Welcome to International Law and International Relations! For our first meeting on Monday, January 9, please read:

Week 1: Introduction to International Law and International Relations (Jan 9)

Thomas M. Franck, *Legitimacy in the International System,* 82 AM. J. INT'L. L. 705, 705-706, 712-718, 751-59 (1998)

ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS, Chapter 2, A General Theory of International Law

Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1792-1803, 1822-1830 (2009)

LEGITIMACY IN THE INTERNATIONAL SYSTEM

*By Thomas M. Franck**

INTRODUCTION

The surprising thing about international law is that nations ever obey its strictures or carry out its mandates. This observation is made not to register optimism that the half-empty glass is also half full, but to draw attention to a pregnant phenomenon: that most states observe systemic rules much of the time in their relations with other states. That they should do so is much more interesting than, say, the fact that most citizens usually obey their nation's laws, because the international system is organized in a voluntarist fashion, supported by so little coercive authority. This unenforced rule system can obligate states to profess, if not always to manifest, a significant level of day-to-day compliance even, at times, when that is not in their short-term self-interest. The element or paradox attracts our attention and challenges us to investigate it, perhaps in the hope of discovering a theory that can illuminate more generally the occurrence of voluntary normative compliance and even yield a prescription for enhancing aspects of world order.

Before going further, however, it is necessary to enter a caveat. This essay attempts a study of why states obey laws in the absence of coercion. That is not the same quest as motivates the more familiar studies that investigate the sources of normative obligation.[1] The latter properly focus on the origins of rules—in treaties, custom, decisions of tribunals, *opinio juris*, state conduct, resolutions of international organizations, and so forth—to determine which sources, qua sources, are to be taken seriously, and how seriously to take them. Our object, on the other hand, is to determine why and under what circumstances a specific rule is obeyed. To be sure, the source of every rule—its *pedigree*, in the terminology of this essay—is *one* determinant of how strong its pull to compliance is likely to be. Pedigree, however, is far from being the only indicator of how seriously the rule will be taken, particularly if the rule conflicts with a state's perceived self-interest. Thus, other indicators are also a focus of this essay insofar as they determine the capacity of rules to affect state conduct.

* Editor in Chief. The author acknowledges the generous support of the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University School of Law, the very helpful advice of his colleagues Paul Chevigny, Ronald Dworkin, David W. Kennedy, David Richards, Alfred Rubin, Michael Sharpston and Roberto Unger, and the unstinting research assistance of Steven Hawkins, Laurie Oberembt and William Richter. Particular thanks are due to several colleagues on the Board of Editors, and Ag. R.-J. Dupuy of the Collège de France, who have made profoundly useful suggestions.

[1] *See especially* Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968).

This essay posits that, in a community organized around rules, compliance is secured—to whatever degree it *is*—at least in part by perception of a rule as legitimate by those to whom it is addressed. Their perception of legitimacy will vary in degree from rule to rule and time to time. It becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.

Legitimacy is used here to mean that quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*. Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights. The elements of right process that will be discussed below are identified as affecting decisively the degree to which any rule is perceived as legitimate.

I. WHY A QUEST FOR LEGITIMACY?

Why study the teleology of law? What are laws *for*? What causes obedience? Such basic questions are the meat and potatoes of jurisprudential inquiry. Any legal system worth taking seriously must address such fundamentals. J. L. Brierly has speculated that jurisprudence, nowadays, regards international law as no more than "an attorney's mantle artfully displayed on the shoulders of arbitrary power" and "a decorous name for a convenience of the chancelleries."[2] That seductive epigram captures the still-dominant Austinian positivists' widespread cynicism towards the claim that the rules of the international system can be studied jurisprudentially.[3]

International lawyers have not taken this sort of marginalization lying down. However, their counterattack has been both feeble and misdirected, concentrating primarily on efforts to prove that international law is very similar to the positive law applicable within states.[4] This strategy has not been intellectually convincing, nor can it be empirically sustained once divine and naturalist sources of law are discarded in favor of positivism.

That international "law" is not law in the positivist sense may be irrefutable but is also irrelevant. Whatever label is attached to it, the normative structure of the international system is perfectly capable of being studied with a view to generating a teleological jurisprudence. Indeed, international law is the *best* place to study some of the fundamental teleological issues that

[2] J. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 13 (1944) (quoting Sir Alfred Zimmern).

[3] Austin believed that law was the enforced command of a sovereign to a subject. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); *see also* Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AJIL 405, 410 (1984). This Austinian view has been widely shared by critics. See, however, H. L. A. HART, THE CONCEPT OF LAW, ch. 10 (1961); and Williams, *International Law and the Controversy Concerning the Word 'Law,'* 22 BRIT. Y.B. INT'L L. 146 (1945).

[4] For the best recent exposition of this view, see A. D'AMATO, *Is International Law Really Law?*, in INTERNATIONAL LAW: PROCESS AND PROSPECT 1 (1987).

domestic counterparts. But that is not now, and it is not likely to be in the foreseeable future. H. L. A. Hart put it more gently: "though it is consistent with the usage of the last 150 years to use the expression 'law' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions ha[s] inspired misgivings, at any rate in the breasts of legal theorists."[15] Such misgivings, however, are not a cause for despair, nor should they be the end of the road of theoretical inquiry. On the contrary, the misgivings are valid but, for that very reason, are precisely the right starting point in the search for those elements which conduce to the growth of an orderly voluntarist international community and system of rules.

Four elements—the indicators of rule legitimacy in the community of states—are identified and studied in this essay. They are *determinacy, symbolic validation, coherence* and *adherence* (to a normative hierarchy). To the extent rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands. To the extent these elements are not present, rules seem to be easier to avoid by a state tempted to pursue its short-term self-interest. This is not to say that the legitimacy of a rule can be deduced solely by counting how often it is obeyed or disobeyed. While its legitimacy may exert a powerful pull on state conduct, yet other pulls may be stronger in a particular circumstance. The chance to take a quick, decisive advantage may overcome the counterpull of even a highly legitimate rule. In such circumstances, legitimacy is indicated not by obedience, but by the discomfort disobedience induces in the violator. (Student demonstrations sometimes are a sensitive indicator of such discomfort.) The variable to watch is not compliance but the strength of the compliance pull, whether or not the rule achieves actual compliance in any one case.

Each rule has an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule. This pull power is its index of legitimacy. For example, the rule that makes it improper for one state to infiltrate spies into another state in the guise of diplomats is formally acknowledged by almost every state, yet it enjoys so low a degree of legitimacy as to exert virtually no pull towards compliance.[16] As Schachter observes, "some 'laws,' though enacted properly, have so low a degree of probable compliance that they are treated as 'dead letters' and . . . some treaties, while properly concluded, are considered 'scraps of paper.' "[17] By way of contrast, we have noted, the rules pertaining to belligerency and neutrality actually exerted a very high level of pull on Washington in connection with the Silkworm missile shipment in the Persian Gulf.

The study of legitimacy thus focuses on the inherent capacity of a rule to exert pressure on states to comply. This focus on the properties of rules, of course, is not a self-sufficient account of the socialization process. How rules

[15] H. L. A. HART, *supra* note 3, at 209.

[16] Permissible activities of diplomats are set out in Article 3 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, TIAS No. 7502, 500 UNTS 95. Obviously, these do not include espionage.

[17] Schachter, *supra* note 1, at 311.

are made, interpreted and applied is part of a dynamic, expansive and complex set of social phenomena. That complexity can be approached, however, by beginning with the rules themselves. Those seemingly inert constructs are shaped by other, more dynamic forces and, like tree trunks and seashells, tell their own story about the winds and tides that become an experiential part of their shape and texture.

II. Determinacy and Legitimacy

What determines the degree of legitimacy of any particular rule text or rule-making process? Or, to ask the same question another way: what observable characteristics of a rule or of a rule-making institution raise or lower the probability that its commands will be perceived to obligate? It is to such questions that the remainder of this analysis is addressed. One could approach the social phenomenon of noncoerced obedience directly, through such various openings as are afforded by the study of myths, game theory or contractarian notions of social compact. Instead, these and other socializing forces will be approached indirectly, through a unifying notion of *rule legitimacy*; that is, by approaching dynamic social forces through those rules which the society chooses to obey or to regard as obligatory. It should be borne in mind, however, that the norm-centered question—what is it about the properties of a rule that conduces to voluntary compliance?—is merely the lawyer's approach to larger sociological, anthropological and political questions: what conduces to the formation of communities and what induces members of a community to live by its rules?

Let us begin by examining the literary properties of the text itself that conduce to voluntary compliance or induce a sense of obligation in those to whom the rule is addressed.

Perhaps the most self-evident of all characteristics making for legitimacy is textual *determinacy*. What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance.

To illustrate the point, let us compare two textual formulations defining the boundary of the underwater continental shelf. The 1958 Convention places the shelf at "a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[18] The 1982 Convention on the Law of the Sea, on the other hand, is far more detailed and specific. It defines the shelf as "the natural prolongation of . . . land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured," but takes into

[18] Convention on the Continental Shelf, Art. 1, Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311.

account such specific factors as "the thickness of sedimentary rocks" and imposes an outermost limit that "shall not exceed 100 nautical miles from the 2,500 metre isobath," which, in turn, is a line connecting the points where the waters are 2,500 meters deep.[19] The 1982 standard, despite its complexity, is far more determinate than the elastic standard in the 1958 Convention, which, in a sense, established no rule at all. Back in 1958, the parties simply covered their differences and uncertainties with a formula, whose content was left in abeyance pending further work by negotiators, courts, and administrators and by the evolution of customary state practice.[20] The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.

Indeterminacy, however, has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve the conflicts between the demands of a rule and their desire not to be fettered, by "interpreting" the rule permissively. A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one.

A good example of this consequence of determinacy is afforded by the recent litigation between Nicaragua and the United States before the International Court of Justice. From the moment it became apparent that Nicaragua was preparing to sue the United States, State Department attorneys began to prepare the defense strategy. One option considered was invoking the "Connally reservation," which, as part of the U.S. acceptance of the jurisdiction of the International Court of Justice, specifically barred the Court from entertaining any case that pertains to "domestic" matters *as determined by the United States*.[21] Yet the American lawyers chose not to use this absolute defense.[22] Instead, they tried in various other ways to challenge the Court's authority. They argued that the dispute was already before the Organization of American States and the UN Security Council; that it was

[19] United Nations Convention on the Law of the Sea, Art. 76, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982).

[20] For a legislative history and analysis of the provisions of the 1958 Convention, see Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AJIL 629 (1958).

[21] 92 CONG. REC. 10,694 (1946).

[22] As I have written elsewhere:

> That the Connally Reservation did not license the United States to refuse to litigate *any* case for *any* reason whatsoever, that a "good faith" caveat was to be implied, is to be given some support by the fact that Connally was not invoked by U.S. lawyers to withdraw the Nicaraguan case from the I.C.J.'s jurisdiction.

Franck & Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 3, 17 (L. Damrosch ed. 1987).

not a legal dispute at all, but a political one;[23] that Nicaragua, having failed to perfect its acceptance of the Court's compulsory jurisdiction, had no right to implead the United States. The failure of the lawyers to use the Connally shield is all the more remarkable because, whereas the reservation gave the United States a self-judging escape from the Court's jurisdiction, all the other defenses left the key jurisdictional decision up to the Court, which rejected every one.[24] Had the U.S. Government simply faced the Court with a "finding" that the mining of Nicaragua's harbors was a "domestic" matter for the United States, that would have ended the litigation. Instead, the United States went on to lose, not only on the matter of jurisdiction, but also, eventually, on the merits.[25]

Why was the Connally shield rejected? The answer, surely, lies in its determinacy. Anyone reading its language would instantly understand that the reservation, while rather open-ended, nevertheless was not intended to cover such matters as the CIA's alleged mining of the harbors of a nation with which the United States was not at war. Although the term "domestic matter" is not so determinate as to bar all differences of interpretation—that, after all, is why its interpretation was reserved to the U.S. Government and not left to the Court—*no* reasonable interpretation of the concept could be stretched to cover the events in question. The U.S. legal strategists, anxious to do everything possible to stay out of court, nonetheless were unwilling to subject their client to the obloquy that would have ensued had the Connally shield been deployed. Interest gratification, convenience and advantage were sacrificed so as not to be seen as absurd.

Such foreboding of shame and ridicule is an excellent guide to determinacy. If a party seeking to justify its conduct interprets a rule in such a way as to evoke widespread derision, then the rule has determinacy. The violator's evidently tortured definition of the rule can be seen to exceed its range of plausible meanings.

Thus, while it may be true in theory, as Wittgenstein has charged, that no "course of action could be determined by a rule because every course of action can be made out to accord with the rule,"[26] some rules are less malleable, less open to manipulation, than others. Although Wittgenstein's point has merit—and has recently been wittily adumbrated by Professor Duncan Kennedy[27]—in practice, determinacy is not an illusion. No verbal formulas are entirely determinate, but some are more so than others.

[23] The United States announced that the case involved "an inherently political problem that is not appropriate for judicial resolution." Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64, 64, *reprinted in* 24 ILM 246, 246 (1985), 79 AJIL 438, 439.

[24] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

[25] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

[26] L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 81, para. 201 (G. E. Anscombe trans. 1953).

[27] Kennedy, *Towards a Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986).

The degree of determinacy of a rule directly affects the degree of its perceived legitimacy. A rule that prohibits the doing of "bad things" lacks legitimacy because it fails to communicate what is expected, except within a very small constituency in which "bad" has achieved a high degree of culturally induced specificity. To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds. These bookends should be close enough together to inhibit incipient violators from offering self-serving exculpatory definitions of the rule. When almost everyone scoffs at such an exculpation, the outer boundary of the rule's determinacy has been established.

There is another sense in which determinacy increases the legitimacy of a rule text. A rule of conduct that is highly transparent—its normative content exhibiting great clarity—actually *encourages* gratification deferral and rule compliance. States, in their relations with one another, frequently find themselves tempted to violate a rule of conduct in order to take advantage of a sudden opportunity. If they do not do so, but choose, instead, to obey the rule and forgo that gratification, it is likely to be because of their longer term interests in seeing a potentially useful rule reinforced. They can visualize future situations in which it will operate to their advantage. But they will only defer the attainable short-term gain if the rule is sufficiently specific to support reasonable expectations that benefit can be derived in a contingent future by strengthening the rule in the present instance.

Let us consider the case of a foreign ambassador's son who has murdered someone in Washington, D.C. He is about to be "booked" by the District police when a message arrives from the State Department demanding his release. The Secretary of State announces that the culprit is to be sent home. Hearing of this, the public understandably is outraged; members of Congress complain to the President. Patiently, the Secretary of State explains that "almost all" states "almost always" act in accordance with the universal rules of diplomatic immunity, which protect ambassadors and their immediate family from arrest and trial.[28] Although in this instance, the Secretary continues, the rule does seem to work an injustice, in general it operates to make diplomacy possible. By gratifying popular outrage and violating the rule this time, the United States would weaken the rule's future utility, its reliability in describing and predicting state behavior. Alternatively, by acting in compliance with the rule, even at some short-term cost to its self-interest, the United States will reinforce the rule text and thus its future utility in protecting U.S. diplomats and their families abroad.[29] Indeed, a study by a committee of the British House of Commons—conducted after a shot from

[28] Vienna Convention on Diplomatic Relations, *supra* note 16, Arts. 31, 37.

[29] The Department of State, on Aug. 5, 1987, submitted its views on a " 'bill to make certain members of foreign diplomatic missions and consular posts in the United States subject to the criminal jurisdiction of the United States with respect to crimes of violence.' " The Department (Ambassador Selwa Roosevelt) "could not support the proposed legislation because it would be detrimental to U.S. interests abroad." If enacted, the law "would place the United States in violation of its international obligations" and would invite more harmful reciprocal action. Contemporary Practice of the United States, 82 AJIL 106, 107 (1988). For the text of Ambassador Roosevelt's statement, see also DEP'T ST. BULL., No. 2127, October 1987, at 29.

the Libyan embassy ("People's Bureau") on April 17, 1984, killed an on-duty London policewoman—came to something very like this conclusion despite the inflamed state of public opinion.[30]

Note, however, that this thoughtful argument by the Secretary against interest gratification only makes sense if the son's immunity is seen as part of a clearly understood normative package, that other countries will refrain from arresting members of the families of U.S. ambassadors on real or trumped-up charges. Such expectations of reciprocity are important threads in the fabric of the international system; but before an expectation of reciprocity can arise, there must be some mutual understanding of what the rule covers, what events constitute "similar circumstances." If the contents of the rule are vaguely defined and fuzzy—if some countries in some instances have extended immunity to the ambassador's children while others have not, or have done so only if no capital crime is involved, or only if the child was actually working for the embassy, or have not extended immunity to second sons, or daughters or stepchildren—the impetus for gratification deferral in the instant case would diminish. The demand for the trial of the ambassador's son might then be both reasonable and irresistible. It could quite easily be defended as not violating a "real" rule. The argument could also be made that bringing the son to trial would create no more hazards for American diplomats abroad than were already posed by the vagueness of the rule. If a norm is full of loopholes, there is little incentive to impose on oneself obligations that others can evade easily.

An excellent example of this cost of indeterminacy is offered by the rules prohibiting and defining aggression that were approved in 1974 by the General Assembly after some 7 years of debate. Among the actions branded as aggression is the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State." Almost in the same breath, however, the text states that nothing in the foregoing "could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . ; nor the right of these peoples . . . to seek and receive support." To confuse matters further, another article declares that no "consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression"; and yet another adds that in "their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions."[31] Interrelated they may be, but like a tangled skein. Do they prohibit or encourage aid by one country to an insurgent movement in

[30] H.C. FOREIGN AFFAIRS COMMITTEE, FIRST REPORT, THE ABUSE OF DIPLOMATIC IMMUNITIES AND PRIVILEGES, REPORT WITH ANNEX; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE; MINUTES OF EVIDENCE TAKEN ON 20 JUNE AND 2 AND 18 JULY IN THE LAST SESSION OF PARLIAMENT, AND APPENDICES (1984). *See also* Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AJIL 641 (1985).

[31] Definition of Aggression, GA Res. 3314, 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1974).

another? It is not that the individual mandates and caveats are opaque, but that, seeking to reconcile irreconcilable positions, they contradict one another. Such a muddled obligation, one would expect, could have little effect on the real-world conduct of states; and one would be right.

It happens—by way of contrast—that, in international practice, the rules protecting diplomats, as codified by the Vienna Convention, have a very high degree of specificity,[32] and they are almost invariably obeyed. So, too, are the highly specific rules, in another Vienna Convention, on the making, interpreting and obligation of treaties.[33] Among other subjects covered by determinate rules that exert a strong pull to compliance and, in practice, elicit a high degree of conforming behavior by states are jurisdiction over vessels on the high seas, and in territorial waters and ports,[34] jurisdiction over aircraft,[35] copyright and trademarks,[36] and international usage of posts,[37] telegraphs, telephones[38] and radio waves.[39] There is also a high degree of determinacy in the rules governing embassy property,[40] rights of passage of naval vessels in peacetime,[41] treatment of war prisoners[42] and the duty of governments to pay compensation—even if not as to the *measure* of that compensation—for the expropriation of property belonging to aliens.[43]

[32] *See* Vienna Convention on Diplomatic Relations, *supra* note 16, Arts. 27, 28.

[33] *See* Vienna Convention on the Law of Treaties, Arts. 6, 55, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), *reprinted in* 8 ILM 679 (1969), 63 AJIL 875 (1969).

[34] United Nations Convention on the Law of the Sea, *supra* note 19.

[35] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 UST 2941, TIAS No. 6768, 704 UNTS 219.

[36] Universal Copyright Convention, July 24, 1971, 25 UST 1341, TIAS No. 7868 (revised version of 216 UNTS 132).

[37] *See* UNIVERSAL POSTAL UNION CONST., July 10, 1964, 16 UST 1291, TIAS No. 5881, 611 UNTS 7.

[38] *See* Telegraph and Telephone Regulations, with appendices, annex, and final protocol, Apr. 11, 1973, 28 UST 3293, TIAS No. 8586.

[39] *See* International Telecommunication Convention, Oct. 25, 1973, 28 UST 2495, TIAS No. 8572.

[40] *See* Vienna Convention on Diplomatic Relations, *supra* note 16, Art. 22 (which provides for inviolability of diplomatic missions and imposes a special duty on states to protect premises of missions on their territory). *See also* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, TIAS No. 8532, 1035 UNTS 167 (which criminalizes violent attacks upon the official premises of internationally protected persons).

[41] The right of innocent passage was specifically provided for in Article 14 of the Geneva Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, and by Article 17 of the UN Convention on the Law of the Sea of 1982, *supra* note 19.

[42] *See* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135. For a complete treatment of war prisoners, see N. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (1987).

[43] As to compensation for expropriated property, there is agreement in principle, but disagreement as to the measure of compensation. *See, e.g.*, Charter of Economic Rights and Duties of States, Dec. 12, 1974, Art. 2(2)(c), GA Res. 3281, 29 UN GAOR Supp. (No. 31) at 50, UN

ant skein of underlying principles is an aspect of community, which, in turn, confirms the status of the states that constitute the community. Validated membership in the community accords equal capacity for rights and obligations derived from its legitimate rule system.

By focusing on the connections between specific rules and general underlying principles, we have emphasized the horizontal aspect of our central notion of a community of legitimate rules. However, there are vertical aspects of this community that have even more significant impact on the legitimacy of rules.

V. ADHERENCE (TO A NORMATIVE HIERARCHY) AND COMMUNITY

Professor Hart's observation, noted above, that the international arena lacks a "legislature, courts with compulsory jurisdiction, and centrally organized sanctions" leads him to deduce "that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system."[195] Although he acknowledges that international law does have many substantive "primary" rules, such as those specific rights and duties typically enumerated in treaties or developed through customary usage, he nevertheless concludes that the system is primitive, if not illusory, because it lacks those crucial procedural "secondary" rules which permit a rule to change and adapt through legislation and the decision of courts. An even more serious disqualification of the international system, Hart alleges, is its lack of "a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."[196] By a "unifying rule of recognition," Hart means an international equivalent of the U.S. Constitution, or the British rule of parliamentary supremacy, both of which are "ultimate" in that they test the validity of all other rules by standards that are not themselves subject to being tested by reference to any superior rule.

Hart identifies the essential elements of a developed system of rules and then concludes that they are missing at the international level. He thus finds the international community to be the approximate equivalent of a small primitive tribe that has primary rules of obligation about such matters as land and kinship, but no system of governance that allocates and regulates social roles or facilitates, by an established process, the making, changing, application and reinterpreting of these random substantive primary rules.

In effect, Hart considers the international system to be primitive because individual rules lack *adherence* to a rule hierarchy. This is a much more sophisticated critique of the international rule system than the simple Austinian one, which focuses on the absence of a system of coercion. Hart does note the lack of institutionalized coercion but puts greater critical emphasis on the failure of international rules to adhere to a hierarchic rule structure.

[195] H. L. A. HART, *supra* note 3, at 209. [196] *Id.*

Adherence—a term Hart does not use—is used here to mean the vertical nexus between a single *primary rule of obligation* ("cross on the green; stop on the red") and a pyramid of secondary rules about how rules are made, interpreted and applied: rules, in other words, about rules. These may be labeled *secondary rules of process*. Primary rules of obligation that lack adherence to a system of secondary rules of process are mere ad hoc reciprocal arrangements. They are not necessarily incapable of obligating parties that have agreed to them. They may even connect coherently with the underlying principles of distinction found in other rules to create a horizontal skein that is an aspect of community. But the degree of legitimacy of primary rules that only cohere is less than if the same rule were also connected to a pyramid of secondary rules of process, culminating in an ultimate rule of recognition. A rule, in summary, is more likely to obligate if it is made within the procedural and institutional framework of an organized community than if it is strictly an ad hoc agreement between parties in the state of nature. The same rule is still more likely to obligate if it is made within the hierarchically structured procedural and constitutional framework of a sophisticated community rather than in a primitive community lacking such secondary rules about rules.

Hart's critique of the community of states as small and primitive is still widely accepted. Even those who think that the system is at a more sophisticated stage of development might well concede that Hart's misgivings are not wholly unjustified. The recurrence of wars, other conflicts and unremedied injustices invites the appellation "primitive."

The misgivings, however, need to be kept in perspective. Of course, there *are* lawmaking institutions in the system. One has but to visit a highly structured multinational negotiation such as the decade-long Law of the Sea Conference of the 1970s to see a kind of incipient legislature at work. The Security Council, the decision-making bodies of the World Bank and, perhaps, the UN General Assembly also somewhat resemble the cabinets and legislatures of national governments, even if they are not so highly disciplined and empowered as the British Parliament, the French National Assembly or even the U.S. Congress. Moreover, there *are* courts in the international system: not only the International Court of Justice, the European Community Court and the regional human rights tribunals, but also a very active network of quasi-judicial committees and commissions, as well as arbitral tribunals established under such auspices as the Algiers agreement ending the Iran hostage crisis.[197] Arbitrators regularly settle investment disputes under the auspices and procedures of the World Bank and the International Chamber of Commerce. Treaties and contracts create jurisdiction for these tribunals and establish rules of evidence and procedure.[198]

[197] *See* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, DEP'T ST. BULL., No. 2047, February 1981, at 3, *reprinted in* 75 AJIL 422 (1981), 20 ILM 230 (1981).

[198] The World Bank approved the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, TIAS No. 6090,

The international system thus appears on close examination to be a more developed community than critics sometimes allege. It has an extensive network of horizontally coherent rules, rule-making institutions, and judicial and quasi-judicial bodies to apply the rules impartially. Many of the rules are sufficiently determinate for states to know what is required for compliance and most states obey them most of the time. Those that do not, tend to feel guilty and to lie about their conduct rather than defy the rules openly. The system also has means for changing, adapting and repealing rules.

Most nations, most of the time, are both rule conscious and rule abiding. Why this is so, rather than that it is so, is also relevant to an understanding of the degree to which an international community has developed in practice. This silent majority's sense of obligation derives primarily not from explicit consent to specific treaties or custom, but from *status*. Obligation is perceived to be owed *to a community of states as a necessary reciprocal incident of membership in the community.* Moreover, that community is defined by secondary rules of process as well as by primary rules of obligation: states perceive themselves to be participants in a structured process of continual interaction that is governed by secondary rules of process (sometimes called rules of recognition), of which the UN Charter is but the most obvious example. The Charter is a set of rules, but it is also about how rules are to be made by the various institutions established by the Charter and by the subsidiaries those institutions have created, such as the International Law and Human Rights Commissions.

In addition, obligation is owed not only to the rules of the game, but also *to the game itself.* This is symptomatic of a community organized by a pyramid of secondary rules at whose apex is an ultimate rule or set of rules of recognition. The ultimate rule defines the community. If the game were football, the ultimate rule of recognition would be the one justifying the statement that what is being played is not baseball or tennis, but football. Thus, when the umpire calls a "foul," the legitimacy of that judgment derives ultimately from those rules which define the activity as football rather than some other sport. In the international system, the game of nations does have its own ultimate, defining set of rules by which the validity of all subsidiary rules—secondary procedural as well as primary substantive —may be tested.

A community is sophisticated when it has such an *ultimate rule of recognition*. In the United States, France, Germany and many other countries this is in the form of a written constitution. In the United Kingdom, however, the existence of an ultimate rule of recognition must be established deductively, since there is no written law defining the community. Nevertheless, it is

---

575 UNTS 159, which established the International Centre for Settlement of Investment Disputes. *See* Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COLUM. J. TRANSNAT'L L. 263 (1966). For U.S. implementing legislation, see Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, §2, 80 Stat. 344 (codified at 22 U.S.C. §§1650, 1650a (1982)). Under certain circumstances, parties to a dispute may arbitrate in the International Chamber of Commerce Court of Arbitration.

demonstrable that parliamentary supremacy qualifies as an ultimate rule of recognition because it owes its legitimacy only to public acquiescence, or to the corporate act of social commitment sometimes metaphorically described as a social contract. Its validity, unlike all the community's other secondary and primary rules, cannot be tested by reference to any other law. No statute makes Parliament supreme, nor can any law curb that supremacy. Indeed, if an act stipulated that it could only be repealed by a two-thirds majority, Parliament could delete that two-thirds requirement by a simple majority vote.[199] The rule of parliamentary supremacy defines the legitimacy of all other laws, but its own legitimacy is undefined, and thus *ultimate*. The rule is autochthonous: one "sprung from the earth itself."

Both the British Parliament and the U.S. Constitution are repositories of ultimate power unfettered by superior authority. Both the rule of parliamentary supremacy in Britain and the rules embodied in the Constitution of the United States are ultimate secondary rules of process by which the legitimacy of all primary rules of obligation may be tested and established. A rule of ultimate recognition operates with such extraordinary power to validate a subsidiary pyramid of rules—both other secondary rules of a procedural nature and primary rules of obligation—because the ultimate rule is accepted by a community that is defined by that rule. The ultimate set of rules also defines the status of each member of the community; that is to say, each member's status derives from the recognition of membership. Rejection of the ultimate rule by the members constitutes revolution and is the only option for discarding the ultimate rule (which, in some states but not in others, may be changed—as distinct from being overthrown—but only in strict accordance with its own terms). Acquiescence, on the other hand, is demonstrated tautologically, by compliance. Ultimate rules of recognition cannot be validated by reference to any other rule. All other secondary rules of the community are inferior to, and validated by, the ultimate rule or set of rules.

It is the nature of community, therefore, both to empower authority and to circumscribe it by an ultimate rule or set of rules of recognition that exists above, and itself is not circumscribed by, the system of normative authority. Does such a notion of community exist internationally, among states? Do nations recognize an ultimate rule or set of rules of recognition or process by which the legitimacy of all other international rules and procedures can be tested, a rule not itself subject to a higher normative test of its legitimacy, a rule that simply *is*, because it is accepted as font of the community's collective self-definition?

If the international community were merely a playing field on which states engaged in various random, or opportunistic, exchanges or interac-

[199] In perhaps the most eloquent statement of Parliament's unlimited legislative authority, Sir Edward Coke has declared that its "power and jurisdiction . . . is so transcendent and absolute, that it . . . hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws." E. COKE, FOURTH INSTITUTE 36, *quoted in* A. DICEY, INTRODUCTION TO THE STUDY OF THE CONSTITUTION 41 (9th ed. 1939).

tions, it would be easy to conclude that this was a truly primitive aggregation, a rabble, lacking the organizing structure of secondary rules of process and, of course, an ultimate secondary rule. This, rather than any absence of coercive force, would indeed justify the appellation "primitive." The international community, however, demonstrably is not like that. States—whatever their occasional rhetorical excesses—recognize that they are not sovereign. They accept that they are members of a sophisticated community with secondary rules and with what amounts to a constitution or ultimate rules of recognition. States also recognize that they derive validation from membership in this community.

The nonsovereignty of states and the existence of a set of ultimate community rules can be demonstrated by examining the way treaties operate from the perspective of those that become parties to them. It is quite wrong to think that treaties bind states *because* they have consented to them. If states were sovereign, the mere act of entering into a treaty could not "bind" them in any accurate sense. States are not bound only because they agree to be bound, in the sense in which neighbors in an apartment building might informally agree, for their mutual convenience, to turn off their television sets by 10 o'clock every evening. Those neighbors are at liberty to disregard their obligation whenever it does not suit their purpose. Nor are states obligated by treaties the way individuals are bound by a contract. In municipal law, contracts are binding because their sanctity is prescribed and enforced by the state.[200] True, most contracts operate without recourse to state sanctions, but the sanctions remain in reserve.

Treaties thus do not exactly fit either model. They are not like the free-will agreement among neighbors, which is valid only as long as it continues to suit everyone's purpose; and they are not contracts made under the authority of a sovereign and enforceable by the full authority of the state, through either compelled specific performance or an award of damages. Treaties obviously cannot be binding in the sense of being sanctioned by an Austinian sovereign; but a treaty also cannot be said to be binding only because two or more sovereign states voluntarily agree to carry it out. "Sovereign" means *unbindable*. A treaty ratified by a truly sovereign state could only *declare*, never *bind*, that state's free will. If the state were indeed sovereign, then, no matter what it had signed, it would nevertheless remain free to terminate its consent at any time, just as the sovereign British Parliament cannot legislate a law that can only be amended by a two-thirds major-

[200] While the term "contract" is susceptible of many definitions, whatever else a contract may entail, it is agreed that it is "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." 1 WILLISTON ON CONTRACTS §1 (3d ed. 1957); RESTATEMENT (SECOND) OF CONTRACTS §1 (1981). *See also* 1 A. CORBIN, CONTRACTS §3 (1963) (which defines a contract to include "a promise enforceable at law directly or indirectly"). In some jurisdictions, courts will routinely mandate specific performance of the promise. *See, e.g.*, Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959). The Anglo-American legal system, however, prefers to impose damages at least equal to the value of the breached promise. *See, e.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 580–604 (1977).

ity. If states were sovereign, entering into a treaty would be nothing more than evidence of their state of mind for the time being.

Notably, states never claim this. They act, instead, as if they were bound. They believe themselves to be bound—which can only be understood as evidence of their acquiescence in something demonstrable only circumstantially: an ultimate rule of recognition. In the international community "sovereignty"—however fragile—resides in the rule, and not in the individual states of the community. States seem to be aware of this rule's autochthony. They act in professed compliance with, and reliance on, the notion that when a state signs and ratifies an accord with one or more other states, then it has an obligation, superior to its sovereign will. The obligation derives not from consent to the treaty, or its text, but from membership in a community that endows the parties to the agreement with status, including the capacity to enter into treaties.

The most recent instance of this perception of an international rule superior to the specific acquiescence of any particular state is to be found in the advisory opinion rendered by the International Court of Justice on April 26, 1988, at the request of the United Nations General Assembly.[201] At issue was a conflict between provisions of a U.S. law that required the closing of the Observer Mission of the Palestine Liberation Organization,[202] and the obligation assumed under the UN Headquarters Agreement.[203] The Court stated unequivocally that it was "the fundamental principle of international law that it prevails over domestic law,"[204] that "the provisions of municipal law cannot prevail over those of a treaty."[205] The U.S. judge (Stephen M. Schwebel) added that "a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations" under a treaty.[206] Unanimously, the Court accepted that clear limitation on the sovereignty of states imposed by membership in the international community.

In Hart's words, the "view that a state may impose obligations on itself by promise, agreement, or treaty is not . . . consistent with the theory that states are subject only to rules which they have thus imposed on them-

[201] GA Res. 42/229B (Mar. 2, 1988).

[202] The Observer Mission status was created by GA Res. 3237, 29 UN GAOR Supp. (No. 31) at 4, UN Doc. A/9631 (1974). The closure of the mission is required by the Anti-Terrorism Act of 1987, title X of the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, tit. X, §1001, 101 Stat. 1331, 1406 (codified at 22 U.S.C.A. §§5201-5203 (West Supp. 1988)).

[203] *See* Agreement Regarding the Headquarters of the United Nations, June 26, 1947, *supra* note 115.

[204] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 ICJ REP. 12, 34, para. 57 (Advisory Opinion of Apr. 26).

[205] Greco-Bulgarian "Communities," 1930 PCIJ (ser. B) No. 17, at 32 (Advisory Opinion of July 31).

[206] 1988 ICJ REP. at 42 (Schwebel, J., sep. op.).

selves."[207] Rather, "*rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do."[208] This hypothetical notion itself is actually set out in the text of a global treaty defining the law of treaties,[209] a document establishing a body of secondary rules of process. Even so, the binding force of the treaty codifying the law of treaties cannot emanate from the agreement of the large majority of states that have ratified it. It must come from some ultimate, generally accepted unwritten rule of recognition that is fundamental to any real understanding of the nature of international obligation.

If there is an ultimate set of secondary rules of process that embodies an abstract sovereignty and confers legitimacy in the international community, what are its other provisions? As with the foregoing rule, *pacta sunt servanda*, the other components of an ultimate rule of recognition can only be hypothesized and demonstrated circumstantially by habitual state deference. Thus, the rule that treaties are binding is itself modified by the rule that treaties are *void ab initio* if they are against the community's basic public policy, that is, if they violate the community's ultimate (peremptory) norms.[210] A treaty to commit genocide, for example, would be invalid for this reason. A related notion that appears to qualify as part of the ultimate rule of recognition pertains to the binding obligation imposed on state conduct by global custom. There is widespread acknowledgment by states that they are obligated by international customary rules, whether or not they agree in any specific instance with the import of a rule. This was recently reiterated by the International Court of Justice in the case brought by Nicaragua against the United States, where the latter was held to be obligated by an extensive array of customary norms despite an evident desire to pursue its self-interest in a manner incongruent with those rules.[211]

There are other parts of the ultimate rule that can be deduced from the practice of states in adhering to it *as an incident of statehood* rather than as a consequence of their specific consent. For example, new states are deemed to acquire the universal rights and duties of statehood not because they have agreed but because they have joined the community.[212] Similarly, new states may "inherit" rights and duties from a "parent" state[213] not by virtue of

[207] H. L. A. HART, *supra* note 3, at 219. [208] *Id.*

[209] Vienna Convention on the Law of Treaties, *supra* note 33, Art. 26.

[210] *Id.*, Art. 53.

[211] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

[212] It is a well-established principle that a new state to the international community is automatically bound by the rules of international conduct existing at the time of admittance. *See* 1 L. OPPENHEIM, *supra* note 77, at 17–18. Even Tunkin concedes that if it enters "without reservations into official relations with other states," a new state is bound by "principles and norms of existing international law." *See* Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CAL. L. REV. 419, 428 (1961).

[213] There has been wide debate over the rights and obligations a successor state can inherit from its parent. The 19th-century doctrine of universal succession maintains that all the rights and duties of the parent pass to the successor. *See* O. UDOKANG, SUCCESSION OF NEW STATES

their consent but as a concomitant of status. Successor governments, too, automatically inherit rights and obligations.[214]

One more example of a part of the ultimate rule of recognition is the previously noted notion of state equality. UN Charter Article 2(1) specifically restates this rule, and no state since Hitler's Germany has claimed anything to the contrary. All states are bound by a rule of state equality as a concomitant of their membership in the community of nations. In the words of U.S. Chief Justice John Marshall in an 1825 decision, *The Antelope*, "No principle of general law is more universally acknowledged than the perfect equality of nations."[215]

It is therefore circumstantially demonstrable that there are obligations that states acknowledge to be necessary incidents of community membership. These are not perceived to obligate because they have been accepted by the individual state but, rather, are rules in which states acquiesce as part of their own validation; that is, as an inseparable aspect of "joining" a community of states that is defined by its ultimate secondary rules of process. It is even possible to conclude that the members of the global community acknowledge—for example, each time they sign a treaty or recognize a new government—*that statehood is incompatible with sovereignty.* They acknowledge this because they must, so as to obtain and retain the advantages of belonging to an organized, sophisticated community, advantages only available if ultimate sovereignty resides in a set of rules of universal application. That is why states behave as if such rules existed and obligated.

To put the matter another way, a "community" of states exists. It has at least some important secondary rules of recognition. These rules are "associative obligations," to use Dworkin's term,[216] which fasten onto all states because of their status as validated members of the international community. Only by stretching the notion of "consent" beyond its natural limits can these specific associative obligations be said to have been assumed consensually, even though they may sometimes be restated in a treaty. Dworkin rightly points out that "associative" rules of obligation are interpretive,[217] defining what a member owes others in the community in general. Thus, the obligation to honor treaties is acquired associatively, rather than by specific consent; and it is owed generally towards all members of the community. This is universally acknowledged. It is inconceivable, for example,

---

TO INTERNATIONAL TREATIES 122–24 (1972). At the other extreme is negativist theory, which holds that a successor inherits no rights and obligations, but begins with a tabula rasa. *See* D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 14–17 (1967). The truth lies somewhere in between, with certain rights and duties of the parent devolving upon the successor. *See* 1 L. OPPENHEIM, *supra* note 77, at 120. Hart further points to evidence that changes in a state's circumstance may automatically accord it new rights and duties, for example, when it acquires new territory giving it a coastline. H. L. A. HART, *supra* note 3, at 221.

[214] Tinoco Case (Gr. Brit. v. Costa Rica), 1 R. Int'l Arb. Awards 369 (1923), *reprinted in* 18 AJIL 147 (1924).

[215] The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825).

[216] R. DWORKIN, *supra* note 7, at 196. [217] *Id.* at 197.

that a state would announce that it would no longer be bound by treaties or custom. The obligation, moreover, cannot be extinguished by renouncing a consent that was never given, but only by extinguishing the status that is the real basis of the obligation.

According to Dworkin, a true community, as distinguished from a mere rabble, or even a system of random primary rules of obligation, is one in which the members

> accept that they are governed by common principles, not just by rules hammered out in political compromise. . . . Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. So each member accepts that others have rights and that he has duties flowing from that scheme . . . .

Nor are these rights and duties "conditional on his wholehearted approval of that scheme; these obligations arise from the historical fact that his community has adopted that scheme, . . . not the assumption that he would have chosen it were the choice entirely his."[218]

Moreover, the community "commands that no one be left out, that we are all in politics together for better or worse."[219] And its legitimizing requirement of rule integrity "assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."[220]

Does that accurately describe the social condition of the nations of the world in their interactive mode? The description does not assume harmony or an absence of strife. According to Dworkin, an "association of principle is not automatically a just community; its conception of equal concern may be defective."[221] What a rule community, a community of principle, does is to validate behavior in accordance with rules and applications of rules that confirm principled coherence and adherence, rather than acknowledging only the power of power. A rule community operates in conformity not only with primary rules but also with secondary ones—rules about rules—which are generated by valid legislative and adjudicative institutions. Finally, a community accepts its ultimate secondary rules of recognition not consensually, but as an inherent concomitant of membership status.

In the world of nations, each of these described conditions of a sophisticated community is observable today, even though imperfectly. This does not mean that its rules will never be disobeyed. It does mean, however, that it is usually possible to distinguish rule compliance from rule violation, and a valid rule or ruling from an invalid one. It also means that it is not necessary to await the millennium of Austinian-type world government to proceed with constructing—perfecting—a system of rules and institutions that will exhibit a powerful pull to compliance and a self-enforcing degree of legitimacy.

[218] *Id.* at 211.
[219] *Id.* at 213.
[220] *Id.* at 214.
[221] *Id.*

VOLUME 122 MAY 2009 NUMBER 7

HARVARD LAW REVIEW

ARTICLE

LAW FOR STATES: INTERNATIONAL LAW, CONSTITUTIONAL LAW, PUBLIC LAW

Jack Goldsmith and Daryl Levinson

TABLE OF CONTENTS

LAW FOR STATES: INTERNATIONAL LAW, CONSTITUTIONAL LAW, PUBLIC LAW

Jack Goldsmith[*] *& Daryl Levinson*[**]

International law has long been viewed with suspicion in Anglo-American legal thought. Compared to the paradigm of domestic law, the international legal system seems different and deficient along a number of important dimensions. This Article questions the distinctiveness of international law by pointing out that constitutional law in fact shares all of the features that are supposed to make international law so dubious. In mapping out these commonalities, the Article suggests that the traditional international/domestic distinction may obscure what is, for many purposes, a more important and generative conceptual divide. That divide is between "public law" regimes like international and constitutional law that constitute and govern the behavior of states and governments and "ordinary domestic law" that is administered by and through the governmental institutions of the state.

I. INTRODUCTION

The divide between international and domestic law runs deep in Anglo-American legal thought. Domestic law is taken to be the paradigm of how a legal system should work. Legal rules are promulgated and updated by a legislature or by common law courts subject to legislative revision. Courts authoritatively resolve ambiguities and uncertainties about the application of law in particular cases. The individuals to whom laws are addressed have an obligation to obey legitimate lawmaking authorities, even when legal rules stand in the way of their interests or are imposed without their consent. And in cases of disobedience, an executive enforcement authority, possessing a monopoly over the use of legitimate force, stands ready to coerce compliance.

Measured against the benchmark of domestic law, international law seems different and deficient along each of these dimensions. International law has no centralized legislature or hierarchical court system authorized to create, revise, or specify the application of legal norms, and as a result is said to suffer from irremediable uncertainty and po-

[*] Henry L. Shattuck Professor of Law, Harvard Law School.

[**] Fessenden Professor of Law, Harvard Law School.

For helpful comments we thank Matthew Adler, Akhil Amar, David Bederman, Eyal Benvenisti, Nehal Bhuta, Gabriella Blum, Lorenzo Casini, Richard Fallon, David Golove, Ryan Goodman, Duncan Hollis, Benedict Kingsbury, Mattias Kumm, Maximo Langer, Frank Michelman, Eric Posner, Kal Raustiala, Jim Ryan, Scott Shapiro, Seana Shiffrin, Paul Stephan, Cass Sunstein, Adrian Vermeule, and participants at workshops at the Emory, NYU, Rutgers-Camden, Stanford, Tel Aviv, Temple, UCLA, University of Chicago, University of Pennsylvania, and Yale law schools. We also thank Steven Horowitz, Will Levi, Joshua Minix, Hagan Scotten, and David Zimmer for very helpful research.

litical contestation. Out of deference to state sovereignty, international law is a "voluntary" system that obligates only states that have consented to be bound, and thus generally lacks the power to impose obligations on states against their interests. As a result, the content of international law often reflects the interests of powerful states. And to the extent that international law diverges from those interests, powerful states often interpret it away or ignore it. They are able to do so because the international legal system lacks a super-state enforcement authority capable of coercing recalcitrant states to comply. These characteristics of the international legal system have led realists and other skeptics to conclude that, in both form and function, international law is a qualitatively different and lesser species of law — if it qualifies as law at all.

Constitutional law, in contrast, has been subject to few such doubts. Conceived as the overarching framework for, and thus inseparable from, the statutes, regulations, and common law rules that comprise the familiar domestic legal system, constitutional law sits securely opposite international law on the domestic side of the divide. Unlike the decentralized and institutionally incomplete international legal system, moreover, constitutional law in the United States and other countries appears closer in form to ordinary, paradigmatically "real" domestic law because it typically features a proto-legislative enactment and amendment process, as well as an authoritative judiciary to resolve ambiguities about meaning and to enforce obligations against government officials. In contrast to the dubious efficacy of international law, constitutional law is generally assumed to serve as an important and effective constraint on government behavior, a meaningful check on the interests of the powerful.

The perceived differences between international and constitutional law have taken on a normative cast as well. For centuries, theorists have worried about how to reconcile the legal constraints of international law with the idea, or ideal, of state sovereignty. Sovereignty is supposed to mean that states cannot be subject to any higher authority; international law and the institutions it creates seem to represent just such authorities. As applied to democratic states like the United States, assertions of sovereignty often blur into defenses of democratic self-determination. A deep strain of U.S. political thought portrays international law as an illegitimate attempt by democratically unaccountable foreigners to interfere with the legitimate self-governance of democratic majorities at home.[1] Constitutional law could, and sometimes does, provoke similar objections, since it too purports to interfere

[1] For background, see generally DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY (1988).

with the ability of the "sovereign" people to govern themselves as they see fit. Yet the most insistent proponents of U.S. sovereignty in the face of international law do not see constitutional law as a comparable threat. To the contrary, they hold up constitutional law as the ultimate expression of American sovereignty and self-government.[2] On this view, "[t]o support international law is to support fundamental constraints on democracy,"[3] but constitutional law "represent[s] the nation's self-given law."[4]

This Article questions whether these apparent differences between international and constitutional law really run as deep as is commonly supposed. Despite superficial appearances to the contrary, constitutional law, like international law, lacks a centralized legislature to specify and update legal norms, and although constitutional courts possess some ability to resolve the existence and meaning of constitutional norms, they are limited in special ways that prevent them from providing authoritative settlement. As a result, constitutional law suffers from the same kinds of foundational uncertainty and contestation over meaning that are viewed as characteristic of international law. Constitutional law also shares with international law the absence of an enforcement authority capable of coercing powerful political actors to comply with unpopular decisions. This lack of an enforcement authority raises doubts about legal compliance and, more generally, the ability of legal norms to constrain and not just reflect political interests. And in much the same way as international law, constitutional law strains to legitimate the limits it purports to impose on popular self-government by invoking various forms (or fictions) of prior sovereign consent.

There are many complexities here, which we discuss in the pages that follow. But the general point is that the basic features of international law that lead lawyers and theorists to question its efficacy and legitimacy are shared by constitutional law. Whatever one makes of the descriptive and normative doubts to which international law is perpetually subject, we argue that constitutional law should be subject to the same doubts.

We are less interested in assessing these doubts on the merits, however, than in understanding their common origins and consequences. In mapping out these commonalities, we hope to show that the tradi-

---

[2] *See, e.g.*, JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 9 (1998) ("Because the United States is fully sovereign, it can determine for itself what its Constitution will require. And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure.").

[3] Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2020 (2004).

[4] *Id.* at 1994.

tional divide between domestic and international law obscures what is, for many purposes, a more important and generative conceptual divide between public law and ordinary domestic law.[5] By "public law" we mean constitutional and international law — legal regimes that both constitute and govern the behavior of states and state actors. By "ordinary domestic law" we mean the usual assortment of statutes and common law that apply to private actors within a state and are administered by and through the governmental institutions of that state.[6] The respects in which both international and constitutional law differ from ordinary domestic law follow from the distinctive aspiration of public law regimes to constitute and constrain the behavior of state institutions and the distinctive difficulty these regimes face of not being able to rely fully on these same state institutions for implementation and enforcement.

The difficulty is indeed distinctive. We are deeply accustomed to thinking of law as created by, working through, and inextricably bound together with the political and legal institutions of the state.[7] Our paradigmatic conception of a legal system rests on the state's definitive monopoly over the power to make and enforce law in a given territory. Without the backing and institutional support of the sovereign state's consolidation of coercive power, authoritative lawmaking, and binding dispute resolution, legal order as we intuitively know it — which is to say, in the form of ordinary domestic law — cannot exist.

---

[5] We do not mean to suggest that the distinction between international and constitutional law is incoherent or insignificant. We merely hope to show that the similarities between the two kinds of legal systems, which are suppressed by the traditional divide, are more interesting and fruitful than has been commonly recognized. To avoid any philosophical confusion, this should be understood as a pragmatic claim about the utility of working with different conceptual frameworks, not as any sort of metaphysical claim about the true joints along which reality must be cut. We are simply offering a new conceptual tool that we believe will prove useful for some purposes.

[6] We avoid the term "private law" because when it is used in contrast to public law it comes freighted with the unnecessary (for our purposes) theoretical and historical baggage of the public/private distinction, and because its meaning becomes even more ambiguous as it crosses the boundary between domestic and international law. We also elide intermediate cases where state actors are subject to contract, criminal, administrative, or tort laws. We call these cases "intermediate" because they implicate some of the features shared by international and constitutional law, but not others. To the extent these legal regimes are based on statutes, for example, they are not subject to the same problems of uncertainty regarding the authoritative sources of legal norms or the same concerns about constraining sovereignty. They are, however, still confronted by the absence of any super-state enforcement authority. It is worth noting that much of what is commonly described as administrative law and government contract and tort law is, in fact, straightforward constitutional law, and thus fully encompassed by our discussion.

[7] *See, e.g.*, William Ewald, *Comment on MacCormick*, 82 CORNELL L. REV. 1071, 1072 (1997) ("[M]ost modern legal theorists, at least tacitly, accept Kelsen's identification of law and state. That is, they take it for granted that the primary task of legal theory is to explicate the legal systems of the modern nation-state. The modern state is taken as the paradigm case; and on those occasions when supra-national or international law is discussed, this form of law is generally treated as a marginal case, if not neglected altogether.").

And yet, of course, we have systems of public law, international and constitutional, which cast the state as the *subject* (and product) rather than solely the *source* of law. Even as legal systems for the state have become a familiar and ubiquitous feature of the modern world, how these systems work remains surprisingly mysterious. Most immediately puzzling, perhaps, is how public law regimes can effectively constrain the behavior of states in the absence of any super-state enforcement authority. "[W]hy do people with power accept limits to their power? . . . [W]hy do people with guns obey people without guns?"[8] But it is not just guns that the state possesses and systems of public law lack. Public law regimes are also missing — and must borrow or functionally recreate — institutions with the legislative and judicial capacities to authoritatively make and interpret law. Also absent from public law is the legitimate, or at least taken-for-granted authority of the state to exercise coercion through law, overriding sovereignty-based claims of self-determination and self-government. How public law regimes can work, and work effectively, despite these handicaps is a puzzle that has seldom come into clear focus in Anglo-American legal theory.[9] Public law has been relegated to the blurry margins, we believe, largely because the artificial divide within public law has made it easy to dismiss the international legal system as an outlier. Constitutional law is less easy to dismiss.

By assimilating constitutional and international law and examining how the two systems similarly manage the peculiar difficulties of running a legal system outside of the state, we hope to bring focus to the possibilities and limitations of public law as a distinctive legal form. More accurately, we hope to *return* focus, for we are far from the first to take this perspective; our contribution can be seen more in the nature of resurrection than invention. Many prominent western political theorists conceived of what we would today call constitutional and international law as conjoined efforts to regulate the sovereign state from an "internal" and "external" perspective.[10] The father of the modern conception of sovereignty, Jean Bodin, also contemplated constitutional rules and a regime of international law as limits on the oth-

---

[8] Stephen Holmes, *Lineages of the Rule of Law*, *in* DEMOCRACY AND THE RULE OF LAW 19, 24 (José María Maravall & Adam Przeworski eds., 2003); *accord* NICCOLÒ MACHIAVELLI, THE PRINCE 71 (Leo Paul S. de Alvarez trans., 1981) (1532) ("[T]here cannot be good laws where there are not good arms . . . .").

[9] At the level of jurisprudence, of course, explaining the coordinated recognition of and compliance with law generally has long been identified as a fundamental problem.

[10] *See* F.H. HINSLEY, SOVEREIGNTY 126–213 (2d ed., Cambridge Univ. Press 1986) (1966). Even before the state emerged as a distinctive form in the sixteenth century, medieval theorists viewed the problem of regulating secular rulers in both their domestic and external affairs through the common lens of Christian theology and natural law. *See id.* at 45–125, 164–78.

erwise illimitable sovereignty of the state.[11] Hugo Grotius's effort to ground public international law in the will and practice of states was built upon an elaborate and influential conception of domestic sovereignty and domestic constitutional constraint.[12] Thomas Hobbes was less enthusiastic about attempts to constrain sovereignty, but his conception of international relations as a war of all against all and his concomitant skepticism about international law went hand-in-hand with the near-limitless power of the Leviathan over its own citizens.[13] And in the nineteenth century, following in Hobbes's footsteps, John Austin sharply distinguished ordinary domestic law, which he conceived as the command of the sovereign backed by force, from international law and constitutional law, both of which he believed were, for similar reasons, rules of "positive morality"[14] rather than laws "properly so called."[15]

This unifying perspective has been largely lost,[16] but it is ripe for recovery. Political and legal developments in recent decades have blurred the international/constitutional law divide in a number of different ways. Debates about whether the European Union is best understood as an international or a constitutional legal order — echoing U.S. debates about whether the Articles of Confederation should be classified as a treaty or a constitution[17] — both presuppose and prob-

---

[11] *See generally* JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25 (M.J. Tooley trans., Basil Blackwell 1955) (1576) (conceiving of sovereignty as "that absolute and perpetual power" vested in the commonwealth). On Bodin and constitutional constraints, see HINSLEY, *supra* note 10, at 120–25; STEPHEN HOLMES, PASSIONS AND CONSTRAINT 100–33 (1995); and J.H. Burns, *Sovereignty and Constitutional Law in Bodin*, 7 POL. STUD. 174 (1959). On Bodin and international law, see HINSLEY, *supra* note 10, at 179–83. *See also id.* at 180 (noting that Bodin's work produced "the doctrine of sovereignty in relation to the internal structure of the political community and, with regard to the relations between communities, the recognition that . . . there was a need for a new category of law [separate from natural law] — for international law").

[12] *See generally* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., 2005) (1625); HINSLEY, *supra* note 10, at 139–41; HISTORY OF POLITICAL PHILOSOPHY (Leo Strauss & Joseph Cropsey eds., Univ. of Chi. Press 1981) (1963); RICHARD TUCK, PHILOSOPHY AND GOVERNMENT 1572–1651 (1993).

[13] *See generally* THOMAS HOBBES, LEVIATHAN (A.R. Waller ed., Cambridge Univ. Press 1935) (1651).

[14] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 141 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

[15] *Id.* at 143; *see also id.* at 141–43; 254–64.

[16] Why it has been lost is an interesting and, as best we can tell, unanswered question. We suspect that the rise of positivism and written constitutionalism in the late eighteenth and early nineteenth centuries led to a conceptual splintering of international and constitutional law, although this is a story that has not yet been fully told. For an enlightening historical analysis of the relationship between international strategic affairs and domestic constitutional orders that is orthogonal to our project, see generally PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002).

[17] *Compare* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 478–87 (1995) (arguing that the Articles were a constitution), *with* Akhil Reed Amar,

lematize a qualitative distinction between the two kinds of legal regimes and lead some to wonder what should turn on the difference.[18] Similar questions are pressed by the so-called movement toward "global constitutionalism"[19] and the increasingly common characterization of international arrangements like the WTO as "constitutional."[20] In the United States, judicial and political debates surrounding the war on terrorism have brought to the fore the complicated overlapping relationship between constitutional and international rights and obligations, and more abstractly, between constitutional and global justice.[21] Responding to these and other proliferating transpositions of the international and the constitutional, political scientists have begun to analyze some of the parallels between the architecture of international and constitutional regimes.[22] Our aim in this Article is to clarify, deepen, and extend these arguments, and to explain their relevance to modern legal theory, by analyzing constitutional and international law as conceptually linked forms of public law.

The Article proceeds as follows. Each of the next three Parts takes a standard critique of international law, shows how it also applies to constitutional law, and then discusses how the problem is structurally symptomatic of public law, in contrast to ordinary domestic law, and how international law and constitutional law attempt to deal with the problem in similar ways. Part II addresses the problem of legal uncertainty, which arises from the absence of centralized legislative and ju-

---

The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 464–69 (1994) (arguing that the Articles were a treaty).

[18] For overviews of the European Union debate, see generally Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called*, 54 AM. J. COMP. L. SUPPLEMENT 505 (2006); and J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

[19] *See generally* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003).

[20] *See* John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000); *see also* Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2006) (collecting and critically examining the meaning of "constitutional" characterizations of the WTO).

[21] *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006). On the relationship between constitutional and global justice, see David Golove, Incorporating Global Justice into the U.S. Constitution (Nov. 19, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

[22] Important efforts in this regard include G. JOHN IKENBERRY, AFTER VICTORY (2001); Alec Stone, *What Is a Supranational Constitution? An Essay in International Relations Theory*, 56 REV. POL. 441 (1994); Clifford James Carrubba, A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems (unpublished manuscript, on file with the Harvard Law School Library); and Jeffrey K. Staton & Will H. Moore, The Last Pillar To Fall? Domestic and International Legal Institutions (Nov. 22, 2008) (unpublished manuscript, on file with the Harvard Law School Library). We are especially indebted to, and build directly upon, Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155 (2004).

dicial institutions with widely recognized authority to determine the meaning and application of legal rules. International and constitutional law have both gone some distance toward reducing legal uncertainty by co-opting or substituting for ordinary domestic legislatures and courts, but compared to the benchmark of ordinary domestic law, their success remains only partial. Part III focuses on the absence of any super-state enforcement authority to compel compliance with legal rules. It shows that the mechanisms through which compliance is achieved must be different from the prototypical threat of coercion or punishment by the state that backs, and to some extent explains, compliance with the statutory and common law rules of ordinary domestic law. Part III also demonstrates how an alternative set of "self-enforcement" mechanisms have been developed in both international and constitutional law and theory. Part IV examines the normative problems that arise in both international law and constitutional law from the attempt to bind states and governments to law. Notwithstanding philosophical concerns about legitimate political authority over private individuals, the authority of domestic law in a well-ordered state is generally taken for granted. Not so the authority of international and constitutional law, each of which is perpetually questioned or resisted on grounds of sovereignty, self-determination, and democracy. The Article concludes by suggesting some constructive implications of assimilating international and constitutional law into a more unified vision of public law.

Three preliminary methodological points will further clarify the scope and ambition of this project. First, while we draw upon the classics of positivist jurisprudence to frame our analysis, we do not intend to make or endorse any claims at the level of jurisprudence. The conventional diagnoses of the deficiencies of international law that we take as our starting point might be understood to implicate jurisprudential claims about what should count as law or a legal system — including some claims that are controversial or have been discredited at a philosophical level. Few contemporary jurisprudes would join Hobbes and Austin in casting sanction-based commands or sovereignty in the central roles these concepts play in the conventional wisdom about the exceptionalism of international law (and therefore in Parts III and IV of this Article, respectively). In bludgeoning international law with its Austinian deficits, conventional legal culture may display some measure of philosophical naiveté in failing to internalize H.L.A. Hart's refutation of Austin — not to mention a selective blindness toward the applicability of the Austinian criteria to constitutional law. But another possibility is that Hobbesian and Austinian features of the legal order, or their absence, remain relevant for functional and normative reasons beyond the jurisprudential one of distinguishing law from other kinds of normative order. For those who believe that sanctions are an empirically important determinant of legal compliance, for ex-

ample, Hart's analysis of the nature of law and legal systems provides no reason to stop caring about them. The same is true of those who believe that sovereignty or democratic self-determination are normatively significant values that legal constraints compromise. The command theory of law may be dead jurisprudentially, but some of the state-centric features of legal systems that Hobbes and Austin emphasized — including sanctions and sovereignty — retain central significance at less rarified levels of legal theory and practice.[23] Whatever jurisprudential progress has been made toward working out a conception of law that is relatively autonomous of the state does nothing to obviate the functional and normative imperatives that the state has long been understood to serve.

Second, consistent with our perhaps exceptionally American perspective on the apparent differences between international and constitutional law, our focus throughout is on the United States's system of constitutional law. Nonetheless, we believe that our fundamental points apply to other constitutional systems as well. Indeed, we believe that the general features of constitutional law in our focus are analytically necessary to the ambitions of any sort of constitutional regime that aspires to limit (as well as constitute) political authority.[24]

Finally, in case it does not go without saying, our argument is not that international and constitutional law are the same in *all* respects. Some formal differences between the two kinds of legal regime are obvious (if not entirely clear-cut). International law predominantly addresses relations between and among states, whereas constitutional law predominantly addresses the political structure of a single state; rules of international law are created primarily through treaties entered into by states or by customary state practice, whereas rules of constitutional law are created primarily by popular ratification of an authoritative text or conventions of political life that have achieved normative status as higher law; and so on. And while our analysis of the two legal regimes along the functional dimensions of uncertainty and enforcement and the normative dimension of sovereignty emphasizes important similarities, we also pause to notice differences. From a functional perspective, the size and heterogeneity of the international community may make it more difficult for the international legal sys-

---

[23] We do not touch upon natural law theories at all, simply because these theories offer no resources for elaborating what we take to be the significant and interesting differences between public and ordinary domestic law (though they do offer resources for portraying international and constitutional law as fundamentally alike).

[24] Where the analytic generalizations are least transparent — particularly in Part II, with respect to the problem of legal uncertainty — we sketch out the comparative extensions. Our discussions of the problems of enforcement and sovereignty in Parts III and IV respectively should translate straightforwardly to other constitutional systems.

tem to develop institutional mechanisms for specifying and enforcing legal rules than for constitutional systems of smaller and more homogenous states to do the same.[25] The fact that American constitutional law is made, interpreted, and implemented exclusively by Americans may make a normative difference to those who believe that sharing governance authority with a broader political community will invariably threaten American sovereignty, or that a politico-legal community can only be sustained at the level of the nation-state. We recognize these and other differences, but the ambition of this project is to reveal an important set of similarities that such differences may have masked.

II. THE PROBLEM OF UNCERTAINTY

For positivists, a defining feature of law is broad agreement in society on what counts as a legal rule and on what identifiable legal rules require in concrete cases. A defining feature of the state is that its institutions foster this agreement. It has been common ground among positivist legal theorists for centuries that a well-functioning legal system requires something like the institutional apparatus of the modern state — legislatures with widely acknowledged authority to enact and modify legal norms and courts with widely acknowledged authority to adjudicate disputes about the proper interpretation of those norms — in order to coordinate understandings of what the law requires.[26] Thus, for Hobbes, the state comes into being to resolve disagreement about what counts as law by serving as the singular and decisive source of legal norms.[27] Without the centralized authority of the Leviathan, Hobbes insisted, the divergent interests, values, and perspectives of individuals in the anarchical state of nature would make it impossible to coordinate any legal order. Bringing this insight to bear on modern political order, Hart emphasized that legal systems solve the problem of "uncertainty" by providing institutions and procedures for resolving what counts as law, "either by reference to an authoritative text or to an official whose declarations on this point are authoritative."[28] Hart famously described how mature legal systems accom-

---

[25] *See* ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 11 (forthcoming 2009).

[26] *See* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 69–83 (1983) (describing the views of Hobbes, Locke, Rousseau, Kant, Bentham, and James Mill).

[27] *See* HOBBES, *supra* note 13, at 189; *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 39–41 (1999). This view was hardly limited to Hobbes. *See, e.g.*, Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

[28] H.L.A. HART, THE CONCEPT OF LAW 92 (2d ed. 1994); *see also id.* at 93 ("Disputes as to whether an admitted rule has or has not been violated will always occur . . . if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation."). Hart calls this second problem "inefficiency," but its relationship to "uncertainty" in the intuitive sense is obvious.

plish this task through "secondary rules" of recognition, change, and adjudication that determine what the primary legal rules are and when they have been violated.[29] Within the institutional framework of the modern state, these rules serve to identify legislatures and courts as the authoritative sources of legal norms and the authoritative arbiters of disputes over their meaning.

The crucial role of state institutions in coordinating public understandings of the sources and proper interpretation of legal norms has long been a reason for skepticism about international law. International society lacks a super-state — including a super-legislature and a super-judiciary — to create the kind of consensus about operative legal norms that these institutions enable within states. This deficiency is why cosmopolitan theorists have long argued for creating a global legislature and court to govern world affairs.[30] In fact, the development of international institutions has proceeded some distance, and the number and density of international institutions continues to increase. But the international system is still a long way from establishing anything like a single, comprehensive global legislature or court. The difficulty of creating such institutions, or of duplicating their functions through some other institutional arrangement, leads to pessimism about whether the international system can ever hope to achieve the level of consensus and certainty that is thought to characterize well-developed systems of domestic law that by definition already have the institutions of an up-and-running state at their disposal.

Our aim in this Part is to illuminate the perhaps surprisingly similar predicament of constitutional law in the United States and other countries. Of course, *all* legal systems generate some level of ambiguity and disagreement about the correct interpretation of particular rules or the right outcome of particular cases. But two characteristics distinguish constitutional law from ordinary domestic law and align it with international law. First, the institutionalized secondary rules of systems of constitutional law are less able to resolve first-order uncertainty than their counterpart institutions in ordinary domestic legal systems. In part, this is because these systems lack an ongoing legislative process. In part it is because, although courts in some systems play an important role in adjudicating disputes over the meaning of constitutional norms (or in creating and changing these norms), their authority to resolve constitutional disputes tends to be limited and contested. The second characteristic is that, in the United States and other countries, there is considerable ambiguity and debate about what, precisely, the secondary rules of constitutional law are, and how

---

[29] *See id.* at 94–98.

[30] *See, e.g.*, DEREK HEATER, WORLD CITIZENSHIP AND GOVERNMENT (1996).

they have been institutionalized. Officials and citizens disagree not just about the meaning of specific constitutional norms but about what counts as an authoritative source of norms, a legitimate mechanism of legal change, or a definitive adjudication of disputes over constitutional meaning. And of course there are no institutionalized "tertiary" rules to resolve this problem of uncertainty about the secondary rules of the system.[31]

These problems of uncertainty create special challenges for constitutional and international law that ordinary domestic legal systems do not face. Domestic legal systems can rely on the authoritative legislative and judicial institutions of the state to identify and specify legal norms. But because systems of public law aspire to stand outside of, and govern, the state, they cannot fully rely on the institutional apparatus of the state itself. Public law systems can only institutionalize the legislative and judicial functions by cautiously conscripting existing state institutions to play a meta-governance role or by building new institutions outside of the state or its conventional governance structure. Both international and constitutional law have used a combination of these strategies with some success in reducing legal uncertainty. Still, the challenges of institutionalizing the secondary rules of a legal system outside of the institutional apparatus of the state remain daunting in both areas of law.

A. International Law

International law lacks a centralized and hierarchical lawmaker akin to the legislature inside a state to specify authoritative sources of law and the mechanisms of legal change and reconciliation. It also lacks centralized and hierarchical judicial institutions to resolve the resulting legal uncertainty. As a result, its norms are imprecise, contested, internally contradictory, overlapping, and subject to multiple interpretations and claims. International law's inability to resolve this uncertainty has fueled skepticism about its status as law; law that is unclear or unknowable, many believe, cannot be described as a real legal system, and in any case cannot be effective.[32]

States coordinate public understandings of what counts as law largely through the institutional mechanism of an authoritative legisla-

---

[31] For a similar analysis at the level of positivist jurisprudence, see Jeremy Waldron, *Are Constitutional Norms* Legal *Norms?*, 75 FORDHAM L. REV. 1697 (2006). Waldron's essential point is that constitutional norms, conceived as fundamental secondary rules in Hart's framework, by definition lack the backing provided by such rules themselves for primary rules. Without this backing, it is unclear why constitutional norms, for Hartians, should count as law, as opposed to merely positive morality.

[32] *See* HART, *supra* note 28, at 214; LOUIS HENKIN, HOW NATIONS BEHAVE 22–25 (2d ed. 1979); HANS J. MORGENTHAU, POLITICS AMONG NATIONS 253–68 (2d ed. 1955).

brace the diversity, inclusivity, and generativity of interpretive pluralism and popular constitutionalism, even at the expense of settlement and certainty.[95] We can remain agnostic on these normative matters. Our conclusion is simply that, for better or worse, a relatively high degree of uncertainty or pluralism inheres in all public law systems.

III. THE PROBLEM OF ENFORCEMENT

The legal positivist tradition running from Hobbes to Austin defined law as the commands of a sovereign backed by sanctions. For Hobbes, "Law, properly is the word of him, that by right hath command over others";[96] and not just by right, but by might: "Covenants, without the Sword, are but Words . . . ."[97] In the traditional positivist view, sovereign states are the only possible source of law, because sovereign states hold a monopoly on the legitimate use of coercive force. This understanding obviously bodes poorly for the status of international law, which lacks a super-state standing above ordinary states with the power to coerce them. Thus, seeing no sovereign to which states could be subject, Hobbes dismissed the possibility of any kind of international law beyond the thin natural laws that would prevail in the ungoverned international state of nature.[98] Austin likewise argued that "the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."[99] At best, in Austin's view, the law of nations could be understood as a form of "positive morality," more akin to the "laws" of honor and fashion than to genuine legal systems.[100]

Hart and his successors have largely succeeded in vanquishing this sanction-based account of law[101] and, by doing so, rehabilitating the

---

[95] *See, e.g.*, SEIDMAN, *supra* note 78; Reva B. Siegel, Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

[96] HOBBES, *supra* note 13, at 109.

[97] *Id.* at 115.

[98] *See id.* at 116–17.

[99] 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 121 (Robert Campbell ed., 1875).

[100] *See* AUSTIN, *supra* note 14, at 141–42.

[101] A good statement of the pre-Hartian conventional wisdom is:

> Most lawyers hold in common a view of international law which runs somewhat as follows: There is a great difference between positive law — law with a policeman behind it — and so-called international law. International law is a body of vague rules for the attention of the political scientist and the amusement of the law student not much interested in law. It should not be confused with real law, which, as Mr. Justice Holmes pointed out, is "the articulate voice of some sovereign or quasi-sovereign that can be identified," [S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting),] and "does not exist without some definite authority behind it," [Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)]. Law is the command of a sovereign backed by force. And

possibility that international law could qualify as genuine law. Nonetheless, the absence of any centralized enforcement authority continues to be regarded as a crucial and distinctive deficiency at a functional level, if not a jurisprudential one. If law is not enforced, why should we expect anyone to comply with it? Law without enforcement and compliance may still be law, but perhaps it is not the kind anyone cares much about in the real world. Embracing this view, some political scientists and legal scholars express doubt that international law imposes serious constraints on state behavior, and therefore dismiss international law as functionally irrelevant. Others seek to rehabilitate the significance of international law by hypothesizing functions other than behavioral constraint that an international legal regime might serve. Even those who do believe that international law significantly constrains and influences the behavior of states recognize that the absence of an overarching executive with the power to coerce presents a special challenge that must be overcome. At the very least, then, the mechanisms and extent of enforcement and compliance in international law are seen as a distinctive set of puzzles or problems that do not arise in domestic legal systems backed by the power of sovereign states.

Here again, however, the domestic versus international distinction is not the right one. Domestic constitutional law, just as much as international law, lacks a coercive enforcement mechanism standing above the state to ensure that the government complies. As Hobbes and Austin both recognized, no system of public law, domestic or international, can be grounded in the sanctioning power of the sovereign state.[102] The puzzle of how a legal regime can coerce the compliance of states in a world where there is no entity more powerful than the state thus arises no less urgently in domestic constitutional law than it does in international law. Yet very little of international law's obsession with the problem of enforcement and compliance has spilled over into constitutional law. This Part emphasizes that the absence of a centralized enforcement authority creates structurally similar, and equally pressing, problems for international and constitutional law — problems that will inevitably arise when public law regimes are ap-

> however much it is hoped that nations will abide by acknowledged rules some day, they do not now; nor can they ever be compelled to do so, at least in the absence of world government. Only woolly thinking would confuse positive law enforced by our courts — our Constitution, our civil and criminal laws — with the moral directives which go by the name of international law.

Roger Fisher, *Bringing Law To Bear on Governments*, 74 HARV. L. REV. 1130, 1130–31 (1961) (footnotes omitted). Fisher argues against the conventional view described in this passage.

[102] This is why Austin believed that constitutional law, like international law, was not law but rather positive morality. *See* AUSTIN, *supra* note 14, at 141–42. Hobbes spoke generally of legal (or "justice") constraints on the state, which he viewed as impossible. HOBBES, *supra* note 13, at 85.

plied against powerful state actors. It also describes the very similar set of solutions that have been developed independently by theorists of international relations and constitutional law.[103]

A. International Law

Until relatively recently, international law scholarship in the United States was dominated by black-letter doctrinalism that sought to identify formal international law rules, and normative work that argued about how international law rules should be interpreted and that criticized nations' violations of those rules.[104] Antecedent questions of how it might be possible for such law to guide or constrain nations were mostly ignored.[105] There seemed to be an implicit assumption in the field that international law rules generated their own compliance — even while scholars were complaining about violations of these rules.

The long realist tradition in political science, by contrast, has focused more on compliance issues, and has been skeptical about international law's impact on national behaviors. The main source of this skepticism is international law's lack of a centralized enforcement mechanism. The absence of an executive power above or outside of states that can enforce international law against states led realists to doubt that international law had much of an effect on state behavior. Without "an executive authority with power to enforce the law," said Louis Henkin in summing up this view, "[t]here is no police system whose pervasive presence might deter violation."[106] Very rarely one may see limited forms of multilateral sanctions for international law violations, but they only occur in special and extreme circumstances when the national interests of the sanctioning countries happen to coincide. In general, though, international law's enforcement mechanisms "are not systematic or centrally directed, and . . . accordingly they are precarious in their operation."[107]

---

[103] For a useful and overlapping survey of the similar approaches taken by political scientists to questions of international and constitutional legal compliance, see Whytock, *supra* note 22, at 167–69.

[104] *See* Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 982–83 (2000) (reviewing STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999)); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, *in* INTERNATIONAL INCIDENTS 3, 6–7 (W. Michael Reisman & Andrew R. Willard eds., 1988).

[105] The exceptions tended to be scholars who came from other fields within law. *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (Univ. Press of Am. 1987) (1974); HENKIN, *supra* note 32; Fisher, *supra* note 101.

[106] HENKIN, *supra* note 32, at 24.

[107] J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 101 (6th ed. 1963) (1928); *see also* ABRAM CHAYES & ANTONIA HANDLER

Realists pointed out that in the absence of a centralized police agency, international law would be enforced, if at all, through self-help. And self-help meant that powerful nations would dominate the international legal system. As Hans Morgenthau explained:

> There can be no more primitive and no weaker system of law enforcement than [international law]; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation.[108]

Powerful nations, Morgenthau emphasized, "can violate the rights of a small nation without having to fear effective sanctions on the latter's part" and can "proceed against the small nation with measures of enforcement under the pretext of a violation of its rights, regardless of whether the alleged infraction of international law has actually occurred or whether its seriousness justifies the severity of the measures taken."[109]

This logic led realists to think that international law would inevitably reflect the distribution of power among nations. Powerful states or coalitions would use political, military, or economic pressure to force weaker states to embrace legal rules that serve the interests of the powerful. There are certainly many examples of this kind of power politics in international law: anti-proliferation regimes that allow nuclear nations to maintain nuclear weapons but ban non-nuclear nations from seeking them; intellectual property agreements that significantly advantage first-world rights holders; the customary international law rule prohibiting expropriation of alien property; and the U.N. Charter, which gives powerful nations a veto in the Security Council. Moreover, when international law for whatever reason fails to reflect the interests of powerful nations, they often violate it with impunity. Morgenthau argued that the U.N. Charter would be ignored by militarily powerful nations. Today he would likely say that NATO's bombing of Kosovo and the 2003 invasion of Iraq, not to mention hundreds of other violations of the Charter,[110] bear out his view.

To the extent international law does not reflect power politics, realists believe that much of its apparent influence can be explained — or explained away — as nations doing what they would have done any-

---

CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 32–33 (1995).

[108] MORGENTHAU, *supra* note 32, at 270–71.

[109] *Id.* at 271. Morgenthau qualified this point by noting that much of international law is self-enforcing, *see id.*, but the sentiment expressed here influenced generations of realist scholars and other international law skeptics who doubted whether international law had a more than non-trivial effect on state behavior.

[110] *See* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 19–30, 112–20 (2001).

how, in the absence of law. If legal rules track national self-interest, then apparent compliance with rules may have nothing to do with law. Behavioral patterns among nations that may seem regularized and law-like may merely reflect a "coincidence of interest."[111] Thus, the reason the vast majority of nations do not commit genocide, a realist would say, is not because international law prohibits genocide, but rather because these nations have no interest in committing genocide or because they would privately lose more than they would gain from doing so. Many nations that ratified the Nuclear Non-Proliferation Treaty or the Mine Ban Treaty have neither an interest in these weapons nor the resources to develop them. In these and other contexts, realists think that much of what seems like compliance with international law is in fact just coincidence of interest. Or, more modestly, they believe that most treaties, especially multilateral treaties, reflect very shallow cooperation that does not require nations to depart much from what they would otherwise do.[112]

In sum, the absence of a Hobbesian enforcement mechanism leads realists to doubt whether international law has ever made much of a difference to international politics. If much of what passes for international law compliance is nothing more than states acting in their immediate self-interest, or the coincidence of international law tracking these interests because powerful states influence its content or because international law reflects the common private interests of all (or most) nations, then there is no puzzle of compliance to be solved.

Over the past quarter century, international relations scholars known generally as institutionalists have employed the tools of game theory to show how, contra the realists, international law and institutions can shape a nation's behavior even without any higher-level enforcement authority.[113] Institutionalists conceptualize much of international relations as a prisoners' dilemma game, in which two or more states know that restraining the pursuit of short-term or private interests will make them better off in the medium or long term, but each worries that if it cooperates in the short term the other will cheat. Nations can overcome this dilemma and achieve mutually beneficial outcomes if (among other things) they know what counts as cooperation.

---

111 JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 27–28 (2005); *see* LISA L. MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS 33–36 (1992).

112 *See, e.g.*, George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996); *see also* COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986).

113 *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY (1984); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INT'L SECURITY 39, 41–42 (1995); Duncan Snidal, *The Game* Theory *of International Politics*, *in* COOPERATION UNDER ANARCHY, *supra* note 112, at 25.

The role of treaties and customary international law, institutionalists posit, is to establish the terms of cooperation and the organizations and other regimes that promote self-enforcing international relations by monitoring compliance (including monitoring by international judges), promoting iteration, linking issues, and providing other sorts of useful information. And compliance with these international laws and the organizations established by them looks law-like, because even in the absence of a centralized enforcer, nations forego their short-term interests to follow the rule embodied in the treaty or custom. Many international laws — concerning diplomatic immunity, extradition, the World Trade Organization, investment and arms control treaties, the law of the sea, the laws of war, and other subjects — can be understood as solutions to some version of a prisoners' dilemma.[114]

Institutionalists recognize that the prisoners' dilemma is not the only strategic logic that nations face. International affairs sometimes seem to follow the logic of coordination games, in which two or more nations benefit from engaging in the same or symmetrical action and have no incentive to depart from that action once it is agreed upon, but cannot initially agree on which of many possible common actions should be chosen, often because the choice has distributional consequences.[115] Treaties and customary international law can help select and embed the focal point for coordination and can also establish institutions for modifying or updating that focal point as times change. Treaties ranging from boundary settlements to communication protocols may reflect the logic of coordination. Combining the two strategic logics, treaties can also solve the coordination problem that arises in choosing which cooperative outcome will count as a solution to a prisoners' dilemma.[116]

Moving beyond realism, institutionalism shows how nations with oft-conflicting interests can use international law to achieve mutually beneficial outcomes, and how international law can have bite in influencing these outcomes even in the absence of coercive enforcement from above. Unlike realism, institutionalism can account for why na-

---

[114] For elaboration of the claims in this paragraph, see the sources cited *supra* note 113, as well as GOLDSMITH & POSNER, *supra* note 111; ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006); and JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008).

[115] *See, e.g.*, Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991); James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994); Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985).

[116] *See* GOLDSMITH & POSNER, *supra* note 111, at 33–34.

tions would bother to expend resources to negotiate and enter into treaties and follow and debate customary rules. But realism and institutionalism are broadly similar in their methodological premises. Both understand international relations as a function of instrumental national behavior. Both see compliance with international law — whether based on coincidence of interest, coercion, cooperation, coordination, or some other strategic logic — as resulting from nations of different strengths pursuing their interests on the international stage.[117] And both hold that nations create and comply with international law when, and only when, the perceived benefits of doing so outweigh the costs.

These premises divide rationalist approaches to international relations from another influential tradition, one that seeks to explain international law compliance and related issues in noninstrumental terms. The most important strand of this tradition, constructivism, focuses on factors that rationalist models downplay or ignore, most notably the "construction" of the international system itself and the actors who populate it.[118] Reduced to its simplest form, constructivism seeks to endogenize national interests. It argues that nations' interests are shaped by international structures and thus that realism and institutionalism get it backward in seeking to explain international behavior, including international law, as a function of exogenous national interests. At the most fundamental level, constructivists argue, international legal and other norms constitute the state's identity. In an important sense a state does not become a state unless and until it is "recognized" under international law by other states. Recognition is what permits states to perform important functions of statehood, including treatymaking, receiving ambassadors, conferring and receiving international immunities, participating in international organizations, excluding foreign authority, and the like. Recognition and the rules that shape it cannot, however, be understood in instrumental terms; they are, in Alexander Wendt's phrase, simply "intersubjective understandings or norms."[119] Similarly, territorial sovereignty is derivative

---

[117] The realist and institutionalist frameworks can be combined because the distribution of power can and usually does influence the form and content of the cooperation or coordination that international law fosters. *See* Goldsmith, *supra* note 104, at 963–64.

[118] *See generally* JOHN GERARD RUGGIE, CONSTRUCTING THE WORLD POLITY (1998); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).

[119] Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 412 (1992); *see also* John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997); John Gerard Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 WORLD POL. 261, 275–79 (1983) (book review).

of the international system because there is no concept of territorialism without a concept of the other.[120]

International lawyers invoke similar ideas. Henkin criticized rational choice accounts of international law for ignoring the "'givens' of international relations,"[121] such as nations and nationhood, territoriality, recognition, the establishment of diplomatic relations, and other characteristics associated with national sovereignty.[122] The international behaviors captured by rational choice explanations, he argued, presuppose a robust international legal system so familiar that it seems invisible.[123] This system, Henkin maintained, "shape[s] the policies of nations and limit[s] national behavior" by establishing the international rules of the game.[124] The upshot of Henkin's analysis is that the constitutive principles of the international legal system have a significant influence on national behaviors that precede, and cannot be explained by, the instrumental rationality of states.

Constructivists further emphasize that the identities and interests of states can change over time as a result of engagement with international law itself. The process of negotiation, mutual education, and principled argument related to the creation of and compliance with international law has a feedback effect on how national actors see themselves and their interests. Constructivists see international law and its associated institutions as creating and dispersing beliefs and standards of appropriate behavior that have a powerful socializing effect on international relations.[125]

It is a short step from these ideas to the congeries of noninstrumental compliance theories that have grown up in international law scholarship in the last few decades in response to the influence of political science and other disciplines. Noninstrumental compliance theories contend that nations follow international law because it is the right or moral or legitimate thing to do. Thomas Franck, for example, maintains that international law emerges from a "right" process and, if seen as legitimate, "exerts a pull toward compliance."[126] Whether a rule is seen as possessing legitimacy depends on four elements: the textual determinacy of the international law rule, its symbolic validation through ritualized practice, its coherence in the sense of consistent application,

---

120 *See* A.D. Smith, *States and Homelands: The Social and Geopolitical Implications of National Territory*, 10 MILLENNIUM: J. INT'L STUD. 187 (1981).

121 HENKIN, *supra* note 32, at 15.

122 *See id.* at 15–17.

123 *See id.* at 22.

124 *Id.*

125 *See* MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); RUGGIE, *supra* note 118; WENDT, *supra* note 118.

126 THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (emphasis omitted).

and "adherence," by which he means the quality of being validated by an infrastructure of rules about rules.[127] When an international law possesses these four elements, it is and appears to be "legitimate" and for this reason induces compliance. Harold Koh, by contrast, explains compliance in terms of "internalization."[128] He says that a nation may follow international law because it has "*internalized* the norm and has incorporated it into its own internal value system."[129] Internalization is the process of international law coming into domestic legal structures, interacting with domestic law and processes, and being interpreted by domestic actors who then learn to comply with the law because it is part of domestic law.[130]

In short, international relations theorists, and more recently, international lawyers, have devoted considerable attention to the puzzle of why states comply with international law in the absence of any external enforcement authority. Solutions to this puzzle have taken two general forms. Rationalists (including realists and institutionalists) see compliance as turning on the alignment between international law rules and institutions and the short- or long-term self-interest of states. Constructivists (and aligned legal theorists) see compliance as a product of the normative force of international law and its ability to shape the interests and values of states, as well as their very identities, in its image.

B. Constitutional Law

Constitutional theorists, though long obsessed with the normative legitimacy of imposing constitutional constraints on democratic decisionmaking,[131] have all but ignored the analytically prior question of whether and how it is possible for such constraints to be imposed. More so even than their international counterparts, constitutional lawyers have been content to assume that simply writing down a rule of constitutional law — in the text of the U.S. Constitution or an opinion by the U.S. Supreme Court — will somehow automatically constrain the behavior of the government officials subject to that rule. Seldom do they pause to ask why Congress, the President, or the political majorities who elect them would have any incentive to comply.

When such questions are raised, moreover, the answers tend to begin and end with judicial review. Indeed, only when confronted with

---

[127] *See id.* at 52, 91, 152, 184.

[128] Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

[129] *Id.* at 2600 n.3.

[130] *See id.* at 2659; *cf.* HENKIN, *supra* note 32, at 60–61 (explaining international compliance with international law on the basis of the "habit and inertia of continued observance").

[131] We discuss this issue in Part IV, below.