LOCKING IN DEMOCRACY:

CONSTITUTIONS, COMMITMENT, AND INTERNATIONAL LAW

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I. INTRODUCTION

During the fall of 2005, ordinary citizens and political leaders in Iraq, the United States, and elsewhere debated complex issues of institutional design in the process of adopting the Iraqi Constitution. Little-noticed in the discussions, however, was a seemingly minor change in the rights provisions applicable to Iraqi citizens. Whereas Iraq's Transitional Administrative Law had guaranteed Iraqis a wide array of rights in international law, including customary international law,[1] the Constitution as adopted only guaranteed rights in treaties endorsed by Iraq and not in conflict with the principles of the Constitution.[2] The new Constitution thus changed the relationship between the domestic order and the international legal order, moving away from a broadly internationalist model toward one in which

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1.The text guarantees Iraqis "the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations." LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 23, *available at* http://www.cpa-iraq.org/government/TAL.html [hereinafter Transitional Administrative Law].

2. IRAQ CONST. art. 44 (2005).

national consent was key to obligation. Presumably, Iraqi citizens no longer can rely on customary international law as a direct source of rights and duties to be enforced in Iraqi courts.

The Iraqi case prompts general questions about constitutional design and international law: Under what circumstances will constitution-drafters allow customary international law to be directly binding in the domestic legal order? Should treaty-making be a relatively simple process, requiring assent by one or two constitutional actors, or more complex, involving multiple actors, supermajorities, and public involvement before external commitment can be effected? These questions of constitutional design may be linked. Some states, for example, make customary international law directly binding but have difficult processes of treaty enactment –that result in agreements of lower legal status than domestic law.[3] Others may make treaties directly applicable and superior to statutes, but refuse to give customary international law direct effect in the legal system.[4] Why would states differ along these dimensions?

These questions implicate the intersection of recently burgeoning scholarship in the fields of comparative constitutional law and institutional design,[5] international law, and international relations.[6]

3. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] Dec. 20, 1993, as amended, chs. 2, 5, arts. 25, 59.

4. *See, e.g.*, CONSTITUCION DE LA REPUBLICA DE EL SALVADOR, art. 144 (1983); 1958 Const. 55.

5.DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 22-29 (Vicki C. Jackson & Mark Tushnet eds., 2002). *See also* NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (2003); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (Foundation Press 1999); FRANCOIS VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES (2000); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION (2000); GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES 195 (1997); DENNIS MUELLER, CONSTITUTIONAL DEMOCRACY (1996).

6. Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9 (2005). *See generally* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Judith O. Goldstein, Miles Kahler, Robert Keohane & Anne-Marie Slaughter, *Preface: Legalization and World Politics*, 54 INT'L ORG. 385 (2000); Kal Raustiala & Anne-Marie Slaughter, *International Law, International*

Surprisingly, none of these bodies of literature has yet addressed the question of why states open their domestic order to international law,[7] and there is no real positive theory in these areas.[8] A vast literature concerns the effects of international law on domestic governance.[9] A smaller literature concerns the effects of domestic institutions on international cooperation.[10] This Article seeks to tackle both problems in a unified framework treating international commitment as a function of domestic constitutional design.

I approach the problem from the perspective of positive constitutional theory that sees constitutions as precommitment devices. Constitutions represent self-binding acts, whereby drafters restrict the actions available to future politicians.[11] By constraining

Relations and Compliance, *in* HANDBOOK OF INTERNATIONAL RELATIONS (W. Carlsnaes et al. eds., 2002).

7. One exception from a constitutional theory perspective is Mattias Kumm, Democratic Constitutionalism and the Status of International Law: Towards an Integrative Constitutional Theory of Natural and International Law (paper on file with author). *See also* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004); John K. Setear, *Treaty, Custom, Iteration and Public Choice*, 5 CHI. J. INT'L L. 715 (2005).

8. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 51 (5th ed. 1998) (noting that "[t]he whole subject resists generalization . . . ."); *see also* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 313-15 (1992) (noting that linguistic and interpretive factors may discourage direct application of international norms); 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, 115-16 (Thomas A.J.A. Vandamme & Jan-Herman Reestman eds., 2001) ("[C]omparative measurement [is] an impossible task").

9.Nancy Boswell, *The Impact of International Law on Domestic Governance*, 97 AM. SOC. INT'L L. PROC. 133 (2003); Saskia Sassen, *The State & Economic Globalization: Any Implications for International Law?*, 1 CHI. J. INT'L L. 109 (2000); Robert Keohane & Lisa Martin, *The Promise of Institutionalist Theory*, 20 INT'L SECURITY 39 (1995); INTERNATIONALIZATION AND DOMESTIC POLITICS (Robert Keohane & Helen V. Milner eds., 1996).

10.*See* HELEN MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION (Princeton University Press 1997). *See generally* LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS (Daniel Drezner ed., 2002); DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993); Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG. 427, 451 (1988); LISA L. MARTIN, DEMOCRATIC COMMITMENTS (2000).

11. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND

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. I focus specifically on the 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. Under some circumstances, this feature of international law provisions may make the resulting commitments more effective. I then examine the particular functions of customary international law and treaty provisions as precommitment devices. This perspective helps to illuminate several puzzles in the domestic constitutional treatment of international law, including why it is that states treat custom and treaties differently, and why certain kinds of states are more likely to make international law directly binding in the domestic legal order.

Before proceeding, I should make clear that my emphasis throughout is on the *domestic* functions of international law. International law scholars have devoted some recent attention to the design of international agreements.[12] With only a couple of exceptions, the conventional approach to treaty design follows the assumption of realism in international relations theory, treating states as unitary actors and focusing only on their interactions with each other, without considering any internal dynamics. This concept of the state as a unitary actor is no doubt easier for modeling.[13] But it is clearly less accurate. This Aarticle follows the two recent contributions of Raustiala and Brewster, who have begun to develop a framework for understanding the domestic bases of international law.[14] This move is methodologically consistent with the broader

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

12. *See* Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 612 (2005); Andrew Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002). *See generally* Kal Raustiala, *Form & Substance in International Agreements*, AM. J. INT'L L. 581 (2005).

13. Eric Posner, *International Law and the Disaggregated State*, 32 FL. ST. U. L. REV. (2005); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 204 (2004).

14. Raustiala, *supra* note 12; Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501 (2004). Raustiala and Brewster

"liberal" school of international law scholarship.[15]

Once we "unpack" the state, we can see that differences in regime types and structures may affect the constitutional treatment of international law. International law, I argue, is a particularly useful device for certain kinds of states, namely those that are undergoing a transition to democracy. By bonding the government's behavior to international standards and raising the price of deviation, international law commitments in the constitution may help to "lock in" democracy domestically by giving important interest groups more confidence in the regime. On the international plane, new democracies may lack credibility in terms of the ability to deliver on their promises, and more sophisticated provisions for international legal obligation can help to communicate to foreign partners the widespread domestic support for international agreements. For both international and domestic audiences, international law helps to resolve commitment problems for new democracies that may not be as urgent for established democracies or continuing autocracies.

In the end, my evidence suggests that new democracies tend to be more open to customary international law, and to provide for treaty-making structures that build on the logic of pre-commitment. This finding demonstrates that international legal commitments have both domestic and international audiences. It also suggests that the scope of international law itself may be determined by domestic constitutional structures, an argument whose implications are explored in the concluding section.

The paper proceeds as follows. Part I introduces the topic by describing the concepts of monism and dualism, which have become conventional ways for international lawyers to speak about the interaction of the domestic and international legal systems. Part II sets out the theory of commitments and explains the relative advantages

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both focus on the domestic origins of international agreements: Raustiala focuses on the impact of domestic groups on the form and substance of international agreement, while Brewster's emphasis is on the institutional allocation of powers in the domestic constitutional order.

15. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206-07 (1993); Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L 367 (1998); Andrew Moravscik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

(and disadvantages) of international law, both customary and that embodied in international agreements. Part III develops empirical implications, which are tested in Part IV. Part V concludes.

II. MONISM, DUALISM AND THE INTERACTION OF DOMESTIC AND INTERNATIONAL LEGAL ORDERS

A. *Status of International Law in the Domestic Order*

National constitutional provisions vary widely in terms of their relationship with international law. International lawyers have traditionally used the concept of monism and dualism to describe the relationship between international legal order and the domestic legal order.[16] Briefly, monists see international law and the domestic legal system as part of the same legal order.[17] International law has a primary place in this unitary legal system, so that domestic legal systems must always conform to the requirements of international law or find themselves in violation. This would be true whether or not domestic legal actors had actively transformed international legal norms into domestic norms in accordance with domestic constitutional rules.

In contrast, dualists view the international legal order as distinct, only penetrating the domestic legal order by explicit consent of the state involved. When the two systems conflict, municipal courts would apply municipal law. This view was especially important in the era of positivism, which viewed the nation-state as the sole unit of political authority and source of legal obligation. From a dualist perspective, the international legal order could purport to bind actors within states but required consent to do so as a matter of domestic law. International legal obligations would require transposition into the domestic order to take effect.[18] Absent such transposition, there is the

16. ANTONIO CASSESE, INTERNATIONAL LAW 213-17 (2d ed. 2005); BROWNLIE, *supra* note 8, at 31-33; Jackson, *supra* note 8, at 310-15; *see also* Daintith, *supra* note 8.

17. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64 (1995). Cassese notes another early view of monism that had domestic law as the primary in the relationship. CASSESE, *supra* note 16, at 213-14.

18. *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 160 (1993).

distinct possibility of an action being legal in municipal law but illegal in international law, in which case a dualist would presume that municipal courts should apply municipal law.[19]

A further complexity is that monism and dualism can vary with the type of obligation, meaning that a state can be 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.[20] But the Dutch Constitution does not give the same status to customary international law.[21] In Germany, Italy and Austria, by contrast, customary international law is superior to domestic statutes, but treaties are equal to domestic statues, with the last in time rule determining which is valid.[22] This is the opposite of the Dutch Constitution. To take another example, the Constitution of Russia states that the "universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall constitute 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 apply."[23]

19. BROWNLIE, *supra* note 8, at 32. The high point of monist thinking is found in the PCIJ opinion in Exchange of Greek and Turkish Populations, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10 (Feb. 21). This opinion asserts that states have a duty to modify national law so as to conform to the requirements of international law. *Id*. at 20.

20. GRONDWET [Constitution] art. 91.3 (Neth.) (providing for approval of treaties that conflict with the constitution by 2/3 vote); Art. 94 (statutes in conflict with treaties are inapplicable). *See* CASSESE, *supra* note 16, at 229 n.30 (providing an explanation). Jackson, *supra* note 8, at 334 n. 122 argues that Dutch Courts have been reluctant to find any treaties truly supreme over the constitution. One also wonders whether a constitutional amendment purporting to escape treaty commitments would be deemed unconstitutional under this scheme. *Id*. at 332-33.

21. *See* Jonkheer H. F. van Panhuys, *The Netherlands Constitution and Internacional Law*, 47 AM. J. INT'L L. 537, 557 (1953); *see also* Benvenisti, *supra* note 18, at 162.

22. CASSESE, *supra* note 16, at 230.

23. CONST. OF RUSSIA art. 15(4). An interesting variant is found in Article 11 of the 1992 Slovak Constitution, stating that "International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties." For a discussion, see Vladlen S. Vereschetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EUR.

France has yet another configuration, in which treaties have higher status than subsequent legislation.[24] The French Constitution is silent on customary international law, however.

With a long tradition of parliamentary supremacy, the United Kingdom would seem to be the paradigmatic dualist state.[25] Parliamentary sovereignty was famously defined by 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."[26] This would presumably include international bodies. Parliament is also free to pass statutes that conflict with prior treaties.[27]

At the same time, customary international law was traditionally viewed as part of the common law, and directly applicable so long as not overruled by subsequent statute or judicial decision.[28] This is called the doctrine of incorporation, whereby changes in CIL are automatically "incorporated" into the common law.[29] Since the 1870s, some have asserted that the UK has followed the competing doctrine of transformation, such that evidence of some governmental intent to incorporate the international rule into domestic law is required; but the conventional view is that the doctrine of

J. INT'L L. 29 (1996).

24. CASSESE, *supra* note 16, at 228; HENKIN, *supra* note 17, 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, 53-62 (Thomas A.J.A. Vandamme & Jan-Herman Reestman eds., 2001).

25. Jackson, *supra* note 8, at 313-15.

26. ALBERT V. DICEY, THE LAW OF THE CONSTITUTION 37-38 (8th ed. 1923).

27. *See* Ian Ward, *The Best of All Possible Worlds? Maastricht and the United Kingdom*, 5 IND. INT'L & COMP. L. REV. 75, 85-86 (1994).

28. BROWNLIE, *supra* note 8, at 42-43. *See generally* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas D. Franck & Gregory H. Fox eds., 1996); 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) (discussing US jurisprudence); Harold Hongju Koh, *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 (1999).

29. Trendtex Trading Corp. v. Cent. Bank of Nigeria, (1977) Q.B. 529, 553-54.

incorporation remains intact.[30]

The U.S. Constitution establishes a scheme somewhat similar to that of the UK.[31] Customary international law, or the "law of nations," was traditionally viewed as part of federal common law.[32] Article I section 8 of the Constitution also gives Congress the power to "define the law of nations."[33] This provision would seem to give the legislative branch primary control over the treatment of custom, but legislation is seldom based on this provision.[34] Treaties are the "Supreme Law of the Land" according to the supremacy clause, although later in time statutes can supersede them.[35] Thus Congress and the President can together supersede a Treaty adopted by the President and Senate alone. In addition, the doctrine of self-executing treaties governs which treaties require legislation to take effect.[36]

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.[37]

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30. BROWNLIE, *supra* note 8, at 43-46 (discussing caselaw); *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, (1977) Q.B. 529, 553-54.

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

32. See the debate following Bradley & Goldsmith, *supra* note 28, at 822; Koh, *supra* note 28, at 1825-26; Neuman, *supra* note 28, at 372; Paust, *supra* note 28, at 301.

33. U.S. CONST. art. I, § 8, cl. 10.

34. The sole exception may be the Alien Tort Claims Act, Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2000)); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 210 (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).

35. Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 334 (2005); HENKIN, *supra* note 34, at 211-12.

36. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 332 (2005).

37. *Cf.* Duncan Hollis, *A Comparative Approach to Treaty law and Practice, in* NATIONAL TREATY LAW AND PRACTICE 1, 8 (D. Hollis, M. R. Blakeslee & L. B. Ederington eds., 2005) (finding "states show surprisingly similar approaches" to treaty practice).

B. *Ease of Obligation*

Constitutions also vary widely in the ease with which they allow international obligations to be made by governments. Most readers will be familiar with the United States' process for making treaties, which involves Senate advice and consent to treaties "made" by the Executive.[38] American practice has also developed Congressional-Executive agreements as a mode of international agreement.[39] Furthermore, since *Missouri v. Holland*,[40] the treaty process can be used to evade constraints of federalism.[41] This shift empowered the national government relative to the states. Thus, in the United States, treaty-making empowers the executive relative to Congress and empowers the national government relative to subnational units, when compared with normal legislative processes.

In other countries, such as Saudi Arabia, treaty making may be accomplished solely by the executive without legislative approval.[42] At the other extreme, some countries require the constitutional court to give assent to treaties before they take effect,[43] while many more countries allow treaties to be challenged before the constitutional court

38. U.S. CONST. art. II, § 2, cl. 2.

39. *See* HENKIN, *supra* note 34, at 215-19; John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 5 (2002); *see also* Brewster, *supra* note 14, at 514.

40. 252 U.S. 416 (1920) (holding a treaty for migratory bird protection which was unconstitutional under commerce clause jurisprudence of the 1920s, legal under the treaty power).

41. See the recent review and critique of the scholarship in Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006).

42. Basic Law of Government (1993), art. 70 (Saudi Arabia). More commonly, this is the case with treaties on certain subject matters only. For example, under the French Constitution, "important" treaties – including those involving peace, territory, international organizations, or the status of persons – do require legislative approval in addition to the standard executive approval. 1958 CONST. 52-53. *See also* Constitution of Zambia (As amended by Act No. 18 of 1996) art. 44(2)(d); THE PERMANENT CONSTITUTION OF THE STATE OF QATAR art. 68; 1975 Syntagma [SYN] [Constitution] 35 (Greece); 1991 Muaritania CONST. art. 78; CONSTITUTION OF THE REPUBLIC OF SENEGAL (2001) art. 95. *See generally* LUZIUS WILDHABER, TREATY-MAKING POWER AND THE CONSTITUTION: AN INTERNATIONAL AND COMPARATIVE STUDY 44-45 (1971).

43. *See* CONSTITUTION OF CZECH REPUBLIC arts. 10, 49, 87.2; The Constitution of the Republic of Madagascar, *reprinted in* CONSTITUTIONS OF THE WORLD (Gisbert H. Flanz ed., Oceana Publications 1999).

if alleged to violate the constitution.[44] A referendum to approve treaties may also be required or allowed. In Switzerland, for example, any 50,000 citizens can submit a request for a referendum on certain treaties.[45]

Related to ease of obligation are provisions on exit.[46] Helfer's recent analysis does an important service by integrating treaty exit with treaty entry.[47] If obligations are easy to escape, they are politically less risky and therefore less costly to enter into.[48] In the United States, for example, the President can unilaterally end treaty obligations even if they were entered into with Senate advice and consent.[49] The United States' system is asymmetric in this regard.[50] Other countries utilize the identical process for treaty enactment as for treaty revocation. But most constitutions are silent on the issue of treaty exit.[51]

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44. *See* CONSTITUTION OF THE GABONESE REPUBLIC (1997) art. 11, *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: REPUBLIC OF GABON, Booklet 1, 6-7 (Daniel G. Anna & Anne-Françoise Bewley trans., Gisbert H. Flanz ed., 1998). CONSTITUTION OF THE REPUBLIC OF ARMENIA art. 81.2; 100.2; MONGOL ULSYN UNDSEN KHUULI [Constitution] art. 66.2 (Mong.). *See generally* Tom Ginsburg, *Ancillary Powers of Constitutional Courts*, *in* INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES (Tom Ginsburg & Robert Kagan eds., 2005).

45. Bundesverfassung der Schweizerischen Erdgenossenschaft [Constitution] art. 141 ("International treaties which: are of unlimited duration and may not be terminated; provide for the entry into an international organization; involve a multilateral unification of law"); *see also* art. 166.2 (empowering the parliament to approve certain international treaties); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] art. 90 (Pol.); Constitution of Albania (1998) art. 125.

46. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

47. *Id.*

48. They are also, therefore, less valuable as commitments, as will be seen in the next section.

49. Goldwater v. Carter, 444 U.S. 996 (1979). Note that another route for treaty "exit" in the United States is the possibility of enacting subsequent legislation that supersedes the earlier treaty. This allows an ordinary majority in both houses, with presidential assent, to over-rule an earlier commitment by a president and 2/3 of the Senate.

50. *See* John McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (arguing that with regard to legislation, the enactment rule of an entrenched provision should be the same as repeal rule). *Cf.* Eric Posner & Adrian Vermuele, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (norms against legislative entrenchment may prevent efficiency-enhancing legislation).

51. The Comparative Constitutions Project at the University of Illinois is

It is possible to measure the degree of difficulty of treaty making and exit in different constitutional systems. Ideally one should pay attention to at least four dimensions.[52] These include the number of actors and voting rules to enact a treaty; the ease of over-riding or exiting treaties as a matter of domestic law; the symmetry between entry and exit; and the relationship of treaties to domestic statutes, including the relative difficulty of enacting each. In the empirical examination at the end of this paper, I focus primarily on ease of entry.

C. *Domestic Constitutional Configurations*

To summarize, every constitutional system has a particular configuration in terms of how it treats international obligation. We have established that constitutional provisions on international cooperation vary widely among nations.[53] The tables below array some of the possible choices. For both CIL and treaties, we ask about the domestic status of international law, and then provide an ideal-type internationalist position, nationalist position, and an intermediate one. We then show how four representative countries deal with the various choices. The United States is relatively nationalist with regard to its treatment of both custom and treaty, but other countries can approach these two forms of international law differently. Germany is internationalist toward custom but relatively more nationalist toward treaties, while the Netherlands has the reverse configuration. Russia, finally, is internationalist with regard to both. The tables represent obvious simplifications: they ignore complexities related to federalist systems, in which sub-federal units may have their own treaty making powers and have distinct treatment of customary international law. The tables also treat all subjects of international law together, whereas actual constitutional schemes may differentiate among types of

currently gathering data on these and other issues concerning the content of formal constitutional texts. Less than 20% of 295 constitutions coded so far, including most current constitutions, mention treaty exit at all. For more information on the project, see https://netfiles.uiuc.edu/zelkins/constitutions/ (last visited Sept. 5, 2006)

52. *See also* Jackson, *supra* note 8 (nine issues, including negotiation, signing, accepting the treaty, determining validity, implementation, direct applicability, invocability, status of the treaty vis-à-vis domestic law, and ongoing administration of the treaty).

53. *See* Hollis, *supra* note 37.

treaties, with only certain subjects requiring legislative assent.[54] Nevertheless, as rough approximations, the table demonstrates the diversity in state constitutional practice. The countries are arrayed from what might be characterized as the most nationalist regime among the four (the United States) to the least nationalist (Russia).

54. For a useful table describing variation in this regard, see *id.* at 33.

Figure 1: Design Choices and Domestic Configurations

United States

	Internationalist	**Intermediate**	**Nationalist**
Status of CIL?	Superior	Equivalent	Inferior
CIL Directly Applicable?	Incorporation	Incorporated at founding only[55]	Transformation
Status of treaties v. legislation?	Superior	Later-in-time rule	Inferior

Netherlands

	Internationalist	**Intermediate**	**Nationalist**
Status of CIL?	Superior	Equivalent	Inferior
CIL Directly Applicable?	Incorporation	Incorporated at founding only	Transformation
Status of treaties v. legislation?	Superior	Later-in-time rule	Inferior

Germany

	Internationalist	**Intermediate**	**Nationalist**
Status of CIL?	Superior	Equivalent	Inferior
CIL Directly Applicable?	Incorporation	Incorporated at founding only	Transformation
Status of treaties v. legislation?	Superior	Later-in-time rule	Inferior

55. Note that we accept *arguendo*, for purposes of this table, the position taken by Professors Bradley and Goldsmith about the role of customary international law in the domestic U.S. order. *See* Bradley & Goldsmith, *supra* note 28, at 822.

Russia

	Internationalist	**Intermediate**	**Nationalist**
Status of CIL?	Superior	Equivalent	Inferior
CIL Directly Applicable?	Incorporation	Incorporated at founding only	Transformation
Status of treaties v. legislation?	Superior	Later-in-time rule	Inferior

III. HOW INTERNATIONAL LAW CAN AFFECT THE DOMESTIC LEGAL ORDER

A. *Precommitment Theory*

Why might these issues of constitutional design vary across countries? I draw on the literature that treats constitutions as mechanisms for making political precommitments.[56] 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."[57] Imagine a constitution written by a single political leader, seeking to establish legitimate authority. The politician can promise to behave in particular ways, for example, not to interfere with the rights of his or

56. *See* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 88-111 (1979); Holmes, *Precommitment and the Paradox of Democracy*, *supra* note 11, at 195; HOLMES, *supra* note 11, at 134-77; JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 129-41, 157-61 (2000). *But see* JEREMY WALDRON, LAW AND DISAGREEMENT 257-60 (1999); Jeremy Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM 271, 271-99 (LARRY ALEXANDER ED., 1998). See discussion in Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEG. STUD. 71, 77-78 (2004). *See generally Symposium: Precommitment Theory in Bioethics and Constitutional Law*, 81 TEX. L. REV. 1729 (2003). Note that commitment and precommitment are utilized interchangeably in these treatments. *See* William E. Forbath, *The Politics of Constitutional Design: Obduracy and Amendability—A Comment on Ferejohn and Sager*, 81 TEX. L. REV 1965, 1966 n.4 (2003).

57. THOMAS SCHELLING, STRATEGIES OF COMMITMENT 1 (2006).

her citizens. But there is no reason for citizens to believe mere promises from their leader. A promise at Time 1 only has value if the promisee believes that it will be obeyed at Time 2. The politician thus faces the problem of making the promise credible. This problem is particularly acute when the politician cannot predict the incentives he or she will face in the future.[58] If costs and benefits vary in unpredictable ways, the politician's promise to behave in the specified way may be less believable. To paraphrase Stephen Holmes, why should people believe their leader when sober, knowing that sometimes leaders can become drunk and behave quite differently?[59]

Facing this problem, a rational constitutional designer might realize that it makes sense to limit her own power, in order to obtain the consent of those ~~they~~ she governs. Democratic constitutions can help to serve this role. As Sunstein has written: "Democratic constitutions operate 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."[60] Constitutions help make the promises credible by imposing costs on those who violate promises.[61] By tying their own hands, politicians actually can enhance their own authority.

There are myriad ways that constitutions can play this role. Elster elaborates how constitutional provisions function to constrain

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

59. Holmes, *Precommitment and the Paradox of Democracy*, *supra* note 11, at 195; *see also* HOLMES, *supra* note 11, at 134-77.

60. CASS SUNSTEIN, 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.") and discussion in A.C. Pritchard and Todd Zywicki, *Finding The Constitution: An Economic Analysis Of Tradition's Role In Constitutional Interpretation*, 77 N.C.L. REV. 409, 447-49 (1999).

61. Oliver Williamson, *Credible Commitments—Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983); Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INST. THEO. ECON. 286 (1993); Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

politicians, but also to restrain the power of the people.[62] _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.[63] Article V is another feature of the United States Constitution that has been analyzed as resolving a commitment problem.[64] More broadly, scholars have long noted that independent courts form a means for politicians to entrench policies and thus resolve problems of credible commitments.[65]

There is no single generic constitutional design which solves the problem of credible commitments because demands for precommitment vary across countries. Designers worried about the "passions" of the majority will tie the hands of the majority by making legislation difficult and subject to judicial scrutiny. Designers worried about long-term economic stability may constitutionalize an independent central bank.[66] Designers that face national security

62. GEORGE LOEWENSTEIN & JOHN ELSTER, CHOICE OVER TIME 35 (1992).

63. *See* THE FEDERALIST NOS. 48, 49 (James Madison).

64. Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1998-99 (2003); Donald J. Boudreaux and A.C. Pritchard, *Rewriting The Constitution: An Economic Analysis Of The Constitutional Amendment Process*, 62 FORDHAM L.J. 111 (1993); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003); Cooter, *supra* note 5; Mueller, *supra* note 5.

65. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); *see also* J. Mark Ramseyer, *The Puzzling (In)Dependence Of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994) (developing a competing electoral explanation); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (describing the insurance model); Keith Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005) (describing entrenchment thesis as current political majorities seeking to insulate policies from future majorities).

66. Politicians fear that were they to have unbridled power to adjust monetary policy, they would pursue expansionary policies to secure short term political gains. Recognizing that their short term preferences may diverge from their long term preferences, politicians can establish an independent central bank that can pursue a long term policy insulated from political control. *See also* William Bernhard, *A Political Explanation of Variations in Central Bank Independence*, 92 AM. POL. SCI. REV. 311 (1998); SYLVIA MAXFIELD, GATEKEEPERS OF GROWTH:

threats may seek to make certain rights non-derogable in emergency situations, so as limit the temptations of military government.[67] Designers may set up a variety of independent regulatory commissions to place specific tasks beyond the reach of normal politics.[68]

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.[69] But they can also seek to structure the mechanisms of precommitment available to *later* politicians. By creating rules that facilitate or hinder international agreements, constitutional designers are designing a structure for future precommitments by leaders selected through constitutional mechanisms.[70]

Explicit characterization of international law as a precommitment device remains infrequent but is gaining currency within the growing body of interdisciplinary scholarship linking international law and international relations.[71] Most literature to date focuses on how

THE INTERNATIONAL POLITICAL ECONOMY OF CENTRAL BANKING IN DEVELOPING COUNTRIES (1997); Robert J. Barro & David B. Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983); James E. Alt, *Comparative Political Economy: Credibility, Accountability and Institutions*, *in* POLITICAL SCIENCE: STATE OF THE DISCIPLINE 147, 152-53 (Ira Katznelson & Helen V. Milner eds., 2002) (summarizing empirical evidence).

67. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1066-74 (2004).

68. Our data indicate that human rights commissions and electoral commissions are the most common variants of these bodies, and that their popularity is increasing over time.

69. *See, e.g.*, CONST. ARG. art. 75.22 (American Declaration of the Rights and Duties of Man; Universal Declaration of Human Rights; American Convention on Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights); CONSTITUTION OF THE REPUBLIC OF BENIN pmbl. (Charter of the United Nations Of 1945; Universal Declaration of Human Rights of 1948; African Charter on Human and Peoples' Rights of 1981).

70. One might characterize of these constitutional provisions as meta-commitments, that is rules structuring the commitment process.

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

precommitment works among states that are each presumed to have a single exogenously defined national interest. Precommitment allows states to signal to other states that they are serious about their promises.[72] Certainly not all international agreements among states are precommitments, in the sense of giving up future choices to guard against preference shifts.[73] States have many other reasons for entering into agreements, including providing information and expressing "cheap talk" in which they seek to induce behavioral change by others without cost to themselves. But some kinds of agreements certainly act as precommitments.

Imagine, for example, a foreign investor interested in investing capital into 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 a problem.[74] The current government may not last as long as the period needed to recoup the investment. Bilateral investment treaties resolve this problem by making the government promise enforceable through international arbitration. The treaty regime makes the government's commitment more credible.[75]

(Summer 2000); *see also* Kumm, *Democratic Constitutionalism*, *supra* note 7; Kumm, *Legitimacy of International Law*, *supra* note 7; Setear, *supra* note 7

72. *See* John A. Robertson, *"Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions*, 81 TEX. L. REV. 1729, 1743-44 (2003) (comparing precommitments to contracts and states to individuals); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 680-81 (1998) (suggesting states sign treaties protecting foreign investments to attract investment by assuring they will honor their agreements).

73. Ratner, *supra* note 71, at 2070-72.

74. Technically, a dynamic inconsistency problem.

75. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. AND ECON. 107, 122 (2005); Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1959-2000* (UC Berkeley Public Law Research Paper No. 578961, 2004), *available at* www.wcfia.harvard.edu/conferences/internationaldiffusion/Papers%20Revised/Competing.pdf.). For empirical studies of BITS see Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, Yale Law & Economics Research Paper No. 293, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121; Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567-85 (2005), *available at*

In the example above, and in most work to date, the promise by the government has an exclusively international audience—in this case the investor—and costs that will be incurred internationally. The argument I wish to focus on is that sometimes 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

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http://eprints.lse.ac.uk/archive/00000627; Jeswald W. Salacuse and Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67 (2005); Guzman, *supra* note 72, at 680-82.

in both democracies and autocracies.[76]

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.[77] A party that is unsure that it will remain in power in the future may wish to entrench its policies in the form of treaties. Since undoing international agreements is typically costly, a policy that is entrenched internationally may survive the demise of the current political coalition or even regime.[78] 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.[79] First, international commitments 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.

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76. *Cf.* DOWNS & ROCKE, *supra* note 58, and Brewster, *supra* note 14, at 511-12 (both focusing on elections as the primary source of uncertainty).

77. Voigt and Salzberger provide one of the few attempts to think through tradeoffs in delegation to international and domestic institutions. Stefan Voigt & Eli Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289-310 (2002). In later work, Voigt and co-authors find support for some of these hypotheses. *See, e.g.,* Stefan Voigt, Michael Ebeling & Lorenz Blume, *Improving Credibility by Delegating Judicial Competence - the Case of the Judicial Committee of the Privy Council*, Discussion Papers in Economics 67/04, University of Kassel, Institute of Economics (2004), http://ideas.repec.org/p/kas/wpaper/2004-67.html; Stefan Voigt, *Membership Has Its Privileges – On the Effects of Delegating Powers Internationally*, Discussion Papers in Economics 73/05, University of Kassel, Institute of Economics (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=739125.

78. For a similar observation focused on the tensions with democratic theory, see Daintith, *supra* note 8.

79. *Compare* Pritchard, *supra* note 60, on the precommitment and agency roles of constitutions.

Second, politicians can in effect bond their behavior by making sure that any future violation of the promise will generate costs from 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. Here, it is the simple cost associated with violation, rather than information generated from abroad, that renders the mechanism useful for enhancing 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 ~~his or~~ 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 non-governmental organizations have, under certain circumstances, an incentive to monitor the performance of the state.[80] It is well understood that information produced by international organizations and other states can help third states decide how to treat the state in question.[81] But the information can also be useful for domestic constituencies. Voters can learn about the nonperformance of their leaders.[82] 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.[83]

Take for example a state that joins the International Whaling

80. On NGOs, see Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. (forthcoming Dec. 2006); MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

81. KEOHANE, AFTER HEGEMONY (First Princeton Classic ed. 2005).

82. Edward D. Mansfield, Helen V. Milner & B. Peter Rosendorff, *Why Democracies Cooperate More: Electrical Control and International Trade Agreements*, 56 INT'L ORG. 477, 479 (2002); Brewster, *supra* note 14, at 15-17.

83. Milner, *supra* note 82, at 503-05.

Commission, in part to satisfy a domestic environmentalist movement.[84] The International Convention for the Regulation of Whaling establishes a scientific monitoring body and provides information on the whale population and harvests. This information is useful to states, but also may be useful to domestic anti-whaling interest groups who can pressure their state (and others) to comply with the regime's requirements.[85] Another example comes from the trade law field.[86] Trade policy, with its multi-sectoral tradeoffs and package structure, may be particularly vulnerable to cycling problems. Cycling would occur when groups seek to re-open negotiations so as to secure a better deal for themselves, and no particular solution is likely to be stable in repeated pairwise voting.[87] Domestic interest groups may therefore wish to lock-in whatever bargain they are able to obtain, and to entrench the agreement, protecting their gains from future renegotiation. The effectiveness of the WTO as an institution, including both its dispute resolution provisions and the broader role it plays in providing information, helps to let interest groups know if their own government is upholding the agreement. This can help them direct lobbying efforts to maintain the course.[88]

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 incentives to generate and transmit information.[89] The key factor is

84. International Convention for the Regulation of Whaling, art. X(4), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, as amended Nov. 19, 1956, 10 U.S.T. 952.

85. KECK & SIKKINK, *supra* note 80.

86. Mansfield et al., *supra* note 82.

87. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d. ed., 1963) (providing five assumptions that cannot all coexist with rational decisionmaking). *See also* Francesco Parisi, *Sources of Law and the Institutional Design of Lawmaking* 5-6 (George Mason Univ. L. & Econ. Working Paper Series, Paper No. 00-42, 2000), *available at* http://www.gmu.edu/departments/law/faculty/papers/docs/00-42.pdf.

88. *See* Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters*, 25 HARV. ENVTL. L. REV. 1, 84 (2001).

89. 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, CHICAGO LECTURES IN LAW AND ECONOMICS 225 (2000) (discussing principal-agent model);

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. Obligation for 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 different ways.[90] For some categories of obligation, particularly involving coordination problems, international obligations can be self-enforcing in that neither party has an incentive to deviate.[91] 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.[92] Obligations can also be enforced through reputational sanctions enforced by third parties.[93] Finally, and relatively rarely, violations can lead to direct financial or material sanctions.[94] For our purposes, the main point is that violations of international obligations are, under some circumstances, accompanied by *some* cost at the international level.[95] 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

Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (applying principal-agent model to the administrative state); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347, 361-62 (1997) (applying principal-agent model to judicial review).

90. Robert Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 580-81 (2004).

91. Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy; An Expressive Theory of International Dispute Resolution*, 45 WM. AND MARY L. REV. 1229, 1237 (2004).

92. KEOHANE, *supra* note 81; ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

93. Scott & Stephan, *supra* note 90, at 590-93.

94. *Id*. at 570-72.

95. Note that I am 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.

and World War II.[96] The end of the Ottoman and Austro-Hungarian empires led to the creation of many new states in Eastern Europe. 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. Certain states, beginning with Poland and Czechoslovakia, concluded treaties with various outside powers promising to protect minority rights within their jurisdictions.[97] In these treaties, the state promised to ensure protection and a certain degree of self-determination for ethnic minorities within its territories.[98] These were important antecedents for the flowering of human rights law after World War II.[99]

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 powerful outside countries,, the states in question posted a reputational bond for their positive treatment of minorities.[100] The outside 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 sanction. The audience for this signal included the voters and governments of the large international powers, whose support was needed for the prospective

96. Discussed in HENKIN, *supra* note 17, at 169-70; *See also* Fred Morrison, *Between a Rock and Hard Place,* 80 CHI.-KENT L. REV. 31, 35-38 (2005); John R. Valentine, *Toward a Definition of National Minority*, 32 DENVER J. INT'L L. AND POL'Y 445, 450-51 (2004); JACOB ROBINSON ET AL., WERE THE MINORITIES TREATIES A FAILURE? 3-4 (1943); L.P. MAIR, THE PROTECTION OF MINORITIES: THE WORKING AND SCOPE OF MINORITIES TREATIES UNDER THE LEAGUE OF NATIONS (Christophers) (1928).

97. Treaty of Poland, June 28, 1919, S. 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 Peace between the Allied and Associated Powers and Hungary, Trianon, June 4, 1920, 6 L.N.T.S. 187.

98. *See* Fred Morrison, *Between a Rock and Hard Place,* 80 CHI.-KENT L. REV. 31, 35-38 (2005).

99. HENKIN, *supra* note 17.

100. On bonding see Larry E. Ribstein, *Cross-Listing and Regulatory Competition*, 1 REV. L. & ECON. 97 (2005), *available at* http://www.bepress.com/rle/vol1/iss1/art7/; Amir N.Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141 (2003).

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 ethnic nationalism of the dominant group.[101] 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.[102] 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.[103] 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 the South Tyrol in 1946.[104] This German-speaking region had been transferred from the Austro-Hungarian Eempire to Italy after World War I, and Mussolini's assimilationist policies had created resentment among the residents. 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.[105] Austria retained the right to complain on behalf of this population before the United Nations and International Court of

101. *See* Fred Morrison, *Between a Rock and Hard Place,* 80 CHI.-KENT L. REV. 31, 35-38 (2005).

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

103.*See* Ratner, *supra* note 71, at 2065-66 (discussing *uti possidetis* principle in post-colonial Africa along similar lines).

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

105. *See* Defeis, *supra* note 104, at 293, 296-99.

Justice, making Italy's promise to its minority more credible.[106] 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.[107]

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.[108] But it also has "teeth" in the form of dispute resolution provisions known as the Dispute Settlement Understanding (DSU). These provisions authorize bilateral retaliation against violators of the agreement.[109] The dispute resolution process also provides a coordination point that can facilitate reputational sanctions.[110] 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 foreign 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.[111] 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.

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106. *Id.* at 299-300 (noting that Austria did indeed bring a complaint to the General Assembly in 1960).

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

108. *See* Mansfield et al., *supra* note 82, at 480.

109. Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 777 (2004).

110.Ginsburg & McAdams, *supra* note 91; *see generally*, Richard McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1049 (developing expressive theory of adjudication).

111.Brewster, *supra* note 14, at 516.

To the extent that international obligations involve giving up control to other actors, they reduce domestic accountability 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.[112] 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 in other countries' signing of agreements with the International Monetary Fund (IMF), is conventionally understood as a way of delegating decision-making to attract international capital. I do not contest that delegation may primarily be addressed to international audiences. But 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.[113] Delegation made the commitment credible in a way that a simple domestic promise could not.

D. *International Law's Advantages*

As noted above in Section II.A., international obligation is not the only means of entrenching policies. However, international law has significant advantages relative to 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, but there is nothing to prevent future majorities from enacting new legislation.[114] 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 beyond the control of any single country, even the most powerful. Indeed, this is the

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

113. *Id.*

114.This is a point not adequately considered in the original Landes/Posner paper.

source of concern about a "democratic deficit" in international institutions, a concern that is quite strong in the United States.[115] The democratic deficit, ironically, may be a *good* thing to the extent that it facilitates the entrenchment of democratically enacted policies.

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 would obviously be reduced. But this seems to be a rare configuration.[116]

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.[117] 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 retained obligations entered into by communist governments operating under a very different economic system in which the relevant level of planning was multinational.[118] Hungary and Czechoslovakia had concluded an

115. John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 312-16 (2006). *But see* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

116.Stefan Voigt, The Interplay Between National and International Law: Its Economic Effects Drawing on Four New Indicators (2005) (unpublished working paper, University of Kassel, on file with New York University Journal of International Law and Politics). 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 over-ride 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 24.

117.Brewster, *supra* note 14, at 13; *see also* Ratner, *supra* note 71, at 2061.

118.Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 155 (Sept. 25); Eyal Benvenisti, *Domestic Politics and International Resources: What*

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. When both Hungary and the Slovak Republic (a successor nation to Czechoslovakia) 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.[119] The ICJ found that the obligation remained even though the economic and environmental rationales for the planned dam had been utterly transformed.[120] 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.[121] Second 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 hegemons; 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 from 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.

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., 2001).

119. *See generally* Gabcíkovo-Nagymaros Project (Hungary v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

120. *Id.* at 34 (political situation transformed), 64-65 (rejecting argument that the changed circumstances modified treaty obligations).

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

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.

Koremenos models the world of treaty making as subject to a series of exogenous shocks which affect the distribution of gains from an agreement.[122] The shocks are not anticipatable, are observable only at a cost, and are cumulative. 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. Under these 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. By analogy, a domestic interest group relying on international commitments to entrench policies faces increasing variance in the prospect of externally imposed costs (as well as externally generated information and decision-making)—although there is potential for the probability of enforcement to *increase* as well as to *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.

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.[123] 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

122.*Id*.

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

means that they are not accountable.[124] This implicates 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.

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

124. McGinnis, *supra* note 115.

but not by instrument type.[125] In practice, however, states tend to vary their constitutional acceptance of forms of international law by instrument, with custom and treaty being treated differently.[126]

1. 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. Another key distinction between customary international law and treaty law is that CIL is created in a decentralized fashion. States, through official action and *opinio juris*, do create CIL. 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." But 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 adoption of the rule, the rule "crystallizes" into CIL and thence binds all states that do not persistently object.[127]

These rules are puzzling in a number of ways.[128] In particular, they do not seem to acknowledge the presence of persistent uncertainty that marks the international system.[129] A state may at T1 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

125. Thomas Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1238 (2004).

126.*See e.g.*, Figure 1, *supra;* Voigt, *supra* note 116. 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. Andrea Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 891-92 (2005) (discussing United States Model Bilateral Investment Treaty and NAFTA).

127.*See* MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999); Kontorovich, *supra* note 80.

128.*See also id*.

129.Koremenos, *supra* note 121.

position where a rule it favored or was neutral towards at T1 has significant costs at T2. It will nevertheless be bound by the rule.[130] Unlike treaties, which have exit provisions,[131] CIL commitments cannot be unilaterally denounced after they have become binding.[132] 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 a 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 obligations, which are of unlimited duration, than with agreements which can be and (as she demonstrates) frequently are limited temporally, and can be exited.[133]

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.[134] 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 myriad bodies, without any centralized mechanism for appeal or control of norm-generation. The potential benefits of CIL as an entrenchment device are outweighed by

130.Of course, if *enough* states find themselves in this position, the rule of CIL can change. In practice, however, examples of CIL change seems 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. *See* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 150 (2005).

131.Helfer, *supra* note 46, at 1581-82.

132. *But see* Joost Pauwelyn, *How Strongly Should We Enforce International Law?* (Duke Law Sch. Legal Studies, Paper No. 105, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894116 (arguing that CIL obligations are alienable).

133.All this assumes that CIL agreements will be enforced. *See* Scott & Stephen, *supra* note 90.

134.BROWNLIE, *supra* note 8, at 50 ("[M]any 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.

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.[135] 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. 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.[136] 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.[137] Because the enforcement of customary international law is highly decentralized, states face a collective action problem in

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135.*See also*, Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 862-64 (2005) (characterizing the 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 33. The executive primacy in customary international lawmaking 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. *Compare* Joanna Harrington, *Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-making*, 55 INT'L & COMP. L.Q. 121 (2006) (discussing parliamentary systems' adjustments to potential executive dominance).

136.My analysis is consistent with Setear, *supra* note 7.

137. *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 517 452 (2000) (517).

enforcing norms. State 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.[138] 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 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.[139]

2. Treaties

In contrast with custom, treaty-making structures have been regularly modeled as a signal to communicate credibility of commitment to foreign countries.[140] 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

138.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 also* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004).

139.*Id.*; J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000); Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5 (2003).

140.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); *see* Lisa Martin, The United States and International Commitments: Treaties as Signaling Devices (January 2003) (unpublished manuscript, on file with author) (showing the choice between executive agreements and treaties is a signal of intention to comply); Setear, *supra* note 39; *see also* Helen V. Milner, *The Interaction of Domestic and International Politics: The Anglo-American Oil Negotiations and in the International Civil Aviation Negotiations, 1943-1947*, *in* DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 207, 217 (Peter B. Evans et al. eds., 1993) (shifting an oil accord from an executive agreement to a treaty subject to Senate ratification prevented the ultimate acceptance of the accord).

thus commitment-enhancing.

This implies a tradeoff. Countries with more difficult treaty-making processes will tend to have fewer agreements, but they will be more credible, since the cost of legislative involvement itself communicates information about the probabilities of compliance.[141] Constitutional designers have to balance cost and commitment, credibility and cooperation.

Two-level game theory has long been used to analyze the treaty negotiation process.[142] This theory models the interaction between domestic and international bargaining. One branch of the theory, initially suggested by Thomas Schelling, suggests that domestic constraint can be used by international negotiators to secure advantages.[143] By having their hands credibly tied by domestic interests, authorities working on the international plane may be able to secure a better bargain than they otherwise would.[144] Of course, having one's hands tied too tightly can prevent any deal from happening at all.[145] Much of the empirical evidence, drawn from trade bargaining, is not consistent with the Schelling conjecture,[146] but this may be in part because the models do not always address the possibility that too much domestic constraint can hinder agreement

141.*See generally* Brewster, *supra* note 14, at 539-542 (arguing that the domestic structure of international agreements will determine their propensity and type though structure alone will not be dispositive; demand factors such as the need for commitment and the difficulty of the treaty process must also be taken into account). *See also* HENKIN, *supra* note 34, at 175 ("Because they took treaties and international obligations seriously, the Framers were not eager for the United States to conclude treaties lightly or widely, and were disposed to render it difficult to make them.").

142.Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 451 (1988). Note two level game theory has usually focused on pre-agreement negotiations. We widen the scope of two-level game theory to consider the optimal constitutional design to facilitate good agreements. One can think about this as three level game theory: in addition to the level of ordinary domestic politcs, there is an additional dimension of temporally removed constitutional politics choosing to structure the standard two level game.

143.THOMAS SCHELLING, THE STRATEGY OF CONFLICT 28-29 (1980).

144.*See id*; Putnam, *supra* note 142, at 451.

145.Frieden & Martin, *supra* note 140, at 124.

146.Robert Pahre, *Endogenous Domestic Institutions in Two-Level Games and Parliamentary Oversight of the European Union*, 41 J. CONFL. RES. 147 (1997) (summarizing literature); *see also* Frieden & Martin, *supra* note 140, at 125.

altogether, so that the relationship between domestic constraint and international advantage is non-monotonic.

This is the tension at the heart of these models. There is an optimal level of cost for international agreements—not so high as to make valuable agreements difficult to reach, but high enough to communicate to other states the seriousness of the obligation. The precise balance between costliness and flexibility will depend on a variety of factors, discussed in the next section. But there is no universally proper balance, and states will have different optimal schemes.

Brewster considers the objection that treaties may not be effective entrenchment devices because they can be exited.[147] She notes, though, that treaties are *relatively* entrenched. Sometimes treaties are interlinked with other agreements, a feature that makes withdrawal from any one more difficult. Treaties also embed multiple commitments into a single instrument, binding the various substantive provisions together. In some constitutional schemes (though not the American), exiting a treaty requires the explicit consent of the legislature or other bodies that acceded to the treaties. In the analysis that follows, we make the assumption that exiting treaty obligations *is* costly. Indeed, if pursued to its conclusion, the objection that treaties are easily exited raises the question as to why states would enter into them in the first place. I assume that treaties are entrenchment devices and that exit is indeed costly. But this is not to deny that some treaty obligations can be exited relatively easily in some circumstances.

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.[148] 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

147.Brewster, *supra* note 14, at 518-19.

148.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. *See* Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L.143, 161-163 (2001).

multilateral obligations to a great degree.[149] Furthermore, treaty regimes identify specific counter-parties, who therefore have an incentive to enforce the norms either directly, through reciprocity or reputation.[150] This is quite a contrast with 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 identifying the violation.[151] Treaties also can provide clear, bounded delegation of particular decisions. The plasticity and vagueness of CIL obligations, though not infinite, suggest that states will prefer treaty obligations. Figure 2 summarizes the relative qualities of custom and treaty in terms of the three modalities of enhancing commitments discussed in Section II.C.

Figure 2: Functions of Enhancing Commitment

	Information Provision	**International Enforcement**	**Delegation of Decisions**
Custom	Collective action problem for identifying violations-low	Varies but always decentralized so violations not directed at a particular state will likely go unpunished	Easy-but no clear decision-maker

149. Edward T. Swaine, *Reserving* 31 YALE J. INT'L L. (forthcoming 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=700981; *see also* Laurence T. Helfer, *Not Fully Committed? Reservations, Risk and Treaty Design*, 31 YALE J. INT'L L. (forthcoming 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894123.

150.Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA INT'L L. 639, 659 (2000). *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. INT'L L. 449, 530-532 (2000) (discussing implications of decentralized CIL enforcement).

151. 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 are 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* Defeis, *supra* note 104; Valentine, *supra* note 96; Zoltani, *supra* note 104.

Treaty	Mechanisms can be tailored-potentially high	Varies but potentially high through reciprocity, reputation	Easy-can identify and tailor the decision-maker

As the table indicates, treaty obligations dominate custom along all three dimensions of enhancing 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 the 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.

The only other rationalist analysis of the choice between treaty and custom is that of Professor Setear.[152] In comparing two rationalist theories of international cooperation, which he labels the iterative perspective and the public choice perspective, Setear analyzes the Executive branch choice of different instruments of international cooperation in the United States.[153] Professor Setear accurately points out that CIL is primarily determined by the executive branch in the United States and elsewhere. The executive makes policy statements, takes positions at international gatherings, and conducts other actions that will count for state practice and expressions of opinio juris. Setear then asserts that public choice theory suggests that executives should prefer customary international law because the executive has more or less sole control of CIL. Control means that the executive will be able to extract more rents from interest groups, relative to treaties, which require sharing rents with the legislature.

This argument fails to consider that the value of the rents generated may systematically differ between treaty and custom. As Setear acknowledges, CIL may be a less *effective* form of lawmaking because it is fuzzy, has an unclear temporal aspect, and does not have authoritative means for determining applicable rules.[154] This means that any actor seeking to "sell" CIL rules to interest groups will face a

152.Setear, *supra* note 7.
153 *Id.* at 730-36.
154.See i*d.* at 737.

discounted price for those rules. A rational executive considering whether to use custom or treaty will maximize rents. Even though treaty rents must be shared with a legislature, the benefits in precision and predicted enforcement may be well worth favoring that instrument when compared with vague customs whose formation is primarily controlled by the executive.

A commitment perspective supports this interpretation. Because treaties are costly, they would be worth more to interest groups than a customary international law obligation, even if precision of obligation were identical.[155] Treaties are also more likely to be enforced, as the preceding analysis demonstrates. A more costly treaty process may be worth more to interest groups than a simple treaty process, and certainly more than a CIL process, which is likely to be dominated by "cheap talk."

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/international relations scholarship.[156] Few, however, have actually tested the implications of this claim. This section develops some hypotheses and presents preliminary empirical evidence in support of the theory outlined here. A more thorough empirical analysis will be published in a companion paper.

We begin with the assumption of a single constitutional designer considering three issues discussed at the outset of this article: (1)

155.One further piece of evidence for the commitment perspective is the fact that the United States executive generally seems to prefer the simpler executive agreement format over the more difficult formal treaty process. However, U.S. agreements with democracies are more likely to take the more costly treaty form. Presumably democratic counter-parties require assurance of the seriousness of the state's commitment, which the more formal process provides. LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 40-41 (1984) (providing evidence).

156.*E.g.*, Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); Slaughter, *supra* note 6. *See generally* Brewster, *supra* note 14, at 502; Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

whether to make customary international law directly applicable in the domestic legal order (for simplicity, we set aside the issue of superiority); (2) how difficult to make the treaty process; and (3) whether to make treaties superior to domestic law. We assume that *any* international obligation comes with some positive probability of some form 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 the constitutional designer provides for.[157] A final assumption is that there are certain public goods for domestic actors, such as access to foreign markets and international security, which can *only* be obtained at the international level. This means that states have a positive incentive to facilitate international commitments, although states may vary in their relative demand for commitments.

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. 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.

Optimal difficulty of treaty commitment processes requires a balancing of the need for credibility of commitments with the need for an effective process to secure public goods at the international level.[158] If treaty commitments are too easy to enter into, they may

157.*See* Eric George Reeves, *United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE L. REV. 877, 877-90 (1993) (discussing incorporation of international law into domestic law in the US); Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423 (2003) (discussing conflicts in Australia between international and domestic laws).

158.Note this calls into question the assumption, common in the international law literature and expressed in Figure 1, that easier processes of commitment are *ipso facto* more internationalist. A state with difficult processes of commitment may in fact be *more* internationalist because its commitments are more credible, sincere, and more difficult to escape.

not facilitate effective policy entrenchment for domestic interests. Neither do they facilitate credible signals on the international plane. Therefore a rational constitutional designer will want to facilitate some level of difficulty for international commitments. The level of commitment (which involves the issue of superiority of treaty obligations) will vary with demand for credibility on the international plane.

Let us now consider two dimensions on which states vary: state power and regime type. Each will plausibly have effects on the design choices discussed here.

A. *State Power*

Other things being equal, we should expect that large and powerful states would have greater need for commitment than smaller and weaker states. This is true for several reasons. First, as Robert Putnam has noted, larger states may be more self-sufficient and therefore their citizens have a lower opportunity cost of non-agreement.[159] That is, a self-sufficient state with a large internal market is less dependent on international cooperation for the provision of international public goods and so need not be concerned with facilitating many international agreements. This means that its leaders can favor a scheme with few credible agreements over a scheme which facilitates easier agreement. We thus predict that difficulty of the treaty process will increase with state size and power.

A second reason has to do more directly with the need for credibility of commitments at the heart of my argument. Weak states can make international commitments, but they can also be coerced by more powerful states with which they make agreements. With the possibility of collateral enforcement, treaty partners of weak states do not need a costly treaty process to find the promise of performance credible. This suggests that, other things equal, weaker states will have less onerous treaty making processes. As state power increases, we should expect the adoption of more rigorous treaty making processes.[160]

159.Putnam, *supra* note 142, at 443 ("All-purpose support for international agreements is probably greater in smaller, more dependent countries with more open economies, as compared to more self-sufficient countries, like the United States . . . .").

160.I am bracketing the interesting problem of foreign interests mobilizing

B. *Regime Type: Democracy and Autocracy*

A wide 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.[161] They cooperate on trade agreements more often.[162] Some scholars have even argued that democracies comply with international obligations to a greater extent.[163]

Without commitment theory, one would expect democracies to desire *simpler* processes of international commitments. If democracies are more internationalist than autocracies, as liberal theory posits, then one would assume they would seek to *facilitate* international engagement. Commitment theory, in contrast, incorporates the strength of commitment into the cost of obligation. The empirical implication of commitment theory is that democracies will tend to involve more bodies in the treaty making process.[164] This

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the domestic legislature to secure their advantage in treaty negotiations. *See* Spiro, *supra* note 13.

161.The voluminous literature on the Democratic Peace begins with IMMANUEL KANT, PERPETUAL PEACE (Helen O'Brien trans., Grotius Society Publications 1927) (1795). *See generally* R.J. RUMMEL, DEMOCRATIC PEACE BIBLIOGRAPHY VERSION 3.0, http://www.hawaii.edu/powerkills/ BIBLIO.HTML (last visited March 2, 2006); CHARLES LIPSON, RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE (2003); PAUL HUTH & TODD L. ALLEE, THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY (2003). Note that democracies do go to war with autocracies, so cannot be characterized as generally peaceful.

162.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); Helfer, *supra* note 46.

163.*See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J INT'L L. 503, 508 (1995); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992). *But see* 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); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000) *cited in* Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. 363 n.16 (2005) (democracies do not comply more).

164.We might also expect that treaty processes will be more difficult than legislative processes. Allowing international commitment too easily can undermine the legislative process and overly empower the executive. Voigt's two measures of international delegation are based on the number of international

makes their promises more believable.

Voigt provides some evidence for this conjecture.[165] He finds that the harder it is to delegate internationally, the more delegation a state actually makes. This finding is consistent with the commitment model of treaty obligations. If actual obligation was monotonically responsive only to the difficulty of the obligation process, we should expect that more difficult processes would lead to *less* obligation. Voigt's finding that the opposite is in fact the case is important and supports the commitment hypothesis: states that desire effective international cooperation will make cooperation more difficult, yet still cooperate more.

Not all democracies are equally situated: *within* the category of democracies, certain countries will have greater need for 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 recovering from 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.[166]

We should thus expect greater demand for commitment mechanisms of international law, including both customary international law and treaty obligations, in new democratic constitutions than in established democracies.[167] International law can

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organizations that the country has joined. *See* Comment, *Resolving Treaty Termination Disputes*, 129 U. PA. L. REV. 1189, 1200 (1981)

165.Voigt, *supra* note 116.

166 *See* William Mishler & Richard Rose, *Political Support for Incomplete Democracies: Realist vs. Idealist Theories and Measures*, 22 INT'L POL. SCI. REV. 303, 304 (2001); Jon Pevenhouse, *Democracy from the Outside-In? International Organizations and Democratization*, 56 INT'L ORG. 515, 522 (2002).

167.Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, *in* POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY 200 (Jonathan I. Charney, Donald K. Anton & Mary Ellen O'Connell eds., 1997) ("Countries that had lived under non-democratic regimes in the past were especially eager to provide 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* Jackson, *supra* note 8, at 335 (Eastern Europe).

lock in the commitments, increasing the prospect of compliance past the life of the current government or even regime, in environments of fragile democracy.[168]

C. *Evidence*

To summarize the hypotheses, we expect that stronger states and new democracies will write constitutions that will have more actors involved in the treaty making process. These actors need credibility of commitments. In contrast, weaker states, autocracies and established democracies have less need for credibility of commitments. We should expect more direct applicability of CIL in newer democracies, but 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.

We consider here some preliminary evidence for these propositions based on a sample of 181 constitutions coded as part of the Comparative Constitutions Project at the University of Illinois.[169] The sample consists of nearly every current national constitution in force.[170] This is the first paper to utilize data from this Project, which will eventually contain data on every national constitution ever written.

We can only consider suggestive evidence on state power; a more thorough analysis will include a number of control variables. However, simple correlations suggest that larger states, as measured

168. An alternative explanation for why new democracies may be particularly prone to adopting "internationalist" constitutions is that there is a kind of trend among countries to do so during the late 20th century wave of constitutional reforms. On the diffusion of policy ideas and institutions, see Zachary Elkins & Beth Simmons, *On Waves, Clusters and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI 33-51 (2005). A companion empirical paper will test this proposition against the commitment theory outlined here.

169.*See* SCHELLING, *supra* note 57.

170.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, UK, New Zealand, and Saudi Arabia, and others for whom the precise scope of constitutional text is not fully agreed upon by scholars (Canada, Sweden). *See* Joseph Jaconelli, *Constitutional Review in an Unwritten Constitution*, 34 INT'L & COMP. L.Q. 627, 627 (1985).

by population at the time of constitutional adoption, are *less* likely to make treaties superior to domestic legislation and more likely to involve multiple actors in treaty approval.[171] Simple correlations do not indicate any propensity for larger states to make customary international law directly applicable.

Consider next the issue of democracies versus autocracies. We characterized each constitutional design situation in our sample as a democratic constitution following a democratic regime (DEM-DEM); an autocratic constitution following an autocratic regime (AUT-AUT); or a transition from autocracy to democracy (AUT-DEM).[172] To make these characterizations we utilized data from Carles Boix, a University of Chicago political scientist, who uses other generally available data to make binary characterizations of countries as autocracies or democracies in a large time-series.[173] For each constitution, the country's autocracy/democracy status was considered for the five years preceding the constitution and immediately afterwards. If the country was rated a democracy in the year of or immediately following the promulgation of the constitution, and had been an autocracy at any time in the five preceding years, without an intervening constitution, it was considered to have undergone a transition from autocracy to democracy.

In this paper, we report several different descriptive statistics, leaving more sophisticated empirical analysis for a later paper. With regard to treaties, we examine whether the constitution mentions treaties at all, provides for constitutional review, and provides for treaty superiority to local legislation.

We also look at the mean number of actors involved in the treaty process. Our coding scheme breaks down the process into treaty proposal, treaty approval, and treaty review for constitutionality (which we treat as a veto point for treaty adoption).[174] A constitutional configuration in which a president proposes a treaty for

171. The log of population is negatively correlated with a dummy variable for treaty superiority (-.27) at the 99 % confidence level. The log of population is positively correlated with the number of bodies involved in treaty approval (.27) at the 99% confidence level. *See* SCHELLING, *supra* note 57.

172. There were too few instances of constitutional transitions from democracy to autocracy to include in the analysis. Apparently, democratic reversals are seldom accompanied by a new constitution shortly after transition.

173. CARLES BOIX, DEMOCRACY AND REDISTRIBUTION (2000).

174. On vetoes, see GEORGE TSEBELIS, VETO PLAYERS (2002).

approval by two houses of the legislature would be coded 3. If the constitution grants the constitutional court an explicit right to evaluate treaties, that would add a point. But if only one house of the legislature need approve the president's proposed treaty (as in the United States process for formal treaties), that would be coded 2. The table below summarizes the data, giving percentage of constitutions with the relevant characteristic for all columns except the second, which reports the sample mean.

Figure 3: Drafting Situations and Treaties

Type of Drafting Situation	**Mention treaties?**	**Mean # of actors involved in treaty process**	**Explicit Constitutional Review of Treaties?**	**Treaties Superior to Legislation?**
AUT-AUT (n=71)	.83 (n=59)	1.90	.21 (n=15)	.14 (n=10)
AUT-DEM (n=58)	.93 (n=54)	2.76	.50 (n=29)	.50 (n=29)
DEM-DEM (n=52)	.81 (n=42)	1.63	.17 (n=9)	.17 (n=9)
TOTAL (n=181)	.88 (n=155)	2.11	.28 (n=51)	.27 (n=48)

Figure 3 demonstrates that what might be called "democratizing constitutions" are more likely to give treaties superior status and to involve more actors in the treaty process than are constitutions written in either established democracies or autocracies. 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. Providing more difficult treaty processes indicates broad support for any international agreements. Domestic audiences may also prefer difficult processes, as this means that treaty processes are relatively entrenched in a context where the government may or may not last, and democracy itself may be tenuous. While it may be difficult to obtain the broad agreement among domestic actors to affirm the treaty obligation, the obligation is likely to last, and in this sense is far superior to domestic legislation. Domestic legislation, after all, could be easily overturned by the opposition political party if it takes power or discarded if the constitutional regime falls.

The interesting finding that democratizing constitutions seem

more likely to include review of treaties for constitutionality is important in distinguishing the domestic and international audiences. It is domestic audiences, not international ones, who typically have access to constitutional courts to challenge treaties. While review of treaties makes the commitment more credible internationally, it also provides limits on the treaty making power in ways that enhance the value of commitment for domestic actors.

Democratizing constitutions are more likely to mention customary international law and more likely to be monist with regard to CIL commitments, as Figure 4 below demonstrates. Of the authoritarian constitutions that mention customary international law, only four out of fourteen purport to make customary international law directly applicable.[175] In contrast, sixteen out of fifty-eight (nearly thirty percent) of democratizing constitutions provide for the direct applicability of CIL, and twenty-two of those constitutions mention CIL. Again, this is consistent with the demand for both international and domestic commitment in new democracies.[176]

Figure 4:Drafting Situations and CIL

Type of Drafting Situation	Constitution Mention CIL?	CIL Directly Applicable?
AUT-AUT (n=71)	.20 (n=14)	.06 (n=4)
AUT-DEM (n=58)	.38 (n=22)	.28 (n=16)
DEM-DEM (n=52)	.29 (n=15)	.06 (n=3)
TOTAL	.28 (n=51)	.13 (n=23)

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. Eighty-six of all current constitutions mention treaties, whereas only twenty-eight mention customary international law. In every subset of countries,

175.The three are Kazakhstan, Byelorussia, and Azerbaijan. The others explicitly require incorporation of international law.

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

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 lawmaking and commitment device.

VI. CONCLUSION: LOCKING IN DEMOCRACY

International law provides important sources of commitment for governments in the domestic legal order. The decision as to how to tailor the structure of commitments is made typically at the stage of constitution drafting. This paper has introduced some considerations relevant to thinking about how drafters will act in designing the interface between the domestic and international legal orders. It has suggested that designers will consider the relative advantages and disadvantages of international law as a means of locking in policies.

International legal commitments are a particular concern for new democracies. These regimes face a number of particular challenges. The recent experience of an authoritarian regime, possibly involving human rights violations, renders control of political power much more salient.[177] Like judicial review, independent regulatory institutions and other commitment devices, international law can help to lock in democracy, by tying the hands of future governments. In turn, this may make domestic interest groups more likely to remain loyal to the new constitutional order. International law makes sense in contexts where one distrusts outsiders less than one distrusts one's own compatriots.

States do not remain new democracies forever. If the democratic regime survives, norms of trust and reciprocity may develop such that international law is no longer needed as a commitment device. International law has a number of disadvantages, including agency problems and the dynamic nature of international politics. As democratic politics becomes established, these negative features may begin to outweigh the benefits offered in terms of domestic commitment. We might thus expect to see states shift from broadly internationalist constitutions to more parochial ones.

177.Ratner, *supra* note 71, at 2072, *citing* CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 68-69 (1996) (describing the post-junta 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).

Indeed, one interpretation of American constitutional discourse is that it has moved away from a broadly monist conception at the time of the founding to a more dualist skepticism about the role and value of international law. The founders assumed that international law applied and constrained their actions.[178] Their modern day successors in government are hostile to international law[179] and academic opinion has shifted toward a dualist conception.[180] Professor Pauwelyn has recently noted a similar dynamic in the European Union.[181]

The findings of this article have implications for our understanding of international law. Professor Slaughter and her fellow liberal theorists have made much of the need to unpack the state and examine the domestic determinants of demand for and compliance with international law.[182] This paper has proceeded in that spirit. The result suggests a further refinement of liberal theory to take into account the particular needs of new democracies, which have the greatest incentive to draw on the norms of international law as means of self-binding.

Given that those articulating CIL rules often draw on state practice, new democracies may have inordinate weight in producing the underpinnings of new rules in turn means that the content of CIL may reflect the interests of this particular subset of democratic states.

A second implication concerns evaluations of compliance. There is now a vigorous debate on whether and when states comply with international obligations.[183] If the analysis of this paper is correct and

178. Cleveland, *supra* note 115.

179. Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Towards the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 416 (2004) (noting "America's deeper-and-growing antipathy toward multilateral institutions"); *see also* Letter from John Bolton, Under Secretary of State, to Secretary General Kofi Annan (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

180. Bradley, *supra* note 31.

181. Joost Pauwelyn, *Europe, America and the Unity of International Law* 16-23 (Duke Law School Working Paper, Paper No. 101, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893611 (noting how at the outset treaties concluded by EC had direct effect and supremacy, and that the position has changed toward a more dualist notion as the European Union has strengthened).

182. *See* Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS (W. Carlsnaes et al. eds., 2002).

183.*See generally* William A. Bradford, *International Legal Compliance:*

international rules function as constraints on *domestic* political action, then the emphasis in the literature on state compliance may not fully take into account the impact of international legal rules. Evaluations of compliance with international norms need to take into account domestic mechanisms of forcing compliance.[184] But they also need to consider that international law can shape intra-state behavior even without apparent impact on the international plane. By locking in policies, international law can be effective on the domestic level even when it is ignored on the international plane.

Surveying the Field, 36 GEO. J. INT'L L. 495 (2005) (surveying the debate over whether states comply with international obligations).

184.Dai, *supra* note 163.