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Volume 37
Number 2 *Symposium: The Emerging
Transnational Constitution*

Article 2

11-1-2003

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CONSTITUTIONAL ANALOGIES IN THE INTERNATIONAL LEGAL SYSTEM

Laurence R. Helfer*

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I. INTRODUCTION

It's recently become fashionable to study the intersection of international and constitutional law. For scholars of domestic constitutions, the rise of globalization, the trend toward democratic governance, and the creation of a robust case law by international tribunals have magnified the attractions of comparative constitutional inquiry. The study of foreign and international exemplars provides a source for domestic innovation and a window through which to view one's own constitutional heritage refracted through a lens of

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difference.¹ The use of foreign and international law as sources for constitutional drafting by legislators or interpretation by judges is often contested. But a comparative gaze can, at a minimum, reveal paths not taken and arguments not advanced at home, even if the comparison ultimately leads to a reaffirmation of domestic first principles.²

For scholars of international law, the appeal of constitutions and the discourse of constitutionalism has a much more urgent character, one driven by major changes to the international legal system. International agreements and institutions are proliferating rapidly, driven by a recognition that the problems governments now confront—environmental degradation, security threats, economic growth, human rights, and many others—can no longer be addressed by the exercise of authority confined within increasingly porous national borders.³ As intergovernmental cooperation has become essential to national and global well-being, states have found it necessary to pool or limit their sovereignty, drafting treaties that set out rules for their collaborative endeavors and create institutions to

1. See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999) (analyzing constitutional approaches in different national jurisdictions).

2. *Compare, e.g.,* *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (holding that state sodomy laws criminalizing sexual conduct between consenting adults of the same sex violates the Due Process Clause of the United States Constitution and citing—as persuasive evidence of “values we share with a wider civilization”—the judgments of the European Court of Human Rights which held similar laws in Europe to be incompatible with the right of privacy), *with id.* at 2495 (“The Court’s discussion of these foreign views . . . is . . . meaningless dicta. Dangerous dicta, however, since ‘this Court[] . . . should not impose foreign moods, fads, or fashions on Americans.’”) (Scalia, J., dissenting) (citing *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring). See also Laurence R. Helfer, *Not Leading the World but Following It*, N.Y. TIMES, June 18, 2003, at A25 (stating that the United States has fallen behind other countries in protecting the rights of lesbians and gay men and predicting that the Supreme Court would take global trends into account in *Lawrence*).

3. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709 (1999) (discussing the expanding number of international tribunals); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 489 n.2 (2001) (noting that the number of intergovernmental organizations more than doubled in the last half of the twentieth century).

help police those rules.⁴ Many of these treaties and institutions—what international relations (IR) scholars collectively refer to as international “regimes”⁵—now exert significant influence on domestic law and politics. What legal frameworks are needed to address this tectonic shift in international relations? Settled doctrines of international law provide an important starting point, establishing basic ground rules for the negotiation, interpretation, and termination of treaties and the responsibility of states for violating their legal obligations.⁶ But many of these doctrines were formulated at a time when international law’s primary focus was mediating the interactions among sovereign nations whose domestic actions were largely immune from scrutiny. This focus did not lend itself to deep comparisons with national legal structures, constitutional or otherwise. Nor did it accurately reflect the reality of a world in which governments possess very different material resources, interests, and political configurations and interact not only with each

4. Contrary to the exaggerated fears (or hopes) of some observers, these agreements and institutions have not usurped nation states as the principal actors on the international stage. Rather, they serve state interests by reducing transactions costs, increasing access to information, monitoring behavior, mediating disputes, and using incentives and sanctions to induce compliance with prior commitments. See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 8 (1998); William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT’L L. & POL’Y 227, 243–56 (1997). The only plausible exception has occurred in Europe, where the agreements and institutions of the European Union have progressed to a hybrid “supranational” status that lies midway between a classical intergovernmental institution and a full-fledged federal system. See *infra* Part II.

5. The canonical (if sometimes criticized) definition of regimes are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” STEPHEN D. KRASNER, *Structural Causes and Regime Consequences: Regimes as Intervening Variables 1, 2*, in INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); see also Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT’L ORG. 491, 493–96 (1987) (discussing three definitions of regimes).

6. See Vienna Convention on the Law of Treaties, done May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (James Crawford ed., 2002).

other but with private individuals and civic networks operating within and across national borders.

Precisely because international rules and institutions are now more pervasive, more consequential, and penetrate further into domestic affairs, they raise normative and conceptual challenges that international lawyers of an earlier age were not forced to confront. As a preliminary example, consider the legitimacy of a state's compliance with its treaty commitments. The law of treaties addresses legitimacy by specifying the formal indicia of a state's consent to a treaty, such as the signature and ratification of the authoritative text by a government official with power to bind her government.⁷ Once these rules of adherence have been followed, compliance is a straightforward matter.⁸ The principle of *pacta sunt servanda* (treaty commitments must be obeyed) compels the state to adhere to its obligations.⁹ Because those obligations were undertaken with the state's consent, the reasoning goes, no legitimacy concerns arise.¹⁰

But consider what lies beneath the surface of this narrative. It assumes that treaty obligations, once undertaken, remain static. In fact, governments often leave agreements imprecise or incomplete, to be clarified and augmented by later state practice.¹¹ The narrative

7. Vienna Convention, *supra* note 6, arts. 6-16, 1155 U.N.T.S. at 334-36.

8. One narrow exception is *rebus sic stantibus*, a doctrine that permits a state, within carefully prescribed limits, to invoke changed circumstances as a justification for failing to adhere to the state's prior treaty obligations. See Vienna Convention, *supra* note 6, art. 62, 1155 U.N.T.S. at 347 (setting forth the doctrine and its limitations). For an insightful discussion of the history of the doctrine and its tension with the principle of *pacta sunt servanda*, see David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT'L L. 1 (1988).

9. Vienna Convention, *supra* note 6, art. 26, 1155 U.N.T.S. at 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

10. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 597 (1999) ("In international law, the strongly consensualist basis of obligation has tended to moot the issue of legitimacy.").

11. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (explaining advantages and disadvantages of using binding and nonbinding commitments and objectives to structure international relations among states); Joel P. Trachtman,

also ignores the role of international institutions, many of which are granted the authority to monitor behavior, settle disputes among treaty parties, interpret ambiguous texts, and develop new hard and soft law norms.¹² Where treaty obligations are dynamic and evolve through institutional processes outside of any one state's control, compliance with those obligations may clash with domestic preferences and raise trenchant legitimacy concerns. The formal rules of state consent to treaties do little to ameliorate these concerns, suggesting the need for alternative sources of legitimacy to support adherence to international agreements and institutions.¹³

The foregoing example illustrates how the maturation of the international legal system is challenging settled doctrines and prompting scholars to assess the system from fresh perspectives. One such perspective is to view international rules and institutions through the lens of constitutionalism.¹⁴ On first inspection, the parallels between international and constitutional law seem both numerous and compelling: Which international norms, for example, should be granted the status of higher law and given a privileged place above ordinary legal rules? What is the appropriate balance of power among international institutions, such as the lawmaking and adjudicative arms of the World Trade Organization (WTO) or the many agencies of the United Nations (UN)? When should those institutions defer to the decisions of other actors in the system, such

The Domain of WTO Dispute Resolution, 40 HARV. INT'L L.J. 333 (1999) (arguing that states may deliberately choose to leave treaty texts incomplete to be filled in by subsequent international adjudication).

12. See Abbott & Snidal, *supra* note 4, at 8. For a recent example of an intergovernmental organization being granted new authority, see Lawrence K. Altman, *W.H.O. Expected to Gain Broader Powers*, N.Y. TIMES, May 28, 2003, at A11.

13. For a more detailed discussion of democracy and legitimacy, see *infra* Part VII.

14. See, e.g., DANIEL J. ELAZAR, CONSTITUTIONALIZING GLOBALIZATION: THE POSTMODERN REVIVAL OF CONFEDERAL AGREEMENTS (1998); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991); see also Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39, 40-41, 40 n.3 (2001) (discussing different meanings of "constitutionalization" by a variety of commentators).

as national courts, parliaments, or executive officials? And to what extent should autonomous international tribunals exercise their limited authority to hold states to their treaty bargains when those bargains run counter to immediate political pressures?

These questions are remarkably similar to those posed by constitutional law scholars, and they suggest fruitful areas of scholarly inquiry. But conceptualizing the international legal system in constitutional terms is not without pitfalls. It requires more than merely identifying successful domestic constitutional responses and transposing them *mutatis mutandis* to international governance structures. The many profound differences between domestic and international legal systems—including not least the lack of a global polity to authorize the creation of constitutional norms and structures above the level of the nation state—require a more careful and guarded appraisal.

Bearing these caveats in mind, in the remainder of this Article I consider constitutional analogies in greater detail. In particular, I review five key structural and systemic challenges that the international legal system now faces: (1) decentralization and disaggregation; (2) normative and institutional hierarchies; (3) compliance and enforcement; (4) exit and escape; and (5) democracy and legitimacy. Each of these five issues raises questions of governance, institutional design, and allocation of authority, many of which are comparable to questions that domestic legal systems have answered through constitutions. For each issue, I survey the international legal landscape and consider the salience of potential analogies to domestic constitutions, drawing upon and extending the writings of international legal scholars and international relations theorists.

My objectives are deliberately modest. I do not intend to offer prescriptions for reforming international agreements or intergovernmental organizations along constitutional lines. Rather, I offer some preliminary thoughts about why some treaties and institutions, but not others, more readily lend themselves to analysis in constitutional terms. I also hope to distinguish those legal and political issues that may generate useful insights for scholars studying the growing intersections of international and constitutional law from other areas that may be more resistant to constitutional

comparisons. Before turning to a point by point discussion of the five structural and systemic issues, I begin with a brief historical overview of two treaty-based intergovernmental organizations that have evolved to most closely resemble domestic constitutional systems.

II. CONSTITUTIONAL BEGINNINGS: FROM THE EU TO THE WTO

The story behind the recent turn to constitutional discourse in international affairs began in Europe in the middle of the last century. The institutions of the European Community (now the European Union, or EU) were created by the Treaty of Rome, an international agreement among six Western European countries that resembled many other multilateral treaties negotiated among sovereign nation states.¹⁵ Over a few short decades, these European institutions transformed the treaty—and themselves—into something far different. As is now well known, the EU evolved into a quasi-federal system with legislative, judicial, and executive branches that exercise significant lawmaking, adjudicative, and enforcement powers over first six, then fifteen, and now twenty-five European member states.¹⁶

The ambitious architect of this transformation was the European Court of Justice (ECJ).¹⁷ The judges on the court understood that their rulings would have little impact if their docket was limited to occasional disputes between member states. To avoid falling into obscurity, the court took advantage of a little known provision in the Treaty of Rome allowing national courts to refer cases to the ECJ for

15. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]; see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

16. See J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 356 (1996–1997) (discussing the shift of the European Community “from a legal order founded by international treaties negotiated by the governments of states under international law and giving birth to an international organization, to a Community which has evolved and behaves as if its founding instrument were not a treaty governed by international law but . . . a constitutional charter governed by a form of constitutional law.”).

17. For a more detailed discussion of the ECJ, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 290–93 (1997).

a preliminary ruling on European Community law. When domestic judges began to refer cases, the court used a teleological method of treaty interpretation¹⁸ to proclaim the doctrines of direct effect, supremacy, preemption, and implied powers.¹⁹ These doctrines—which have direct analogues in domestic constitutional jurisprudence—bolstered the authority of the European Community’s legislative and executive arms and made the ECJ’s own judgments nearly as effective as those of national courts.²⁰ In short order, both the court and the scholars and lawyers who had observed its evolution proclaimed that the Treaty of Rome was now “the basic constitutional charter” of the European Community.²¹ By 2002, this remarkable trajectory had accelerated to the point where delegates from all of the EU’s member states were debating a new Convention on the Future of Europe, a document that many observers hoped would “replace the EU’s complex web of constitutive treaties with a definitive constitution.”²²

Could this “constitutionalization” of international law and institutions be replicated elsewhere? The prospects for successful imitation at first seemed bleak. International courts and tribunals,

18. The “telos” or goal of the Court’s doctrinal handiwork was to facilitate the Treaty of Rome’s paramount objective of an “ever closer union” among the member states. Treaty of Rome, *supra* note 15, pmbi., 298 U.N.T.S. at 14.

19. For a discussion of these doctrines, see Weiler, *supra* note 15, at 2413–17.

20. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT’L L. & BUS. 681, 716 (1996–1997) (“[T]he Court of Justice has both displayed a tendency toward self-aggrandizement and has supported an expansion of the authority of the EU organs at the expense of national lawmaking authority.”).

21. See Parti Ecologiste ‘Les Verts’ v. Parliament, 1986 ECR 1339, 1365 (describing the Treaty of Rome as “the basic constitutional charter” of the Community); J.H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 221 (1999) (“The constitutionalism thesis claims that in critical aspects the [European] Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court, a constitutional charter governed by a form of constitutional law.”).

22. Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism*, 77 N.Y.U. L. REV. 1612, 1614 n.3 (2002).

thought by many observers to be essential for effective constitution building beyond national borders, were weak and underutilized outside of Europe. Some were, in truth, only quasi-judicial bodies that lacked the basic power to issue legally binding decisions and instead operated entirely by persuasion. Even tribunals that enjoyed greater formal authority were hobbled by limited jurisdictional mandates, empty dockets, or narrow subject-matter competencies that made judicial constitution building a political and practical impossibility.²³ Yet, the powerful example of European constitutionalism remained, suggesting that “a conventional treaty regime, once endowed with a judicial mechanism for interpretation and enforcement, can be converted by degrees to a genuine constitutional order.”²⁴

The dim prospects for international constitutionalism brightened in the mid-1990s with the creation of the World Trade Organization.²⁵ The WTO is the successor to the General Agreement on Tariffs and Trade (GATT) and incorporates the substantive obligations of that earlier treaty.²⁶ But the WTO also contains key institutional innovations that scholars quickly interpreted as containing the seeds of a proto-constitution. First, the WTO endorses a legalistic approach to resolving international trade disputes,²⁷ creating *ad hoc* dispute settlement panels and a standing

23. See Helfer & Slaughter, *supra* note 17, at 285–86.

24. Robert Howse & Kalypto Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far* 227, 239, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 239 (Roger B. Porter et al. eds., 2001) [hereinafter EFFICIENCY, EQUITY, AND LEGITIMACY].

25. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1140 (1994), available at http://www.wto.org/english/docs_e/legal_e/03-fa_e.htm [hereinafter Final Act].

26. The subject matter of the WTO Agreements includes far more than the tariff and nontariff barriers of the GATT. It also extends to trade in services, intellectual property, agriculture, and detailed rules concerning government procurement, sanitary and phytosanitary measures, antidumping, subsidies, and countervailing duties. Stein, *supra* note 3, at 500 n.60.

27. See Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479–83 (1994); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 833–34 (1995).

tribunal of trade experts known to hear appeals from panel rulings. The WTO Dispute Settlement Understanding refers to this tribunal by the politically palatable euphemism of "Appellate Body." But it has been clear from the outset that, whatever its formal appellation, this judicial dispute settlement institution would function as a *de facto* court of international trade. WTO panels and the Appellate Body have issued dozens of rulings each year in contentious cases between WTO member states involving high financial stakes and difficult questions of treaty interpretation that cut to the core of domestic regulation. WTO jurists, in short, have begun to perform "functions somewhat like a constitutional court elaborating the meaning and import of a fairly fixed primary text."²⁸

Second, in a manner analogous to domestic constitutions, the WTO treaties have acquired something of the status of higher law—at least when that law clashes with inconsistent national legislation or regulations. The system's robust dispute settlement mechanism further entrenches the perception that "WTO rules act as a super-constitutional text with a force superior to ordinary national enactments."²⁹ After losing before a panel or the Appellate Body, defending member states are expected to bring their inconsistent measures into conformity with the treaty. Those that fail to do so face the threat of authorized retaliation in the form of trade sanctions, giving all governments—including those of economically powerful states—a strong incentive to comply.

A third characteristic that buttresses WTO's incipient constitutional character is its *de facto* separation of international trade from ordinary domestic politics. The organization (like the GATT before it) was premised on a club model of multilateral cooperation.³⁰ The members of the club were trade ministers, initially from a relatively small number of like-minded industrialized states, who met in closed door sessions and then presented the results

28. Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 458 (2001); see also Cass, *supra* note 14, at 42–71 (discussing constitutional functions performed by the WTO Appellate Body).

29. Atik, *supra* note 28, at 452.

30. Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 24, at 264.

of their negotiations to largely uninformed and unchallenging domestic constituencies. This approach facilitated deeper integration by “limiting the disruptive force of parochial concerns emanating from domestic politics.”³¹ But the broader effect was to disengage trade norms from national political structures and national politics, transforming the character of the WTO Agreements “from that of a complex, messy negotiated bargain of diverse rules, principles, and norms into a single structure” whose elements were far more difficult to contest.³²

Other features of the WTO, however, suggest that these constitutional attributes are far less entrenched than in the EU. For one thing, the treaties under the organization’s umbrella do not create private rights to be given direct effect before domestic courts. Only member states have rights and obligations under the WTO agreements.³³ In addition, the detailed thicket of trade rules applies not merely (as in Europe) to a regionally contiguous cluster of countries with similar economies and levels of industrialization, but to a truly global association of states whose economies range from the most to the least developed.³⁴ Having so many issues and so many nations seated at the bargaining table increases the opportunity for package deals. But these same features also make it far more difficult to reach consensus on a set of constitutional meta norms to govern the organization and its members. Finally, the WTO’s dispute settlement jurists have adopted a more circumspect interpretive approach than their European colleagues. Where the ECJ has used an openly teleological method to forge the support beams that were missing from the EU’s constitutional frame, the WTO panels and the Appellate Body have acted as comparatively

31. *Id.* at 266.

32. Howse & Nicolaïdis, *supra* note 24, at 228.

33. See WTO Dispute Panel Report, United States—Sections 301–310 of the Trade Act of 1974, WTO Doc. WT/DS152/R ¶¶ 7.76–7.78 (Dec. 22, 1999) (WTO panel stated that, unlike the EU, the WTO had only “indirect effect” on “individual economic operators” and did not create a new legal order that comprised both member states and their nationals).

34. See Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 389–92 (1998) [hereinafter Helfer, *Adjudicating Copyright Claims*] (discussing differences in membership between EU and WTO).

strict constructionists. Taking their cue from the Dispute Settlement Understanding which prohibits “add[ing] to or diminish[ing] the rights and obligations” in the treaties,³⁵ the trade jurists have conceived of their role as enforcers of the bargains negotiated by the member states rather than as creative builders who can fill in constitutional gaps in the treaty’s architecture.³⁶

The foregoing discussion reveals that the WTO’s constitutional attributes are only partial and incomplete. But the cumulative effect of those features has been sufficient to create a fully functioning and effective system of international trade. Indeed, so successful is the WTO as an intergovernmental organization that some commentators have advocated adding still more international law issues within its purview—including environmental protection, labor standards, and human rights—notwithstanding the fact that each of these subjects is already governed by its own set of treaties and institutions.³⁷ Other scholars have warned against these incorporation efforts, however, contending that dyeing these legal issues with a tincture of trade

35. General Agreement of Tariffs and Trade—Multilateral Trade Negotiations (the Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, art. 3.2, Annex 2, 33 I.L.M. 112 (1994) [hereinafter Dispute Settlement Understanding].

36. See Atik, *supra* note 28, at 458 (“When common and political sense might have suggested straying from the text, WTO decisions have often held close to the letter of the law while expressing reluctance about the holding.”); Stein, *supra* note 3, at 502 (“There is no indication . . . that the dispute settlement organs will be able or willing to ‘constitutionalize’ the basic [WTO] agreements in the image of the crucial role that the [ECJ] has played in European integration.”). *But see* John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. (forthcoming Winter 2004, manuscript at 51–80, on file with author).

37. For discussions of the merits and demerits of incorporating each of these issue areas into the WTO, see Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 134–35 (1999); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 84–90 (2001); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT’L L. & POL’Y 1, 40–45 (1996).

would leave an indelible stain.³⁸ Many WTO members themselves have protested the linkage to non-trade issues, arguing that it would give unfair economic advantages to some nations (mainly wealthy industrialized ones) at the expense of others (mainly poorer developing countries). But the very fact that governments and observers are giving vent to such expansionist proposals reveals the degree to which the WTO has, in only a few short years, demonstrated its present efficacy and its future potential to evolve into an international institution with aspirations to constitutional authority.³⁹

III. DECENTRALIZATION AND DISAGGREGATION

Seen from the perspective of encouraging states to comply with their treaty obligations, the EU and the WTO are unadulterated success stories. But it would be wrong for readers unfamiliar with international politics to conclude that these intergovernmental organizations are representative of the international legal system as a whole. Quite to the contrary, these two institutions are exceptional cases and for that reason are often viewed with envy by lawyers and scholars whose work focuses on weaker or less effective international regimes or treaties with poor compliance records.⁴⁰

38. See, e.g., Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 756 (1999); J. Patrick Kelly, *The WTO and Global Governance: The Case for Contractual Treaty Regimes*, 7 WIDENER L. SYMP. J. 109, 128–31 (2001).

39. See Daniel C. Esty, *Comment*, in EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 24, at 301, 304 (referring to the failed attempt to launch the Millennium Round of trade negotiations in Seattle in 1999 as “the opening of a Global Constitutional Convention” that will “involve decades or even centuries of discussions and refinements”).

40. See, e.g., José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 1 (2001) (“Whatever its flaws, the World Trade Organization (WTO) is the envy of international lawyers who are more familiar with less efficient and more compliance-resistant legal regimes, including those within the International Labor Organization (ILO), United Nations (UN) human rights bodies, and other adjudicative arrangements such as the World Court or the *ad hoc* war crimes tribunals.”).

Anarchy is the principal reason why robust international institutions and governance structures have been slow to develop.⁴¹ There is no single legislative, executive, or judicial body with mandatory, universal authority over all subjects denominated as “international,” in the way that a national parliament can regulate all aspects of domestic law.⁴² A few important institutions, such as the UN Charter and the International Court of Justice (ICJ), are empowered to resolve a broad range of controversies. But even these entities are significantly limited when compared to domestic legislatures, courts, and administrative agencies.⁴³

In the absence of a centralized, hierarchical authority with the power to coerce behavior, nation states are free to pursue their own interests, with states that possess more material or financial resources often enjoying a decided advantage in their relations with weaker or poorer countries.⁴⁴ But operating under anarchic conditions is costly, time consuming, and inefficient, even for powerful states. These negative byproducts of anarchy create incentives for states to achieve more productive outcomes by negotiating treaties and participating in international governance structures. Yet, because the incentive to cooperate varies with factors such as information asymmetries, power imbalances, differentiated applicability rules, and the nature of

41. See, e.g., Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226 (1985); JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS* 9 (2000).

42. See José E. Alvarez, *Constitutional Interpretation in International Organizations* 104, 106–07, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

43. In the case of the ICJ, a state must expressly consent to the Court’s jurisdiction. In the absence of such consent, the Court has no power to hear a dispute. See ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 30 (1999). The authority of the United Nations is broader, but still does not reach all nations or all legal issues. See Elizabeth Olson, *Slim Edge Mars Vote by Swiss To Join U.N.*, *N.Y. TIMES*, Mar. 10, 2002, at A8. In addition, the Charter contains important subject-matter carve-outs, such as the domestic jurisdiction exclusion in Article 2(7), although these have eroded significantly over time. See Alvarez, *supra* note 42, at 107.

44. See Jonathan D. Greenberg, *Does Power Trump Law?*, 55 *STAN. L. REV.* 1789, 1793–96 (2003) (discussing the importance of anarchy and power in international politics).

the underlying problem to be resolved,⁴⁵ no one mode of cooperation, institutional format, or even type of law has predominated.⁴⁶

The result is a disaggregated and decentralized international legal system,⁴⁷ comprised of a hodge podge of rules and institutions that includes tens of thousands of multilateral, regional, and bilateral treaties;⁴⁸ myriad nonbinding soft law norms; intergovernmental organizations; standard setting bodies; courts, tribunals and arbitral panels; and formal and informal government, private, and hybrid networks.⁴⁹ To the uninitiated, the number and diversity of these

45. *Id.* at 1797–98 (discussing “difficulties associated with ‘prisoner’s dilemmas’ (especially the risk of cheating), coordination problems, asymmetrical information, transaction costs, free riding, the ‘tragedy of the commons,’ and other challenges to collective action”); Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 407 (2000) (identifying instances where international environmental agreements impose “differential regulatory obligations” on developed and developing states).

46. The term “international” is inadequate to convey the richness and complexity of the legal rules and structures now operating outside or alongside of national legal systems, prompting observers to coin such terms as “supranational,” “anational,” and “non-national.” See Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 145 (2001).

47. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 288, 301 (1999) (using these terms to describe the international human rights petition system) [hereinafter Helfer, *Forum Shopping*].

48. See *United Nations Treaty Collection: Overview*, at <http://untreaty.un.org/English/overview.asp> (last visited Aug. 20, 2003) (stating that the United Nations Treaty Series, a collection of international agreements registered or recorded with the UN Secretariat since 1946, contains over 50,000 treaties).

49. See, e.g., Helfer & Dinwoodie, *supra* note 46, at 144–45 nn. 1–5 (“The number of [lawmaking and dispute settlement] institutions operating outside the confines of national borders have become more numerous and heterogeneous in the last decades of the twentieth century. Indeed, their growth appears exponential.”); Christine Chinkin, *Normative Development in the International System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM, 22, 25–31 (Dinah Shelton ed., 2000) (discussing different forms of soft law); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy* at 2–3 (Harv. L. Sch. Pub. L., Working Paper No. 018, 2001 available at <http://papers.ssrn.com/abstract=283976> (discussing government networks)).

entities may seem nothing short of overwhelming. It is possible, however, to discern a degree of order amid the chaos created by such multiplicity.

To start with, a distinct set of treaties, organizations, and dispute settlement procedures generally governs each substantive issue area—such as the environment, human rights, trade, arms control, etc. With only a few exceptions,⁵⁰ discussed in greater detail below, the entities that operate in one issue area have no formal competence over other issue areas. To illustrate, the European Court of Human Rights (ECHR) does not have the authority to consider violations of trade or environmental agreements, even by states parties to the European Convention on Human Rights whose civil liberties records the court does scrutinize. Often, the division of competence is even narrower, with an entity empowered to address only one among many treaties within a single issue area. The ECHR, to continue the above example, cannot rule on whether a state party to the European Convention has violated other human rights agreements it has ratified, such as the International Covenant on Civil and Political Rights, even though many obligations in the two treaties are virtually identical.⁵¹

In practice, of course, the lines of demarcation are not always so sharply etched. National land use regulations may raise human rights concerns as well as environmental ones, just as trade policies may implicate labor issues. Formal jurisdictional boundaries do not bar institutions of limited competence from addressing such spillover effects. Nor do they prevent international bureaucrats or jurists from considering “external” rules and norms in deciding how to interpret

50. The Inter-American Court of Human Rights is authorized to give advisory opinions interpreting “other treaties concerning the protection of human rights in the American states.” “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82 of Sept. 24, 1982, Inter-Am. C.H.R. 12, 16 OEA/Ser.L/V/III,9, doc. 13 (1983). The proposed (but not yet operational) African Court on Human and Peoples’ Rights will have jurisdiction to hear petitions by individuals alleging violations of any human rights treaty. See Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342, 354 (1999) (discussing the extent of the court’s jurisdiction).

51. See Helfer, *Forum Shopping*, *supra* note 47, at 301–04 (describing typology of similarities and differences among human rights treaties).

treaty texts that do fall within their purview.⁵² These are important caveats. But they do not detract from the dominant systemic theme of multiple institutions, each working independently of the others to articulate a relatively constrained set of legal norms.

What are the consequences of decentralization and disaggregation for analyzing international law and international institutions from a constitutional perspective? Many domestic constitutions require a balancing or a sharing of power among different governmental authorities, both vertically (between national and local power, for example) and horizontally (such as between national legislative and judicial power). This division of authority among governmental actors provides an intrinsic check against abuse of power. It also allows certain issues to be devolved to decision makers who have better expertise or are closer to the politics affected by their decisions. And it creates opportunities for regulatory experimentation, diversity, and competition within a single national jurisdiction.

The decentralized international legal system raises similar issues, both with respect to vertical and horizontal allocations of power. In terms of vertical power dynamics, decentralization and disaggregation create the need for rules of relation between international agreements and institutions on the one hand, and domestic legal systems on the other. Those rules can be plotted along a continuum that, at one extreme, grants absolute deference to states and the decisions of their governments and, at the other, gives international bodies the right to review domestic decisions *de novo* and to supplant them whenever they are inconsistent with a state's treaty commitments.⁵³ In between these two polestars lie various

52. For two examples of such interpretive maneuvers, see Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, October 12, 1998, WT/DS58/AB/R, 1998 WL 720123 (WTO) (construing GATT in light of international environmental law) and *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994) (construing European Convention on Human Rights in light of International Convention on the Elimination of All Forms of Racial Discrimination).

53. Compare Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 326–30 (1998) (discussing national security exception in Article XXI of GATT which purportedly grants states the right to “self-judg[e]” whether the exception should be applied) *with*

gradations of international sensitivity to domestic actors and their actions, which appear under such headings as subsidiarity, complementarity, and margin of appreciation.⁵⁴ As the subjects that treaties regulate have become more complex, it is increasingly common for a single treaty or treaty system to specify different degrees of deference for different substantive or procedural issues.⁵⁵

Whatever rules of relation a particular treaty regime adopts, the critical issue will be drawing lines that separate international from domestic decision making powers. Who, for example, determines whether a particular subject or dispute falls within the authority of international as opposed to domestic actors? In practice, the entity that answers this “[k]ompetenz-[k]ompetenz” question (that is, the competence to determine one’s own competence) enjoys considerable power both to police and to revise jurisdictional boundaries in ways that enhance its own authority.⁵⁶

Decentralization and disaggregation also raise important horizontal power allocation issues. The horizontal division of

Dispute Settlement Understanding, *supra* note 35, art. 11, 33 I.L.M. at 120 (requiring WTO panels to make “an objective assessment” of the facts and relevant treaty articles when hearing disputes between WTO members). *See also* Howse & Nicolaïdis, *supra* note 24, at 227, 243 (advocating “strict scrutiny of national compliance with general trade regime norms such as nondiscrimination, and especially procedural norms such as transparency and due process”).

54. *See, e.g.*, Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 40–46 (2003); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT’L L. REV. 391, 450–66 (2001); Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 870 (2002).

55. *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 198–201 (1996) (analyzing deferential standards of review for anti-dumping and countervailing duty measures under the GATT 1994 and comparing them to standards of review in other WTO Agreements); *see also* Helfer, *Adjudicating Copyright Claims*, *supra* note 34, at 412–39 (proposing that WTO dispute settlement jurists adopt a graduated continuum of deference to domestic decision makers under the copyright provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights).

56. *See* Helfer & Slaughter, *supra* note 17, at 305 n.128 (discussing *kompetenz-kompetenz* disputes between ECJ and national courts in Europe).

authority among international institutions was traditionally conceived along functional lines.⁵⁷ Each institution was granted control (subject to the ultimate authority of its member states) over a specific set of issues and tasks in a way that generally excluded the competence of other institutions. Although the ICJ recently reaffirmed this approach,⁵⁸ pure functionalism no longer accurately describes most forms of international lawmaking and adjudication. A more accurate assessment recognizes that the proliferation of institutions and the blurring of issue area boundaries have enabled different decision makers to address similar issues in distinct international fora.⁵⁹

Unlike the relationships among power holders in domestic constitutional systems, however, the relationships among international institutions with overlapping competencies are rarely formally specified. This *de facto laissez faire* approach has both virtues and vices. On the benefit side, it allows different institutions to act as laboratories, experimenting with alternative approaches to resolving the same legal problems.⁶⁰ Experimentation may also lead actors to share information and compare results, creating formal and informal dialogues that enrich the conversation about the pathways along which cooperative solutions might evolve. A multiplicity of venues also allows certain institutions to develop specialized expertise that may, in turn, attract claims from private parties and create additional opportunities to press states to comply with their

57. See Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 48 (2002) (discussing history of functionalism).

58. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Op., 1996 ICJ Rep. 66 ¶ 26 (July 8) available at http://www.icj-cij.org/icjww/icasess/ianw/ianjudgment_advisory%20opinion_10960708/iuan_ajudgment_19960708_Advisory%0pinion.htm (applying the "principle of specialty" and holding that World Health Organization lacked the competence to question the legality of using nuclear weapons).

59. For a more detailed discussion of this phenomenon as it applies to intellectual property rights, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) [hereinafter Helfer, *Regime Shifting*].

60. Those alternatives may include some organizations that promote cooperation using soft law and others that generate legally binding commitments, as well as organizations with greater or lesser degrees of accessibility to nonstate actors.

treaty commitments. Finally, granting two or more institutions shared competence over a particular issue area may engender healthy inter-organizational rivalries in which institutions curb each other's expansive tendencies or compete to provide a superior set of services to member states and other constituencies.⁶¹

The relatively unstructured horizontal relationships among disaggregated international institutions also have problematic consequences, however. Dividing lawmaking or dispute settlement authority over a single issue area may create inefficiencies, needless duplication or bureaucratization of work, and opportunities for forum shopping.⁶² It may also force officials to address discrete (but interrelated) aspects of a regulatory problem in different venues, rather than developing a comprehensive solution.⁶³ In addition, governments may create institutions with overlapping jurisdictions, not to foster competition or experimentation, but as a safety valve to

61. See Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L L. 77, 92 (2002) (discussing "[t]he [r]ole of [i]nterorganizational [c]ompetition"). Such competition may also arise in response to domestic pressures, for example when states create a new institution to express their dissatisfaction with the activities of an existing one. See Helfer, *Regime Shifting*, *supra* note 59, at 14-17 (discussing motivations for United States and EC to shift intellectual property lawmaking from the World Intellectual Property Organization to the WTO).

62. In the human rights context, for example, more than a dozen courts, tribunals, and treaty bodies have been created to receive complaints from individuals and groups challenging governments' human rights practices. See Helfer, *Forum Shopping*, *supra* note 47, at 296-98. Several studies have argued that some or all of these bodies should be consolidated into a single human rights court or similar institution. See Philip Alston, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. ESCOR, 53d Sess., Anex, Agenda Item 15, ¶¶ 14-36, U.N. Doc. E/CN.4/1997/74 (1997); Thomas Buergenthal, *Remarks, The UN Human Rights Regime: Is It Effective?*, 91 AM. SOC'Y INT'L L. PROC. 482, 483 (1997). *But see* Helfer, *Forum Shopping*, *supra* note 47, at 346-60 (defending the use of forum shopping given the current decentralized nature of the international human rights petition system).

63. See MICHEL PETIT ET AL., *WHY GOVERNMENTS CAN'T MAKE POLICY: THE CASE OF PLANT GENETIC RESOURCES IN THE INTERNATIONAL ARENA 6* (2002) (lamenting that the "multiplicity of interests and fora, and the existence of several debates or negotiations taking place simultaneously, can . . . lead to poorly coordinated, inconsistent, and even contradictory policies").

placate the demands of domestic interest groups.⁶⁴ Finally, a multiplicity of lawmaking fora creates the possibility of conflicts among legal norms and allows states to justify their conduct as sanctioned by one treaty even if that same conduct violates the prescriptions of another international agreement.⁶⁵ I assess the risk of such conflicts and the different approaches to minimize them in the following section.

IV. NORMATIVE AND INSTITUTIONAL HIERARCHIES

In constitutional systems, the controversies raised by horizontal and vertical divisions of power are often resolved by granting particular institutions or particular norms a higher order status that trumps competing institutions or norms within the same system.⁶⁶ The international legal system too contains normative and institutional hierarchies that, upon initial inspection, seem to offer a tool for resolving the difficulties that decentralization and disaggregation may engender. As I explain below, however, these hierarchies do not (at least in their present form) provide a blueprint for resolving questions of governance in a manner analogous to the hierarchies enshrined in domestic constitutions.

Consider first the body of rules known to international lawyers as *jus cogens* or peremptory norms. These are an evolving set of legal norms acknowledged by states to have attained the status of “higher” international law from which no derogation is permitted.⁶⁷

64. Governments may find it advantageous, for example, to address the intersection between trade and labor issues not in the WTO, where treaty commitments are made meaningful through a robust dispute settlement system, but in the ILO whose rules and dispute settlement institutions are much weaker. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 567 (2000).

65. See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 699 (1993) (noting the inefficiencies created by “overlapping provisions in agreements, inconsistencies in obligations, significant gaps in coverage, and duplication of goals and responsibilities”).

66. This is not to suggest that such institutions or norms necessary remain constant over time, nor that their placement precludes domestic actors from contesting their primacy.

67. See *Alvarez-Machain v. United States*, 331 F.3d 604, 613 (9th Cir.) (en banc) (“[*Jus cogens* embraces customary laws considered binding on all

Indeed, so strong is the normative force of *jus cogens* that any treaty that conflicts with them is simply void.⁶⁸

In theory, the existence of *jus cogens* provides a basis for a normative ordering of the international legal system. In practice, only a very narrow list of rules has thus far achieved this elevated status. Other than a ban on unauthorized uses of force, peremptory norms concern the most serious human rights abuses, such as slavery and slave trading, genocide, extrajudicial killing, forced disappearances, torture, degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination.⁶⁹ These are unquestionably egregious acts. But they are a far more circumscribed list than the catalog of individual liberties given pride of place in many domestic constitutions (and in human rights law generally). Nor, more importantly, do these norms provide an adequate foundation for resolving the most pressing power sharing and conflicts issues that the international legal system now faces. They offer no guidance for resolving competency disputes among international lawmaking institutions, nor do they constrain decision makers to follow precepts that are often considered hallmarks of legitimate governance, such as adherence to the rule of law, due process, transparency, and non-discrimination.

Recognizing such inadequacies, some commentators have attempted to expand the list of *jus cogens* to include all human rights⁷⁰ or, alternatively, to embrace the core values of international

nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.”), *cert. granted sub. nom. Sosa v. Alvarez-Machain*, 124 S. Ct. 807 (2003).

68. Vienna Convention, *supra* note 6, art. 53, 1155 U.N.T.S. 331 (defining peremptory norms).

69. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (stating that “[n]ot all human rights norms are peremptory norms (*jus cogens*)” but including rights listed in the text as having attained that elevated status).

70. See, e.g., Warren Allmand, *The Primacy of Human Rights in International Law*, at <http://serveur.ichrdd.ca/english/commdoc/publications/globalization/globalAllmandTechnical.html> (last visited September 2, 2003) (asserting the “primacy of human rights obligations” over other rules of international law); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* 5 (Int’l

economic law.⁷¹ Both arguments are contested and controversial, however, suggesting that, whatever their substantive merits, these claims should be regarded as pathways along which the international legal system might evolve, rather than accurate statements of existing positive law.

What hierarchical orderings are possible in the absence of a comprehensive body of preemptory norms? One possibility is found in Article 103 of the UN Charter, which states that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁷² This “UN supremacy clause” might be seen as granting the UN an institutional primacy over other intergovernmental organizations. Indeed, commentators have used Article 103 in precisely this way, arguing that “the aims and purposes of the UN, [including] maintenance of peace and security, and the promotion and protection of human rights, constitute an international public order to which other treaty regimes must conform.”⁷³

In practice, however, Article 103 has been given a narrow construction that emphasizes the preeminence of specific Security

Centre for Human Rts. & Democratic Dev., Policy Paper, 2000) (“In the event of a conflict between a universally recognized human right and a commitment ensuing from international treaty law such as a trade agreement, the latter must be interpreted to be consistent with the former.”).

71. The foremost proponent of this approach is Ernst-Ulrich Petersmann. See, e.g., Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: the Need to Clarify their Interrelationships*, 4 J. INT’L ECON. L. 3 (2001); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT’L ECON. L. 19 (2000).

72. Charter of the United Nations, June 26, 1945, art. 103, 59 Stat. 1031, T.S. 993 (entered into force Oct. 24, 1945). Other international agreements often acknowledge the Charter’s supremacy. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187, 266, art. XXI(c) (stating that nothing in GATT shall be construed “to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security”).

73. Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L. REV. 273, 304 (2002); see also Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998).

Council resolutions over inconsistent treaty obligations.⁷⁴ Broader efforts to bootstrap the entire corpus of human rights law or other international rules to a position of primacy under the Charter have been met with considerable skepticism. The reason for this is clear enough: although Article 103 specifies that the Charter's obligations trump other treaty commitments, its open-ended text does not specify with any degree of precision which norms are entitled to that higher order status.⁷⁵ That interpretive task remains to be developed by UN institutions and by the discursive practices of its member states.

Yet another potential candidate for international hierarchy is found in Article 30 of the Vienna Convention on the Law of Treaties, entitled "Application of Successive Treaties Relating to the Same Subject-Matter."⁷⁶ Article 30 sets out a series of default rules to determine which of two treaties negotiated at different points in time is to be given effect in the event of a conflict between them.⁷⁷ By providing a mechanism to reconcile seemingly inconsistent treaty commitments, Article 30 would seem to fill a critical void in a decentralized, disaggregated legal system whose treaty population is becoming increasingly dense. Sadly, the conflicts rules that Article

74. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), 1998 I.C.J. 3, available at http://www.icj-cij.org/icjwww/idocket/ilus/ilus_isummaries/ilus_19920414.htm (invoking Article 103 to uphold UN Security Council resolution imposing sanctions against Libya in the face of conflicting treaty obligations). See also Alvarez, *supra* note 40, at 7 (emphasizing that Article 103 has been authoritatively interpreted to address only the "relatively narrow" issue of the authority of certain UN organs "to override pre-existing treaty obligations and to instruct U.N. members to do likewise").

75. See Alvarez, *supra* note 40, at 7 ("Article 103 does not say which customary international law obligations are to be given privileged status as U.N. Charter obligations"); see also Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 798 n.140 (2002) (critiquing claim by Fédération Internationale des Liges des Droits de l'Homme, 'Rapport l'OMC et les droits de l'homme' No. 320 (Nov. 2001), that Article 103 gives primacy to all human rights obligations over other treaty commitments).

76. See Vienna Convention, *supra* note 6, art. 30, 1155 U.N.T.S. at 339-40.

77. The provisions of Article 30 are "default rules" because governments are free to opt-out of them and include different conflicts rules in the treaties they negotiate. *Id.* art. 30(2).

30 endorses are far from clear and have engendered confusion rather than certainty.

Consider first the scope of Article 30, which applies only to “successive treaties relating to the same subject-matter.”⁷⁸ Determining whether the subject matter of two international agreements is the same is hardly a straightforward exercise. Are two treaties that seek to preserve different aspects of the global environment the same, or must the subject matter nexus be tighter? The drafting history of the Vienna Convention provides minimal insight, and authoritative commentary offers little more, merely stating that the clause should be “construed strictly” and should exclude “cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.”⁷⁹ If two international agreements do not share the same subject matter, Article 30’s conflicts rules simply do not apply, leaving states with little guidance over how to reconcile their inconsistent treaty commitments.

The difficulties only deepen where two treaties are related. Assuming that all of the states parties to both treaties are the same (or that the states parties differ but a dispute arises between states that have ratified both agreements), Article 30 adopts a rule of *lex posterior*, directing that the later treaty is to be applied to the extent of any conflict with the earlier one.⁸⁰ If, however, only one of the disputing states has ratified both treaties, precisely the opposite rule (*lex prior*) applies. The earlier agreement governs since that is the only text to which both disputing states have agreed to be bound.

Both of these temporal rule choices are problematic. *Lex posterior* relieves states of the impossibility of complying with inconsistent international commands, but does so by mechanically applying the latter agreement without considering the treaties’ underlying substantive values. It thus “takes account neither of the

78. *Id.* art. 30(1).

79. SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98 (2d ed. 1984).

80. See Vienna Convention, *supra* note 6, art. 30(3), 1155 U.N.T.S. at 339 (“When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”).

issues actually involved in [a] conflict nor of the interests evident (or not evident) in both treaty regimes in having their respective rules applied.”⁸¹ Article 30 also endorses the proposition that more recent treaties are normatively superior to older ones, a claim belied by the realities of present day international lawmaking in which new agreements reach back into the past to link up with earlier ones and forward into the future as they are augmented and revised over time.⁸² The *lex prior* rule is even more troublesome. It suffers from the same flaws as its cousin, but in addition it leaves the state that has ratified two inconsistent agreements with no guidance as to how to reconcile that conflict.⁸³ It is hardly surprising, therefore, that commentators have dubbed Article 30 “an entirely unsatisfactory response” to the problem of conflicting treaties.⁸⁴

States have responded to these inadequacies by opting-out of the Vienna Convention, drafting treaty-specific conflicts rules to mediate the relationship among international agreements. Most often, these rules take the form of “savings clauses” which clarify that the provisions of one treaty do not prejudice or otherwise undermine the obligations of some other agreement.⁸⁵ Although this contracting

81. Gregory H. Fox, *International Organizations: Conflicts of International Law*, 95 AM. SOC'Y INT'L L. PROC. 183, 186 (2001).

82. See J.H. Reichman, *The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 765 (1995) (discussing the “backward-looking character” of the TRIPs Agreement); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 912–13 (1996) (discussing procedures for adoption of protocols to environmental law treaties and the difficulties they create under Vienna Convention Article 30).

83. See Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT'L & COMP. L. REV. 1, 12 (1998) (Article 30 “provides no practical guidance on how the country that is a party to both treaties is to reconcile conflicting legal obligations.”).

84. Fox, *supra* note 81, at 185 (paraphrasing SINCLAIR, *supra* note 79, at 98).

85. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 60, 213 U.N.T.S. 221, 250 [hereinafter European Convention] (“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”).

around Article 30's default rule is eminently sensible, deciding which treaty rules enjoy priority in the event of a conflict is often highly contested. In several recent negotiations, states were unable to agree on clear savings rules and adopted instead a set of aspirational but ambiguous clauses in the treaties' preambles, the legal effect of which has yet to be conclusively determined.⁸⁶

International tribunals have also mitigated Article 30's mischief by narrowly construing the types of inconsistencies that rise to the level of a conflict. WTO dispute settlement panels, for example, presume that two treaties relating to the same subject matter are compatible and can be implemented by a state that has ratified both agreements. A true conflict exists only where treaty rules are mutually inconsistent, in the sense that a state's compliance with one rule necessarily compels it to violate another.⁸⁷ Although this narrow definition avoids Article 30's problems, it creates considerable uncertainty about the scope of states' obligations when treaties are in tension with each other. A more promising approach has been followed by tribunals that refuse to hide behind formalistic rules and instead interpret treaties that straddle subject matter boundaries by harmonizing the texts, objectives, and values in both issue areas.⁸⁸

As this discussion reveals, normative and institutional hierarchies are as vital to international legal systems as they are to constitutional ones. A key difference is that constitutional hierarchies are generally fixed at the time when the founding documents are drafted, whereas international law hierarchies are continually evolving and (often) continually contested. At present,

86. See Sabrina Saffrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 33 AM. J. INT'L L. 606, 614–18 (2002).

87. See Panel Report on Indonesia—Certain Measures Affecting the Automobile Industry, July 2, 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R & WT/DS64/R ¶ 14.28 in 7 WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT DECISIONS: BERNAN'S ANNOTATED REPORTED 164, 488 (1999) (“[I]n public international law there is a presumption against conflict.”); see also *id.* at 488 n.649 (“[T]here is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously Incompatibility of contents is an essential condition of conflict.”).

88. See *supra* note 52.

these hierarchies are still in a nascent stage of development that will require further refinement before they can crystallize into system-wide normative or institutional orderings.

V. COMPLIANCE AND ENFORCEMENT

In most domestic legal systems, particularly rule of law societies and liberal democracies, the implicit assumption is one of adherence to legal rules. Affected parties may vigorously oppose new legal proscriptions through the judicial process, often by testing them against higher order constitutional norms. And such challenges may on occasion produce crises of constitutional magnitude in which tensions flare between different sources of domestic political authority. But in the large majority of cases, once a rule's validity has been conclusively determined, the parties whom it affects know that the state possesses a variety of tools to sanction noncompliance. Noncompliance still occurs, of course, but it does so constrained by the shadow of legal systems that enjoy relatively robust enforcement powers.

The international legal system is radically different, and for that reason constitutional analogies are less salient in this area than elsewhere. Because of underlying power differentials and the dearth of external coercive authority,⁸⁹ compliance with treaties and other international commitments is decidedly not taken as a given. Quite to the contrary, compliance is a subject of intense examination and debate by both international lawyers and political scientists.⁹⁰ An entire school of IR theory contends that international law is epiphenomenal—i.e., that it reflects rather than constrains existing distributions of power among nations.⁹¹ Most international legal

89. See *supra* Part III.

90. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1826 (2002) (“[C]ompliance is one of the most central questions in international law.”). For a comprehensive survey of the compliance literature, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 539–45 (Walter Carlsnaes et al. eds., 2002).

91. See MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 8 (1999) (“International relations [IR] scholars have traditionally... regarded international law as something of an epiphenomenon, with rules of

scholars, by contrast, agree with the famous assertion that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”⁹² But only recently have they moved from anecdotal narratives about compliance to case studies⁹³ and more ambitious empirical projects testing the veracity of that claim.⁹⁴

One important explanation for this preoccupation with questions of compliance is the lack of strong international enforcement mechanisms. As explained earlier, most treaties lack resilient judicial oversight. Those few regimes where international tribunals do have teeth (such as the EU, WTO, and European Convention) are, not surprisingly, progressing the furthest along the path toward constitutionalization.⁹⁵ Outside of the judicial realm, the prospects for collective enforcement of legal obligations are not much brighter. The UN Security Council’s sanctioning powers are notoriously weak and politicized, and regional sanctioning practices are only marginally better.⁹⁶

international law being dependent on power, subject to short-term alteration by power-applying States, and therefore of little relevance to how States actually behave.”).

92. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis omitted).

93. See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002) [hereinafter Helfer, *Overlegalizing Human Rights*].

94. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940, 1962–2002 (2002) (presenting extensive quantitative analysis of states’ human rights practices and concluding that “noncompliance [with treaty obligations] appears [to be] common” and that “treaty ratification is not infrequently associated with worse . . . human rights ratings than would otherwise be expected”). For a broad based critique of this ambitious empirical study and the author’s reply, see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003); Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT’L L. 185 (2003).

95. See *supra* Part II.

96. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 34–67 (1995) (discussing weak sanctioning mechanisms in international law).

In the absence of robust third party enforcement mechanisms, scholars have sought other explanations for why compliance with international obligations does or does not occur. One crucial force favoring compliance is reciprocity—the right of a state adversely affected by another state’s violation of its commitments to withhold its own performance under a treaty or customary law.⁹⁷ The prospect of such reciprocal noncompliance is a form of self help that creates an incentive for states to adhere to international law,⁹⁸ although the strength of that incentive varies across issue areas. In the trade context, for example, the prospect of a state raising tariff barriers in response to its trading partner’s restriction of imports can be a considerable deterrent. But the threat to torture one’s own citizens as a response to acts of torture of another state’s nationals would be morally unthinkable as well as practically useless.⁹⁹

Even where the reciprocity operates effectively, it is not immediately apparent why states don’t simply renege on their commitments while attempting to hide that fact and benefit from the compliance of their treaty partners. As analyses of international cooperation using the insights of game theory—most notably the classic Prisoner’s Dilemma—have shown, defection by all parties (i.e. reciprocal noncompliance) is often the equilibrium position.¹⁰⁰ Without more, then, anarchy, rather than a legal order, would seem to be the dominant mode of interstate relations.

Two different strands of IR theory suggest why this is not so. The first views states as rational, self-interested (and unitary) actors that maximize their own welfare. The puzzle for rational choice scholars has been to explain how states acting under this set of assumptions could move from defection to cooperation. The answer

97. See Vienna Convention, *supra* note 6, art. 60, 1155 U.N.T.S. at 346; see also John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997).

98. See David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 831–32 (2002).

99. Quite sensibly, the Vienna Convention excludes human rights agreements from the agreements that may be terminated or suspended as a consequence of another state’s breach. See Vienna Convention, *supra* note 6, art. 60(5), 1155 U.N.T.S. at 346.

100. See Setear, *supra* note 97, at 27–31.

is found in international regimes and institutions which transform the Prisoner's Dilemma from a single play to an iterated game and use information sharing, third party monitoring, dispute settlement, and other tools to "lengthen the shadow of the future" so that cooperation becomes entrenched.¹⁰¹ As performance records are exposed and institutions link across issue areas, states begin to consider the reputation costs of breaching their legal commitments. Acquiring a reputation as a rule violator means that "other states may refuse to enter into future agreements, demand greater concessions when entering into such agreements, or lose faith in the strength of existing agreements" that matter to the putative violating state.¹⁰²

The second strand of IR theory focuses on norms rather than interests. It argues that international legal rules possess a unique persuasive pull that leads states to alter their behavior in favor of compliance. Different strands of normative theory focus on the legitimacy of international law, its internalization into domestic legal systems, and designing regimes to promote a shift of preferences and values among state actors.¹⁰³ Scholars of this school are equally concerned with identifying the causes of compliance, and have examined the role of norm entrepreneurs and norm cascades, transnational advocacy networks, and domestic compliance constituencies as agents of change.¹⁰⁴

Both rationalist and normative IR theories thus share the belief that compliance is possible even in a decentralized legal system. Yet

101. Robert O. Keohane, *International Relations and International Law: Interests, Reputation, Institutions*, 93 AM. SOC'Y INT'L L. PROC. 375, 378 (2000) ("Institutions that lengthen the shadow of the future or link otherwise separate issues may create incentives to cooperate now for the sake of promoting cooperation by others later.").

102. Guzman, *supra* note 90, at 1829 n.16.

103. See Hathaway, *supra* note 94, at 1955–62 (reviewing normative compliance models); see also George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465, 471 (2000) (discussing regime design).

104. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000); Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001).

the general absence of strong enforcement machinery continues to generate disputes about the depth of cooperation such a system can achieve. Some scholars argue that the proper response to a dearth of enforcement is to manage compliance by nonconfrontational measures that monitor behavior, build capacity, and resolve disputes informally, thereby persuading states to adhere to their treaty commitments.¹⁰⁵ Others counter that such approaches work only where legal commitments are shallow (that is, where they require little change from the existing baseline of states' conduct).¹⁰⁶ Where states negotiate more demanding treaty commitments, these scholars argue, they also adopt more powerful enforcement systems, in the absence of which cooperation is likely to break down.¹⁰⁷

This debate brings the story full circle. In a sense, scholars of international law and politics are deliberating the preconditions of constitutionalism, that is, whether agreements among nation states even amount to "law" and the circumstances under which a promise to adhere to treaty commitments is borne out in practice. Because the answers to these fundamental questions are still contested and unsettled, constitutional analogies must be tempered to the particularities of individual international regimes with different compliance records and different enforcement mechanisms.

VI. EXIT AND ESCAPE

Another point of comparison between international and constitutional systems concerns the rules and procedures each uses to revise, suspend, and terminate previous commitments. A common analytical thread these issues raise is the link between how commitments are created and how they are ended. As explained in greater detail below, constitutions and constitutional obligations are, as a rule, more difficult to enter into and to exit from than treaties,¹⁰⁸

105. CHAYES & CHAYES, *supra* note 96, at 22–28.

106. Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 408 (2000) ("Depth refers in this context to the degree of costly change a treaty requires from the *status quo ante*.").

107. See George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 379–80 (1996).

108. More difficult, but not impossible, particularly where affected parties can opt-out of applicable legal norms by "going private." See Elizabeth G.

a fact with important implications for both domestic political structures and international cooperation.

Consider first the drafting of domestic constitutions, which often occurs during periods of intense reflection and deliberation by national polities over the norms, institutions, and procedures that will control the government's relationship to the governed. The rules agreed to during such "constitutional moments" are deliberately elevated above the normal political fray. The justification for imposing such antidemocratic constraints on future majoritarian lawmaking is the "extraordinary levels of democratic consent . . . to the rules that will tie the hands of future governments," including "referenda, supermajority votes, and elected constitutional assemblies."¹⁰⁹ In most instances, these higher order rules cannot be altered by subsequent generations except by the use of comparably exceptional procedures.¹¹⁰ Constitutions, in short, are designed to be sticky precisely to deter future retrenchments away from the values they enshrine.

Many international agreements and institutions share this propensity for stickiness. In the human rights area, for example, scholars have argued that governments in newly democratic states ratify human rights treaties for many of the same reasons that they adopt constitutions—to prevent their successors from backsliding away from democratic rule.¹¹¹ Stringent treaty amendment

Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS. L. REV. 151 (2000) (discussing a Internet dispute settlement mechanisms that allow private parties to contract out of public law norms).

109. Howse & Nicolaïdis, *supra* note 24, at 237.

110. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, TEX. L. REV. 703, 798–99 (2002) (discussing amendment procedures in U.S. Const. art. V); see also Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 276 n.220 (2001) (discussing amendment procedures for German and Canadian constitutions and noting that the U.S. Constitution is "much more difficult" to change).

111. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 228 (2000). Given this justification for ratification, it is significant that several human rights treaties, unlike the international agreements discussed below, do not contain denunciation clauses. See Elizabeth Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of*

procedures serve similar functions, safeguarding the compromises reached during what are often lengthy and contentious negotiations by permitting the parties to revisit those deals only if all (or a large majority) of the signatories agree to do so.¹¹² International tribunals too can enhance the durability of intergovernmental cooperation. Where, as with the ECJ, such tribunals interpret or augment treaty bargains to grant rights to private parties, they create domestic constituencies that make it politically impossible to reverse the governments' initial decision to cooperate.¹¹³ Still another form of self-limitation occurs when legislators give executive officials power to negotiate international package deals, reserving for themselves only the right to accept or reject the treaty package as a whole.¹¹⁴

These examples illustrate the parallels between the hands tying functions of treaties and those of constitutions. But the analogy should not be overstated because in many important ways legalized international cooperation is not a one way ratchet. To the contrary, such cooperation occurs in the shadow of differentiated applicability rules that, at the front end, allow states both to opt into and to opt out of specific obligations and, at the back end, permit them to exit and escape from their treaty commitments.¹¹⁵

Self-Defence?, 5 AUSTL. J. HUM. RTS. 215, 219–20 (1999) (discussing North Korea's attempt to denounce the International Covenant on Civil and Political Rights and UN Human Rights Committee's conclusion that the drafters of the Covenant intended to preclude states parties from denouncing the treaty).

112. See Bernhard Boockmann & Paul W. Thurner, *Flexibility Provisions in Multilateral Environmental Treaties*, Discussion Paper No. 02-44 (2002), at <ftp://ftp.zew.de/pub/zew-docs/dp/dp0244.pdf> (survey of 400 environmental law treaties noting their unanimity, consensus, and qualified majority voting rules for the adoption of amendments); see also Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289, 309, 313 (2001) (discussing the amendment provision of Nuclear Nonproliferation Treaty and Antarctic Treaty and concluding in the case of the latter treaty that the contracting states "ma[de] it very difficult to either modify or withdraw from the agreement" during its first thirty years).

113. See Weiler, *supra* note 15, at 2412 (discussing the "closure of selective Exit" from the European Community by its member states).

114. See Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1 (2003).

115. These differentiated treaty applicability rules are the subject of a research agenda on "Exit, Escape, and Commitment in International

Front end opt-ins and opt-outs come in a variety of different stripes. The most well known opt-out mechanism is the filing of a reservation—a document that a state appends to its ratification of a treaty to limit or qualify the scope of its obligations.¹¹⁶ Many international agreements expressly preclude states from filing reservations to preserve the precise package of negotiated commitments.¹¹⁷ But many others permit these unilateral carve outs, subject to the overriding limitation that they do not prejudice the object and purpose of the agreement.¹¹⁸

Opt-in rules are somewhat less common, but are found in agreements supplemented through optional protocols or annexes that allow the parties to the principal treaty text to decide if and when to take on additional commitments.¹¹⁹ Other important examples are plurilateral codes—families of treaties that require ratifying states to accept certain treaty obligations but make others entirely voluntarily.¹²⁰ In other cases, these differentiated rules find their

Governance” that I am pursuing as a Fellow in the Program in Law and Public Affairs at Princeton University. See Princeton Program in Law and Public Affairs, <http://www.princeton.edu/~lapa/main.html>.

116. Vienna Convention, *supra* note 6, art. 2(1)(d), 1155 U.N.T.S. 331 (defining reservations). For a recent discussion of the use of reservations, see Frederic L. Kirgis, *ASIL Insights: Reservations to Treaties and United States Practice* (May 2003), at <http://www.asil.org/insights/insigh105.htm>.

117. The WTO is one such agreement. See Final Act, *supra* note 25, art. XVI, ¶ 5, 33 I.L.M. at 1175.

118. See, e.g., Vienna Convention, *supra* note 6, art. 19(c), 1155 U.N.T.S. 331. Sometimes opt-out provisions are made a part of the treaty itself. See Berne Convention for the Protection of Literary and Artistic Works, *done* July 14, 1967, 828 U.N.T.S. 221 App. (setting out a special regime of nonexclusive compulsory licenses for developing countries that grant rights to translate or otherwise reproduce copyrighted works needed for teaching, scholarship, or research purposes in those countries).

119. See, e.g., Organization of American States: Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *approved* June 8, 1990, 29 I.L.M. 1447; Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

120. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 357–59 (2002) (discussing plurilateral codes adopted during the Tokyo Round of GATT).

expression in transition and phase-in provisions that delay the onset of treaty obligations for certain member states but not others.¹²¹

In contrast to opt-out and opt-in rules which operate *ex ante*, exit and escape mechanisms come into play after a state has ratified a treaty. Exit mechanisms take the form of denunciation clauses that allow any ratifying state unilaterally to withdraw from a treaty, thereby terminating its obligations. Significantly, many of these clauses permit denunciations for any reason or for no reason at all. All that the withdrawing state must do is to notify the other treaty parties of its decision, which then takes effect a short time after notice is given.¹²²

Somewhat less prevalent and having a less drastic effect are escape clauses, provisions that permit states to temporarily derogate from or suspend their treaty obligations for a specific period of time in response to war, emergencies, or changed circumstances.¹²³ One

121. The TRIPs Agreement's phase in rules for developing and least developed WTO members provide a notable example. See Helfer, *Adjudicating Copyright Claims*, *supra* note 34, at 431.

122. See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, *done* Mar. 3, 1973, art. XXIV, 27 U.S.T. 1087, 1116, 993 U.N.T.S. 243, 257, ("Any Party may denounce the present Convention by written notification . . . [to] take effect twelve months after the Depositary Government has received the notification."); International Convention for the Regulation of Whaling, Dec. 2, 1946, art. XI, para. 1, 62 Stat. 1716, 1721 (providing that any party may withdraw by written notification to the depositary government on or before January 1 of a given year, with withdrawal effective on June 30 of that year). Some treaties prohibit denunciations until they have been in force for a particular length of time. See European Convention, *supra* note 85, art. 65(1), 213 U.N.T.S. at 252 (providing that, after the Convention has been in force for five years, any party may withdraw by written notification to the Secretary-General of Council of Europe, with withdrawal effective six months after such notice). Others set out substantive standards that limit withdrawals, but allow the withdrawing state to decide whether those standards have been met. See Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., art. XV(2), 23 U.S.T. 3435, ("Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty *if it decides* that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.") (emphasis added). Still other agreements qualify, condition, or, occasionally, preclude exit altogether. See Evatt, *supra* note 111, at 219-20.

123. See B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829, 830 (2001) (defining "escape clauses" of international agreements as "any

important example of such an escape mechanism is the Agreement on Safeguards, a treaty that specifies the conditions under which a WTO member can suspend its free trade commitments under the GATT in response to economic shocks.¹²⁴ A very different example is found in human rights agreements, which permit states to derogate from the protection of certain individual liberties during times of public emergency.¹²⁵

These examples suggest that exit and escape clauses are an important aspect of treaty design along with other “risk management” tools such as reservations, amendment procedures, dispute settlement clauses, and specification of standards of review to be applied by international tribunals.¹²⁶ But the existence of such clauses says nothing about whether states will in fact invoke them.¹²⁷ Although there have been a number of high profile derogations and suspensions in recent years,¹²⁸ international cooperation would be

provision[s] of an international agreement that allow[] a country to suspend the concessions it previously negotiated without violating or abrogating the terms of the agreement”).

124. See Agreement on Safeguards, Apr. 15, 1994, Annex 1A, in FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, at 1 (1994), available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm.

125. See, e.g., American Convention on Human Rights: “Pact of San José, Costa Rica,” Nov. 22, 1969, art. 27, 1144 U.N.T.S. 144, 152 (entered into force July 18, 1978) (identifying limited emergency situations in which ratifying states may derogate from their treaty obligations but also listing rights from which no derogation is permitted).

126. See RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT 23–77 (1981) (identifying a suite of general risk management techniques in treaties).

127. From an instrumentalist perspective, a state will choose to exit or escape from its treaty commitments if benefits of denunciation or derogation outweigh the costs. That cost benefit calculation is likely to vary widely. Denunciations of agreements, such as those creating the WTO and the EU, which link different substantive obligations into multi-issue packages supported by broad cross sections of domestic interest groups, create significant costs and thus are unlikely to occur.

128. See Helfer, *Overlegalizing Human Rights*, *supra* note 93, at 1881–82 (discussing denunciation of human rights agreements by Guyana, Jamaica, and Trinidad & Tobago); Charles Hutzler, *U.S. Presses U.N. to Act Quickly on North Korea: Washington Sees the Need for Security Council Role in Halting Nuclear Plans*, WALL ST. J., Jan. 21, 2003, at A16 (discussing North Korea’s withdrawal from the Nuclear Nonproliferation Treaty); *New Zealand Opposes*

impossible if states habitually walked away from their treaty obligations. Yet exit and escape mechanisms, if appropriately constrained, can serve several useful functions.

Exit can be a valid response to changed circumstances arising after ratification or to jurisprudential shifts that cause treaty commitments to become overlegalized.¹²⁹ Where states periodically negotiate revisions to treaties, exit clauses can increase bargaining power by allowing states to threaten to leave the regime if at least some of their demands are not met.¹³⁰ Exit can also function as the ultimate check on international institutions, allowing states to influence their actions and, if necessary, create alternative organizations that better serve their interests.¹³¹ Finally, exit may actually be a superior response from the perspective of respect for

Iceland Bid to Re-enter Whaling Body, AGENCE FR.-PRESSE, Apr. 24, 2003, available at 2003 WL 2787030 (discussing Iceland's withdrawal and subsequent readmission to International Whaling Commission); Kate O'Hanlon, *Detention of Suspected International Terrorists Not Incompatible with Human Rights*, INDEP. (London) Oct. 29, 2002, at 18 (discussing the United Kingdom's derogation from article 5(1) of the European Convention on Human Rights, to detain foreign nationals suspected of being terrorists); Eliza Patterson, *ASIL Insights: The US Provides Section 201 Relief for the American Steel Industry* (Mar. 2002), at <http://www.asil.org/insights/insigh84.htm> (analyzing temporary increase in tariffs on imports of certain steel products to protect US steel industry). A related phenomenon is the United States decision to "unsign" the Rome Statute creating the International Criminal Court. See Curtis A. Bradley, *ASIL Insights: U.S. Announces Intent Not to Ratify International Criminal Court Treaty* (May 2002), at <http://www.asil.org/insights/insigh87.htm>.

129. See Helfer, *Overlegalizing Human Rights*, *supra* note 93, at 1891-94 (discussing denunciation of human rights treaties by three Commonwealth Caribbean governments in response to changes in legalization levels brought about by interactions between international tribunals and a domestic court).

130. See Steinberg, *supra* note 120, at 348-49 (discussing different ways in which powerful countries use threats of exit to achieve their negotiating objectives).

131. See David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 155 (1995) (the creation of a new, rival institution can be viewed as "an institutional release mechanism" that compensates for the inability of an existing institution to alter its position); *cf.* Stephan, *supra* note 20, at 693 (stating that "individual members may threaten to resort to the exit option to rein in" the bureaucracy of an intergovernmental organization).

law, where the alternative is to publicly profess adherence but fail to comply in fact.

Escape mechanisms too can have beneficial uses. They allow states to commit to deeper levels of cooperation *ex ante* while preserving the flexibility to respond *ex post* to temporary external shocks and pressures from domestic interest groups—events that might overwhelm more constraining treaty commitments and force governments to revise or exit from the treaty. But not all escape clauses are created equal. The critical issue is to design optimal penalties or constraints that allow efficient uses of escape clauses while deterring opportunism.¹³²

Taken together, these differentiated applicability rules reinforce the notion that treaties—whatever their putative normative force—continue to be conditioned upon the formal consent of states, which is precisely calibrated and can even be suspended or withdrawn if compliance is no longer in their interest. This aspect of treaty design is decidedly unlike constitutions, which articulate rules that apply with equal force to all similarly situated individuals and which generally do not envision the possibility of unilateral withdrawal by specific domestic polities. Yet, the fact that treaties are sometimes used to tie the hands of domestic political actors and that states invoke exit clauses only rarely suggests that international cooperation is not simply an illusion and that it is possible to draw appropriately limited parallels between international governance structures and constitutions.

VII. EMERGING CHALLENGES: DEMOCRACY AND LEGITIMACY

International organizations that are weak or simply mirror domestic political preferences often go unnoticed or at least unchallenged. But when these entities regulate subjects at the core of

132. See Rosendorff & Milner, *supra* note 123, at 845–52; Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255, 297 (1991). See also Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1583 (1999) (“[H]ow can we distinguish a nation’s principled assertion of a right to withdraw from a relationship that has turned out badly from an opportunistic attempt to appropriate benefits that were created for a collective good?”).

national law and policy, critics begin to question their authority and the anti-democratic character of their actions.¹³³ Stated another way, it is precisely when international agreements and institutions start to matter that challenges to their democratic pedigree and legitimacy become more prevalent and more trenchant.

The potential for a nexus to constitutional law should be obvious. Democracy and legitimacy concerns are the bread and butter of constitutional discourse. The specific mechanisms for addressing these concerns may differ from country to country and from constitution to constitution. But the common thread that connects the creators and interpreters of constitutions in different jurisdictions is the need to resolve questions of power and governance. These questions include deciding what procedures elected or representative institutions must use to create binding rules of general applicability, how those institutions are held accountable for their actions to the relevant political communities, questions of delegation and separation of powers, and when normal rules of majoritarian decision making should be constrained in the service of higher order principles and values. In short, as democracy and legitimacy concerns become a more important focus of international governance, the analogies to domestic constitutions acquire greater allure.

The literature on democracy and legitimacy-based critiques of treaties and institutions is rich and extensive, and, not surprisingly, focuses mainly on the EU and WTO. Commentators analyzing these two institutions and predicting the future of other international bodies have identified several overlapping strands of democratic difficulties, each of which generates a different prescription for

133. Although “legitimacy” and “democracy” are central concerns of constitutional law and now international law scholars, there is surprisingly little consensus as to their meanings. For a detailed discussion and collection of alternative definitions of legitimacy, see Bodansky, *supra* note 10, at 600–03. For a helpful definition of democracy, see Keohane & Nye, *supra* note 30, at 281 (“Democracy is government by officials who are accountable to the majority of the people in a jurisdiction, albeit with frequent provisions for supermajority voting and protections for individuals and minorities.”).

reform. These critiques can be roughly divided into deficiencies of process and deficiencies of outcome.¹³⁴

Among the more numerous process critiques, commentators have focused in particular on participation and transparency issues. From a traditional international law perspective, participation begins and ends with the state's decision to ratify a treaty or become a member of an intergovernmental organization. Such formalism no longer satisfies most critics, many of whom draw upon the core insight of liberal IR scholars that nation states must be disaggregated into their constituent parts.¹³⁵ Once the state is no longer treated as a unitary entity, the true democratic difficulty emerges: the attenuated links and diffuse connections between international institutions on the one hand and national elected officials and the electorate itself on the other.¹³⁶

Prescriptions for enhancing participation occupy a wide range of positions along a continuum from the incremental to the utopian, and separately target adjudication, treaty negotiations, and rulemaking functions. In the trade context, one modest proposal seeks to open the doors of dispute settlement chambers (and perhaps negotiating halls) to input from nongovernmental organizations (NGOs) and

134. See Atik, *supra* note 28, at 453–54 (drawing this distinction). See also Keohane & Nye, *supra* note 30, at 282 (“Democratic governments are judged both on the procedures they follow (inputs) and on the results they obtain (outputs).”); Raustiala, *supra* note 45, at 410 (identifying the two facets of the democracy problem in international law as “generativity”—meaning the “ability of international institutions to produce new substantive rules that modify or extend a given legal agreement”—and “insularity”—meaning “both the degree of transparency and of non-executive branch (for example, legislative/public) participation in the international institution and its decisions”).

135. See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997); see also Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 241 (2000) (stating that characteristics of liberal theory include its bottom-up view, its linking of the international and domestic spheres, its rendering of state-society relations as transparent, and its transformation of states into governments).

136. See Keohane & Nye, *supra* note 30, at 276 (noting that critics of intergovernmental organizations such as the WTO have challenged the “closed clubs indirectly linked to popular demands by long and opaque chains of delegation”).

other non-state actors.¹³⁷ Further along the spectrum are efforts to grant private parties affected by a state's violation of its treaty commitments the right to assert claims before WTO dispute settlement institutions which are now open only to member states.¹³⁸ Such proposals emulate the approach of other intergovernmental organizations and international tribunals, many of which already permit various forms of participation by or grant standing to individuals and members of civil society.¹³⁹

Other observers believe more radical reforms are required, such as (1) holding direct elections to newly created international legislatures (an institutional innovation that at present exists only in the EU's European Parliament); (2) authorizing national parliamentarians to serve on international legislative bodies; and (3) granting voting or participation rights to affected private individuals

137. See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation in the WTO*, 1 J. INT'L ECON. L. 433 (1998); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996).

138. See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996); Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587 (1998).

139. With respect to participation in treaty negotiations, compare Convention on Biological Diversity, *The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs): Relationships and Synergies*, Oct. 5, 1996, UNEP/CBD/COP/3/23 ¶ 53, stating that NGOs "may not participate as observers or in any fashion whatsoever in any proceedings of . . . the WTO," with *Food or Famine—Three Words Will Determine Our Future: Civil Society Groups Fear a New Global Convention Governing the Genes of the Major Food Crops Will Not Be Fair, Equitable, or Comprehensive*, ITDG, at <http://www.ukabc.org/threelittlewords.doc> ("Over 400 civil society groups from 70 countries have lobbied the negotiators of [the International Treaty on Plant Genetic Resources for Food and Agriculture]."). Human rights tribunals and NAFTA chapter 11 dispute settlement panels are just two examples of international adjudication mechanisms that allow individuals and firms to bring suits directly against states. See, e.g., Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51–87 (2003) (reviewing recent case law and legitimacy challenges to NAFTA's investor-state dispute settlement system); Helfer, *Forum Shopping*, *supra* note 47, at 296–301 (reviewing UN and regional human rights petition systems).

and interest groups.¹⁴⁰ These proposals have, in turn, been critiqued on the ground that, in the absence of any international political community, “the extension of domestic voting practices to the world scale would make little normative sense, even if it were feasible.”¹⁴¹

Yet if increasing the electoral accountability of international institutions is not a viable option, what alternatives remain? For some, the critical issue is enhancing transparency. Here, too, proposals range widely, from opening closed judicial and lawmaking venues, to granting observer status to intergovernmental organizations, NGOs, and other private parties, to soliciting public comment on institutional activities, and to publishing documents and studies on the internet.¹⁴²

140. See, e.g., Ernst-Ulrich Petersmann, *From ‘Negative’ to ‘Positive’ Integration in the WTO: Time for ‘Mainstreaming Human Rights’ into WTO Law?*, 37 COMMON MKT. L. REV. 1363, 1373 (2000) (proposing the establishment of an advisory WTO Economic and Social Committee composed of civil society representatives and an advisory “parliamentary body”); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT’L L. & BUS. 398, 431 (1997) (calling for national legislatures and civil society groups to seek a new initiative within the WTO to strengthen individual rights, constitutional safeguards and more representative institutions); see also Atik, *supra* note 28, at 468–71 (reviewing proposals for broadening participation in decision making of intergovernmental organizations).

141. Keohane & Nye, *supra* note 30, at 283. The truth of this insight is buttressed by the failed attempt to hold global, online elections for the public board members of the Internet Corporation for Assigned Names and Numbers (ICANN), a private, non-national regulatory body. See Laurence R. Helfer, *International Dispute Settlement at the Trademark-Domain Name Interface*, 29 PEPP. L. REV. 87, 98 (2001) (asserting that is premature to consider ICANN “as anything even approaching a global cyberspace parliament, given the many challenges to its legitimacy . . . and the paucity of voters in recent elections to the ICANN Board”).

142. See Keohane & Nye, *supra* note 30, at 277–78 (reviewing proposals); Stein, *supra* note 3, at 531–34 (reviewing proposals). There is good reason to question whether the use of digital media to make documents publicly available or even to allow direct public commentary is sufficient, in itself, to provide a plurality of views to international lawmakers or to avoid the capture of the lawmaking process by special interests. See Helfer & Dinwoodie, *supra* note 46, at 169 nn.85–87 (stating that “formal transparency in theory cannot ensure broad-based participation in fact” and citing in support articles and position by Professor Michael Fromkin critiquing online public consultations held by the World Intellectual Property Organization concerning the creation

Increased transparency has dangers as well as benefits, however. It is often the closed nature of the proceedings that enables government officials to make the tradeoffs necessary to conclude treaty negotiations or allows litigating parties to reach a mutually satisfactory settlement. The effect of greater openness may, paradoxically, be a diminution in the efficacy of international cooperation or adjudication, a result that exacerbates a different type of democracy and legitimacy challenge to treaties and intergovernmental organizations.

Commentators who stress the latter type of shortcoming target their criticism at the outcomes of international lawmaking and dispute settlement—that is, at deficiencies in the principles, norms, or rules that international regimes generate. In some cases, the problem is one of ineffectiveness—an institution that has not achieved the goals set forth in its founding charter or established by its member states. In other instances, the difficulty is one of proper balance, with one institution or another said to be biased in favor of particular substantive values.¹⁴³

Strategies for ameliorating these substantive democracy deficits raise considerable challenges. On the one hand, achieving greater efficacy may require granting additional authority to international institutions and their staff, a result that would be anathema to states that jealously guard their sovereignty. Yet in the absence of such independent authority, it may be difficult or impossible to begin the slow process of modifying the preferences of national actors that deeper international cooperation often requires. Resolving problems of actual or perceived institutional bias are equally challenging. One might seek to dilute normative partiality by directing reforms at a single influential organization, such as by altering the mix of expertise possessed by its bureaucrats or by expanding its competence to address a broader range of substantive issue areas (as discussed in connection with the WTO above). A very different response would seek to enhance the powers of those

of a new non-national dispute settlement system to resolve cybersquatting claims between trademark owners and domain name registrants).

143. See Frank J. Garcia, *Building a Just Trade Order for a New Millennium*, 33 GEO. WASH. INT'L L. REV. 1015, 1059 (2000); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 709–18 (1996).

intergovernmental organizations whose principles, norms, or rules are being entrenched upon by more powerful rival institutions. Yet whether states will agree to cede to such organizations the authority that such a strategy requires remains a contentious and unresolved question.

VIII. CONCLUSION

This Article has provided a brief exploration of nascent analogies between domestic constitutions and the international legal system, identifying institutions and issue areas for which constitutional analogies have greater salience, and comparing them to those for which such analogies have less purchase. The Article has also examined constitutional trends that are beginning to emerge outside of the nation state by focusing on five structural and systemic challenges that the international legal system now faces. Although the analogies between domestic constitutions and treaty regimes are inexact, they may nevertheless help to generate insights for international legal scholars and political scientists seeking to explain recent changes to international law and institutions and to predict their future trajectories.

Scholars considering the next phase in this project should undertake more fine-grained comparisons of specific institutions or issue areas in which constitutional analogies seem to hold the most promise for enhancing international cooperation. Although the translation of legal norms from one system to another is often fraught with danger,¹⁴⁴ careful comparative analysis may help state and nonstate actors operating within international regimes to learn from national constitutional experiences, adapting or even enhancing their benefits while avoiding their mistakes.

144. See generally Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994).

