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International law and international relations theory: a prospectus

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Scholars of international relations generate a wide range of theories to solve the problems and puzzles of state behavior. Each theory offers a causal account of a particular outcome or pattern of behavior in interstate relations in a form that isolates independent and dependent variables precisely enough to generate hypotheses (predictions) that can be empirically tested.[1] At a higher level of generality, these theories can be grouped into different families or approaches on the basis of their underlying analytical assumptions about the nature of states and the relative explanatory power of broad classes of causal factors, such as the distribution of power in the international system, international institutions, national ideology and domestic political structure.

This chapter will summarize the three main theoretical approaches used in contemporary American political science: Realism, Institutionalism

[1] The theories described are all "positivist" theories, in the sense that they proceed from the premise that "every theory, to be worthwhile, must have implications about the observations we expect to find if the theory is correct." See Gary King, Robert O. Keohane and Sidney Verba, *Designing Social Inquiry* (1994), p. 28; also Richard K. Ashley, "The Poverty of Neorealism" in R. Keohane, *Neorealism and its Critics* (2nd ed., 1986), p. 281 (summarizing four basic tenets of positivism as: (1) there are objective scientific causes of events; (2) science can produce technically useful knowledge that is (3) value neutral; and (4) the truth can be empirically tested). But see Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory* (Yale University Press, New Haven, 1994), p. 6 (rational choice theory has not delivered on its empirical promises; this failure of empiricism as it bears upon the study of political phenomena is "rooted in the aspiration of rational choice theorists to come up with universal theories of politics.").

The precise meaning of "positivism" as it is used in international legal discourse, however, is somewhat distinct from the social science formulation of the term. See e.g., Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press, New York, 1999), p. 89 (noting that "traditional positivists would define the very existence of a treaty as evidence of an authoritative rule.").

and Liberalism.[2] Political scientists are likely to find the versions presented here overly simplified and distilled. Yet each approach gives rise to a distinct mental map of the international system, specifying the principal actors within it, the forces driving or motivating those actors and the constraints imposed on those actors by the nature of the system itself. Anyone who thinks about foreign policy or international relations, from either a political or a legal standpoint, must have some such map to guide her thinking, whether consciously or subconsciously.

Beyond mental geography, however, the explicit role of theory differs for political scientists and lawyers. For political scientists, the purpose of uncovering this map and explicating its underlying assumptions is to test the positive validity of those assumptions. Do states in fact behave as they are assumed to? Does the mental map correspond to what observers actually see, or think they see? Does it permit accurate diagnosis of international problems and generate valid predictions and prescriptions for their resolution? Clarity about underlying premises is an indispensable foundation for accurate positive explanation.

For lawyers, the significance of underlying positive assumptions about the way the world works may be less immediately apparent, but no less important. Assume an instrumental view of international law, in which law-makers and commentators design legal rules to achieve specific ends based on positive reasoning about how those ends may be achieved. This is by no means the only or even the best perspective on the discipline and practice of international law; many might prefer a deontological quest for

[2] Many political scientists would protest this selection of theoretical paradigms, arguing that it is too narrow and excludes such important theories as world systems theory, dependence theory and structuration theory, to name only a few. The choice of these three approaches does not deny the existence of other bodies of theory or seek to discourage international lawyers from drawing on them. The approach here is intended to be illustrative rather than exhaustive.

For additional explications of these and other IR theories within political science, see generally Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner (eds.), "International Organization at Fifty: Exploration and Contestation in the Study of World Politics" (1998) 52 *International Organization* 1; Benjamin J. Cohen and Charles Lipson, *Issues and Agents in International Political Economy* (1999); John Mearsheimer, "The False Promise of International Institutions" (1995) 19 *International Security* 5; Jeffrey W. Legro and Andrew Moravcsik, "Is Anybody Still a Realist?" (1999) 24 *International Security* 5. For earlier versions of ongoing debates discussed in these sources, see David A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (1993); Charles W. Kegley, Jr. (ed.), *Controversies in International Relations Theory: Realism and the Neoliberal Challenge* (1995); Robert J. Beck, Anthony Clark Arend and Robert D. Vanderlugt, *International Rules: Approaches from International Law and International Relations* (1996).

norms of international justice.[3] Even from this perspective, however, part of the international lawyer's task will be to determine how these norms can be most effectively implemented. Thus, at some stage, excavating and challenging assumptions about the nature and form of the international system emerges as an essential component of legal analysis, an effort to understand the realm of the possible and expand the realm of the probable.

To illustrate, imagine a set of agreed exogenous goals, such as peace, increasing international cooperation, resolving international conflict, preserving common resources or advancing global prosperity. Altering positive assumptions about who the principal actors are in the international system and about the motives that drive them gives rise to different causal statements about the source of particular problems – war, conflict or non-cooperation. These differing analyses will in turn suggest different political and legal strategies as to how to resolve those problems in the service of the posited affirmative goals.[4]

The most prominent example of this type of reasoning is the differential diagnosis of the sources of war: an imbalance of power in the international system, misinformation and uncertainty or inadequate representation of the individuals and groups most directly affected by war in the decision to go to war.[5] The first diagnosis gives rise to legal norms seeking to restrict or constrain state use of power. The second would suggest the creation of international institutions to facilitate communication and confidence-building measures among potentially warring parties. And the third would generate both rules and possibly institutions designed to expand political representation at the domestic level.

An equally important example concerns competing diagnoses of trade conflicts.[6] Here again, the problem can be identified as a fundamental and

[3] See e.g., Janna Thompson, *Justice and World Order: A Philosophical Inquiry* (1992).

[4] See Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 *Michigan J. Int'l L.* 345, 369–72 (explaining that the process of the selection of strategies to effect the attainment of affirmative goals such as compliance with transnational regulatory institutions, dependent as it is upon differing assumptions regarding the important actors and causal processes in international relations, is difficult to investigate through normative methods alone).

[5] See e.g., Evan Luard, *Conflict and Peace in the Modern International System* (1988) (providing an exposition of the broad domain of theoretical explanations and analyses of the causes of war).

[6] See e.g, Klaus Stegemann, "Policy Rivalry Among Industrial States: What Can We Learn from Models of Strategic Trade Policy?" (1989) 41 *International Organization* 73 (illustrating the various explanations for international trade conflicts).

inevitable conflict between states competing to gain a relative advantage over one another; a problem of institutional design affecting the ability of states to coordinate and cooperate to reach an optimal solution; or the misrepresentation of underlying individual and group interests such that conflicting state positions reflect the capture of domestic political processes by special interests. Each of these diagnoses would give rise to different political strategies and corresponding legal regimes: the facilitation of trade alliances to neutralize competition; an international regime designed to overcome coordination and information problems (the GATT); or strategies allowing domestic litigants to invoke international rules against domestic interest groups in court. This last strategy does not exclude an international institutional framework, but it would be intermeshed with domestic politics and law.

Some international law (IL) lawyers might conclude that these differential diagnoses are the preliminary steps that must be taken to determine what category of law is appropriate to the solution of a particular policy problem – international or domestic. On this view, competing paradigms of international relations (IR) theory thus serve above all to delimit the boundaries of disciplinary jurisdiction. For present purposes, international lawyering is defined as seeking legal solutions to international problems, regardless of the labels attached to any particular body of law. From this perspective, international relations theory is an important part of any international lawyer's toolkit.

Others will argue that it is IR/IL scholars who are determined to attach political science labels to concepts and modes of analysis that international lawyers already engage in, but without fanfare. This claim has some merit, particularly with regard to the overlap between much of traditional international law and what political scientists call regime theory.[7] Even here, however, the political science account of the role that international rules and institutions play in international life yields valuable insights into the workings of current international institutions and suggests new possibilities for institutional design. More generally, explicating the connections between the two disciplines may make international lawyers more aware of the extent to which deeply entrenched international legal rules and principles reflect outmoded or discredited assumptions about the

[7] For a description of this overlap, see Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 *Yale J. Int'l L.* 335; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *Am. J. Int'l L.* 205, 208; Stephan Haggard and Beth A. Simmons, "Theories of International Regimes" (1987) 41 *International Organization* 491.

international system. Following the analytical course charted by different theories of international relations may encourage them to challenge these assumptions and formulate fresh solutions to old problems.

Principal paradigms in international relations theory

The "theories" of international relations presented here are not precise theories of war or peace or economic relations among nations. They are rather families of theories, which can also be thought of as conceptual frameworks or paradigms. More specific theories can be grouped within these paradigms in terms of the fundamental assumptions that they share about the nature of the principal actors in the international system and the principal factors that determine the outcomes of interactions among these actors. With a basic grasp of these different sets of assumptions, it is possible to identify virtually any more specific theory as either belonging to or containing elements from one or more of these paradigms. More useful for international lawyers, it is also possible to analyze any current problem in international relations from several competing perspectives and quickly to generate a number of potential solutions. In this sense, knowledge of these paradigms and an understanding of the basic mindset that animates the political scientists who work within them is a valuable technology. It is a technology that international lawyers can use to suit their many purposes in the different kinds of projects they undertake, provided, as with any technology, that they understand both its strengths and its limits.

Realism

The dominant approach in international relations theory for virtually the past two millennia, from Thucydides[8] to Machiavelli[9] to Morgenthau,[10] has been Realism, also known as Political Realism. Realists come in many stripes. Most notably, they divide between Classical Realists and Contemporary Structural Realists or Neorealists. Classical Realists, according to Professor Michael Smith, share the following assumptions:

[8] Thucydides, *History of the Peloponnesian War* (Rex Warner (trans.), 1986).
[9] Niccolo Machiavelli, *The Prince* (1946).
[10] See Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948), p. 244.

(1) Human nature displays an "ineradicable tendency to evil."[11]
(2) The important unit of social life is the collectivity; in international politics the only really important collective actor is the state.
(3) Power and its pursuit by individuals and states is ubiquitous and inescapable. Thus the "important subjects for theoretical consideration are the permanent components of power."[12]
(4) International institutions, networks or norms are epiphenomenal.[13] They are reflections of the prevailing power relations among states, rather than independent factors determining state behavior.
(5) The "real issues of international politics can be understood by the rational analysis of competing interests defined in terms of power."[14]

These assumptions are linked. If human nature displays an ineradicable tendency toward evil, humans cannot live together without a powerful central authority to keep them in check. This is Hobbes' Leviathan, the domestic sovereign that must exercise absolute control within its territory.[15] When sovereigns encounter each other in the international system, they display the same characteristics that humans do in the state of nature. They seek power and dominion over one another, but can be held in check by countervailing power. In this context, rules and institutions can only endure to the extent that they reflect the interests of the most powerful states in the system.[16]

[11] See Michael Joseph Smith, *Realist Thought from Weber to Kissinger* (1986), p. 219; see also *ibid.* at p. 1 (contending that "[e]vil is inevitably part of all of us which no social arrangement can eradicate: men and women are not perfectible").
[12] *Ibid.* at pp. 219–20.
[13] F. S. Northedge, *The Use of Force in International Relations* (1974), pp. 213–13 (noting that for Morgenthau the relative distribution of state military power determined whether legal, rather than political, attempts to regulate the use of interstate force would trump the resort to self-help measures).
[14] Smith, *Realist Thought*, p. 221.
[15] Thomas Hobbes, *Leviathan* (1651), p. 107.
[16] Smith, *Realist Thought*, p. 13. See also W. Michael Reisman and Andrew R. Willard (eds.), *International Incidents: The Law That Counts in World Politics* 5 (1988) (indicating that for Realists who think that it is a form of law, international law is the law of the lowest common denominator as it operates horizontally rather than vertically, proceeds via coordination rather than through subordination and superordination, and binds powerful states only to the degree that it is in their interest to be bound). Some Realists will not even go this far. Michael Smith, for instance, suggests that for Classical Realists, states would not "peacefully consent to the creation of [rules and institutions], even if [they] could be shown to be workable." Smith, *Realist Thought*, p. 1.

In the 1970s, Kenneth Waltz reformulated these assumptions in an updated version of Realism that he called Structural Realism.[17] He insisted that a true theory of international relations must be formulated not in terms of human nature or the nature of national governments, but rather only in terms of factors operating at the level of the international system. John Mearsheimer summarizes the assumptions of this approach as follows:

(1) The international system is anarchic; it has no central authority.
(2) "[S]tates inherently possess some offensive military capability, which gives them the wherewithal to hurt and possibly destroy each other."[18]
(3) "States can never be certain about the intentions of other states."[19]
(4) The "most basic motive driving states is survival. States want to maintain their sovereignty."[20]
(5) [S]tates think strategically about how to survive in the international system.[21]

In this version, Realism is driven not by human nature but by the *structure* of the international system. The basic principle of anarchy means that states must protect themselves from other states. In a system in which all states possess the means to harm each other through offensive military capability and states can *never be certain* about what other states' intentions are, they must prepare for the worst. Their very survival is potentially at stake; assuring that survival must become the priority in all interactions with other states. Thus foreign policy becomes an exercise in figuring out how to amass and maintain sufficient power to defend against other states and conquer them if necessary. Instead of pursuing strategies of cooperation to secure common interests, states instead maximize their specific gains relative to other states.[22]

Differences in these variants of Realism can be important for specific applications of Realist theory. For present purposes, however, the various assumptions set forth above can be distilled into three. First, Realists believe that states are the primary actors in the international system, rational unitary actors who are functionally identical. Second, they assume that the organizing principle of the international system is anarchy, which cannot be mediated by international institutions. Without a central authority,

[17] Kenneth Waltz, *Theory of International Politics* (1979), p. 91.
[18] Mearsheimer, "False Promise," p. 11.
[19] *Ibid.* [20] *Ibid.* at p. 12. [21] *Ibid.* [22] *Ibid.* at p. 14.

power determines the outcomes of state interactions. Third, states can be treated as if their dominant preference was for power.

International lawyers assessing Realist theory must be careful to understand the internal logic of the Realist paradigm, if only to dispel any notion that Realists are somehow immoral or love power for its own sake. On the contrary, as the name suggests, Realists perceive that they are describing the realities of the international system, however unpleasant they may be. Stanley Hoffmann highlights the value that Realists place on prudence, leading them often to counsel against well-intentioned but potentially disastrous exercises of power that can erode the foundations of sovereignty and diminish the intellectual bases for the "protection of a society's individuals and groups from external control".[23]

Further, although Realism is probably best known among international lawyers for rejecting any causal role for international legal norms in the international system, much of both the structure and substance of traditional international law appears to be built on a Realist foundation.[24] Realists and traditional international lawyers overlap on all three core assumptions: concerning actors, preferences and the constraints imposed by the international system. They do ultimately diverge, with international lawyers seeking to blunt or alter the implications of a pure Realist analysis, but less than either camp might suspect.

The clearest overlap concerns the relevant criteria for identifying participants in the international system. Both Realists and traditional international lawyers agree that the primary actors are states, and define states as monolithic units identifiable only by the functional characteristics that constitute them as states. Neither would take account of domestic political ideology or structure, or of the multiplicity of sub-state actors that determine state policy at the domestic level. Both would assume that rules governing state behavior apply to all states *qua* states, without regard to their internal identity. The first-order international legal principles of sovereign equality and exclusive domestic jurisdiction are safeguards of the identity and opacity of the sovereign sphere. International legal rules governing recognition and state succession similarly ensure a complete divorce between governments and states.

[23] Stanley Hoffmann, "The Politics and Ethics of Military Intervention Survival" (1995–96) 37 *IISS Quarterly* 29, 33–34.
[24] Slaughter Burley, *International Law*, p. 207. See also Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106 *Yale L. J.* 2599, 2607–8 (underscoring the Realist, particularly the statist and sovereigntist, foundations of traditional international law).

For post-Westphalian international lawyers, then, states are both the source and the subject of rules governing international relations. What motivates and constrains these states in their relations with one another? As will be discussed below with regard to Institutionalism, most international lawyers assume that states have at least some common ends and that they can arrange to achieve them by means other than power. Nevertheless, many aspects of traditional international law tacitly acknowledge the extent to which international relations are power relations.

To take only one example, consider the centrality of the territoriality principle in both international law and politics. For Realists, territorial boundaries define the area from which resources necessary for military and economic power can be extracted, thereby circumscribing the extent of state power. It is this notion of territorially defined power that underpins Arnold Wolfers' classic Realist image of states as billiard balls: opaque, hard, clearly defined spheres interacting through collision with one another.[25] The circumference of each sphere is defined by territory. For international lawyers, control over a defined territory is the first criterion of statehood, an indispensable prerequisite for participation in the international system. It thus appears that the ante for participation in the international game is the capacity to wield power.

More generally, consider the many international lawyers who have sought to reconcile their discipline with the primacy of state power in the international system. The great positivists were all steeped in this tradition. Michael Reisman reminds us of Oppenheimer's realism, his uncompromising recognition of the limits set by the balance of power.[26] David Kennedy similarly depicts Hans Kelsen as the progenitor of a line of international law scholars who "hoped to remain realistic about state power without becoming political scientists," who embraced "formalism and respect for sovereignty" as a realistic recognition of the limits of law and the persistence of power.[27] More sweepingly, Martti Koskenniemi dichotomizes all of international legal argumentation into a debate between the apologists and the utopians – those who accept that international law reflects whatever states do and those who would have

[25] Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (1962), p. 19.

[26] W. Michael Reisman, "Lassa Oppenheim's Nine Lives" (1994) 19 *Yale J. Int'l L.* 255 (reviewing S.R. Jennings and S.A. Watts, *Oppenheim's International Law* (1992)).

[27] David Kennedy, "The International Style in Postwar Law and Policy" (1994) *Utah L. Rev.* 7, 36.

international law transcend and constrain state behavior.[28] The apologists are Realists.

Institutionalism

To the extent that Institutionalism reflects the belief that "rules, norms, principles and decision-making procedures" can mitigate the effects of anarchy and allow states to cooperate in the pursuit of common ends, all international lawyers are Institutionalists. "Rules, norms, principles and decision-making procedures" is the definition of an international "regime," the much-studied phenomenon that reintroduced international law to political scientists in the 1980s.[29] According to Robert Keohane's influential account in *After Hegemony*, international regimes:

> enhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime. They create the conditions for orderly multilateral negotiations, legitimate and delegitimate different types of state action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of the information that governments receive.[30]

[28] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), p. 5 (contending that, by refusing to incorporate sufficient normative aspects into their scholarship, Realists "lack critical distance" from state behaviors that most would "refuse to accept at the moment of application" and consequently cannot overcome the status of apologists for such behaviors).

[29] See Stephen D. Krasner (ed.), *International Regimes* (1983), p. 2 ("Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.").

[30] Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), p. 244. See also Robert O. Keohane, *International Institutions and State Power* (1989). For slightly different versions of regimes and regime theories, see Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (1989) (defining regimes as human artifacts whose distinguishing feature is the conjunction of "convergent expectations" and recognized patterns of behavior or practice in a given issue-area of social relations); John G. Ruggie, "International Responses to Technology: Concepts and Trends" (1975) 29 *International Organization* 557, 570 (defining regimes as sets of "mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states"); Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence: World Politics in Transition* (1977), p. 19 (treating regimes as simply "governing arrangements that affect relationships of interdependence"); Volker Rittenberger (ed.), *Regime Theory and International Relations* (1993), pp. 3–11 (explaining the German research on regime theory and its conceptualization of international regimes as, alternatively, either "a form of institutionalized collaboration distinct from governments, treaties, or international organizations," a series of "routinized and institutionalized transactions between and among states," or "explicit

International regimes also enhance compliance with international agreements in a variety of ways, from reducing incentives to cheat and enhancing the value of reputation, to "establishing legitimate standards of behavior for states to follow" and facilitating monitoring, thereby creating "the basis for decentralized enforcement founded on the principle of reciprocity."[31] Moreover, regimes are important factors not only in international political economy but also in the security area.[32] As a group of international political economists and security scholars demonstrated in the 1980s, regime theory can be usefully applied to explaining cooperation under conditions of conflict.[33]

Primarily through the work of Keohane and many of his students, regime theory evolved into Institutionalism, an alternative paradigm to Realism.[34] The basic assumptions of Institutionalism are the following:

(1) The primary actors in the international system are states.
(2) Absent institutions, states engage in pursuit of power, but in many areas their underlying interests are not necessarily conflictual.

sets of rules which achieve prescriptive status in the sense that actors refer regularly to the rules both in characterizing their own behavior and in commenting on the behavior of others").

[31] Keohane, *After Hegemony*, p. 245.

[32] For elaboration on this point, see Friedrich Kratochwil, *Rules Norms, and Decisions* (1989), p. 187 (noting that Realism does not *ipso facto* exclude security as an issue-area susceptible to regime development, as norms underpin and structure collective security even if they are more opaque and less robust than the norms that under-gird other issue-areas); see also Robert Jervis, "Security Regimes" in Krasner, *International Regimes*, pp. 173–94 (insisting that security regimes, though theoretically possible even under conditions of anarchy, are more difficult to construct and maintain than regimes in other issue-areas for the following reasons: (1) security is more competitive than other issue-areas; (2) securing one's own interests harms or menaces other states; (3) stakes, which include survival, are higher in security than in other issue-areas; and (4) detection of the actions of other states is more difficult in security than in other issue-areas, which complicates evaluation of relative security relationships).

[33] See Jervis, *Security Regimes*, 173–94; see also Kenneth Oye (ed.), *Cooperation Under Anarchy* (1986); Robert Axelrod, *The Evolution of Cooperation* (1984).

[34] Keohane, *International Institutions*. This volume is a collection of Keohane's essays on institutions through the 1980s. For those seeking to find their way through the bewildering maze of theoretical labels, the introductory essay offers a useful overview of the distinctions between Neoliberal Institutionalism, Neorealism and Liberalism. However, Keohane's summation of the Liberal tradition differs considerably from the Liberal paradigm described in the second half of this chapter. On the contrary, Keohane's definition of Liberalism "as a set of guiding principles for contemporary social science" essentially equates it with Institutionalism. Thus, "Neoliberal institutionalists accept a version of liberal principles that . . . emphasizes the pervasive significance of international institutions without denigrating the role of state power." *Ibid.* at p. 11.

(3) Institutions can modify anarchy sufficiently to allow states to cooperate over the long term to achieve their common interests.
(4) In assessing the factors that determine international outcomes, institutions "are as fundamental as the distribution of capabilities among states."[35]

Here, then, is the divergence from Realism. Whereas Institutionalists would agree that states are the primary actors in the international system and that, absent institutions, states are engaged in the pursuit of power, they would contend that the presence of institutions modifies the organizing principle of anarchy. The uncertainty and ever-present possibility of conflict that lead states in a Realist world to expect and prepare for the worst is diffused by the information provided by and through institutions.[36] These institutions must thus be factored into systemic explanations of state behavior independently of structure. Further, having ameliorated the conditions of conflict that force states to concentrate on the quest for power, institutions can facilitate the achievement of common ends.

How do institutions accomplish this function? In a wide variety of ways. In Keohane's account, they decrease the transaction costs of interstate relations, increase information to reduce uncertainty and facilitate communication. In addition, institutions can promote learning, create conditions for orderly negotiations and facilitate linkages in complex negotiations. They can also legitimize or delegitimize different kinds of behavior. Finally, they can enhance the value of a state's reputation for honoring commitments, facilitate monitoring of state behavior and make decentralized enforcement possible by creating conditions under which reciprocity can operate. Other theorists, explored in greater detail below, emphasize the ways in which institutions can create a particular normative environment that helps shape both state identity and interests.

A key point here is that Institutionalism depends on the existence of common interests among states, which will not necessarily obtain among all states or in all issue areas. Where state interests do not converge, power politics is likely to continue to rule. Thus a prerequisite for Institutionalist analysis is the identification of underlying common interests, even in

[35] *Ibid.* at p. 8. See also Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner (eds.), *Exploration and Contestation in the Study of World Politics* (1998), p. 23 (elaborating the basic assumptions of institutionalism).

[36] Keohane, *International Institutions*, p. 33 (describing how institutions reduce information costs and enhance incentives toward cooperation and the preclusion of conflict.

apparently conflictual situations. The "game" in game theory, for instance, first involves identifying which of a number of games best fits a particular pattern of state interactions, a step that requires figuring out whether states have an interest in coordinating their behavior or in cooperating more extensively in a variety of ways. To be more concrete, states may all have an interest simply in coordinating their behavior around one common standard, such as an agreement on navigational rules on the high seas. Alternatively, they may face a situation as in international trade, in which all have collective interest in reducing tariffs, but absent an institution that can prevent defection and solve free-rider problems, each state will have an interest in raising or maintaining tariffs.

In large degree, the debate between Realists and Institutionalists recapitulates the ancient debate between Hobbes and Grotius.[37] Not surprisingly, international lawyers typically side with Grotius. If they did not believe that international institutions (defined so broadly as to include all international legal rules and doctrines, as well as formal international organizations) could modify state behavior and in turn bring common goals within reach, they could not justify their own existence. In the process, however, they, like the Institutionalists, continue to accept a largely Realist foundation and framework as the point of departure for conceptualizing the international system.

To take one example, the UN Charter is an Institutionalist response to the fact of state power. Whereas Realists design political strategies to answer power with power, international lawyers search for rules to define and thus to restrain legitimate and illegitimate uses of power. Norms of sovereign identity and equality seek to create a fictional world in which power is equalized; prohibitions on the use of force seek to shape reality to approximate this fiction. The UN Charter neatly blends both political and legal approaches, combining an absolute prohibition on the use of force in Article 2(4) with a mechanism for the concentration of power by a designated group of powerful states against a transgressor against international peace.[38]

[37] See the account of these different strands in international relations theory in Hedley Bull, "Martin Wight and the Theory of International Relations" (1972) 2 *British J. Int'l Studies* 101, 104–5 (describing Wight's differentiation of Realists, "the blood and iron and immorality men" whose principal philosophical font was the work of Machiavelli and Hobbes, from Institutionalists, "the law and order and keep your word men" who took instruction from Grotius, from Revolutionists, "the subversion and liberation and missionary men" for whom Kant was inspiration).

[38] See Anne-Marie Slaughter, "The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations" (1994) 4 *Transnational Law and Contemporary Problems* 377.

Liberalism

The principal alternative to Realism and Institutionalism among international relations theorists is Liberalism.[39] As in the domestic realm, Liberal international relations theories have been repeatedly characterized as normative rather than positive theories.[40] The best-known Liberal theory in this category is Wilsonian "liberal internationalism," popularly understood as a program for world democracy. As used here, however, Liberalism denotes a family of positive theories about how states do behave rather than how they should behave.

A number of political scientists have sought to reduce Liberalism to a set of positive assumptions that can be stated as succinctly as the Realist counterparts.[41] I draw here primarily on one particular version developed by Andrew Moravcsik.[42] The fundamental premise of Moravcsik's account of Liberal theory is that "the relationship of states to the domestic and transnational social context in which they are embedded critically shapes state behavior by influencing the social purposes underlying state preferences."[43] He elaborates this premise in terms of three core assumptions:

(1) The primacy of societal actors: "The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints

[39] I use "Liberalism" here and throughout this chapter as a term of art to refer to Liberal international relations theory. As Andrew Moravcsik has argued, the elements of this theory do indeed flow out of the political theory and philosophy called "liberalism," in its broadest sense. But that link is not of concern here. See Andrew Moravcsik, "The Liberal Paradigm in International Relations Theory: A Scientific Assessment" in Colin and Miram Fendius Elman (eds.), *Progress in International Relations Theory: Appraising the Field* (MIT Press, Cambridge, MA, 2003). See also Michael Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (1997).

[40] See Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51 *International Organization* 513, 514 ("its lack of paradigmatic status has permitted critics to caricature liberal theory as a normative . . . ideology").

[41] See e.g., Doyle, *Ways of War and Peace*; David Fidler, "Caught Between Traditions: The Security Council in Philosophical Conundrum" (1996) 17 *Michigan J. Int'l L.* 411, 443–46 (parsing the nuances that distinguish the various strands of Liberalism); Thomas Risse-Kappen, "Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" (1994) 48 *International Organization* 185; Robert O. Keohane, "International Liberalism Reconsidered" in J. Dunn (ed.), *The Economic Limits to Modern Politics* 155 (1990); Joseph S. Nye, "Neorealism and Neoliberalism" (1988) 40 *World Politics* 235.

[42] Moravcsik, "Taking Preferences Seriously," 516–21.

[43] *Ibid.* at 516.

imposed by material scarcity, conflicting values, and variations in societal influence."

(2) Representation and state preferences: "States (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics."

(3) Interdependence and the international system: the configuration of interdependent state preferences determines state behavior, e.g., "what states want is the primary determinant of what they do."

Thus specified, this theory, hereafter referred to as Liberal theory or Liberal international relations theory, offers a way of looking at the world that is radically different from the traditional assumptions underlying international law and international relations theory.

(1) It is a bottom-up view rather than a top-down view.

(2) It is an integrated view that does not separate the international and domestic spheres but rather assumes they are inextricably linked.

(3) It is a view that preserves an important role for states but deprives them of their traditional opacity by rendering state-society relations transparent. They bear no resemblance to billiard balls, but rather to atoms of varying composition, whose relations with one another, either cooperative or conflictual, depend on their internal structure.

(4) It is a view that transforms states into governments. By requiring us to focus on the precise interactions between individuals and "states," it leads us quickly to identify and differentiate between different government institutions, each with distinct functions and interests.

To dichotomize Realism and Liberalism in more concrete terms, where Realists look for concentrations of state power, Liberals focus on the ways in which interdependence encourages and allows individuals and groups to exert different pressures on national governments.[44] Where Realists assume "autonomous" national decision-makers, Liberals examine the nature of domestic representation as the decisive link between societal demands and state policy.[45] Where Realists model patterns of strategic

[44] *Ibid.* at 516–17. The phenomenon of "interdependence," defined as a situation in which two or more nations each depend on the other, whether symmetrically or not, by virtue of trade and investment patterns, population flows or even cultural and other social exchanges, can be analyzed from either a Realist or a Liberal perspective. Realists focus only on the impact of interdependence on the power differential between the nations concerned, whereas Liberals analyze it as an international social phenomenon.

[45] *Ibid.* at 518.

interaction based on fixed state preferences, Liberals seek first to establish the nature and strength of those preferences as a function of the interests and purposes of domestic and transnational actors.

An international legal system seeking to accomplish instrumental goals such as the reduction of conflict and the increase of cooperation through laws grounded on Liberal assumptions looks very different from traditional international law.[46] To begin with, it assumes that the primary source of conflict among states is not a clash or imbalance of power, but a conflict of state interests. Further, it assumes that these interests vary from state to state as a function of the individual preferences of individuals and groups operating in society; of the distribution of different preferences within a particular society; and of the degree to which a particular government is representative of individuals and groups in its own society and in transnational society. Based on these assumptions, the best way to resolve conflict and to promote cooperation in the service of common ends is to find ways to align these underlying state interests, either by changing individual and group preferences or by ensuring that they are accurately represented. In the military context, prescriptive Liberal international relations theories thus seek to ensure that all sectors of a given society who are likely to be directly affected by a war are represented in the decision to go to war. In the economic context, Liberal international relations theorists seek to avoid trade wars by ensuring that special interest groups with trading interests that are not representative of the population as a whole do not capture the decision-making process.

Second, a Liberal conception of international law focuses on states as the agents of individual and group interests. This means that the law designed to achieve specific international outcomes does not have states as its subjects, but rather the individuals and groups that states are assumed to represent.[47] It does not mean, however, that international legal rules and institutions would no longer have states as subjects. Traditional international law, after all, imposes a duty of domestic implementation, requiring states to make whatever domestic legal changes are necessary to conform

[46] For further elaboration of this point, see Anne-Marie Slaughter, "Liberal Theory of International Law" (2000) 240 *Proceedings of the 94th Annual Meeting of the American Society of International Law*, April 5–8, 2000.

[47] Note that the concept of state representation of individual and group interests need not imply fair, or equal, or accurate representation. A military dictatorship may represent the interests of only a very small portion of the state's population; nevertheless, it represents a particular "interest." See Moravcsik, "Taking Preferences Seriously," 518 ("No government rests on universal or unbiased political representation; every government represents some individuals and groups more fully than others").

to their international obligations. The decision whether to achieve a particular policy solution by laws binding on states alone or by laws and institutions aimed directly at individuals and groups would depend on an empirical determination as to which strategy would be most effective in altering either the behavior of individuals and groups as represented by states, or the mode and scope of state representation.

Rationalism versus Constructivism

The families or paradigms of IR theories set forth above define themselves in terms of assumptions about who the principal actors in the international system are and what forces and factors determine the outcomes of interactions between them. Realism and Institutionalism both specify states as the primary actors, but then diverge to focus on the relative impact of state power versus international institutions in determining outcomes. Liberalism focuses on individuals and groups and the way in which their preferences are represented by state actors; it further regards the intensity of those represented preferences as the determinant of international outcomes.

What these paradigms do not specify is how the actors they identify behave, the internal or external mechanisms by which the stipulated factors actually generate or produce the stipulated outcomes. What actually happens? How do state leaders actually reason about and decide on a particular course of action?

To illustrate the point, assume that power is the most important factor determining outcomes in the international system. Do state leaders assess the balance of power, calculate their position relative to other states, and decide to increase military spending to improve their position? Or does a particular balance of power prevailing in either the system as a whole or a particular region create a culture of mistrust within states long used to being dominated, instilling an automatic defensiveness and suspicion in leaders of such states?

Calculation and socialization

Two quite different causal mechanisms are at work in this example. In the case of leaders whom we imagine assessing the prevailing balance of power and determining their defense policies accordingly, the behavioral mechanism at work is calculation. In the case of leaders whom we imagine acting, or rather reacting, reflexively, from an ingrained psychological

or cultural impulse, the mechanism is socialization. Further, these two mechanisms are likely to operate through different thought processes, or logics.

Social scientists James March and Herbert Simon distinguish between a "logic of consequences" versus a "logic of appropriateness."[48] The logic of consequences involves instrumental calculation concerning how best to advance a predetermined set of interests. If a particular course of action is selected, how will those interests be affected? Or even more bluntly, "How do I get what I want?"[49] This logic is quickly complicated by the prospect of strategic intervention, in which multiple actors are calculating consequences and attempting to factor in the consequences of each other's calculations.

The logic of appropriateness, by contrast, involves socialization, in the sense that the actor seeks to determine what is "the right thing to do" consistent with that actor's identity or sense of self. The presumed thought process that occurs is to ask: "What kind of a situation is this? And what am I supposed to do now?"[50] Further, "What would other people like me–members of the same social class, the same profession, the same moral community, the same nationality–do?" In this conception, interests can be neither fixed nor predetermined; rather, the perception of interests is likely to flow from a felt identity. Yet neither is identity itself fixed, as it often flows from a felt identity with others, suggesting that it could fluctuate either through different associations or through changing self-perception.[51]

These are differences that make a difference. In thinking about norms, for instance, it is possible to imagine norms operating through both types of mechanisms, but with a different type of impact and for quite different purposes. If actors are calculating how best to advance their interests, they are quite likely to establish norms as a means of reducing informational uncertainty, providing a focal point for coordinated action, and decreasing transaction costs. If actors are asking instead what would be the appropriate course of action, then they might actively seek to identify a pre-existing norm as a behavioral guide. In the calculation scenario,

[48] See James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders" in Katzenstein, Keohane and Krasner, *Exploration and Contestation*, pp. 309–12.

[49] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 *International Organization* 887, reprinted in Katzenstein, Keohane and Krasner, *Exploration and Contestation*, pp. 274–75.

[50] *Ibid.* [51] March and Olsen, *Institutional Dynamics*, 312.

interests come first and norms help advance those interests. In the socialization scenario, norms come first and shape both identity and interests.

As discussed at the outset of this essay, Robert Keohane has distilled these differences into two "optics," an "instrumentalist optic" and a "normative optic."[52] He initially advanced this distinction as a way of distinguishing between IR and IL. But again, that division is easy to dissolve. Within IL, consider the debate between positivists and natural lawyers, or functionalists and culturalists. Many international lawyers are entirely comfortable with an image of states as rational calculators, consenting to treaties or engaging in customary practices that they have determined will advance their individual and collective interests. Many others, however, will insist that states are profoundly shaped by the carapace of norms and institutions that they acquire when they gain and exercise their sovereignty.[53]

The debate is, if anything, even more heated and partisan among IR scholars. It is framed in terms of Rationalists versus "Constructivists." Constructivists are so named, or rather so name themselves, because of their emphasis on the way interests and identities are constructed, rather than fixed or given. Constructed identities and interests, in turn, are contingent – on ideas, culture, norms, law – a host of factors that humans, including scholars, activists, leaders, can influence.

The elements of Constructivism

As with the other paradigms set forth above, a number of scholars have sought to define Constructivism.[54] They generally agree that Constructivism, like Rationalism, is an *ontology* rather than a theory, in the sense

[52] Robert O. Keohane, "International Relations and International Law: Two Optics" (1997) 38 *Harvard Int'l L. J.* 487.

[53] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), pp. 27–28.

[54] See e.g., Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner, "Preface: International Organization at Its Golden Anniversary" in Katzenstein, Keohane and Krasner, *Exploration and Contestation*, pp. 34–36 (describing Constructivism as a sociological orientation that illuminates sources of conflict and cooperation while producing normative consequences); John Gerard Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 *International Organization* 185 ("constructivism is about human consciousness and its role in international life ... [N]ot only are identities and interests of actors socially constructed, but ... they must share the stage with a whole host of other ideational factors that emanate from the human capacity and will"); Finnemore and Sikkink, "International Norm Dynamics," 272–73 (arguing that "notions of duty, responsibility, identity, and obligation" are all social constructions that may, just as does self-interest and personal gain, motivate behavior);

that it is a general conception of what exists rather than what causes what. According to Alexander Wendt, one of the pioneers of a constructivist approach to IR, Constructivism is both anti-materialist, in the sense that it focuses on ideas and ideals rather than material interests, and anti-rationalist, in the sense that it rejects the idea of instrumental calculation based on fixed preferences.[55]

Beyond these general claims, Wendt specifies the elements of Constructivism as follows. He begins by accepting all five of the basic Realist assumptions set forth by Mearsheimer: the international system is anarchic; states possess offensive capabilities; they can never be certain of each other's intentions; they wish to ensure their own survival; and they are rational. He underlines two additional assumptions that Mearsheimer would accept: a commitment to states as the basic units of analysis in the international system and a commitment to "systemic theory," meaning theory that focuses on the interaction of states within the structure of the international system.[56]

It is the definition of structure, however, that differentiates Constructivism from Realism, or rather Constructivist Realism from Rationalist Realism. As Wendt explains, Neorealists define the structure of the international system as consisting only of the distribution of material capabilities. For Constructivists, by contrast, that structure is also composed of

Alexander Wendt, "Constructing International Politics" (1994–95) 19 *J. Int'l Security* 5 (describing Constructivism as a "concern with how world politics is 'socially constructed,' which involves two basic claims: that the fundamental structures of international politics are social rather than strictly material (a claim that opposes materialism), and that these structures shape actors' identities and interests, rather than just their behavior (a claim that opposes rationalism)"); Alexander Wendt, "Anarchy is What States Make of It" (1992) 46 *International Organization* 391, reprinted in Charles Lipson and Benjamin Cohen (eds.), *Theory and Structure in International Political Economy: An International Organization Reader* (1999), p. 79 (defining Constructivism as an approach which accepts that actors' identities and interests are constructed and transformed under anarchy "by the institution of sovereignty, by an evolution of cooperation, and by intentional efforts to transform egoistic identities into collective identities"); Alexander Wendt, *Social Theory of International Politics* (1999), p. 7 (identifying four "sociologies" involved in the debate over Constructivism, namely Individualism, Holism, Materialism and Idealism); Peter J. Katzenstein (ed.), *The Culture of National Security* (1996), p. 46 (suggesting that for some scholars, foreign policy discourses are a process of production and reproduction of state identities and the primacy of the territorial boundaries in the calculus of the interests of states); Emanuel Adler and Michael Barnett (eds.), *Security Communities* (1998) (applying Constructivism to the study of security communities); Michael N. Barnett, *Dialogues in Arab Politics: Negotiations in Regional Order* (1998) (applying Constructivism to the analysis of the Arab regional system).

[55] Wendt, *Social Theory*, pp. 22, 34–35.

[56] Wendt, "Constructing International Politics," 8.

social relationships. These social relationships, in turn, are composed of "shared knowledge, material resources, and social practices."[57]

To get a more concrete sense of what these differences actually mean, it is helpful to turn to John Ruggie's account of Constructivism. For Ruggie, the distinction between Constructivism and what he calls Neo-utilitarianism, or instrumental calculation, is straightforward. "[C]onstructivism is about human consciousness and its role in international life."[58] The realities of international politics are understood "inter-subjectively," meaning through the collective perception of states or any other actors in the international system. Collective perception, in turn, depends on ideas and principled beliefs as well as material interests, "social facts" as well as physical facts. "Social facts include money, property rights, sovereignty, marriage, football, and Valentine's Day, in contrast to such brute observational facts as rivers, mountains, population size, bombs, bullets, and gravity, which exist whether or not there is agreement that they do."[59] In other words, much of the world is what we make of it.[60]

Ruggie also emphasizes that ideas and principled beliefs have normative as well as instrumental dimensions. They affect behavior through a process of felt obligation as well as instrumental calculation. This felt obligation is itself a part of the socialization mechanism, which can "lead states to redefine their interests or even their sense of self." Learning is a key part of this process, learning that is not simply instrumental, in the sense of problem solving, but transformative, in the sense of changing the definition of what the problem is and what it would mean to solve it. Finally, humans engage in deliberation and persuasion, which requires a concept of actors who are "not only strategically but also discursively competent."[61] Talking matters as much as calculating.

Martha Finnemore and Kathryn Sikkink, on the other hand, reject the dichotomies of materialism versus ideational factors or norms versus rationality.[62] They insist that individuals whom they call "norm entrepreneurs" routinely engage in strategic calculation about how to advance their ends; conversely, calculation on the basis of fixed preferences can include ideas and normative commitments as well as material interests. They present the heart of Constructivism as an account of how norms work: how they emerge, how they influence behavior, and how they are internalized to become part of the social structure that conditions actor

[57] *Ibid.* [58] Ruggie, "What Makes the World," 216.
[59] *Ibid.* [60] See Wendt, "Anarchy", 79.
[61] Finnemore and Sikkink, "International Norm Dynamics," 274–75. [62] *Ibid.*

choice.[63] The fights between Constructivists and non-Constructivists, in turn, involve the precise link "between rationality and norm-based behavior, the particular logic that drives action, and the degree to which norms operate by constraining choice or by internalizing a different set of choices."[64] At its most basic, this is the old debate about free will versus determinism dressed in new clothes.

Not surprisingly, many lawyers are drawn to Constructivism. Many lawyers are norm entrepreneurs; virtually all lawyers engage daily in deliberation and persuasion – a world of discourse. Many lawyers are intuitively uncomfortable with purely Rationalist instrumental accounts, believing deeply and verifying empirically through their practice the ways in which the rules that they shape in turn shape the identity and interests of the actors who operate within those rules. For these lawyers, Constructivism provides a deeply satisfying account of how and why what they do matters. For other lawyers, however, legal rules are indeed tools to enable clients – individuals, corporations, NGOs, governments or international organizations – to pursue their interests and values. There is nothing wrong with "rules as tools"; instrumental rationality celebrates the human capacity to escape the constraints of structure and the weight of collective expectations. IR theory can never resolve these debates, any more than can law or philosophy, but lawyers can find Constructivist or Rationalist variants within all three of the major IR paradigms.

Marrying Constructivism with Realism, Institutionalism and Liberalism

The major paradigms of Realism, Institutionalism and Liberalism each encompass more specific theories that rely on Constructivist as well as Rationalist causal mechanisms. However, it remains true that most standard overviews of IR theory privilege the Rationalist versions of each of the paradigms. Constructivist variants are thus most often found in the role of critique.

It often seems particularly difficult to square Realism with Constructivism, given Realism's uncompromising insistence on the role of power in determining state behavior. However, as noted above, Wendt is willing to embrace the principal assumptions of Realism. He would also agree that at least in some parts of the international system, states behave according to Realist precepts. The difference is that Wendt insists that states

[63] *Ibid.* at 255–66. [64] *Ibid.* at 271.

pursue power because they have learned, or been taught, to pursue power. The need to amass power to ensure survival does not flow ineluctably from the fact that other states have power, but from the learned perception of that power as a threat. The structure of the international system comprises these perceptions and resulting practices, accreting over decades and centuries to determine behavior. Rationalist Realists accept the enduring fact of some distribution of power across the system and insist that the implications of that distribution are unalterable absent a central coercive authority. Constructivist Realists believe that those implications can be changed as a result of learning to think about them differently.

The debates between Rationalists and Constructivists are most developed within Institutionalism. To take only one example, consider Andrew Hurrell's critique of Rationalist regime theory.[65] Hurrell claims that although the Rationalist account of international institutions develops the idea of self-interest and reciprocal benefits, it "downplays the traditional emphasis on the role of community and a sense of justice."[66] A view of rules primarily as tools for reducing transactions costs, increasing information, and decreasing opportunities for cheating cannot account for a "sense of community" and the emergence of cooperation through the growing perception of common interests.[67] Nor can it address fundamental perceptions of justice and equity in the formation of state preferences. Finally, Rationalist approaches can neither integrate the importance of domestic politics in creating institutions and making them work, nor elaborate the relationship between legal rules and the broader structure of the international system. Constructivist approaches, however, which Hurrell embraces as part of the older tradition of sociological institutionalism, focus on all these factors.[68]

[65] Andrew Hurrell, "International Society and the Study of Regimes: A Reflective Approach" in Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt (eds.), *International Rules: Approaches from International Law and International Relations* (1999), pp. 206–24.

[66] *Ibid.* at p. 210. [67] *Ibid.* at pp. 214–15.

[68] For another account of Constructivist Institutionalist theory, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (2000), pp. 56–67. Krasner describes Rational Choice Institutionalism as an approach that conceives of norms and rules as the voluntary choices of calculating actors who perceive resulting institutions as stable equilibria that generate shared expectations and outcomes beneficial over a range of policy options. Similarly, Neoliberal Institutionalism is a rational and contractual response to externalities, collective goods problems and informational imperfections that works to provide information, reduce transaction costs and offer opportunities for issue linkages, thereby promoting more efficient institutional designs. Finally, Sociological Institutionalism functions to socialize relevant actors by embedding them in networks of intersubjectively shared cognitive constructs so as to define their interests and capabilities and thereby determine "the patterns of appropriate economic, political, and cultural activity engaged in" by individuals, organizations, interest groups and ultimately states – for some Sociological Institutionalists, actors create the institutions, whereas for others it is the institution that generates the agents.

Finally, Liberalism readily incorporates both Rationalist and Constructivist causal mechanisms. In Moravcsik's account of different types of Liberal theory, he includes "ideational liberalism" as well as commercial and republican Liberalism.[69] Ideational Liberalism "views the configuration of domestic social identities and values as a basic determinant of state preferences, and, therefore, of interstate conflict and cooperation."[70] "Social identity," in turn, refers to the different ways individuals constitute themselves as a nation, as a particular type of political system, or as a particular type of economic order. How and why they constitute themselves this way is left open. "Liberals take no distinctive position on the origins of social identities, which may result from historical accretion or be constructed through conscious collective or state action, nor on the question of whether they ultimately reflect ideational or material factors."[71] In practice, ideational Liberal theories focus on the role of nationalism, ideology and economic libertarianism versus social welfare economics in determining state preferences. Many of these theories are explicitly Constructivist in their explanations of how individuals and states come to identify themselves as part of a particular nation, as adherents of a particular political ideology or as proponents of more-or-less economic regulation.

The road ahead

Looking beyond the specific paradigms to actual work marrying international law with international relations theory, the landscape is becoming increasingly interesting. I advance five basic propositions about the role of law in shaping international politics, the role of politics in shaping international law, the prospects for a new generation of international institutions and the fate of the state. Each of these propositions draws on recent work in both international law and international relations scholarship, and often on work either done by joint teams of lawyers and political scientists or by single scholars with full training in both disciplines. Each is formulated as a definitive proposition of a kind likely to be helpful to

[69] Moravcsik, "Taking Preferences Seriously," 524–33.

[70] *Ibid.* at 525. [71] *Ibid.*

practicing lawyers and policy-makers. At the same time, however, each is advanced as a proposition under active debate, a debate that is advanced by the essays in this volume.

International lawyers can profit from an analysis of power

Perhaps unsurprisingly, lest the global order crowd get too carried away, the Realists have raised their heads again to remind the legal and policy-making community of the critical role of power in determining international outcomes. This time, however, with a twist. Whereas the traditional Realist-Legalist debate has been conducted in terms of whether law could play any autonomous role in shaping international outcomes, this round focuses more on the role of power in shaping law. In other words, even if Realists remain uninterested in law as an independent variable, a number are suddenly interested in law as a dependent variable – perhaps from the recognition that, for whatever reasons, the prevailing great powers at this historical moment are keen to use legal rules and institutions to advance their interests and institutionalize their power. Thus, as Richard Steinberg writes, "most realist explanations of international law focus on the distributive consequences of international negotiations – and how powerful states have advanced their interests. Realist predictions center on the kind of international legal developments that may be expected as power disperses or concentrates in particular international organizational or historical contexts, or as the interests of powerful states change."[72]

This approach is represented in this volume by several contributions, most notably the essay by Downs and Jones (Chapter 5). Downs has a well-deserved reputation for forcing international lawyers to think hard about the real sources of cooperation, most notably in his debates with Abram and Antonia Chayes about the relative role of enforcement versus management in ensuring compliance.[73] He and Jones extend this analysis by taking a more nuanced look at the role of reputation in enhancing compliance, noting that many IR and IL scholars believe empirically that states are concerned to protect their reputations for compliance with existing agreements so as to be included in negotiations on new agreements. They argue, by contrast, that states can develop multiple reputations,

[72] Richard H. Steinberg (ed.), *The Greening of Trade Law? International Trade Organizations and Environmental Issues* (2000), p. 8.

[73] See Chayes and Chayes, *The New Sovereignty*; George W. Downs, David M. Rocke and Peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation?" (1996) 50 *International Organization* 379.

"often quite different, in connection with different regimes and even different treaties within the same regime."[74] As a result, developing countries may suffer less from non-compliance in specific issue areas than might be expected. Conversely, however, more powerful developed countries can also defect from relatively less important agreements with little reputational consequence. While Downs and Jones do not track the differences in treaty compliance explicitly in terms of the distribution of economic and military power in the international system, their findings underline differential treatment for powerful and less powerful states. Abbott and Snidal also find that differences in the relative power of the prospective parties to an agreement affect the choice of a particular regime design.

Legalized rules and institutions operate differently from non-legalized rules and institutions

As political scientists discovered and embraced regime theory in the 1980s and 1990s, many international lawyers questioned the value of lumping "rules, norms, principles and decision-making procedures" together, thereby denying any difference between a legal obligation and an informal agreement.[75] Michael Byers, for instance, insists that "international relations scholars need to be told that international law is different from the other factors they study."[76] A growing number of political scientists now accept this proposition (in addition to the many, particularly outside the United States, who never doubted it!). Translated into American political science jargon, the question then becomes how "legalized" regimes differ from "non-legalized regimes" in both their origins and impact on state behavior. Alternatively, how does "law" differ from "norms"? Relatedly, when should policy-makers seek to legalize? And for what purposes?

Note that this debate is not over whether law matters relative to power, interest, geography or a host of other factors in international life. It is conducted among scholars who take as a matter of empirical observation,

[74] As elaborated on by George W. Downs and Michael A. Jones in Chapter 5.

[75] See e.g., Tom J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention" in Lori Fisler Damrosch and David J. Scheffer (eds.), *Law and Force in the New International Order* 196 (1991). In addition to the various political scientists and international lawyers engaged in the legislation debate, see Anthony Arend, "Do Legal Rules Matter? International Law and International Politics" (1998) 38 *Virginia J. Int'l L.* 107; also Arend, *Legal Rules.*

[76] Michael Byers, "Taking the Law out of International Law: A Critique of the Iterative Perspective" (1997) 38 *Harvard Int'l L. J.* 201, 205.

logic or faith that rules and institutions affect state behavior. The question is a narrower one: How do *legal* rules affect behavior differently from non-legal rules, or, more broadly, norms? On the other hand, the debate in practice is actually broader than most international lawyers would likely assume. "Legalization" refers not only to the obligatory status of a rule as part of the system of international law, but also, in one formulation, to the rule's relative precision and the delegation of its interpretation and application to a third party tribunal.[77] For other political scientists, as well as lawyers, the question involves the "judicialization" of international affairs as much as "legalization."[78] But for present purposes, and in plain English, the issue of interest is the significance and impact of law and courts in the international system, as compared to less formal and binding prescriptions and dispute resolution mechanisms. The answers to these questions, however tentative and incomplete, are of intrinsic interest to any international lawyer and may also prove very important to the larger field of regime design, discussed below.

Several of the contributions to this volume significantly enrich the debate over legalization, particularly regarding the role of international judges. Abbott and Snidal, leading contributors to the original legalization volume, have refined their analysis further in thought-provoking and productive ways. Their analysis of three different pathways to cooperation – framework conventions, plurilateral agreements and soft law – strengthens one of the important conclusions of the original volume: that no necessary teleological progression exists from soft law to hard law.

[77] The special issue of *International Organization* devoted to the phenomenon of "legalization" distinguishes "legalized" institutions from non-legalized institutions along three dimensions: "the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party." Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, "Introduction: Legalization and World Politics" (2000) 54 *International Organization* 385, 387. Compare Alec Stone Sweet's definition of legal norms as a "subset of social norms," a sub-set "distinguished by their higher degree of clarity, formalization, and binding authority." Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000), p. 11. The *International Organization* volume thus defines the phenomenon of legalization more broadly than simply the increased appearance and influence of legal rules in international affairs.

[78] Alec Stone Sweet is the most prominent scholar studying the "judicialization" of politics, both within specific countries, across countries and in the international realm. See Alec Stone, *The Birth of Judicial Politics in France* (1992); Alec Stone Sweet, "Judicialization and the Construction of Governance" (1999) 32 *Comparative Political Studies* 147; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000).

In many cases, agreements instantiating cooperation will be more effective if they contain legally binding obligations from the beginning. On the other hand, excessive legalization can backfire, whereas soft law can provide necessary escape valves to help ensure compliance. It is noteworthy in this regard that Edith Brown Weiss does not list the "legal" nature of an agreement in her extensive list of eleven factors that affect compliance.

Eyal Benvenisti takes a different tack, one that is likely to be very welcome to scholars of international relations but that may seem heretical to international lawyers. By training a game theoretic lens on international courts and arbitral tribunals, he finds that international judges contribute directly to creating more "efficient" international legal rules by simply "finding" customary international norms that are in fact unsupported by actual state practice and *opinio juris*, with the happy by-product that these rules are more likely to be complied with. A corollary implication, which he does not emphasize, is that international judges are only empowered to hear cases arising from fully legalized agreements, suggesting that their valuable role in "leap-frogging" existing state practice will be missing in issue areas dominated by soft law.

Soft law is as important as hard law in global governance but plays a different role

An important corollary of the legalization debate is the relationship between soft law and hard law, or, in a parallel conception, low legalization and high legalization. The debate over soft law among international lawyers is extensive and growing, too extensive to chronicle here.[79] However, much if not most of this literature either seeks to respond to

[79] See e.g., Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000). Of particular value within this important volume are Naomi Roht-Arriaza, "'Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization" (p. 263); Laurence Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards" (p. 281); Lyuba Zarsky, "Environmental Norms in the Asia-Pacific Economic Cooperation Forum" (p. 303). Other notable examples include Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54 *International Organization* 421; P. Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 *Michigan J. Int'l L.* 420; Antonio Cassese and Joseph H.H. Weiler (eds.), *Change and Stability in International Law-Making* (1988); Oscar Schachter, "The Existence of Nonbinding International Agreements" (1977) 71 *Am. J. Int'l L.* 296.

the gauntlet thrown down by Prosper Weil in 1983, arguing that soft law would ultimately destabilize and undermine the entire international legal system,[80] or tries within a doctrinal framework to determine whether soft law is law at all.[81] More recent IR/IL scholarship moves away from this jurisprudential debate and instead explores the relative advantages of soft law and hard law in different situations.[82] It also seeks to establish the conditions under which soft law may ripen into hard law.[83]

In previous work, Abbott and Snidal emphasize that "international actors often deliberately choose softer forms of legalization as superior institutional arrangements."[84] Soft law, in their definition, means "soft legalization," or any legal arrangement "weakened along one or more of the dimensions of obligation, precision, and delegation."[85] Why would states choose such softer arrangements? In a word, "Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own."[86] More specifically, a number of different factors condition states' choice of soft law, including "transactions costs, uncertainty, implications for national sovereignty, divergence of preferences, and power differentials."[87]

In this volume, as noted above, Abbott and Snidal describe a soft law pathway to cooperation in conjunction with two other pathways that begin with hard law agreements but that either deepen or widen over time. They analyze the development of the international human rights regime as an example of how soft law obligations – even if close to the purely hortatory – can gradually become "harder" over decades of political mobilization and pressure. It is not at all clear from their analysis, however, that soft law

[80] Prosper Weil, "Towards Relative Normativity in International Law?" (1983) 77 *Am. J. Int'l L.* 413.

[81] See e.g., Dupuy, "Soft Law"; Ved P. Nanda, "Development as an Emerging Human Right under International Law" (1996) 13 *Denver J. Int'l L. and Policy* 161.

[82] Abbott and Snidal, "Hard and Soft Law."

[83] Jutta Brunnee and Stephen Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" (1994) 5 *Yearbook of Int'l Environmental Law* 41; Jutta Brunnee and Stephen Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building" (1997) 91 *Am. J. of Int'l L.* 6; Stephen Toope and Jutta Brunnee, "Freshwater Regimes: The Mandate of the International Joint Commission" (1998) 15 *Arizona J. Int'l and Comparative L.* 273.

[84] Abbott and Snidal, "Hard and Soft Law." [85] *Ibid.* at 422.

[86] *Ibid.* at 423. As Abbott and Snidal acknowledge, they are building here on the pioneering work of Charles Lipson, "Why Are Some Agreements Informal?" (1991) 45 *International Organization* 495. Lipson's work presaged the current debate by almost a decade.

[87] Abbott and Snidal, "Hard and Soft Law."

strategies are more or less effective than the framework convention or the plurilateral approaches.

Regime design matters

The broad legalization debate and the more focused study of the choice of hard versus soft law can both be understood as sub-sets of, or perhaps precursors to, the growing field of regime design. Much IR/IL scholarship through the 1990s drew on IR theory to help explain the structure and function of existing international institutions. These authors sought to catalogue and explain what particular international legal institutions *do* and why they are structured as they are. Kenneth Abbott pioneered this approach in legal scholarship by examining, through the lens of Rationalist regime theory, the functions performed by international trade law[88] and by the "assurance" and "verification" provisions of major arms control agreements.[89] He also teamed up with political scientist Duncan Snidal to explore the functions performed by formal international organizations.[90]

Although this type of analytical work is important in enhancing a general understanding of why the international institutional landscape looks the way it does, it is more important for most international lawyers and policy-makers to know how specific institutional features can enhance or detract from the performance of the institution's designated function. This type of knowledge can then be directly incorporated into regime design, the architectural blueprints for reforming old institutions and creating new ones in response to the changing needs of the international community. As Ronald Mitchell frames the issue:

> Why do states design regimes the way they do? How should they design them in the future? Why do some regimes appear to rely on tough sanctions, others on financial incentives, and others on what appear to be little more than exhortation? Should states strengthen the nuclear non-proliferation regime

[88] See Kenneth W. Abbott, "The Trading Nation's Dilemma: The Functions of the Law of International Trade" (1985) 26 *Harvard Int'l L. J.* 501.

[89] See Kenneth W. Abbott, "'Trust But Verify': The Production of Information in Arms Control Treaties and Other International Agreements" (1993) 26 *Cornell Int'l L. J.* 1, 2.

[90] Kenneth W. Abbott and Duncan Snidal, "Why States Act Through Formal International Organizations" (1998) 42 *J. Conflict Resolution* 3. See Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 *Am. J. Int'l L.* 376 (1998), for a review of other work in the same vein.

by tightening export controls, offering security guarantees, or developing clear and public bombing plans? Should the Convention on the Rights of the Child threaten countries that violate its terms or engage them in long-term normative dialogue?[91]

Many authors in this volume wrestle with these kinds of questions, with valuable results. Petros Mavroidis, for instance, engages in a sustained analysis about the impact of a commitment to negative integration in the WTO rather than positive integration, on states' abilities simultaneously to fulfill their obligations under international environmental and human rights agreements. Abbott and Snidal explicitly address the basic issue of what general type of regime – a framework convention, a plurilateral agreement or a soft law declaration – may be best tailored to different issue areas. Brown Weiss contributes data on the important role of Secretariats in enhancing compliance with some regimes. Benvenisti's arguments about the role of the International Court of Justice (ICJ) in establishing efficient norms suggests the advantages of including a dispute resolution clause conferring jurisdiction on the ICJ in areas such as global commons issues where it has traditional authority. And Milner, building on John Ruggie's seminal work on embedded Liberalism,[92] demonstrates the crucial value of escape clauses that are explicitly designed with domestic political pressures in mind.

Domestic politics are as important for international lawyers as international politics

International lawyers and international relations scholars alike are paying increasing attention to domestic politics. Even a brief survey of recent work indicates the broad scope of this work and the range of opportunities for further research. To take only one example, in Ronald Mitchell's work on compliance with the international oil pollution regime, he emphasizes that while compliance by private actors varied considerably between the two regimes, state compliance did not. The equipment regime was markedly more *effective* than the discharge regime because it tapped into the power of private actors who had little reason not to follow the Treaty

[91] Ronald B. Mitchell, "Situation Structure and Regime Implementation Mechanisms," paper presented at the American Political Science Association Conference, Atlanta, Georgia, September 1999.

[92] See John G. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36 *International Organization* 379.

rules but had significant influence over the ultimate targets of the regime: shippers.[93]

Relatedly, the special International Organization issue on legalization spotlights the role of domestic actors and domestic politics more generally both in generating a demand for legalization, as discussed earlier in this chapter, and in determining its consequences. On the demand side, as Abbott and Snidal point out: "In many issue-areas, from trade and investment to human rights and the environment, individuals and private groups are the new actors most responsible for new international agreements – and for resisting new agreements in favor of the status quo."[94] Regarding the consequences of legalization, Miles Kahler summarizes the many ways in which writers on legalization link compliance with legal rules to domestic politics, and particularly to specific configurations of domestic politics.[95] In her study of compliance with IMF regulations, for instance, Beth Simmons finds that "regimes that were based on clear principles of the rule of law were far more likely to comply with their commitments."[96] Yet these results do not flow from some magic incantation of "the rule of law." On the contrary, as Kahler notes, rule of law societies "construct" specific channels of compliance that connect international legal commitments to specific groups of domestic actors, denominated as "compliance constituencies."[97]

This growing literature highlights three cutting edge issues for both international lawyers and political scientists, each of which supports the claim that domestic politics are as important for international lawyers to understand and integrate into their work as international politics:

(1) First, one of the most promising pathways for enhancing the effectiveness of an international legal regime is by bolstering or even triggering domestic political activity.
(2) Second, international law is made by states, but state positions do not spring fully formed from chancelleries or foreign ministries. Different

[93] Ronald B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (1994), pp. 299–300.

[94] Abbott and Snidal, "Hard and Soft Law," 450. See also Miles Kahler's extensive discussion of domestic politics and legalization, discussed above in the section on legalization. Miles Kahler, "Conclusion: The Causes and Consequences of Legalization" (2000) 54 *International Organization* 661, 675–76.

[95] *Ibid.* at 674–77.

[96] Beth A. Simmons, "The Legalization of International Monetary Affairs" (2000) 54 *International Organization* 573, 599.

[97] Kahler, "Conclusion," 675.

social and governmental actors who actually succeed in being represented at the state policy-making level are the real sources of international law. Thus international law-making is better understood as a "bottom up" than a "top down" process.

(3) Third, the state itself must be reconceptualized as a two-level entity, a set of interaction between actors in domestic and transnational society and a wide array of government institutions.

Milner takes the two-level approach to trade law and policy as their point of departure, identifying the domestic motives that prompt leaders to sign trade agreements in the first place. Further, she notes the ways in which publicizing non-compliance before domestic publics can reinforce compliance. Second, as mentioned above, she focuses on the specific need to accommodate domestic constituencies in regime design. Brown Weiss also points to the differential role of domestic constituencies in strengthening or weakening compliance. And Hirsch argues that the sociological perspective on compliance operates through domestic actors very like Kahler's "compliance constituencies," a mechanism that is strengthened by globalization. Finally, Mavroidis makes clear that the critical variable in improving human rights is domestic actors responding to international pressure; as long as WTO obligations do not actively impede these actors, it is difficult to attribute human rights violations or failure to ameliorate them to the WTO itself.

Conclusion

A decade ago, it was relatively rare for international lawyers and international relations scholars to come together in any format other than a "political science" panel at the annual meeting of the American Society of International Law and an "international law" panel at the annual meeting of the American Political Science Association. That has changed remarkably. Enterprises such as this volume, where political scientists and international lawyers come together to study a common problem, write together, and publish together, have enriched both disciplines. International lawyers, as Eyal Benvenisti makes explicit in his chapter, have learned to deploy political science techniques and draw on empirical data to make positive claims about how law works. At the same time, they are still able, and in my view required, to shift gears to make normative arguments about what the law or a legal institution should be or do, building on their positive claims. Political scientists, on the other hand, such as Downs and Jones, have learned to listen to international lawyers' insights about how phenomena such as compliance actually work, and to build those insights into their theories and models.

As a scholar, it is relatively easy to survey the literature, the conferences, and the collaborations and to evaluate the academic value of such cross-fertilization. The real test, however, is the world. Both international lawyers and international relations scholars confront pressing global problems, issues of such urgency and import that lives and lands hang in the balance. Compliance with international environmental regimes is not an abstract subject, however much data we collect; however many models we build; however sophisticated the rules we devise. Designing regimes that are effective at actually addressing the problems they purport to regulate and promoting or even enforcing compliance with those regimes are global – indeed planetary – imperatives. If conferences and volumes such as this one improve the ability of individuals in all fields to diagnose problems and develop effective solutions, they will perform the dual function, well known to international lawyers, of advancing knowledge and making a genuine difference in the world.