonymous with the impact of national courts.²⁴¹

Empirical studies on the effect of courts have also looked to the third face of power and demonstrated how ECtHR rulings have empowered social actors and other European bodies, thus diminishing the ability of national governments to control the direction of European law.²⁴² Recent formal modeling has also contributed to this debate by focusing on how courts affect the perceived legitimacy of international commitments and levels of compliance with ECJ decisions.²⁴³

²³⁸ See Geoffrey Garrett & Barry Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market*, in IDEAS AND FOREIGN POLICY (Judith Goldstein and Robert O. Keohane eds., 1993); Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995). See also See George W. Downs, David M. Roocke, & Peter N. Barsboom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996).

²³⁹ See Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT'L ORG. 1 (1995).

²⁴⁰ See Karen J. Alter, *Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice*. 52 INT'L ORG. 121 (1998).

²⁴¹ Several of these scholars have since moderated their positions. See, e.g., Geoffrey Garrett, Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998) (noting that, in some instances, domestic governments would comply with decisions they would prefer to ignore); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2002) (noting that governments might ignore ECJ rulings, but argued that in many cases the legitimacy cost of doing so would prevent such non-compliance).

²⁴² Rachel Cichowski argues that the expansion of rights and access to international judicial institutions in Europe, especially in the form of the ECtHR, has expanded democratic accountability and transparency. She argues that this occurred for two reasons. First, the embodiment of personal rights in the European Convention on Human Rights and its incorporation into domestic law gave individuals "a powerful tool to engage in participation through law enforcement, rights claiming, and expanded protection" (p. 70). Secondly, she argues that a sequence of violations of the Convention led to the expansion of access to the ECtHR, thus creating increased opportunities for democratic participation and rights protection. See Rachel A. Cichowski, *Courts, Rights, and Democratic Participation*, 39 COMP. POL. STUD. 50. (2006).

²⁴³ These studies have looked at questions such as how legitimacy influences compliance with ECJ decisions. Clifford Carrubba provides a formal model that seeks to determine under which conditions legitimacy costs would promote compliance with ECJ. His model has several important implications. First: "The more frequently the government expects to experience high costs and the more costly high-cost situations are, the more severe the public's punishment must be for the government to choose to comply." (p. 90). Second: "If the public is not sufficiently suspicious of its government's behavior, governments will have a free hand to ignore adverse rulings on EU law independently of how costly the legitimacy costs may

All four of these lines of research point to cause and effect mechanisms that are familiar to international lawyers. The contribution of political science has been one of emphasis and evidence. All of the lines of cause and effect research point to the conclusion that causation is highly complex and often indirect. And the tenor of political science research has been to emphasize that except in rare areas where international institutions are highly developed and powerful, much of the effect of international institutions is through the domestic political process and domestic institutions such as courts. Human rights agreements, for example, mostly exert influence on government behavior indirectly through the domestic political process rather than directly through the treaty system.²⁴⁴

Part V. Opportunities for Collaboration

The study of international law has generated a large and productive research program for political scientists who study international legal institutions. Looking to the

be." (p. 90). Third: "If the public does not believe it is sufficiently likely that the court is a strategic type, governments will have a free hand to ignore adverse rulings on EU law independently of how costly the legitimacy costs may be." (p. 91). As these implications imply, the model do not guarantee the ECJ will be able to prevent non-compliance costs. The ability of the ECJ regime to generate legitimacy costs will depend on factors such as the relationship between the public and the government, the government's nationality, and whether the court behaves strategically. Clifford J. Carrubba, *The European Court of Justice, Democracy, and Enlargement*, 4 EUR. UNION POL. 75 (2003). Indeed, in a more recent paper on international courts generally (rather than the ECJ specifically), Carrubba provides a formal model that predicts that governments will not comply with international court decisions that impose high costs unless they anticipate being punished for non-compliance by other countries. Some recent formal modeling work also suggests that strong courts have an effect in part by encouraging parties to reveal information. Clifford J. Carrubba, *Courts and Compliance in International Regulatory Regimes*, 67 J. POL. 669 (2005). Michael Gilligan, Leslie Johns and B. Peter Rosendorff provide a formal model that attempts to explain how the variation in the strength of international courts' jurisdiction and enforcement powers affects member-states' strategic behavior. Their first point is that is that strong court results in the parties revealing less information in pretrial bargaining. Second, they argue that stronger courts reduce the probability of pretrial settlement, leading to costly litigation. Third, they argue that stronger courts lead to brinksmanship, which can often lead to conflict if the court chooses not to hear the case. They argue that these conclusions emphasize the important of precision in international law because many of their implications of their model derive from an assumption of incomplete information. Gilligan, Leslie Johns, & B. Peter Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 J. CONFLICT RESOL. 5 (2010). See also, supra, notes [x] to [y] and accompanying text (section on precision).

²⁴⁴ See, e.g., TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* (2005). The indirect line of argument helps explain the importance of studying types of governments and domestic politics. For example, Beth Simmons shows that international law has indeed made a positive contribution to the realization of human rights, but mainly in the countries "in flux," with some democratic experience, where treaties spark political mobilization. Among the many countries with weak legal systems or undemocratic political systems – Angola, Belarus, Cameroon, Myanmar, Tajikistan – or with strong rule of law – Australia, France, Oman, Portugal, Spain, U.S. – treaties seem to make little difference. They are either impossible to enforce or redundant. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

future, we see at least three main areas for collaboration that are likely to yield important insights about international legal institutions, processes and outcomes.

First is empirical research on enforcement and flexibility. In theory, these concepts are two sides of the same coin because the enforcement mechanisms that a country is willing to tolerate are related to the options it thinks it will have when it faces inconvenient commitments.²⁴⁵ Yet the actual experience with these mechanisms varies markedly. In most areas of international environmental and human rights law there are few or no formal enforcement mechanisms. By contrast, over the last two decades the design and operation of enforcement mechanisms in international trade law—notably in the WTO—has been a central topic for research. Meanwhile, flexibility provisions are commonplace in trade and human rights agreements yet rare in most of the flagship international environmental agreements. The theories that explain these patterns are advanced enough that systematic empirical testing is now possible.²⁴⁶ Such research could help explain the observed patterns in enforcement as well as how enforcement and flexibility interact in ways that influence the effectiveness of legal agreements.²⁴⁷

Progress on this front would help address important debates that have opened in both fields. For political scientists, one of the main insights from scholarship on the “rational design” of international institutions is that uncertainty can lead to large amounts of delegation and that one of the chief functions of delegated bodies is to help states manage the practical and political problems associated with enforcement.²⁴⁸ Yet outside the WTO relatively little is known about how enforcement works. For public international lawyers, progress in this area will 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 a gridlock of conflicting legal interpretations.²⁴⁹

²⁴⁵ See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000); Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* (Eyal Benvenisti & Moshe Hirsch eds., 2004) (on different pathways through which states can obtain flexibility needed to promote deeper cooperation); DAVID G. VICTOR, *GRIDLOCK ON GLOBAL WARMING* (2011) (on how flexibility could help address the particular challenges of global climate change); RICHARD BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* (1981) (on the special role of soft law as a source of flexibility).

²⁴⁶ See, *supra*, notes [x] to [y] and accompanying text (section on trade law enforcement).

²⁴⁷ See, e.g., Emilie M. Hafner-Burton, Laurence R. Helfer, & Christopher J. Fariss, *Emergency and Escape: Explaining Derogation from Human Rights Treaties*, INT'L ORG., forthcoming.

²⁴⁸ See, *supra*, notes [x] to [y] and accompanying text (section on rational design).

²⁴⁹ See, *supra*, notes [x] to [y] and accompanying text (discussion of forum shopping).

Second scholarship on private actors—that is, actors other than governments and their officials—has exploded within both fields. Most scholars agree that private actors play instrumental roles yet their remains relatively little collaboration between lawyers and political scientists on exactly when and how non-state actors have a practical effect on legal institutions and outcomes.

In the 1980s and early 1990s a topic of particular focus was “epistemic communities”—that is, groups of experts (usually scientists) organized as a transnational network to share information and influence government policy.²⁵⁰ In parallel, a body of legal research emerged that examined how transnational legal networks—including courts—were influencing international coordination.²⁵¹ And for the last two decades both fields have devoted substantial attention to NGOs as important private actors—especially public interest pressure groups such as organizations that have mobilized transnationally to press for arms control (e.g., the ban on landmines), protection of human rights (e.g., rights of women) and all manner of environmental goals.²⁵² We are concerned that the NGO focus—which arises in part because many scholars working in these areas are also normatively committed to the ideals of the most active NGOs—has been prone to over-state the importance of NGOs.

A particular blind spot is firms. Most of the literature that looks at firms has seen them with limited roles, such as performing functions that are delegated to them by governments.²⁵³ And most studies also see firms as an interest group that is usually keen to oppose regulation and prone, when regulation is inevitable, to favor private regulation that industry can control more readily.²⁵⁴ A sharper focus on how firms actually behave in

²⁵⁰ See, e.g., PETER M. HAAS, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* (1990). The argument that scientists had a big transnational influence was not new, of course. Studies on international cooperation about nuclear testing done in the 1960s, for example, saw a big influence for informal networks of scientists—partly because scientists had similar outlooks and partly because they had unrivaled access to information such as seismology that was essential to making regulations on underground nuclear tests workable. See KARAN JACOBSON & ERIC STEIN, *DIPLOMATS, SCIENTISTS, AND POLITICIANS: THE UNITED STATES AND THE NUCLEAR TEST BAN NEGOTIATIONS* (1966).

²⁵¹ See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

²⁵² See, *supra*, notes [x] to [y] and accompanying text (sections on NGOs).

²⁵³ See *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., 2009). But see Layna Mosley, *Private Governance for the Public Good? Exploring Private Sector Participation in Global Financial Regulation*, in *POWER, INTERDEPENDENCE AND NON-STATE ACTORS IN WORLD POLITICS* (Helen Milner & Andrew Moravcsik eds., 2009); RONIE GARCIA-JOHNSON, *EXPORTING ENVIRONMENTALISM: U.S. MULTINATIONAL CHEMICAL CORPORATIONS IN BRAZIL AND MEXICO* (2000).

²⁵⁴ See JOHN BRAITHWAITE & PÉTER DRAHOS, *GLOBAL BUSINESS REGULATION* (2009); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler, & Tony Porter eds., 2005); Phillip Pattberg, *Institutionalization of Private Governance*, 18 *GOVERNANCE* 589 (2005). Research on private regulation has also overlapped with the study of corporate social responsibility and debates over

international law is overdue—especially one that is empirically oriented to explain the kinds of regulation that firms actually favor and how they organize to influence the content of such rules.²⁵⁵ We note that the histories of many international regulatory agreements, such as on intellectual property under the WTO²⁵⁶ and on regulation of ozone-depleting chemicals under the Montreal Protocol on the Substances that Deplete the Ozone Layer,²⁵⁷ 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.²⁵⁸ New research in political science is beginning to explore how international regulatory law is quite different both because it is usually weaker than national law and because firms usually can't act directly in most formal international processes—they must search for governments who will serve as their agents.

Third, there are potentially large gains from collaboration in the study of customary international law. A large fraction of the work in public international law focuses on the role of custom. Important debates over the sources and impacts of customary international law—including whether countries can even exit from some customary obligations—have long been a staple of legal writing.²⁵⁹ Political scientists have been almost completely

whether firms will (and should) self-regulate in ways that may be immediately contrary to their particular financial interests. [see David Baron, *Morally Motivated Self-Regulation*]

²⁵⁵ Among the earlier studies in this area charting research lines that have not much been followed further see Ronie Garcia-Johnson *Exporting Environmentalism: U.S. Multinational Chemical Corporations in Brazil and Mexico* (MIT Press, 2000).

²⁵⁶ See PETER DRAHOS & JOHN BRAITHWAITE INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2007); Susan K. Sell, *Intellectual Property Rights*, in GOVERNING GLOBALIZATION: POWER AUTHORITY AND GLOBAL GOVERNANCE (David Held & Anthony McGrew, eds. 2002); Jon Aaronson, *International Intellectual Property Rights in a Networked World*, in POWER, INTERDEPENDENCE AND NON-STATE ACTORS IN WORLD POLITICS (Helen Milner & Andrew Moravcsik eds., 2009).

²⁵⁷ On the ozone layer, see generally EDWARD PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY (2003). On firms, see James Maxwell & Forrest Briscoe, *There's Money in the Air: The CFC Ban and DuPont's Regulatory Strategy*, 6 BUS. STRATEGY & ENVIRONMENT 276 (1998); DAVID LEVY & PETER NEWELL, THE BUSINESS OF GLOBAL ENVIRONMENTAL GOVERNANCE (2006); Horst Albach, Ellen Krupa & Dieter Koster, *Entry, Entry-Deterrence and Exit: A Study of the Market for CFCs*, 51 KYKLOS 469 (1998).

²⁵⁸ 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).

²⁵⁹ See, e.g., Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); Theodor Meron, *The Continuing Role of Custom in International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. PUB. POL'Y 7 (2006); Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, in PROGRESS IN INTERNATIONAL ORGANIZATION (Rebecca Bratspies & Russell A. Miller eds., 2007); Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. (2010).

absent from this debate, and a large swath of political scientists drawn to the first face of power are also inclined not to see such legal norms, especially because they do not necessarily derive from the interests of powerful states, as unimportant.²⁶⁰ For most public international lawyers customary international law is omnipresent; for most political scientists it is rarely considered.

The shift in emphasis within international relations over the last two decades has led to much more sophisticated theories about how forces within states interact with international politics. At the same time, the field has put much greater emphasis on general norms—including how norms come to be viewed as legitimate and the conduits for norms to spread—and that puts political science in a 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.

Part VI. Conclusion

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

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

Here we have suggested a framework for understanding the development of political science research related to public international law. Our approach is to emphasize that political science, broadly, rests on three main building blocks—with different scholars

²⁶⁰ See, *supra*, notes [x] to [y] and accompanying text (sections on realism)

varying which blocks they emphasize. Those blocks help explain why some studies focus on state power and coercion as a dominant force affecting the content and operation of legal institutions while others look to forces within countries. Those blocks also help explain the particular approaches that political scientists have taken when studying the design and operation of legal institutions—an area where political science research, in theory, should overlap heavily with the work of public international lawyers yet actual collaborations still remain remarkably scarce.

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