To appear in: Jeffrey L. *Dunoff* and *Mark* A. *Pollack*, eds., *International Law and International Relations: The State of the Art* (forthcoming, 2012).

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CT Liberal Theories of International Law

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Liberal theories of international relations (IR) focus on the demands of individuals and social groups, and their relative power in society, as fundamental forces driving state policy and, ultimately, world order. For liberals, every state is embedded in an interdependent domestic and transnational society that decisively shapes the basic purposes or interests that underlie its policies. This "bottom-up" focus of liberal theories on state–society relations, interdependence, and preference formation has distinctive implications for understanding international law (IL). Accordingly, in recent years liberal theory has been among the most rapidly expanding areas of positive and normative analysis of international law. As the world grows more and more interdependent and countries struggle to maintain cooperation amidst diverse economic interests, domestic political institutions, and ideals of legitimate public order, international law will increasingly come to depend on the answers to questions that liberal theories pose.

I am grateful to Chris Kendall and Justin Simeone for excellent research assistance and for stylistic and substantive input, and to William Burke-White, Jeffrey Dunoff, Laurence Helfer, Mark Pollack, Anne-Marie Slaughter, and participants at a conference at Temple University Beasley School of Law for detailed comments,

The first section of this chapter ("Liberal Theories of International Relations") elaborates the assumptions and conclusions of liberal international relations theory. Section II ("What Can Liberal Theories Tell Us about International Law Making?") develops liberal insights into the substantive scope and depth of international law, its institutional form, compliance, and long-term dynamic processes of evolution and change. Section III ("International Tribunals: Liberal Analysis and Its Critics") examines the specific case of international tribunals, which has been a particular focus of liberal theorizing, and treats both conservative and constructivist criticisms of liberal theory. Section IV ("Liberalism as Normative Theory") considers the contribution of liberal theory to policy, as well as to conceptual and normative, analyses of international law.

A I. Liberal Theories of International Relations

The central liberal question about international law and politics is: who governs? Liberals assume that states are embedded in a transnational society comprised of individuals, social groups, and substate officials with varying assets, ideals and influence on state policy. The first stage in a liberal explanation of politics is to identify and explain the preferences of relevant social and substate actors as a function of a structure of underlying social identities and interests. Among these social and substate actors, a universal condition is *globalization*, understood as transnational interdependence, material or ideational, among social actors. It creates varying incentives for cross-border political regulation and interaction. State policy can facilitate, block, or channel globalization, thereby benefitting or harming the

interests or ideals of particular social actors. The state is a representative institution that aggregates and channels those interests according to their relative weight in society, ability to organize, and influence in political processes. In each state, political organization and institutions represent a different subset of social and substate actors, whose desired forms of social, cultural, and economic interdependence define the underlying concerns (preferences across "states of the world") that the state has at stake in international issues. Representative functions of international organizations may have the same effect.

The existence of social demands concerning globalization, translated into state preferences, is a necessary condition to motivate any purposeful foreign policy action. States may seek to shape and regulate interdependence. To the extent this creates externalities, positive or negative, for policy-makers in other states seeking to realize the preferences of their individuals and social groups, such preferences provides the underlying motivation for patterns of interstate conflict and cooperation. Colloquially, what states want shapes what they do.

Liberal theory highlights three specific sources of variation in state preferences and, therefore, state behavior. Each isolates a distinctive source of variation in the societal demands that drive state preferences regarding the regulation of globalization. To avoid simply ascribing policy changes to ad hoc or unexplained preference changes, liberal theory seeks to isolate the causal mechanisms and antecedent conditions under which each functions. In each case, as the relevant

domestic and transnational social actors and contexts vary across space, time, and issues, so does the distribution of state preferences and policies.

Ideational liberal theories attribute state behavior to interdependence among social demands to realize particular forms of public goods provision. These demands are, in turn, based on conceptions of desirable cultural, political, and socioeconomic identity and order, which generally derive from both domestic and transnational socialization processes. Common examples in modern world politics include conceptions of national (or civic) identity and self-determination, fundamental political ideology (such as democratic capitalism, communism, or Islamic fundamentalism), basic views of how to regulate the economy (social welfare, public risk, environmental quality), and the balance of individual rights against collective duties. The starting point for an ideational liberal analysis of world politics is the question: How does variation in ideals of desirable public goods provision shape individual and group demands for political regulation of globalization?

Commercial liberal theories link state behavior to material interdependence among societal actors with particular assets or ideals. In international political economy, conventional "endogenous policy" theories of trade, finance, and environment posit actors with economic assets or objectives, the value of which depends on the actors' position in domestic and global markets (i.e., patterns of globalization). The starting point for a commercial liberal analysis of world politics is the question: How does variation in the assets and market position of economic actors shape their demands for political regulation of globalization?

Republican liberal theories stress the role of variation in political representation. Liberals view all states (and, indirectly, international organizations) as mechanisms of political representation that privilege the interests of some societal actors over others in making state policy. Instruments of representation include formal representation, constitutional structure, informal institutional dynamics, appointment to government, and the organizational capacity of social actors. By changing the "selectorate" – the individuals and groups who influence a policy – the policy changes as well. The starting point for a republican liberal analysis of world politics is the question: How does variation in the nature of domestic representation alter the selectorate, thus channeling specific social demands for the political regulation of globalization?

Although for analytical clarity we customarily distinguish the three categories of liberal theory, they are generally more powerful when deployed in tandem. Interdependence often has significant implications for both collective goods provision (ideational liberalism) and the realization of material interests (commercial liberalism). Moreover, whether underlying preferences are ideational or material, they are generally represented by some institutionalized political process that skews representation (republican liberalism). Even the simplest conventional theories of the political economy of international trade, for example, assume that all three strands are important: private economic interest is balanced against collective welfare concerns, whether in the form of a budget constraint or countervailing public policy

goals, and these social pressures are transmitted to the state through representative institutions that privilege some voices over others (Grossman and Helpman 1994).

It is important to be clear what liberal theory is not. Theoretical paradigms in international relations are defined by distinctive causal mechanisms that link fundamental causes, such as economic, technological, cultural, social, political, and behavioral changes among states in world politics, to state behavior. Hence the term *liberal* is not used here to designate theories that stress the importance of international institutions; the importance of universal, altruistic, or utopian values, such as human rights or democracy; or the advancement of left-wing or free market political parties or policies. In particular, institutionalist regime theory, pioneered by Robert Keohane and others, often termed "neo-liberal," is distinctly different. Kenneth Abbott has written that:

> EXT Institutionalism…analyzes the benefits that international rules, organizations, procedures, and other institutions provide for states in particular situations, viewing these benefits as incentives for institutionalized cooperation…. [R]elatively modest actions – such as producing unbiased information, reducing the transactions costs of interactions, pooling resources, monitoring state behavior, and helping to mediate disputes – can help states achieve their goals by overcoming structural barriers to cooperation (2008: 6).

This institutionalist focus on the reduction of informational transaction costs differs from the focus of liberalism, as defined here, on variation in social preferences—even if the two can coexist, with the former being a means of achieving the latter.

The distinctiveness of liberal theories also does not stem from a unique focus on "domestic politics." True, liberal theories often accommodate and explain domestic distributional and political conflict better than most alternatives. Yet, it is unclear what a *purely* "domestic" theory of rational state behavior would be, liberal or otherwise. Liberal theories are international in at least three senses. First, in the liberal view, social and state preferences are driven by transnational material and ideational globalization, without which liberals believe foreign policy has no consistent purpose. Second, liberal theories stress the ways in which individuals and groups may influence policy, not just in domestic but in transnational politics. Social actors may engage (or be engaged by) international legal institutions via domestic institutions, or they may engage them directly. They may organize transnationally to pursue political ends. The liberal assumption that political institutions are conduits for political representation is primarily directed at nation-states simply because they are the preeminent political units in the world today; it may also apply to subnational, transnational, or supranational institutions. Third, liberal theories (like realist, institutionalist, systemic constructivist theories, and any other intentionalist account of state behavior) are strategic and thus "systemic" in the sense that Kenneth Waltz (1979) employs the term: they explain collective international outcomes on the basis of the interstate distribution of the characteristics or attributes of states, in this case their preferences. The preferences of a single state alone tell us little about its probable strategic behavior with regard to interstate interaction, absent knowledge of the preferences of other relevant states, since liberals agree that state preferences and

policies are interdependent and that the strategic games states play matter for policy – assumptions shared by all rationalist theories.

The critical quality of liberal theories is that they are "bottom-up" explanations of state behavior that focus on the effect of variations in state–society relations on state preferences in a context of globalization and transnational interdependence. In other words, liberalism emphasizes the distribution of one particular attribute (socially determined state preferences about the regulation of social interdependence), rather than attributes favored by other major theories (e.g., coercive power resources, information, or nonrational standards of appropriate strategic behavior). Indeed, other theories have traditionally defined themselves in contrast to the liberal emphasis on social preferences.

A II. What Can Liberal Theories Tell Us About International Law Making?

Liberal theories can serve as the "front-end" for multicausal syntheses with other theories of institutions, explaining the substance of legal regimes; can generate their own distinctive insights into the strategic and institutional aspects of legal regimes; and can provide explanations for the longer-term dynamic evolution of international law. Let us consider each in turn.

B A. Liberal Explanations for the Substantive Scope and Depth of International Law

One way to employ liberal theory is as the first and indispensable step in any analysis of international law, focusing primarily on explaining the substantive content of

international interaction. Explaining the substantive focus of law, a task at which few IR theories excel, is a particular comparative advantage of liberal theory. Realism and institutionalism seek to explain the outcome of strategic interaction or bargaining over substantive matters, but they take as given the basic preferences, and hence the substance, of any given interaction. Constructivists do seek to explain the substantive content of international cooperation, but do so not as the result of efforts to realize material interests and normative ideals transmitted through representative institutions, but rather as the result of conceptions of appropriate behavior in international affairs or regulatory policy divorced from the instrumental calculations of societal actors empowered by the state.

For liberals, the starting point for explaining why an instrumental government would contract into binding international legal norms, and comply with them thereafter, is that it possesses a substantive purpose for doing so. From a liberal perspective, this means that a domestic coalition of social interests that benefits directly and indirectly from particular regulation of social interdependence is more powerfully represented in decision making than the countervailing coalition of losers from cooperation – compared to the best unilateral or coalitional alternatives. This is sometimes mislabeled a realist ("interest-based") claim, yet most such formulations follow more from patterns of convergent state preferences than from specific patterns of state power (e.g., Abbott 2008). Thus, liberals have no reason to disagree with Jack Goldsmith and Eric Posner's claim that much important state behavior consistent with customary international law arises from pure coincidence

(independent calculations of interest or ideals), the use of IL as a coordination mechanism (in situations where symmetrical behavior increases payoffs), or the use of IL to facilitate cooperation where coordinated self-restraint from short-term temptation increases long-term issue-specific payoffs (as in repeated bilateral prisoners' dilemma, where payoffs to defection and discount rates are low) (Goldsmith and Posner 1999: 1127). Contrary to Goldsmith and Posner, however, liberals argue that such cases do not exhaust the potential for analyzing or fostering legalized cooperation. The decisive point is that if social support for and opposition to such regulation varies predictably across time, issues, countries, and constituencies, then a liberal analysis of the societal and substate origins of such support for and against various forms of regulation is a logical foundation for any explanation of when, where, and how regulation takes place (Keohane 1982; Legro 1997; Milner 1997; Moravcsik 1997; Lake and Powell 1999; Wendt 1999).

The pattern of preferences and bargaining outcomes helps define the underlying "payoffs" or "problem structure" of the "games" states play – and, therefore, help define the basic potential for cooperation and conflict. This generates a number of basic predictions, of which a few examples must suffice here. For liberals, levels of transnational interdependence are correlated with the magnitude of interstate action, whether essentially cooperative or conflictual. Without demands from transnationally interdependent social and substate actors, a rational state would have no reason to engage in world politics at all; it would simply devote its resources to an autarkic and isolated existence. Moreover, voluntary (noncoercive) cooperation,

including a sustainable international legal order that generates compliance and evolves dynamically, must be based on common or compatible social purposes. The notion that some shared social purposes may be essential to establish a viable world order, as John Ruggie observes (1982), does not follow from realist theory – even if some realists, such as Henry Kissinger, assumed it (1993 79). The greater the potential joint gains and the lower the domestic and transnational distributional concerns, the greater the potential for cooperation. Within states, every coalition generally comprises (or opposes) individuals and groups with both "direct" and "indirect" interests in a particular policy: direct beneficiaries benefit from domestic policy implementation, whereas indirect beneficiaries benefit from reciprocal policy changes in other states (Trachtman 2010). Preferences help explain not only the range of national policies in a legal issue, but also the outcome of interstate bargaining, since bargaining is often decisively shaped by *asymmetrical interdependence* – the relative intensity of state preferences for inside and outside options (Keohane and Nye 1977). States that desire an outcome more will pay more – either in the form of concessions or coercion – to achieve it.

Trade illustrates these tendencies. Shifts in comparative advantage and intra-industry trade over the past half-century have generated striking cross-issue variations in social and state preferences. Trade creates coalitions of direct and indirect interests: importers and consumers, for example, generally benefit from trade liberalization at home, whereas exporters generally benefit from trade liberalization abroad. Patterns of trade matter as well. In industrial trade, intra-industry trade and

investment means liberalization is favored by powerful economic interests in developed countries, and cooperation has led to a massive reduction of trade barriers. A long period of exogenous change in trade, investment, and technology created a shift away from North–South trade and a post–World War II trade boom among advanced industrial democracies. Large multinational export and investment interests mobilized behind it, creating ever-greater support for reciprocal liberalization, thereby facilitating efforts to deepen and widen Generalized Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) norms (Gilligan 1997*a*). In agriculture, by contrast, inter-industry trade patterns and lack of developed-country competitiveness has meant that powerful interests oppose liberalization, and agricultural trade has seen a corresponding increase in protection. Both policies have massive consequences for welfare and human life. In trade negotiations, as liberal theory predicts, asymmetrical interdependence is also a source of bargaining power, with governments dependent on particular markets being forced into concessions or costly responses to defend their interests.

More recently, as developed economies have focused more on environmental and other public interest regulation, liberalization has become more complex and conflict-ridden, forcing the GATT/WTO and European Union (EU) systems to develop new policies and legal norms to address the legal complexities of "trade and" issues. In environmental policy, cross-issue variation in legal regulation (the far greater success of regulation of ozone depletion than an area such as climate change, for example) reflects, most fundamentally, variation in the convergence of underlying

economic interests and public policy goals (Keohane and Victor 2011 The willingness of EU member states to move further than the more diverse and less interdependent WTO is similarly predictable.) The "fragmentation" of the international legal system due to multiple, overlapping legal commitments reflects, from a liberal perspectives, underlying functional connections among issues due to interdependence, rather than autonomous tactical or institutional linkage. (Alter and Meunier 2009). .

In global financial regulation, regulatory heterogeneity under conditions of globalization (especially, in this case, capital mobility) undermines the authority and control of national regulators and raises the risk of "races to the bottom" at the expense of individual investors and national or global financial systems (Simmons 2001; Drezner 2007; Singer 2007; Helleiner, Pagliari, and Zimmermann 2010; Brummer 2011). Major concerns of international legal action include banking regulation, which is threatened when banks, investors, and firms can engage in offshore arbitrage, seeking the lowest level of regulation; regulatory competition, where pressures for lower standards are created by professional, political, and interest group competition to attract capital; and exacerbation of systemic risk by cross-border transmission of domestic financial risks arising from bad loans or investments, uninformed decisions, or assumed risk without adequate capital or collateral. Coordination of international rules and cooperation among regulators can address some of these concerns, but in a world of regulatory heterogeneity, it poses the problem of how to coordinate policy and overcome political opposition from those

who are disadvantaged by any standard. High levels of heterogeneity in this issue area, and the broad impact of finance in domestic economies, suggest that legal norms will be difficult to develop and decentralized in enforcement.

Similar variation can be observed in human rights. The most important factors influencing the willingness of states to accept and enforce international human rights norms involve domestic state–society relations: the preexisting level and legacy of domestic democracy, civil conflict, and such. Even the most optimistic assessments of legalized human rights enforcement concede that international legal commitments generally explain a relatively small shift in aggregate adherence to human rights (Simmons 2009). By contrast, liberal theories account for much geographical, temporal, and substantive variation in the strength of international human rights norms. The fact that democracies and post-authoritarian states are both more likely to adhere to human rights regimes explains in part why Europe is so far advanced – and the constitutional norms and conservative legacy in the United States is an exception that proves the rule. Recent movement toward juridification of the European Convention on Human Rights system, with mandatory individual petition and compulsory jurisdiction, as well as the establishment of a court, occurred in part in response to exogenous shocks – the global spread of concern about human rights and the "second" and "third" waves of democratization in the 1980s and 1990s – and in part in order to impose them on new members. Political rights are firmly grounded in binding international law, but socioeconomic and labor rights are far less so – a reflection not of the intrinsic philosophical implausibility of the latter, but of large

international disparities in wealth and social pressures on governments to defend existing domestic social compromises (Moravcsik 2002, 2004). Even existing political rights are constrained in the face of economic interests, as when member states ignore indigenous rights in managing large developmental projects.

Liberal theories apply also to security areas, such as nuclear nonproliferation. Constructivists maintain that the behavior of emerging nuclear powers – such as India, Pakistan, Israel, North Korea, and Iran – is governed by principled normative concerns about fairness and hypocrisy: if existing nuclear states were more willing to accept controls, new nuclear states would be. Realists argue that the application and enforcement of the nonproliferation regime is simply a function of the cost-effective application of coercive sanctions by existing nuclear states; were they not threatened with military retaliation, states would necessarily be engaged in nuclear arms races. Both reasons may be important causes of state behavior under some circumstances. The liberal view, by contrast, hypothesizes that acceptance of non-proliferation obligations will reflect the underlying pattern of material and ideational interests of member states and their societies. Insofar as they are concerned about security matters, it reflects particular underlying ideational or material conflicts. Recent research findings on compliance with international nonproliferation norms confirm the importance of such factors. The great majority of signatories in compliance lack any evident underlying desire to produce nuclear weapons. Those that fail to sign face particular exogenous preference conflicts with neighbors or great powers (Hymans 2006; Grotto 2008; Sagan 2011).

B B. Liberal Explanations for the Institutional Form and Compliance

So far, we have considered the implications of liberal IR theory for explaining the substance of cooperation, not its form: when states cooperate legally, but not how they go about it. This may seem appropriate. One might suppose that such a liberal theory is all one needs, for international law is no more than a simple coordination mechanism that ratifies what states would do anyway. (This sort of explanation is often mislabeled "realist," but it is more often a crude version of liberal theory, since, in most accounts, it is a convergence of social preferences, not interstate centralization of coercive power, that explains most of the variation in underlying state interests.) This may sometimes be enough.

Yet in some cases international law surely plays a more independent role. For such cases, liberal theories almost always must still be properly employed as a "first stage," explaining the distribution of underlying preferences. After that, analysts may hand off to other (realist or institutionalist) theories to explain choice of specific legal forms, compliance pull, and long-term endogenous evolution. These "later-stage" theories may contribute to defining the ultimate problem structure by considering factors such as information and transaction costs, coercive power resources, various types of beliefs, and various process variables. As long as one assumes purposive state behavior, as all these theories do, however, liberal theory's focus on variation in social interdependence, the substantive calculations of powerful domestic and transnational groups, and state preferences must properly be considered first. One cannot theorize the efficient matching of means to ends without first explaining the

choice of ends. Indeed, liberal theory may constrain (or even supplant) the theories that are appropriate to employ in later stages of the multicausal synthesis, because the nature of underlying preferences is a decisive factor shaping the nature of strategic interaction (Moravcsik 1997, 1998; Lake and Powell 1999). Realist theories, for example, assume an underlying expected conflict of interest sufficient to motivate costly coercive strategies, whereas institutionalist theories assume underlying positive-sum collective action problems. (The role of non-rational theories is more complex.) In this view – to extend Stephen Krasner's celebrated metaphor – once liberalism defines the shape of the Pareto frontier, realism explains distributional outcomes, and institutionalism explains efforts to maximize efficiency and compliance (1991).

This role of liberal theory as the primary stage of multi-causal explanation is an important and increasingly widely recognized one. Yet, to limit the scope of liberal international theories solely to a "first-stage" explanation for initial preference formation and the substance of legal norms would be to ignore many of the fundamental contributions that liberal theory has made, or can potentially make, to the study of the institutionalization, enforcement, and evolution of international law. There are three specific ways in which involvement of social actors can have a direct influence on institutional form and compliance pull. First, the future preferences of individuals and groups have influence decisions about institutionalization and compliance; second, many international legal rules directly regulate the behavior of non-state actors; and third, many international enforcement systems are "vertical,"

functioning primarily by embedding international norms in domestic institutions and politics. Let us consider each in turn.

C **1. Social Preferences Influence Institutional Delegation and Compliance**

On a conventional functional understanding, international law influences behavior by pre-committing governments with short time horizons or uncertainty about future social circumstances and preferences. States maintain international legal regimes to enhance their capacity for elaborating and enforcing regime norms by enhancing reciprocity, reputation, and retaliation. Yet, from a liberal perspective, cooperation is also what Keohane and Nye (1977) term "complex interdependence" and Robert Putnam (1988) calls a "two-level game," in which national leaders bargain not just with foreign counterparts, but also with domestic social actors at home and abroad. Legal institutions are, in essence, efforts to establish current arrangements that will appropriately shape not just future interstate interaction, but also future domestic and transnational state–society relations. Future state-society relations are to some degree inherently uncertain, due to exogenous trends and shocks or endogenous feedback induced by commitment to international law. Were this not the case, governments would not need to establish international regimes or overarching norms, such as "legality," but could simply enter into specific narrow substantive agreements on whatever subject is of importance to them. It is uncertainty that generates much of the demand for transaction-cost–reducing international regimes. To analyze or evaluate such processes precisely, we must depart from the horizontal state-to-state politics and incorporate information about the current and future demands of social

groups and the nature of representative institutions. Variation in present and future social preferences – the direction, intensity, risk and uncertainty, and time horizon of social demands – can have a direct impact on institutional design and compliance. Smart policy makers will design institutions so as to shift and channel social preferences in the future in a direction consistent with their favored view of elaboration of and compliance with the legal regime.

Variation in the flexibility of compliance mechanisms is just one example of the way in which the institutional design of international legal agreements takes into account expected shifts in preferences. When entering into a legal commitment, a rational state must weigh the advantages and disadvantages of being bound in the future. The design problem is delicate: excessive rigidity might encourage defection, yet excessive flexibility might encourage abuse. Recent work has sought to locate the "optimal" level and form of *ex ante* commitment (Goldstein and Martin 2000: 604). The critical factor is not primarily whether the domestic sector in question is "sensitive" or "sovereign": it is often in the most sensitive areas, such as diplomatic immunity, arms control, or agricultural policy, where we see the most rigid rules. The critical point is rather the level of current uncertainty and intensity of concern about future exogenous shocks, which might tempt states to defect.

There are a number of institutional solutions to this problem. Rosendorff and Milner argue for establishing proper *ex ante* penalties (2001). Sykes (1991), Downs and Rocke (1995), and Pelc (2009) likewise argue for the utility of escape clauses in international agreements. Koremenos (2002) argues that sunset clauses would permit

risk-averse states to renegotiate agreements. Chayes and Chayes (1995) argue for capacity building for governments in trouble. Kleine (2011) observes that the EU employs *ex post* negotiation over exceptions, which may be more efficient than the more rigid solutions above, because it permits governments to elicit new information about the true nature of social demands for exceptions and amendments *ex post*, while insulating governments against pressures from domestic special interests. For example, it would hardly have been useful for European governments to have set "optimal" penalties for ignoring European Court of Justice (ECJ) judgments in 1957, when the entire legal evolution of the system was unforeseen, and it is suboptimal to do so in any given case solely on the basis of prior knowledge (Burley and Mattli 1993; Slaughter-Burley 1993; Weiler 1996).

The pattern of social preferences, present and future, often defines whether interstate interaction approximates a game of coordination or a game of collaboration, with implications for institutional form. Some international agreements govern coordination games, in which bargaining to agreement may be difficult, but a coalition of social actors has little incentive to press for unilateral defection from an agreement (Keohane 1982, 1984). Coordination games require mechanisms to overcome bargaining problems, the intensity of which depend on informational challenges and the extent of distributional conflict. Other agreements govern collaboration games, in which social actors have a strong incentive to press for defection, creating a prisoners' dilemma structure (Martin 1992). Collaboration games require multi-issue linkages, stronger oversight, and enforcement mechanisms

to secure compliance. Even the extent to which a regime is based on reciprocity at all is a function of the distribution of social interests.

Consider, for example, postwar international trade cooperation. Industrial tariff reductions among developed country members of the European Economic Community (EEC) and the GATT in the 1950s and 1960s appear to have generated a coordination game. Negotiation among many detailed issues was sometimes technically complex, but once a handful of "sensitive sectors" had been excluded, cross-cutting ties of intra-industry trade and investment created reciprocal interest in membership and a low incentive to defect unilaterally. There is some reason to believe that institutionalization of implementation and binding interstate dispute resolution added little (Gilligan 1997*b*). Contrast this with contemporaneous efforts to liberalize declining industrial sectors and agriculture, where strong veto groups existed, and patterns of factor abundance and sectoral advantage were cross-cutting, and with the rise of "trade and" issues, in which trade liberalization comes in conflict with increasingly varied public regulatory concerns. These issues created sectoral conflicts of interest requiring oversight, dispute resolution, and enforcement to clarify obligations and secure compliance. Within Europe, cooperation was impossible in areas like agriculture without a complex regional subsidy regime, a set of exceptions and safeguards in the GATT, and far more centralized oversight.

Another example of how *ex ante* social preferences influence institutional design, which feeds back on social preferences, arises when leaders exploit international norms to impose favored domestic policies at home. The conventional

view of international cooperation focuses on "indirect" benefits, treating domestic commitments solely as a necessary *quid pro quo* to secure foreign adherence to international norms. Yet, domestic coalitions generally also include those who gain "direct" benefits, sometimes led by politicians who seek to impose domestic competitiveness, democracy, environmental quality, or other longer-term reform goals. Mexican entry into the North American Free-Trade Agreement, Chinese entry into the WTO, Republican support for free trade in the United States, and East European entry into the EU have all been interpreted in this way. The tendency of new democracies to favor international human rights commitments and to respond with greater compliance has been seen as a self-interested effort to entrench human rights in domestic institutions and practices (Moravcsik 2000; Hathaway 2007). Traditionally, more advanced democracies have also joined human rights regimes to gain foreign policy externalities in situations of underlying ideological conflict (Moravcsik 2000; Landman 2005).

One methodological implication of the liberal approach is that any study of institutional impact must be rigorously controlled for variation in exogenous preferences: this discussion of compliance and impact is closely connected with the previous discussion of delegation and substantive content. The analyst needs to understand the basic elements that lead a state to commit to international legal mechanisms initially, because states often sign agreements with which they intend to comply. High rates of compliance may not suggest anything about the power of international law, but could simply signal prior convergent preferences. In order to

distinguish the independent effect of legal institutions from background preferences, an analysis of international law must take place in two stages. Scholars have attempted to cope with this issue with "two-stage" selection models, in which one explains which states sign which treaties, and then model how treaties then affect compliance decisions with a new specification of preferences that seeks to isolate circumstances in which compliance is costly (e.g. Simmons 2009).

C 2. International Law Directly Regulates Social Actors

A second way in which variation in social preferences helps explain institutional choice and compliance is that *international law and organizations may regulate or involve social ("non-state") actors directly*. Many international legal rules and procedures are not primarily designed to shape state policy and compliance, as in the classic model of public international law or conventional WTO dispute resolution, but to assist states in regulating domestic and transnational social actors (Alter 2008). When states cooperate to manage matters such as transnational contract arbitration, money laundering, private aircraft, multinational firms, emissions trading, or the behavior of international officials, for example, or when they assist refugees; establish institutions within failed states; or combat terrorism, criminality, or piracy; recognize nationalist movements; or grant rights of participation or representation to private actors in international deliberations, they directly influence domestic and transnational non-state actors such as corporations, nongovernmental organizations (NGOs), private individuals, political movements, international organizations, and criminal and terrorist organizations. The legal enforcement of many such regulatory

regimes functions by empowering individuals and groups to trigger international legal proceedings vis-à-vis states. As we shall see, the greater the range of private access to an international regime, all other things being equal, the more likely it is to be effective and dynamic. Often, such access is a function of the issue area itself. It is customary within nations for individuals to trigger litigation about rights, independent prosecutors to trigger criminal prosecutions, and interested parties to sue to assert economic rights and enforce contracts, and the international system is no different.

Many, perhaps most, international legal instruments are not "self-binding" for states at all, but are instead "other-binding" (Alter 2008). They do not force the signatory states to delegate direct sovereignty over government decisions, but are designed primarily to constrain non-state actors. Some regulate international organizations, establishing international procedures or regulating the actions of international officials. Many other international legal rules oversee the behavior of private actors. Much private international law governs corporate activity, individual transactions, investment, communications, and other transnational activities, mostly economic, by non-state actors (Alter 2008). Which non-state actors are regulated and how they are regulated by international law is itself determined by the interests and political strength of those and other social groups. (e.g., Keohane and Victor 2011). Other rules govern different aspects of individuals and NGOs. It is conceivable that a government may find such rules onerous, just as it may find an entrenched domestic law onerous, but there is no particular reason to assume that this is more likely in

international than domestic life – or that there are "sovereignty costs" associated with international legal obligations of this kind (Goldsmith and Posner 2005). We cannot understand the attitude of states without the subtle understanding of state-society relations provided by liberal theory.

C 3. Vertical Enforcement of International Law on the Domestic Plane

A third way in which social preferences help explain institutional choice and compliance issues relating to international law is that *compliance with many international legal norms does not rely on "horizontal" interstate reciprocity and retaliation, but instead on "vertical" enforcement embedded in domestic politics ("internalization")*.

Many, perhaps most, international legal regimes are enforced vertically rather than horizontally. A traditional "horizontal" perspective treats international legal obligations as external institutional constraints on state sovereignty, enforced by interstate retaliation, mediated by via reciprocity, reputation, or linkage (Posner and Yoo 2005*a*). The horizontal path envisages a role for institutions to render threats to manipulate interdependence more transaction-cost efficient. Institutions may establish norms for granting or revoking reciprocal policy concessions, including or excluding countries in a club, or responding in a linked issue area. The "vertical" path to compliance foresees compliance and enforcement without retaliation. Instead, it seeks to alter the preferences and relative influence of social (non-state) actors who favor and oppose compliance, locking in international norms domestically or transnationally by establishing new legal institutions, shifting coalitions, and creating

new ideas of public legitimacy (Burley and Mattli 1993; Chayes and Chayes 1993, Moravcsik 1998; Dai 2005; Alter 2008; Simmons 2009).

Many analyses assume that, in issues such as trade, where reciprocal concessions are exchanged at the bargaining stage, enforcement also rests on such mechanisms. Thus, horizontal enforcement is often seen as the core of international relations, whereas vertical enforcement is often seen (particularly by political scientists) as a secondary mechanism that functions almost exclusively in exceptional areas such as human rights, where reciprocity is rarely a credible enforcement tool and opportunities for linkages are scarce. In fact, however, vertical mechanisms may be the primary enforcement mechanisms, and reciprocity and retaliation secondary, in most international legal regimes. Consider, for example, the EU, the world's most ambitious and effective international economic regime and, in the eyes of leading liberal international lawyers Anne-Marie Slaughter and William Burke-White, the world's most advanced liberal international order (2006). The EU's founding Treaty of Rome not only does not facilitate retaliation, it bans it. Hence, it is impossible to analyze compliance with EU law without theorizing vertical enforcement through domestic social coalitions, political institutions, ideational frameworks, transnational networks, and judicial mechanisms. Similarly, in the GATT/WTO, it is possible to view compliance mechanisms as largely constructed at the domestic level, for example through insulating and adopting internationally compliant trade law and bureaucratic structures, mobilizing interest group support, or spreading free-trade norms The GATT possessed notably ineffective enforcement mechanisms, and,

although those of the WTO are somewhat stronger, it is unclear whether retaliation, legalized or not, actually explains levels of compliance. (Goldstein and Martin 2000; Abbott 2008; Davis and Bermeo 2009).

Vertical enforcement may take three forms, each consistent with a different variant of liberal theory. Law may alter state–society relations and state preferences via interests, institutions, or ideas.

The first and simplest mechanism of vertical enforcement, in accordance with republican liberal theory, is a change domestic and transnational representative institutions. Many international obligations are incorporated as constitutional amendment, domestic legislation, treaty law, or through bureaucratic bodies, rules, and procedures. Such changes are important, on the liberal understanding, insofar as they tilt the domestic representative bias among decision makers on various issues (Moravcsik 1995, 2000; Simmons 2009). Legal or bureaucratic incorporation can place international norms onto the national legislative and executive agenda, increase their salience, and give sympathetic public officials and private individuals a bureaucratic edge. In rule-of-law systems, national officials and courts have some obligation to implement and enforce these norms. Individual litigants, lawyers, and especially NGOs and corporations, may be able to cite international norms in domestic courts and international tribunals, as occurs in the human rights realm (Risse and Sikkink 1999; Sikkink 2011). Christina Davis and Sarah Bermeo have analyzed WTO dispute settlement as a mechanism used by leaders to “manage domestic politics” by signaling resolve at home and abroad (2009: 1037).

Participation in ongoing international negotiation and enforcement procedures may strengthen the autonomy of executives, foreign ministries, trade ministries, and others whose "public interest" view can reliably be expected to prevail in favor of cooperation over special interest opposition, as is often the case in trade (Moravcsik 1994; Davis 2004). Finally, involvement in legal institutions may link issues domestically, empowering counter-coalitions at home against those who would violate international norms, as occurs within trade policy.

Another republican liberal mechanism of vertical institutional enforcement works through the adoption and implementation of soft-law norms by national regulators – often working in networks, a characteristic Slaughter associates with "the new world order" (Slaughter 2004). Much EU governance can be understood as coordination run through the Council of Ministers and its committees, in which national officials play a permanent, but in many ways informal, role in legislation, regulation, and enforcement. At the global level, we see a similar process in international finance. Of the Basel financial system, Brummer observes:

> EXT In this decentralized regulatory space, the national–international dichotomies associated with public international law do not apply. National regulators are responsible for devising rules and participating in international standard-setting bodies. International standard-setting bodies serve as inter-agency forums; they are run by consensus and their members (national regulators) are responsible for implementing legislative products. (2011: 273)

Public–private partnerships perform a similar function for policy implementation. Shared international legal norms and ideological interdependence can create situations for domestic courts with domestic legal autonomy to enter into transnational judicial dialogues with international tribunals and domestic judges in other countries (Alter 1998; Raustiala 2002; Slaughter 2004). Slaughter argues that "[n]ational courts are the vehicles through which international treaties and customary law that have not been independently incorporated into domestic statutes enter domestic legal systems" (2000: 1103). This is particularly true in human rights areas, where common law courts have become the agents of incorporating international norms – a process Melissa Waters calls "creeping monism" (2007). Domestic courts have become mediators of transnational norms on issues such as the death penalty, human rights, and a range of free speech issues, including hate speech, defamation, and Internet activity (Waters 2005).

A second mechanism of vertical enforcement, this time in accordance with commercial liberalism, is to transform the interests of domestic and transnational social groups. From a liberal perspective, the purpose of international cooperation is rarely simply to fix a particular static interstate bargain, but to engineer beneficial and enduring transformation of the domestic and transnational economy, society, and politics. (Recall that international legal regimes are, by their very nature, established in circumstances of repeat play under uncertainty, with a time horizon into the future; otherwise, spot agreements would do.) If new policies were not "locked in" in this way by fundamental social, institutional, and cultural change, governments would

still be fighting and refighting the same battles over international cooperation with the same supporters and opponents, decade in and decade out. Issues would never be resolved, except by exogenous social, economic, or cultural change. Inducing endogenous shifts in preferences – "internalization" of norms – is thus not simply a side-effect of cooperation essential to enforcement and compliance; it is often, although not always, the objective (Abbott 2008). To the extent that domestic economic groups reorient their behavior around these norms, making investments in economic activity predicated on their continued validity, the norms are internalized. When a state implements a trade liberalization agreement, for example, the resulting import competition eliminates some domestic firms that opposed liberalization, causes others to adjust in ways that reduce their demand for protection, and expands or creates exporting firms that benefit from free trade. The result is greater support for enforcement of trade liberalization (Bailey, Goldstein, and Weingast 1997; Hathaway 1998). Even Chayes and Chayes' "managerial approach" contemplates the possibility that states might generate the desired and required social and economic changes in the legally specified time (1993). To be sure, if domestic groups are strong enough to block adaptation and secure subsidies, as is the case in agriculture and some other declining sectors, this process will not take place (Gilligan 1997*b*; Hiscox 2002; Desbordes and Vauday 2007).

Another example is the issue of nonproliferation. Governments that promote uniform enforcement of nonproliferation norms tend to have minimal exogenous preference conflicts with neighbors or great powers, whereas those that oppose them

tend to have important conflicts. Although they are unlikely to eschew nuclear weapons, studies show that democracies are less likely to cheat on nonproliferation treaty (NPT) commitments; we do not know whether this is because they are more constrained in what they select, more cautious about hypocrisy, or more vulnerable to whistleblowers (Sagan 2011: 239–40). Much research suggests, however, that genuine compliance requires deeper "NPT-plus" obligations. Understanding whether governments are likely to comply with such norms requires an analysis of economic interests, local security conflicts, global market connections of the civilian nuclear power industry, and leadership structure of states, which can inhibit them from accepting the onerous obligations of committing to goals such as the prevention of smuggling, restrictions on domestic fuel cycle activities, the proper management of spent-fuel resources, the implementation of container shipping protocols, and such (Grotto 2008: 17–18, 23–24).

A third mechanism of vertical enforcement, this time in keeping with ideational liberalism, is to encourage enforcement by embedding new collective objectives in the minds of domestic and transnational actors. International organizations can render ideas more salient in the minds of groups able to transmit and publicize favorable international norms. Commonly cited examples include the impact of national human rights commissions, human rights units in foreign ministries, independent financial institutions, and scientific establishments on the substantive preferences of domestic and transnational actors (P. Haas 1989; Risse and Sikkink 1999; Dai 2005). Liberals believe this is most likely to occur when such

domestic groups are inclined, or can be socialized, to sympathize with the values and interests underlying international norms or can benefit professionally or in other ways from such values. International legal regimes may also affect opportunities and incentives for social actors to organize, mobilize, and represent their views domestically and transnationally. International law can accord NGOs, corporations, or individuals formal rights of representation, participation, or observation in transnational deliberations or international activities (Keck and Sikkink 1998). This differs from the constructivist view of preference change, whereby groups engage in a process of "acculturation" in which they seek conformity with the rules of an international reference group for its own sake. Here the emphasis is on self-interest or persuasion to adhere to substantive ideals in tune with preexisting concerns (e.g., Goodman and Jinks 2004: 670–73.) Liberals argue that domestic groups must have an interest or ideal at stake, even if that interest may simply be professional advancement – any of which may also lead them to avoid exclusion and social stigmatization – as in Slaughter's analysis of European integration. One example from public international law is United Nations (UN) Security Council decisions on intervention. Non-liberals might view such decisions as epiphenomenal to power politics, or as means to coordinate the expectations and actions of governments. Liberals view them as a means of shaping the preferences of individuals and groups. Subsequent social support for intervention, both elite and popular, is in part a function of the process and outcome of Security Council decision making – not least in third countries uninvolved in the decision itself (Voeten 2005).

B C. Exogenous and Endogenous Evolution of International Law

A particular advantage of the liberal accounts of the substance, form, and enforcement of international law is that they can be extended to particularly detailed and plausible accounts of the long-term evolution of international legal norms. International law can evolve through liberal mechanisms of either exogenous or endogenous change.

Exogenous change takes place when autonomous changes in underlying ideational, commercial, and republican factors drive the elaboration, expansion, and deepening of international legal norms over time. Since exogenous trends in core liberal factors such as industrialization, competitiveness, democratization, globalization, and public ideologies often continue for decades and centuries, and vary widely geographically and functionally, such theories can support explanations for "big-picture" regularities in the scope and evolution of international law over the long term, among countries and across issues (Milner and Keohane 1996; Kahler 1999). This offers a particularly powerful means of explaining trends in substantive content. For example, nineteenth- and twentieth-century waves of democracy and industrialization have driven a steady shift away from treaties governing military, territorial, and diplomatic practice to treaties governing economic affairs, which now dominate international law making and the activity of international tribunals, and in recent years toward human rights and human security, although the latter still remain only 15 percent of the total (Ku 2001). Also consistent with factors such as democratization, industrialization, and education is the fact that the development of

international law has been geographically focused in developed countries, notably Europe, and has emanated outward from there.

Endogenous evolution occurs when initial international legal commitments trigger feedback, in the form of a shift in domestic and transnational state–society relations that alters support for the legal norms. In liberal theory, such feedback can influence material interests (commercial liberalism), prevailing conceptions of the public good (ideational liberalism), or the composition of the "selectorate" (republican liberalism), thereby changing state preferences about the management of interdependence. Each of these three liberal feedback loops creates opportunities for "increasing returns" and internalization, but they do not assure that it will take place. It takes place, on the liberal account, only if the net preferences of groups mobilized by cooperation are positively inclined toward cooperation, and if those groups are powerful enough to have a net impact in domestic political systems. Isolating examples and conditions under which this takes place is an ongoing liberal research program.

Exogenous and endogenous effects are often found together. There is, for example, broad agreement that exogenous shifts in technology, underlying market position, and a desire to expand permanently the size, wealth, and efficiency of the tradable sector of the economy explains the general direction of postwar changes in trade policies. Bailey, Goldstein, and Weingast (1997) argue that postwar, multilateral trade liberalization generated domestic economic liberalization, thereby increasing the underlying social support for further rounds of trade liberalization in a

continuing virtuous circle of deepening international obligations. A strategy like EU enlargement is expressly designed to use this sort of incentive not just to induce a shift in trade policy, but also to engineer broader economic and political reform, as well as more cooperative international policies in the future (Berman 1995; Hitchcock 2004).

In the EU and elsewhere, vertical and horizontal judicial networking can encourage deeper forms of tacit cooperation, such as "judicial comity," in which judges mutually recognize that "courts in different nations are entitled to their fair share of disputes…as co-equals in the global task of judging" (Slaughter 2000: 1113). As a result, domestic courts no longer act as mere recipients of international law, but instead shape its evolution (Benvenisti and Downs 2009; Conant 2012). Moreover, as we saw in the area of multilateral trade, legal cooperation may have broader effects on political and economic systems, both intended and unintended. Even French President Charles de Gaulle, in many ways an archetypical defender of traditional sovereignty, committed France to firm legal developments with the deliberate goal of fundamentally reforming and modernizing the French economy – adaptations that altered French attitudes over the long term and facilitated more cooperation. More recently, EU enlargement has been employed as a means to encourage broad reforms in domestic politics, economics, and societies. Even the distant prospect of enlargement, as was the case in Turkey, encouraged movements toward Islamist democracy that are now irreversible (Tocci 2005; Robins 2007).

What is the relative impact of exogenous and endogenous effects on international law? Here, research still progresses and, obviously, the answer depends on the specific case. Nonetheless, the available evidence suggests that, in general, exogenous factors seem to have a more significant effect than endogenous ones on substantive state policies. The broad constraints on compliance and elaboration tend to be set by patterns of interdependence among countries with underlying national preferences – even if endogenous effects can dominate on the margin and in particular cases. Consider two examples. One is European integration. "Neo-functionalists," such as Ernst Haas, long stressed the essential importance of endogenous processes ("spillovers") in explaining integration. Recently, Alec Stone Sweet and Wayne Sandholtz (1997) have sought to revive the argument for endogenous effects, presenting legal integration as the primary cause of economic integration. Yet, it is now widely accepted that Europe has responded primarily to exogenous economic and security shocks. Nearly all basic economic analyses, which leave little doubt that exogenous liberal processes (factors such as size, proximity, level of development, common borders, common language) explain the bulk (around 80 percent) of postwar economic integration in Europe, leaving about 20 percent for other factors, such as endogenous legal development (Frankel 1997: 80–88). Similarly, in the area of human rights, the consensus in the literature is that the effect of international human rights norms on state behavior is marginal (Hathaway 2007; Hafner-Burton, forthcoming). Even those scholars who claim the most for legal

norms concede that their impact is uneven and secondary to underlying exogenous factors (Simmons 2009).

Yet, the focus on substantive outcomes may underestimate some endogenous effects. In the same case of the EEC, Weiler, Slaughter, Alter, and others have persuasively demonstrated that initial legal delegation and intervening feedback processes (sometimes unforeseen and even, in part, unwanted by national governments) can decisively influence the form of legal cooperation – even if they are not the primary cause of substantive cooperation. European Court of Justice jurisprudence embedded itself in domestic legal systems and helped establish "supremacy," "direct effect," and other doctrines. Explaining this process requires close attention to the liberal micro-incentives of litigants, domestic judges, and international courts under supranational tribunals – to which we now turn (Alter 1998; Burley and Mattli 1993; Weiler 1991).

A III. International Tribunals: Liberal Analysis and Its Critics

Institutional conditions for successful enforcement and endogenous feedback have been most intensively analyzed in studies of international tribunals. As we have just seen, Slaughter helped pioneer the analysis of "supranational adjudication" in the EU, arguing that the key is not simply international enforcement but the internationalization of norms in domestic legal systems: litigants bring cases to domestic courts, which interact with international tribunals, and international norms feed back into domestic legal systems (Burley and Mattli 1993). The European experience, according to Slaughter and Helfer,

> EXT challenges us to transcend the traditional framework of "state versus tribunal," summoning an image of a confrontation between two discrete entities in which the outcome depends upon whether the state defines its (unitary) national interest to include compliance with international law. The ECJ and the ECHR have succeeded in becoming effective supranational tribunals by looking not to states per se but to their component institutions, using the link to private parties granted them as supranational tribunals to penetrate the surface of the state [with decisions being made by] courts, ministries, and legislative committees competing and cooperating with one another as part of the normal domestic political process. (1997: 337)

Helfer and Slaughter, and many other scholars since, have generalized this approach to other international tribunals, seeking to specify conditions under which they are effective. The process of externalizing and internalizing norms can be analyzed in three stages of a transnational legal process: access, adjudication, and implementation (Keohane, Moravcsik, and Slaughter 2000).

B A. Access

The most critical dynamic in vertical enforcement is not one state bringing pressure to bear on another, but private parties bringing pressure to bear on national governments. This requires institutional mechanisms whereby individuals and social groups can influence the agenda of international tribunals. These include individual petition, referral of cases by domestic courts, and, in criminal cases, independent

prosecution. The key is that they be independent of the policy makers against whom pressure is brought to bear.

If this is correct, we should expect to observe the following: *The lower the cost of access for individuals and social groups with an incentive to use an international tribunal, the more dynamic potential the system has.* This is confirmed by the striking empirical correlation between breadth of individual access and the use, effectiveness, and dynamism of international legal arrangements (Table 4.1).

Insert Table 4.1 about here

The basic factors motivating access, and thus internalization, may vary. In the EU, they have been largely economic. Slaughter and Mattli, followed by Weiler, Alter, and others, argue that mobilization of interest groups with an interest in liberalization within a legal system that both grants them standing in domestic courts and offers domestic courts an incentive to recognize European law was a precondition for European legal integration. Systems of economic law enforcement with individual or administrative petition can be robust, even under conditions that may seem unpropitious, as in the case of the Andean Pact (Alter and Helfer 2009). In the human rights area, similarly, underlying trends, such as democratization and the growth of civil society, are the most important determinants of human rights performance, but international legal institutions can have a secondary impact. This impact is dependent on access in the form of individual petition (and, in criminal systems, private prosecution). Human rights arrangements without these institutional forms are far less dynamic.

B. Adjudication

For legalization, access is necessary but insufficient. International and domestic tribunals must also have incentives to adjudicate cases in a way consistent with the enforcement, internalization, and deepening of international norms. Without "autonomous domestic institutions committed to the rule of law and responsive to citizen interests," international norms are unlikely to be internalized. Although the receptivity of domestic courts to international jurisprudence may depend in part on a common cultural commitment to legal process per se, it depends more on the institutional independence of domestic actors and common substantive values, such as "individual rights and liberties in systems where the individuals themselves are ultimately sovereign" (Helfer and Slaughter 1997: 334). In systems where judges are not independent, or where the divergence between the domestic and international normative systems at stake in individual rulings is too high, domestic judges will not have incentive to make common cause with a supranational tribunal against the government. This requires that courts be relatively autonomous. If this is correct, we should observe that *where the domestic polity has elements of a rule-of-law system, granting autonomy to judges and legal adjudicators, and where judges possess sympathetic values, international legal systems will tend to function better.* It also helps if international or domestic adjudicators are competent, autonomous, and neutral, and they possess a manageable caseload, fact-finding capacity, high quality of legal reasoning, and an ability to engage in judicial networking (Helfer and Slaughter 1997).

Liberals hypothesize that the density of "vertical" international legal commitments and overall legal cooperation tends to be highest among advanced industrial democracies. Yet, this is not to say that democracies are, in all cases, more likely to promote or adhere to international law. Instead, the relationship is subtle and contingent—and therefore the subject of ongoing research. To be sure, democratic and interdependent Europe has emerged predictably as the major promoter of transnational legal norms in the world today, with a regional density of law higher than anywhere else. Yet, although the United States is a democratic, individualist, and rule-of-law country at home, it takes an "exceptionalist" attitude toward international law. One liberal explanation would be that U.S. constitutional culture, deeply embedded over two centuries, embodies distinctive U.S. values (e.g., unique conception of human rights, regulatory style, constitutional norms) that diverge significantly from the norms of advanced industrial democracies. These are bolstered by libertarian and social conservatives, an institutionalized judiciary insufficiently powerful to overcome it, and a constitution uniquely resistant to amendment and subject to veto group obstruction (Moravcsik 2001, 2005). Nondemocratic countries may be more likely to defend traditional state-to-state horizontal conceptions of international law, particularly those that privilege expansive notions of sovereignty. In a substantial tier of industrializing nondemocratic countries, moreover, economic law enjoys some autonomy, and this may permit a vertical dynamic by which a substantial body of international economic law is "internalized" – even if such dynamics are limited by the ever-present possibility of discretionary state action.

B C. Implementation

Helfer and Slaughter argue that "the overall boundaries for [courts] are set by the political institutions of [regimes], above all the member states." If courts become too "teleological," that is, if they adopt a mode of interpretation biased toward achieving further legal integration "too far too fast," the member states may not comply, or might even act "to curtail its jurisdiction or urge their national courts to disregard its judgments," or to "shift the composition of the Court" (Helfer and Slaughter 1997: 314–18). This principle can be formulated as follows: *national governments must have interests that incentivize them to implement the judgments of domestic courts, or at least not to defy them outright.* The more effective courts are "those charged with policing modest deviations from a generally settled norm or modifying a particular rule or set of rules incrementally" (Helfer and Slaughter 1997: 330) – a quality that is linked both to interest-based politics and to preexisting rule-of-law norms. Helfer and Slaughter continue, "the link between liberal democracy and effective supranational adjudication" is "complex and contingent, particularly at the margins" (1997: 334).

Recent studies confirm this close relationship between evolution of legal norms and national institutions and interests concerning compliance. In environmental cooperation, for example, liberal states are more likely than illiberal states to create and maintain structures for regularized monitoring and implementation review that often enhance compliance (Raustiala and Victor 1998). One study of compliance with European social and legal norms concludes that "the structure of domestic institutions seems to be key in explaining variance in the

mechanisms through which compliance occurs" (Checkel 2000: 34). The domestic political, administrative, and financial cost of compliance is a further constraint on the willingness of states to follow international legal norms. Raustiala and Slaughter (2002: 545) stress that "[c]ompliance with the International Whaling Convention, for example, which requires little action by most states, should be higher than compliance with many narcotics agreements, which require pervasive and costly domestic regulation." In the European Court of Human Rights (ECHR), states almost uniformly implement legal judgments in a strictly formal sense, but the way in which they choose to do so substantively – quickly or slowly, broadly or narrowly, by financial settlement or by implementing policy change – depends on the size of the stakes and the government interest. Where a judgment threatens a core state interest, implementation will tend to be very narrow – limited, for example, to granting compensation to a single plaintiff, rather than changing a policy (Von Staden 2009).

B D. Critics of the Liberal Analysis of Tribunals

Liberal theorists such as Helfer and Slaughter contend that international legal regimes more deeply internalized in society often generate more effective compliance and more dynamism over time than do conventional state-to-state legal arrangements. This argument is sometimes stated as a liberal ideal type and, perhaps as a result, the Helfer-Slaughter view of international tribunals has often been criticized for positing an unrealistically linear relationship between "democracy" and the effectiveness and dynamism of international law. The resulting debates have received much scholarly attention, but the underlying critique seems misplaced. As we have seen, liberal

theory in fact predicts considerable variation in the effectiveness and dynamism of international law, both among democracies and among autocracies, based on variation in domestic and transnational ideas, interests, and institutions – a finding that may coexist with the observation that democracies are, as a whole, more law-abiding. This liberal claim (properly understood) has been accepted by its critics, and their queries are best viewed as friendly amendments or extensions to liberal theory.

Neo-conservative critics, such as Eric Posner and John Yoo, allege that liberal theory overestimates the extent of vertical internalization. (2005*a*,*b*; also Alvarez 2001). Yet, in fact, Posner and Yoo accept most of the liberal empirical argument. They concede that interest group pressures shape state interests in the promulgation and enforcement of international law. They acknowledge that vertical enforcement and evolutionary dynamics sometimes occur – notably in the significant areas of WTO enforcement and in promoting democratic peace (2005*a*). They also accept that the EU and the ECHR exhibit more dynamism than other legal systems, though they seek to exclude Europe from consideration as an exceptional "political union". Yet, excluding Europe paints an arbitrary and misleading picture of international law, not simply because it eliminates over a quarter of the global economy and a much greater proportion of global trade, investment, and law making, but also because EU scholars do not view the institutions as an exceptional "federation," but rather, as do Helfer and Slaughter, as the most interdependent and uniformly democratic of continents (Posner and Yoo 2005*a*: 55).

Posner does insist, rightly, that dominant interest group coalitions lack "a commitment to international law" per se and thus may oppose the promulgation and enforcement of international norms if they are inconsistent with social interests (Posner 2005). He and liberals agree that liberal analysis of international law requires underlying theories to explain variation in social and state preferences across issues, countries, and time. Mills and Stephens make a similar point, from an "English school" perspective (2005: 18), when they argue that

> EXT it is difficult to disagree with Slaughter's argument that vertical (through domestic courts) rather than horizontal (through international bodies) enforcement of rules of international law offers the greatest potential at present for an international rule of law. However, Slaughter must confront the reality of domestic politics when it comes to the actual use of domestic courts or highly integrated international courts. Nowhere is this more apparent than from an analysis of the failings of the United States and many other liberal states to accept or internalize international human rights standards by allowing their enforcement in domestic courts…[A]t least part of the explanation for the failure of vertical enforcement in this context must derive from the actions of individuals and groups as political actors within democratic states.

Perhaps early formulations of liberal theory were too dichotomous, but the theory, properly understood, is based on precisely the need to theorize the state-society foundations of the variation in the response of liberal states to international law. The

fact that compliance requires such an analysis seems an argument for, not against, the centrality of liberal theory.

Harold Koh similarly criticizes liberals for exaggerating the link between democracy and the dynamic success of international law. He presents himself as a "constructivist" and seeks to argue the contrary of the conservative case, namely that Helfer and Slaughter underestimate the extent to which internalization may occur in non-European and especially nondemocratic settings (Koh 1998; Alvarez 2001). Yet, Koh's most important conclusions, too, dovetail with those of liberal theory.

First, his claim that some vertical enforcement can take place in non-democracies is consistent with liberal theory. To present this fact as a critique creates disagreement where none exists. Helfer and Slaughter do maintain that democratic states are more likely to establish dynamic and successful vertical "supranational" adjudication systems, yet, as we have seen, they do not view this relationship as dichotomous: "Non-democracies may have democratic impulses, embodied in specific institutions; illiberal states may have strong liberal leanings" (1997: 335). For example, international economic law can be developed with a nondemocratic China, while even the most advanced democracies, such as the United States in human rights, have incentives to resist compliance with international norms, which is why courts always need be jurisprudentially incremental and politically cautious (Helfer and Slaughter 1997: 314–17).

Second, although Koh superficially rejects the importance of regime-type for domestic internalization, his view that internalization is promoted by stable, repeated

interactions, the "legal" quality of norms, open transnational legal interaction, and a rich field of NGOs puts him on a slippery slope to recognizing its importance. As Joel Trachtman observes, Koh's simple claim that "repeated participation in the international legal process" leads to norm acceptance "is hardly theoretically satisfying" on its own because "repeated interaction with duplicity or hostility would not necessarily change anyone's ideas, or their incentives to comply" or "necessarily overcome strong incentives to defect" (Trachtman 2010: 13). In fact, this mechanism is likely to function in the way constructivists imagine only under certain (liberal) preconditions, as Koh himself concedes: "the structural attributes of liberal systems undeniably make them more open to some kinds of internalization" (1998: 676). Indeed, the qualities Koh stresses—stable interaction, legality, open interaction, and civil society—all depend on democratic institutions. Without transparency, accountability, issue-advocacy networks, and professional status, legal processes are unlikely to have a consistently positive effect. As Keohane observes, "[i]nstead of downplaying the point, it would seem wiser to elaborate it" – something Slaughter and other liberals have done in work on transnational networks and democratic institutions (1998: 710).

Third, while Koh's approving references to Thomas Franck, suggestive use of the term "internalization," and self-identification as a "constructivist" seem to suggest that he holds a non-rationalist or "non-liberal" theory of international law, he does not in fact commit to the distinctive causal mechanisms of these theories, but rather to liberal ones. Unlike Franck, Goodman, or others, he does not portray states

as governed by "logics of appropriateness" drawn from habit, cognitive framing, psychology, deontological morality, or standard operating procedures – and he avoids Frank's view that law-abiding states will necessarily be more law-abiding abroad simply because they transfer legalistic habits of mind. Instead, like Helfer and Slaughter, Koh believes that dynamic legal cooperation is possible with semi-democratic or nondemocratic states in selected areas primarily because states pragmatically seek to realize interests and ideals. Legal agreements are possible between China and the United States, for example, because a measure of largely self-interested institutional autonomy has been granted to economic law, even when fundamental disagreement remains in other areas. These are quintessentially liberal processes of instrumental pursuit of specific material interests and ideals channeled through representative institutions. Overall, Koh's specific use of theoretical language from IR theory seems misplaced—a case of paradigms hindering understanding.

A IV. Liberalism as Normative Theory: Sovereignty and Democracy

Liberal theories of international law also have implications for the conceptual analysis and normative evaluation of international law. Liberalism can help shape our understanding of specific legal concepts, even those that govern traditional interstate relations. An example is the concept of national sovereignty – and related notions of "intervention," "domestic jurisdiction," and "legitimacy." For liberals, sovereignty, like the state itself, is socially embedded and constructed. Its meaning is thus fluid.

Without rejecting entirely the institutionalist view that sovereignty is a transaction-cost–reducing means to simplify interstate interaction, the realist view that prevailing conceptions of sovereignty may result from coercion, or the constructivist insight that the sovereignty norm may gain strength from its legal form or habitual acceptance over time, liberals insist that the substantive meaning of the sovereignty norm varies greatly as a function of the domestic and transnational social context.

From a liberal perspective, nearly all unilateral or multilateral engagement with foreign governments involves some de facto "intervention" in domestic politics, since any international legal norm helps or hurts some individuals and social groups (Slaughter and Burke-White 2006). Such intervention may benefit or disadvantage the existing domestic government and ruling coalition, particularly in nondemocratic states. Even formally domestic activities not formally subject to international law or generally viewed as foreign policy matters may have a substantial impact on foreigners. Thus, for liberals, what remains "essentially within the domestic jurisdiction of any state," as Article 2.7 of the UN Charter[1] states, not only varies with the social context but is inherently ambiguous.

As a result of this ambiguity, the state actions recognized as sovereign prerogatives, or, conversely, subject to international legal restraints, are subject to constant negotiation and renegotiation by states in the international community. Norms about sovereignty vary over time, and not always simply as a function of consent or power. In different eras, powerful states in the international community have recognized as consistent or inconsistent with sovereignty a changing set of

activities on the high seas, domestic religious practices, conceptions of dynastic and national legitimacy, regime types and political practices, and economic activities. Under the Concert of Europe, Wilson's conception of self-determination, or modern human rights law and the doctrine of "responsibility to protect," governments have – for varying reasons – collectively decided to recognize private individuals, groups, and political movements against ruling governments (Krasner 1999; Philpott 2001; Evans and Sahnoun 2002; Haas 2008). Even in areas of human rights and economic law, where intervention into domestic practices are common today, international tribunals must commonly decide how much respect ("margin of appreciation") to accord domestic practices – a decision made not simply (or even primarily) on the basis of black-letter law, but on the basis of the underlying legitimacy enjoyed by different forms of domestic practices. These are accepted or rejected, in the liberal view, based on their consistency with the prevailing consensus about acceptable interests and ideals.

Liberal theory also has implications for a normative evaluation of international law. One obvious pragmatic sense in which this is so has to do with practical policy implementation. Insofar is liberal theory is empirically valid, it would be both prudent and normatively advisable (from a consequentialist perspective) to tailor international law to an accurate assessment of which laws are likely to be viable, effective, and dynamic, given underlying social constraints. One important question, for example, is under what conditions to insist on strict adherence to ambitious goals, employing direct state-to-state mechanisms to achieve them (such

as international legal direction, reciprocity, coercive sanctions, and regime-changing intervention), and under what conditions to work via state–society relations to encourage favorable endogenous long-term social, economic and political change and the slower establishment of vertical enforcement mechanisms. In areas such as human rights, there can be a divergence between two uses of the term "liberal": what "liberal" political actors recommend, which is often the former, and what "liberal" IR theory views as more fundamental and enduring, which is generally the latter. Without a theory of the social foundations of law making and compliance, neither governments nor their critics are likely to generate sound and humane policy recommendations.

Yet, the normative implications of liberal theory go beyond recognition of existing pragmatic policy constraints. This would be to render it conservative and status quo oriented, as some critics charge (Mills and Stephens 2005). In fact, liberal theory supports normative evaluation and critique of existing international law. One such area is in problematizing the democratic legitimacy of international law—on which there is now a burgeoning scholarly interest.

Liberal theory is centrally concerned with the question of social representation; that is, with whose interests and ideals international law represents. Liberal theory, with its focus on the ways in which international engagement alters domestic processes, suggests that the proper way to pose this question is not to ask whether international institutions themselves are democratic, but whether domestic democratic processes are enhanced or degraded by participation in transnational legal

processes (Keohane, Macedo, and Moravcsik 2009). To be sure, judging whether a system of social representation is fair and equitable requires a sophisticated set of normative standards from democratic theory to judge them – about which different analysts may disagree (Buchanan 2004: 18; Keohane *et al.* 2009). It also requires a valid understanding of the empirical functioning of domestic and international systems of representation provided by liberal theory. For example, pluralist, libertarian, deliberative, and social democratic critics may differ in assessing the same pattern of facts (Moravcsik 2004).

Still, most democratic theorists would accept certain conclusions that follow from liberal theory. In general, recent liberal research challenges the notion, widespread among both conservative and radical critics, that multilateral institutions are presumptively democracy-degrading because they are more distant and insulated from individuals and groups in civil society than are domestic institutions. This threat is generally less significant than many fear it to be.

One reason to be less concerned about a global "democratic deficit" is that, from a liberal perspective, the center of gravity of legal commitment remains largely domestic. International legal norms change the legal and policy processes, but they remain essentially domestic. In the final analysis, decisions to enact, enforce, and extend legal norms remain subject to whatever domestic constitutional provisions states see fit to impose. As a practical matter, enforcement of nearly all international norms remains at home.

Another reason to be relatively sanguine about the effect of international law on domestic democracy is that the proper "applied" standard – if we use prevailing domestic practices to judge international commitments – would not be the pure majoritarian norm adopted by many critics, but a "constitutional democratic" standard. All modern democratic systems are based on complex systems of domestic constitutional delegation; most acts of international legal delegation are no different in kind – and not necessarily any less subject to public control – than these (Goldsmith and Levinson 2009; Keohane *et al.* 2009). Both types of institutional commitment are designed to permit peoples and their leaders to achieve political goals they would not otherwise be able to achieve by managing the impact of interdependence. From this perspective, international law might be viewed by national publics as sovereignty-enhancing. Peoples ought to maintain the right to enter into such arrangements, just as they retain the right to enter into constitutional arrangements (Chayes and Chayes 1993, 1998).

From a liberal perspective, moreover, such interstate exchanges of democratic authority are essential policy-making instruments in an interdependent world, where citizens of one nation, in exchange for committing to limit domestic discretion in areas that affect other nations, secures the pre-commitment of foreign counterparts to adopt particular policies in areas that affect them – policies over which they otherwise would have no control. In essence, this bargain does not necessarily differ from the bargain struck among citizens in a domestic constitutional polity, who

precommit to particular policies to secure the commitment of others within an interdependent society (Beitz 1979; Goldsmith and Levinson 2009).

Yet another reason to be suspicious of conservative critics of multilateralism is that there is no reason to assume, as many do, that preexisting domestic democratic institutions are themselves ideal. All national political and social systems are unfair in one or more ways, and domestic institutions as modified by international law may better realize democratic ideals than would autonomous domestic ones (Keohane *et al*. 2009). This is most obvious when international legal regimes are explicitly designed to promote democracy, but this may also occur in other ways (Mansfield and Pevehouse 2006). Even where international legal commitments do undermine everyday domestic majoritarian control over policy, perhaps by virtue of the more diffuse, distant, insulated, or technocratic nature of multilateral processes or the absence of domestic deliberation over foreign policy issues, this need not mean that they debase domestic democracy. Rather, we should judge involvement in international legal institutions by the same standards that are used in everyday domestic constitutional practice.

In modern democracies, well-functioning constitutional institutions are not simply designed to maximize popular control over individual issues – nor is it normatively advisable that they do so (Moravcsik 2004; Keohane *et al*. 2009). Instead, majoritarian control is balanced against other essential democratic virtues, including the defense of individual and minority rights, the suppression of powerful special-interest factions, and the improvement in the epistemic quality of domestic

deliberation via new information and ideas. In areas such as foreign trade, central banking, human rights protection, and pharmaceutical regulation, democracies normally delegate to insulated experts. International cooperation seems to consist disproportionately of such issues, whereas issue that inspire the most broad and active popular engagement – such as fiscal policy, social welfare provision, medical care, pension reform, education, local infrastructure, third-country immigration, and such – tend to remain largely national. Still, there may well be areas – European monetary integration is possibly one – where international bodies enjoy an autonomy that exceeds the norm in most domestic democratic systems, without any clear technocratic or normative justification. In such cases, liberal theory treats current international legal institutions as presumptively lacking in democratic legitimacy (Moravcsik 2004).

Even if one concludes that certain international legal practices are democratically legitimate initially upon delegation, it might be objected that legal systems can develop a life of their own that can eventually escape democratic control. Although this may occur in some cases, we have seen – based on trade and human rights – that endogenous legal processes of this kind generally seem to have a much less significant effect on the evolution of substantive policy making than do exogenous factors. One reason is, as we have seen in liberal analyses of tribunals, is that access, adjudication, and implementation remain closely bound up with domestic politics. This makes it difficult to argue that autonomous evolution of legal systems generally traps national publics into entirely unexpected and unwelcome substantive

outcomes – even if individual cases may sometimes diverge from the norm. This is good news for those who believe that international law rests on a firm basis of consent. The fate of the Euro is putting this proposition to the test.

There is much more work to be done in assessing the democratic legitimacy of specific international legal arrangements, and debates must be conducted between those with different normative starting points. It is clear, however, that estimating the impact of specific international legal institutions on domestic democratic practice – assessed in terms of popular control, the quality of deliberation, individual and minority rights, and suppression of special interests – requires the type of detailed empirical analysis of the real-world behavior of domestic social interests and representative institutions that liberal theory offers.

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Table 4.1 Access Rules and Dockets of International Courts and Tribunals

Level of access	International court or tribunal	Average annual number of cases since founding
Low	PCA	0.3
Medium	ICJ	1.7
	GATT	4.4
	WTO	30.5
	Old ECHR	23.5
High	EC	100.1

EC, European Court; ECHR; European Court on Human Rights; GATT, Generalized Agreement on Tariffs and Trade; ICJ, International Court of Justice; PCA, Permanent Court of Arbitration; WTO, World Trade Organization

Source: Keohane, Moravcsik, and Slaughter (2000: 475).

Note

[1] Charter of the United Nations, 1 U.N.T.S. XVI (1945).