

COMMITMENT AND DIFFUSION: HOW AND WHY NATIONAL CONSTITUTIONS INCORPORATE INTERNATIONAL LAW

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Drafters of new constitutions face a bewildering array of choices as they seek to design stable and workable political institutions for their societies. One such set of choices concerns the status of international law in the domestic legal order. In a global era, with an expanding array of customary and treaty norms purporting to regulate formerly domestic behavior, this question takes on political salience. This paper seeks to describe the phenomenon of constitutional incorporation of international law in greater detail and provide a preliminary empirical test of the competing explanations for it. First, the discussion focuses on the concepts of monism and dualism, which have become conventional terms used by lawyers to describe the interaction of domestic and international legal systems. Second, a theory of commitments as well as the advantages and disadvantages of international law are set forth. Third, empirical implications are developed for the precommitment and diffusion theories, which are then tested. Findings show that adopting international law is a useful strategy for democracies to lock in particular policies, encourage trust in governments and state regimes, and bolster global reputations.

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I. INTRODUCTION

Drafters of new constitutions, from Iraq to Montenegro, face a bewildering array of choices as they seek to design stable and workable political institutions for their societies. One such set of choices concerns the status of international law in the domestic legal order. In a global era, with an expanding array of customary and treaty norms purporting to regulate formerly domestic behavior, this question takes on particular salience.

The design choices are myriad. Should customary international law be directly binding in the domestic legal order? When will particular international treaties be constitutionalized? What status should be given to international treaties? States differ significantly along these dimensions, as Part II below demonstrates. In this paper, we are concerned not with normative answers about what states *should* do, but rather the positive question about what conditions give rise to different configurations in national constitutions. Why do states vary in their approach to international law?

In a recent treatment, Tom Ginsburg approaches the problem from the perspective of positive constitutional theory, in particular treating constitutions as precommitment devices.¹ Constitutions as precommitment devices represent self-binding acts, whereby drafters restrict the actions available to future politicians.² By constraining choices to be made at a later time, constitutions can help to resolve current political problems and thereby facilitate stable political order in the future. Ginsburg's theory focuses specifically on these precommitment functions of international law provisions, noting that they are distinct from other forms of constitutional precommitment in that they offer a means of placing policies beyond the control of any domestic actor. Such functions, he argues, will be particularly useful for certain kinds of states, namely those that are undergoing a transition to democracy. Ginsburg presented preliminary evidence suggesting that such states are more likely to be open to customary international law, and to provide for treaty-making structures that build on the logic of precommitment.³ International law can lock in

1. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006).

2. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36-111 (1979); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134-77 (1995) [hereinafter HOLMES, PASSIONS AND CONSTRAINT]; Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988) [hereinafter Holmes, *Paradox of Democracy*].

3. For other theories of this phenomenon, see Tom Buergenthal, *Modern Constitutions and Human Rights Treaties*, in POLITICS, VALUES AND FUNCTIONS 197, 200 (Johnathan I. Charney et al. eds., 1997) ("Countries that had lived under non-democratic regimes in the past were especially eager to endow their courts with the legal power not to give effect to national laws or executive decisions in conflict with the states' international human rights obligations."); see also John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 335 (1992).

these commitments, increasing the prospect of compliance past the life of the current government or regime, in environments of fragile democracy.

There is an alternative hypothesis, however, that might explain the empirical patterns observed in Ginsburg's paper. It may be that new democracies are instead particularly prone to adopting "internationalist" constitutions as part of a trend among countries to do so during the late twentieth century wave of constitutional reforms.⁴ The incorporation of international law, in that view, is part of a more general process of diffusion in which the constitutional choices of one country alter the choice set and the calculus of others. Study after study confirms the explanatory power of this sort of conformity in policy choices across a range of substantive domains and settings.⁵ The constitutional drafting exercise—which is often set in situations of national crisis and institutional uncertainty⁶—is particularly amenable to these sorts of influences. Under such circumstances, leaders are arguably more sensitive to reputational concerns. At the same time, limitations on time and information lead them toward considering legal models that are readily available elsewhere. Both of these sets of conditions—a highly symbolic decision process and cognitive constraints—favor the complementary diffusion processes of *adaptation* and *learning* that we describe more fully below. The resulting legal structure may suggest a hybrid form characteristic of constitutional "bricolage," but one that nevertheless exhibits particular patterns over time and across space.⁷

This paper seeks to describe the phenomenon of constitutional incorporation of international law in greater detail and to provide a preliminary empirical test of these competing explanations. Part II introduces the topic by describing the concepts of monism and dualism, which have become conventional ways for international lawyers and scholars to speak about the interaction of the domestic and international legal systems. Part III sets out the theory of commitments and explains the relative advantages (and disadvantages) of international law, both customary and those embodied in international agreements. Part IV develops empirical implications, which are then tested in Part V. Part VI concludes.

4. For a conceptual review of the diffusion of policy ideas and institutions, see Zachary Elkins & Beth Simmons, *On Waves, Clusters and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. OF POL. & SOC. SCI. 33, 39–40 (2005).

5. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 369–70 (1995).

6. *Id.* at 366–67.

7. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1285–1301 (1999) (discussing the concept of bricolage).

II. THE INTERACTION OF DOMESTIC AND INTERNATIONAL LEGAL ORDERS

National constitutional provisions vary widely in terms of their relationship with international law. International lawyers and scholars have traditionally used the concept of monism and dualism to describe the relationship between international legal order and the domestic legal order.⁸ Monism sees international law and the domestic legal system as part of the same legal order.⁹ International law has a primary place in this unitary legal system, such that domestic legal systems must always conform to the requirements of international law or find themselves in violation.¹⁰ This would be true whether or not domestic legal actors had taken any formal steps to introduce international legal norms into the domestic legal order in accordance with domestic constitutional rules.

In contrast, dualism views the international legal order as distinct, only penetrating the domestic legal order by explicit consent of the state involved. When the two systems conflict, national courts would apply their own national law. From a dualist perspective, the international legal order could purport to bind actors within states, but consent is required to do so as a matter of domestic law.¹¹ International legal obligations would require transposition into the domestic order to take effect. Absent such transposition, there is the distinct possibility of an action being legal in national law but illegal in international law; in which case, a dualist would presume that courts should apply the rules of national law.¹²

A further complexity is that monism and dualism can vary with the type of obligation, so that some states are monist with regard to treaty law but dualist with regard to customary international law. For example, the Netherlands Constitution of 1983 places international treaties above the Constitution, and explicitly states that statutes that conflict with international law are void.¹³ But the Dutch Constitution does not give the

8. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31–33 (5th ed. 1998); ANTONIO CASSESE, *INTERNATIONAL LAW* 213–17 (2d ed. 2005); Jackson, *supra* note 3, at 313–15; see also Richard Frimpong Oppong, *Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa*, 30 *FORDHAM INT'L L.J.* 296, 297–98 (2007).

9. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 64 (1995).

10. *But see* CASSESE, *supra* note 8, at 213–14 (noting another early view of monism that put domestic law as primary).

11. *Id.* at 214.

12. BROWNLIE, *supra* note 8, at 32. The high point of monist thinking is found in the Permanent Court of International Justice opinion in *Exchange of Greek and Turkish Populations* (Greece v. Turk), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21) at 20 (states which have entered into international obligations have a duty to modify national law so as to satisfy the obligations promised).

13. GRONDWET [GW.] [Constitution] art. 91(3) (Neth.) (providing for approval of treaties that conflict with the constitution by two-thirds vote); *id.* at art. 94 (statutes in conflict with treaties are inapplicable). For an explanation, see CASSESE, *supra* note 8, at 229 n.30 (discussing several countries' methods of determining treaties' precedence); see also Jackson, *supra* note 3, at 332–34.

same status to customary international law.¹⁴ In Germany, Italy and Austria, by contrast, customary international law is superior to domestic statutes, but treaties are equal to domestic statutes, with the last-in-time rule determining which is valid.¹⁵ This is the opposite configuration of the Dutch Constitution. To take another example, the Constitution of Russia states that the “[u]niversally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of international agreement shall be applied.”¹⁶ France has yet another configuration, in which treaties have higher status than subsequent legislation, but the French constitution is silent on customary international law.¹⁷ In Switzerland, preemptory norms of *jus cogens*, but not other rules of customary international law, are superior to the Constitution.¹⁸ Finally, constitutions can require that courts interpret the document in conformity with international human rights law.¹⁹

The United Kingdom, with its long tradition of parliamentary supremacy, would seem to be dualist.²⁰ Parliamentary sovereignty was famously defined by Albert Dicey as “the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”²¹ This means that parliament is unconstrained by national courts and also by international bodies; parliament is also free to pass statutes that conflict with prior treaties. This stance came under some pressure from the European Union and the European Court of Human Rights, because the British treaty commitments accept European law to

14. The Constitution does not mention customary international law per se.

15. CASSESE, *supra* note 8, at 225, 229–30.

16. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] art. 15(4). An interesting variant is found in Article 11 of the 1992 Slovak Constitution, stating that “International instruments on human rights and freedoms ratified by the Slovak Republic and promulgated under statutory requirements shall take precedence over national laws provided that the international treaties and agreements guarantee greater constitutional rights and freedoms.” ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] art. 11 (Slovak.). For a discussion, see Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EUR. J. INT’L L. 29 (1996).

17. CASSESE, *supra* note 8, at 228; HENKIN, *supra* note 9, at 73; Dominique Remy-Granger, *The Ambiguities of the State Based on the Rule of Law: A Unitary System à la Française*, in AMBIGUITY IN THE RULE OF LAW: THE INTERFACE BETWEEN NATIONAL AND INTERNATIONAL LEGAL SYSTEMS 53, 53–54 (Thomas A.J.A. Vandamme & Jan-Herman Reestman eds., 2001).

18. Constitution fédérale de la Confédération Suisse [Cst] April 18, 1999, art. 194, ¶ 2 (Switz.).

19. E.g., CONST. OF THE PORTUGUESE REPUBLIC art. 16 § 2; C.E. [Constitution] pt. 1, § 10, cl.2 (Swed.); CONST. OF ROMANIA art. 20, § 1; S. AFR. CONST. 1996, § 233.

20. Jackson, *supra* note 3, at 319. *But see* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 635–36 (2007) (arguing that courts are engaged in creeping monism in the UK and other common law jurisdictions).

21. ALBERT V. DICEY, *THE LAW OF THE CONSTITUTION* 3–4 (8th ed. 1915).

be superior.²² Nevertheless, the doctrine of parliamentary sovereignty survives.

At the same time, customary international law (CIL) was traditionally viewed as part of the common law, and directly applicable so long as it was not overruled by subsequent statute or judicial decision.²³ This is called the doctrine of incorporation, whereby changes in CIL are automatically “incorporated” into the common law.²⁴ For many decades, scholars have asserted that the UK has followed the competing doctrine of transformation, so that courts require some evidence of governmental intent to incorporate the international rule into domestic law before it will be applied; but the conventional view is that the doctrine of incorporation remains intact.²⁵

The United States Constitution establishes a scheme somewhat similar to that of the UK.²⁶ Customary international law, or the “law of nations,” was traditionally viewed as part of federal common law.²⁷ Article I Section 8 of the Constitution also gives Congress the power to “define . . . offences against the law of nations.”²⁸ This provision would seem to give the legislative branch primary control over the treatment of custom, but legislation is seldom based on this provision.²⁹ Treaties are the “Supreme Law of the Land” according to the supremacy clause, although later-in-time statutes can supersede them.³⁰ Thus Congress and the President can together supersede a treaty adopted by the President and Senate alone.³¹

22. Case C-213/89, *The Queen v. Sec’y of State for Transp. Ex parte Factortame Ltd.*, 1990 E.C.R. I-2433.

23. BROWNLIE, *supra* note 8, at 42–43; *see also* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 3 (Thomas D. Franck & Gregory H. Fox eds., 1996).

24. *Trendtex Trading Corp. v. Cent. Bank of Nig.*, (1977) Q.B. 529, 553–54.

25. *See Trendtex Trading Corp.*, (1977) Q.B. at 553–54; BROWNLIE, *supra* note 8, at 43–46 (discussing case law); *see also* discussion in Waters, *supra* note 20.

26. Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530–31 (1999).

27. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822 (1997); Harold Hongju Koh, *Commentary, Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–26 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371–72 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT’L L. 301, 301 (1999).

28. U.S. CONST. art. I, § 8, cl. 10.

29. The sole exception may be the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). For a recent discussion, *see* William S. Dodge, *After Sosa: The Future of Customary International Law in the United States* (Nov. 11, 2006) (unpublished working paper), available at <http://ssrn.com/abstract=944245>. *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 68 (2d ed. 1996) (noting the power “has been little used, and its purport has not been wholly clear”); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power To “Define And Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 523 (2000).

30. HENKIN, *supra* note 29, at 211–12; Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule in Treaties and Federal Statutes*, 80 IND. L.J. 319, 333–35 (2005).

31. Arguably, treaties have slightly higher status in that the *Charming Betsy* interpretive canon places the burden on Congress to be explicit when overriding treaties. *Murray v. Schooner Charming*

These examples illustrate the great variety of ways in which states treat international law vis-à-vis domestic obligations. There is no necessary relationship between the treatment of customary international law and treaty law, nor any general convergence among states in terms of the manner in which they treat international obligations.

Another dimension of interest is that some countries directly incorporate particular international treaties into their constitutions. This constitutionalization of particular treaty regimes most often involves human rights treaties. In this article, we analyze a dataset of 363 constitutions coded as part of the Comparative Constitutions Project at the University of Illinois.³² In the current dataset, twenty-eight percent of constitutions written after 1945 (n=283) reference at least one international treaty, but only ten percent of these constitutions explicitly incorporate the provisions of the treaties. Figure 1 shows the frequency of the mention and incorporation of particular treaties. The Universal Declaration of Human Rights is the most frequently referenced and incorporated document, followed by the United Nations Charter and the African Charter of Human People's Rights.³³ For example, Nicaragua's constitution declares "full applicability of the rights set forth in the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the International Covenant of Economic, Social and Cultural Rights, the International Covenant of Civil and Political Rights, and the American Convention of Human Rights of the Organization of American States."³⁴ The Constitution of the Republic of Congo (Brazzaville) "declare[s] as an integral part of the . . . Constitution" the Charter of the United Nations, the Universal Declaration of Human Rights, and the African Charter of the Rights of Man and Peoples.³⁵ On customary international law, however, both of these constitutions are silent.

Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 *BROOK. J. INT'L L.* 341, 364 (2006).

32. See Comparative Constitutions Project, <http://netfiles.uiuc.edu/zelkins/constitutions/index.htm> (last visited Oct. 23, 2007).

33. Our threshold for what constitutes incorporation, as opposed to a mere reference to a treaty, is relatively high. We focus on explicit language that makes the treaty clearly enforceable or an integral part of a constitution. We did not consider general statements about the respect for and observation of "principles" of particular treaties to be full incorporation.

34. Constitución Política de la República de Nicaragua [Cn.] [Constitution] art. 46, La Gaceta [L.G.] 9 January 1987; see also, CONST. ARG., ch. IV, § 75.22 (referencing American Declaration of the Rights and Duties of Man; Universal Declaration of Human Rights; American Convention of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights).

35. See CONSTITUTION OF THE REPUBLIC OF CONGO (BRAZZAVILLE) pmbi.; see also CONSTITUTION OF THE REPUBLIC OF BENIN, pmbi. (referencing Charter of the United Nations of 1945, Universal Declaration of Human Rights of 1948, African Charter on Human and People's Rights of 1981).

FIGURE 1
 NUMBER OF CONSTITUTIONS THAT MENTION OR INCORPORATE
 SELECTED INTERNATIONAL TREATIES
Universe: Constitutions adopted in or after 1945 (n = 283)

Treaty	Mentioned	Incorporated
UN Universal Declaration of Human Rights (1948)	69	24
French Declaration of the Rights of Man (1789)	10	0
UN Charter (1945)	27	6
European Convention for Protection of Human Rights and Fundamental Freedoms (1950)	2	2
International Covenant of Civil and Political Rights (1966)	7	1
International Covenant of Economic and Social Rights (1966)	4	1
American Convention on Human Rights (1969)	2	1
Helsinki Accords (1966)	1	1
African Charter of Human People's Rights (1981)	23	4
Number of constitutions with at least one of the above	80	28

Source: Comparative Constitutions Project

One can think of these various dimensions of choice as reflecting a single underlying concept of internationalization. More internationalist constitutions make customary international law directly binding; give both treaties and customary international law superior authority to local legislation, even if adopted later; and specifically incorporate particular human rights treaties. Less internationalist constitutions require customary international law and treaties to be specifically incorporated by national legislation into the local legal order, or give them an inferior po-

sition vis-à-vis legislation and do not incorporate specific treaties. No doubt there are tradeoffs among these various dimensions of internationalization, some of which we discuss below.

Clearly there are trends in national constitutions over time. For theoretical reasons we divide the analysis into three periods: the pre-1914 years, the interwar period, and the post-1944 years. Preliminary analysis of constitutional drafting over time reveals a number of interesting trends.³⁶ The incorporation of customary international law predates World War I. References to customary international law were more prevalent in national constitutions written before 1914 than in those drafted in or after 1945, and least prevalent in the interwar years. By contrast, decisions to make customary international law directly applicable increased over time. In fact, the proportion of constitutions incorporating customary international law in the domestic legal order doubled from the pre-1914 to the post-1944 periods. Finally, the notion of making international treaties superior to domestic legislation is a phenomenon of the post-1944 period. None of the constitutions written before 1945 included in the current sample granted superior status to international treaties.³⁷

FIGURE 2
CONSTITUTIONAL STATUS OF CUSTOMARY INTERNATIONAL LAW (CIL)
AND TREATIES OVER TIME

Universe: Constitutions of independent states since 1789

	Percent (and number) of Constitutions			
	Pre-1914 (n=36)	1914– 1944 (n=33)	Post-1944 (n=296)	TOTAL (n=365)
Constitution				
Mentions CIL	28% (10)	18% (6)	23% (67)	23% (83)
CIL Directly Applicable	6% (2)	9% (3)	13% (37)	12% (42)
Treaties are Su- perior to Legislation	0% (0)	0% (0)	23% (67)	18% (67)

Source: Comparative Constitutions Project

36. Unfortunately, our current sample does not allow us to draw definitive conclusions about these trends, since we do not yet have a complete sample of coded constitutions from before 1944. However, our current sample is, for present purposes, randomly selected, and we believe our results are strongly suggestive.

37. All the human rights treaties coded in our data were written after 1945, which makes it impossible to assess the trends over time for the periods of analysis.

No doubt many of these trends reflect the changing content and scope of international law. Whereas customary international law before World War I chiefly governed classic interstate issues such as diplomatic relations, thereafter the content of customary international law changed to gradually include more direct regulation of human rights issues.³⁸ Making customary international law directly applicable in national courts made little sense until the content of that law applied to individuals. Furthermore, the number and scope of international agreements also expanded, and international treaties increasingly covered human rights issues.³⁹

III. HOW INTERNATIONAL LAW CAN AFFECT THE DOMESTIC LEGAL ORDER

A. *Precommitment Theory*

We now see that every constitutional system has a particular configuration in terms of how it treats international obligations, and that patterns across countries have changed over time. Internationalization, broadly speaking, has increased over time, with more constitutions incorporating specific treaties, providing for treaty superiority over domestic legislation, and making customary international law directly applicable, even as the scope of customary law has expanded dramatically.

Why might these issues of constitutional design vary across countries and time? We follow Ginsburg in drawing on literature that treats constitutions as mechanisms for making political precommitments.⁴⁰ A precommitment means “becoming committed, bound or obligated to some course of action or inaction or to some constraint on future action . . . to influence someone else’s choices.”⁴¹ Consider for example a politician seeking to establish legitimate authority over a citizenry. The politician can promise to behave with moderation, protecting the rights of citizens and pursuing liberal policies. The citizenry may believe the politician is sincere, but they may still be reluctant to trust the promise of the politician because they know his or her circumstance may change. The promise only has value if the citizenry believes that the sincere politician will not change his mind should he face different circumstances down the road. The politician must therefore make the promise credible.⁴² This problem is particularly acute when the politician cannot pre-

38. HENKIN, *supra* note 9, at 169, 173 (1995).

39. *See id.*

40. ELSTER, *supra* note 2, at 36–111; JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 129–41, 157–62 (2000); HOLMES, PASSIONS AND CONSTRAINT, *supra* note 2, at 134–77; JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 129–30 (2001); Holmes, *Paradox of Democracy*, *supra* note 2.

41. THOMAS C. SCHELLING, STRATEGIES OF COMMITMENT AND OTHER ESSAYS 1 (2006).

42. *See* Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286, 288 (1993); Barry R. Weingast,

dict the incentives he or she will face in the future.⁴³ If costs and benefits vary in unpredictable ways, the politician's promise to behave in the specified way may be less believable.

Constitutions can help solve this problem. A rational constitutional designer might realize that it makes sense to limit her own power, in order to make her promises credible and thereby obtain the consent of the governed. Democratic constitutions can help facilitate this role, serving as "precommitment strategies" in which nations, aware of problems that are likely to arise, take steps to ensure that those problems will not arise or that they will produce minimal damage if they do."⁴⁴ Constitutions help make the promises credible by imposing costs on those who violate promises. By tying their own hands, politicians actually can enhance their own authority.

There are a myriad of ways that constitutions can play this role. Jon Elster elaborates how constitutional provisions function not only to constrain politicians, but also to restrain the power of the people.⁴⁵ For example, in the American context, the existence of a bicameral legislature and an executive veto makes legislation more difficult. This can be seen as a device to restrain the "passions" of the people, who might otherwise act through legislative majorities in unwise ways.⁴⁶ Other features of constitutions that enhance precommitment include high amendment thresholds and an independent judiciary.⁴⁷

B. *International Law as Precommitment*

To the extent that international law binds states and limits the options of policymakers, it can serve as a precommitment device. One way to do this is for constitutional designers to incorporate specific policies and international instruments into the constitutional text.⁴⁸ The earlier

The Political Foundations of Democracy and the Rule of Law, 91 AM. POL. SCI. REV. 245, 259 (1997); Oliver E. Williamson, *Credible Commitments—Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 519 (1983).

43. See generally GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1997).

44. CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 241 (2001); see also F.A. HAYEK, THE CONSTITUTION OF LIBERTY 179 (1960) ("[The reason for constitutions] is that all men in the pursuit of immediate aims are apt—or, because of the limitation of their intellect, in fact bound—to violate rules of conduct which they would nevertheless wish to see generally observed. Because of the restricted capacity of our minds, our immediate purposes will always loom large, and we will tend to sacrifice long-term advantages to them."); HOLMES, *supra* note 2, at 153; A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 447–49 (1999).

45. Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME 35 (George Loewenstein & Jon Elster eds., 1992).

46. See THE FEDERALIST Nos. 48, 49 (James Madison).

47. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123–26 (1993) (amendment processes); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 892 (1975).

48. See *supra* text accompanying notes 34–35.

discussion presenting evidence that constitution drafters incorporate human rights treaties into the domestic constitutional order is consistent with this idea. By saying, for example, that the International Covenant of Civil and Political Rights is directly applicable, the constitution drafters accept an international definition of international human rights, somewhat limiting their freedom of action and committing themselves to suffer costs if the rights are violated.⁴⁹

Explicit characterization of international law as a precommitment device is growing within the interdisciplinary scholarship linking international law and international relations.⁵⁰ Most literature to date focuses on how precommitment works among states that interact to advance their national interest, which is conceived as unitary. Precommitment allows states to communicate to other states that they are serious about their promises. Certainly not all international agreements among states are precommitments, in the sense of giving up future choices to guard against preference shifts.⁵¹ States have many other reasons for entering into agreements. But some kinds of agreements certainly act as precommitments.

Imagine, for example, a foreign investor interested in investing capital in a developing country. The government may promise not to expropriate the capital, but even if the investor believes the sincerity of the promise, the time delay between the promise and the performance creates an enforcement problem.⁵² The current government may not last as long as the period needed to recoup the investment and sunk costs leave the investor vulnerable to Vernon's "obsolescing bargaining" problem, in which the power of the host state increases over time.⁵³ Bilateral investment treaties resolve this problem by making the government promise enforceable through international arbitration. The treaty regime makes the government's commitments more credible because it removes the adjudication of disputes from the government's hands and raises the possibility of externally imposed sanctions down the road.⁵⁴ This in turn makes performance more likely.

In the example above, and in most work to date, the promise by the government has an exclusively international audience—in this case the

49. We do not assert that the potential cost suffered is necessarily high.

50. See generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055 (2003).

51. Ratner, *supra* note 50, at 2070–72.

52. Technically, a dynamic inconsistency problem.

53. RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 46–53 (1971).

54. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 113 (2005); Andrew Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 651–58 (1998); Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 277–79.

investor—and costs that will be incurred internationally. Sometimes, however, international commitment can also work to resolve problems for *domestic* governance. If we relax the conventional modeling assumption of a monadic state, we can see how international agreements can resolve domestic commitment problems.

Domestic commitment differs from the conventional international story in that it does not necessarily involve a signal of private information by the politician. When a politician makes an international promise to other states, he or she may try to communicate a serious intent to abide by the promise. The seriousness of the politician is something other states usually cannot observe directly, so undertaking politically costly behavior such as asking parliament to ratify the agreement can communicate information to other states about the probability of compliance. By expending scarce political capital, the politician may raise the cost of defection and convince other states that she is serious about fulfilling the promise.

The domestic political function of international promises does not necessarily require communication of information, but can rely simply on the increased costs associated with violations of international promises. The next section discusses the ways in which international promises affect the domestic environment.

C. *How International Law Resolves Domestic Commitment Problems*

All politicians face problems committing to their promises. In democracies, electoral institutions ensure that the politician will eventually be out of power. Even in an autocracy, however, the risk of coup, revolution, or democratization is always present, and supporters of any dictator will discount her promises by the probability of her losing power, however remote that probability may be. We should thus see some demand for devices to ensure that promises will be kept in both democracies and autocracies.⁵⁵

Domestic legislation is one means of entrenching policies beyond the life (or the whim) of current political leaders. A difficult legislative process means that the legislation will be relatively difficult to overturn in future periods. A relatively easy process, by contrast, will mean that legislation is of less value in situations of electoral uncertainty, because a future politician can easily undo today's policies.

One can think of international law as helping to solve domestic commitment problems.⁵⁶ A party that is unsure that it will remain in

55. Cf. DOWNS & ROCKE, *supra* note 43, at 56–75; Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L. L. 501, 511–13 (2004) (both focusing on elections as the primary source of uncertainty).

56. Voigt and Salzberger provide one of the few attempts to think through tradeoffs in delegation to international and domestic institutions. Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289, 289–310 (2002). In later work,

power in the future may wish to entrench its policies in the form of treaties. Because undoing international agreements is typically costly, a policy that is entrenched internationally may survive the demise of the current political coalition or even regime.⁵⁷ This increases the value of the commitment made to one's supporters at the time of the promise.

International commitment devices work in three different ways.⁵⁸ First, international obligations can generate information on the behavior of politicians in future periods. This is relevant when the behavior in question is difficult for the domestic constituents to observe. A politician that promises to undertake a particular course of action can enhance the value of his promise by utilizing international monitors, beyond the reach of *any* domestic politician, to generate neutral and valuable information on performance.

Second, politicians can, in effect, bond their behavior by making sure that any future violation of the promise will generate costs imposed by international actors. A government promise to submit to international arbitration for investment disputes means that the government may have to pay compensation if it violates its promises. It is the simple cost associated with violation, rather than information generated from abroad, that renders the mechanism useful for enhancing the commitment.

Third, politicians can make a credible commitment by delegating the decision-making authority to an independent international actor. In this mode, the politician guards against her future preference shifts by completely ceding decision-making authority. Let us consider each of these mechanisms in turn.

1. *Generating Information for Domestic Groups*

The first modality of international commitment is information generation. Making an international commitment can generate information for domestic actors that might otherwise be unavailable to them. International organizations, foreign states, and nongovernmental organiza-

Voigt and coauthors find support for some of these hypotheses. See, e.g., Stefan Voigt, *Membership has its Privileges—On the Effects of Delegating Powers Internationally* (Univ. of Kassel, Inst. of Econ., Discussion Papers in Economics No. 73/05, 2005), available at <http://ideas.repec.org/p/kas/wpaper/2005-73.html>; Stefan Voigt, Michael Ebeling & Lorenz Blume, *Improving Credibility by Delegating Judicial Competence—the Case of the Judicial Committee of the Privy Council* (Univ. of Kassel, Inst. of Econ., Discussion Papers in Economics No. 07/04, 2004), available at <http://ideas.repec.org/p/kas/wpaper/2004-67.html>.

57. For a similar observation focused on the tensions with democratic theory, see Terence Daintith, *Is International Law the Enemy of National Democracy?*, in *AMBIGUITY IN THE RULE OF LAW: THE INTERFACE BETWEEN NATIONAL AND INTERNATIONAL LEGAL SYSTEMS* 115, 119 (Thomas A.J.A. Vandamme & Jan-Herman Reestman eds., 2001); see also Stefan Voigt, *The Interplay between National and International Law—Its Economic Effects Drawing on Four New Indicators* 12–18 (August 2006), available at <http://ssrn.com/abstract=925796>.

58. Cf. Pritchard & Zywicki, *supra* note 44, at 446–51 (discussing the precommitment and agency roles of constitutions).

tions have, under certain circumstances, an incentive to monitor the performance of the state.⁵⁹ It is well understood that information produced by international organizations and other states can help third-party states decide how to treat the state in question.⁶⁰ But the information can also be useful for domestic constituencies. Voters can learn about the non-performance of their leaders.⁶¹ Domestic interest groups can determine whether politicians are delivering on promises to act on the international plane. This information can reduce or eliminate the agency problem for voters and interest groups, and thus be advantageous to political leaders seeking their support *ex ante*.

This may explain the pattern of successful complaints before the United Nations Human Rights Committee, established under the International Covenant on Civil and Political Rights.⁶² Although many nations have signed the International Covenant, not all have signed the first Optional Protocol which provides for an individual right of complaint.⁶³ Signing this document can be seen as a form of precommitment to protect human rights at home. In practice, the most notable cases that have led to changes in state behavior have come against some of the states that best protect human rights. For example, Canada was found to have violated the rights of aboriginal persons, and Australia the rights of homosexuals.⁶⁴ One might think about the international mechanism as serving an information-generating function, allowing local actors to put pressure on their governments by informing the public about violations of core rights. This information then becomes important to organize efforts to change the behavior in question.

This information modality works through enhancing the possibility of *domestic* punishment of a politician who violates his or her promise. The actual cost is incurred domestically, but the international obligation makes that cost more likely by providing legitimate third-party account-

59. On NGOs, see Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 914–15 (2006); see also MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 89–120 (1998).

60. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 93–94 (1984).

61. See Brewster, *supra* note 55, at 535–37; Helen V. Milner, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477 (2002).

62. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

63. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6136 (Dec. 16, 1966).

64. *Lovelace v. Canada*, Communication No. R 6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (July 30, 1981) (declaring Canada responsible for continuing violation of individual rights of aboriginal women and their children); *Nicholas Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994); see also HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 745 (2d ed. 2000). In the case of Australia, the Australian national government welcomed the decision as providing leverage against a recalcitrant provincial government that had continued to criminalize homosexual sovereignty. *Id.* at 748.

ing of domestic behavior.⁶⁵ The key factor is the interaction of the domestic and international levels of governance, which generates different modalities of enforcement than would be possible at either level on its own.

2. *International Enforcement*

International law can also increase directly the cost of noncompliance with an obligation. In general, obligations are enforced on the international plane in at least four ways.⁶⁶ For some categories of obligation, particularly involving coordination problems, international obligations can be self-enforcing in that neither party has an incentive to deviate.⁶⁷ In other situations, parties to an agreement can enforce the agreement directly through retaliation. This mechanism works in repeated play games, iterated over time, as in the paradigmatic prisoners' dilemma example.⁶⁸ Obligations can also be enforced through reputational sanctions enforced by third parties.⁶⁹ Finally, and relatively rarely, violations can lead to direct financial or material sanctions.⁷⁰ For our purposes, the main point is that violations of international obligations are, under some circumstances, accompanied by *some* cost at the international level.⁷¹ In turn, this can reduce the incentives for violating the promise and make the promise more effective for *domestic* groups.

As an illustrative example, consider the minorities regimes that were an important class of treaties in Europe between World War I and World War II.⁷² The end of the Ottoman and Austro-Hungarian empires

65. One can characterize this as a solution whereby principals—the voters and interest groups in a domestic political environment—are able to reduce their agency costs. For more on principal-agent models, see Eric A. Posner, *Agency Models in Law and Economics*, in CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000) (discussing principal-agent models); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (applying principal-agent model to the administrative state); and Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347, 361–62 (1997) (applying principal-agent model to judicial review).

66. Robert Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 581–82 (2004) [hereinafter Scott & Stephan, *Self-Enforcing International Agreements*]; see also ROBERT SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN 110–11 (2006).

67. See, e.g., Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1324 (2004).

68. ROBERT O. KEOHANE, *supra*, note 60, at 75–78; see ROBERT AXELROD, THE EVOLUTION OF COOPERATION 123 (1984).

69. Scott & Stephan, *Self-Enforcing International Agreements*, *supra* note 66, at 590–93.

70. *Id.* at 570–71.

71. Note that we are not asserting or assuming perfect compliance with international obligations, or that *all* violations of international obligations will lead to costs. So long as there is some positive probability of an international cost, the function of enhancing commitment can be effective.

72. See HENKIN, *supra* note 9, at 63–64; JACOB ROBINSON ET AL., WERE THE MINORITIES TREATIES A FAILURE? 3–4 (1943); Fred L. Morrison, *Between a Rock and Hard Place: Sovereignty and International Protection*, 80 CHI.-KENT L. REV. 31, 35–38 (2005); John R. Valentine, *Toward a Definition of National Minority*, 32 DENV. J. INT'L L. & POL'Y 445, 450–51 (2004). See generally L.P. MAIR,

led to the creation of many new states in Eastern Europe.⁷³ But this created a new set of problems, in that national ethnic groups did not always reside within the borders of the state, nor were any states free of minorities.⁷⁴ Certain states, beginning with Poland and Czechoslovakia, concluded treaties with Great Powers promising to protect minority rights within their jurisdictions.⁷⁵ In these treaties, the state promised to ensure protection and a certain degree of self-determination for ethnic minorities within its territories.⁷⁶ These were important antecedents for the flowering of human rights law after World War II.⁷⁷

How did the minorities regimes work? The conventional understanding of these treaties is that the audience for them was primarily international. By concluding the agreement with Great Powers, the states in question posted a reputational bond for their positive treatment of minorities.⁷⁸ The Great Powers would no doubt monitor the new states' performance and might also sanction a state that violated the terms. A state that mistreated its own ethnic minorities would now suffer reputational harm, and potentially even suffer international economic or military sanctions. The audience for this signal included the voters and governments of the large international powers, whose support was needed for the prospective states to come into being.

But it is important to note that the audience for the signal was also domestic, within the new countries making the promise. The minorities in question, residing in the midst of larger groups of others, can hardly have been enthusiastic about the creation of nation-states around them that were explicitly based on the ethnic nationalism of the dominant group. One might expect them to have resisted a development which made them suddenly a conspicuous "outsider" in a nationalistic polity of insiders. The new governments needed to reassure these minorities. To do this, they could have promised to treat the minorities well in a domestic constitution or piece of legislation, but by making the promise in the form of an international treaty, the promise had greater credibility.⁷⁹

THE PROTECTION OF MINORITIES: THE WORKING AND SCOPE OF MINORITIES TREATIES UNDER THE LEAGUE OF NATIONS (1928).

73. MAIR, *supra* note 72, at v.

74. *Id.*

75. Treaty of Poland, Aug. 23, 1919, S. TREATY DOC. NO. 82 (1919); Treaty Between the Principal Allied and Associated Powers and Czechoslovakia, Sept. 10, 1919, 226 Consol. T.S. 170; *see also* Declaration Concerning the Protection of Minorities in Albania, Oct. 2, 1921, 9 L.N.T.S. 173; Treaty of Trianon, June 4, 1920, 6 L.N.T.S. 187.

76. *See generally* MAIR, *supra* note 72.

77. HENKIN, *supra* note 9, at 169–70.

78. *See* Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 145–48 (2003) (discussing bonding for international companies engaged in security cross-listing); Larry E. Ribstein, *Cross-listing and Regulatory Competition*, 1 REV. L. ECON. 97, 104–05 (2005) (discussing bonding in security markets).

79. *See generally* Jon C. Pevehouse, *Democratization, Credible Commitments, and Joining International Organizations*, in LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS 25, 25–26 (Daniel Drezner ed., 2003).

This promise, in turn, may have helped the politicians establishing the new nations, because it reduced the probability that the minorities would resist the new government.⁸⁰ The international promise had domestic ramifications, ultimately reinforcing sovereignty by minimizing internal dissension.

Another example comes from the territorial settlement between Italy and Austria over South Tyrol in 1946.⁸¹ This German-speaking region had been transferred from the Austro-Hungarian empire to Italy after World War I, and Mussolini's assimilationist policies had created resentment among the residents.⁸² After World War II, Austria and Italy concluded the Gasperi-Gruber Accord of 1946 that assured equality and autonomy for the German-speaking population and special guarantees for cultural and economic development.⁸³ Austria retained the right to complain on behalf of this population before the United Nations and International Court of Justice, making Italy's promise to its minority more credible.⁸⁴ The regional autonomy of Trentino-Alto Adige was thus bolstered by an international agreement, making it more durable than if it were secured only by ordinary legislation or even a constitutional provision.⁸⁵

Trade law provides another example. The WTO provides information, typically generated by national reports and other nations' complaints, which may be of value to domestic interest groups unsure of their politicians' performance of agreements.⁸⁶ But it also has "teeth" in the form of dispute resolution provisions known as the Dispute Settlement Understanding (DSU).⁸⁷ These provisions authorize bilateral retaliation against violators of the agreement.⁸⁸ The dispute resolution process also generates a focal point that can facilitate reputational sanctions.⁸⁹ The DSU provides a framework for increasing the possibility of internationally generated costs for violations of the WTO agreements. This means that domestic interest groups such as exporters who value access to for-

80. See also Ratner, *supra* note 50, at 2065–66 (discussing *uti possidetis* principle in postcolonial Africa along similar lines).

81. Elizabeth F. Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HASTINGS INT'L AND COMP. L. REV. 291, 292–301 (1999); Csaba K. Zoltani & Frank Koszorus, *Group Rights Defuse Tensions*, 20 FLETCHER F. WORLD AFF. 133, 137–38 (1996).

82. Defeis, *supra* note 81, at 297–98; Zoltani & Koszorus, *supra* note 81, at 137.

83. Defeis, *supra* note 81, at 298; Zoltani & Koszorus, *supra* note 81, at 138.

84. Indeed, Austria did bring a complaint to the General Assembly in 1960. Defeis, *supra* note 81, at 299–300.

85. Siegfried Weissner, *The Movement Toward Federalism in Italy: A Policy-Oriented Perspective*, 15 ST. THOMAS L. REV. 301, 316 n.75 (2002).

86. See Milner, *supra* note 61, at 480.

87. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marakesh Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

88. *Id.*

89. Ginsburg & McAdams, *supra* note 67, at 1311–12. See generally Richard McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043 (developing expressive theory of adjudication).

eign markets can count on an international sanction against their own government should it renege on the agreement, raising the value of the promise to keep foreign markets open.⁹⁰ These examples show that in some cases, one interest group can entrench policies at the international level to ensure that the policies survive the fall of the current government or even regime.

3. *Delegation*

The third modality is to completely remove the politician's future ability to influence the policy. This mode relies not so much on costs to be imposed on domestic government, but on isolating decisions from the control of those governments.

To the extent that international obligations involve giving up control to other actors, they reduce domestic autonomy and flexibility. For example, after the currency crises of the 1990s, Argentina sought to commit itself to stable policies by tying the peso to the U.S. dollar. This worked precisely because American monetary policy was unlikely to be made with Argentina's interests in mind.⁹¹ Argentina thus committed itself to following uncertain future policies, by definition outside the control of Argentine citizens.

Committing to a monetary policy made outside one's borders, such as in the Argentine example or when other countries sign agreements with the International Monetary Fund (IMF), is conventionally understood as a way of delegating decision making to attract international capital. We do not contest that delegation may primarily be addressed to international audiences. However, the audience for such moves can *also* be domestic. Argentina's move not only attracted international capital, but also assured citizens that they need not remove all their assets from the country.⁹² Delegation made the commitment credible in a way that a simple domestic promise could not.

D. International Law's Advantages

As noted above in Part II.A, international obligation is not the only means of entrenching policies. However, international law has significant advantages relative to other mechanisms, such as legislative supermajorities, an independent judiciary, or specialized independent regulatory agencies. A state can set up an independent judiciary, but legislative majorities can always, later, intimidate the judges or change their jurisdiction. An independent judiciary may enhance the value of legislation,

90. See Brewster, *supra* note 55, at 515.

91. THE ARGENTINE CRISIS AT THE TURN OF THE MILLENNIUM: CAUSES, CONSEQUENCES AND EXPLANATIONS 4 (Flavia Fiorucci & Marcus Klein eds., 2004).

92. *Id.*

but there is nothing to prevent future majorities from enacting new legislation. And even independent regulatory commissions can be bribed, intimidated, or captured by determined majorities.

International legal actors, by contrast, are more difficult to control. International organizations and courts are arguably beyond the unilateral control of any single country, even the most powerful. Indeed, this is the source of concern about a “democratic deficit” in international institutions, a concern that is quite strong in the United States.⁹³

Independent of its reliance on insulated decision makers, international commitment may be a better device to entrench policies simply because it is typically more difficult to implement than ordinary legislation. In the United States, some international agreements may be more difficult to enact than ordinary legislation, but others may not be. Other constitutional schemes vary in terms of the relative difficulty of legislation and treaties. Where treaties are easier to enact than legislation, their value as a commitment device is obviously reduced. But this seems to be a rare configuration.⁹⁴

There is another reason international law may provide more credible commitments than domestic legislation. The relevant unit of analysis in international law is the state, not the government. New governments can come into power, but they are still bound by the principle of *pacta sunt servanda* and must perform the obligations entered into by a previous regime.⁹⁵ This is true, even if the changes are of momentous nature. For example, in the *Gabcikovo* case, the International Court of Justice (ICJ) insisted that states retain obligations entered into by communist governments operating under a very different economic system in which the relevant level of planning was multinational.⁹⁶ Hungary and Czechoslovakia had concluded an agreement to build a joint dam that made sense under the socialist system, but was seen as both environmentally and economically unfeasible after the fall of communism.⁹⁷ When both Hungary and the Slovak Republic (a successor nation to Czechoslovakia)

93. John O. McGinnis, *Foreign to Our Constitution*, 16 NW. U. L. REV. 303, 309 (2006). *But see* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 104 (2006).

94. Stefan Voigt, *The Interplay Between National and International Law: Its Economic Effects Drawing on Four New Indicators* 6 (unnumbered working paper), available at <http://ssrn.com/abstract=925796>. Note that constitutional amendment ought also be taken into account in developing an economic model of the tradeoffs among law-making devices. Even if treaties are more difficult to entrench than legislation, they will be less reliable as entrenchment devices where the constitution is easier to amend because amendment can override treaty commitments. The French experience with the European Union illustrates this story. French courts found several new commitments of the European Union to be incompatible with the French constitution, which was promptly amended. Remy-Granger, *supra* note 17, at 53.

95. Brewster, *supra* note 55, at 513; *see also* Ratner, *supra* note 50, at 2061.

96. *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 43, 47 (Sept. 25); Eyal Benvenisti, *Domestic Politics and International Resources: What Role for International Law?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 109, 114 n.21 (Michael Byers ed., 2000).

97. *Gabcikovo-Nagymaros Project*, 1997 I.C.J. at 45.

asserted violations of the agreement, the ICJ had to decide whether the circumstances had changed so significantly that the states had been released from their obligations.⁹⁸ The ICJ found that the obligation remained even though the economic and environmental rationales for the planned dam had been utterly transformed.⁹⁹ In this sense, a constitutional design providing for a particular model of treaty entry will be locked in even against future constitutional change, outlasting the government, the entire regime, and even (as in the *Gabcikovo* case) the state itself. This has the effect of strengthening treaty commitments relative to legislation, and makes international law a powerful form of obligation.

E. International Law's Disadvantages

The very qualities that give international law its power to allow politicians to make credible commitments in the domestic sphere—a decision to give up control—have costs. These costs come in two forms. First are those rooted in the “persistent uncertainty” that permeates the international arena.¹⁰⁰ Second, there are agency problems associated with international governance.

First, the international arena is constantly changing. New states come into being, while old ones die or break up; rising powers displace erstwhile hegemonies; and new technologies change the relative position of states. The variation in conditions over time means that it is difficult to determine in advance the costs that will be associated with violating an international obligation. Some of these costs depend on other states voluntarily punishing the violating state through bilateral retaliation or third-party reputational sanctions. These decisions will be made in accordance with the particular political situation of the potential enforcer at the time of violation, as well as the relative power of the violator. From the point of view of a domestic interest group seeking to entrench its policies in international obligations, this reduces the certainty of an externally imposed cost.

Barbara Koremenos models the world of treaty making as subject to a series of exogenous shocks which affect the distribution of gains from an agreement.¹⁰¹ The shocks are not anticipatable, are observable only at a cost, and are cumulative.¹⁰² This means that as time goes on the difference between the initial and anticipated distribution of gains and the actual distribution in any period can grow quite large.¹⁰³ Under these

98. *Id.*

99. *Id.* at 49 (noting new political situation and rejecting argument that changed circumstances modifying treaty obligations).

100. Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549, 550 (2005).

101. *Id.*

102. *Id.*

103. *Id.*

circumstances, Koremenos argues that states may prefer international agreements that are short in duration so as to allow renegotiation, particularly when uncertainties abound as to the future distribution of gains.¹⁰⁴ By analogy, a domestic interest group relying on international commitments to entrench policies faces increasing variance in the prospect of externally imposed costs (in addition to externally generated information and decision making)—although, there is potential for the probability of enforcement to *increase* as well as *decrease*, depending on the direction of change in the international arena. To the extent states are risk-averse, however, they will view the dynamic quality of international legal enforcement as a disadvantage and will be reluctant to constitutionalize particular treaties.

Second, international obligations sometimes involve delegation to international organizations or actors that are unaccountable to *any* domestic body. It is sometimes asserted that a growing array of regulatory and government decisions are made by “networks” of regulators working across national boundaries.¹⁰⁵ These networks, or specialized epistemic communities, are given these powers because of their technocratic expertise in an increasingly complex world. But, even more than domestic regulators, their insulation from control means that they are not accountable.¹⁰⁶ This raises the familiar problem of principal and agent. National governments, duly elected by their citizens, may delegate decision making to networks of bureaucrats, but there is always the risk that the bureaucrats will act in their own collective interest rather than that of any national government.

These forms of uncertainty cut *against* international commitment. There is thus a tradeoff between enhanced credibility of commitments through international entrenchment, which is facilitated by giving up control of policies, and the risks of agency costs and exogenous change that are inherent in the international environment. Given that there are disadvantages as well as advantages to international commitments, we ought not to expect every state to have identical constitutional provisions on international law, nor should we anticipate that patterns will be stable over time. Some periods, when there is a good deal of change in the international arena, will be relatively risky for delegation. In contrast, when international law is stable and enforcement is predictable, the advantages of international commitment increase for domestic actors.

104. *Id.* at 551–52.

105. PETER M. HAAS, SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION 7–8 (1990); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 10–11 (2000) [hereinafter SLAUGHTER, A NEW WORLD ORDER]; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 347 (2001); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

106. See McGinnis, *supra* note 93, at 319.

F. *The Relative Advantages of Custom and Treaty*

We have now seen that international commitments have certain advantages, including insulation of decision makers and the fact that commitments will survive changes in government or even state structure. They also have disadvantages: the insulated decision makers may be unaccountable, and the changing nature of the international environment generates unpredictability. With these in mind, this section considers the relative advantages of custom and treaty in terms of facilitating international commitments for domestic actors.

Traditional international lawyers tended to view the international system as unitary in character and cooperation as normatively desirable as an end in itself. Viewing “international obligation” as unitary makes it difficult to understand why it is that states would differ in terms of their treatment of custom and treaty. While customary international law and treaty law are different in structure and character, most scholarship to date has tended to treat states as having propensities toward cooperation which may vary by issue area but not by instrument type. In practice, however, states tend to vary their constitutional acceptance of forms of international law by instrument, with custom and treaty being treated differently.¹⁰⁷

I. *Custom*

For present purposes we focus on the distinct processes by which international obligations are formed. Whereas consent is explicit in treaty commitments, consent can be implicit in the case of customary international law (CIL); states are considered permanently bound unless they persistently object to an emerging rule.¹⁰⁸ Another key distinction between customary international law and treaty law is that CIL is created in a decentralized fashion.¹⁰⁹ States, through official action and *opinio juris*, do create CIL.¹¹⁰ Undertaking certain forms of action may be costly—for example refraining from abusing prisoners during wartime. The costs help distinguish customary obligation from mere “cheap talk.” However, the decisions to undertake the action, and the decisions as to what actions “count,” are highly decentralized. When a sufficient number of states (the precise number is unclear) have acted in a way to indicate

107. See Voigt, *supra* note 95, at 14–15; *supra* Figure 1. In reality, the distinction between CIL and treaties is also overstated. For example, many investment treaties explicitly or implicitly invoke customary international law as the standard for expropriation. See, e.g., Andrea Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 891–92 (2005) (discussing the United States' Model Bilateral Investment Treaty and NAFTA).

108. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 192 (1998).

109. See *id.* at 13.

110. *Id.*

adoption of the rule, the rule “crystallizes” into CIL and binds all states that do not persistently object.¹¹¹

These rules are puzzling in a number of ways.¹¹² In particular, they do not seem to acknowledge the presence of the persistent uncertainty that marks the international system.¹¹³ A state may at time T_1 be neutral towards a particular rule, and thus fail to persistently object. Exogenous shocks, however, can significantly affect the distributional gains from a rule of CIL. If so, then the state could find itself in a position where a rule it favored or was neutral towards at time T_1 has significant costs at time T_2 . It will nevertheless be bound by the rule.¹¹⁴ Unlike treaties, which have exit provisions,¹¹⁵ CIL commitments cannot be unilaterally denounced after they have become binding.¹¹⁶ The only way to escape the obligation will be to convince other states that the rule is ineffective and should give way to a new rule.

This uncertainty might seem to make CIL a particularly attractive commitment device. By joining international regimes which impose costs, a state seems to signal its commitment to abide by the obligation *even if it becomes costly to do so in the future*. If Koremenos is correct, this function should be stronger with CIL, which is time unlimited, than with agreements which can be, and (as Koremenos demonstrates) frequently are, limited temporally and can be exited.¹¹⁷

But the problem is that a state cannot specify the *content* of customary international law in the same way that a state can specify treaty obligations. Custom is vague.¹¹⁸ The content is beyond the control of any state. The determination of rules is quite decentralized, with national court decisions, international organization statements, policy pronouncements, scholarly writings, and various other materials being commonly cited for support of a particular rule proposed by the analyst. The rules are also adjudicated by a myriad of bodies, without any centralized mechanism for appeal or control of norm generation. The potential

111. *Id.*; Kontorovich, *supra* note 59, at 875.

112. *See* Kontorovich, *supra* note 59, at 877.

113. *See* Koremenos, *supra* note 100, at 549.

114. Of course, if *enough* states find themselves in this position, the rule of CIL can change. In practice, however, examples of CIL change seem to indicate that strong and powerful states have an inordinate influence on the process. Thus a state of middling power can not anticipate much future control over the international legal system.

115. *See generally* Laurence R. Helfer, *Not Fully Committed? Reservations, Risk and Treaty Design*, 31 *YALE J. INT'L L.* 367 (2006).

116. *But see* Joost Pauwelyn, *How Strongly Should We Protect and Enforce International Law?* 14 (Duke Law Sch. Working Paper Series, Paper No. 44, 2006), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1044&context=duke/fs> (arguing that CIL obligations are alienable).

117. All this assumes that CIL agreements will be enforced. *See* Scott & Stephan, *Self-Enforcing International Agreements*, *supra* note 66, at 552–53.

118. BROWNLIE, *supra* note 8, at 50 (noting that “many rules of [CIL] do not provide precise guidance for their application on the national plane”). Of course, this might explain why states tolerate it. Since the obligations are not precise, states can shift their positions on the interpretation of particular rules in different situations, to a certain degree.

benefits of CIL as an entrenchment device are outweighed by its inability to specify authoritatively the particular policy to be entrenched.

The value of entrenchment may also be reduced because CIL relies nearly exclusively on the executive branch for its definition and implementation.¹¹⁹ Much of the evidence for state practice and consent to rules of custom comes from statements by the executive. The executive, typically a ministry of foreign affairs, usually has internal bureaucratic competence for representing the state abroad and will be the actor best situated to monitor and respond to proposed new rules of customary international law.¹²⁰ While legislation certainly can provide evidence for state practice and *opinio juris*, generally speaking the executive is in the best position to monitor and respond to changing rules of CIL. In addition, the requirement of state *practice* is heavily weighted toward the executive branch, for it is national bureaucracies that must ultimately undertake actions enforcing or failing to enforce any particular rule.¹²¹ All of this means that the commitment is within the control of a single branch, so that as control of that branch changes, policy may change too easily.

In terms of the modalities through which international law solves domestic commitment problems, these negative qualities of custom outweigh its temporal advantage of long-term commitment (or at least commitment of uncertain duration). Because CIL is vague, and its details are worked out in a diffuse, unpredictable fashion, it has relatively little ability to generate information for domestic interest groups. Because the enforcement of customary international law is highly decentralized, states face a collective action problem in enforcing norms. States rarely have an incentive to incur the costs of enforcing a rule of CIL against a violating state, or generating information for domestic interest groups.¹²² CIL's only advantage as a precommitment device is that it essentially delegates the law-making function to the collectivity of states. Even here, though, CIL's vagueness renders it ineffective. The broad

119. See Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 862–64 (2005) (characterizing Executive as primary in the U.S. allocation of powers with regard to CIL). This is likely true notwithstanding the formal position of Article I of the U.S. Constitution noted *supra* at note 28. The executive primacy in customary international law-making is even more pronounced in parliamentary systems, in which the government is formed out of the legislature. In these systems the executive predominates both in reacting to statements of custom, as well as domestic lawmaking. Cf. Joanna Harrington, *Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-making*, 55 INT'L & COMP. L.Q. 121, *passim* (2006) (discussing various parliamentary systems' adjustments to potential executive dominance).

120. See Ku, *supra* note 119, at 862.

121. Our analysis is consistent with John Setear, *Treaties, Custom, Iteration and Public Choice*, 5 CHI. J. INT'L L. 715, 728–30 (2005).

122. Of course, if the violation of CIL injures a particular state, that state will have an incentive to incur the costs of enforcement and publicity. Many CIL norms, however, concern the treatment of a state's own citizens. No particular external state has the incentive to take the lead to enforce and publicize violations of these norms. See Eugene Kontorovich, *A Positive Theory of Universal Jurisdiction* 39–42 (The Berkeley Elec. Press, Working Paper No. 211, 2004), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1515&context=espresso>.

range of topics that CIL covers means that no domestic interest group can be confident that CIL will evolve to cover its specific area of concern. CIL's weakness bodes poorly for its usage to resolve domestic commitment problems.¹²³

2. *Treaties*

In contrast with custom, treaty-making structures have been regularly modeled as a signal to communicate credibility of commitment to foreign countries.¹²⁴ Because legislatures have the ability to frustrate implementation of democratic agreements, other states may not believe the executive branch without legislative acquiescence to treaties. Legislative involvement in treaty making communicates information to other states as to which type of agreements will be enforced by the state and which will not. They are thus commitment enhancing.

Constitutionalizing particular treaty commitments is a very strong form of signal. By including the treaty in the text of the constitution, designers raise the cost of exiting the treaty and thus communicate a high level of domestic commitment to foreign parties. They also communicate to domestic audiences that the treaty is fundamental and unlikely to be exited lightly.

3. *Treaty v. Custom*

With regard to the modalities of information, enforcement, and delegation discussed in Part II.C, treaties have significant advantages over custom.¹²⁵ Treaties can tailor the information-generating mechanisms to address the precise needs of domestic interest groups. The complex law of treaty reservations allows states to tailor even multilateral obligations to a great degree.¹²⁶ Furthermore, treaty regimes identify

123. *Id.*; cf. Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5 (2003) (illustrating the problems of incorporating CILs into the framework of domestic laws); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000).

124. Jeffrey Frieden & Lisa L. Martin, *International Political Economy: Global and Domestic Interactions*, in POLITICAL SCIENCE: STATE OF THE DISCIPLINE 118, 124 (Ira Katznelson & Helen V. Milner eds., 2002); Lisa Martin, *The United States and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440 (2005) (showing the choice between executive agreements and treaties is a signal of intention to comply); see also Helen V. Milner, *The Interaction of Domestic and International Politics: The Anglo-American Oil Negotiations and the International Civil Aviation Negotiations, 1943-1947*, in DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 207, 208-18 (Peter B. Evans et al. eds., 1993) (noting that shifting an oil accord from an executive agreement to a treaty subject to Senate ratification prevented the ultimate acceptance of the accord).

125. Of course, the precise distinction between treaty and custom used in this article is overstated. Sometimes, treaties will serve as evidence of custom, and some treaties will incorporate customary international law into the treaty. They are complements as well as substitutes. For ease of explication, however, we consider the choice between treaty and custom to be a binary one.

126. See Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 331-32 (2006); see also Laurence R. Helfer, *supra* note 115.

specific counterparties, who therefore have an incentive to enforce the norms either directly, through reciprocity, or through reputation.¹²⁷ This is quite a contrast to CIL, the enforcement of which is decentralized and therefore potentially subject to a collective action problem for states. When a state violates a CIL norm concerning the treatment of its own citizens, no state has much incentive to take the lead on enforcement, or even to identify the violation.¹²⁸ Treaties can also provide clear, bounded delegation of particular decisions. The plasticity and vagueness of CIL obligations, though not infinite, suggest that states will prefer treaty obligations.

Treaty obligations dominate custom along all three dimensions by which international law enhances commitment. CIL is worse at providing information and norm enforcement because states are subject to collective action problems. Delegation of decision making is easy in the sense that states give up complete control of norm production when they accept a CIL obligation, but the lack of an identified decision maker to articulate norms makes it inferior to treaties, where the scope and scale of delegation can be precisely designed.

IV. EMPIRICAL IMPLICATIONS AND HYPOTHESES

This article has suggested that greater attention needs to be paid to domestic constitutional and political structures as determinants of international legal behavior. To be sure, a number of authors have made similar claims in recent years, typically those associated with the “liberal” school of international law and international relations scholarship.¹²⁹ Few, however, have actually tested the implications of this claim. This section presents a preliminary empirical evaluation of the theory outlined here.

We begin with the assumption of a single constitutional designer considering three issues discussed at the outset of this article: (1) whether to make customary international law directly applicable in the domestic legal order (for simplicity, we set aside the issue of superiority),¹³⁰

127. The incentive is relative to the decentralized regime of CIL enforcement.

128. To be sure, one can identify some of the same problems with the broad international human rights conventions, such as the International Covenants for Civil and Political Rights, and for Economic and Social Rights. Nevertheless, there is at least the possibility of concluding human rights treaties with specific counter-parties, as the earlier discussion of the Minorities Regimes and the Gasperi-Gruber treaty showed. *See supra* text accompanying notes 72–85.

129. *See* SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 105, at 31–35; Brewster, *supra* note 55; Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 544 (1997); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 585 (2005).

130. Some constitutions limit the application of customary international law to interstate relations or human rights. For instance, Article nine of the Constitution of Ecuador (1967) accepts the norms of international law as “the standard of conduct for states in their relations with one another” but the constitution does not mention human rights. However, constitutions in our sample rarely make the above distinction.

(2) whether to incorporate specific treaties into the constitution,¹³¹ and (3) whether to make treaties superior to domestic law.¹³² We assume that *any* international obligation comes with some nonzero probability of international enforcement, either in the form of generating information for domestic groups or a sanction, reputational or otherwise, imposed at the international level. The probability of other states expending resources in this manner increases monotonically with the perceived level of commitment of the state in question. We assume that the domestic judiciary will enforce international legal norms in the manner in which the constitutional designer provides.¹³³

Each decision involves a choice about commitment structure. As described in the previous section, monist incorporation of CIL into domestic law has serious defects, because both the content of norms and the expected costs of violation are quite variable in a changing international environment.¹³⁴ We should expect this device to be utilized only when there are particular kinds of public goods that can only be obtained from the CIL form of international commitment, for which substitute mechanisms are insufficient.

A. *Regime Type*

Let us now consider one very important dimension on which states vary, namely regime type. A broad theoretical and empirical literature suggests that democracies and autocracies behave differently with regard to a wide range of international phenomena. Democracies do not go to war with each other.¹³⁵ They cooperate on trade agreements more often.¹³⁶ Some scholars have even argued that democracies comply with international obligations to a greater extent.¹³⁷ Without commitment the-

131. See *supra* notes 34–35 and accompanying text.

132. Some constitutions distinguish certain types of treaties. Romania's 1991 Constitution, for example, makes human rights treaties superior to domestic law as opposed to other international treaties, which are made equal to domestic law. CONST. OF ROMANIA arts. 11, 20 (1991). This is very unusual in our current sample.

133. This assumption is heroic, of course, but serves the present discussion.

134. See discussion *supra* Part III.E.

135. The voluminous literature on the Democratic Peace begins with IMMANUEL KANT, PERPETUAL PEACE (1795). See generally PAUL K. HUTH & TODD L. ALLEE, THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY (2002); CHARLES LIPSON, RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE (2003); R.J. Rummel, *Democratic Peace Bibliography Version 3.0*, <http://www.hawaii.edu/powerkills/BIBLIO.HTML> (last visited Nov. 9, 2007). Note that democracies do go to war with autocracies, so democracies cannot be characterized as generally peaceful.

136. Edward D. Mansfield, Helen V. Milner & B. Peter Rosendorff, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477, 479 (2002).

137. See, e.g., Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 508 (1995). But see Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. 363, 379 n.16 (2005) (democracies do not comply more); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 252 (2000) (only more likely to comply with international dispute resolution).

ory, one would expect democracies to have more international commitments. If democracies are more internationalist than autocracies, as liberal theory posits, then one would assume democracies would seek to facilitate international engagement.

Not all democracies are equally situated: within the category of democracies, certain countries will have greater need for the credibility of commitments. Of particular importance here are newly democratizing countries. New democracies have little international reputation and thus need more credibility on the international plane. But they also have greater difficulty committing to domestic groups. Frequently they are following regimes in which government power was used against citizens, and citizens are unlikely to believe mere promises that rights will be protected. There is less of a record on which to judge whether promises will be kept. Citizens may also believe that the regime itself is fragile and unlikely to survive.

Democracies, then, may steer towards more internationalist constitutions, but *new* democracies may well *oversteer* in that direction for compensatory reasons. As such, we should thus expect greater demand for commitment mechanisms of international law, including both customary international law and treaty obligations, in democratic constitutions, but particularly in *newly* democratic constitutions.

B. Diffusion

In accordance with diffusion theory, we should predict that, like other international devices, there is a certain degree of clustering that occurs when it comes to adopting a particular constitutional posture toward international law.¹³⁸ The basic hypothesis is that the enactment of a provision in one constitution (particularly one in a neighboring or otherwise proximate country) increases the probability of the enactment of the provision in another. Following convention,¹³⁹ we can think of this general phenomenon as *diffusion*, a category that includes a host of more specific causal processes. Zachary Elkins and Beth Simmons show that most of these mechanisms fall into two broad categories—*learning* and *adaptation*.¹⁴⁰ In the case of *learning*, a prior enactment provides information for other governments facing a similar choice.¹⁴¹ The assumption is that decision makers are operating under conditions of severe cognitive constraint.¹⁴² This assumption may be especially appropriate with respect to constitutional drafting situations that follow crises, in which

138. See Elkins, Guzman & Simmons, *supra* note 54, at 274.

139. Elkins & Simmons, *supra* note 4, at 36.

140. *Id.* at 39.

141. *Id.* at 42.

142. *Id.* at 43.

drafters do not have the luxury of careful rumination.¹⁴³ Under such conditions, existing constitutional models—especially those of countries deemed to be analogous or successful, but also those that are highly available—are likely to be influential guides for decision makers. In the case of processes of *adaptation*, a prior enactment may not only impart information about the utility of the choice, it may also alter the utility itself.¹⁴⁴ One characteristic of such mechanisms is that the utility of the particular policy or practice depends upon the number of users.¹⁴⁵ A paradigmatic example might be the network externalities associated with the density of a telephone network or the density of subscription to a particular industry standard (e.g., the QWERTY keyboard).¹⁴⁶ The development of norms, in which reputational benefits accrue according to the number or identity of countries that subscribe to a particular constitutional provision, operates in this way. Regardless of whether diffusion takes the form of learning or adaptation, however, the general empirical result is the same: the clustering of enacted provisions among countries that are proximate along some dimension, whether geographically, culturally, politically, or economically.

Eric Posner and Cass Sunstein recently developed an account of why it is sometimes advisable to adopt institutions from abroad, similar to *learning*.¹⁴⁷ In considering whether and when courts ought to rely on foreign decisions, they utilize the Condorcet Jury Theorem, which holds that, under certain specified conditions, more decision makers involved in a particular decision are more likely to produce an accurate result.¹⁴⁸ By extension, a country can draw information from another country's decision to adopt a particular institution. This is true so long as the first country's decision is independent, reflects considered judgment, and so long as conditions are similar along the relevant criteria for the two countries. If one believes these criteria are broadly met in institutional adaptation, then borrowing is normatively attractive. On the other hand, if one is skeptical that these conditions exist, diffusion is likely to merely reflect trends and nonrational factors.

One tractable way to explore diffusion effects is to incorporate spatial lags of the dependent variable in regressions that specify a baseline set of domestic predictors. Spatial lags are similar to temporal lags except that they lag the dependent variable one (or more) units in space.¹⁴⁹

143. See, e.g., Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000*, 18 INT'L SOC. 71, 71 (2003) (noting that a majority of postcolonial states have redrafted their original constitutions).

144. Elkins & Simmons, *supra* note 4, at 39.

145. *Id.* at 39–40.

146. *Id.* at 41.

147. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 160–64 (2006).

148. *Id.* at 141.

149. Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 178 (2004).

They allow one to test whether the central tendency in a country's neighborhood in one year is associated with that country's choice in a subsequent year.¹⁵⁰ Typically, scholars posit that channels of influence run along geographic lines, but of course neighborhoods can be defined along any dimension of similarity or interaction.¹⁵¹ In the analysis that follows, we employ two basic spatial lags in order to explore the possibility of clustering. The first, which captures global norms, is the mean of the dependent variable among all constitutions in force in the previous year. The second, which captures geographic neighborhood effects, is the mean of the dependent variable in a country's region in the previous year. Both of these variables are liable to absorb common shocks or any domestic variables that affect countries simultaneously that are omitted from the model. Thus, until the model is fully specified, one should be wary of ascribing causal power to diffusion explanations. Nonetheless, the spatial lags allow us to rule out diffusion at this point as an alternative hypothesis.

V. EVIDENCE

To summarize the hypotheses, we expect that democracies will, on average, be more likely than others to write constitutions that defer to international law. We also expect this monist streak to be most prevalent among new democracies—that is, those that emerge from a recent past checkered by authoritarianism. Such states need credibility of commitments. As such, we expect both a main effect of contemporaneous democracy and a negative interaction between contemporaneous democracy and the recent democratic past. On the strength of the complementary diffusion processes we describe above, we also expect a considerable degree of interdependence among constitutional decisions across states, both globally and regionally (to the extent that geography defines relevant reference groups).

In general we predict that states will be less inclined to incorporate CIL than they will be to provide for treaty commitments, which can be precisely tailored. This is consistent with our argument that CIL provides a vaguer form of commitment, one that is less precise in terms of the scope of obligations and the enforcement mechanisms at issue.

We consider here some preliminary evidence for these propositions based on a sample of 363 constitutions coded as part of the Comparative Constitutions Project at the University of Illinois.¹⁵² The sample consists of nearly every current national constitution in force among independent

150. *Id.*

151. *Id.*

152. Comparative Constitutions Project, *supra* note 32.

states.¹⁵³ It also includes roughly 150 historical constitutions that are drawn from our archive; eventually we will include data on every national constitution ever written.¹⁵⁴

Consider first the issue of democracies versus autocracies. For descriptive purposes, we begin by characterizing each constitutional design situation as either newly democratic, newly authoritarian, stable democratic, or stable authoritarian. We based these classifications on a comparison of the Polity scores of states in the year following constitutional promulgation versus an average of those scores during the five years prior to promulgation.¹⁵⁵ For simplicity, we defined democracies as those with a Polity score above 5, a threshold that corresponds closely to dichotomous measures of democracy such as that of Adam Przeworski et al.¹⁵⁶

With regard to treaties, we examine whether the constitution mentions treaties at all, whether it refers to a particular treaty, and whether it provides for treaty superiority to domestic legislation. We also ask about treatment of CIL. The table below summarizes the data for the sample of current and historical constitutions, giving the proportion of constitutions with the relevant characteristic.

Figure 3 demonstrates that what might be called “democratizing constitutions” are generally more internationalist than are constitutions written in either established democracies or autocracies. They are more likely to give treaties superior status and to make customary international law directly binding (though less likely than autocracies to mention treaties). This finding is consistent with the idea that new democracies need to provide more credible international and domestic commitments. New democracies lack both a reputation for cooperation and other mechanisms for obtaining goods in the international arena. The finding is especially strong when we compare constitutions of newly democratic states to those of states that have been democratic for at least five years (“continuously democratic states”). Continuously democratic states are much less likely to incorporate customary international law—less likely, even, than authoritarian states. Forty-five percent of newly democratic states mention customary international law, versus twenty and fifteen

153. There are a half dozen current countries not included in the sample because of difficulties characterizing exactly which documents ought be considered the constitution. These include countries that have no formal written constitution such as Israel, United Kingdom, New Zealand, and Saudi Arabia, and others for whom the precise scope of constitutional text is not fully agreed upon by scholars, such as Canada and Sweden.

154. The current sample is randomly drawn in the sense that our coders selected them without accord to any specific criteria.

155. Polity is a widely used database in political science that measures the level of democracy and autocracy on a twenty point scale. Center for International Development and Conflict Management, <http://www.cidcm.umd.edu/polity/about> (last visited Aug. 18, 2007).

156. ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 15–32 (2000).

FIGURE 3
REGIME TYPE AND CONSTITUTIONAL TREATMENT OF INTERNATIONAL
LAW

Universe: Constitutions of independent states (1800–2000)

Regime Type	Percent (and number) of Constitutions that				
	Mention treaties in general	Mention or incorporate specific treaties	Place treaties superior to legislation	Mention CIL	Make CIL directly applicable
Newly Democratic (n=49)	88% (43)	21% (10)	26% (13)	45%* (22)	28%* (14)
Stable Authoritarian (n =260)	95%* (248)	26%* (64)	19% (50)	20% (52)	10% (26)
Stable Democratic (n=53)	74%* (39)	8%* (4)	6%* (3)	15% (8)	2% (1)
TOTAL (n=363)	91% (331)	22% (78)	18% (67)	23% (82)	11% (41)

*Significant at .05%. T-tests were performed using the relevant category against all other categories combined.

Source: Comparative Constitutions Project

percent of continuously authoritarian and continuously democratic states, respectively. Across each of these groups, approximately half of those constitutions that mention customary international law go on to make it directly binding. Again, these patterns are consistent with the demand for both international and domestic commitment in new democracies.¹⁵⁷

157. Bivariate regressions confirms this analysis. AUTDEM predicts Directly Applicable Customary International Law, with a positive coefficient of .01, at the 99% confidence level.

The contrast between constitutional treatment of custom and treaty is important. The analysis in Part II suggested that custom had distinct defects as a mechanism to make commitments. This led us to predict that states would systematically be more reluctant to rely on constitutional acceptance of customary international law than they would the more precise and flexible instrument of treaties. Ninety-one percent of all current constitutions mention treaties, whereas only twenty-three percent mention customary international law. In every subset of countries, treaties are more likely than custom to be mentioned and to be superior to legislation. This provides support for the analysis in Part II about the flaws of custom as a law-making and commitment device.

A more sophisticated analysis requires regression techniques. Here, we execute a series of regression analyses on our dependent variables of interest, using our complete sample of 363 constitutions.

Variables:

Global Mean, t-1. This variable captures the global mean value of the dependent variable in the year before the constitution was adopted. It is used to capture temporal clustering, an early warning sign of diffusion.

Regime Stability. This is the mean absolute value of yearly change in the Polity IV democracy variable for the thirty years preceding the Constitution's adoption. Our theory suggests that one reason countries may seek to constitutionalize international law is to compensate for unstable political environments. Hence regime instability ought to be positively associated with the decision to internationalize the constitution.

Transitions: (a) Newly Democratic; (b) Stable Authoritarian. These are dummy variables measured as described and employed in the discussion of Figure 3 above. The two excluded categories from the four possible categories are "newly authoritarian" (for which we only have one case) and "stable democratic." Thus, the effects of the included dummy variables should be interpreted with "stable democratic" as the baseline.

GDP per capita. We use this to measure level of development. It is drawn from the World Bank's *World Development Indicators*.¹⁵⁸

Population. This is total population drawn from the World Bank's *World Development Indicators*.¹⁵⁹

Figure 4 reports the Ordinary Least Squares results of two fairly parsimonious models of the constitutional status of customary international law (column 1) and treaties (column 2). More specifically, the dependent variables are dichotomous measures of whether customary international law is directly binding and whether international treaties are

158. The World Bank Group, *World Development Indicators (2006)*, available at <http://devdata.worldbank.org/wdi2006/contents/cover.htm>.

159. *Id.*

FIGURE 4
 REGRESSION MODELS OF CUSTOMARY INTERNATIONAL LAW AND
 TREATY STATUS
Universe: Independent states (1800–2002)

	Dependent Variable	
	CIL Status	Treaty Status
Global Mean, t-1	0.948* (0.414)	1.775** (0.266)
Average Change in Democracy [t-1, ..., t-30]	-0.019 (0.030)	0.039 (0.035)
Stable Authoritarian	0.111* (0.048)	0.131* (0.057)
Newly Democratic	0.270** (0.061)	0.155* (0.071)
GDP per capita (constant 1995 US\$) (in 10,000s)	0.043 (0.028)	-0.014 (0.034)
Population, total (in billions)	-0.045 (0.134)	-0.186 (0.158)
Constant	-0.101 (0.065)	-0.129 (0.067)
Observations	363	363
R-squared	0.07	0.16

Standard errors in parentheses

*significant at 5%, ** significant at 1%

superior to ordinary law, respectively. The results of the two models are roughly comparable, suggesting that we can speak of them as consequences of the same causal processes. Both sets of results provide corroboratory evidence for the two central causal stories we describe above.

First, the regime transition variables confirm some of the bivariate results we report above. That is, compared to stable democracies (the baseline category), new democracies are significantly more likely to defer to customary international law ($b=.27$) as well as international treaties ($b=.16$). Interestingly, authoritarian constitutions that continue in the authoritarian tradition are also more likely to do so, although to a lesser extent, again, bolstering some of the bivariate observations above. These results together suggest that an authoritarian past (at least an immediate

past) is associated with an abdication to international law in general, but *especially* when the actors in question are crafting a democratic future.¹⁶⁰

A second set of results concerns the global mean, lagged one year. Again, this is a catch-all variable that taps a very general sense of global trends and norms. The coefficients on both variables suggest rather dramatic effects. We should be somewhat guarded regarding the interpretation of these effects, as these sorts of lagged means capture not only the effect of an interdependence among countries (i.e., diffusion), but also that of any excluded variable correlated with time. However, the predictive power of this variable suggests that we cannot rule out the possibility of a significant diffusion effect.

VI. CONCLUSION: ENHANCING DEMOCRACY THROUGH CONSTITUTIONALIZING INTERNATIONAL LAW

International law provides important channels by which governments can make commitments in the domestic legal order. The constitution provides a structure for these commitments. We have argued that constitutional drafters, in designing the interface between the domestic and international legal orders, will take advantage of international law as a way of locking in particular policies (in the form of treaties).

This paper has argued that constitutionalizing international law is a particularly useful strategy for new democracies. These regimes typically operate in an environment with little trust in government, often in the shadow of recent severe human rights violations. Understandably, domestic audiences in such circumstances may have little confidence in the ability of the government to keep its promises. Scholars have observed that entering into treaties provides a way for governments to make their commitments to domestic audiences more credible.¹⁶¹ We have added the observation that constitutions, as devices designed to ensure commitments generally, are likely to reflect this logic in their treatment of international law.

States do not remain new democracies forever. If the democratic regime survives its infancy, some of the costs of international commit-

160. It is also possible that authoritarian constitution-writers adopt more internationalist constitutions as “cheap talk,” designed to signal to the international community that the country takes international law seriously. This story is not tested here, but is similar to that told by Professor Hathaway with regard to international human rights treaties. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2022 (2002) (arguing that some countries sign human rights treaties with no intention of improving their human rights performance).

161. Ratner, *supra* note 50, at 2072 (citing CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 68–69 (1996)) (describing the postjunta Argentine President’s plans for ratifications of international human rights treaties); *see also* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *INT’L ORG.* 217, 243–44 (2000) (concluding that newly democratizing states choose to enter treaties to “lock in” human rights). *But see* Beth Simmons, *Why Commit? Explaining State Acceptance of International Human Rights Obligations* (unpublished working paper 2002) (finding limited empirical support for lock-in by many states).

ments may begin to outweigh the benefits. To the extent that international law delegates decisions to outsiders, policies may conflict with local democratic preferences. International politics are dynamic, and the policies protected at the time the constitution was adopted may change over time, particularly with regard to customary international law. As democracy matures, we might see pressures to shift from broadly internationalist constitutional practice toward more parochial policy.¹⁶²

Our findings in this article remind us that we ought to think of the functions of international law, not merely from an interstate perspective but from an intrastate perspective. This view, known as the liberal approach to international law, has long focused on understanding the domestic origins of international discourse. We extend this approach to examining constitutional functions of international rules. International law, although often described as in tension with local democracy, in fact can help facilitate democratization, by making the promises of new democracies more believable.

162. Arguably, this pattern describes the United States' approach, as we have become less internationalist than at the founding. The founders assumed that international law applied and constrained their actions. Cleveland, *supra* note 93, at 51. We now see more public and academic skepticism about international law. Bradley, *supra* note 26, at 566. Letter from John Bolton, U.S. Under Sec'y of State, to Sec'y Gen. Kofi Annan (May 6, 2002), available at <http://www.state.gov/r/pa/pres/ps/2002/9968.htm>.

