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How to Influence States: Socialization and International Human Rights Law

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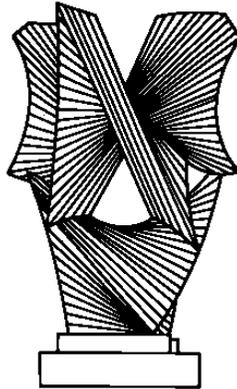
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HOW TO INFLUENCE STATES: SOCIALIZATION AND INTERNATIONAL HUMAN RIGHTS LAW

Derek Jinks

THE LAW SCHOOL
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**How to Influence States:
Socialization and International Human Rights Law**

Ryan Goodman

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Forthcoming, 54 DUKE LAW JOURNAL (2004)

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How to Influence States: Socialization and International Human Rights Law

Ryan Goodman[†] & Derek Jinks^{††}

Forthcoming, 54 DUKE LAW JOURNAL (2004)

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ABSTRACT

Regime design choices in international law turn on empirical claims about how states behave and under what conditions their behavior changes. We suggest that a central problem for human rights regimes is how best to socialize “bad actors” to incorporate globally legitimated models of state behavior and how to get “good actors” to do better. Substantial empirical evidence suggests three distinct mechanisms whereby states and institutions might influence the behavior of other states: coercion, persuasion, and acculturation. Several structural impediments preclude full institutionalization of coercion- and persuasion-based regimes in human rights law. Yet, inexplicably these models of social influence predominate in international legal studies. In this Article, we first describe in some detail the salient conceptual features of each mechanism of social influence. We then link each of the identified mechanisms to specific regime design characteristics—identifying several ways in which acculturation might occasion a rethinking of fundamental regime design problems in human rights law. Through a systematic evaluation of three design problems—conditional membership, precision of obligations, and enforcement methods—we elaborate an alternative way to conceive of regime design problems. We maintain that (1) acculturation is a conceptually distinct social process through which state behavior is influenced; and (2) the regime design recommendations issuing from this approach defy conventional wisdom in international human rights scholarship. This exercise not only recommends reexamination of policy debates in human rights law; it also provides a conceptual framework within which the costs and benefits of various design principles might be assessed. Our aim is to improve the understanding of how norms operate in international society with a view to improving the capacity of global and domestic institutions to harness the processes through which human rights cultures are built.

Can international law substantially help to reduce human rights violations? Must an international human rights regime¹ include strong enforcement mechanisms to be effective? Or can abstract considerations of legitimacy and shame induce governments not to oppress their citizens? At bottom, these questions are essentially empirical in nature. Addressing them requires nothing short of understanding the behavioral logic that guides state practice—whether states (and individuals) might be influenced by rewards and penalties, the power of persuasion, and concerns about status. These broad issues also imply a series of more specific regime design questions. Should the relevant rules apply equally to powerful and weak states? Should international regimes encourage the participation of states with good human rights records, poor human rights records, or both? These regime design choices also turn on empirical claims about how the diffusion of norms occurs, how groups interact, and the conditions under which actors cooperate. Put differently, how international law affects state behavior has significant implications for how human rights regimes should be designed.

¹ Drawing on international relations literature, we use the concept of “regime” to refer to the formal and informal aspects of a regulatory environment. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen .D. Krasner ed., 1983) (“Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”).

In this Article, we claim that debates about how best to design international regimes should be closely tethered to empirical debates about how best to socialize outlier states into international society and how to induce liberal states to perform better. In short, questions of design must be married to empirical questions of state behavior. In furtherance of that objective, this Article seeks to develop a theory of the empirical foundations of regime design principles.

The character of human rights regimes suggests productive avenues of investigation. Most international regimes seek to facilitate cooperation or coordination between states. The global promotion of human rights is importantly different from both types of regimes.² The prevalence of human rights violations is not reducible to a simple collective action problem. First, states have substantial capacity to promote and protect human rights within their territory without coordinating their efforts with other states. Without question, states retain some substantial measure of effective autonomy in this issue area. Second, many states have no interest in promoting and protecting human rights. That is, some states are willing to violate human rights when it is convenient to do so—and have no interest in accepting structural commitments that might alter their current decision processes. Indeed, one of the central regime design problems in human rights law is how best to influence “bad actors” to make fundamental changes. The question whether international law can promote human rights norms might be recast, in an important sense, as how human rights regimes can best harness the mechanisms of social influence.

This task is further complicated by several structural characteristics of international society that undercut the potential effectiveness of some strategies. Consider two. First, international human rights norms are not self-enforcing. This point issues from the fact that human rights regimes do not address coordination problems and that states have no clear, direct interest in securing human rights protection in other states. Second, good-faith regime participants are generally unwilling or unable to shoulder the enforcement costs necessary to coerce recalcitrant states to comply with human rights norms (associated with such measures as economic sanctions, armed force, and harsh diplomatic pressure). This “enforcement deficit”—reinforced by high enforcement costs and negligible direct returns—is a political reality of the current international order.

The increasing exchange between international relations scholarship and international legal scholarship illuminates some of these difficulties and offers useful insights on how best to address them.³ Indeed, research projects in international relations now focus on

² These distinctive features are well understood. See, e.g., Andrew Moravcsik, *The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 217 (2000) (“These arrangements differ from most other forms of institutionalized international cooperation in both their ends and their means. Unlike international institutions governing trade, monetary, environmental, or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities. In contrast to most international regimes, moreover, human rights regimes are not generally enforced by interstate action.”); see also JACK L. GOLDSMITH & ERIC POSNER, A THEORY OF INTERNATIONAL LAW (forthcoming 2005) (chapter on International Human Rights Law).

³ See, e.g., Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, et al. eds., 2002); Anne-Marie

theoretical and empirical issues concerning human rights and state practice.⁴ And, this research has begun to influence legal analysis of international human rights regimes.⁵ This ground-breaking “first generation” of empirical international legal studies demonstrated that international law “matters.” Nevertheless, the existing literature has not adequately accounted for the regime design implications of this research. Regime design debates (both substantive and procedural) often turn on unexamined or undefended empirical assumptions about foundational matters such as: the conditions under which external pressure can influence state behavior, which social or political forces are potentially effective, and the relationship between state preferences and material and ideational structure at the global level. Moreover, prevailing approaches to these problems are predicated on a thin and under-specified conception of the mechanisms for influencing state practice. What is needed is a “second generation” of empirical international legal studies aimed at clarifying the mechanics of law’s influence. This “second generation,” in our view, should generate concrete, empirically falsifiable propositions about the role of law in state preference formation and transformation.

In short, “first generation” scholarship in international human rights law provides an indispensable but plainly incomplete framework. Prevailing approaches suggest that law changes human rights practices by either: (1) coercing states (and individuals) to comply with regime rules,⁶ or (2) persuading states (and individuals) of the validity and legitimacy of human rights law.⁷ In our view, the former fails to grasp the complexity of

Slaughter, *International Law and International Relations*, 285 RECUEIL DES COURS (2001). Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367 (1998).

⁴ See Hans Peter Schmitz & Kathryn Sikkink, *International Human Rights*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note __, at 517 (offering a survey of the existing literature).

⁵ See, e.g., Oona A. Hathaway, *The Cost Of Commitment*, 55 STAN. L. REV. 1821 (2003); Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935 (2002); Laurence R. Helfer, *Overlegalizing Human Rights*, 102 COLUM. L. REV. 1832 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997). We have previously utilized this frame in analyzing other aspects of human rights law. Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 13 EUR. J. INT’L L. 171 (2003); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT’L L. 531 (2002).

⁶ An important strand of international legal scholarship accordingly adheres to the coercion model. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Jack L. Goldsmith & Eric A. Posner, *Symposium on Rational Choice and International Law, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115 (2002); Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L. J. 1935, 2020 (2002); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959 (2000); Jack Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

⁷ An important strand of international legal scholarship adheres to the persuasion model. See, e.g., Koh, *supra* note __, at 2599; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990). Anne-Marie Slaughter’s influential work on transgovernmental networks also relies principally on notions of persuasion. See Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177, 205 (Michael Byers ed., 2000) (describing transgovernmental networks in which “[t]he dominant currency is engagement and persuasion”); see also Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 51

the social environment within which states act; and the latter fails to account for many ways in which the diffusion of social norms occurs. We contend that a specific body of interdisciplinary scholarship now requires a reexamination of the empirical foundations of human rights regimes. Indeed, this robust cluster of empirical studies documents particular processes whereby states are socialized in the absence of coercion or persuasion. Put differently, these studies conclude that the power of social influence can be harnessed even if: (1) the collective action problems that inhibit effective “coercion” are not overcome; and (2) the complete internalization sought through “persuasion” is not achieved.⁸

Drawing on this burgeoning literature, we provide a more complete conceptual framework by identifying a third mechanism by which international law might change state behavior—*acculturation*. By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self. This mechanism encompasses a number of micro-processes including mimicry, identification, and status-maximization. The touchstone of this mechanism is that varying degrees of identification with a reference group generate varying degrees of cognitive and social pressures—real or imagined—to conform.⁹ We do not suggest that international legal scholarship has completely failed to

(2002) (“[W]hen networks promote regulatory change, change occurs more through persuasion than command.”). Slaughter and Raustiala’s work derives, in significant part, from the school of “managerialism,” pioneered by Abram and Antonio Chayes. Chayes and Chayes’ project understands persuasion as central. See ABRAM CHAYES & ANTONIA CHAYES, *NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 25 (1995) (“[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.”); *id.* at 26 (“Persuasion and argument are the principal engines of this process...”). Koh’s work derives more directly from political science scholarship concerning transnational advocacy networks. As Rodger Payne’s survey of that scholarship explains, “persuasion is considered the centrally important mechanism for constructing and reconstructing social facts.” Rodger A. Payne, *Persuasion, Frames, and Norm Construction*, 7 *EUR. J. INT’L REL.* 37, 38 (2001).

⁸ See, e.g., Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 *STAN. L. REV.* 1749 (2003) (outlining general theoretical model founded on acculturation mechanisms). We should note that some international legal scholars—most notably Harold Koh—have advanced theories relying in part on mechanisms that resemble what we have called acculturation. See, e.g., Koh, *supra* note ___, at 2646 (suggesting that “habitual obedience” is part of the process of norm incorporation). Koh, however, has not identified what role, if any, global-level acculturation processes might play in his theoretical model. In Koh’s model, processes that most closely resemble acculturation occur at the final stage of norm implementation; they are governed primarily by bureaucratic and administrative impulses to follow already accepted legal rules. See, e.g., *id.* at 2655; see also Harold Hongju Koh, *Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 651-53 (1998) (describing “bureaucratic compliance procedures” as the cause for habitual compliance). As mentioned above, Koh’s discussion of global-level norm diffusion borrows from political science scholarship on transnational advocacy networks, which emphasizes the mechanism of persuasion. See *supra* note 7. That said, we consider our project an extension of Koh’s and others’ work on transnational norm diffusion. We intend to supplement that larger constructivist agenda by isolating the micro-processes of social influence.

⁹ See, e.g., *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991); W. RICHARD SCOTT & JOHN W. MEYER, *INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS* (1994); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOC.* 340 (1977); Lynne G. Zucker, *Institutional Theories of Organization*, 13 *ANN. REV. SOC.* 443-64 (1987); Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 *AM. SOC. REV.* 726 (1977).

identify aspects of this process. Rather we maintain that the mechanism is under-emphasized and poorly understood, and that it is often conflated (or even confused) with other constructivist mechanisms such as persuasion. Differentiating the mechanism of acculturation—and specifying the micro-processes through which it operates—are profoundly important, however. Indeed, each of the three mechanisms is likely to have distinct implications along a number of dimensions including the durability of norms, patterns of adoption and diffusion, and the depth of compliance.

Additionally, we argue that mechanisms matter for regime design. We link each of the three mechanisms of social influence to specific regime design characteristics—identifying several ways in which acculturation might occasion a rethinking of fundamental design problems in human rights law. In short, we reverse engineer structural regime design principles from the salient characteristics of underlying social processes. We maintain that (1) acculturation is a conceptually distinct social mechanism that influences state behavior; and (2) the regime design recommendations issuing from this approach defy conventional wisdom in international human rights scholarship. We contend that, without this understanding, several characteristics of international society will frustrate regime design models that rely on only coercing and persuading states to comply with human rights law.

Some careful readers will, no doubt, argue that the best approach to regime design might incorporate elements of all three mechanisms. On this view, the identified mechanisms reinforce each other—or, put differently, there is a dynamic relationship between the mechanisms that is sacrificed by any scheme emphasizing one to the exclusion of the others. This is an important point; and it is almost certainly correct. However, the kind of analysis contemplated by this line of criticism (*viz.* the development of an integrated theory of regime design that accounts for each mechanism) would, in our view, first require identification and clear differentiation of these mechanisms. This conceptual clarification is a first step, which enables subsequent work aimed at identifying the conditions under which each of the mechanisms would predominate (and the ways in which each mechanism might reinforce or frustrate the operation of the others). Moreover, we think it useful to link specific mechanisms to concrete regime design problems. Doing so illustrates the design features suggested by each and further clarifies the conceptual commitments of each mechanism. Our analysis of regime design problems yields three models of human rights regimes built on each of the mechanisms. But we do not suggest that any regime does or should exhibit all of these features. In this sense, our application of the mechanisms to regime design issues is offered in the spirit of Max Weber's "ideal types."¹⁰ Ideal types are theoretical constructs that model certain aspects of the social world. These constructs are useful because they serve as the basis for a particular brand of comparative analysis: By comparing an ideal type with a particular historical (observable) case, it is possible to determine the extent to which the elements emphasized in the ideal type occur in reality. In other words, the ideal type is a useful tool that permits an assessment of the extent to which certain attributes or processes exist in a particular case.

¹⁰ Max Weber, "Objectivity" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49 (Edward A. Shils & Heary A. Finch trans. and eds., 1949).

The Article proceeds in four parts. In Part I, we outline three mechanisms by which actors (and their practices) are influenced by other actors and institutions. We emphasize the conceptual core of each mechanism—analyzing in some detail the ways in which each is distinct from the others. This exposition also identifies the schools of thought and research programs that suggest the presence and characteristics of each. We then apply these three mechanisms to three foundational regime design problems in human rights law. In Part II, we address the problem of membership—how best to define the regime community; how best to articulate regime boundaries. We then consider, in Part III, the ways in which each mechanism would approach the problem of defining the substantive obligations around which the legal community is built. As an important instance of this broad problem, we analyze the issue of rule precision—to what extent should precision be valued in defining prescribed and proscribed conduct. Finally, in Part IV, we discuss how each mechanism would approach the problem of compliance and effectiveness—how might regimes directly discourage undesirable behavior and encourage desirable behavior. In short, we assess the implications of each mechanism for common regime design problems in human rights law—analyzing the ways in which design recommendations issue from the underlying theory of social influence.

I. THREE MECHANISMS OF SOCIAL INFLUENCE

What are the mechanisms by which international institutions might exert influence over recalcitrant states? According to conventional wisdom, there are two ways in which international law and international regimes change state behavior (if at all): coercion and persuasion.¹¹ These explanations of state behavior are conceptually coherent, empirically supported, and important. However, substantial evidence suggests that the two approaches do not exhaust the ways in which actors and institutions exert influence on the behavior of others. As discussed briefly in the Introduction, we suggest a third mechanism: acculturation, whereby conformity is elicited through a range of socialization processes. We develop the typology further here. First, we discuss in more detail the character of the typology itself. Then, we describe the attributes of each mechanism. In this Part, we seek only to model generally the three mechanisms. In the remainder of the Article, we apply these models to several concrete problems of regime design in human rights law.

We should make a couple points about the state of the field in international relations and international law as it pertains to these mechanisms. Extending at least two decades back, scholars have generally divided into two camps: rationalists and constructivists. The former emphasizes military-economic power and global material structure while the latter emphasizes norms and global ideational structure. Despite the considerable accomplishments of both camps, the micro-processes of social influence are often under-

¹¹ See, e.g., Moravcsik, *supra*, note __, at 220 (“Existing scholarship seeking to explain why national governments establish and enforce formal international human rights norms focuses on two modes of interstate interaction: coercion and normative persuasion.”).

specified, under-analyzed, or, at best, under-explained. Several important questions merit more sustained reflection. For example, how exactly do norms change behavior or attitudes? Do social sanctions place pressure that must be weighed as a cost against other interests, or do social sanctions function more as cognitive cues? If one answer to how norms influence actors is through “persuasion,” what exactly are the micro-processes and elements by which persuasion works? Our project calls for reorienting the academic discussion toward such issues of micro-process. We discuss how mechanisms of coercion and persuasion work, in part, by contrasting them with the third mechanism of acculturation. We link that discussion to legal rules and legal institutional design. This latter conceptual move demonstrates why the study of social mechanisms is important and the range of particular design questions that turn on such a distinction.

Initially, note that these mechanisms are, at bottom, theories of how preferences form and the conditions under which they change. They vary in their claims about whether, and the degree to which, international institutions prompt endogenous change in the preferences and identities of actors. Although this point, so framed, immediately suggests that our project is linked to ontological debates between rationalists and constructivists in international relations theory,¹² the typology we develop here does not track these debates. Indeed, many constructivist scholars rely on coercion as a lever of change. These scholars suggest that norms and ideas matter in international politics in part because they provide a reservoir of symbolic authority that might, in various ways, be brought to bear on recalcitrant states. For example, socialization processes might exert direct influence over third parties (e.g., donor countries), who in turn use traditional coercive techniques to effect compliance in the target state. In this vein, Margaret Keck and Kathryn Sikkink argue that transnational activist networks utilize international norms to persuade domestic audiences to coerce target governments.¹³ Likewise, many rationalist scholars suggest that the social context of international institutions (including the attendant structural opportunities for persuasion and learning) influences the effectiveness of traditional coercive techniques. For example, Lisa Martin has argued that threats made within a highly institutionalized environment are more credible because of the greater “audience costs” in this social setting.¹⁴ And Leonard Schoppa has suggested that coercive tactics are more effective when they accord with widely shared procedural norms governing international bargaining.¹⁵ Nevertheless, it is fair to say that rationalists emphasize the coercion mechanism,¹⁶ and constructivists emphasize the persuasion mechanism.¹⁷ Two important points follow from this discussion. First, the rationalist-constructivist debate concerns matters that are, for the most part, beyond the scope of this Article. The

¹² See James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note __, at 52 (describing those debates).

¹³ MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 16-25 (1998).

¹⁴ Lisa Martin, *Credibility, Costs, and Institutions*, 45 *WORLD POL.* 406 (1993).

¹⁵ Leonard J. Schoppa, *The Social Context in Coercive International Bargaining*, 53 *INT’L ORG.* 307 (1999).

¹⁶ See, e.g., Daniel W. Drezner, *Introduction: The Interaction of Domestic and International Institutions*, in *LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS* 1, 15-19 (Daniel Drezner, ed. 2003); Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 *INT’L STUD. Q.* 487, 489-90 (2001).

¹⁷ See, e.g., Payne, *supra* note __, at 38; Johnston, *supra* note __, at 495.

important point here is that our typology outlines the micro-processes by which actors are influenced by their social context—without building into these models additional assumptions about the character of actors. Second, conventional approaches de-emphasize, and often ignore, other ways in which institutions and actors influence others.¹⁸

One unfortunate aspect of the prevailing theoretical landscape is that acculturation sometimes appears obliquely in constructivist accounts of human rights law. That is, constructivist scholars, in describing the mechanics of “persuasion,” occasionally slip into accounts that rely on various aspects of acculturation. Indeed, surveys of constructivist scholarship often expressly identify persuasion as the central mechanism of social influence.¹⁹ This failure to differentiate between importantly distinct social processes leaves several important tasks undone, including: defining the elements that differentiate persuasion from social sanctions, examining whether social sanctions exhaust the forms of acculturation, and determining when techniques of persuasion and acculturation conflict. In the following discussion, we draw from empirical studies that focus squarely on processes of acculturation to help define the distinctiveness and significance of each mechanism.

In this Part, we develop in some detail the meaning of each of the three mechanisms, and briefly describe the research suggesting their presence and general features. We do not attempt to prove or disprove the empirical validity of the identified causal mechanisms. In our view, substantial evidence suggests that each of these modes of social influence occur in global politics and that there are conditions under which each would be expected to predominate. An open question, in our view, is how this burgeoning empirical record might be employed to build more effective, more responsive human rights institutions. We consider each of the mechanisms in turn.

A. Coercion

The first, and most obvious, social mechanism is *coercion*—states and institutions influence the behavior of other states by escalating the benefits of conformity or escalating the costs of non-conformity through material rewards and punishments. Of course, this mechanism does not necessarily involve any change in the target actor’s underlying preferences. Consider a simple example: Even if State A would prefer to continue Practice X, it discontinues the practice to avoid the sanctions threatened by States B, C, and D. The anatomy of this example also helps illustrate the various moving parts of the coercion mechanism. Note that the coercive gesture of States B, C, and D would prove ineffective if the expected benefit of Practice X exceeded the expected cost

¹⁸ See, e.g., Drezner, *supra* note ___, at 11 (identifying three types of interactions: contracting (true coordination games), coercion, and persuasion); Ian Hurd, *Legitimacy and Authority in International Relations*, 53 INT’L ORG. 379 (1999) (same).

¹⁹ See, e.g., Payne, *supra* note ___, at 38 (pointing out that “persuasion is considered the centrally important mechanism” for constructivists); Johnston, *supra* note ___, at 495 (“The focus on internalization tends to lead constructivists to focus on persuasion.”).

of the threatened sanctions. Take a more concrete example. The United States, under the Foreign Assistance Act, denies foreign assistance to states “engag[ing] in a consistent pattern of gross violations of internationally recognized human rights.”²⁰ Any state denied assistance on this basis (and any state facing this prospect) is thereby coerced to alter its behavior. States and institutions, under the logic of this mode of influence, change the behavior of other states not by reorienting their preferences but rather by changing the cost/benefit calculations of that state. Also, although international institutions do not reconfigure state interests and preferences, they might, under certain conditions, constrain strategic choices by stabilizing mutual expectations about state behavior.²¹ Put simply, target states change their behavior because they perceive it to be in their material interest to do so.

Theories suggesting the predominance of this mechanism build on more general theories about the character of international politics. Proponents of this school of thought often contend that the material distribution of power among states essentially determines state behavior.²² “Normative” and institutional developments thus reflect the interests of powerful states,²³ and compliance with these norms is largely a function of powerful states’ willingness to enforce them.²⁴ On this view, international institutions facilitate state cooperation and coordination by reducing transaction costs (and overcoming other collective action problems). This view is typically, though not exclusively, associated with “rationalist” or rational choice approaches to international relations. However, as noted above, coercion plays an important role in so-called constructivist models of state behavior as well.

B. Persuasion

The second mechanism of social influence is *persuasion*—the active, often strategic, inculcation of norms (often identifying transnational “norm entrepreneurs” as agents of change).²⁵ On this view, international law influences state behavior through processes of

²⁰ 22 U.S.C. § 2151 (a) (2002).

²¹ See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY. COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Jeffrey W Legro, *Which Norms Matter? Revisiting the “Failure” of Internationalism*, 51 INT’L ORG. 31 (1997).

²² NEOREALISM AND ITS CRITICS (Robert O. Keohane ed., 1986); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

²³ STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (2001); Jack Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

²⁴ A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT’L L. 45 (1999); Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* (V. Rittberger ed, 1993).

²⁵ Thomas Risse, *Let’s Argue!: Communicative Action in World Politics*, 54 INTERNATIONAL ORGANIZATION 1 (2000); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 International Organization 887 (1998); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). For important legal arguments relying on a persuasion mechanism, see THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1998); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

social “learning” and other forms of information conveyance.²⁶ Persuasion then “is not simply a process of manipulating exogenous incentives to elicit behavior from the other side. Rather it requires argument and deliberation in an effort to change the minds of others.”²⁷ Persuaded actors “internalize” new norms and rules of appropriate behavior and redefine their interests and identities accordingly.²⁸ The touchstone of this approach is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice.²⁹ That is, persuasion occurs when actors actively assess the *content* of a particular message—a norm, practice, or belief—and “change their minds.”³⁰

Next consider how persuasion works—a matter explored in depth in a vast, interdisciplinary literature. At the risk of oversimplifying this rich and varied body of work, we highlight two factors that determine, in substantial part, the persuasiveness of counter-attitudinal messages.³¹ The first and most important dimension is the technique of “framing.” The basic idea is that the persuasive appeal of a counter-attitudinal message increases if the issue is strategically “framed” to “resonate” with already accepted normative frameworks.³² Many studies of this technique emphasize the role of strategic “norm entrepreneurs” who manipulate frames to resonate with target audiences.³³ One widely studied, because highly successful, example of such strategic “framing” is the campaign to ban anti-personnel landmines. The campaign—which culminated in the Ottawa Convention banning the production and use of the weapons—successfully framed the issue in terms of the “indiscriminate nature and effects” of landmines thereby linking the issue with a universally accepted principle of humanitarian law (and other successful campaigns against weapons of mass destruction).³⁴

²⁶ See, e.g., MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 141 (1996) (arguing that even “normative claims become powerful and prevail by being persuasive”).

²⁷ Alastair Iain Johnston, *The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors*, in LOCATING THE PROPER AUTHORITIES, *supra* note ___, at 145, 153.

²⁸ See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Jeffrey T. Checkel, *Norms, Institutions, and National Identity in Contemporary Europe*, 43 INT’L STUD. Q. 83 (1999).

²⁹ This is a long-held view in social psychology. See, e.g., CARL IVER HOVLAND, ET AL., COMMUNICATION AND PERSUASION (1953) (outlining the steps in the persuasion process including attention, comprehension, and acceptance of message).

³⁰ See, e.g., Johnston, *supra* note ___, at 496 (“[Persuasion] involves changing minds, opinions, and attitudes about causality and affect (identity) in the absence of overtly material or mental coercion.”).

³¹ See THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE (James Price Dillard & Michael Pfau, eds. 2002) [hereinafter THE PERSUASION HANDBOOK] (surveying literature across disciplines); PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 127-67 (1991) (surveying social psychology literature); Diana Mutz, et al., *Political Persuasion: The Birth of a Field of Study*, in POLITICAL PERSUASION AND ATTITUDE CHANGE 1-17 (Diana Mutz, et al., eds. 1996) (surveying research in political science).

³² See, e.g., KECK & SIKKINK, *supra* note ___, at 16-18; David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and participant Mobilization*, in FROM STRUCTURE TO ACTION: COMPARING SOCIAL MOVEMENT RESEARCH ACROSS CULTURES 197 (Bert Klandermans, et al. eds. 1988); David A. Snow, et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOCIOLOGICAL REV. 464 (1986).

³³ See, e.g., Koh, *supra* note ___, at 2612; Ethan Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479, 482 (1990).

³⁴ See Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Landmines*, 52 INT’L ORG. 613, 622-630 (1998).

A second dimension of persuasion is the technique of “cueing” target audiences to “think harder” about the merits of a counter-attitudinal message. The idea here is that the introduction of new information often prompts actors to “engage in a high intensity process of cognition, reflection, and argument”³⁵ Substantial empirical evidence suggests that actors often change their beliefs when, under such conditions, they examine (and defend) their positions systematically.³⁶ Given its general features, this micro-process works best in iterated, highly institutionalized social environments wherein new information is routinely and systematically linked to broadly shared attitudes.³⁷ In this way, documentation and study of the extent of human rights abuses (and the conditions under which abuses are likely) cue states to reexamine current practices and positions—particularly within the framework of global human rights institutions. For example, the extensive documentation of gross human rights abuses in several Latin American military governments in the 1970s and 1980s prompted states to reconsider the scope and character of international human rights regimes—and important changes followed in many inter-governmental organizations at the regional and international level.³⁸ This example, however, should not encourage a narrow view of the kind of information likely to produce these “cueing” effects. Indeed, new information about the preferences of other states might prompt states to reexamine their views or practices.³⁹ Put differently, the new information need not concern matters exogenous to the international institution.

We should also note that “cueing” often operates more like “teaching”—depending on the character of the issue and the predisposition of the relevant actors. That is, actors and institutions, in some circumstances, might convince target audiences to discard previously held views by conveying authoritative information discrediting those views.⁴⁰ This specie of “cueing” is particularly important in addressing inadvertent or uninformed non-observance of community standards.⁴¹

C. *Acculturation*

As described briefly in the Introduction, a burgeoning, interdisciplinary literature suggests another important mechanism of social influence—*acculturation*. By acculturation, we mean the general process of adopting the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through

³⁵ Johnston, *supra* note ___, at 496.

³⁶ See ZIMBARDO & LEIPPE, *supra* note ___, at 192-97 (summarizing important developments in the field).

³⁷ See, e.g., James L. Gibson, *A Sober Second Thought: An Experiment in Persuading Russians to Tolerate*, 42 AM. J. POL. SCI. 819, 826-831 (1998).

³⁸ See KECK & SIKKINK, *supra* note ___, 89-97 (summarizing these developments).

³⁹ See, e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895-905 (1998) (arguing that norm internalization occurs when the number of states accepting of the norm reaches a “tipping point” triggering “norm cascades.”); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

⁴⁰ See, e.g., FINNEMORE, *supra* note ___ (discussing example of UNESCO).

⁴¹ See, e.g., CHAYES & CHAYES, *supra* note ___; Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INT’L ORG. 609 (2002).

pressures to assimilate—some imposed by other actors and some imposed by the self.⁴² This mechanism encompasses a number of micro-processes including orthodoxy, identification, and status-maximization.⁴³ In this Section, we first specify some of the ways in which acculturation occurs. We then clarify the relationship between this mechanism and the other two previously discussed. And, finally, we analyze (at a conceptually abstract level for the moment) how institutions might harness acculturation processes to socialize recalcitrant states.

1. *The Micro-processes of Acculturation*

The touchstone of this mechanism is that varying degrees of identification with a group generates varying degrees of *cognitive and social pressures*—real or imagined—to conform. These “cognitive pressures” are in an important sense internal and pro-social—that is, actors in several respects are driven to conform. These internal pressures include: (1) social-psychological costs of non-conformity (such as dissonance associated with conduct that is inconsistent with an actor’s identity and social roles);⁴⁴ and (2) social-psychological benefits of conforming to group norms and expectations (such as the “cognitive comfort” associated with both high social status⁴⁵ and membership in a perceived “in-group”⁴⁶). Acculturation is also propelled by “social pressures”—by which we mean pro-social pressure applied by the group. These pressures—which are no doubt more familiar to many readers—include: (1) the imposition of social-psychological costs through shaming or shunning; and (2) the conferral of social-psychological benefits through “back-patting” and other displays of public approval.⁴⁷

⁴² See, e.g., THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS (1994); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); Lynne G. Zucker, *Institutional Theories of Organization*, 13 ANN. REV. SOC. 443, 443-64 (1987); Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOC. REV. 726 (1977).

⁴³ See, e.g., Johnston, *supra* note ___, at 499-502 (summarizing research on this point across several disciplines); Elvin Hatch, *Theories of Social Honor*, 91 AM. ANTHROPOLOGIST 341 (1989) (summarizing cross-cultural research); ROMANO HARRE, SOCIAL BEING: A THEORY FOR SOCIAL PSYCHOLOGY (1979) (providing more extended statement of this research agenda in psychology and sociology).

⁴⁴ See, e.g., Robert Axelrod, *Promoting Norms: An Evolutionary Approach to Norms*, in THE COMPLEXITY OF COOPERATION 44 (Robert Axelrod, ed. 1997); JOHN C. TURNER, REDISCOVERING THE SOCIAL GROUP (1987); Christopher Barnum, *A Reformulated Social Identity Theory*, 14 ADVANCES IN GROUP PROCESSES 29 (1997).

⁴⁵ See, e.g., ROBERT FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 31-33 (1985) (arguing that high status is a good itself—generating a range of psychological benefits); see also ROBERT FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS (1988).

⁴⁶ See, e.g., ROBERT B. CIALDINI, INFLUENCE: THE NEW PSYCHOLOGY OF MODERN PERSUASION (1984).

⁴⁷ See, e.g., CIALDINI, *supra* note ___; Petty, et al., *supra* note ___, at 612-20. These micro-processes are well-represented in the international law literature—though they are typically embedded in a coercion model of social influence. See, e.g., Thomas Risse, et al., *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 11-35 (Thomas Risse, et al., eds. 1998) (outlining a “spiral model” of socialization incorporating elements of coercion, persuasion, and shaming).

2. *Acculturation as Incomplete Internalization: Distinguishing Persuasion*

Despite the obvious similarities, this mechanism differs from persuasion in important respects. First, persuasion requires acceptance of the validity or legitimacy of a belief or norm—acculturation requires only that an actor perceive that an important reference group harbors the belief, engages in the practice, or subscribes to the norm. Second, persuasion requires active assessment of the merits of a belief.⁴⁸ Acculturation processes often operate tacitly; it is often the very act of conforming that garners social approval and alleviates cognitive discomfort (see Table I). Persuasion involves assessment of the *content* of the message (even if only indirectly); acculturation involves assessment of the *social relation* (the degree of identification) between the target audience and some group. Because the acculturation process does not involve being persuaded of the merits of a group's position, it may result in outward conformity with a social convention without private acceptance or corresponding changes in private practices.

These differences have important practical ramifications. The empirical research in psychology, sociology, and political science strongly suggests the importance of processes of acculturation in shaping state identity, preferences, interests, and behavior.⁴⁹ Some of these studies emphasize the significance of group identification and cognitive frames in influencing state action.⁵⁰ The studies also predict spurious forms of

⁴⁸ It is also important to note that we include in our conception of acculturation, a micro-process identified in the persuasion literature. One well-documented finding of this literature is that the *relationship between the persuader and the target audience* may foster (or impede) “persuasion.” That is, the “persuasiveness” of a message—controlling for its content—varies according to the relationship between the persuader and persuadee. Although this factor is not central in human rights literature, it is important to mention this dimension of acculturation because of its significance for institutional design in general. Again, the scholarship studying various manifestations of this dynamic is vast, but for our purposes we highlight one important point: Substantial evidence suggests that high affect relationships foster “persuasion.” See PERSUASION HANDBOOK, *supra* note __, at 289-328 (summarizing recent developments in this research). The idea here is simple. If the persuadee trusts, “likes,” respects, or identifies with the persuader, the persuasiveness of claims advanced by the persuader increases. See, e.g., Richard E. Petty et al., *Attitudes and Attitude Change*, 48 ANN. REV. PSYCH. 609, 612-629 (1997); James H. Kuklinski & Norman L. Hurley, *It's a Matter of Interpretation*, in POLITICAL PERSUASION AND POLITICAL CHANGE, *supra* note __, at 129-131. In the international relations literature specifically, see Risse, *supra* note __ (arguing that “trust in the authenticity of the speaker is a precondition for the persuasiveness of a moral argument.”). Moreover, a related finding of these studies is that such affect relations are fostered in iterated, highly institutionalized environments. *Id.* Examples of this micro-process abound. Consider Steven Ratner's study of the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe; Ratner demonstrates how such “normative intermediaries,” if perceived as impartial and legitimate, persuade states (and other parties to ethnic conflicts) to de-escalate tensions and embrace rule of law values in their dealings with each other. See Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 678-683 (2000). In this example, the perceived impartiality and legitimacy of the persuader imbued him with normative authority and instilled trust in the target audience. *Id.* at 681-82. Because, in this scenario, the persuadee does not actively assess the content of the message, we classify this affect-driven “persuasion” as “acculturation.”

⁴⁹ See generally Goodman & Jinks, *Toward an Institutional Theory of Sovereignty* (summarizing this empirical work).

⁵⁰ See, e.g., SCIENCE IN THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION (Gili S. Drori ed. 2003); John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997); John Boli, *World Polity Sources of Expanding State Authority and Organizations, 1870-1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL (George Thomas et al. eds., 1987).

compliance and peculiar patterns of norm diffusion associated with acculturation. And, all these features naturally have considerable implications for regime design.

These insights are obviously “constructivist” in that they emphasize the role of social interaction in preference and identity formation. As such, the acculturation mechanism shares many conceptual commitments with the persuasion mechanism. Indeed, it is fair to say that acculturation is, in many respects, part of the broader process of persuasion. That is, acculturation might serve as the cultural predicate for all acts of persuasion. Whether this claim is accurate or not, the analytical distinction between the two mechanisms is coherent and meaningful. Moreover, because complete “internalization” is elusive in international affairs—particularly on many contentious human rights issues—international legal studies should fashion a framework for analyzing lower levels of socialization. We maintain that social forces influence actors in many ways other than “internalization;” and that law and legal institutions might harness these social forces to promote rule of law values.

3. Acculturation as Social Sanctions and Rewards: Distinguishing Coercion

The conceptual distinction between acculturation and coercion also requires some clarification. Although the distinction is clear at a high level of abstraction, the way in which we define acculturation potentially blurs the distinction between the two at a lower level of abstraction. Recall that, on our view, acculturation processes include *social sanctions and rewards*, such as shaming, back-patting, and other means of identification and belonging. Many readers will justifiably think that this definition of acculturation eviscerates the distinction between coercion and acculturation (and that, as a consequence, social sanctions and rewards should be part of the “coercion” category).

A few points make clear the conceptual integrity of acculturation in our model. The distinction, on the conceptual level, is straightforward. Coercion encompasses social sanctions that influence actors because those target actors conclude that “social costs” will translate into material costs. Acculturation, on the other hand, includes these “coercive” elements only to the extent that social costs, in and of themselves, influence thought and action. That is, this dimension of acculturation captures those circumstances in which actors conform to social pressure not because of some second-order calculation of the costs and benefits of cooperation but rather because “conforming” and “belonging” themselves confer substantial affective returns (“cognitive comfort”).⁵¹ Simple coercion models cannot adequately account for these effects; and we demonstrate the difference this distinction makes in our analysis of concrete regime design problems below. Moreover, there are good reasons to analyze pure “social costs” differently. Consider first that these costs are virtually incalculable—and indeed an avalanche of social science evidence suggests that actors do not attempt, even in a casual way, to calculate them. Substantial evidence, for example, suggests that actors systematically fail to forecast accurately their future affective states (and the impact that certain practices will have on

⁵¹ See, e.g., TIM WILSON, *STRANGERS TO OURSELVES* (2003).

those states).⁵² The expected influence and effects of material rewards are, on the other hand, more amenable to conventional cost-benefit modeling.

4. *Acculturation and the State*

Although substantial evidence demonstrates that acculturation processes occur and more precisely how they take place, there is good reason to question whether states as such are amenable to “acculturation.” After all, much of the research suggesting the presence of this mechanism centers on the cognitive processes of individuals. Do states “identify” with a reference group in any meaningful sense? Are states motivated by cognitive frameworks and social pressures? Substantial evidence strongly suggests, on both counts, that they do. As we summarized in an earlier article, there is a burgeoning empirical (and theoretical) literature—so-called “world polity institutionalism”—documenting cultural and associational aspects of international politics that suggest the influence of acculturation.⁵³ This scholarship has direct roots in the sociology of organizations and, more specifically, in empirical studies that demonstrate how the goals and composition of formal organizations (e.g., universities, public hospitals) derive in considerable part from their wider social environment.⁵⁴ A methodologically simple, yet enormously useful, move is to study the state as a formal organization—taking the sociology of organizations global.

In organizational sociology, theories of acculturation predict that socialization processes will press organizations toward increasing “isomorphism”—that is, structural similarity across organizations.⁵⁵ These theoretical models also predict that increasing homogenization will not reflect the functional task demands of the organization.⁵⁶ Rather than correlating with local task demands, structural attributes and goals of the organization will correlate with attributes and goals of other organizations at the time. When institutional conditions are favorable for acculturation, the evidence suggests that the previously identified cognitive and social pressures will encourage pro-social behavior. Isolating these institutional conditions is more difficult. As suggested by the micro-processes of acculturation, however, one can delineate two requirements for the effective functioning of this mechanism: (1) embedding target actors in an institutionalized social setting and (2) institutionalizing at the group level preferred forms of identity.⁵⁷ The question is whether states, like other organizational forms, respond to and are in significant part reflections of their wider institutional environment.

Numerous empirical studies now suggest that states are significantly shaped and legitimated through their broader organizational environment.⁵⁸ That is, states constitute

⁵² See, e.g., Daniel Gilbert & Tim Wilson, *Affective Forecasting*, in *ADVANCES IN EXPERIMENTAL PSYCHOLOGY* 345-411 (2003).

⁵³ See Goodman & Jinks, *Toward an Institutional Theory of Sovereignty*, *supra* note __, at 1757-1765.

⁵⁴ W. RICHARD SCOTT, *INSTITUTIONS AND ORGANIZATIONS* (1995).

⁵⁵ Zucker, *supra* note __, at 443 & 452 (surveying the literature).

⁵⁶ See generally *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS*, *supra* note __ (explaining the empirical predications of various institutional approaches); see also Zucker, *supra* note __, at 443.

⁵⁷ Zucker, *supra* note __, at 453.

⁵⁸ Our approach is “constructivist” in that we emphasize the importance of social interaction. That is, we advance the view that state structure, identity and preferences are constructed by social forces. Nevertheless,

highly legitimated actors in world society and their formal structures (e.g., administrative bodies, policy commitments) are substantially derived from institutionalized models promulgated at the global level. These studies generally proceed by collecting quantitative data for all available states over several decades and use analytic techniques—including event history analysis, regression analysis, and process tracing—to test predictions of acculturation. The studies demonstrate that states emulate standardized models of structural organization in areas such as environmental policy,⁵⁹ educational curricula,⁶⁰ militarization,⁶¹ the laws of war,⁶² and human rights.⁶³ As many commentators have pointed out, the extent of isomorphism across states is remarkable, and seemingly inexplicable without reference to acculturation processes.⁶⁴ Importantly, the studies do not suggest that this structural convergence reflects actual practices or effects on the ground. On the contrary, the convergence (across states) is accompanied by substantial and persistent *decoupling* (within states): official purposes and formal structure are disconnected from functional demands and results. Rather than correlating

our approach contrasts with conventional constructivist models in two respects: (1) we emphasize *top-down processes*; and (2) we identify *acculturation* as the causal mechanism that drives the emergence and diffusion of global scripts (rather than “habitualization” and “persuasion”). We should emphasize at the outset that our approach avoids two common pitfalls in constructivist research. First, our approach is falsifiable in that it generates a range of concrete empirical predictions that allow for the adjudication between our approach and competing explanations. Second, our approach avoids the circularity problem endemic to some constructivist research. Indeed, constructivist research often fails to distinguish adequately between explanatory and outcome variables. The “new institutionalism” we embrace distinguishes between “organizations” and “institutions”—the concept of “organization” refers to the formal apparatus (and its purposes) whereas the concept of “institution” refers to all regulative and cognitive features of the organizational environment such as rules or shared beliefs. Of course, many “institutions” can also be understood as “organizations” depending on the object of the study. For example, in a study of the organizational features of hospitals, the state (including perhaps most prominently, regulatory agencies) are part of the institutional environment within which hospitals operate. But, in a study of the organizational features of state regulatory agencies, it is the agencies themselves that are analyzed as “organizations” (and “institutions” in this study would include the salient features of the wider cultural environment in which the agencies are embedded). The important point is that our approach avoids circularity problems by clearly differentiating, as an analytic matter, explanatory (institutions) and outcome variables (organizations). *See generally* SCOTT, *supra* note ___ ; Goodman & Jinks, *supra* note ___ .

⁵⁹ David John Frank, Ann Hironaka & Evan Schofer, *Environmentalism as a Global Institution*, 65 AM. SOC. REV. 122 (2000); David John Frank, Ann Hironaka & Evan Schofer, *The Nation-State and the Natural Environment over the Twentieth Century*, 65 AM. SOC. REV. 96 (2000).

⁶⁰ JOHN W. MEYER, DAVID KAMENS & AARON BENAVIDES, *SCHOOL KNOWLEDGE FOR THE MASSES: WORLD MODELS AND NATIONAL PRIMARY CURRICULAR CATEGORIES IN THE TWENTIETH CENTURY* (1992); John W. Meyer, Francisco O. Ramirez & Yasemin Soysal, *World Expansion of Mass Education, 1870-1980*, 65 SOC. EDUC. 128 (1992).

⁶¹ *See, e.g.*, Dana P. Eyre & Mark C. Suchman, *Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 79 (Peter J. Katzenstein ed., 1996).

⁶² *See, e.g.*, Martha Finnemore, *Rules of War and Wars of Rules: The International Red Cross and the Restraint of State Violence*, in *CONSTRUCTING WORLD CULTURE*, *supra* note __, at 149.

⁶³ *See infra* notes __-__.

⁶⁴ *See, e.g.*, *CONSTRUCTING WORLD CULTURE* (John Boli & George Thomas eds., 1999); David John Frank, Suk-Ying Wong, John W. Meyer & Francisco O. Ramirez, *What Counts as History: A Cross-National and Longitudinal Study of University Curricula*, 44 COMP. EDUC. REV. 29 (2000); John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997). Indeed, “institutionalists would expect roughly contemporaneous global change, regardless of objective technological conditions.” Finnemore, *supra* note __.

with local task demands, structural attributes and official goals of the state correlate in important ways with attributes and goals of other states in the world.

With respect to human rights, extensive research identifies these patterns of norm diffusion in fundamental areas of governance including welfare and labor policy,⁶⁵ civil rights guarantees,⁶⁶ and public order strategies.⁶⁷ For example, the number of constitutions that include provisions committed to the state management of childhood and the right to education has increased dramatically.⁶⁸ A study of every national constitution in 1870-1970 shows that the adoption of such provisions in constitutions over time does not correlate with local forms of social organization (such as urbanization and national wealth) or with technical capacities of the state.⁶⁹ Moreover, each group of newly established states shows a significantly higher probability of adopting such constitutional provisions than the preceding group of entrants.⁷⁰ The overall findings suggest that “[n]ational constitutions do not simply reflect processes of internal development. They reflect legitimating ideas dominant in the world system at the time of their creation.”⁷¹

Also consider state convergence with respect to women’s rights. One of the leading studies uses sophisticated analytic techniques (event history analysis) to examine state definitions of political citizenship over a hundred-year period.⁷² According to the study, once universal suffrage became a legitimating principle associated with the modern nation-state, state enactment of women’s suffrage followed a pattern anticipated by theories of acculturation. After an initial stage of early adopters, the number of states providing women the right to vote increased steeply and included most states before tapering off; rates of adoption tracked world trend lines; and adoption correlated far less with domestic political conditions once isomorphism took hold.⁷³ An especially important finding clearly indicates a “contagion effect”: once the norm is institutionalized, a strong predictor for whether an individual state will enact women’s suffrage is whether other states in its region have done so in the past five years.⁷⁴ The overall findings suggest that,

⁶⁵ Andrew Abbott & Stanley DeViney, *The Welfare State as Transnational Event: Evidence from Sequences of Policy Adoption*, 16 SOC. SCI. HIST. 245 (1992); David Strang & Patricia Mei Yin Chang, *The International Labour Organization and the Welfare State: Institutional Effects on National Welfare Spending, 1960-80*, 47 INT’L ORG. 235 (1993); George M. Thomas & Pat Lauderdale, *State Authority and National Welfare Programs in the World System Context*, 3 SOC. FORUM 383 (1988).

⁶⁶ John Boli, *World Polity Sources of Expanding State Authority and Organizations, 1870-1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL (George M. Thomas, John W. Meyer, Francisco Ramirez & John Boli eds., 1987); see also David John Frank & Elizabeth McEneaney, *The Individualization of Society and the Liberalization of State Policies on Same Sex Sexual Relations*, 77 SOC. FORCES 911 (1999).

⁶⁷ CONNIE MCNEELY, CONSTRUCTING THE NATION-STATE: INTERNATIONAL ORGANIZATION AND PRESCRIPTIVE ACTION (1995); Meyer et al., *supra* note 39, at 158.

⁶⁸ John Boli-Bennett & John W. Meyer, *The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970*, 43 AM. SOC. REV. 797 (1978).

⁶⁹ Boli-Bennett & John W. Meyer, *supra* note ___, at 809.

⁷⁰ *Id.* at 805.

⁷¹ *Id.* at 805.

⁷² Francisco Ramirez, Yasemin Soysal & Susanne Shanahan, *The Changing Logic of Political Citizenship: Cross-national Acquisition of Women’s Suffrage Rights, 1890 to 1990*, 62 AM. SOC. REV. 735, 739 (1997) (using events history analysis).

⁷³ *Id.* at ___.

⁷⁴ *Id.* at 740 & 741.

compared with local conditions (such as the strength of domestic women's rights groups), "countries apparently are affected much less strongly by internal factors and much more strongly by shifts in the international logic of political citizenship."⁷⁵

These results coincide with other areas of women's rights. For example, a separate study of states in the western hemisphere examines how these governments made roughly contemporaneous commitments to eradicate violence against women.⁷⁶ Within a relatively short time span, "nearly all American states have created national women's councils that include domestic violence problems among their priorities, have approved legal changes that define domestic violence as a crime, have launched educational campaigns to combat the problem, and have created social services for victims."⁷⁷ They have also done so without any one state far exceeding, or distinguishing itself from, the average set of commitments.⁷⁸ The extent of isomorphism notwithstanding wide variations in national political, cultural, and social conditions is remarkable. Specifically, once domestic violence was institutionalized at the regional-level as an obligation for governments to address, states joined the bandwagon in adopting such measures despite dramatic differences in women's political power or access to economic resources at the national level.⁷⁹ Indeed, the authors conclude that at this stage of institutionalization, "international socialization is more important than domestic politics" in getting "nonconformist states to change their policies to meet the standards of new international norms."⁸⁰

In general, the adoption of structural commitments or official policy goals in human rights does not necessarily entail concrete implementation. On the contrary, when states copy a global model that does not fit their local needs we should expect a continued disjuncture between structural isomorphism (across states) and technical demands and results (within states). For example, the authors of the study of state management of childhood "did not argue that constitutional rules in particular countries are likely to be 'implemented,' but rather that prevailing world ideologies are likely to be incorporated both ideologically and organizationally."⁸¹ The fact that local social and economic drivers do not explain when states adopt the observed constitutional provisions, and the fact that adoption of such constitutional guarantees does not correlate with technical capacities to implement the provisions, suggests decoupling might persist. The study of domestic violence also finds that many of the official commitments remain "woefully underfunded"⁸² and subsequent implementation of these programs "is still unclear."⁸³

⁷⁵ *Id.* at 742.

⁷⁶ Darren G. Hawkins & Melissa Humes, *Human Rights and Domestic Violence: Norm Diffusion in the Americas*, 117 *Political Science Quarterly* 231, 235 (2002).

⁷⁷ *Id.* at 234; *see also id.* at (finding that the "share important similarities in the ways in which they identify national goals, institutionalize guidelines and procedures ... and outline programs to prevent abuse and treat victims").

⁷⁸ *Id.* at 234 ("[I]t is difficult to argue that any state's policy is more far-reaching or successful than that of any other state."); *see also id.* (discussing other comparative studies).

⁷⁹ *Id.* at

⁸⁰ *Id.* at 256.

⁸¹ *Cf.* Boli-Bennett & John W. Meyer, *supra* note ___, at 809; *see also* John Boli-Bennett & John W. Meyer, *Constitutions as Ideology*, 45 *AM. SOC. REV.* 525, 526 (1980).

⁸² *Id.* at 236.

⁸³ *Id.* at 257.

Indeed, as explained above with respect to the sociology of organizations in general, the theory of acculturation predicts cross-national isomorphism irrespective of local circumstances. Because these models have developed universal authority and legitimacy, states follow the global scripts as members of world society despite the ineffectiveness (or even dysfunctionality) of resultant organizational forms.

We maintain that the evidence of structural isomorphism and decoupling discredit theories that explain state behavior solely in terms of global power politics. To clarify why this is so, we consider an important alternate explanation. Critics might accept that the empirical evidence indicates an external source for state organizational formation, yet that external source could be powerful actors compelling states through material penalties or rewards to adopt particular practices. This account, however, is unpersuasive. First, one would naturally assume that poorer countries are more susceptible to such external coercion. However, the empirical studies discussed above show that norm adoption does not correlate with the economic wealth or development of country. Second, this competing explanation would predict that mimicry (and, hence, isomorphism) would vary depending on the presence, power, and influence of relevant audiences. Substantial evidence, however, shows that isomorphism will frequently occur regardless of whether there is external political pressure to conform. For example, governments follow global scripts concerning the proper orientation of state policy toward children—even though powerful states do not have a strong interest in monitoring or forcing others to adopt such an ideology.⁸⁴ Third, powerful states are often late adopters in some issue areas, including human rights law.⁸⁵ Fourth, counter-hegemonic norms exhibit the same pattern of diffusion as pro-hegemonic norms—suggesting that conventional conceptions of global power politics provide an inadequate descriptive account. One important example is the norm of self-determination (understood as a fundamental human right), which supported decolonization and motivated many indigenous rights campaigns.⁸⁶ And, finally, the coercion explanation cannot account for persistent “decoupling”—that is, there is no theory to explain why formal policy convergence without effective implementation on the ground would appease powerful states.⁸⁷

⁸⁴ See, e.g., John Boli-Bennett & John W. Meyer, *The Ideology of Childhood and the State 1870-1970*, 43 AM. SOC. REV. 797 (1978).

⁸⁵ See, e.g., Finnemore & Sikkink, *supra* note ___ (describing global diffusion of women’s suffrage and highlighting that global hegemony were late adopters); Ramirez, *supra* note __, at 735.

⁸⁶ See David Strang, *Global Patterns of Decolonization 1500-1987*, 35 INT’L STUD. Q. 429 (1991); David Strang, *From Dependency to Sovereignty: An Event History Analysis of Decolonization 1870-1987*, 55 AM. SOC. REV. 846 (1990).

⁸⁷ Another approach might emphasize the rationality of mimicry as a signal to domestic and international audiences—irrespective of whether the global script produces results on the ground. See, e.g., Goldsmith & Posner, *Moral and Legal Rhetoric*, *supra* note __. Although the predictions of this approach track our own in many respects, two points of disagreement bear mentioning. First, this approach does not adequately account for isomorphism and decoupling. That is, the point about decoupling and learning in the text applies to this approach as well—although in a slightly modified form: Assuming that states learn, the credibility of the mimicry signal would substantially degrade over time in an environment characterized by decoupling. Second, this approach would predict that mimicry (and, hence, isomorphism) would vary depending on the presence, power, and influence of relevant audiences. Our approach, on the other hand, predicts isomorphism irrespective of whether there is political pressure to conform. See generally Goodman & Jinks, *supra* note ___.

One remaining question is whether the conditions favorable to acculturation are amenable to manipulation in order to promote behavioral change through institutions. Drawing on institutional theories of the state, we maintain that they are. First, significant empirical evidence shows that increased institutionalization of a model at the global level is followed by its adoption, or diffusion, across states.⁸⁸ Second, the empirical research also shows that integration of a state in world society is a strong predictor of whether that state will adopt global cultural scripts.⁸⁹ Accordingly, this body of scholarship offers unique insights for designing international regimes to regulate state behavior. We submit that the basic elements necessary for acculturation could be fostered by embedding target actors in social settings organized around highly institutionalized, broadly shared principles.⁹⁰ Under these conditions, we maintain that states will likely value their status in the group (“identify” with, or mimic, the group if you will)—exploiting the cognitive and social pressures described above.⁹¹ In short, the conditions for acculturation exist at the international level and can be studied by examining the state as the primary unit of analysis.

This evidence demonstrates, at a high level of generality, that states respond to cultural forces. Less clear is how exactly this occurs. That is, the evidence described above does not document a specific causal pathway by which culture influences state action. And although we consider this issue an important one—one that requires rigorous empirical testing—the claims made in this Article do not rely upon any particular theories about how acculturation occurs. In other words, our claims are not predicated on a tacit theory of domestic political economy. Indeed, the empirical record to date is consistent with a number of possible causal routes including the following: government representatives or high-level policy makers might be directly acculturated in the social environments of international institutions;⁹² members of special interest groups might be acculturated and they, in turn, persuade domestic audiences (or political leaders) to adopt pro-social practices;⁹³ or perhaps, in some cases, relevant domestic audiences are directly acculturated by broader social forces and these audiences, in turn, coerce (or persuade) their political leaders to adopt pro-social behavior.⁹⁴ We are, for the purposes of this Article, agnostic about which of these theories best accounts for the observed behavior of states. Irrespective of the specific causal pathway, we maintain that observed state behavior is, in some non-trivial sense, the product of acculturation. The following Parts also illustrate that fundamental issues of institutional design turn on processes at this level of abstraction.

⁸⁸ Frank et al., *The Nation-State*, *supra* note 49, at 97-101.

⁸⁹ See, e.g., Meyer et al., *supra* note __; John Frank, Ann Hironaka & Evan Schofer, *The Nation-State and the Natural Environment over the Twentieth Century*, 65 AM. SOC. REV. 96, 106 (2000); John W. Meyer, Francisco O. Ramirez & Yasemin Soysal, *World Expansion of Mass Education, 1870-1980*, 65 SOC. EDUC. 146 (1992).

⁹⁰ This is a necessary predicate of acculturation in any meaningful sense. See, e.g., Johnston, *supra* note __, at 501 (pointing out that effectiveness of acculturation processes “hinges . . . on an intersubjectively agreed upon notion of what socially valuable behavior looks like”).

⁹¹ See, e.g., LOWELL DITTMER & SAMUEL S. KIM, CHINA’S QUEST FOR NATIONAL IDENTITY 14-15 (1993) (arguing that shaming effects turn on the perceived legitimacy of the actor or group engaged in social opprobrium).

⁹² See, e.g., Johnston, *supra* note __.

⁹³ See, e.g., Risse, et al., *supra* note __.

⁹⁴ See, e.g., Finnemore & Sikkink, *supra* note __.

Table I. Three Mechanisms of Social Influence on States

	Coercion	Persuasion	Acculturation
Basis of Influence	Interest	Congruence with Values	Social Expectations Cultural Identity
Behavioral Logic	Instrumentalism	Active Assessment of Validity of Rule	Social Role Social Status Mimicry
Forms of Influence	Material Rewards and Punishment	Convincing Teaching Cueing to Think Harder	Social Rewards and Punishment (shaming, shunning, back-patting) Cognitive Costs and Benefits (orthodoxy, dissonance)
Result	Compliance	Acceptance	Conformity

In the balance of the Article, we analyze three regime design problems in human rights law: (1) conditional membership in organizations; (2) precision of obligations; and (3) monitoring and enforcement mechanisms. Two primary points follow from this analysis. First, regime design principles for each issue vary substantially across the identified behavioral logics. In short, mechanisms matter for regime design. Second, the previously under-theorized acculturation mechanism yields many regime design recommendations that defy conventional wisdom in international law. For example, the de-institutionalizing effects of many traditional “hard law” devices would, we claim, diminish the compliance-inducing effects of acculturation. We also provide three tables—one for each regime design problem— summarizing our analysis.

II. CONDITIONAL MEMBERSHIP

An important choice in designing human rights regimes involves deciding between an inclusive or restrictive rule on membership in multilateral organizations.⁹⁵ More

⁹⁵ Koremenos, et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 770 (2001) (“Who belongs to the institution? Is membership exclusive and restrictive, like the G-7’s limitation to rich

specifically, an ongoing debate—among governmental actors, practitioners, and scholars—is whether to condition membership on compliance with particular human rights standards. An inclusive approach would essentially allow all comers to join the organization and place negligible conditions on maintaining membership status. In contrast, a restrictive approach would reject candidate states or expel member states that do not meet particular human rights standards. For example, two supranational organizations—the United Nations⁹⁶ and the Council of Europe⁹⁷—have formally adopted a restrictive rule. The goals and activities of these organizations include issues other than human rights. Their membership rules, however, have inspired recent proposals for human rights regimes. It is that debate—whether to condition membership in exclusively human rights regimes on human rights performance—which we consider in depth.

The two principal global human rights forums—international human rights treaties⁹⁸ and the U.N. Commission on Human Rights⁹⁹—are currently modeled on an inclusive approach. Both institutions formally allow the equal participation of liberal and illiberal states. However, commentators have suggested that these institutions should condition their membership on human rights performance. Specifically, scholars have recently suggested that the major international human rights treaties should limit admission to states that already comply with particular human rights standards and expel members that do not comply with terms of the treaty.¹⁰⁰ These proposals have spurred an animated

countries? Or is it inclusive by design, like the UN? Membership has been one of the most hotly contested issues in recent years.”).

⁹⁶ The U.N. Charter formally allows the organization to function in a restrictive manner, but these powers have remained largely dormant in practice. Specific articles provide for the exclusion of applicant states, I Charter of the United Nations, art. 4; *cf.* Covenant of the League of Nations, art. 1(2), suspension of membership privileges, *see* Charter of the United Nations, art. 5, and complete expulsion from the organization, *see* Charter of the United Nations, art. 6; *cf.* Covenant of the League of Nations, art. 16(4).

⁹⁷ In 1993, the Council adopted a Resolution essentially limiting the provision of observer status to democratic states. *See* Statutory Resolution (93) 26 on Observer Status, Committee of Ministers, 92nd Session (May 14, 1993). In 1994, the Council required applicant states to abolish the death penalty as a precondition for full membership in the Council. In 2001, the Council’s Parliamentary Assembly adopted a resolution “call[ing] into question the continuing Observer status of Japan and the United States with the Organisation as a whole, should no significant progress” occur toward abolition of the death penalty. *See* Resolution 1253 (2001) on Abolition of the death penalty in Council of Europe Observer states, 17th Sitting (June 25, 2001).

⁹⁸ The six major international human rights treaties are the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 331; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195; the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, art. 10, 1249 U.N.T.S. 13, 18 (entered into force Sept. 3, 1981); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988), 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987); the Convention on the Rights of the Child, opened for signature Nov. 20, 1989, arts. 34, 35, 1577 U.N.T.S. 44, 55 (entered into force Sept. 2, 1990).

⁹⁹ The Commission on Human Rights is a sub-organ of the U.N. General Assembly. Its mandate includes developing standards for the elaboration and codification of international human rights law and monitoring and reporting the human rights practices of U.N. member states.

¹⁰⁰ *See, e.g.,* Hathaway, *supra* note __, at 224 (“Countries might, for example, be required to demonstrate compliance with certain human rights standards before being allowed to join a human rights treaty. ... Or treaties could include provisions for removing countries that are habitually found in violation of the terms of the treaty from membership in the treaty regime”); *see also* Anne F. Bayefsky, Reform of the UN Human

discussion within the academy.¹⁰¹ They have also begun to gain political momentum within other forums, in particular the Commission on Human Rights. A wide range of actors—including government representatives,¹⁰² policy analysts,¹⁰³ activists,¹⁰⁴ and the Office of the U.N. High Commissioner for Human Rights¹⁰⁵—have recently supported the idea of excluding states with poor human rights records from membership in the Commission on Human Rights.

Importantly, formal membership rules do not exhaust the range of choices confronting regime architects on this issue. States could, as several historical examples illustrate, deploy other strategies when existing organizational rules do not explicitly permit exclusion. As Louis Sohn explained in a leading article on expulsion from multilateral organizations, “[a]ll these measures can be taken by international organizations, whether or not their own constitutions expressly provide for them. In fact, only on a few occasions were the measures taken those actually authorized by explicit constitutional provisions.”¹⁰⁶ Indeed, states have deployed a range of tactics to limit the participation of governments with offensive human rights practices including: denying access to regional and preparatory meetings,¹⁰⁷ rejecting credentials required for participation,¹⁰⁸ limiting voting or speaking rights,¹⁰⁹ and adopting extraordinary

Rights Treaty System, available at <<http://66.36.242.93/tree.php/area/reform>> (last visited September 6, 2003). These restrictive approaches resemble proposals for excluding illiberal states from transnational legal regimes. See Anne-Marie Burley [Slaughter], *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

¹⁰¹ See, e.g., Philip Alston, *Beyond “Them” and “Us”: Putting Treaty Body Reform into Perspective*, in THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING 501 (Philip Alston & James Crawford eds., 2000); Philip Alston, Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System, U.N. ESCOR, 53d Sess., Agenda Item 15, P 37, U.N. Doc. E/CN.4/1997/74 (1996); Goodman & Jinks, *Measuring the Effects of Human Rights Treaties*, *supra* note __, at 171; Hathaway, *supra* note __.

¹⁰² Ambassador Kevin Moley, U.S. Permanent Representative to the United Nations in Geneva, Jan. 20, 2003 <www.useu.be/Categories/GlobalAffairs/Jan2003UNUSLibyaHumanRights.html> (last visited July 21, 2003) (“The United States will continue to make its position clear. . . . We are convinced that the best way for the Commission to ensure the ideals of the Universal Declaration of Human Rights over the long term is to have a membership comprised of countries with strong human rights records at home.”).

¹⁰³ Jeane J. Kirkpatrick, *U.S. Human Rights Panel Needs Some Entry Standards*, INT’L HERALD TRIBUNE, May 14, 2003.

¹⁰⁴ See, e.g., Human Rights Watch, United Nations: Rights Commission Shields Abusers, (Press Release April 26, 2002) (“[A]ny government whose records the Commission has condemned, who have failed to implement the Commission’s resolutions, or who have refused to allow visits by the Commission’s investigators and experts, should be excluded from membership on the commission.”) available at <<http://hrw.org/press/2002/04/unhchrfinal.htm>> (last visited July 21, 2003).

¹⁰⁵ Richard Waddington, *Libya Elected to Chair U.N. Human Rights Body*, REUTERS, Jan. 20, 2003 (“U.N. High Commissioner for Human Rights Sergio Vieira de Mello has backed activists’ calls for conditions to be agreed for Commission membership. These could include signing and ratifying all human rights treaties and inviting U.N. special rights investigators to visit.”).

¹⁰⁶ Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1421 (1964).

¹⁰⁷ See, e.g., Chayes & Chayes, *supra* note __, at 72 (discussing measures involving Food and Agriculture Organization, International Telecommunications Union, and South Africa).

¹⁰⁸ Chayes & Chayes, *supra* note __, at __; see Sohn, *supra* note __ at 1401-04 (discussing exclusion of Spain from several U.N. specialized agencies).

¹⁰⁹ Chayes & Chayes, *supra* note __, at 72 (World Health Organization and South Africa).

resolutions tantamount to expulsion (e.g., “advising” a member state to withdraw).¹¹⁰ These measures often serve as the functional equivalent of formal conditions on membership. Although we discuss only formal membership rules, our analysis applies to these informal measures as well.¹¹¹

Before proceeding to that analysis, it is also important to note that other design features may raise some, though not all, of the same considerations. First, procedural or substantive terms of a treaty may produce significant exclusionary effects. It is well understood that higher standards in a human rights treaty tend to reduce levels of state participation. For instance, in drafting the Rome Statute for the International Criminal Court negotiators ultimately adopted strong procedural and substantive provisions that effectively forfeited the participation of particular governments. As others have shown,¹¹² these design choices may also be understood as membership rules.

Second, administrative rules applied in the course of managing a human rights regime may also implicate the scope of membership. Consider, for example, the controversy over the appropriate remedy for invalid treaty reservations.¹¹³ Proposals include: severing the reservation and thus keeping the state bound to the treaty; or nullifying the entire act of ratification.¹¹⁴ Although this debate is complex, the effect each proposal has on treaty membership must weigh heavily in any systematic evaluation of these proposals.¹¹⁵ Indeed, the invalidity rule itself was originally justified as the best way to promote universal membership without sacrificing the integrity of humanitarian treaty norms.¹¹⁶ Another administrative question concerns the criteria used for accreditation of governmental delegations in international forums—for example, whether to seat a democratically elected government-in-exile or the non-democratic government with

¹¹⁰ See, e.g., Sohn, *supra* note __ at 1409-12 (discussing Economic and Social Council and Portugal); Chayes & Chayes, *supra* note __, at 80-81 (discussing Organization of African States and Cuba); id. at 71 (discussing International Labor Organization and South Africa).

¹¹¹ Aspects of our discussion also apply to strategies that individual governments and non-governmental organizations might take to encourage illiberal states to join human rights regimes. For example, understanding the institutionalizing effects of universal membership should influence the emphasis or priority such actors give to pressuring illiberal states to ratify human rights treaties. Such an understanding should similarly inform the decision whether to pressure illiberal states to leave international organizations (e.g., African states’ boycotting intergovernmental organizations that allowed South African participation).

¹¹² Downs, et al., *supra* note __, at 500 (analyzing stronger obligations as effectively a restrictive membership approach in environment, trade, and arms control agreements); Abbott & Snidal, *supra* note __, at 429 (describing use of hard law as functionally “an *ex ante* sorting device”).

¹¹³ A reservation is a formal condition made by a state when ratifying a treaty, whereby the state purports to exclude or modify its obligations under the treaty. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 2, 1155 U.N.T.S. 331. For a range of opinions on the subject of severing invalid reservations, see Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT’L L. 531 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 PA. L. REV. 399 (2000); cf. Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 509-11 (2002); Catherine Redgwell, *US Reservations to Human Rights Treaties: All for One and None for All?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 392 (Michael Byers & Georg Nolte, eds. 2003).

¹¹⁴ Goodman, *supra* note __ at 531; Bradley & Goldsmith, *supra* note __, a 438.

¹¹⁵ The selected remedy will also affect whether some states are willing to consent to human rights treaties in the first place. See Goodman, *supra* note __, at 535-55.

¹¹⁶ See International Court of Justice, Advisory Opinion on Reservations to the Genocide Convention (1951).

effective control of the country.¹¹⁷ Again, this is a thorny problem, but deciding which approach is optimal will turn on the work one expects membership rules to perform (and, of course, the effect we expect exclusion to have).¹¹⁸ The important point is that an empirical question inheres in these doctrinal problems: what are the consequences of restrictive membership. The following discussion examines the empirical foundations of membership rules. For the sake of clarity, we focus on rules that directly restrict—either through denial of admission or through expulsion—membership on the basis of human rights performance.

This type of exercise is helpful in at least three ways. First, the social mechanism one emphasizes (or tries to harness) might dictate whether and how to condition membership. Second, close attention to social processes clarifies the trade-offs that would accompany specific membership rules. Third, the social mechanism one emphasizes also implicates various second-order determinations. For example, if a restrictive approach is adopted, each of the mechanisms would suggest unique design principles with respect to the *substantive criteria and procedures* for selecting, retaining, and potentially ousting members.

A. Coercion

As Table II demonstrates, the coercion mechanism places a low or medium level of importance on this design question. On one view, whether states act within or outside a regime should not substantially affect the ability of stronger states to exert influence over delinquent, weaker states.¹¹⁹ Another view is that high levels of regime participation can yield nontrivial benefits: regimes help generate information about the distribution of state preferences, develop reputations for compliance, and lower the transaction costs of cooperation.¹²⁰ These effects promote stable cooperative arrangements in part because they facilitate the efficient allocation of rewards and penalties.¹²¹

¹¹⁷ Cf. Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 605 (1992).

¹¹⁸ Inclusion of the de facto (but illegitimate) government signals acceptance of its authority—and perhaps imbues it with some measure of legitimacy. *Id.* Exclusion, on the other hand, might sacrifice some measure of influence over non-democratic governments. *Id.* at 605-06 (evaluating the claim that using accreditation power of the General Assembly would “lose any leverage [the United Nations] might have to influence the policies of excluded unelected governments”).

¹¹⁹ See, e.g., John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5 (Winter 1994/95); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988).

¹²⁰ ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SECURITY 39, 46-50 (1995). Accordingly, the regime itself would likely emphasize measures that accentuate these features, such as reporting requirements and repeat interactions to help develop reputations.

¹²¹ We have isolated the different causal mechanisms for theoretical reasons explained above. Note, however, that if legitimacy is also an empirically meaningful variable, inclusive membership may bolster the effectiveness of coercive power. Specifically, some scholars who argue for the coercion paradigm (for example, some neorealists) accept that legitimacy is a component of power. On this view, the use of sanctions against a state that violates human rights might be viewed as more legitimate, and thus more effective, if the target state has formally acceded to the relevant human rights obligations.

The benefits of inclusion, however, must be weighed against the benefits of a restrictive rule. Under the coercion mechanism, two advantages might be gained from restrictive membership. First, conditioning admission on performance has an information-forcing effect. The editors of a special issue of *International Organization* thus hypothesize that rational regime designers are more likely to adopt a restrictive membership rule under conditions of uncertainty about state preferences: “Membership enables states to learn about each others’ preferences if the membership mechanism can distinguish cooperators from non-cooperators. . . . Effective membership rules create a separating equilibrium where only those who share certain characteristics will bear the costs necessary to be included in an equilibrium.”¹²² Assuming that such information is valued, rational regime designers should weigh (1) the information produced by a high admissions bar against (2) the information produced by lowering the bar—allowing more states to participate in the intra-regime organizational processes that generate information over time.¹²³

Second, restricting membership to states with better human rights records might facilitate deep cooperation among regime participants. George Downs et al. define the depth of an agreement as “the extent to which [the agreement] requires states to depart from what they would have done in its absence.”¹²⁴ These scholars stress the utility of coercive tools in ensuring cooperation among states,¹²⁵ and they contend that only states that are strongly committed to regime principles would ratify treaties requiring deep change.¹²⁶ Naturally, they conclude that cooperative international regimes should restrict membership to states that are prepared to undertake substantial obligations.¹²⁷ It is unclear whether this reasoning applies to human rights treaties (Downs et al. developed the theory in the context of environmental regimes). As we describe in the Introduction, human rights regimes do not fit neatly into cooperative models—there is no clear “free rider” problem and states can, in a non-trivial sense, ensure human rights domestically without the cooperation of other states.¹²⁸ As a consequence, the types of costs identified

¹²² Koremenos, et al., *The Rational Design of International Institutions*, *supra* note __, at 784; *id.* (“When the price of membership is too low, membership is not informative.”); *see also* Koremenos et al., *Rational Design: Looking Back to Move Forward*, 55 INT’L ORG. 1051 1056-57 (2001) (discussing results of contributions to the special issue that support this conjecture); *cf.* Abbott & Snidal, *supra* note __, at 429.

¹²³ Through this comparison, it is difficult to see why a rational institutional designer would invariably, or more frequently, favor restrictive membership under conditions of uncertainty.

¹²⁴ *See* George Downs, David Roche & Peter Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT’L ORG. 379, 383 (1996); *see also* Guzman, *supra* note __.

¹²⁵ *Id.* at 386 & 391.

¹²⁶ *See, e.g.*, Downs, Roche & Barsoom, *supra* note __, at 399 (“One possible strategy is to restrict regime membership to states that will not have to defect very often. The idea is that whatever benefit is lost by excluding such states from the regime will be more than made up by permitting those that are included to set and also enforce a deeper level of cooperation.”).

¹²⁷ *Cf.* George W. Downs, Kyle W. Danish & Peter Barsoom, *Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT’L L. 465, 508 (2000) (“[T]he maximum amount of cooperation is likely to be achieved through the creation of a noninclusive regime that contains a majority of the most cooperatively progressive states. Such regimes tend to establish an initial level of cooperation that is relatively deep, whereas a more inclusive regime in which the average state had yet to be affected . . . would do little or nothing.”).

¹²⁸ One might incorrectly think that Downs’ analysis equally applies to human rights. Downs does apply his argument to environmental regimes, *see id.*, and, at first blush, the environmental context may appear to raise the same concerns as human rights: The states least willing to control environmental degradation would

by Downs et al. (*viz.* increased free-riding and/or the emergence of sub-optimal focal points) are negligible in the human rights context.

It is also important to note an additional feature of human rights regimes that mitigates this family of concerns. Because human rights protection does not require a unified institutional framework, there are multiple, overlapping human rights treaty regimes.¹²⁹ There are no fewer than four international human rights regimes: the global regime (embodied in the UN system and the “International Bill of Rights” treaties) and three regional systems. As a result, states can pursue multiple cooperative strategies simultaneously—tailoring the membership rules of each regime to the specific goals of the treaty system in question. Assume, for the sake of argument, that human rights treaties solve some collective action problems—an assumption that makes plausible the Downs et al. critique. Liberal states committed to “deep” cooperation on human rights issues could jointly pursue multiple objectives. To capture the benefits of cooperation, such states could establish a separate treaty regime with (1) robust substantive commitments and (2) restricted membership. To capture the “non-cooperative” benefits of constructive engagement, these states could also pursue a global regime with (1) more modest substantive commitments and (2) unrestricted membership.¹³⁰

If a restrictive approach were adopted, the coercion mechanism suggests certain procedures for applying the membership rule. Specifically, it would make sense to design the admission process to yield particular types of information. The regime might, for example, target information that is otherwise difficult to detect. Candidate states could be required to provide information on death in custody or statistics on racially disparate social conditions.¹³¹ The important point is that the analysis of mechanisms informs not

be omitted from a restrictive regime. However, this is not necessarily the case. In the environmental context, the states more willing to join a restrictive regime (“cooperatively progressive” states) may also be the states with greater environmental problems (or there may be no association between environmental degradation and being a cooperatively progressive state). However, if a restrictive rule entails that outsiders are the ones most likely to exhibit the problem (environmental degradation, human rights abuses, etc.), Downs’ argument is less persuasive. *Cf.* Downs, Rocke, & Barsoom, *supra* note __, at 399 (“The idea is that whatever benefit is lost by excluding such states from the regime will be more than made up by permitting those that are included to set and also enforce a deeper level of cooperation.”).

¹²⁹ Overlapping, inconsistent rights regimes can coexist because the regulatory problem they address is unidirectional. That is, rights regimes seek to maximize the protection of individual rights—subject only to the other necessities of good governance. Rights regimes regulate only under-protection of rights, not their over-protection. Consider a stylized example. Assume that regime X protects rights at level 10 and regime Y protects rights at level 5. All states willing to protect rights at level 10 could lawfully participate in both regimes.

¹³⁰ This is an important point because it goes a long way toward dispelling one potential problem with our model. As we note in the Introduction, one purpose of international human rights regimes is to improve the practices of illiberal states. There are, however, other important objectives of human rights regimes. For example, international rights regimes might empower national governments to “lock in” certain levels of rights protection—allowing national leaders to consolidate gains in liberalization and democratization. *See* Andrew Moravcsik, *The Origin of Human Rights Regimes*, 54 INT’L ORG. (2000). As the discussion in the text suggests, these goals can be pursued within the context of a regional regime—or a regime organized around some other salient state characteristic. Indeed, Moravcsik’s important study documents how some national governments utilized the European human rights regime for this purpose. *See id.*

¹³¹ U.N. monitoring bodies have had difficulty acquiring this type of information. *See, e.g.,* Michael Banton, United Nations Background Paper, *The Causes of, and Remedies for, Racial Discrimination*, U.N. Doc. E/CN.4/1999/WG.1/BP.6 (Feb. 26, 1999) (member of the treaty body for the Racism Convention,

only the decision whether to adopt a restrictive rule, it also informs the administration of such a rule.

B. Persuasion

The persuasion mechanism suggests a moderate level of importance for this particular design question. Properly considered, persuasion—like coercion—can and does occur outside international organizations.¹³² Treaty regimes do accord, however, some structural opportunities for persuasion. Moreover, international human rights regimes help liberal states coordinate their efforts at persuasive diplomacy. Typically, those who emphasize the value of persuasion also suggest membership should be inclusive.¹³³ Broad treaty membership, on this view, would lower transaction costs and facilitate opportunities for collective deliberation and dialogue. The primary advantage of unrestricted membership is that it enmeshes illiberal states in regularized communicative processes.¹³⁴ In addition, the interdisciplinary “communicative action” literature suggests that open debate and constructive dialogue would push states toward a progressive realization of human rights.¹³⁵ Under this approach, restrictive membership rules risk de-institutionalization by foregrounding disagreements without providing a constructive institutional setting in which these disagreements could be debated.¹³⁶ In fact, restrictive rules are often perceived as crude punitive measures. Chayes and Chayes, for example, classify restrictive membership rules exclusively within the rubric of “sanctions.”¹³⁷ Similarly, Rodger Payne contends that measures implying “participant rank” introduce a wholly undesirable “warping factor” into persuasive settings.¹³⁸ The argument for inclusiveness in this literature, however, is often based on the theory that broad-based membership will exert stronger and more authoritative “community pressure” on

explaining difficulties in obtaining data from governments on dimensions of racial discrimination) available at <www.unhcr.ch/Huridocda/Huridoca.nsf/0/a0a298536f43dc51802567a5005a1d09?Opendocument> (last visited July 20, 2003).

¹³² Some commentators may overestimate the importance of treaty regimes for pro-social persuasion. See Downs, Danish & Barsoom, *supra* note __, at 496-97 (criticizing scholars for trumpeting processes of persuasion within international organizations without considering alternative opportunities for persuasion in the wider regime); *but cf.* Keck and Sikkink, *supra* note __ (describing transnational processes of persuasion including but not limited to formal organizations); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002) (analyzing importance of networks outside formal organizations and treaties); Koh, *supra* note __ (describing multiple forums and processes apart from international organizations).

¹³³ See Downs, Danish & Barsoom, *supra* note __, at 477-78 (describing the literature); see also Chayes & Chayes, *supra* note __, at 68; PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 175 (1992).

¹³⁴ Of course the nature of the forum would accordingly need to foster these types of interactions.

¹³⁵ Thomas Risse, “*Let’s Argue!*”: *Communicative Action in World Politics*, 54 INT’L ORG. 1 (2000); *cf.* Reus-Smit, *supra* note __, at 526.

¹³⁶ Chayes & Chayes, *supra* note __, at 69 (“[D]isputes about membership necessarily imposed costs in terms of regime performance.”); *id.* at 85 (“The very effort to impose sanctions [through membership status], even when it is successful, turns into a major issue, disrupts the work of the organization and generates dissatisfaction and resentment among supporters as well as opponents of the action.”). *Cf.* Rodger A. Payne, *Persuasion, Frames and Norm Construction*, 7 EUR. J. OF INT’L RELATIONS 37 (2001) (borrowing from Habermas in discussing noxious effects of using coercive tools with ongoing processes of persuasion).

¹³⁷ Chayes & Chayes, *supra* note __, at 68-87.

¹³⁸ Payne, *supra* note __, at 47.

recalcitrant states.¹³⁹ Such a proposition, however, describes (within the four corners of our model) the mechanism of acculturation, which involves a different set of assumptions and implications.

On the other hand, the mechanics of persuasion mechanism suggest some non-trivial advantages of restricted membership. For example, exclusion of illiberal states from human rights regimes can promote “issue salience” for domestic audiences. This increased salience empowers human rights advocacy networks to shape the local political agenda by alerting others to these issues and exposing inconsistencies in current priorities.¹⁴⁰ The important point is that “negative” events—such as exclusion or expulsion from a human rights regime—can inspire social movement mobilization.¹⁴¹

If a restrictive approach were adopted, the mechanics of persuasion would also suggest how best to make membership determinations. The process initiated by such a membership regime would, on this view, provide multiple opportunities for “framing” human rights issues. For example, membership criteria (and the negotiations triggered by them) might target issue areas that might not have received adequate attention on the international stage (such as indigenous rights, or the legality of extraterritorial human rights violations). The important comparative point is that this “negotiating” process—understood by the coercion approach as transaction costs—is, in the persuasion approach, an advantage in that it provides structural opportunities for productive exchange and “teaching.”

C. Acculturation

Unlike the other two approaches, the acculturation mechanism suggests that membership rules are of high importance. On this view, broad membership would amplify social pressure. Broad membership would also help substantiate the claim that the principled commitments of the regime are, indeed, universal. Moreover, one of the principal empirical insights of acculturation studies is that the degree to which states are embedded in international organizations is strongly associated with the state’s conformity to global models of appropriate behavior.¹⁴² Participation in international institutions thus plays a significant role in promoting standardized, pro-social models.¹⁴³ Importantly, institutions with broad membership advance the social processes by which states adopt

¹³⁹ See, e.g., Birnie & Boyle, *supra* note __, at 175 (“These are institutions in which community pressure is arguably at its strongest because of their broadly drawn membership”).

¹⁴⁰ KECK & SIKKINK, *supra* note __, at 24-27.

¹⁴¹ William A. Gamson & David S. Meyer, *Framing Political Opportunity*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 275 (Doug McAdam, et al., eds. 1996). For example, the denial of Turkey’s admission to the European Union might assist domestic human rights movements in promoting long-term reforms.

¹⁴² John W. Meyer, et al., *World Society and the Nation-State*, *supra* note __, at 144 (1997); Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism*, 50 INT’L ORG. 325 (1996); see also *supra* text accompanying notes __-__.

¹⁴³ Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699 (1999); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996).

norms identified with being a “modern state.”¹⁴⁴ Accordingly, the mechanism of acculturation—unlike coercion and persuasion—operates much more effectively, and sometimes necessarily, through international organizations.

Several additional reasons for inclusive membership under this approach bear mentioning. First, inclusive membership encourages illiberal states to define and justify their resistance to global norms in terms of the treaty. To guard against retrenchment, for example, disputes over rights protection should occur within the terms of global models of legitimate state objectives. In practice, human rights treaties often contain provisions that delineate acceptable governmental restrictions on particular rights, such as derogation and limitation clauses. The inclusion of illiberal states within these frameworks should facilitate the institutionalization of globally legitimated restrictions. Exclusion, on the other hand, may encourage parochial or idiosyncratic modes of resistance to human rights norms. The important point is that these “escape clauses” encourage state participation in human rights regimes and increase the acceptability of various institutionalized forms of state reporting and third-party evaluation. Moreover, states can—through the use of these devices—meaningfully participate in the treaty regime because many state interests (even if idiosyncratic or highly controversial) can be expressed *within the terms of the treaty*.¹⁴⁵

Second, the logic of acculturation, in contrast with the other approaches,¹⁴⁶ highlights the importance of discouraging certain relationships that can arise between organizational insiders and outsiders. As a model of culture, the acculturation approach predicts the institutionalization of deviance within subcultures that can form outside dominant modes of legitimated behavior. Indeed, acculturation studies explain variation between states by showing that adherence to dominant norms is associated with levels of participation in international institutions and organizations.¹⁴⁷ For example, these studies suggest that states with fewer connections to international bodies (e.g., Burma and North Korea) will be more likely to adopt aberrant official policies and forms of governance. Furthermore, the forces of social pressure and orthodoxy that occur within global institutions can also occur within smaller communities—e.g., Asia-Pacific states with low participation in international human rights forums—thus propelling local standards partly defined in contradistinction to dominant conventions.

¹⁴⁴ See, e.g., Martha Finnemore, *Institutional Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT’L ORG. 565 (1993).

¹⁴⁵ This suggests an important, and potentially problematic, difference between the mechanics of acculturation and persuasion. The acculturation approach is agnostic about the “truth-finding” capacities of social interaction. Under the persuasion approach, on the other hand, “communicative action” theory suggests (either expressly or impliedly) that greater rights protections will emerge from well-structured discourse among states. Downs, Danish & Barsoom, *supra* note __, at 474 (explaining that this area of scholarship appears to consider a set of prescribed processes “relentlessly progressive”). The acculturation model, instead, emphasizes cultural and associational factors that shape the definition and transmission of socially-accepted behavior.

¹⁴⁶ Recall that under the coercion and persuasion approaches, gains to insiders are largely absolute and localized; they do not impose costs on outsiders. The only question we raised in that respect involved the denial of organizational benefits to outsiders. The organizational benefits to insiders do not affect the relationships between insiders and outsiders or the nature of outsiders’ attitude or behavior due to their exclusion.

¹⁴⁷ See *supra* text accompanying notes __-__.

Finally, an acculturation approach evaluates “defections” by states inside the organization differently than the other approaches. First, an acculturation approach predicts certain patterns of defection not envisioned by the others, and it thus evaluates the cost of defection on regime maintenance very differently. The coercion approach, for example, raises the concern that including states with lower commitments to regime objectives will prove unworkable due to frequent defection within the forum.¹⁴⁸ The persuasion approach predicts few meaningful defections will occur and considers defection in exclusively unfavorable terms.¹⁴⁹ An acculturation approach, in contrast, predicts that defections will occur and may be somewhat salutary. Specifically, it predicts that pressure to conform will produce a particular form of defection: structural adherence to globally institutionalized models that do not correspond with actual state practices on the ground. As we have argued elsewhere,¹⁵⁰ this disconnect between local circumstances and universal models is not an impediment to the diffusion of global norms, as other theories would suggest. Rather, the diffusion of global models and the resultant convergence of policies and organizational structure are, in important respects, made possible by this form of decoupling. The important point here is that the acculturation mechanism predicts a peculiar form of defection and that this form of defection assists the diffusion of norms.

The mechanics of acculturation also suggest potential advantages to a restrictive rule. First, membership itself can serve as a device for affirmation or censure. That is, inclusion can provide a form of back-patting, while exclusion can shame and shun. In a related context, Anne-Marie Slaughter has advocated calibrating the application of doctrines of judicial deference according to different forms of government. She proposed that national courts exercise jurisdiction over the acts of liberal foreign states but abstain from reviewing the acts of illiberal foreign states.¹⁵¹ Slaughter contends that the result of shielding illiberal states from judicial scrutiny entails “salving their sovereign sensitivities, but at the price of ... moral ostracism from the liberal community.”¹⁵² Indeed, her proposal is designed to confer a “badge of alienage” on illiberal states and a “badge of legitimacy” on liberal states.¹⁵³ While substantial empirical evidence now suggests these categories are socially meaningful,¹⁵⁴ Slaughter does not consider countervailing effects within the terms of the same social logic. That is, the same body of empirical work provides strong reasons for bringing recalcitrant states into the fold. Specifically, as discussed above, processes of assimilation suggest illiberal states will begin to imitate the group in which they are included. On this view, “identification” with other members—not banishment from the group—is perhaps more likely to propel the legal and political systems of illiberal states toward conformity with prevailing norms.¹⁵⁵

¹⁴⁸ Downs, Rocke & Barsoom, *supra* note __, at 398-99.

¹⁴⁹ See Raustiala & Slaughter, *supra* note __, at 543; cf. George Downs, David Rocke, & Peter Barsoom, *supra* note __, at 379 (criticizing this prediction of noncompliance).

¹⁵⁰ See Goodman & Jinks, *Toward an Institutional Theory of Sovereignty*, *supra* note __, at 1761.

¹⁵¹ See Anne-Marie Burley [Slaughter], *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

¹⁵² *Id.* at 1991.

¹⁵³ *Id.* at 1990-92.

¹⁵⁴ See *supra* text accompanying notes __-__.

¹⁵⁵ Notably, Slaughter’s more recent work largely abandons this earlier model. Slaughter’s influential work on transgovernmental networks, for example, does not sharply distinguish between liberal and illiberal states.

Second, the acculturation approach suggests that restrictive membership might foster greater affinity among insiders—thus accelerating processes of norm diffusion within the group. The social meaning of exclusivity—created by the restriction itself—should intensify forms of identification. And, if the substantive criteria for membership include human rights performance, identification is likely to develop along the axis of that defining feature. However, such dynamics improve the situation only for states willing and able to join the organization. Although we discussed a similar difficulty with the coercion approach (that gains only accrue to insiders),¹⁵⁶ this result is especially problematic in the context of acculturation. Widening disparities between insiders and outsiders might culminate in standards that are unrealistically high for illiberal states; thus the probability that these states will “identify” with insiders is diminished substantially.

Finally, substantial evidence from social psychology suggests that small groups often facilitate processes of acculturation. Note initially that this effect is often described as “persuasion” in the literature, but the mechanics of this social process mirror what we call “acculturation.”¹⁵⁷ In discussing international institutions, for example, Iain Johnston notes that “ideal persuasion is likely to be the most prevalent and powerful socialization process when membership is small (social liking and in-group identity effects on the persuasiveness of counter-attitudinal messages are strongest).”¹⁵⁸ Notwithstanding the persuasion label, this view clearly suggests that small group size promotes “acculturation” because small groups are more likely to foster intimate, high-affect exchanges. Regimes with restricted membership, on this theory, should facilitate convergence of practices.¹⁵⁹ The degree to which this insight is applicable to human rights treaty regimes, however, is questionable. The identified advantages issue only from the size of the group. As such, this literature is non-specific in that it offers no guidance on any other defining characteristic of membership regimes. For example, the “small group” effect does not necessarily support the view that regime members should be selected on the basis of human rights performance—and were it otherwise, acculturation would prove most effective where it is needed least (with high performance states). In addition, persuasive encounters—such as bilateral or trilateral diplomatic exchanges—may occur in “small group settings” irrespective of the size of the treaty regime writ large. Notably, the potential benefits of small group size have largely escaped scholarly consideration due to analytic slippage and a failure to isolate causal mechanisms.

Also, as we note above, Slaughter’s project on transgovernmentalism relies centrally on notions of persuasion. *See supra* note ____.

¹⁵⁶ *See supra* text accompanying notes ____-____.

¹⁵⁷ This is yet another important example of conceptual slippage in the literature along the persuasion/acculturation divide. *See supra* note ____ (describing this conceptual slippage at an abstract level).

¹⁵⁸ Johnston, *supra* note ____, at 509.

¹⁵⁹ Johnston risks the same framing error that we discussed with respect to the coercion paradigm. *See supra* text accompanying notes ____-____. That is, focusing on institutional effectiveness in this manner displaces the wider regime and implications for excluded states. An exclusionary organization may enhance the social environment for insiders. But, especially with respect to human rights, one should weigh the benefits of significantly enhanced effectiveness for member states against lowering the bar and allowing more states to benefit from—overall less effective—participation.

On balance, the features of acculturation support inclusive membership. However, if a restrictive rule were adopted, the principles of acculturation would favor particular criteria in applying the rule. First, the acculturation approach would suggest requiring only a *de minimus* demonstration of human rights performance. Second, qualifying criteria for new entrants might be used to encourage candidate states to establish institutional arrangements that foster subsequent structural opportunities for diffusion of global norms. The acculturation literature suggests particular domestic arrangements can (unintentionally) accelerate diffusion. For example, David John Frank et al. identify “receptor sites”¹⁶⁰—in the case of the environment, scientific institutes—that facilitate the local transmission of global normative models. In our context, a national human rights commission is a close analog. Hence, admission to the intergovernmental organization might be conditioned on (or highly favor) establishing such an institution. In a similar vein, an intergovernmental organization might require or encourage candidate states to establish a human rights ombudsman or a human rights unit in the foreign ministry to interface with the organization. The basic idea is to promote institutional arrangements that, according to this behavioral logic, should produce a multiplier effect in the transmission and diffusion of human rights norms.

¹⁶⁰ David John Frank, Ann Hironaka & Evan Schofer, *The Nation-State and the Natural Environment over the Twentieth Century*, 65 AM. SOC. REV. 96, 96 n. 1 (2000) (“Receptor sites are social structures (e.g., scientific institutes) with the capacity to receive, decode, and transmit signals from the world society to national actors.”); *see also* David John Frank, Ann Hironaka & Evan Schofer, *Environmentalism as a Global Institution*, 65 AM. SOC. REV. 122 (2000).

Table II: Conditional Membership¹⁶¹

	IMPORTANCE	INCLUSIVE	RESTRICTIVE
Coercion	<p>POTENTIALLY LOW OR MEDIUM</p> <p>(no special substantive effect -- can exercise coercion on bilateral basis)</p>	<p>1. Repeat interactions increase information</p> <p>2. Repeat interactions decrease cheating (by fostering future gains and developing reputations for compliance)</p> <p>3. Institutional setting decreases transaction costs in gaining information and making agreements</p> <p>4. Process of reviewing membership involves transaction cost</p> <p>NOTE: A reason for inclusiveness exists if the size of membership increases the amount of rewards and penalties for members¹⁶²</p>	<p>1. Membership rule = information-forcing device revealing willingness and capacity of states to join organization¹⁶³</p> <p>2. Smaller membership involves lower transaction costs in management of organization (but benefits accrue only to liberal states inside the organization)</p>
Persuasion	MEDIUM	<p>1. Promotes opportunities for discussion, argument, debate</p> <p>2. Lowers transaction costs of collective communication and exchange</p> <p>3. Process of applying membership rules undermines deliberative atmosphere</p>	Exclusion increases issue salience (e.g., with domestic audiences)

¹⁶¹ Assumptions include: (1) sufficiently high human rights standards within regime; (2) a principal concern is changing behavior of governments engaged in frequent and severe human rights violations.

¹⁶² Also, issue-linkage within the regime (linking human rights compliance with material rewards or penalties) would provide a stronger reason for a more inclusive rule.

¹⁶³ If issue-linkage includes rewards for mere membership, a stronger reason exists for a restrictive rule.

Acculturation	HIGH	<ol style="list-style-type: none"> 1. Strong social effects on insiders (embeddedness in regimes promotes conformity) 2. Regulates forms of resistance 3. Avoids creating subculture of outsiders 4. Promotes message of universality in norm enunciation 5. Larger membership maximizes social pressure (cumulative effect for back-patting and shaming) <p>RISK: high prevalence of violations among insiders risks institutionalizing undesirable behavior</p>	<ol style="list-style-type: none"> 1. Membership itself is device for conferring legitimacy and ostracism 2. Membership rule strengthens affinity among insiders 3. Process of reviewing membership has institutionalizing benefits
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III. PRECISION OF OBLIGATIONS

Another important choice in human rights regime design concerns the level of precision¹⁶⁴ used to define state obligations. Scholars consider “[p]recision and elaboration ... especially significant hallmarks of legalization at the international level.”¹⁶⁵ The issue of precision has accordingly become a prominent topic in the study of international institutions.¹⁶⁶ Similar to a debate over legal formalism in domestic law,¹⁶⁷

¹⁶⁴ We use a standard definition of precision: “Precision means that rules unambiguously define the conduct they require, authorize, or proscribe.” Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401 (2000); *id.* at 412 (“A precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation.”).

¹⁶⁵ Abbott et al., *supra* note __, at 414.

¹⁶⁶ For example, in 2000, *International Organization*—the leading international relations journal—devoted a special issue to the topic of legalization. The authors of the volume identified “precision” as one of three characteristics for evaluating the concept of legalization across international institutions. Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385 (2000). Issues of “determinacy” figure prominently in Thomas Franck’s influential study of international legal compliance. FRANCK, LEGITIMACY, *supra* note __, at 50-90.

¹⁶⁷ Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

these debates in international law persist without an adequate understanding of the connection between prescriptive claims and empirical assumptions. That is, commentators have argued for—or against—precision without due regard to the manner in which their ostensibly normative claims are tethered to undefended or unexamined empirical propositions.

Consider, for example, the debates about whether treaties or customary international law provide a better vehicle for regulating state practice. As David Kennedy remarks in a more critical voice, “Are international norms best built by custom or treaty? International lawyers have worried about this for at least a century, one or the other mode coming in and out of fashion at various points.”¹⁶⁸ Kennedy suggests these debates repeat themselves across generations of international legal scholars without moving matters forward. One reason for this repetition without progression may be the failure to specify and trace the significance of relevant behavioral logics. For example, according to some commentators, because treaties generally provide a level of specification that is difficult to obtain through custom, treaties are better devices for regulating state behavior.¹⁶⁹ However, without empirical support, that assessment is largely conjecture. We would need to know whether, how, and under what conditions normative and legal precision actually influences state behavior. And we would want to identify gaps in empirical information required to assess the social effects of precision. Whether states are likely under certain conditions to try to obfuscate their human rights obligations, to evaluate obligations deliberatively, or to mimic obligations should inform this debate.

The language used to define obligations in human rights treaties is notoriously vague compared with other legal domains.¹⁷⁰ A common view is that human rights treaties should aspire to greater levels of precision to foster compliance and enforcement.¹⁷¹ Others caution, however, that ambiguity can help build consensus in the treaty drafting

¹⁶⁸ David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335 (2000).

¹⁶⁹ See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1876 (2002) (“Because CIL’s content is uncertain, states can often claim to have complied even when they have ignored the content of CIL. In other words, the commitment to CIL is more easily avoided than the commitment to treaty.”); *id.* at 1877 (“Problems of clarity and a lack of explicit commitment on the part of states make CIL weaker than treaties.”); *id.* at 1873 & 1876-77; OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 66 (1991) (“It is easy to see the advantages of that process. ... In place of the uncertain and slow process of custom, ... [t]he text brings clarity and precision where there had been obscurity and doubt.”); *id.* at 71 (theorizing a “bureaucratic factor” that encourages the application of treaties because “[t]he law is declared in a concise and definitive form that is highly convenient for lawyers and officials.”).

¹⁷⁰ Louise Doswald-Beck & Sylvian Vité, *International Humanitarian Law and Human Rights Law*, 293 INT’L REV. OF THE RED CROSS 94 (1993) (“[T]he major difficulty of applying human rights law as enunciated in the treaties is the very general nature of the treaty language.”).

¹⁷¹ See, e.g., Bruno Simma, *A Hard Look at Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 371, 378 (1988) (“What I have just said will be feasible, however, only if and to the degree that human rights treaty provisions are actually susceptible to violations in the sense that infringements of treaty provisions can be determined clearly. ... Indeed, international human rights treaties are not notorious for the precision of their wording; they contain many vague and ambiguous provisions ... It will not be easy to localize clear-cut violations of such provisions”).

process.¹⁷² The issue of precision should thus be evaluated along two dimensions: *ex post* effects on compliance and *ex ante* effects on legislative processes. The following discussion analyzes the issue along those lines.

A. Coercion

Precision offers a number of advantages according to the coercion approach. A general assumption of the approach is that states act to maximize their own material well-being. Precision is therefore a valuable device for constraining “self-serving auto-interpretation”¹⁷³—thereby discouraging free-riding and clearly defining what counts as cooperative moves. The precise delineation of proscribed behavior can also help maximize reputational effects of compliance and non-compliance. That is, the reputational costs of human rights violations (which may in turn translate into material costs) are made more certain by reducing potential interpretive disputes over whether a state has fulfilled its obligations.¹⁷⁴ Reputational effects can be particularly important in a human rights regime: the coercion approach assumes little else but procuring benefits or avoiding penalties will constrain behavior. Moreover, if “reputational effects of a violation can be generalized to all agreements subject to international law”¹⁷⁵—that is, if violations of a human rights treaty can damage a state’s overall reputation as a treaty partner—then human rights regimes can piggyback on issue areas in which states value their reputations more highly.¹⁷⁶ Finally, because precision raises the costs of defection, it enhances the ability of regime participants to gauge the credibility of commitments—the act of ratifying a treaty with high levels of precision signals a willingness and capacity to make the grade.¹⁷⁷

Under the coercion approach, the most important cost of precision is its *ex ante* effects on treaty negotiations. Commentators suggest that ambiguity facilitates agreement in drafting stages. Indeed, Abbott and Snidal, contend that ambiguity can be “a major

¹⁷² Chayes & Chayes, *supra* note __, at 11; FRANCK, LEGITIMACY, *supra* note __, at 52-53; Abbot & Snidal, *supra* note __, at 434, 444-45.

¹⁷³ Abbot & Snidal, *supra* note __, at 427.

¹⁷⁴ Guzman, *supra* note __, at 1863 (“The clarity of both the international obligation and its violation are important because a failure to live up to an international obligation triggers a reputational loss. The reputational consequences are most severe when the obligation is clear and the violation is unambiguous. As the uncertainty of an obligation increases, the reputational cost from a violation decreases.”).

¹⁷⁵ Abbot & Snidal, *supra* note __, at 427 (“When a commitment is cast as hard law, the reputational effects of a violation can be generalized to all agreements subject to international law, that is, to most international agreements.”); Keohane, *supra* note __, at 106 (“For reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to....[T]hey might often decide, in light of this cost-benefit calculation, to conform to the rules. ”); *but see* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95, 95-96 (2002) (disputing the influence of reputational effects of noncompliance across regimes); Weisburd, *supra* note __ at 104.

¹⁷⁶ *See also* Guzman, *supra* note __ at (discussing impact of reputational loss on capacity to extract concessions in negotiating future agreements).

¹⁷⁷ Abbot & Snidal, *supra* note __, at 427.

advantage”¹⁷⁸ in lowering contracting costs and that, in some circumstances, insisting on precision “may prevent agreement altogether.”¹⁷⁹ The important point is that states will find it easier to build consensus at a higher level of abstraction.

B. Persuasion

The persuasion approach generally favors greater precision in the definition of legal obligations. It is important to note that commentators relying on this mechanism often acknowledge that imprecision may be necessary in the drafting and ratification processes. Nevertheless, these commentators argue that regime participants should endeavor to “concretize” treaty terms over time on the view that specificity facilitates persuasive interactions and norm internalization.¹⁸⁰ These calls for evolutionary precision are typically tethered to recommendations concerning how best to design dispute resolution mechanisms—and, at times, are directed not to treaty makers but to actors and institutions created by the treaty (such as the independent experts serving on so-called treaty bodies). Because these proposals are so closely tethered to implementation strategies, we analyze them more fully in our discussion of enforcement in Part IV.

The important point for now is that persuasion-centered approaches emphasize the value of precision. For example, Chayes and Chayes argue that much non-compliance is caused by imprecision in the framing of obligations: “[A]mbiguity and indeterminacy of treaty language,” they contend, “lie at the root of much of the behavior that may seem to violate treaty requirements.”¹⁸¹ Under the persuasion approach, rules are most useful if they sharply reduce uncertainty about the content of obligations. In general, precise rules help clarify points of agreement and disagreement—facilitating targeted debates in which agreement on clearly-defined obligations provides a normative framework within which the parties might move toward agreement. Recall that the touchstone of this approach is that states internalize human rights norms following an active assessment of the claims made on behalf of these norms. On this view, it is the *content* of the rule that is assessed and, ideally, internalized. In this sense, the precision of legal obligations is central to the project of persuasion. As a comparison, the acculturation approach tolerates greater disparity between rule-acceptance and actual practice; under certain conditions states will accede to obligations in order to avoid social ostracism or to conform to orthodoxy—the obligation does not require precision to be accepted and (under some conditions) to be applied.

More specifically, framing strategies analogize controversial practices to one or more clearly prohibited practice. In this sense, reasoning by analogy carries persuasive force only if the “frame” itself is well-defined. Similarly, the strategy of “cueing actors to think

¹⁷⁸ Abbot & Snidal, *supra* note __, at 434; *see also* *id.* at 436 (“In general, we hypothesize that softer forms of legalization will be more attractive to states as contracting costs increase.”); *id.* at 444-45.

¹⁷⁹ *Id.*

¹⁸⁰ *Cf.* Abbot & Snidal, *supra* note __, at 445 (“Over time, if the soft arrangements are successful and without adverse consequences, the initially reluctant states may accept harder legalization.”).

¹⁸¹ Chayes & Chayes, *supra* note __, at 10; *id.* at 126-27; *cf.* Raustiala, *supra* note __, at 78 (“Managerialism...argues that the primary drivers of non-compliance are actually rule ambiguity and, especially, lack of domestic regulatory capacity.”).

harder” about controversial practices relies upon the precision of some underlying obligations. Recall that this tactic works because the persuadee is forced to confront and reconcile inconsistencies in stated positions. This strategy is unlikely to prompt in the persuadee an active reevaluation of controversial practices if inconsistencies are easily resolved because the underlying norms are highly malleable.

We should also say a bit more about the various intra-regime contexts in which persuasive encounters might take place. First, the very exercise of drafting a legal instrument (such as treaties, resolutions, declarations) provides an important opportunity for persuasive encounters. In the course of drafting text, debates over the specific definition of legal obligations are viewed as productive. Many commentators underscore the importance of these occasions as opportunities to enunciate norms: “They [substantive norms] are elaborated and given more concrete and specific form so that parties can more readily adapt their conduct.”¹⁸² In short, as with membership procedures discussed above, a seemingly arduous process—understood in the coercion model as transaction costs—is understood as a benefit in the persuasion model. The process affords valuable opportunities for discourse and exchange.¹⁸³

Second, persuasive encounters occur in the administration of the regime—in the course of applying rules to specific practices. That many structural opportunities for such encounters exist suggests *ex ante* precision is less important than one might otherwise suppose. That is, states could draft imprecise rules and defer the process of specification to subsequent, intra-regime encounters. This deferral typically involves delegation of interpretive authority to a dispute resolution or supervisory body established by the treaty. Abbott and Snidal explain that “[d]elegation is often the best way to deal with incomplete contracting problems,” that is, states can “utilize administrative ... institutions to interpret and extend broad legal principles.”¹⁸⁴ The mechanics of persuasion suggest some non-trivial virtues of deferral. Most importantly, deferral can provide structural opportunities for reflection, application, justification, and argument. “The discursive elaboration and application of treaty norms is the heart of the compliance process.... In the course of debate, the performance required of a party in a particular case is progressively defined and specified.”¹⁸⁵ That is, broad standards can furnish a general template against which “seemingly endless discussion of the scope and meaning of norms” can take place—an important, even if counter-intuitive, benefit.¹⁸⁶ Perhaps most significantly, enmeshing rights-violating states in active interpretation and justification should facilitate the effectiveness of persuasion.¹⁸⁷

¹⁸² Chayes & Chayes, *supra* note __, at 126.

¹⁸³ *Id.* at 123 (“The participants seek, almost in Socratic fashion, to persuade each other of the validity of the successive steps in the dialectic.”).

¹⁸⁴ Abbot & Snidal, *supra* note __, at 433.

¹⁸⁵ Chayes & Chayes, *supra* note __, at 123.

¹⁸⁶ *Id.* at 126 (“The seemingly endless discussion of the scope and meaning of norms in the formal proceedings of the organization enhances their authoritativeness...[and] the content of the substantive norms becomes more transparent.”).

¹⁸⁷ Risse, *supra* note __; Chayes & Chayes, *supra* note __, at 126; *cf.* STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

C. Acculturation

The acculturation model departs significantly from canonical approaches to the “level of precision” problem. International instruments are often “remarkably precise and dense, presumably because proponents believe that these characteristics enhance their normative and political value.”¹⁸⁸ The other two behavioral models exhibit this line of thinking. For those approaches, obtaining precision is generally considered essential to the long term effectiveness of the regime. For these approaches, the major cost associated with precision is that it complicates *ex ante* negotiations—making it more difficult to obtain initial commitments from illiberal (or weakly liberal) states. In short, precision (1) promotes compliance, but it also (2) increases transaction costs. Under the acculturation approach, however, both effects are potentially reversed: imprecision will sometimes help to produce behavioral conformity; and precision might reduce *ex ante* negotiating costs. In other words, strategic imprecision is valuable *ex post* and costly *ex ante*.

We should say more about both of these points. The first—that imprecision promotes behavioral conformity *ex post*—requires an important qualification. Here, it is necessary to distinguish the two types of acculturation discussed earlier: conformity due to cognitive cues and conformity due to social sanctions. Both types of acculturation predict pro-social behavior. That is, behavioral regularities do not issue from the content of the relevant rule or norm, rather they are a function of social structure—the relations between individual actors and some reference group(s). Conformity depends less on the properties of the rule than on the properties of the relationship of the actor to the community. Because the convention is associated in general terms with the identity of the group, rules best foster conformity by “establish[ing] broad hortatory goals with few specific proscribed or prescribed activities.”¹⁸⁹ This effect, so described, suggests that imprecision mobilizes “cognitive pressures” to adopt pro-social behavior (the first type of acculturation). Precision, on the other hand, is more likely to emphasize disagreements—triggering cognitive cues that the would-be reference group is importantly dissimilar from the target actor.¹⁹⁰ There are, nevertheless, good reasons to suspect that precision might facilitate social rewards and sanctions—the second type of acculturation. One problem is that constructivist scholarship on the subject has not carefully distinguished the two types of acculturation (even when acculturation is distinguished from persuasion). Therefore, the value of precision has been obscured.

Thomas Franck’s discussion of “determinacy”¹⁹¹ helps explain the distinction and potential benefits to precision. Franck discusses how precise rules promote compliance—emphasizing the social value of precision. His analysis of precision, however, generally suggests the latter type of acculturation—the distribution of social sanctions. According

¹⁸⁸ Abbott et al., *supra* note ___ at 414; *see also* FRANCK, FAIRNESS IN INTERNATIONAL LAW, *supra* note ___, at 30-31 (“Rules which have a readily assessable meaning and which say what they expect of those who are address are more likely to have a real impact on conduct.”).

¹⁸⁹ Mitchell, *supra* note ___, at 46.

¹⁹⁰ The literature here is substantial. *See, e.g.*, Zucker, *Institutional Theories of Organization*, *supra* note

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¹⁹¹ FRANCK, LEGITIMACY, *supra* note ___, at 52.

to Franck, precision strengthens the perceived fairness (and legitimacy) of a rule because “it is thought fairer to impose rights and duties which can be understood and anticipated by those to whom they are addressed than to impose rights and duties which leave the reader unable to anticipate the vagaries of interpretation.”¹⁹² Target states are accordingly more likely to accept the social sanction as legitimate, and other states are more likely to sponsor sanctions. In addition, Franck suggests that the determinacy of a rule will narrow the range of permissible interpretations, and thus assist in the regulatory effects of social sanctions. He contends that states, in trying to avoid the wrath of the community, will attempt to evade the application of a rule by “‘interpreting’ the rule permissively” and “using clever sophistry.”¹⁹³ Precision limits that possibility.

We agree that precision may strengthen social pressure by enhancing the legitimacy of a sanction. In that respect, an acculturation approach would value precision. Franck, however, undervalues (or fails to consider) the interplay between the two types of acculturation. Effective social sanctions (and rewards) require that target actors value the judgment of some reference group. Indeed, it is the approval of, or status in, this reference group that the target actor seeks. If precision outstrips the institutionalized preferences and expectations of target actors, then it disserves acculturation. As described above, too much precision risks de-institutionalization.¹⁹⁴

Moreover, Franck’s concern over self-serving and evasive interpretations does not fit neatly in the conceptual apparatus of the second type of acculturation. Indeed, cognitive pressures suggest that states may be more inclined to conform their behavior to community expectations—and they are unlikely to sustain, over the long term, an idiosyncratic interpretation of any norm considered central to the international community. The motivation to mimic the reference group is also “self-directed.” Indeed, states will even adopt legitimated practices under conditions of little or no surveillance by the international community.¹⁹⁵ On this view, it is inaccurate to suggest that states embedded in international organizations will invariably engage in “unilateral, self-serving exculpatory interpretations ... of [] rules by interested parties.”¹⁹⁶ Furthermore, Franck’s analysis of this issue emphasizes the “penalties side” of social pressures, rather than social rewards or cognitive impulses to conform. In that respect, precision may be a less valuable tool under conditions in which social sanctions are underutilized, infeasible, or expensive.

¹⁹² FRANCK, FAIRNESS, *supra* note __, at 33.

¹⁹³ FRANCK, FAIRNESS, *supra* note __, at 31 & 33; *see also* FRANCK, LEGITIMACY, *supra* note __, at 79-80.

¹⁹⁴ *See, e.g.*, Zucker, *Institutional Theories of Organization*, *supra* note __.

¹⁹⁵ *See, e.g.*, Martha Finnemore, *Institutional Organizations as Teachers of Norms*, *supra* note __, at 565; David John Frank, Suk-Ying Wong, John W Meyer & Francisco O. Ramirez, *What Counts as History: A Cross-National and Longitudinal Study of University Curricula*, 44 COMP. EDUC. REV. 29 (2000); Aaron Benavot, Yun-Kyung Cha, David Kamens, John W. Meyer & Suk-Ying Wong, *Knowledge for the Masses: World Models and National Curricula, 1920-1986*, 56 AM. SOC. REV. 85, 90-91 (1991).

¹⁹⁶ FRANCK, LEGITIMACY, *supra* note __, at 79.

The acculturation approach also suggests that precision will have less dramatic *ex ante* effects on treaty negotiations—and other efforts at promulgating international legal obligations. Many international legal scholars contend that establishing precise, strong human rights obligations requires the approximation of a “world culture.” The existence of a wide range of cultures, national histories, and material resources is thought to confound efforts to fashion a global consensus. Indeed, some commentators even contend that customary international law is chimerical: “With over 180 nations representing an even larger number of cultures, international society lacks a reservoir of shared values or a common ideology from which to derive and perceive norms. Shared values and perceptions are essential to the formation of customary norms.”¹⁹⁷ As an empirical matter, however, remarkable levels of homogeneity exist across all states (in many issue areas including education policy, science bureaucracies, development agendas, environmental policy). As we have argued elsewhere, the patterns of policy convergence suggest the existence of a global culture (or “global polity”).¹⁹⁸ This global cultural system suggests that some measure of precision is achievable, especially in areas related to globally-shared norms. These convergent tendencies in policy and structure suggest that treaty negotiators (and nongovernmental organizations) can demand greater levels of precision than persistent cross-national variations might suggest possible.

¹⁹⁷ See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 465 (2000).

¹⁹⁸ See Goodman & Jinks, *supra* note __.

Table III: Precision of Obligations

	IMPORTANCE	PRECISION	AMBIGUITY
Coercion	LOW (predicts similar outcome regardless of precision or ambiguity in formal obligation)	<p>1. <i>ex post</i>: clear yardstick – less room to deny or contest violation</p> <p>2. <i>ex post</i>: augments reputational effects</p> <p>3. <i>ex post</i>: creates focal point</p>	<p>1. <i>ex ante</i>: ambiguity facilitates agreement</p>
Persuasion	HIGH	<p>1. <i>ex post</i>: significantly lower degree of compliance if not precise -- not as serviceable (must be sufficiently precise to solve specific problems)</p> <p>2. <i>ex post</i>: higher levels of compliance because agreement is genuine and reflects changed preferences</p> <p>3. <i>ex ante</i>: debate over exact rule is productive</p> <p>4. <i>ex ante</i>: higher levels of agreement because debate changes minds</p>	<p>1. <i>ex post</i>: generates opportunity and need for subsequent discussions</p> <p>2. <i>ex post</i>: specific process of applying rules to practices propels communicative process</p>
Acculturation	HIGH	<p>1. <i>ex ante</i>: predicts broader zone of potential agreement due to social pressures</p> <p>2. <i>ex ante</i>: predicts broader zone of potential agreement due to existence of shared global culture</p>	<p>1. <i>ex post</i>: predict high degree of compliance despite ambiguity (states are proven to follow general, even unstated, global models)</p> <p>2. <i>ex post</i>: important to reach broad consensus for institutionalizing effects</p> <p>3. <i>ex ante</i>: precision risks overemphasizing disagreement = deinstitutionalizing</p>

IV. IMPLEMENTATION: MONITORING AND ENFORCEMENT

The final design issue we examine is how best to monitor and enforce compliance with substantive regime rules. Admittedly, other design choices also bear on questions of compliance and effectiveness. But the devices for monitoring and enforcement probably have the most direct consequences for observance of regime rules. Existing options range from “soft” to “hard” techniques. We discuss the following points along that spectrum:

1. Publishing best practices

examples: International Coordinating Committee for National Human Rights Institutions;¹⁹⁹ U.N. Sub-Commission on the Promotion and Protection of Human Rights;²⁰⁰

2. Monitoring and reporting

examples: Special Mechanisms under the U.N. Commission on Human Rights;²⁰¹ Inter-American Commission of Human Rights;²⁰² periodic state reports to international human rights treaty bodies;²⁰³

3. Criticizing bad actors

examples: Country Resolutions by the U.N. Commission on Human Rights;²⁰⁴ concluding observations by international human rights treaty bodies on state periodic reports;²⁰⁵

¹⁹⁹ The International Coordinating Committee is an umbrella organization representing national-level human rights institutions (e.g., commissions and ombudsmen). The Committee has developed, along with the High Commissioner for Human Rights, a guide of best practices for national human rights institutions. <www.nhri.net/pdf/ICCProcedureEng2002.pdf> (last visited September 23, 2003).

²⁰⁰ The Sub-Commission on the Promotion and Protection of Human Rights is the main subsidiary body of the U.N. Commission on Human Rights. The Sub-Commission is comprised of 26 independent experts who meet annually to undertake studies and make recommendations on thematic issue areas. The Sub-Commission has assisted in the development of best practices related to prevention of trafficking in women, conscientious objection to military service, and human rights standards for corporations. <www.unhchr.ch/html/menu2/2/sc.htm> (last visited September 23, 2003).

²⁰¹ The Commission on Human Rights appoints independent individuals (special rapporteurs) or a group of individuals (a working group) to address specific country situations (e.g., Burma/Myanmar) or thematic issues (e.g., torture). They examine, monitor, advise, and publicly report on human rights situations in specific states and on types of human rights violations across different states. <www.unhchr.ch/html/menu2/2/mechanisms.htm> (last visited September 23, 2003).

²⁰² The Inter-American Commission on Human Rights is a permanent organ of the Organization of American States. The mandate of the Commission includes conducting on-site visits to investigate specific situations and publishing special reports regarding human rights conditions in a particular state. <www.cidh.oas.org/what.htm> (last visited September 23, 2003).

²⁰³ The six principal human rights treaties each require state parties to submit a period report to a supervisory organ, called a “treaty body,” which reviews the state’s compliance with the treaty obligations. *See, e.g.,* International Covenant on Civil and Political Rights, *supra* note __, at art. 40 (“The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.”).

²⁰⁴ *See supra* note __ (describing Commission on Human Rights). The Commission on Human Rights is empowered to adopt resolutions criticizing a UN member state in “situations which reveal a consistent pattern of violations of human rights.” S.C. Res. 1235, U.N. ESCOR, 42nd Sess., Supp. No. 1, 1479th plen. mtg. at 17, U.N. Doc E/4393 (1967).

²⁰⁵ The concluding observations of a treaty body provide a collective assessment of a state’s periodic report. Concluding observations commonly include a declaration of factors impeding the application of the

4. Binding decisions and material sanctions

examples: European Court of Human Rights;²⁰⁶ International Criminal Court²⁰⁷

Scholars also offer variations on existing structures. Laurence Helfer and Anne-Marie Slaughter, for example, propose institutional changes to make treaty bodies appear and act more like courts.²⁰⁸ Harold Koh emphasizes the importance of increasing transnational adjudication.²⁰⁹ Jack Goldsmith and Stephen Krasner stress that economic and military force would best promote human rights,²¹⁰ and they question whether new institutions (the International Criminal Court) and new doctrines (humanitarian intervention) support or undermine the maximum use of that power.²¹¹ Notably, these projects share the sense that the options we list above reflect a continuum of effectiveness. Compliance is best induced by the exercise of coercive authority—such as military intervention or the binding decision of third-party monitoring institutions. This view, we maintain, is called into question by the acculturation approach. Indeed, we posit that, under certain conditions, “soft law” mechanisms will be more effective in establishing durable norms.

It is important to isolate the three mechanisms of social influence in examining this set of design issues. One might mistakenly suppose that exploiting a range of tactics—without having to delve into finer details of mechanisms and behavioral logics—is a pragmatically sound approach. However, this response is riddled with problems. First, and perhaps most obviously, effective regime design often requires setting priorities and making tough choices with limited resources. Accordingly, enforcement decisions should be based on a comparison of the expected efficiency—the probability for achieving behavioral change—of each option.²¹² Second, the features of the three mechanisms reveal potential incompatibilities between strategies. For example, as we discuss below, some forms of coercion would undercut strategies for fostering acculturation; that is, coercive tactics can have a de-institutionalizing effect. Some of these conflicts can be managed, while others are more fundamental. Third, the central practical concerns of specific strategic options vary by social logic. For example, the persuasion approach is

treaty and criticism of specific practices. <<http://web.amnesty.org/pages/treaty-periodic-reports-eng>> (last visited September 23, 2003).

²⁰⁶ Judgments of the European Court of Human Rights are binding. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe, which verifies whether the state has taken adequate remedial measures to comply with the Court’s decision. <www.echr.coe.int> (last visited September 23, 2003).

²⁰⁷ Rome Statute of the International Criminal Court, art. 77, July 17, 1998, UN Doc. A/CONF. 183/9, 37 I.L.M. 999.

²⁰⁸ Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication*, *supra* note ____.

²⁰⁹ See Koh, *supra* note ____, at 2599; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

²¹⁰ Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 979 (2000); Krasner, *Sovereignty, Regimes, and Human Rights*, *supra* note ____.

²¹¹ Goldsmith & Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (Winter 2003); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

²¹² Studying mechanisms of social influence may also help assess the likelihood that states will resort to one strategy or another. For example, Chayes and Chayes reject several coercive strategies not because the respective approach would be ineffective if deployed, but because they conclude that the prospects of states using it are dim. See Chayes & Chayes, *supra* note ____, at 63-65.

most concerned about “over-legalization” by third-party monitoring institutions.²¹³ Other concerns that vary by behavioral logic include the informational politics employed by various strategies—including the type and timing of disclosures.²¹⁴ In short, sensible regime design must carefully consider the three social mechanisms when fashioning implementation strategies.²¹⁵

A. Coercion

Under the coercion approach, traditional notions of power—military and economic—provide the principal machinery for changing state practices. Treaty regimes discourage undesirable behavior by increasing its costs (or, alternatively, encourage desirable behavior by rewarding its practice). On this view, the best prospects for orchestrating change include establishing “agreements with teeth” (e.g., the International Criminal Court, the U.N. Security Council) and arrangements that link human rights performance to financial and military interests (e.g., conditional U.S. security assistance; good governance requirements for World Bank loans).

The coercion approach does not highly value strategies such as publishing best practices or monitoring and reporting human rights abuses—except insofar as these strategies are integrated into some coercive apparatus. Publishing “best practices,” for example, might serve to establish a focal point, around which coercive measures can be organized—in other words, these focal points might help regime participants identify good and bad actors. However, utilizing “best practices” in this manner probably contradicts the informal character of their promulgation²¹⁶ and ignores the fact that they represent a prospective ideal.²¹⁷ Indeed, tying “best practices” to coercive strategies would frustrate the relaxed political process through which such standards are generally drafted, endorsed, and promoted. Monitoring and reporting are also valuable—if connected to coercive tools. They might generate information according to which rewards and penalties could be directed. Linking information about state practices to coercive

²¹³ See Laurence R. Helfer, *Overlegalizing Human Rights*, 102 COLUM. L. REV. 1832 (2002).

²¹⁴ Cf. Mitchell, *supra* note __ (describing different type and timeliness of information required by various nonproliferation strategies).

²¹⁵ Understanding the potential of different logics can also help identify important, incidental social effects of a design choice. For example, coercive devices—such as binding decisions by supranational institutions—may most effectively produce social change through their non-coercive effects (such as helping to frame issues). Evaluating their utility should thus take into account predicted outcomes—not simply express objectives such as deterrence and raising costs of proscribed behavior. This lens reveals how NGO strategies that may appear naïve—such as constructing tribunals to deter tyrants or advocating that regime principles apply equally to powerful liberal states—could reflect more sophisticated understandings of symbolic politics than critics give them credit. See Goldsmith & Krasner, *supra* note __ (criticizing the political platforms of human rights NGOs with respect to constructing international criminal tribunals); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 99-101 (2003).

²¹⁶ The Office of the High Commissioner for Human Rights has sometimes assumed responsibility for compiling and publishing best practices in the human rights field. The Office of the U.N. Secretary-General has undertaken similar initiatives, as well as the Sub-Commission on the Protection and Promotion of Human Rights. Each of these bodies is notably comprised of U.N. administrative officials or independent experts, not states. These institutions accordingly lend themselves to informal, less politicized processes.

²¹⁷ Cf. Christopher McCrudden, *Human Rights Codes For Transnational Corporations: The Sullivan and MacBride Principles*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 418 (Dinah Shelton ed., 2000).

tactics, however, can also force information underground. Indeed, coercive strategies might provide states with incentives to conceal the very types of information most useful to the persuasion or acculturation approach.

The coercion approach also considers “official” criticism to be largely unimportant. As a direct coercive technique, criticism constitutes a nominal sanction. It is, indeed, difficult to conceive of its net benefit once transaction costs are taken into account. Nevertheless, depending on the nature of the institutions responsible for levying criticism, the practice may help to delineate proscribed behavior. For example, Abbott and Snidal explain that states may promulgate relatively general directives due to *ex ante* contracting costs, and thus designate institutions to elaborate more specific rules.²¹⁸ The creation of a formal body to criticize state performance—and thereby apply legal obligations to practice—can serve this process of elaboration. Additionally, depending on the composition of the institution, graduated criticism might convey useful information to a targeted state in order for it to reorient its practices. Specifically, graduated criticism might signal the existence of a political commitment to employ coercive power.²¹⁹ Of course, this kind of purpose suggests that official criticism be used judiciously—to maintain the credibility of threats over time. The important point is that this understanding of official criticism is inconsistent with tactics of persuasion and acculturation, which rely on more liberal or sweeping use of criticism (e.g., to bring attention to events or to facilitate the process of institutionalizing norms).

B. Persuasion

Under the persuasion approach, so-called “managerialism”²²⁰ is the central medium for promoting regime objectives. Generally, human rights regimes can encourage desirable behavior in two ways: (1) by systematically engaging governments in discussion about controversial practices; and (2) by fostering structural opportunities for transnational networks to engage governments (or relevant domestic audiences). On this view, states can be convinced to embrace regime norms (1) through organizational arrangements that facilitate meaningful communicative exchanges among stakeholders (e.g., the International Labor Organization²²¹); and (2) through the exercise of “good offices” by high-level officials (e.g., the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe²²²).

²¹⁸ See Abbott & Snidal, *supra* note __, at 433-34.

²¹⁹ As an illustration, the U.N. Security Council has adopted a routine of using deliberately graduated language in a series of resolutions, before activating its more powerful enforcement authority.

²²⁰ Raustiala & Slaughter, *supra* note __, at 542 (“The theory was ‘managerial’ in that it rejected sanctions and other ‘hard’ forms of enforcement in favor of collective management of (non)performance.”); *id.* at 542-43.

²²¹ The International Labor Organization is structured on a tripartite system; each country is represented by delegations from government, labor, and business. The members meet regularly to devise policy recommendations, develop standards, and discuss implementation. <<http://www.ilo.org>> (last visited September 21, 2003).

²²² Steven R. Ratner, Does International Law Matter in Preventing Ethnic Conflict?, 32 N.Y.U. J. INT’L L. & POL. 591, 595 (2000) (arguing that the High Commissioner on National Minorities exemplifies “an innovative instrument for persuading relevant domestic decision-makers to comply through a set of distinct strategies. These aspects of the European experience represent a direct challenge to existing theories on

In accordance with this approach, monitoring and reporting can induce change if conducted in a sensitive manner. Some persuasion scholars recommend these strategies as means of generating useful information and cooperative solutions. Chayes and Chayes, for example, discuss the usefulness of alerting states of potential defections so as to direct attention to managing such situations.²²³ Some also discuss the significance of periodic state reports in which they assess actual practices under the terms of the treaty. The open exchange of ideas and experiences assists “the winnowing out of reasonably justifiable or unintended failures to fulfill commitments ... and the identification and isolation of the few cases of egregious and willful violation.”²²⁴ Furthermore, monitoring and reporting can serve an important function in cuing states to think harder about human rights violations—another valuable ingredient in the persuasion process.²²⁵ Accordingly, international organizations could create institutional environments in which new information (e.g., about the type or prevalence of human rights violations) is routinely and systematically linked to broadly established values. In contrast, a second variant of the persuasion scholarship suggests that regimes do not have to emphasize exposing state practices. External surveillance is considered less important because the dominant social influence is based on sincere agreement with the content of the rules.²²⁶ Nevertheless, disclosures that reveal new types and patterns of violations are independently important in that they “change minds” about the significance and prevalence of human rights violations. These views, in turn, help mobilize (and organize) responses at a systemic level. And finally, as we discussed above, some of this scholarship recommends strategies not clearly linked to the persuasion-centered causal account—indeed, they seem to rely on coercion or acculturation processes. For example, some commentators suggest social sanctions will gradually compel states to narrow the gap between position-taking and actual practice.²²⁷

Less clear in the persuasion model are the effectiveness of criticism and sanctions. The literature is ambivalent on these issues. One school of thought maintains that criticism and more severe penalties can compliment efforts at persuasion. Another maintains that these forces are incongruous or contradictory. As for the first perspective, the prospect of forceful measures if persuasive strategies collapse energizes and deepens cooperative endeavors (indeed it may also bring states to the table in the first place).²²⁸ Moreover, some scholarship stresses the importance of persuasion but finds its greatest

compliance with international law.”); *id.* at 695 (“The work of the High Commissioner shows the salience of softer forms of law not merely as pieces of paper, but as tools of persuasion.”).

²²³ See, e.g., Chayes & Chayes, *supra* note __, at 126.

²²⁴ *Id.* at 28.

²²⁵ See *supra* Part IB.

²²⁶ In discussing this regulatory strategy in the nuclear proliferation context, Ronald Mitchell explains: “Monitoring potential proliferants behavior becomes unnecessary since actors serve as ‘their own ubiquitous inspectors.’” Mitchell, *supra* note __, at 45 (quoting EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 248 (1982)).

²²⁷ *Id.* at 123 (“The participants seek . . . to persuade each other . . . Since the party has participated in *each stage of the argument, the pressures to conform to the final judgment are great.*”) (emphasis added); see also *id.* at 119 (“Failure to behave in ways for which one can construct acceptable accounts leads to varying degrees of censure... It is crucial that international relations are conducted in large part through diplomatic conversation—explanation and justification, persuasion and dissuasion, approval and condemnation.”).

²²⁸ Chayes & Chayes, *supra* note __, at 26 & 28.

impact in encouraging transnational political movements and foreign states to leverage concessions from recalcitrant states.²²⁹ In sharp contrast, other scholarship argues that criticism and more severe penalties have a deleterious effect on the communicative atmosphere required for collective deliberation to thrive.²³⁰ Criticism may, therefore, also discourage states from systematically reviewing new types and patterns of human rights violations.²³¹

C. Acculturation

The acculturation approach suggests different techniques for changing state practices. Central to this perspective is that it understands power as productive, cultural, and diffuse—not merely prohibitory, material, and centralized. Treaty regimes can induce desirable behavior through processes that institutionalize models of legitimate state practice; and by linking states and their citizenry to forums that elaborate and apply such standards. On this view, regimes should carry out a number of activities: direct available resources to assist states in reporting on their own human rights practices (e.g., under Article 40 of the International Covenant on Civil and Political Rights); facilitate transnational experts in human rights consultancy (e.g., technical and advisory services of the Office of the High Commissioner for Human Rights); and create local “receptor sites” for transmitting global norms (e.g., establishing and strengthening national human rights commissions).

Compared with the other approaches, the acculturation approach more highly values the publication of best practices. Admittedly, the general approach does not suggest relying heavily on this method. Nevertheless, publishing best practices can contribute to the process of standardization. States may be more willing to adopt such models, at faster rates and more durably, than the other approaches suggest. The emulation of best practices will not require persuading relevant actors. And state policies that “mimic” best practices should also be more durable than policy shifts caused by coercion—the policies should generally persist even when material pressure is no longer applied or available.

Monitoring and reporting can also perform valuable functions in a regime that takes acculturation seriously. However, these devices should be used differently depending on the form of acculturation being harnessed. Here, it is necessary to distinguish again between the two types of acculturation: conformity produced through social rewards and sanctions and conformity produced through cognitive pressures.²³² With respect to the first type, it is vital to expose wrongdoing (and tie that exposure to external praise and

²²⁹ KECK & SIKKINK, *supra* note __, at 12, 16 & 117; see *supra* text accompanying notes __-___. Specifically in terms of framing effects (and thus within the strict terms of the persuasion model), criticism of a state’s behavior can also increase the salience of an issue.

²³⁰ Notably, scholars who derive their models of communicative action from Habermas stress the purity of discourse free of coercive techniques. See, e.g., Payne *supra* note __, at 41.

²³¹ Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT’L L. 26, 44 (1997).

²³² See *supra* text accompanying notes __-__.

criticism). Accordingly, external surveillance and reporting—especially by third-party states and organizations—should be significant parts of the apparatus.²³³

With respect to the second type of acculturation, monitoring and reporting serve different functions. States will formally adopt particular conventions even under conditions of non-surveillance. That is, they will accede to particular norms in the process of identity formation and mimicking globally promulgated models. External monitoring and reporting are thus not necessarily required (a factor in considering where to expend limited resources). Nevertheless, visibility might perform a regulatory function. Indeed, the leading social theorist on discursive practices, Michel Foucault, emphasized the power of visibility in regulating social behavior.²³⁴ A regime that tried to exploit these attributes might stress reporting by a state's own organs, not simply reporting by third parties. Indeed, the very process of identifying, describing, and controlling human rights practices helps the diffusion of the human rights discourse through global and local levels. This general approach, however, would need to be careful not to “institutionalize noncompliance.” As suggested by recent studies of domestic order maintenance,²³⁵ international regimes should be concerned that emphasizing the prevalence of violations might promote disorder and further violations.²³⁶

Under certain conditions, binding third-party decisions and material sanctions may weaken the effectiveness of acculturation. Cognitive dissonance studies suggest that subtle forms of socialization can be undermined by the simultaneous presence of instrumental threats and promises.²³⁷ Actors are more willing to embrace a practice or idea if they consider the decision to comply an act of personal choice (intrinsic motivation), rather than compelled by external force (extrinsic motivation). However, the

²³³ See *supra* text accompanying notes __-__; see also ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* (2002); cf. KECK & SIKKINK, *supra* note __, at 23 (“‘Moral leverage’ involves what some commentators have called the ‘mobilization of shame,’ where the behavior of target actors is held up to the light of international scrutiny....on the assumption that governments value the good opinion of others...”).

²³⁴ Michel Foucault, *Questions on Geography*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, at 63, 72 (Colin Gordon et al. trans., Colin Gordon ed., 1980); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 200 (Alan Sheridan trans., Vintage Books ed. 1979) (1978); James F. Keeley, *Toward a Foucauldian Analysis of International Regimes*, 44 *INT’L ORG.* 83, 92 (1990) (briefly explaining how actors “are defined and become visible as targets of observation and control”). Cf. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 *CAL. L. REV.* 643, 687-89 (2001) (discussing Foucault’s analysis of visibility in constructing norms and inducing behavioral regularity).

²³⁵ GEORGE KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *VA. L. REV.* 349 (1997).

²³⁶ More theoretical work could examine how these concerns might relate to Foucault’s notion of “incitement to discourse”—a social process in which classification and prohibition helps produce the perversions. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION* 17-35 (Robert Hurley trans., Vintage Books ed. 1990) (1978).

²³⁷ See, e.g., Sheena S. Iyengar & Mark R. Lepper, *Rethinking the Value of Choice: A Cultural Perspective on Intrinsic Motivation*, 76 *J. OF PERSONALITY & SOCIAL PSYCHOLOGY* 349 (1999) (reporting cross-cultural variations); Mark R. Lepper, *Social Control Processes and the Internalization of Social Values: An Attributional Perspective*, in *SOCIAL COGNITION AND SOCIAL DEVELOPMENT* 294 (E. T. Higgins et al., eds., 1983).

applicability of this theory to states (either at the macro-level of states or the micro-level of diplomats, elites, domestic publics) is questionable. Additionally, once norms are internalized, more intrusive (and perhaps coercive) measures are legitimated (e.g., the European Court of Human Rights).

Table IV: Mechanisms of Implementation

	PUBLISHING BEST PRACTICES	MONITORING & REPORTING	CRITICIZING BAD ACTORS	BINDING DECISIONS & SANCTIONS
Coercion	Negligible	Effective (in providing information) if tied to coercion	Negligible	Highly effective and essential
Persuasion	Moderately Effective	<p>ONE VIEW: Highly effective – generates issue salience (e.g., change minds regarding gravity of problem)</p> <p>ANOTHER VIEW: Moderately important if already agree on rule</p>	<p>Potentially effective –generating issue salience</p> <p>Potentially counterproductive – deleterious impact on communicative atmosphere</p>	<p>Potentially counterproductive – creates incentive not to reveal information</p> <p>RISK: “overlegalization” (third-party adjudicator exceeds states’ acceptance of obligation)</p>
Acculturation	Effective	<p>Highly effective and important</p> <p>RISK: Emphasizing prevalence risks institutionalizing noncompliance (qua “Broken Windows” research on order maintenance)</p>	<p>Highly effective and important: mobilization of shame</p>	<p>Potentially counterproductive – creates incentive not to reveal information</p> <p>Potentially productive if there are high levels of institutionalization</p> <p>RISK: Can undermine institutionalization (e.g., with cognitive dissonance, coercive force can undermine acceptance)</p> <p>RISK: Coercion administered inequitably (e.g., with double standards or shielding some states) undercuts social influence</p>

CONCLUSION

Regime design choices turn on empirical claims about how states behave and under what conditions their behavior changes. We suggest that a central problem for human rights regimes is how best to socialize “bad actors” to incorporate globally legitimated models of state behavior and how to get “good actors” to do better. Substantial empirical evidence suggests three distinct mechanisms whereby states and institutions might influence the behavior of other states: coercion, persuasion, and acculturation. Several structural impediments preclude full institutionalization of coercion- and persuasion-based regimes in human rights law. Yet, inexplicably these models of behavioral modification predominate in international legal studies. In this Article, we first unpack the components of each mechanism. We then link each of the identified mechanisms of social influence to specific regime design characteristics—identifying several ways in which acculturation might occasion a rethinking of fundamental regime design problems in human rights law. Through a systematic evaluation of three design problems—conditional membership, precision of obligations, and enforcement methods—we identify and elaborate a “third way” to conceive of regime design problems. We maintain that (1) acculturation is a conceptually distinct social process through which state behavior is influenced; and (2) the regime design recommendations issuing from this approach defy conventional wisdom in international human rights scholarship. This exercise not only recommends reexamination of policy debates in human rights law; it also provides a conceptual framework within which the costs and benefits of various design principles might be assessed. Our aim is to improve the understanding of how norms operate in international society with a view to improving the capacity of global and domestic institutions to harness the processes through which human rights cultures are built.

In this Article, our principal objectives have been to analyze the characteristics of each mechanism of social influence and to demonstrate their significance for institutional design. The empirically-grounded conceptual structure offered here will, we hope, assist future research agendas in international legal scholarship—empirical, conceptual, and doctrinal. Toward that end, we offer, in conclusion, some provisional comments about the prospects for developing an integrated model of social mechanisms. That is, having now analyzed the micro-processes that comprise each mechanism, we can look toward a fully integrated approach—one that accounts for all three mechanisms—in fashioning a human rights regime.

Building an effective global human rights regime, in our view, will require an empirically-grounded, integrated model that appreciates the distinct qualities of, and interactions between, the various micro-processes. We identify some general features that such a model should include. First, the model should take seriously the processes of acculturation. Indeed, acculturation has been systematically undervalued (and, at times, misunderstood) in debates about human rights regimes. As discussed above, commentators rarely invoke acculturation; and, when they do, it is often either (1) conflated with persuasion or (2) unexplained. Yet, the acculturation approach is potentially quite useful in the context of human rights law. As we mentioned in the Introduction, there are several reasons to suspect that the other mechanisms will prove ineffective in this arena. States generally lack sufficient interest or political will to sustain

an effective strategy of coercion. Persuasion approaches require “internalization” of the values of the regime—and there is little evidence to suggest that this is a reliable method of socializing bad actors. Indeed, theories of persuasion do not provide a useful way to think about partial or incomplete internalization. In short, we should expect that prevailing approaches—coercion and persuasion—will prove ineffective in the human rights issue area. Furthermore, as the analysis of membership rules demonstrates, acculturation strategies greatly value the social effects generated by intergovernmental organizations. In contrast, both coercion and persuasion operate quite effectively outside formal organizational settings.

Second, an integrated model should account for negative interactions between the three mechanisms. Simply put, deploying one mechanism might undermine the ability to deploy another. For example, overt coercion can interfere with persuasion strategies by polarizing group deliberations. Coercion might also undercut acculturation by suggesting that the target behavior is not self-evidently appropriate—the “deinstitutionalization” effect we described above.²³⁸ Persuasion and acculturation may also countermand one another if the former focuses attention on resolving particular substantive disagreements between states when the latter has reason to stress abstract commonalities. Persuasion and acculturation strategies may also conflict when the former highlights the prevalence of human rights violations as a framing device and the latter casts such violations as anomalous in order to avoid the institutionalization of undesirable behavior.

Third, an integrated model should endeavor to identify the conditions under which the various mechanisms operate successfully. For example, the effectiveness of the mechanisms will likely vary by socio-economic and socio-political conditions of the relevant states. In particular, it is important to assess the structural capacities of states to monitor human rights practices and sanction human rights violations. The likelihood, feasibility, and costs of these measures will often determine which strategy (or strategies) should predominate. Another important variable is the character of the extant structural relations at the global or regional level. For example, we should expect that the effectiveness of various mechanisms will turn on considerations such as: the density of inter-national interactions, the axes along which relevant states share important cultural characteristics (including religion, ethnicity, and language), and the distribution of military and economic power.

Finally, an integrated model should consider various “sequencing” effects. That is, an integrated model might emphasize different mechanisms at different stages of the institutionalization of a norm. For example, there may be reason to coerce states into formal organizations in which they are later subject to measures that rely on persuasion or acculturation. If acculturation can alter state preferences over time, intergovernmental organizations might incorporate more flexible administrative devices such as renegotiation clauses—essentially devices that are attentive to the fact that the preferences of states may be systematically influenced by their very participation in the organization. These insights suggest a human rights regime might also enhance its effectiveness by demanding modest initial commitments and ratcheting up obligations

²³⁸ See *supra* text accompanying notes ____ - ____.

over time. More specifically, strategies could include allowing supervisory organs to expand their authority incrementally and creating opportunities for optional protocols only after the organization has existed for a certain period of time. Under certain conditions, a regime might concentrate on exploiting the effects of acculturation before investing heavily in persuasive techniques to define obligations more precisely. Human rights regimes can also potentially employ coercive techniques most effectively once robust levels of internalization have occurred. This is, in many respects, the evolutionary path of the European Convention on Human Rights.

These reflections on the general contours of an integrated model are, we recognize, provisional. The full elaboration of an integrated model will require further empirical and conceptual work. Nevertheless, we contend that this work should be guided by a few basic points. First, the project of building an effective international human rights regime will be stymied if the micro-processes of social influence are not taken into account. And, second, considerable attention must be given to the force of acculturation. International human rights regimes, at bottom, seek to influence state practice through the elaboration of global models of legitimate state behavior. In our view, this is, in many respects, a social process. Regime design in human rights law must then seek to incorporate what we know about: global culture, the diffusion of practices within and across societies, and the processes of social influence more generally. This Article is, we hope, a step in that direction.