Commitment and Diffusion: How and Why National Constitutions Incorporate International Law

Tom Ginsburg
Svitlana Chernykh
Zachary Elkins

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles
Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
COMMITMENT AND DIFFUSION: HOW AND WHY NATIONAL CONSTITUTIONS INCORPORATE INTERNATIONAL LAW

Tom Ginsburg*
Svitlana Chernykh **
Zachary Elkins ***

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

* Professor of Law and Political Science, University of Illinois, Urbana-Champaign. The authors would like to thank Anne van Aaken, Christoph Engel, Anne Peters, Andreas Zimmermann, and other participants at the Conference on International Law and Economics at the Max Planck Institute in Bonn for helpful comments. Portions of Part III of this article draw on Tom Ginsburg, Locking in Democracy: Constitutions, Commitment and International Law, 38 N.Y.U. J. INT'L L. & POL. 707-59 (2006) and are used by permission. Data is used from the Comparative Constitutions Project at the University of Illinois [netfiles.uiuc.edu/zelkins/constitutions]. The authors thank the Center for the Study of Democratic Governance and the National Science Foundation for support of that project.

** Graduate Student, Department of Political Science, University of Illinois, Urbana-Champaign.

*** Professor of Political Science, University of Illinois, Urbana-Champaign.
I. INTRODUCTION

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

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

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

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

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

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

---

4. For a conceptual review of the diffusion of policy ideas and institutions, see Zachary Elkins
   & Beth Simmons, On Waves, Clusters and Diffusion: A Conceptual Framework, 598 ANNALS AM.
5. Jon Elster, Forces and Mechanisms in the Constitution-Making Process, 45 DUKE L.J. 364,
6. Id. at 366-67.
7. Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225,
II. THE INTERACTION OF DOMESTIC AND INTERNATIONAL LEGAL ORDERS

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

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

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

---


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

11. Id. at 214.

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

13. Grondwet [Gw.] [Constitution] art. 91(3) (Neth.) (providing for approval of treaties that conflict with the constitution by two-thirds vote); id. at art. 94 (statutes in conflict with treaties are inapplicable). For an explanation, see Cassese, supra note 8, at 229 n.30 (discussing several countries' methods of determining treaties' precedence); see also Jackson, supra note 3, at 332-34.
same status to customary international law. In Germany, Italy and Austria, by contrast, customary international law is superior to domestic statutes, but treaties are equal to domestic statutes, with the last-in-time rule determining which is valid. This is the opposite configuration of the Dutch Constitution. To take another example, the Constitution of Russia states that the “[u]niversally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of international agreement shall be applied.” France has yet another configuration, in which treaties have higher status than subsequent legislation, but the French constitution is silent on customary international law. In Switzerland, preemptory norms of jus cogens, but not other rules of customary international law, are superior to the Constitution. Finally, constitutions can require that courts interpret the document in conformity with international human rights law.

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

14. The Constitution does not mention customary international law per se.
be superior. Nevertheless, the doctrine of parliamentary sovereignty survives.

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

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

23. BROWNLIE, supra note 8, at 42-43; see also INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 3 (Thomas D. Franck & Gregory H. Fox eds., 1996).
25. See Trendtex Trading Corp., (1977) Q.B. at 553-54; BROWNLIE, supra note 8, at 43-46 (discussing case law); see also discussion in Waters, supra note 20.
31. Arguably, treaties have slightly higher status in that the Charming Betsy interpretive canon places the burden on Congress to be explicit when overriding treaties. Murray v. Schooner Charming
These examples illustrate the great variety of ways in which states treat international law vis-à-vis domestic obligations. There is no necessary relationship between the treatment of customary international law and treaty law, nor any general convergence among states in terms of the manner in which they treat international obligations.

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


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


One can think of these various dimensions of choice as reflecting a single underlying concept of internationalization. More internationalist constitutions make customary international law directly binding; give both treaties and customary international law superior authority to local legislation, even if adopted later; and specifically incorporate particular human rights treaties. Less internationalist constitutions require customary international law and treaties to be specifically incorporated by national legislation into the local legal order, or give them an inferior po-
sition vis-à-vis legislation and do not incorporate specific treaties. No doubt there are tradeoffs among these various dimensions of internationalization, some of which we discuss below.

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

### FIGURE 2

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

*Universe: Constitutions of independent states since 1789*

<table>
<thead>
<tr>
<th></th>
<th>Pre-1914 (n=36)</th>
<th>1914–1944 (n=33)</th>
<th>Post-1944 (n=296)</th>
<th>TOTAL (n=365)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mentions CIL</td>
<td>28% (10)</td>
<td>18% (6)</td>
<td>23% (67)</td>
<td>23% (83)</td>
</tr>
<tr>
<td>CIL Directly Applicable Treaties are Superior to Legislation</td>
<td>6% (2)</td>
<td>9% (3)</td>
<td>13% (37)</td>
<td>12% (42)</td>
</tr>
<tr>
<td></td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>23% (67)</td>
<td>18% (67)</td>
</tr>
</tbody>
</table>

*Source: Comparative Constitutions Project*

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

\textsuperscript{37} All the human rights treaties coded in our data were written after 1945, which makes it impossible to assess the trends over time for the periods of analysis.
No doubt many of these trends reflect the changing content and scope of international law. Whereas customary international law before World War I chiefly governed classic interstate issues such as diplomatic relations, thereafter the content of customary international law changed to gradually include more direct regulation of human rights issues. Making customary international law directly applicable in national courts made little sense until the content of that law applied to individuals. Furthermore, the number and scope of international agreements also expanded, and international treaties increasingly covered human rights issues.

III. HOW INTERNATIONAL LAW CAN AFFECT THE DOMESTIC LEGAL ORDER

A. Precommitment Theory

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

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

39. See id.
42. See Barry R. Weingast, Constitutions as Governance Structures: The Political Foundations of Secure Markets, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286, 288 (1993); Barry R. Weingast,
dict the incentives he or she will face in the future.\textsuperscript{43} If costs and benefits vary in unpredictable ways, the politician’s promise to behave in the specified way may be less believable.

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

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

\textbf{B. International Law as Precommitment}

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

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

\textsuperscript{44} CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 241 (2001); see also F.A. HAYEK, THE CONSTITUTION OF LIBERTY 179 (1960) (“[T]he reason for constitutions is that all men in the pursuit of immediate aims are apt—or, because of the limitation of their intellect, in fact bound—to violate rules of conduct which they would nevertheless wish to see generally observed. Because of the restricted capacity of our minds, our immediate purposes will always loom large, and we will tend to sacrifice long-term advantages to them.”); HOLMES, supra note 2, at 153; A.C. Pritchard & Todd J. Zywicki, Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation, 77 N.C. L. REV. 409, 447–49 (1999).

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

\textsuperscript{46} See THE FEDERALIST Nos. 48, 49 (James Madison).


\textsuperscript{48} See supra text accompanying notes 34–35.
discussion presenting evidence that constitution drafters incorporate human rights treaties into the domestic constitutional order is consistent with this idea. By saying, for example, that the International Covenant of Civil and Political Rights is directly applicable, the constitution drafters accept an international definition of international human rights, somewhat limiting their freedom of action and committing themselves to suffer costs if the rights are violated.49

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

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

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

49. We do not assert that the potential cost suffered is necessarily high.
51. Ratner, supra note 50, at 2070-72.
52. Technically, a dynamic inconsistency problem.
investor—and costs that will be incurred internationally. Sometimes, however, international commitment can also work to resolve problems for domestic governance. If we relax the conventional modeling assumption of a monadic state, we can see how international agreements can resolve domestic commitment problems.

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

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

C. How International Law Resolves Domestic Commitment Problems

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

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

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


56. Voigt and Salzberger provide one of the few attempts to think through tradeoffs in delegation to international and domestic institutions. Stefan Voigt & Eli M. Salzberger, Choosing Not to Choose: When Politicians Choose to Delegate Powers, 55 KYKLOS 289, 289–310 (2002). In later work,
power in the future may wish to entrench its policies in the form of treaties. Because undoing international agreements is typically costly, a policy that is entrenched internationally may survive the demise of the current political coalition or even regime. This increases the value of the commitment made to one’s supporters at the time of the promise.

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

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

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

1. Generating Information for Domestic Groups

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

---


58. Cf. Pritchard & Zywicki, supra note 44, at 446–51 (discussing the precommitment and agency roles of constitutions).
tions have, under certain circumstances, an incentive to monitor the performance of the state. It is well understood that information produced by international organizations and other states can help third-party states decide how to treat the state in question. But the information can also be useful for domestic constituencies. Voters can learn about the non-performance of their leaders. Domestic interest groups can determine whether politicians are delivering on promises to act on the international plane. This information can reduce or eliminate the agency problem for voters and interest groups, and thus be advantageous to political leaders seeking their support ex ante.

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

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

ing of domestic behavior.\footnote{One can characterize this as a solution whereby principals—the voters and interest groups in a domestic political environment—are able to reduce their agency costs. For more on principal-agent models, see Eric A. Posner, Agency Models in Law and Economics, in CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000) (discussing principal-agent models); Mathew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. ECON. & Org. 243 (1987) (applying principal-agent model to the administrative state); and Pablo T. Spiller & Emerson H. Tiller, Decision Costs and the Strategic Design of Administrative Process and Judicial Review, 26 J. LEGAL STUD. 347, 361-62 (1997) (applying principal-agent model to judicial review).} The key factor is the interaction of the domestic and international levels of governance, which generates different modalities of enforcement than would be possible at either level on its own.

2. International Enforcement

International law can also increase directly the cost of noncompliance with an obligation. In general, obligations are enforced on the international plane in at least four ways.\footnote{Robert Scott & Paul B. Stephan, Self-Enforcing International Agreements and the Limits of Coercion, 2004 Wis. L. REV. 551, 581–82 (2004) [hereinafter Scott & Stephan, Self-Enforcing International Agreements]; see also ROBERT SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN 110–11 (2006).} For some categories of obligation, particularly involving coordination problems, international obligations can be self-enforcing in that neither party has an incentive to deviate.\footnote{See, e.g., Tom Ginsburg & Richard H. McAdams, Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution, 45 WM. & MARY L. REV. 1229, 1324 (2004).} In other situations, parties to an agreement can enforce the agreement directly through retaliation. This mechanism works in repeated play games, iterated over time, as in the paradigmatic prisoners’ dilemma example.\footnote{ROBERT O. KEOHANE, supra, note 60, at 75–78; see ROBERT AXELROD, THE EVOLUTION OF COOPERATION 123 (1984).} Obligations can also be enforced through reputational sanctions enforced by third parties.\footnote{Scott & Stephan, Self-Enforcing International Agreements, supra note 66, at 590–93.} Finally, and relatively rarely, violations can lead to direct financial or material sanctions.\footnote{Id. at 570–71.} For our purposes, the main point is that violations of international obligations are, under some circumstances, accompanied by some cost at the international level.\footnote{Note that we are not asserting or assuming perfect compliance with international obligations, or that all violations of international obligations will lead to costs. So long as there is some positive probability of an international cost, the function of enhancing commitment can be effective.} In turn, this can reduce the incentives for violating the promise and make the promise more effective for domestic groups.

As an illustrative example, consider the minorities regimes that were an important class of treaties in Europe between World War I and World War II.\footnote{See HENKIN, supra note 9, at 63–64; JACOB ROBINSON ET AL., WERE THE MINORITIES TREATIES A FAILURE? 3–4 (1943); Fred L. Morrison, Between a Rock and Hard Place: Sovereignty and International Protection, 80 CHI.-KENT L. REV. 31, 35–38 (2005); John R. Valentine, Toward a Definition of National Minority, 32 DENV. J. INT’L L. & POL’Y 445, 450–51 (2004). See generally L.P. MAIR,
led to the creation of many new states in Eastern Europe. But this created a new set of problems, in that national ethnic groups did not always reside within the borders of the state, nor were any states free of minorities. Certain states, beginning with Poland and Czechoslovakia, concluded treaties with Great Powers promising to protect minority rights within their jurisdictions. In these treaties, the state promised to ensure protection and a certain degree of self-determination for ethnic minorities within its territories. These were important antecedents for the flowering of human rights law after World War II.

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

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


73. MAIR, supra note 72, at v.
74. Id.
76. See generally MAIR, supra note 72.
77. HENKIN, supra note 9, at 169–70.
This promise, in turn, may have helped the politicians establishing the new nations, because it reduced the probability that the minorities would resist the new government. The international promise had domestic ramifications, ultimately reinforcing sovereignty by minimizing internal dissension.

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

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

80. See also Ratner, supra note 50, at 2065–66 (discussing uti possidetis principle in postcolonial Africa along similar lines).
82. DeFeis, supra note 81, at 297–98; Zoltani & Koszorus, supra note 81, at 137.
83. DeFeis, supra note 81, at 298; Zoltani & Koszorus, supra note 81, at 138.
84. Indeed, Austria did bring a complaint to the General Assembly in 1960. DeFeis, supra note 81, at 299–300.
86. See Milner, supra note 61, at 480.
88. Id.
eign markets can count on an international sanction against their own
government should it renege on the agreement, raising the value of the
promise to keep foreign markets open. These examples show that in
some cases, one interest group can entrench policies at the international
level to ensure that the policies survive the fall of the current government
or even regime.

3. Delegation

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

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

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

D. International Law’s Advantages

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

90. See Brewster, supra note 55, at 515.
91. THE ARGENTINE CRISIS AT THE TURN OF THE MILLENNIUM: CAUSES, CONSEQUENCES AND
EXPLANATIONS 4 (Flavia Fiorucci & Marcus Klein eds., 2004).
92. Id.
but there is nothing to prevent future majorities from enacting new legislation. And even independent regulatory commissions can be bribed, intimidated, or captured by determined majorities.

International legal actors, by contrast, are more difficult to control. International organizations and courts are arguably beyond the unilateral control of any single country, even the most powerful. Indeed, this is the source of concern about a “democratic deficit” in international institutions, a concern that is quite strong in the United States.\(^9\)

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

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

---


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


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

\textbf{E. International Law's Disadvantages}

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

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

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

\textsuperscript{98} Id.
\textsuperscript{99} Id. at 49 (noting new political situation and rejecting argument that changed circumstances modifying treaty obligations).
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
circumstances, Koremenos argues that states may prefer international agreements that are short in duration so as to allow renegotiation, particularly when uncertainties abound as to the future distribution of gains. By analogy, a domestic interest group relying on international commitments to entrench policies faces increasing variance in the prospect of externally imposed costs (in addition to externally generated information and decision making)—although, there is potential for the probability of enforcement to increase as well as decrease, depending on the direction of change in the international arena. To the extent states are risk-averse, however, they will view the dynamic quality of international legal enforcement as a disadvantage and will be reluctant to constitutionalize particular treaties.

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

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

104. Id. at 551-52.
106. See McGinnis, supra note 93, at 319.
F. The Relative Advantages of Custom and Treaty

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

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

1. Custom

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

---

107. See Voigt, supra note 95, at 14–15; supra Figure 1. In reality, the distinction between CIL and treaties is also overstated. For example, many investment treaties explicitly or implicitly invoke customary international law as the standard for expropriation. See, e.g., Andrea Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 VA. J. INT’L L. 809, 891–92 (2005) (discussing the United States’ Model Bilateral Investment Treaty and NAFTA).
109. See id. at 13.
110. Id.
adoption of the rule, the rule "crystallizes" into CIL and binds all states that do not persistently object.111

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

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

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

111. *Id*.; Kontorovich, supra note 59, at 875.
112. See Kontorovich, supra note 59, at 877.
113. See Koremenos, supra note 100, at 549.
114. Of course, if enough states find themselves in this position, the rule of CIL can change. In practice, however, examples of CIL change seem to indicate that strong and powerful states have an inordinate influence on the process. Thus a state of middling power can not anticipate much future control over the international legal system.
117. All this assumes that CIL agreements will be enforced. See Scott & Stephan, Self-Enforcing International Agreements, supra note 66, at 552-53.
118. BROWNLIE, supra note 8, at 50 (noting that "many rules of [CIL] do not provide precise guidance for their application on the national plane"). Of course, this might explain why states tolerate it. Since the obligations are not precise, states can shift their positions on the interpretation of particular rules in different situations, to a certain degree.
benefits of CIL as an entrenchment device are outweighed by its inability to specify authoritatively the particular policy to be entrenched.

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

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

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

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


122. Of course, if the violation of CIL injures a particular state, that state will have an incentive to incur the costs of enforcement and publicity. Many CIL norms, however, concern the treatment of a state's own citizens. No particular external state has the incentive to take the lead to enforce and publicize violations of these norms. See Eugene Kontorovich, A Positive Theory of Universal Jurisdiction 39-42 (The Berkeley Elec. Press, Working Paper No. 211, 2004), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1515&context=espresso.
range of topics that CIL covers means that no domestic interest group can be confident that CIL will evolve to cover its specific area of concern. CIL's weakness bodes poorly for its usage to resolve domestic commitment problems.  

2. Treaties

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

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

3. Treaty v. Custom

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


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

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

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

IV. EMPIRICAL IMPLICATIONS AND HYPOTHESES

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

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

127. The incentive is relative to the decentralized regime of CIL enforcement.
128. To be sure, one can identify some of the same problems with the broad international human rights conventions, such as the International Covenants for Civil and Political Rights, and for Economic and Social Rights. Nevertheless, there is at least the possibility of concluding human rights treaties with specific counter-parties, as the earlier discussion of the Minorities Regimes and the Gasperi-Gruber treaty showed. See supra text accompanying notes 72–85.
130. Some constitutions limit the application of customary international law to interstate relations or human rights. For instance, Article nine of the Constitution of Ecuador (1967) accepts the norms of international law as "the standard of conduct for states in their relations with one another" but the constitution does not mention human rights. However, constitutions in our sample rarely make the above distinction.
(2) whether to incorporate specific treaties into the constitution, and (3) whether to make treaties superior to domestic law. We assume that any international obligation comes with some nonzero probability of international enforcement, either in the form of generating information for domestic groups or a sanction, reputational or otherwise, imposed at the international level. The probability of other states expending resources in this manner increases monotonically with the perceived level of commitment of the state in question. We assume that the domestic judiciary will enforce international legal norms in the manner in which the constitutional designer provides.

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

A. Regime Type

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

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

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

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

134. See discussion supra Part III.E.


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

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

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

B. Diffusion

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

138. See Elkins, Guzman & Simmons, supra note 54, at 274.
139. Elkins & Simmons, supra note 4, at 36.
140. Id. at 39.
141. Id. at 42.
142. Id. at 43.
drafters do not have the luxury of careful rumination. Under such conditions, existing constitutional models—especially those of countries deemed to be analogous or successful, but also those that are highly available—are likely to be influential guides for decision makers. In the case of processes of adaptation, a prior enactment may not only impart information about the utility of the choice, it may also alter the utility itself. One characteristic of such mechanisms is that the utility of the particular policy or practice depends upon the number of users. A paradigmatic example might be the network externalities associated with the density of a telephone network or the density of subscription to a particular industry standard (e.g., the QWERTY keyboard). The development of norms, in which reputational benefits accrue according to the number or identity of countries that subscribe to a particular constitutional provision, operates in this way. Regardless of whether diffusion takes the form of learning or adaptation, however, the general empirical result is the same: the clustering of enacted provisions among countries that are proximate along some dimension, whether geographically, culturally, politically, or economically.

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

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

144. Elkins & Simmons, supra note 4, at 39.
145. Id. at 39–40.
146. Id. at 41.
148. Id. at 141.
They allow one to test whether the central tendency in a country's neighborhood in one year is associated with that country's choice in a subsequent year. Typically, scholars posit that channels of influence run along geographic lines, but of course neighborhoods can be defined along any dimension of similarity or interaction. In the analysis that follows, we employ two basic spatial lags in order to explore the possibility of clustering. The first, which captures global norms, is the mean of the dependent variable among all constitutions in force in the previous year. The second, which captures geographic neighborhood effects, is the mean of the dependent variable in a country's region in the previous year. Both of these variables are liable to absorb common shocks or any domestic variables that affect countries simultaneously that are omitted from the model. Thus, until the model is fully specified, one should be wary of ascribing causal power to diffusion explanations. Nonetheless, the spatial lags allow us to rule out diffusion at this point as an alternative hypothesis.

V. EVIDENCE

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

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

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

150. Id.
151. Id.
152. Comparative Constitutions Project, supra note 32.
3 It also includes roughly 150 historical constitutions that are
drawn from our archive; eventually we will include data on every na-
tional constitution ever written.154

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

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

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

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

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

155. Polity is a widely used database in political science that measures the level of democracy and
autocracy on a twenty point scale. Center for International Development and Conflict Management,

156. ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS
### Figure 3

**Regime Type and Constitutional Treatment of International Law**

*Universe: Constitutions of independent states (1800–2000)*

<table>
<thead>
<tr>
<th>Regime Type</th>
<th>Percent (and number) of Constitutions that</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mention treaties in general</td>
<td>Mention or incorporate specific treaties</td>
</tr>
<tr>
<td>Newly Democratic</td>
<td>88% (43)</td>
<td>21% (10)</td>
</tr>
<tr>
<td>(n=49)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stable Authoritarian</td>
<td>95%* (248)</td>
<td>26%* (64)</td>
</tr>
<tr>
<td>(n=260)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stable Democratic</td>
<td>74%* (39)</td>
<td>8%* (4)</td>
</tr>
<tr>
<td>(n=53)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>91% (331)</td>
<td>22% (78)</td>
</tr>
<tr>
<td>(n=363)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

**Source:** Comparative Constitutions Project

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

---

157. Bivariate regressions confirms this analysis. AUTDEM predicts Directly Applicable Customary International Law, with a positive coefficient of .01, at the 99% confidence level.
The contrast between constitutional treatment of custom and treaty is important. The analysis in Part II suggested that custom had distinct defects as a mechanism to make commitments. This led us to predict that states would systematically be more reluctant to rely on constitutional acceptance of customary international law than they would the more precise and flexible instrument of treaties. Ninety-one percent of all current constitutions mention treaties, whereas only twenty-three percent mention customary international law. In every subset of countries, treaties are more likely than custom to be mentioned and to be superior to legislation. This provides support for the analysis in Part II about the flaws of custom as a law-making and commitment device.

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

Variables:

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

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

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

GDP per capita. We use this to measure level of development. It is drawn from the World Bank’s World Development Indicators.\footnote{158}{The World Bank Group, World Development Indicators (2006), available at https://devdata.worldbank.org/wdi2006/contents/cover.htm.}

Population. This is total population drawn from the World Bank’s World Development Indicators.\footnote{159}{Id.}

Figure 4 reports the Ordinary Least Squares results of two fairly parsimonious models of the constitutional status of customary international law (column 1) and treaties (column 2). More specifically, the dependent variables are dichotomous measures of whether customary international law is directly binding and whether international treaties are
superior to ordinary law, respectively. The results of the two models are roughly comparable, suggesting that we can speak of them as consequences of the same causal processes. Both sets of results provide corroboratory evidence for the two central causal stories we describe above.

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

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

VI. CONCLUSION: ENHANCING DEMOCRACY THROUGH CONSTITUTIONALIZING INTERNATIONAL LAW

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

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

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

---

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

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

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

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