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The New Sovereignty: Compliance with International Regulatory Agreements by Abram Chayes; Antonia Handler Chayes; Fairness in International Law and Institutions by Thomas M. Franck

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Review Essay

Why Do Nations Obey International Law?

The New Sovereignty: Compliance with International Regulatory Agreements. By Abram Chayes* and Antonia Handler Chayes.** Cambridge: Harvard University Press, 1995. Pp. xii, 404. \$49.95.

Fairness in International Law and Institutions. By Thomas M. Franck.*** Oxford: Clarendon Press, 1995. Pp. 500. \$55.00.

Harold Hongju Koh[†]

Why do nations obey international law?

This remains among the most perplexing questions in international relations. Nearly three decades ago, Louis Henkin asserted that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹ Although empirical work since then seems largely to have confirmed this hedged but optimistic description,² scholars

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† Gerard C. and Bernice Latrobe Smith Professor of International Law; Director, Orville H. Schell, Jr., Center for International Human Rights, Yale University. This Essay sketches arguments to be fleshed out in a forthcoming book, tentatively entitled WHY NATIONS OBEY: A THEORY OF COMPLIANCE WITH INTERNATIONAL LAW. Parts of this Review Essay derive from the 1997 Waynflete Lectures, Magdalen College, Oxford University, and a brief book review of the Chayeses volume in 91 AM. J. INT'L L. (forthcoming 1997). I am grateful to Glenn Edwards, Jessica Schafer, and Douglas Wolfe for splendid research assistance, and to Bruce Ackerman, Peter Balsam, Geoffrey Brennan, Paul David, Noah Feldman, Roger Hood, Andrew Hurrell, Mark Janis, Paul Kahn, Benedict Kingsbury, Tony Kronman, Anthony Lester, Katya Lester, Laurence Lustgarten, Frances Milliken, Gerald Neuman, David Parkin, and Alex Wendt for most valuable advice. My deepest thanks go to the Warden and Fellows of All Souls College, Oxford; the President and Fellows of Magdalen College, Oxford; the Guggenheim Foundation; the Twentieth Century Fund; Gene Coakley; Renee DeMatteo; and Mary-Christy Fisher for so generously supporting the research underlying this Review Essay and the book toward which it is directed.

1. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

2. In recent years, scholars of both international law and international relations have begun to conduct broad empirical studies regarding the conditions under which compliance with international treaty obligations will occur, particularly in the fields of international trade, *see, e.g.*, ADJUDICATION OF

have generally avoided the causal question: If transnational actors do generally obey international law, *why* do they obey it, and why do they sometimes disobey it?

The question is fundamental from both a theoretical and practical perspective. It challenges scholars of international law and international relations alike. It vexes all subfields in international affairs, from international security to political economy; from international business transactions to international trade; from European Union law to international organizations. It poses a critical ongoing challenge for United States foreign policy, for if we cannot predict when nation-states will carry out their international legal obligations respecting trade retaliation, environmental protection, human rights, global security, and supranational organizations, how can we count on "multilateralism" to replace bipolar politics as the engine of the post-Cold War order? Not least, it remains the daily practical question facing nongovernmental organizations that challenge governmental officials on behalf of victims of human rights abuse.

International law and relations scholars have inquired into the power of rules in international affairs for centuries, but the Cold War's demise, and its implications for the possibilities of international law, have dramatically sharpened interest in the "compliance question."³ Within the last decade, the

INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW (Ernst-Ulrich Petersmann & Gunther Jaenicke eds., 1992); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993) [hereinafter HUDEC, ENFORCING INTERNATIONAL TRADE LAW]; ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990) [hereinafter HUDEC, THE GATT LEGAL SYSTEM]; Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L BUS. L. 555 (1996); international adjudication, see, e.g., COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS (M.K. Bulterman & M. Kuijer eds., 1996); international human rights, see, e.g., R.R. Churchill & J.R. Young, *Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom, 1975-87*, 62 BRIT. Y.B. INT'L L. 283 (1992); and international environmental law, see, e.g., JAMES CAMERON ET AL., IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 48 (1996); INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter M. Haas et al. eds., 1993); ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994); Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119 (1995). For an ongoing historical study of national compliance with inconvenient commitments, see Robert O. Keohane, Jr., *Commitment Incapacity, the Commitment Paradox, and American Political Institutions* (1996) (unpublished manuscript, on file with author). These studies tend to confirm not only that most nations obey international law most of the time, but also that, to a surprising extent, even noncomplying nations gradually come back into compliance over time with previously violated international legal norms. *But see* George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996) (claiming that much of this compliance would have occurred without international regulatory agreements).

3. Throughout this Review Essay, I will distinguish among four relationships between stated norms and observed conduct: coincidence, conformity, compliance, and obedience. Suppose that after living my life in the United States, I arrive in England, only to notice that both the law and the practice are that everyone drives on the left-hand side of the road. One could conceive of at least four possible relationships between the legal rule and the observed conduct.

First, and least likely, is that no causal relationship exists: It is simply a massive *coincidence* that everyone appears to "follow" the rule. A second possibility is that people loosely *conform* their conduct to the rule when convenient, but feel little or no legal or moral obligation to do so. See, e.g., Robert F.

growing perception that "international law does matter" has brought the question to the attention of political scientists, regime theorists, international law practitioners, and legal philosophers.

Two recent books, which cap the careers of three eminent international lawyers, represent the most comprehensive and sophisticated efforts to date to address this demanding question. In *The New Sovereignty*, Harvard Law Professor Abram Chayes, former Legal Adviser to the U.S. State Department, and Antonia Handler Chayes, former Undersecretary of the U.S. Air Force, argue that compliance with international law is best fostered, at least within treaty regimes, by a "managerial model."⁴ In the Chayeses' view, nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong. "[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level," they argue, "is an *iterative process of discourse* among the parties, the treaty organization, and the wider public."⁵

In *Fairness in International Law and Institutions*,⁶ New York University Law Professor Thomas Franck argues that the key to compliance is not so much the managerial process as the fairness of international rules themselves.

Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292 (1977); Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCH. 632 (1989). Yet a third possibility is compliance—that is, that entities accept the influence of the rule, but only to gain specific rewards (such as insurance benefits) or to avoid specific punishments (for example, traffic tickets). See SECURING COMPLIANCE: SEVEN CASE STUDIES (Martin L. Friedland ed., 1990); Benedict W. Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE DIALOGUE (Harold Hongju Koh ed., forthcoming 1998) (distinguishing among competing conceptions of compliance). A fourth possibility, *obedience*, occurs when an entity adopts rule-induced behavior because it has *internalized* the norm and has incorporated it into its own internal value system. See JOHN FINLEY SCOTT, *INTERNALIZATION OF NORMS: A SOCIOLOGICAL THEORY OF MORAL COMMITMENT* (1971); Martin L. Hoffman, *Moral Internalization: Current Theory and Research*, 10 ADVANCES EXPERIMENTAL SOC. PSYCH. 85 (1977) (discussing norm-internalization in individuals).

Applying a similar framework, Herbert Kelman distinguishes compliance and internalization from *identification*, which he describes as an entity adopting induced behavior in order to be like the influencer, or because it is associated with a desired relationship. Under Kelman's rubric, people who follow driving rules to avoid traffic tickets are complying; those who obey those rules because their parents always do are identifying; and those who obey because they are convinced those rules are just have internalized the norms. See Herbert C. Kelman, *Compliance, Identification, and Internalization: Three Processes of Attitude Change*, 2 J. CONFLICT RESOL. 51, 52–53 (1958). Kelman's categories have been widely adopted throughout the "influence" literature. See, e.g., ELLIOT ARONSON, *THE SOCIAL ANIMAL* 28–31 (3d ed. 1980); Charles O'Reilly, *Corporations, Culture, and Commitment: Motivation and Social Control in Organizations*, CAL. MGMT. REV., Summer 1989, at 9, 18; Charles O'Reilly III & Jennifer Chatman, *Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization on Prosocial Behavior*, 71 J. APPLIED PSYCHOL. 492, 493 (1986). For purposes of this Review Essay, I will simply treat norm-internalization and identification as two different aspects of what I will call "obedience."

4. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3 (1995).

5. *Id.* at 25 (emphasis added).

6. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995).

Threaded with philosophical arguments from his earlier work,⁷ and based on his 1993 Hague Lectures in Public International Law, Franck's *tour d'horizon* of international law asserts that nations "obey powerless rules" because they are pulled toward compliance by considerations of legitimacy (or "right process") and distributive justice.

Both volumes are works of adepts. Both recognize that the modern transformation of sovereignty has remade international law, so that international law norms now help construct national identities and interests through a process of justificatory discourse.⁸ Moreover, the Chayeses' managerial approach and Franck's fairness approach give cogent modern expression to two prominent intellectual traditions in international legal scholarship, which I will call the "process" and "philosophical" traditions. These intellectual traditions have historically defended the discipline against two divergent claims: on one hand, the realist charge that international law is not really law, because it cannot be enforced;⁹ on the other, the rationalistic claim that nations "obey" international law only to the extent that it serves national self-interest.¹⁰

Yet both books, instructive as they are, give shape to only parts of the blind men's elephant. Both the managerial and the fairness accounts of the compliance story omit, in my view, a thoroughgoing account of *transnational legal process*: the complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems.¹¹ Both the managerial and the fairness accounts fail

7. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

8. Cf. CHAYES & CHAYES, *supra* note 4, at 26 ("[T]his justificatory discourse is expressly recognized as a principal method of inducing compliance."); FRANCK, *supra* note 6, at 14 (explaining that fairness inquiry is "a process of discourse, reasoning, and negotiation leading, if successful, to an agreed formula").

9. See Terry Nardin, *Ethical Traditions in International Affairs*, in *TRADITIONS OF INTERNATIONAL ETHICS* 1, 13 (Terry Nardin & David R. Mapel eds., 1992) ("Every student of international affairs has encountered the view that international law is 'not really law' because it lacks effective institutions for making and applying laws, and that it is therefore of negligible importance in international affairs."); see also GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95-103 (1984). Typically, detractors of legalism in international affairs make two claims. First, "[t]here can be no authentic rule of law among nations until nations have a common political morality or are under a common sovereignty." Robert Bork, *The Limits of "International Law"*, *NAT'L INTEREST*, Winter 1989/90, at 3, 10 (dismissing international law as device serving "both internationally and domestically, as a basis for a rhetoric of recrimination directed at the United States"). Second, critics deem it absurd for powerful nation-states to allow their policies to be dictated by legalistic formulations, because such rules disserve the national interest. See, e.g., Jeanne J. Kirkpatrick, *Law and Reciprocity*, 78 *AM. SOC'Y INT'L L. PROC.* 59, 67 (1984) (purporting to redefine rule of international law by arguing that "we cannot permit . . . ourselves to feel bound to unilateral compliance with obligations which do in fact exist under the [United Nations] Charter, but are renounced by others"); Charles Krauthammer, *The Curse of Legalism*, *NEW REPUBLIC*, Nov. 6, 1989, at 44, 44 (declaring entire notion of "an ordered international system regulated by international law" to be fictional).

10. See HENKIN, *supra* note 1, at 49 (labeling as "cynic's formula" suggestion that "since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance").

11. For elaboration of this argument, see Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); and *infra* Part III.

to describe the pathways whereby a “managerial” discourse or “fair” international rule penetrates into a domestic legal system, thus becoming part of that nation’s internal value set. Both books thereby avoid explaining the evolutionary process whereby repeated compliance gradually becomes habitual obedience. In my view, this overlooked process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations “obey” international law, rather than merely conform their behavior to it when convenient.

Part I of this Review Essay examines the history of scholarly efforts to grapple with the compliance question. Part II locates the Franck and Chayeses volumes amid this intellectual landscape, and suggests what they have gotten right, wrong, and incomplete. Part III sketches what I believe to be a more complete approach toward understanding why nations obey, one that combines the managerial and fairness approaches with deeper analysis of how transnational legal process promotes the interaction, interpretation, and internalization of international legal norms.

I. THE ROOTS OF THE COMPLIANCE PROBLEM

Like most laws, international rules are rarely enforced, but usually obeyed.¹² Although this phenomenon has been studied in the domestic law context by psychologists, philosophers, anthropologists, and domestic lawyers,¹³ it has received far less direct attention in the international realm.

12. Even Hans Morgenthau, a prominent critic of international law, conceded that, “to deny that international law exists as a system of binding legal rules flies in the face of all the evidence.” HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 249–52 (2d ed. 1954).

13. The study of compliance with and obedience to domestic law has been a broadly multidisciplinary enterprise. *See, e.g.*, SANCTIONS AND REWARDS IN THE LEGAL SYSTEM: A MULTIDISCIPLINARY APPROACH (Martin L. Friedland ed., 1989). In recent years, the topic has attracted the attention of criminologists, *see, e.g.*, MALCOLM K. SPARROW, *IMPOSING DUTIES: GOVERNMENT’S CHANGING APPROACH TO COMPLIANCE* (1994); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 L. & SOC’Y REV. 457 (1983); students of corporate compliance, *see, e.g.*, Marc I. Steinberg & John Fletcher, *Compliance Programs for Insider Trading*, 47 SMU L. REV. 1783 (1994); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605 (1995); Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996); advocates of regulatory reform, *see, e.g.*, IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); social psychologists, *see, e.g.*, STANLEY MILGRAM, *OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1969); anthropologists, *see, e.g.*, MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* (1968); SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978); legal and moral philosophers, *see, e.g.*, FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Robert S. Gerstein, *The Practice of Fidelity to Law*, 4 L. & SOC’Y REV. 479 (1970); Paul Harris, *The Moral Obligation to Obey the Law*, in *ON POLITICAL OBLIGATION* (Paul Harris ed., 1990); Roscoe E. Hill, *Legal Validity and Legal Obligation*, 80 YALE L.J. 47 (1970); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973); and sociologists and law-and-society scholars, *see, e.g.*, Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers’ Dilemma*, 13 LAW & POL’Y 73 (1991); Harold G. Grasmick & Robert J. Bursick, *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 L. & SOC’Y

Indeed, the very way that the compliance question has been treated over the years as, in turn, a religious, moral, philosophical, political science, process, and now empirical question, itself provides a fascinating window into how internationalists have chosen to think about the role and function of international law. This evolution in academic thinking reflects the fact that this serial examination has transpired against the backdrop of an epochal transformation of international law. That transformation has been characterized by the marked decline of national sovereignty; the concomitant proliferation of international regimes, institutions, and nonstate actors;¹⁴ the collapse of the public-private distinction; the rapid development of customary and treaty-based rules; and the increasing interpenetration of domestic and international systems. These trends have restructured the planetary stage on which international law performs, making way for what Franck calls "the post-ontological era" of mature and complex international law.¹⁵

A. *Ancient and Primitive International Law*

During the classical period of international law, the causal question of why nations obey was generally conflated with the normative question of why they *should* obey, which was in turn usually answered by "semi-theological" reference to "the higher law—the 'law of nature,' of which international law was but a part."¹⁶ Before the Roman empire, religion served as the paramount source of the law of nations.¹⁷ In Roman law, Gaius defined *jus gentium* in terms of "law 'common to all men.'"¹⁸ The Preface to Justinian's *Institutes*, published in 533 A.D., began with observations about the relationship between the law of nations and natural law.¹⁹ During the Middle Ages, international or universal law merged with ecclesiastical law, and even positive treaty law was considered to have legal force only because treaties were confirmed by

REV. 837 (1990); John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POL'Y 385 (1984); Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 27 (1967).

14. As I note below, these two trends make up what the Chayeses call "the new sovereignty." See *infra* text accompanying notes 189–91.

15. FRANCK, *supra* note 6, at 6.

16. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 22 (10th ed. 1989).

17. See generally David J. Bederman, *Religion and the Sources of International Law in Antiquity, in THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 3 (Mark W. Janis ed., 1991) [hereinafter INFLUENCE OF RELIGION] (tracing role of religion in Near East during empires of Egypt, Babylon, Assyria, Hittites, Mittani, Israelites, Greek city-states, Indian states before 150 B.C., and Mediterranean powers before 168 B.C.).

18. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1, 1 n.2 (1988) (citation omitted). Francisco Vitoria, a Dominican professor of theology at Salamanca from 1526 until 1546, later reconceptualized Gaius's notion of *jus gentium* "as what natural reason has established among *nations*," rather than Gaius's original formulation "among all men." ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 58–59 (1947); see also *id.* at 59 (explaining that Vitoria's text does not acknowledge novelty or importance of his crucial change in language, which seems not planned but "rather to have been a momentary flash of Vitoria's mind").

19. See J. INST. 1.2 (De Iure Naturali et Gentium et Civili).

oath, which "being a 'sacrament,' subjected the obligation incurred to the jurisdiction of the Church."²⁰ Nor did medieval legal scholars distinguish municipal from international law, instead viewing the law of nations, understood as *jus naturae et gentium*, as a universal law binding upon all mankind.²¹ Thus in these early years, the public/private, domestic/international categories that later came to dominate classical international legal theory had not been developed. The law of nations was thought to embrace private as well as public, domestic as well as transborder transactions, and to encompass not simply the "law of states," such as rules relating to passports and ambassadors, but also the law between states and individuals, including the "law maritime" (affecting prizes, shipwrecks, admiralty, and the like) and the "law merchant" (*lex mercatoria*) applicable to transnational commercial transactions.²² The system was "monistic," inasmuch as international and domestic law together constituted a unified legal system, with domestic institutions acting as important interpreters and enforcers of international legal norms.²³

As one scholar has noted, "the most fundamental difference between ancient and modern international law" was "antiquity's complete elimination of *process* as an essential link between sources and substance. . . . [T]he ancient mind could not conceive of norms of State behavior apart from the admittedly diverse sanctions for non-compliance with those rules."²⁴ This began to change in the fourteenth century, as the theoretical distinctions that came to dominate international legal discourse began to appear. Italian commentators such as Perugian Professors Bartolus of Sassoferrato (1313–1357) and Baldus of Perugia (1327–1400) first inaugurated private international law as the branch of international law centering on "the rights and duties of individuals where the revelant [sic] facts are wholly or in part foreign,"²⁵ a subject later subsumed by English and American law under the heading of "conflict of laws."²⁶ In *Six livres de la république* (1576),

20. NUSSBAUM, *supra* note 18, at 24.

21. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26–27 (1952).

22. See *id.* at 27; Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT'L L.J. 221, 224–29 (1978) (explaining that law merchant was transnational private law based not on any single national law but on mercantile customs generally accepted by trading nations).

23. Under a dualistic, as opposed to a monistic, view of international law, individuals injured by foreign states would have no right to pursue claims directly against those states. Their states would pursue those claims for them on a discretionary basis, and would subsequently determine the rights of those injured individuals to redress as a matter of domestic law. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864–66 (1987) (discussing monism and dualism); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936).

24. Bederman, *supra* note 17, at 6 (emphasis added).

25. NUSSBAUM, *supra* note 18, at 47.

26. See *id.*; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (Boston, Hilliard, Gray & Co. 1834). Story understood his treatise to be the first on Conflict of Laws

Frenchman Jean Bodin advanced a general theory of the state that gave rise to the modern concept of sovereignty as a driving force in international law.²⁷ In a famous passage in the second book of *De Legibus ac Deo*, Spanish Jesuit Francisco Suárez (1548–1617) introduced the notion of the customary practice of nations as an important supplementary source of rules in international law.²⁸ Italian Alberico Gentili, writing from Oxford, became “perhaps the first writer to make a definite separation of international law from theology and ethics and to treat it as a branch of jurisprudence.”²⁹ Finally, Hugo Grotius, the Dutchman generally acclaimed as the “father of international law,”³⁰ was the first writer to express *jus gentium* not simply as natural law, derived from right reason, but as the consequence of volitional acts, generated by independent operation of the human will.³¹ Grotius posited the notion of what has become known as “international society,” a community of those participating in the international legal order, whose fabric was interwoven with international law.³² Thus, by the mid-seventeenth century, the theoretical

written in English. See STORY, *supra*, at v.

27. See NUSSBAUM, *supra* note 18, at 56. See generally JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (1995) (reviewing conceptual history of sovereignty).

28. See NUSSBAUM, *supra* note 18, at 67 (quoting FRANCISCO SUÁREZ, DE LEGIBUS AC DEO (1612)) (“[Nations] need a law by which they are guided and rightly ordered in respect to communication and association. To a great extent this is done by natural reason but not so sufficiently and directly everywhere. Hence, certain special rules could be established by the customs of these nations.”); JAMES B. SCOTT, THE SPANISH CONCEPTION OF INTERNATIONAL LAW AND OF SANCTIONS (1934); see also JAMES LESLIE BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 362 (Hersch Lauterpacht ed., 1958). Brierly explains:

Jus gentium is needed to fill the gap that *jus naturale* leaves. . . . [Suárez is] . . . saying that there are a few matters for which *jus naturale* does not sufficiently provide, and that therefore, for reasons of practical convenience, it has been supplemented by the addition of certain customary rules, the rules of *jus gentium inter se*.

BRIERLY, *supra*, at 362.

29. JAMES LESLIE BRIERLY, THE LAW OF NATIONS 26 (6th ed. 1963); see also NUSSBAUM, *supra* note 18, at 79, 84 (“Gentili made great strides towards ridding international law of the shackles of theology. . . . One may well call him the originator of the secular school of thought in international law.”). For works discussing Gentili’s influence on Grotius, see, for example, THOMAS ERSKINE HOLLAND, STUDIES IN INTERNATIONAL LAW 1–58 (London, Frowde 1898); and Peter Haggénmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 133 (Hedley Bull et al. eds., 1990).

30. Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT’L L.J. 1609, 1609 (1995). For a fuller view of Grotius’s influence, see HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 29; and Benedict Kingsbury, *Grotius, Law, and Moral Scepticism: Theory and Practice in the Thought of Hedley Bull*, in CLASSICAL THEORIES OF INTERNATIONAL RELATIONS 42 (Ian Clark & Iver B. Neumann eds., 1996).

31. See NUSSBAUM, *supra* note 18, at 104; see also HUGO GROTIUS, DE JURE BELLI AC PACIS (1625); HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 29. The “necessary and voluntary” character of the law of nations was also an important theme in the works of Christian Wolff (1676–1756) and Emmerich de Vattel (1714–67). See generally NUSSBAUM, *supra* note 18, at 150 (discussing Wolff’s theory about the obligations and rights of nations); Andrew Hurrell, *Vattel: Pluralism and Its Limits*, in CLASSICAL THEORIES OF INTERNATIONAL RELATIONS, *supra* note 30, at 233 (discussing Vattel’s theories of international society).

32. For a sampling of the extensive literature discussing the relationship between Grotius and the “international society” tradition, discussed *infra* text accompanying notes 73–76, see, for example, Hedley Bull, *The Grotian Conception of International Society*, in DIPLOMATIC INVESTIGATIONS 51 (Herbert Butterfield & Martin Wight eds., 1966); Benedict Kingsbury & Adam Roberts, *Introduction: Grotian*

foundations that came to govern traditional international law had been laid: The discipline was now deemed a branch of jurisprudence, born of both nature and of human will, driven by sovereignty concerns, and segmented into public and private components.

B. *Traditional International Law*

The shift from the primitive to the traditional accompanied a fundamental change in conceptual thinking about the nature of transborder obligations. As Friedrich Kratochwil has noted:

Traditional scholars tend to draw a fundamental conceptual boundary between municipal and international law, and view international law largely in terms of contractual relations, therefore assigning to the “sovereign” a central place in the construction of the two orders. Primitive texts on the other hand, envision a set of universal ordering principles, be they moral, divine, or natural, to which sovereigns and individuals alike are subject. Consequently, in assessing the obligatory character [of international law], traditional scholars have to begin with the sovereign act, and proceed to their analysis by ascertaining its public or private character in order to come to conclusions about the legitimacy of the act [while the] primitive scholar . . . begins with the notion of “justice” while proceeding from there to the capacities of the various actors, and then to the assessment of the acts.³³

In 1648, the Treaty of Westphalia ended the Thirty Years War by acknowledging the sovereign authority of various European princes. This event marked the advent of traditional international law, based on principles of territoriality and state autonomy.³⁴ Sovereign states functioned as the chief actors within the system, while intergovernmental and nongovernmental organizations played relatively minor roles. Custom and state practice came to be seen as primary sources of the law of nations, which largely mirrored and ratified state conduct. Those who wrote about the power of rules in international affairs during these years remained less concerned with why nations obey than with what national rulers should do, viewing the compliance

Thought in International Relations, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 29, at 1; and Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946).

33. Friedrich Kratochwil, *Constructivism as an Approach to International Law and Relations* 14 (Dec. 10, 1996) (unpublished manuscript, on file with author). See generally David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986) (discussing works of such primitive international law scholars as Vitoria, Suárez, and Gentili).

34. Thus, most standard international law texts give 1648 as the advent of the modern law of nations. See, e.g., LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* at xxxiv (1987). But see David Kennedy, *Images of Religion in International Legal Theory*, in *INFLUENCE OF RELIGION*, *supra* note 17, at 137, 143 (challenging appropriateness of 1648 as starting date); Stephen D. Krasner, *Compromising Westphalia*, 20 INT'L SECURITY 115 (1995) (arguing that predominance of sovereignty in Westphalian model had been compromised from start by conventions, contracting, coercion, and imposition).

question as ethical and philosophical, not scientific or empirical.³⁵ Within this system, the concept of legal obligation (so-called *opinio juris sive necessitatis*) emerged as the keystone for distinguishing customary international law from voluntary practice to which states might conform, but which they felt legally free to disregard. The very concept of obligatory custom assumed that nations, by virtue of their sovereign statehood, had de facto consented to compliance with customary practices out of a sense of legal obligation.³⁶

C. *The Dualistic Era: From Natural Law to Positivism*

From this understanding, it was but a short step to positivism, which viewed international law not as natural law, but as a construct of man-made law, treaties, and custom. Early positivists such as Thomas Hobbes (1588–1679), Richard Zouche (1590–1661), and Samuel Rachel (1628–1691) rejected natural law reasoning, instead asserting that the “law of nations . . . is a law *among* nations, [which] consists of customs and treaties.”³⁷

In 1789, as considerations of sovereignty came to dominate international discourse, Jeremy Bentham coined the phrase “inter-national law.”³⁸ The very term rejected the monistic vision of a single, integrated transnational legal system in favor of a notion that the public law of nations operates on a separate horizontal plane for states only. Equally important, Bentham “assumed that foreign transactions before municipal courts were always decided by internal, not international rules.”³⁹ By breaking the normative link between international and domestic legal systems, Bentham helped initiate the era of dualistic theory, in which the bases for compliance with domestic and international law expressly diverged.

Unlike the ethical tradition, which had blurred the issues of whether nations should and would obey international law, the positivist, scientific challenge brought into focus the causal question of why nations obey. The English analytical school of jurisprudence, led by such legal positivists as Bentham’s disciple, John Austin, soon concluded that international law rules

35. See PERCY E. CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 20 (1951) (citation omitted).

36. For a doctrinal discussion of *opinio juris*, see 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c, reporter’s note (1986). For a history of the concept, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1450–53 (1996); W. Ullmann, *Bartolus on Customary Law*, 52 JURID. REV. 265, 267 (1940); and Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561, 561–63. For a philosophical analysis, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 297–98 (1980).

37. NUSSBAUM, *supra* note 18, at 123; see also *id.* at 112–25 (discussing early positivists).

38. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 296–97 (J.H. Burns & H.L.A. Hart eds., 1970) (1789); see M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law”*, 78 AM. J. INT’L L. 405, 409 (1984).

39. *Id.*; see BENTHAM, *supra* note 38, at 296 (“Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of these states . . .”).

are not really law, because unlike domestic norms, they are not enforced by sovereign coercion. "The duties which [international law] imposes," Austin wrote, "are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected."⁴⁰

Yet contemporaneously, both dualism and positivism were challenged in practice and in theory. In practice, deep interpenetration of domestic and international systems and strong blending of public and private remained key features of the legal system. Contrary to Bentham's assertions, Blackstone's *Commentaries* had declared that the common law fully internalized the law of nations, which Blackstone described as "a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each."⁴¹ Particularly as England became the preeminent global power, the law of nations became domesticated into English common law, was applied to the American colonies, and subsequently came to be incorporated into U.S. law.⁴² Until the mid-nineteenth century, the leading American treatises on international law, particularly the *Commentaries* of Chancellor James Kent (1763–1847) and Henry Wheaton's *Elements of International Law* (1785–1848), presented the

40. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 201 (Weidenfeld & Nicolson 1954) (1832); see also *id.* at 127 (defining law as enforced command of sovereign to subject and concluding that international law is thus not law, but merely "positive international morality") (emphasis omitted).

41. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *66 (emphasis added); see also *id.* at *67 (stating that law of nations was "adopted in it's [sic] full extent by the common law, and is held to be a part of the law of the land"). As Mark Janis notes, "Blackstone . . . not Bentham, reflected the reality of practice," Janis, *supra* note 38, at 410, because "Bentham was attempting mostly to reform the law, Blackstone mostly to restate it," *id.* at 410 n.31.

42. The Declaration of Independence announced that the new United States was declaring the causes of its separation out of a "decent Respect to the Opinions of Mankind." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 20 (1990) ("Twenty-three of the fifty-six signers of the Declaration were lawyers, and they were a clear majority at the Constitutional Convention."); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 39 (1994) (discussing this language); *id.* at 49 ("[E]arly Justices such as John Jay and John Marshall . . . were familiar with the law of nations and comfortable navigating by it."); see also G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727 (1989) (recounting Marshall's familiarity with law of nations). For accounts of how international law became U.S. law, see Dickinson, *supra* note 21; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); and Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932).

Until recently, it has been almost universally accepted that customary international law is federal law. See generally Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (challenging what authors call "the modern position"). For convincing refutations of this recent challenge, see Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. (forthcoming 1997); Gerald Neuman, *Sense and Nonsense About Customary International Law*, 66 FORDHAM L. REV. (forthcoming 1997).

law of nations, as discussed by Grotius, Vattel, Bynkershoek, and Pufendorf, as fully internalized first principles of the American legal system, whose "faithful observance . . . is essential to national character."⁴³

Among theorists, Immanuel Kant's famous 1795 essay, *To Perpetual Peace*, constituted the principal response to the positivists.⁴⁴ Kant specifically urged governments to take advice from philosophers, and to follow international law as a route toward "perpetual peace." Kant predicated his understanding of international law not on Benthamite utilitarian concerns, but on a vision of international law as a purposive system dedicated toward securing peace, and built on the cornerstones of justice, democracy, and a liberalism focused on the centrality of human rights. Kant argued not for world government, but for a law-governed international society among sovereign states, in which the strong ties existing among individuals create mutual interests that cut across national lines.⁴⁵ Kant believed these transnational ties would create moral interdependence, and lead to greater possibilities for peace through international agreement.⁴⁶

Once framed, these debates between natural law and positivism, utilitarianism and Kantianism came to dominate traditional discourse.⁴⁷

43. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 1 (2d ed. New York, O. Halsted 1832); *id.* at 19 ("England and the United States have been equally disposed to acknowledge . . . the binding force of the general usage and practice of nations, and the still greater respect due to judicial decisions recognizing and enforcing the law of nations."); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW WITH A SKETCH OF THE HISTORY OF THE SUBJECT (Philadelphia, Carey, Lea & Blanchard 1836). Nearly 200 pages of Kent's first volume address the law of nations. On the influence of foreign and international law on Chancellor Kent, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 569-70 (1993). See also Morris L. Cohen, *International Law Treatises in Early America*, in ESSAYS IN HONOUR OF JAN STEPAN ON THE OCCASION OF HIS 80TH BIRTHDAY 32 (1994) (noting prominence of Grotius, Vattel, and Bynkershoek in law libraries of early America); Mark W. Janis, *American Versions of the International Law of Christendom: Kent, Wheaton, and the Grotian Tradition*, in T.M.C. ASSER INSTITUTE, FIVE HUNDRED YEARS SINCE THE REDISCOVERY OF THE AMERICAS: ESSAYS PUBLISHED IN THE NETHERLANDS INTERNATIONAL LAW REVIEW 37 (1992) (discussing religious influences on Kent and Wheaton, who "paid homage . . . to what they saw as 'Grotius' Protestant fashioning of an international law of Christendom").

44. See Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* [1795], in PERPETUAL PEACE AND OTHER ESSAYS 107 (Ted Humphrey trans., 1983).

45. See Andrew Hurrell, *Kant and the Kantian Paradigm in International Relations*, 16 REV. INT'L STUD. 183 (1990); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 86 (1992) (arguing that Kant did not believe in world government so much as in "an alliance of separate free nations, united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by the mutual advantages derived from peaceful intercourse") (emphasis omitted).

46. For explications of the Kantian position that the law of nations shall be based on a federation of free states making a concerted effort to explicate international moral principles, see generally Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 323 (1983); Wolfgang Schwarz, *Kant's Philosophy of Law and International Peace*, 23 PHIL. & PHENOMENOLOGICAL RES. 71 (1962); and Howard Williams & Ken Booth, *Kant: Theorist Beyond Limits*, in CLASSICAL THEORIES OF INTERNATIONAL RELATIONS, *supra* note 30, at 71. On the relationship of Kant to natural law, see generally LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 90-96 (1987).

47. See generally Josef L. Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951 (1961) (reviewing history of debate between natural law and positivism in international law).

Coincidentally, at almost the same time that Kant's essay appeared, Bentham authored his own essay entitled *A Plan for Universal and Perpetual Peace*. In that essay and another entitled *Objects of International Law*, Bentham put forward a strikingly procedural and positivistic proposal to combat war, which he termed "a species of *procedure* by which one nation endeavours to enforce its rights at the expense of another nation."⁴⁸ Bentham recommended codification of unwritten laws that had become established by custom, the making of new conventions "upon all points which remain unascertained [and] . . . in which the interests of two states are capable of collusion"; "[p]erfecting the style of the laws of all kinds, whether internal or international"; and creating "a common court of judicature" to settle differences of inter-state opinion by circulating rulings "in the dominions of each state."⁴⁹

Thus, by the end of this period, four identifiable strands of thinking had emerged about the compliance question. The first was an Austinian, positivistic *realist* strand, which suggests that nations never "obey" international law, because "it is not really law." The philosophical tradition of analyzing international law obligation had bifurcated into a Hobbesian utilitarian, *rationalistic* strand, which acknowledged that nations sometimes follow international law, but only when it serves their self-interest to do so, and a *liberal* Kantian strand, which assumed that nations generally obey international law, guided by a sense of moral and ethical obligation derived from considerations of natural law and justice. Bentham's international law writings suggested a fourth, *process-based* strand, which derived a nation's incentive to obey from the encouragement and prodding of other nations with whom it is engaged in a discursive legal process.

As the nineteenth century closed, state practice exhibited increasingly robust norm-enunciation and procedural institution-building. The period marked the development of such incipient global humanitarian norms as treaties prohibiting piracy and privateering, slave trade, prostitution (or "white slavery"), certain acts in wartime, and the harboring of fugitives.⁵⁰ Even as the Treaty of Berlin in 1878 accorded special legal protection to religious minorities (which served as a model for the Minorities System later created under the auspices of the League of Nations),⁵¹ the First Hague Peace Conference in 1899 established the Permanent Court of Arbitration (which the League of Nations shortly followed by fashioning the Permanent Court of

48. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 538 (John Bowring ed., Edinburgh & London, W. Tait 1843) (emphasis added). The essays were written between 1786 and 1789. See generally Janis, *supra* note 38, at 412–15.

49. 2 BENTHAM, *supra* note 48, at 540, 552–54.

50. See MOYNIHAN, *supra* note 42, at 20 ("[N]ineteen hundred [was a] good year for international law."); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479 (1990).

51. See PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 25–56 (1991).

International Justice).⁵² These strands came together in what would become the nascent law of international human rights. Particularly critical to these norm-generating developments was the work of such nineteenth-century "transnational moral entrepreneurs"⁵³ as William Wilberforce and the British and Foreign Anti-Slavery Society; Henry Dunant and the International Committee of the Red Cross (ICRC); and Christian peace activists, such as America's William Ladd and Elihu Burritt, who promoted public international arbitration and permanent international criminal courts.⁵⁴

The first World War interrupted this momentum, and forced scholars to reflect on the new legal order that emerged from the Treaty of Versailles.⁵⁵ The interwar years marked three watersheds. The Charter of the League of Nations sought to place limits on a sovereign state's freedom to pursue war as an instrument of national policy; the International Labour Organization (ILO) became the first permanent intergovernmental organization devoted specifically to improving conditions of social welfare; and the Paris Peace Conference sought to generate proposals to remedy nationalist conflict.⁵⁶

52. See David J. Bederman, *The Hague Peace Conferences of 1899 and 1907*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 9, 10–11 (Mark W. Janis ed., 1992).

53. Nadelmann, *supra* note 50, at 482 (defining "transnational moral entrepreneurs" as nongovernmental transnational organizations who (1) "mobilize popular opinion and political support both within their host country and abroad"; (2) "stimulate and assist in the creation of like-minded organizations in other countries"; (3) "play a significant role in elevating their objective beyond its identification with the national interests of their government"; and (4) often direct their efforts "toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society"); cf. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (describing similar domestic concept of "norm entrepreneurs" who "can alert people to the existence of a shared complaint and can suggest a collective solution . . . by (a) signalling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial").

54. On the transnational work of Wilberforce and the British anti-slavery movement, see generally BETTY HENRY FLADELAND, *MEN AND BROTHERS: ANGLO-AMERICAN ANTI-SLAVERY COOPERATION* (1972); and Nadelmann, *supra* note 50, at 495. On the work of Dunant and the ICRC, which spurred the Geneva Convention of 1864 and the Hague Convention of 1899 and the movement toward codified rules of wartime conduct, see generally PIERRE BOISSIER, *HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS: FROM SOLFERINO TO TSUSHIMA* (1985); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 69–88 (1996); and Michael Ignatieff, *Unarmed Warriors*, *NEW YORKER*, Mar. 24, 1997, at 54. On the work of Ladd and Burritt, see Mark W. Janis, *Protestants, Progress and Peace in the Influence of Religion: Enthusiasm for an International Court in Early Nineteenth-Century America*, in *INFLUENCE OF RELIGION*, *supra* note 17, at 223. These cases demonstrate "the role of a few morally committed private individuals—individuals without government positions or political power—and the elite networks they were able to use to build an international organization," FINNEMORE, *supra*, at 86.

55. See Nathaniel Berman, *The Paradoxes of Legitimacy: Case Studies in International Legal Modernism*, 32 HARV. INT'L L.J. 583, 584 (1991).

56. As David Kennedy has noted, 1918 marked the break between the eras of international "law" and international "institutions." See David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 844 (1987). The constitution of the ILO signaled "the end of an era in which international law was, with few exceptions, confined to the regulation of relations between the states." HENKIN ET AL., *supra* note 34, at xi; see also VIRGINIA LEARY, *INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW* (1981). On the influence of the Paris Peace Conference on European nationalism, see Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

These early political steps toward institution-building stimulated interwar academic thinking about international community as a key factor in promoting compliance with international norms. One of the first modern works specifically to address the question of why nations obey, Alfred Verdross's 1927 Hague Lectures, *Le Fondement du Droit International*,⁵⁷ identified the central cause of compliance as a Grotian commonality of values and interest which drives states to agree to honor the agreements they enter.⁵⁸ The following year, Oxford's James Brierly lectured at the Hague on *The Basis of Obligation in International Law* ("Le Fondement du caractère obligatoire du droit international").⁵⁹ Building on Verdross, Brierly eschewed strict reliance on either natural law or positivist consent as sources of legal obligation, suggesting instead the need to preserve "solidarity" with one's fellow states as an explanation for compliance.⁶⁰

Thus, the interwar years modified the process-based strand of thinking about the compliance question by mixing *process with reputation*: the "solidaristic" strand that emerged derived a nation's incentive to obey from the encouragement and prodding of other nations with whom it is engaged in a managerial, discursive legal process.⁶¹ In short, by the time World War II began, thinking about the compliance question had diverged into four different schools, resting on assumptions based on realism, rationalism, Kantianism, and process (including considerations of "solidarity" with other members of "international society"). As we shall see, these lines of argument laid down the basic pathways along which subsequent analysis of the compliance question has proceeded.

57. 16 RECUEIL DES COURS 244 (1927).

58. Verdross argued that "the duty of states in their reciprocal relations" derives from "a supra-consensual norm [*pacta sunt servanda*], the content of which enshrines consent at the foundation of the legal system." Berman, *supra* note 55, at 585.

59. 23 RECUEIL DES COURS 458 (1928).

60. BRIERLY, *supra* note 28, at 56 (ascribing this view to Duguit). Brierly ascribed to Krabbe an alternative theory, which asserts that obligation "proceeds from men's sense of right." *Id.* at 61. Brierly's two explanations for compliance—based on solidarity and legitimacy, respectively—bear a striking resemblance to the "managerial" and "fairness" explanations later elaborated by the Chayeses and Franck. See *infra* Part II. Fitzmaurice later connected the reasoning of both Verdross and Brierly to the Grotian "international society" school. See Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1 (1956). He wrote:

As Verdross, Brierly and others have conclusively shown, it is not consent, as such, that creates the obligation The real foundation of the authority of international law resides . . . in the fact that the States making up the international society recognise it as binding upon them, and, moreover, as a system that *ipso facto* binds them as members of that society, irrespective of their individual wills.

Id. at 8–9.

61. The academic writing of this era, however, remained unabashedly dualistic. See, e.g., Starke, *supra* note 23, at 70–74 (citing work of leading dualist theorists, Triepel and Anzilotti); *id.* at 73 n.2 (discussing I ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 51 (1928)) ("In Anzilotti's view, there is such a complete separation between the two systems that one system cannot contain binding norms emanating from the other.").

D. *The Era of Institutions*

In the wake of the Allied victory in World War II, the architects of the postwar system replaced the preexisting loose customary web of state-centric rules with an ambitious positivistic order, built on institutions and constitutions: international institutions governed by multilateral treaties organizing proactive assaults on all manner of global problems. These global "constitutions" sought both to allocate institutional responsibility and to declare particular rules of international law. Political conflict, for example, was to be regulated by the United Nations and its constituent organs—the Security Council, the General Assembly, and the World Court—under the aegis of a United Nations Charter premised on abstinence from unilateral uses of force.⁶² The United Nations system was supplemented by an alphabet soup of specialized, functional political organs and regional political and defense pacts based on respect for sovereignty and territorial integrity. Destructive economic conflicts, by contrast, were to be mitigated through the Bretton Woods system, which provided that the World Bank would supervise international reconstruction and development, the International Monetary Fund would monitor balance of payments, and the General Agreements on Tariffs and Trade (GATT) would manage international principles of economic liberalism and market capitalism.⁶³ These global economic institutions were buttressed by regional economic communities such as the European Economic Community, each governed by its own constitution-like treaty.

This complex positive law framework reconceptualized international law as a creative medium for organizing the activities and relations of numerous transnational players, a category that now included intergovernmental organizations with independent decisionmaking capacity. Within this intensely regulatory global framework, it was imagined, legal rules would reflect international systemic concerns, rather than parochial interests. The globalization of economic regulation made sharp inroads into now-established distinctions between public and private law. Meanwhile, the prospect of European regional integration of domestic and international law, along with the post-Nuremberg growth of international human rights law and its potentially deep incursion into domestic jurisdiction, posed powerful theoretical challenges to the dualistic municipal-international distinction.⁶⁴ One of the best-known

62. For descriptions of this heady period, see generally TOWNSEND HOOPES & DOUGLAS BRINKLEY, *FDR AND THE CREATION OF THE UN* (1997); and BRIAN URQUHART, *A LIFE IN PEACE AND WAR* 90–130 (1987).

63. The GATT, of course, was only an interim document intended to apply provisionally until the charter of the International Trade Organization (ITO) was ratified. See HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 2, at 49. In fact, the failure of the requisite number of nations to ratify the ITO's Charter left the GATT as the world's trading regulator until the creation of the World Trade Organization in 1994, "a defining moment in the evolution of international economic law." Reitz, *supra* note 2, at 557.

64. The judgments of the Tokyo and Nuremberg war crimes tribunals not only galvanized the

legal tracts of this era, Grenville Clark and Louis Sohn's *World Peace Through World Law*, even proposed a criminal law enforcement model to enforce international rules, with the great powers of the United Nations acting jointly as the policemen of the world.⁶⁵

Yet almost immediately, the intense bipolarity of the Cold War era rendered this positivistic vision a Potemkin Village. With respect especially to the use of force, the Cold War order soon resembled a "revolutionary system," one "wracked by inexorable power rivalries and ideological conflicts . . . in which international organization [was] reduced to impotence as a force of its own."⁶⁶ The system remained dualistic, particularly in the United States, as international and domestic law continued as separated systems.⁶⁷

During these years, international law fell into tremendous public disrepute. Particularly in the United States, the positivistic, realist strand came to dominate thinking on the compliance issue. Meanwhile, the Kantian strand fell into particular disrepute, dismissed as a kind of utopian moralizing about world government, which, like the strategy of appeasement, played into the hands of the Communist bloc. One leading critic, George F. Kennan, memorably attacked "the legalistic-moralistic approach to international problems," that is, "the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints," as an approach that "runs like a red skein through our foreign policy of the last fifty years."⁶⁸

Particularly in the United States, the realists' Cold War disdain for the utopianism of international law helped trigger the odd estrangement between the fields of international law and international relations. Although the two fields cover much of the same intellectual territory, they began to evolve independently, pursuing different analytic missions, and reaching different

international human rights movement but also pierced the veil of state sovereignty by denying that international law is for states only, and redeclaring that individuals are subjects, not just objects, of international law. The law of nations had always punished piracy, for example, as an international crime committed by individuals against individuals, and punishments had been imposed upon pirates under domestic law. See Nadelmann, *supra* note 50, at 486-91; White, *supra* note 42, at 727-31. For discussions of the historical role of the individual in international law, see, for example, JANIS, *supra* note 18, at 163-74; Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 1-16 (1982).

65. See GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (2d ed. 1960) (discussing "World Police Force"). For accounts of contemporaneous political discussions of this issue, see 2 CORDELL HULL, *MEMOIRS OF CORDELL HULL* 1642-43 (1948).

66. STANLEY HOFFMANN, *International Organization and the International System*, in JANUS AND MINERVA: *ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS* 293, 294 (1987).

67. See, e.g., Koh, *supra* note 23, at 2362-64 (describing impact of U.S. Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)); Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORDER 1, 32 (1974) (calling *Sabbatino* "[a] case in which the United States Supreme Court abdicated its active role in the global process of constitutive decision").

68. KENNAN, *supra* note 9, at 95.

conclusions about the influence of law in international affairs.⁶⁹ Over time, the fields came to adopt an unspoken division of labor regarding the intellectual projects that they would pursue. International relations scholars, suffused with realism, treated international law as naive and virtually beneath discussion. International lawyers, meanwhile, shifted their gaze toward modest tasks: description of international legal norms; application of these norms to particular cases; and occasional prescription of what the rule of law should be. Legal scholars therefore largely avoided the difficult tasks of causal explanation and prediction.

During this era, legal philosophers mounted the most sustained theoretical critique of the obligatory force of international law. Hans Kelsen modified John Austin's rejection of international law as a system not enforced by sovereign command, claiming instead that international law constitutes a primitive form of law, based on self-help.⁷⁰ H.L.A. Hart refined that challenge, arguing that international law lacks two features that he deemed central to the very concept of law: first, "the secondary rules of change and adjudication which provide for legislature and courts"; and second, "a unifying rule of recognition, specifying 'sources' of law and providing general criteria for the identification of its rules."⁷¹ Until actors within the international system internalize both a rule of recognition and secondary rules for orderly change and interpretation, Hart argued, international law will consist only of a set of primary rules with which nations will comply out of a sense of moral, not legal, obligation. In effect, Hart defined the very notion of "obedience" out of international law, for under his description, international rules are ones with which nations may conform or comply, but never "obey," in the sense of internally accepting or incorporating those rules into national law.

Yet even during this era, international law had its defenders. Within the international relations field, a Kantian American school of liberal internationalists⁷² and a Grotian British School of "International Society"

69. For an intriguing intellectual history of the schism, see FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 3-76 (1985).

70. See HANS KELSEN, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 417-18 (1952) ("[S]tates must eventually evolve from their present non-coercive primitivism to become a genuine, organized community in which 'real' obligations are enforced by judges and a police force deployed by a *supranational* executive."). See generally David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 29-59 (discussing Kelsen's 1941 lectures on Law and Peace in International Relations).

71. H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994); see also NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 284 (1978); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 110 (1993) ("Since H.L.A. Hart, jurisprudence has been grounded on the so-called 'internal point of view'—the perspective of a participant in the legal system who regards its laws as norms for her behavior.").

72. Stanley Hoffman has called liberal internationalism, along with Communism, one of the two great postwar ideologies. See Stanley Hoffmann, *The Crisis of Liberal Internationalism*, 98 FOREIGN POL'Y 159 (1995); see also Michael Joseph Smith, *Liberalism and International Reform*, in *TRADITIONS OF INTERNATIONAL ETHICS*, *supra* note 9, at 201. For other prominent writings in this school, see INIS L. CLAUDE, *SWORDS INTO PLOWSHARES* (4th ed. 1971); and *THE RELEVANCE OF INTERNATIONAL LAW* (Karl Deutsch & Stanley Hoffman eds., 1968).

theorists⁷³ continued to argue for the relevance of international law. Both, however, remained vague about precisely why nations obey. Writing about "International Systems and International Law" in 1965, for example, one prominent liberal internationalist wrote, "[t]he basis of obligation is the same in every legal order: a consciousness among the subjects that this order is needed if one is to reach a common end."⁷⁴

European theorists, perhaps less emotionally driven by a need to support American hegemony, never fully accepted a schism between international law and international relations.⁷⁵ English scholars such as Martin Wight (1913–1972) and Hedley Bull (1932–1985) developed the notion of a common consciousness among states. Building upon the "solidaristic" strand identified by Brierly and Verdross, they expressly invoked the Grotian notion of "international society."⁷⁶ Within this international society, they reasoned, nations comply with international law for essentially communitarian reasons: not solely because of cost-benefit calculations about particular transactions, but because particular rules are nested within a much broader fabric of ongoing communal relations.

Within the American legal academy, a new defense of international law

73. See, e.g., Bull, *supra* note 32. Bull argued elsewhere that [i]f states today form an international society . . . this is because, recognizing certain common interests and perhaps common values, they regard themselves as bound by certain rules in their dealings with one another . . . [and] co-operate in the working of institutions such as the forms of procedures of international law, the machinery of diplomacy and general international organization, and the customs and conventions of war.

HEDLEY BULL, *THE ANARCHICAL SOCIETY* 13 (1977). For other writings in this vein, see, for example, DIPLOMATIC INVESTIGATIONS, *supra* note 32; ADAM WATSON, *THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE HISTORICAL ANALYSIS* (1992); MARTIN WIGHT, *INTERNATIONAL THEORY: THE THREE TRADITIONS* (1991); Barry Buzan, *From International System to International Society: Structural Realism and Regime Theory Meet the English School*, 47 INT'L ORG. 327 (1993); Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 49 (Volker Rittberger ed., 1993); and James Mayall, *International Society and International Theory*, in THE REASON OF STATES: A STUDY IN INTERNATIONAL POLITICAL THEORY 122 (Michael Donelan ed., 1978).

74. STANLEY HOFFMANN, *International Systems and International Law*, in HOFFMANN, *supra* note 66, at 149, 171.

75. Andrew Hurrell argues that "one of the most striking features of European thought before 1914 was just how few theorists actually accepted" a dichotomy between domestic "society" and international "anarchy It was perhaps only the extreme nature of post-war US realism that produced a situation in which co-operation came to be seen as an 'anomaly' in need of explanation." Hurrell, *supra* note 73, at 50.

76. They defined "international society" as a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining these arrangements.

Hedley Bull, *The Emergence of a Universal International Society*, in THE EXPANSION OF INTERNATIONAL SOCIETY 117 (Hedley Bull & Adam Watson eds., 1984); see also Kingsbury, *supra* note 30 (arguing that intellectual link between Grotius and modern European theorists lies less in Grotius's specific elaboration of the concept of international society than in their common focus on need for theory in international relations).

arose, based less on Kant or Grotius than on emerging American notions of legal process. This defense followed two distinct paths: the so-called Policy Science or New Haven School of International Law, pioneered at Yale by Myres McDougal, Harold Lasswell, and their associates,⁷⁷ and a lawyering approach founded at Harvard, crystallized in the International Legal Process School of Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld.⁷⁸ Both strands argued that transnational actors' compliance with transnational law could be explained by reference to the process by which these actors interact in a variety of public and private fora. Through this interactive process, they suggested, law helps translate claims of legal authority into national behavior.

The two schools of legal process theory grew from disparate roots. The New Haven School grew from the American theory of legal realism, which focused on the interplay between rules and social process in enunciating the law.⁷⁹ The School sought to develop "a functional critique of international law in terms of social ends . . . that shall conceive of the legal order as a *process* and not as a condition."⁸⁰ "Within the decision-making process," McDougal and Lasswell wrote, "our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions."⁸¹ In its modern incarnation as the "World Public Order" school, New Haven School leaders Myres McDougal and W. Michael Reisman argued that international law is itself a "world constitutive process of authoritative decision," not merely a set of rules, whose goal is a world public order of human dignity, designed to serve particular ends and values by establishing regimes of effective control.⁸²

77. Like most "schools," the New Haven School does not include all international lawyers who live in New Haven, nor do all of its members reside there. As one student of the School put it:

The New Haven school does not describe the world's different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of the *interpenetration of multiple processes of authoritative decision* of varying territorial compass. . . . [I]nternational law is most realistically observed, not as a mere rigid set of rules but as the whole *process* of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.

Suzuki, *supra* note 67, at 30 (emphasis added); see Symposium, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266 (1985) [hereinafter Symposium].

78. See, e.g., ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS (2 vols., 1968).

79. See 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY 249-67 (1992).

80. Roscoe Pound, *Philosophical Theory and International Law*, quoted in MYRES MCDUGAL, INTERNATIONAL LAW, POWER AND POLICY: A CONTEMPORARY CONCEPTION 137 (1954) (emphasis added). For a jurisprudential history of the New Haven School, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 191-203 (1995).

81. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959); see also *id.* ("Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not.").

82. As a prominent member of the school, Dame Rosalyn Higgins, recently put it: "International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules. . . .

Almost contemporaneously, Chayes, Ehrlich, and Lowenfeld published a series of case studies entitled *International Legal Process*, which sought to illustrate the role of law in the process of policy decisions in the international realm. Unlike the New Haven School, which drew on Yale's domestic school of policy science, Chayes and his colleagues drew explicitly upon Henry Hart and Albert Sacks's famous unpublished domestic materials on *The Legal Process*. The Chayes materials deliberately "cut across the categories of international legal studies as they are sometimes conceived—'public international law,' 'international organizations,' 'legal problems of international business,' and the like."⁸³ They asked explicitly: "How and how far do law, lawyers and legal institutions operate to affect the course of international affairs? What is the legal process by which interests are adjusted and decisions are reached on the international scene?"⁸⁴

The Hart and Sacks school had made the relatively narrow claim that legal techniques and doctrine are not self-defining, but rather develop from the interaction of institutions and procedures, as brought to bear in particular cases pending before both public and private decisionmaking fora. Applied to international law, Chayes and his colleagues argued, this interactive process operates in a largely unspecified way to allocate resources, organize activity, and to resolve and contain conflict. Like the Hart and Sacks materials before them, the Chayes materials were more descriptive than prescriptive, making the modest claim that law is rarely determinative in international affairs, but that "law is relevant and the role of lawyers is important."⁸⁵ Without denying the importance of substantive legal norms, the Chayes team argued that in case after case, the legal process allocates decisionmaking competence between national and international decisionmakers, specifies particular regulatory arrangements for particular subject matters, restrains and organizes national and individual behavior, and interacts with the political, economic, and cultural setting. As Chayes himself later put it, international legal process theorists believed that international and domestic law affect political action by operating "[f]irst, as a constraint on action; second, as the basis of justification or legitimation for action; and third, as providing organizational structures, procedures, and forums" within which political decisions may be reached.⁸⁶

The role of international law is to assist in the choice between . . . various alternatives [arguably prescribed by existing rules]. International law is a process for resolving problems." ROSALYN HIGGINS, *PROBLEMS AND PROCESS* 267 (1994).

83. CHAYES ET AL., *supra* note 78, at vii. The topics covered included domestic and international adjudication, trade, rate regulation, commodity arrangements and other economic affairs, bilateral and multilateral treaty relations, and use of forcible and nonforcible sanctions.

84. *Id.* at xi; see also William N. Eskridge, Jr. & Phillip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* at ciii n.232, cxiv n.286, cxxxii n.346 (1994) (describing Chayes's and Ehrlich's schooling in Legal Process thought).

85. CHAYES ET AL., *supra* note 78, at xii.

86. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 7 (1974).

Although few international legal scholars openly affiliated themselves with the international legal process school, the two faces of legal process soon became the defining tradition within which most American postwar international law scholars began to operate.⁸⁷ The New Haven School consistently argued that international law is not a body of rules, but a process of authoritative decisionmaking.⁸⁸ Myres McDougal and W. Michael Reisman elaborated the claims of policy science in various fields of public international law,⁸⁹ along with scholars of such diverse political orientation as Richard Falk,⁹⁰ John Norton Moore,⁹¹ Rosalyn Higgins,⁹² and Burns Weston,⁹³ who shared the School's process methodology without adopting its social ends or policy values.

Meanwhile, Abram and Antonia Chayes pursued applied international legal process analysis in the areas of arms control and use of force;⁹⁴ Roger Fisher did the same for international negotiations;⁹⁵ Milton Katz, Kingman Brewster,⁹⁶ and Andreas Lowenfeld⁹⁷ for international business transactions;

87. See Koh, *supra* note 11, at 207 ("[F]or more than forty years, international legal scholars have been studying transnational legal process without knowing it."); see also Kennedy, *supra* note 70, at 21 (noting that "scholarly canon" of 1950s comprised mainly "scholarship focusing on policy-making, institutions, administration, and what was called the 'international legal process'").

88. See Symposium, *supra* note 77, at 283; see also Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 991, 997 (1995) (relating how McDougal and Lasswell converted core insight of legal realism, "its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form . . . into a comprehensive framework of inquiry").

89. For representative works within this vast literature, see, for example, LASSWELL & MCDUGAL, *supra* note 79; MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980); MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* (1981); W. MICHAEL REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* (1971); and Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* (Ronald St. J. MacDonald & Douglas Johnston eds., 1983). See also MORTON KAPLAN & NICHOLAS DEB. KATZENBACH, *POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 356 (1961) (citing McDougal's work as view that "most clearly approximates the view taken in this book, and which has most influenced the authors' approach").

90. See, e.g., RICHARD A. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 642-59 (1970) (supporting McDougal position on fundamental level).

91. See John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968).

92. See, e.g., HIGGINS, *supra* note 82.

93. See, e.g., BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* (2d ed. 1990); Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 227 (1983).

94. See, e.g., CHAYES, *supra* note 86 (discussing role of law in U.S. foreign policy decisionmaking); Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905 (1972).

95. See, e.g., Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961); Roger Fisher, *Constructing Rules that Affect Governments*, in *ARMS CONTROL, DISARMAMENT, AND NATIONAL SECURITY* (Donald G. Brennan ed., 1961); Roger Fisher, *International Enforcement of International Rules*, in *DISARMAMENT: ITS POLITICS AND ECONOMICS* 99, 106-20 (Seymour Melman ed., 1962).

96. See MILTON KATZ & KINGMAN BREWSTER, JR., *LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS* (1960).

97. See ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (six vols., 1975-84).

Richard Lillich for international human rights;⁹⁸ Frederick Kirgis for international organizations;⁹⁹ and John Jackson¹⁰⁰ and Robert Hudec for international trade law.¹⁰¹

Yet during these years, surprisingly few scholars attempted direct answers to the question of why nations obey. For the International Legal Process school, the most complete attempt appeared in Louis Henkin's oft-quoted *How Nations Behave*, first published in 1968.¹⁰² A close reading of Henkin's discussion of the "politics of law observance" shows that his defense of international law rests largely on utilitarian, rationalistic premises.¹⁰³ Starting with the assumption "that nations act deliberately and rationally, after mustering carefully and weighing precisely all the relevant facts and factors," Henkin posited "that barring an infrequent non-rational act, nations will observe international obligations unless violation promises an important balance of advantage over cost."¹⁰⁴ He went to identify numerous foreign policy and domestic factors that weigh into law observance, without separating out those factors that rest on national interest or concern for reputation.¹⁰⁵ Nor did his "domestic reasons" clearly distinguish among those factors that vary with national identity,¹⁰⁶ that result from domestic legal incorporation of international norms,¹⁰⁷ or that constitute bureaucratic or psychological reasons for "internal acceptance."¹⁰⁸ Henkin acknowledged that "[w]ith

98. See, e.g., RICHARD B. LILlich, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* (2d ed. 1991).

99. See, e.g., FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* (1977).

100. See, e.g., JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989); JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (3d ed. 1995). For an analysis of Jackson's work, see Kennedy, *supra* note 70, at 59–82.

101. See, e.g., HUDEC, *ENFORCING INTERNATIONAL TRADE LAW*, *supra* note 2; HUDEC, *THE GATT LEGAL SYSTEM*, *supra* note 2.

102. See HENKIN, *supra* note 1. As a colleague of leading Legal Process School member Herbert Wechsler, Henkin had also authored a number of constitutional law articles in the legal process vein. See, e.g., Louis Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637 (1961); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968). For an updated account of Henkin's views, see Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 67–87 (1989).

103. See HENKIN, *supra* note 1, at 49–87.

104. *Id.* at 47.

105. Among "foreign policy factors," Henkin includes a common interest in keeping international relations orderly and friendly, *see id.* at 46–48; a desire for a reputation for principled behavior, for propriety and respectability, *see id.* at 48–50; reciprocity, *see id.* at 50–52; tacit agreements, *see id.* at 52–54; and fear of communal response, *see id.* at 58–59.

106. Henkin mentions in passing separation of powers and national constitutions as "domestic legal factors" favoring observance of international law. *Id.* at 63–68. His argument is fleshed out more thoroughly in the revised edition of his classic foreign affairs work, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* (rev. ed. 1996).

107. See HENKIN, *supra* note 1, at 58 ("[I]t seems permissible to suggest that some nations are more law-abiding than others by reason of their national 'morality' and 'character' . . ."); *id.* at 59 ("In general, Western-style democracies tend to observe international law more than do others. . . .").

108. See *id.* at 58–63 (citing habit imitation, existence of nongovernmental organizations, political personalities, and legal advisers to foreign office as factors favoring law observance).

acceptance [of international rules] comes observance, then the habit and inertia of continued observance."¹⁰⁹ Yet he nowhere explored the extent to which observance of international law is itself a *constructivist* activity, which feeds back to modify domestic law, reshape domestic bureaucracies, and change the attitudes of domestic decisionmakers.

The New Haven School, by contrast, pursued a course that was both more expressly normative and avowedly scientific.¹¹⁰ In the same year that Henkin's analysis appeared, his Columbia colleague Oscar Schachter sought to answer the question of why nations obey by applying the Lasswell-McDougal framework for inquiry into the global process of authoritative decisionmaking.¹¹¹ Schachter offered "a 'processive' definition of the formation of obligation,"¹¹² arguing that "five processes constitute the necessary and sufficient conditions for the establishment of an obligatory legal norm."¹¹³ But in the end, Schachter concluded: "The whole process [of generating obligations] is purposive, directed to the satisfaction of interests and demands, hence pervasively 'value-oriented.'"¹¹⁴ Over time, the New Haven School's overriding focus on value-orientation came to trouble even those who

109. *Id.*

110. By arguing that international law is the end result of an authoritative decision-making process . . . embedded in social context . . . [the New Haven School] argue[d] that a scientifically grounded answer to any given policy problem may be reached that is likely to promote the common interest in achieving a world order founded on fundamental principles of human dignity.

Falk, *supra* note 88, at 1992 (citations omitted). In 1981, Michael Reisman argued that the New Haven School's "communications model"—which sees the legal process as comprising three communicative streams, "policy content, authority signal and control intention"—"liberates the inquirer from the . . . distorting model of positivism, which holds that law is made by the legislature," in favor of the notion that "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking." W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 107, 113 (1981).

111. See Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 307–08 (1968). Schachter cotaught the course in World Public Order with McDougal and Lasswell at Yale Law School from 1955 to 1970. See Symposium, *supra* note 77, at 267 (remarks of Oscar Schachter).

112. Schachter, *supra* note 111, at 319.

113. *Id.* at 307 (emphasis omitted). Schachter's factors were: (1) the designation of a behavioral requirement; (2) the indication that persons with competence and authority have made the designation; (3) an indication of the capacity and willingness of those concerned to make the designated requirement effective; (4) transmittal of the requirement to the target audience; and (5) creation in the target audience of psychological and operational responses that indicate that the designated requirement is regarded as authoritative and hence, as likely to be complied with in the future. See *id.* at 308. On examination, these factors bear a family resemblance to Thomas Franck's later notion that rules have "compliance pull" because of a perception that they have been promulgated through a legitimate, or "right process." See *infra* Part II. Moreover, the fifth of Schachter's factors—the requirement of a response *within* a domestic audience that an international rule is authoritative—represents a nascent effort to begin to address the question of norm-internalization.

114. Schachter, *supra* note 111, at 319. Schachter acknowledged that the New Haven School consistently argued that international law is not a body of rules, but a process of authoritative decision. See, e.g., Symposium, *supra* note 77, at 283 (remarks of Myres S. McDougal); see also Falk, *supra* note 88, at 1991 (maintaining that McDougal and Lasswell converted "the core insight of legal realism"—"its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form"—into a comprehensive framework of inquiry").

sympathized with its methodological ambitions. By connecting process and context with an overriding set of normative values, critics argued, the New Haven School came to support the notion “that a clear and specific rule of law or treaty obligation may be disregarded if it is not in accord with a fundamental goal of the international community,”¹¹⁵ a goal too often set by reference to U.S. national interest. Some years later, Schachter himself came to lament that “by subordinating law to policy, the McDougal approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law.”¹¹⁶

Thus by the end of this era, the process tradition had diverged into two distinct streams: the International Legal Process School’s focus on process as policy constraint versus the New Haven School’s focus on process as policy justification. The New Haven School viewed international law as itself a decisionmaking process dedicated to a set of normative values, while the International Legal Process School saw international law as a set of rules promulgated by a pluralistic community of states, which creates the context that cabins a political decisionmaking process.¹¹⁷

In the end, neither school attempted, much less offered, a convincing explanation of why nations obey. Until the Chayeses returned to the question decades later, the International Legal Process School suggested, but never explained why, participation in process leads nations to obey. The New Haven School merged law into policy, and by so doing, too readily concluded that what constitutes right policy is *per se* lawful. By implying that the powerful cannot disobey international law, the New Haven School’s analysis “miss[ed]

115. Symposium, *supra* note 77, at 271 (remarks of Oscar Schachter). He further noted: the tendency on the part of McDougal and others in the policy-oriented school to apply their theory in a highly selective manner to override the constraints of law in favor of the “higher ends” sought by present U.S. policy. . . . If applied with a nationalist bias, [the New Haven approach] becomes an ideological instrument to override specific restraints of law . . . [,] a unilateralist vision of policy jurisprudence in which law plays a secondary role and policy is determined by the perception of self-interest of a particular state.

Id. at 272–73; *see also id.* at 281 (criticizing “the ‘miraculous element’ in the McDougal jurisprudence—that uncanny capacity he has to apply the eight values in a manner that consistently accords with U.S. foreign policy”) (remarks of Richard A. Falk).

116. *See, e.g.,* DUXBURY, *supra* note 80, at 197 (“Policy science is premissed [sic] on the development, in the future, of a single international community, a world public order, within which there exist certain common political interests—interests which, though supposedly divorced from national interests, turn out to be the embodiment of post-war American foreign policy.”); Symposium, *supra* note 77, at 267 (remarks of Oscar Schachter); *see also id.* at 280 (remarks of Richard A. Falk).

117. *See* Symposium, *supra* note 77, at 268 (remarks of Oscar Schachter). Schachter argued that viewing international law “as an order concerned with binding rules and obligations and with their principled use in defining choices and justifying action,” as international legal process scholars did, “need not lead us to accept Austinian positivism or a ‘rule-oriented’ approach,” as McDougal claimed. “We can still recognize,” said Schachter, “that the processes of creating and applying such rules and obligations necessarily involve conditions, determinants and values that fall outside the law.” *Id.* at 268–69 (remarks of Oscar Schachter).

the distinctiveness of law as a method of social control . . . [,] ironing out the normative essence of law under the pretext of straightening the discipline."¹¹⁸

E. *Interdependence and Transnationalism*

By the 1970s and '80s, the legal landscape had altered significantly. The growth of international regimes and institutions,¹¹⁹ the proliferation of nonstate actors,¹²⁰ and the increasing interpenetration of domestic and international systems inaugurated the era of "transnational relations," defined by one scholar as "regular interactions across national boundaries ari[sing] when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization."¹²¹ Multinational enterprises, nongovernmental organizations, and private individuals reemerged as significant actors on the transnational stage. In particular, the oil crisis of the early 1970s highlighted the interdependence of politics and economics in the new transnational economy, and created the discipline of international political economy.¹²² Instead of focusing narrowly on nation-states as global actors, scholars began to look as well at transnational networks among nonstate actors, international institutions, and domestic political structures as important mediating forces in international society.

The question now forced upon international relations scholars was why, despite the bipolarity of the Cold War regime, had interstate cooperation persisted? These scholars could not ignore the remarkable growth of formal and informal, public and nonpublic regimes, which promoted the evolution of norms, rules, and decisionmaking procedures in such "transnational issue areas" as international human rights, arms control, international economic law, and international environmental law. In response, liberal institutionalists and

118. Stanley Hoffman, *The Study of International Law and the Theory of International Relations*, 57 AM. SOC'Y INT'L L. PROC. 26, 27 (1963).

119. See HAROLD JACOBSON, NETWORKS OF INTERDEPENDENCE (1979).

120. See RICHARD W. MANSBACH ET AL., THE WEB OF WORLD POLITICS, NON-STATE ACTORS AND THE TRANSFORMATION OF INTERNATIONAL RELATIONS (1976); PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS (Peter Willets ed., 1982).

121. Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Introduction*, in BRINGING TRANSNATIONAL RELATIONS BACK IN 3 (Thomas Risse-Kappen ed., 1995) (emphasis omitted); see also Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 WORLD POL. 333 (1973) (defining "transnational organization" as "relatively large, hierarchically organized, centrally directed bureaucracy . . . [that] performs a set of relatively limited, specialized, and in some sense, technical functions . . . across one or more international boundaries and, insofar as is possible, in relative disregard of those boundaries"). As Risse-Kappen notes, the subject of transnational relations "rose to a certain prominence during the early 1970s, but then withered away, while state-centered approaches to international relations carried the day." Risse-Kappen, *supra*, at xi. For contemporaneous discussion of the question, see JAMES N. ROSENAU, THE STUDY OF GLOBAL INTERDEPENDENCE (1980); TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph J. Nye, Jr. eds., 1972); and Karl Kaiser, *Transnationale Politik*, in DIE ANACHRONISTISCHE SOUVERÄNITÄT (Ernst-Otto Czempiel ed., 1969).

122. See ROBERT O. KEOHANE & JOSEPH S. NYE, JR., POWER AND INTERDEPENDENCE 12-15 (1977); WORLD POLITICS AND INTERNATIONAL ECONOMICS (C. Fred Bergsten & Lawrence B. Krause eds., 1975).

international political economists developed "regime theory," the study of principles, norms, rules, and decisionmaking procedures that converge in given issue areas.¹²³ In so doing, they shifted the focus of inquiry from the functioning of international organizations per se to the broader phenomenon of international cooperation, as exemplified by the regimes of "international peacekeeping"¹²⁴ or "debt management" as they transpire both within and without institutional settings.

In one fell swoop, this analysis created new theoretical space for international law within international relations theory, as political scientists came to recognize that legal rules do, in fact, foster compliance with regime norms by providing channels for dispute-settlement, signaling and triggering retaliatory actions, and requiring states to furnish information regarding compliance. The major theoretical work on compliance in this era was done by political scientists Robert Keohane,¹²⁵ Robert Axelrod,¹²⁶ and Oran Young.¹²⁷ But as the Chayeses wryly note, what strikes an international lawyer reading this literature is the political scientists' persistent reluctance ever "to say the 'L-word,'" (law) even though "'principles, norms, rules and decision-making procedures' are what international law is all about."¹²⁸ Moreover, regime theorists chose to explain cooperation almost entirely in rationalistic terms: They understood compliance with international law to result almost entirely from the functional benefits such compliance provides.¹²⁹

The rationalists dominated international relations theory in the 1980s with their functionalist analysis of why nations obey international law. Yet in the

123. For the foundational text, see INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

124. Robert O. Keohane, Jr. & Joseph Nye, *Two Cheers for Multilateralism*, FOREIGN POL'Y, Fall 1985, at 148, 165.

125. See ROBERT O. KEOHANE, JR., AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); ROBERT O. KEOHANE, JR., INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY (1989) [hereinafter KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER].

126. See ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984); Robert M. Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986); see also MICHAEL TAYLOR, ANARCHY AND COOPERATION (1976); MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 166 (1987).

127. See ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979); ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994); Oran Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 160 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

128. CHAYES & CHAYES, *supra* note 4, at 303 n.3.

129. See, e.g., ROBERT O. KEOHANE, JR., *International Institutions: Two Approaches*, in KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER, *supra* note 125, at 158, 159. Keohane wrote:

International cooperation does not necessarily depend on altruism, idealism, personal honor, common purposes, internalized norms, or a shared belief in a set of values embedded in a culture. At various times and places any of these features of human motivation may indeed play an important role in processes of international cooperation, but cooperation can be understood without reference to any of them.

Id.; see also Hurrell, *supra* note 73, at 56 ("The core claim is that regimes are created and that states obey the rules embodied in them because of the functional benefits that they provide.").

United States, the study of legal process continued to dominate the study of international law.¹³⁰ Following the lead of Chayes, Ehrlich, and Lowenfeld, legal scholars began to eschew, as artificially constraining, the traditional public/private, domestic/international categories in favor of what Philip Jessup called "transnational law," defined to embrace "all law which regulates actions or events that transcend national frontiers" and including "[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories."¹³¹

In revising the Harvard casebook originally developed by Milton Katz and Kingman Brewster, Henry Steiner and Detlev Vagts chose to focus on "*Transnational Legal Problems*." The category expressly mixed public and private, domestic and international, and cut across issue areas ranging from international human rights, to trade, environment, international business transactions and the law of U.S. foreign policy.¹³² All transnational legal issues, they reasoned, "occupy different positions on a spectrum between the extremes of 'national' and 'international' law, or on one between 'private' and 'public' law," and can be analyzed in generic process terms.¹³³

The Steiner and Vagts casebook inaugurated what I now call the explicit study of *transnational legal process*: the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law.¹³⁴ What distinguished transnational legal process from its "international legal process" forebears was its focus on the transnational, normative, and constitutive character of global legal process. By focusing on transnational transactions, the

130. In the postwar years, the theoretical study of international relations became predominantly an "American social science." Stanley Hoffmann, *An American Social Science: International Relations*, 106 DAEDALUS 43 (1977). Similarly, an examination of the Collected Courses of the Hague Academy of International Law during these years reveals that European scholarship in international law throughout this period continued largely in the traditional, nontheoretical, doctrinal vein. International legal scholarship in other countries followed this doctrinal, Eurocentric pattern. Cf. Yasuaki Onuma, "Japanese International Law" in the Postwar Period—Perspectives on the Teaching and Research of International Law in Postwar Japan—, 33 JAPANESE ANN. INT'L L. 25, 44 (1990) ("[M]ost [postwar] Japanese scholars have shown little interest in methodology and the general theory of international law. They have basically followed the major trends of Western international lawyers (another example of [the] passivism of Japanese international law) . . ."). One exception came in the Third World, where "the McDougal and Lasswell framework has had more influence . . . than any other American jurisprudential perspective." Falk, *supra* note 88, at 1997.

131. PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956); see also Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 321 (1979) (stating that "public international law has been too rigid, too rule-orientated, and therefore too abstract, in part because it has been insulated from the more flexible, approach-orientated developments of private international law").

132. See HENRY STEINER & DETLEV VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (1968) (now HENRY STEINER, DETLEV VAGTS, & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS* (4th ed. 1994), updating KATZ & BREWSTER, *supra* note 96).

133. STEINER & VAGTS, *supra* note 132, at xvii.

134. See Koh, *supra* note 11, at 183–84.

approach was expressly nontraditional—cutting across historical private/public, domestic/international dichotomies—and nonstatist, inasmuch as the actors studied were not just, or even primarily, nation-states. By focusing on legal, as opposed to political or social, process, the approach examined the distinctiveness of law as a means of authority and social control. The approach emphasized law's normativity: how legal rules generated by interactions among transnational actors shape and guide future transnational interactions. By focusing less on particular substantive issue areas than on the transsubstantive continuities of process, the approach emphasized that transnational law is both dynamic—mutating from public to private, domestic to international and back again—and constitutive, in the sense of operating to reconstitute national interests.¹³⁵

Much of the writing in international law journals during the 1970s and 1980s embraced studies of incidents, cases, lawsuits, and institutional episodes that revealed the richness of transnational legal process.¹³⁶ Yet the only monograph to address the compliance question in transnational legal process terms was Roger Fisher's overlooked *Improving Compliance with International Law*.¹³⁷ Rejecting both the private/public, domestic/international distinctions, Fisher adopted an expressly transnational focus.¹³⁸ His argument recognized the importance to promoting compliance of regular institutional interaction,¹³⁹ norm interpretation,¹⁴⁰ and norm-internalization.¹⁴¹

135. See, e.g., Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451 (1995). For other examples, see Koh, *supra* note 11.

136. For some examples of this process tradition, see, for example, INTERNATIONAL INCIDENTS (W. Michael Reisman & Andrew R. Willard eds., 1988); Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519 (1991) (discussing enforcement of environmental law); Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 196–200 (1987) (discussing methodologies of international trade law); and sources cited *supra* notes 87–101.

137. ROGER FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* (1981).

138. Fisher explicitly disaggregated the concept of government. See *id.* at 17 (“[I]n seeking to influence a government, we are seeking to influence the official conduct of one or more human beings acting pursuant to institutional arrangements.”). He similarly rejected “a view of law which distinguishes sharply between domestic and international legal obligations.” *Id.* at 18; see also *id.* (“[T]he line between laws that are obeyed and laws that are broken does not correspond to the line between domestic law and international law.”).

139. Fisher distinguished between “first-order compliance”—encouraging respect for standing rules through deterrence against governments and individuals, rule drafting, reciprocity, and enlightened self-interest—and “second-order compliance,” coping with apparent noncompliance by creating fora where transnational players may interact, with the goal of obtaining and following up determinations that violations of international law have occurred. See *id.* at 29. His major procedural proposals promote second-order compliance, namely, compliance resulting from repeated interaction of transnational actors.

140. In examining such fora, he gave special attention to domestic institutions and domestic courts as appropriate fora for enunciating violations of international law norms. For other treatments of this issue, see RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964); KAPLAN & KATZENBACH, *supra* note 89, at 270; Thomas M. Franck, *International Law: Through National or International Courts?*, 8 VILL. L. REV. 139, 150 (1962–63); Friedrich Kratochwil, *The Role of Domestic Courts as Agencies of the International Legal Order*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 236 (Richard Falk et al. eds., 1985).

141. As Fisher explained:

If Fisher's book marked the Process School's answer to the rationalists, Thomas Franck's *The Power of Legitimacy Among Nations* supplied the answer from legal philosophy. These same years saw a resurgence of Kantianism across the breadth of Anglo-American jurisprudence, and with it, a revival of the Kantian philosophical tradition in both international relations¹⁴² and international law.¹⁴³ Applied to international relations, the turn to Kant called for "[a] commitment to a threefold set of rights": First, "freedom from arbitrary authority, often called 'negative freedom'"; second, "those rights necessary to protect and promote the capacity and opportunity for freedom, the 'positive freedoms'"; and "[a] third liberal right, democratic participation or representation, [as] necessary to guarantee the other two."¹⁴⁴ Applying these values, Franck's *Legitimacy* asked directly, "Why do powerful nations obey powerless rules?"¹⁴⁵ Explicitly adapting the theory and terminology of Ronald Dworkin, John Rawls, and Jürgen Habermas, Franck answered: "Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy."¹⁴⁶ He defined legitimacy as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."¹⁴⁷ Asserting that "legitimacy exerts a pull to compliance which is powered by the quality of the rule," Franck suggested four indicators of a norm's legitimacy: its rule-clarity or "determinacy"; its symbolic validation by rituals and other formalities; its

[O]ne of the best ways to increase initial respect by a government for the rules of international law is to weave those substantive rules into the fabric of the domestic law so that, in most cases, there is little or no difference between an international obligation and a domestic one. Similarly, in pursuing the objective of second-order compliance, it is desirable to make the maximum possible use of domestic procedures.

FISHER, *supra* note 137, at 212.

142. See, e.g., Doyle, *supra* note 46.

143. See, e.g., Tesón, *supra* note 45. In 1979, H.L.A. Hart wrote:

We are currently witnessing . . . the progress of a transition from a once widely accepted old faith that some form of utilitarianism . . . must capture the essence of political morality [to a] new faith[:] that the truth must lie not with a doctrine that takes the maximisation of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals . . .

H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 828 (1979).

144. Doyle, *supra* note 46, at 206-07; see also CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); Hurrell, *supra* note 45; Thomas Pogge, *Rawls and Global Justice*, 18 CAN. J. PHIL. 227 (1988); Williams & Booth, *supra* note 46. John Rawls's monumental *A Theory of Justice*, which led the Kantian revival, only briefly considered application of his general theory to the international realm. See JOHN RAWLS, *A THEORY OF JUSTICE* 377-81 (1971).

145. FRANCK, *supra* note 7, at 3. The book grew out of Franck's influential 1988 article, Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

146. FRANCK, *supra* note 7, at 25 (emphasis omitted).

147. *Id.* at 24 (emphasis omitted); see also *id.* at 16 (defining this audience to include "nations, international organizations, leadership elites, and, on occasion, multinational corporations and the global populace").

conceptual coherence; and its adherence to “right process,” or conformity with the “organized normative hierarchy” of the international rule system.¹⁴⁸

Predictably, Franck’s analysis attracted criticism from each of the other compliance schools. Functionalists like Robert Keohane argued that Franck’s effort to link “legitimacy” and compliance was essentially circular and begged the important causal question.¹⁴⁹ Other self-styled Kantians criticized Franck for exalting legitimacy over justice, and thereby constructing a principle “that sacrifices morality and the primacy of respect for individual autonomy in favor of procedural regularity.”¹⁵⁰

The fiercest critique came from the “New Stream” of international critical legal studies theorists, who rejected Franck’s claim of “compliance because of legitimacy” as just another version of neo-Kantian liberal positivism.¹⁵¹ By their own concession, very few New Stream scholars sought to address the compliance question Franck framed, in part because they viewed international law as indeterminate and thus found incoherent the notion of state behavior as “compliance” with indeterminate international law doctrines.¹⁵² By thus embracing the “law is powerless” position, the left-wing critical scholars of the legal academy made strange bedfellows with the right-wing political realists.¹⁵³

148. *See id.* at 26, 41–207. Franck analogized legitimate norms to social conventions or rules of a social club, “secular rule[s] supported by the perceived needs of society for an orderly, peaceful community.” *Id.* at 37.

149. *See* Robert O. Keohane, Jr., *International Relations and International Law: Two Optics* 9 (Sherrill Lecture, Yale Law School, transcript on file with author) (“[L]egitimacy’ is difficult to measure independently of the compliance that it is supposed to explain. . . . Franck describes a rule’s compliance ‘pull power’ as ‘its index of legitimacy.’ Yet legitimacy is said to explain ‘compliance pull,’ making the argument circular.”).

150. Tesón, *supra* note 45, at 95 (“By requiring that a legitimate norm satisfy the four part test of determinacy, symbolic validation, coherence, and adherence, Franck constructs his own principle of international justice that sacrifices morality and the primacy of respect for individual autonomy in favor of procedural regularity.”); *see also* Dencho Georgiev, Letter, 83 AM. J. INT’L L. 554, 555 (1989) (stating that Franck’s approach “runs the danger of equating legitimacy with effectiveness”).

151. Martti Koskenniemi, Book Review, 86 AM. J. INT’L L. 175, 177 (1992) (arguing that Franck’s view is born of the narrow, agnostic “justice of recent Anglo-American neo-Kantianism”); *see also* Berman, *supra* note 55; Anthony Carty, *Social Theory and the “Vanishing” of International Law: A Review Article*, 41 INT’L & COMP. L.Q. 939 (1992). *See generally* David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT’L L.J. 1 (1988) (describing New Stream as embracing “variety of critical projects being pursued in the field of international law”).

152. *See* Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT’L L.J. 81, 110 (1991) (“Very few CLS academics have attempted to address this [compliance] issue.”). Critical scholars have thus tended to focus more on the rhetorical structure of international law than on its causal impact. *But see id.* at 109–16 (attempting to explain international law’s authority in terms of its cultural self-validation).

153. *Compare* KENNAN, *supra* note 9, with Purvis, *supra* note 152, at 110 (explaining that nations do not obey international law, they only “[o]n occasion, . . . seem to act [as] if they actually were ‘complying’ with international law”). At the same time, the New Stream’s views conflicted with those of their similarly leftist and critical, “constructivist” counterparts in the international relations field, who reasoned that norms constitute the international game by determining who the actors are and what rules they must follow. *See* Ngaire Woods, *The Uses of Theory in the Study of International Relations*, in *EXPLAINING INTERNATIONAL RELATIONS SINCE 1945*, at 26–27 (Ngaire Woods ed., 1996). Like the New Stream, constructivists believe that “norms do not cause a state to act in a particular way, but rather provide reasons for a state to do so.” *Id.* At the same time, however, constructivists resemble the Kantians, inasmuch as they believe that “rules and norms are valid even if they fail to guide action in one or several cases.” FRIEDRICH V. KRATOCHWIL,

F. *After the Cold War: The New World Order*

The end of the Cold War and the ensuing collapse of bipolarity initiated the era of global law in which we now live. In the heady days after the Berlin Wall fell, the future seemed unusually bright for the new "New World Order." Democracy was breaking out all over.¹⁵⁴ Multilateralism and international law seemed resurgent with the United Nations's defeat of Saddam Hussein in Operation Desert Storm.¹⁵⁵ The Soviet Union did a remarkable about-face, first embracing international law,¹⁵⁶ then disintegrating, leaving the United States as "the world's indispensable nation."¹⁵⁷ The conclusion of the Uruguay Round of the GATT, the North American Free Trade Agreement (NAFTA), and the Maastricht Treaty all signalled new vitality for regional organization and trade liberalization.

But the euphoria faded, as reality dampened the possibilities for new global law.¹⁵⁸ As Communism collapsed, states fragmented, triggering violent waves of ethnic nationalism and brutal war and genocide in the former Yugoslavia. Regional organizations like NAFTA and the European Union and global regimes of trade and the environment faced difficult challenges brought on by the global recession. The dissolution of failed states like Somalia, Rwanda, and Haiti triggered refugee outflows that challenged compassion and vexed policymakers.¹⁵⁹

The post-Cold War era has seen international law, transnational actors, decisional fora, and modes of regulation mutate into fascinating hybrid forms. International law now comprises a complex blend of customary, positive,

RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 100 (1989). Constructivists accordingly place little value on the compliance question, because they reason that "[a]lthough norms and rules might function in certain contexts like causes, their influence on human action is not adequately captured in probabilistic statements about future conduct." *Id.* See generally text accompanying notes 179–80 (discussing constructivism).

154. See, e.g., BRUCE A. ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992).

155. No less an initial skeptic than President George Bush referred to "international law" six times in a single press conference responding to Saddam Hussein's invasion of Kuwait. See *Transcript of News Session by President Bush*, N.Y. TIMES, Aug. 23, 1990, at A16.

156. Speaking to the United Nations in 1988, Mikhail Gorbachev signaled this extraordinary turnabout by urging "the political, juridical and moral importance of the ancient Roman maxim: *Pacta sunt servanda*!—agreements must be honored," and noting that "[a]s the awareness of our common fate grows, every state would be genuinely interested in confining itself within the limits of international law." Mikhail Gorbachev, U.S.S.R. Arms Reduction: Rivalry into Sensible Competition (1988), translated in 55 VITAL SPEECHES OF THE DAY 233–34 (Feb. 1, 1989) (translation of speech delivered before United Nations).

157. *The Inauguration: Transcript of President Clinton's Second Inaugural Address to the Nation*, N.Y. TIMES, Jan. 21, 1997, at A14.

158. See Hoffmann, *supra* note 72, at 169 ("Sovereignty . . . self-government or democracy, national self-determination . . . and human rights . . . [became] norms in conflict and a source of complete liberal disarray.").

159. See generally GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* (1993); NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, *DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA* (1996).

declarative,¹⁶⁰ and "soft" law,¹⁶¹ which seeks not simply to ratify existing practice, but to elevate it. As sovereignty has declined in importance, global decisionmaking functions are now executed by a complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks.¹⁶² The system has become "neomonistic," with new channels opening for the interpenetration of international and domestic law through judicial decision, legislation and executive action.¹⁶³ New forms of dispute resolution,¹⁶⁴ executive action, administrative decisionmaking and enforcement, and legislation have emerged as part of a transnational legal process that influences national conduct, transforms national interests, and helps constitute and reconstitute national identities.¹⁶⁵

In the last five years, these developments have returned the compliance question to center stage in the journals of international theory. A significant number of international relations scholars have tackled pieces of the problem, particularly in the environmental and arms control areas.¹⁶⁶ International ethicists have continued to examine the question, usually from a Kantian/Rawlsian perspective.¹⁶⁷ A small but increasing number of international law scholars have come to explore compliance issues from an interdisciplinary perspective.¹⁶⁸ Among international law and relations

160. See Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991).

161. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414 (1983).

162. See, e.g., THE ROLE OF NON-GOVERNMENTAL ORGANIZATION IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (G. Castermans et al. eds., 1990); NGOS, THE UN, AND GLOBAL GOVERNANCE (Thomas G. Weiss & Leon Gordenker eds., 1996); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L BUS. L. 331 (1996); Jessica Matthews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50; Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-making Institutions*, WASH. Q., Winter 1994, at 18.

163. See generally STEINER, VAGTS, & KOH, *supra* note 132, at 514-994 (providing examples of this interpenetration).

164. See, e.g., Koh, *supra* note 23 (discussing "transnational public law litigation").

165. See Harold Hongju Koh, *Refugees, the Courts and the New World Order*, 1994 UTAH. L. REV. 999, 1014-18 (describing transnational legal process); Koh, *supra* note 11; Koh, *supra* note 23, at 2398-402, 2400 n.278.

166. See INSTITUTIONS FOR THE EARTH, *supra* note 2; INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 11-12 (Robert J. Beck et al. eds., 1996); RONALD B. MITCHELL, *INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE* ch. 2 (1994); YOUNG, *supra* note 2; Downs et al., *supra* note 2; John S. Duffield, *International Regimes and Alliance Behavior: Explaining NATO Conventional Force Levels*, 46 INT'L ORG. 819, 835 (1992); Gloria Duffy, *Conditions that Affect Arms Control Compliance*, in U.S.-SOVIET SECURITY COOPERATION (Alexander L. George et al. eds., 1988); Keohane, *supra* note 2.

167. See, e.g., CHRIS BROWN, *INTERNATIONAL RELATIONS THEORY, NEW NORMATIVE APPROACHES* (1992); Doyle, *supra* note 46; David R. Mapel & Terry Nardin, *Convergence and Divergence in International Ethics*, in *TRADITIONS OF INTERNATIONAL ETHICS*, *supra* note 9.

168. In addition to the Chayeses and Franck, legal scholars who have recently addressed these questions include Kenneth Abbott, Jose Alvarez, Richard Bilder, Michael Byers, Mark Janis, David Kennedy, Benedict Kingsbury, John Setear, Edwin Smith, Anne-Marie Slaughter, Phillip Trimble, and Edith Brown Weiss. See also JAMES CAMERON ET AL., *IMPROVING COMPLIANCE WITH INTERNATIONAL*

scholars interested in norms, much of the recent talk has been of interdisciplinary collaboration, with some even suggesting an emerging "joint discipline" to examine the compliance question and related issues.¹⁶⁹

The compliance literature has followed three distinct explanatory pathways, each having origins in one of the historical roots of compliance theory.¹⁷⁰ The first, not surprisingly, is a rationalistic instrumentalist strand that views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like.¹⁷¹ International relations scholars such as Robert Keohane, Duncan Snidal,¹⁷² and Oran Young, and legal scholars such as Kenneth Abbott¹⁷³ and John Setear,¹⁷⁴ have applied increasingly sophisticated techniques of rational choice theory to argue that nation-states obey international law when it serves their short or long term self-interest to do so. Under this rationalistic account, pitched at the level of the international system, nations employ cooperative strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy in a reiterated "prisoner's dilemma" game. While hard-core rationalists tend generally to embrace some

ENVIRONMENTAL LAW (1996); *Compliance with International Standards: Environmental Case Studies*, 89 AM. SOC'Y INT'L L. PROC. 206 (1995). One measure of the growing interest in these matters is that the theme of the 1997 Annual Meeting of the American Society of International Law was the implementation, compliance, and effectiveness of international law.

169. See, e.g., Kenneth W. Abbott, *Elements of a Joint Discipline, International Law and International Relations Theory: Building Bridges*, 86 AM. SOC'Y INT'L L. PROC. 167-68 (1992) (calling for "the study of organized international cooperation"); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 411 (1989) ("Modern IR theory could help international lawyers to expand the bounds of their discipline . . .") [hereinafter Abbott, *Modern International Relations Theory*]; Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Michael Byers, *Custom, Power, and the Power of Rules*, 17 MICH. J. INT'L L. 109, 180 (1995); Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549 (1991). For summaries of recent writings attempting to link theories of international institutions and international law, see Robert J. Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, in INTERNATIONAL RULES, *supra* note 166, at 3; and John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 142-47 (1996).

170. See *supra* text accompanying notes 47-61.

171. See Keohane, *supra* note 149, at 2 ("The 'instrumentalist optic' puts little weight on a major theme of students of international law: the impact that shared norms, and the processes by which those norms are interpreted, have on state policies.").

172. See, e.g., Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985); Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 226 (1985).

173. See, e.g., Abbott, *Modern International Relations Theory*, *supra* note 169, at 335; Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985) [hereinafter Abbott, *The Trading Nation's Dilemma*]; Kenneth W. Abbott, *'Trust but Verify': The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993) [hereinafter Abbott, *'Trust but Verify'*].

174. See, e.g., Setear, *supra* note 169 (arguing that law of treaties should encourage repeated interactions among nations to lead to international cooperation). But see Michael Byers, *Response, Taking the Law out of International Law: A Critique of the "Iterative Perspective"*, 38 HARV. INT'L L.J. 201, 203 (1997) (criticizing Setear's "reductionism").

variant of Henkin's "cynic's formula,"¹⁷⁵ the more sophisticated instrumentalists are willing to disaggregate the state into its component parts, to introduce international institutions and transnational actors, to incorporate notions of long-term self-interest, and to consider the issue within the context of massively iterated multiparty games.¹⁷⁶

A second explanatory pathway follows a Kantian, liberal vein. The Kantian thread divides into two identifiable strands: one based on Franck's notion of rule-legitimacy,¹⁷⁷ and another that makes more expansive claims for the causal role of national identity. "Liberal international relations" theorists, such as Andrew Moravcsik and Anne-Marie Slaughter, have argued that the determinative factor for whether nations obey can be found, not at a systemic level, but at the level of domestic structure. Under this view, compliance depends significantly on whether or not the state can be characterized as "liberal" in identity, that is, having a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. Flipping the now-familiar Kantian maxim that "democracies don't fight one another," these theorists posit that liberal democracies are more likely to "do law" with one another, while relations between liberal and illiberal states will more likely transpire in a zone of politics.¹⁷⁸

The third strand is a "constructivist" strand, based broadly on notions of both identity-formation and international society. Unlike interest theorists, who tend to treat state interests as given, "constructivists" have long argued that states and their interests are socially constructed by "commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse."¹⁷⁹ Rather than arguing that state actors and interests create rules

175. See, e.g., JOSEPH M. GRIECO, *COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE* (1990); Krasner, *supra* note 34; see also HENKIN, *supra* note 10.

176. See, e.g., Keohane, *supra* note 149, at 4 ("Subtler instrumentalist arguments recognize that rules, as part of the environment faced by a state, exert an impact on state behavior" because "they alter incentives, not merely for states conceived of as units but for interest groups, organizations, members of professional associations, and individual policymakers within governments.").

177. For a discussion of Franck's rule-legitimacy argument, see *supra* text accompanying notes 142-48; and *infra* Section II.B.

178. See, e.g., Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1920-21 (1992); Burley, *supra* note 169; Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter & Alec Stone, *Assessing the Effectiveness of International Adjudication*, 89 AM. SOC'Y INT'L L. PROC. 91, 91 (1995) (positing that "[l]iberal states will rely more heavily on legal rules—such as those established by treaties—to govern their relations, and they will more often rely on adjudication to resolve disputes, both intergovernmental and transnational"); Andrew Moravcsik, *Liberalism and International Relations Theory* (Center for Int'l Affairs, Harvard Univ., Working Paper No. 92-6, 1992).

179. FINNEMORE, *supra* note 54, at 15; see also INTERNATIONAL RULES, *supra* note 166, at 4-8; *supra* note 153. Leading constructivists include Friedrich Kratochwil, John Ruggie, Nicholas Onuf, Hayward Alker, Richard Ashley, Ernst Haas, and Alex Wendt. For samples of their work, see, for example, KRATOCHWIL, *supra* note 153; ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (forthcoming 1997); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994); and Alexander Wendt, *Constructing International Politics*, 20 INT'L SECURITY 71 (1995). For a recent, systematic treatment of norms from a constructivist perspective, see *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein ed., 1995).

and norms, constructivists argue that “[r]ules and norms *constitute* the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred.”¹⁸⁰ Thus constructivists see norms as playing a critical role in the formation of national identities.

The predominantly American constructivist school has close familial ties to the English “international society” school of Grotian heritage.¹⁸¹ Like the constructivists (and unlike sophisticated instrumentalists), the international society scholars see the norms, values, and social structure of international society as helping to form the identity of actors who operate within it. Nations thus obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance. In Andrew Hurrell’s words, “[a] good deal of the compliance pull of international rules derives from the relationship between individual rules and the broader pattern of international relations: states follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community.”¹⁸²

Each of these explanatory threads has significant persuasive power, and strongly complements the others. Yet my own view, elaborated in Part III below, is that none of these approaches provides a sufficiently “thick” theory of the role of international law in promoting compliance with shared global norms. The short answer to the question, “Why do nations obey international law?” is not simply: “interest”; “identity”; “identity-formation”; and/or “international society.” A complete answer must also account for the importance of *interaction* within the transnational legal process, *interpretation* of international norms, and domestic *internalization* of those norms as determinants of why nations obey. What is missing, in brief, is a modern version of the fourth historical strand of compliance theory—the strand based on *transnational legal process*.

Yet this claim, which is fleshed out below, begs two important questions. First, what is the current understanding of the process by which nations and other transnational actors promote compliance, and ultimately, obedience? Second, what determines the legitimacy of the norms that are internalized through this process? The Chayeses’ managerial approach and Franck’s fairness approach help answer these questions.

180. Woods, *supra* note 153, at 26.

181. Modern scholars working in this vein include Andrew Hurrell, John Vincent, Barry Buzan, Gerritt Gong, Richard Little, and Michael Donelan.

182. Hurrell, *supra* note 73, at 59.

II. MANAGERIAL AND FAIRNESS APPROACHES

Both the Chayeses and Franck seek to throw off the realist paradigm in an effort to explain what role international law plays in the post-Cold War world in which we now live. Their books are important landmarks in the compliance debate and in important ways culminate the process and philosophical traditions to which they are heir. Each chooses to view the compliance question through a single analytic filter: management and fairness, respectively. Yet like all lenses, these filters clarify at the same time as they distort, simplifying at the cost of oversimplification. What do they see and what do they miss?

A. *Compliance Without Enforcement: The Chayeses' Managerial Approach*

The New Sovereignty draws together the Chayeses' vast practical life experience, as well as numerous threads pursued throughout their extensive teaching and writing about the architecture of international regimes and patterns of treaty compliance in the arms control and environmental fields.¹⁸³ Deliberately both descriptive and prescriptive, the book seeks to describe how international regulation is accomplished through "treaty regimes." The authors set as their goal a concise explanation of why certain kinds of treaty regimes succeed where others fail in promoting compliance with treaty norms.

Their framing chapter posits that three factors—efficiency, national interest, and regime norms—foster a general propensity for nation-states to comply with treaty rules. Why, then, do nations deviate from those rules? The Chayeses explain such noncompliance as stemming from the ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their treaty undertakings, and what they call "the temporal dimension": avoidable and unavoidable time lags between a state's undertaking and its performance.¹⁸⁴

Yet given these impulses to noncompliance, how can deviance be contained within acceptable levels? The Chayeses derive and contrast two alternative strategies for promoting treaty compliance. They first develop an "enforcement" model, and after reviewing the various coercive devices available—treaty-based military and economic sanctions, membership, and

183. See, e.g., Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311 (1991); Antonia Handler Chayes & Abram Chayes, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, 4 INT'L SECURITY, Spring 1990, at 147; Abram Chayes & Antonia Handler Chayes, *Living Under a Treaty Regime: Compliance, Interpretation, and Adaptation*, in DEFENDING DETERRENCE: MANAGING THE ABM TREATY REGIME INTO THE 21ST CENTURY 197 (Antonia Handler Chayes & Paul Doty eds., 1989); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); see also sources cited *supra* notes 86, 94.

184. See CHAYES & CHAYES, *supra* note 4, at 15.

unilateral sanctions—conclude that it is usually doomed to failure.¹⁸⁵ They argue that “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.”¹⁸⁶ Repeated use of sanctions entails high costs to the sanctioner and can raise serious problems of legitimacy.¹⁸⁷

As an alternative, they offer a “management” model, whereby national actors seek to promote compliance not through coercion but, rather, through a cooperative model of compliance, which seeks to induce compliance through interactive processes of justification, discourse, and persuasion.¹⁸⁸ Sovereignty, they contend, no longer means freedom *from* external interference, but freedom *to* engage in international relations as members of international regimes.¹⁸⁹ “The New Sovereignty” thus comprises not territorial control or governmental autonomy, but “status—the vindication of the state’s existence as a member of the international system.”¹⁹⁰ Now, the impetus for compliance is not so much a nation’s fear of sanction, as it is fear of diminution of status through loss of reputation.¹⁹¹

185. *See id.* at 2–3 (arguing that political costs of imposing sanctions is high, therefore efforts to impose such sanctions will be intermittent and ad hoc, not systematic and even-handed, leading to deficiencies in legitimacy, for only weak states and not strong ones can be made to comply with their undertakings).

186. *Id.* at 32–33.

187. *See id.* at 54 (noting difficulty “of assembling and maintaining a coalition capable of and willing to apply forceful economic and military sanctions when costs and risks of intervention are high, results are uncertain, and impetus of American or other great-power leadership is lacking”). Treaty-based military and economic sanctions are almost never invoked, they find, for an organization’s decision actually to trigger a sanction may destroy the sanction if it fails to work. *See id.* at 85. Nor are membership sanctions often employed by international organizations because of the “membership dilemma”: Failure to sanction leaves the rogue member “in good standing while continuing to flout the regime,” while expulsion of an outlaw may leave it embarrassed but newly free to act without legal constraint. *See id.* at 74. Similarly, unilateral sanctions are employed infrequently and sporadically to redress violations of treaty obligations, and even when employed, rarely prove effective. *See id.* at 32.

188. *See id.* at 109–11.

189. Sovereignty, the Chayeses suggest, has nowadays become the residual category and international commitment the rule. “[W]hat we mean by the new sovereignty,” they conclude, is “that no single country, no matter how powerful, can consistently achieve its objectives through unilateral action or ad hoc coalition.” *Id.* at 123. This status is highly contingent upon a nation’s web of international ties and obligations. *Cf.* HART, *supra* note 71, at 305 (“Sovereignty is only a name given to so much of the international field as is left by law to the individual action of states.”).

190. CHAYES & CHAYES, *supra* note 4, at 27. They elaborate:

[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. . . . In today’s setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.

Id.

191. No state can blithely ignore international norms because “there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to other issues to be ignored.” *Id.* at 119. Furthermore, “in the last analysis, the ability of a state to remain a participant in the international policy-making process—and thus its status as a member of the international system—depends in some degree on its demonstrated willingness to accept and engage the regime’s compliance procedures.” *Id.* at 230.

Given the contingent nature of the new sovereignty, how precisely do treaty regimes “manage” state compliance with international law? Here the Chayeses display their policy science heritage by giving functional, not philosophical, answers. They repeatedly suggest that an “iterative process” of “justificatory discourse” among regime members—good old-fashioned “jawboning,” not sanctions—is the principal method of inducing compliance with regime norms.¹⁹² Much like Roger Fisher’s 1981 monograph,¹⁹³ the Chayeses close with a policymaker’s toolkit of devices designed to foster greater compliance with regime norms: “instruments of active management,” such as transparency, reporting and data collection, verification and monitoring, dispute settlement, capacity-building, and strategic review and assessment. With prudent use of these tools, they argue, nongovernmental and intergovernmental institutions can be revitalized as instruments of managing treaty compliance.

The Chayeses’ book is a classic refurbishment of international legal process. It is the most insightful and complete, transsubstantive description of the role of law in the international regulatory process currently available. It bristles with mini-case studies, cutting across the traditional realms of both private and public international law.¹⁹⁴

Yet for all of the book’s virtues, two questions linger. First, how, precisely, does a managerial approach to treaty compliance work? Second, what relevance, if any, does their managerial strategy have for the enforcement of the vast realm of customary, as opposed to treaty-based, international law?

The Chayeses’ managerial approach requires both a manager (the regime) and a process (the discourse).¹⁹⁵ The authors correctly reject the simplistic depiction of the regime as “a switching system, facilitating the independent interactions of independent states” in favor of “the active role of the regime in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the

192. *See id.* at 25.

193. *See supra* text accompanying notes 137–41.

194. Examples are drawn, *inter alia*, from use of force, economic sanctions, international trade, environmental law, maritime law, international transport and communications, human rights, nuclear nonproliferation, arms control, expropriation, international commodity agreements, labor, and sovereign debt reduction. The most interesting examples are drawn from the Chayeses’ rich experiential base as government and private lawyers participating in such incidents as the Cuban Missile Crisis, *see* CHAYES, *supra* note 86; the ABM Treaty controversy, *see* Abram Chayes & Antonia Handler Chayes, *Testing and Development of “Exotic” Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986); and before the International Court of Justice, *see Certain Expenses of the United Nations* (Advisory Opinion), 1962 I.C.J. 151 (July 20), in which Abram Chayes appeared as agent for the United States; and *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), in which Abram Chayes appeared as agent against the United States. *See also* Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

195. Or, as the Chayeses put it, a “discourse among states, international organizations, and, to some extent interested publics, elaborating the meaning of [treaty] norms.” CHAYES & CHAYES, *supra* note 4, at 110.

regime.”¹⁹⁶ The treaty regime manages an “interactive process for dealing with compliance” that proceeds in seven stages: (1) development of data about the situation and parties under regulation; (2) identification of behavior that raises significant compliance questions; (3) diagnosis of the sources of apparently deviant behavior; (4) examination of the noncomplying party’s capacity to carry out its obligations; (5) offers of technical assistance to redress any undercapacity; (6) the threat or invocation of dispute-settlement mechanisms; and (7) sometimes, the conclusion that the treaty norms themselves should be modified to accommodate the noncompliant conduct.¹⁹⁷

In so arguing, *The New Sovereignty* becomes strongly reminiscent of Abram Chayes’s classic article on domestic legal process, *The Role of the Judge in Public Law Litigation*.¹⁹⁸ There, Chayes the proceduralist argued that in the post-*Brown* era, domestic litigation had shifted from a retrospective, private law paradigm to a prospective, public law mode. Within the new paradigm, the judge sheds her passive and blinkered umpireal role in favor of an open-ended, managerial role, interpreting constitutive text, demanding and receiving information, declaring norms, and using broad supervisory equitable tools to persuade and prod the parties before her into legal compliance. The primary power of Chayes’s public law judge, like Richard Neustadt’s President,¹⁹⁹ is the power to persuade, with the formal powers of legal office serving as leverage points and bargaining chips in a discursive, norm-creating process. In *The New Sovereignty*, the Chayeses similarly contend that the treaty regime has assumed a managerial role with regard to the compliance of its member states. Like public law litigation and the judges who manage it, “[t]he [regulatory] treaty and the regime in which it is embedded are best seen not as a set of prohibitory norms, but as institutions for the management of an issue area over time.”²⁰⁰ In both cases, the key role of the overseer of the legal process—the judge in domestic litigation and the treaty regime in international regulation—is managing an interactive, dialectic process of justificatory discourse, in which norms are invoked, interpreted, and elaborated in a way that generates pressure for compliance.²⁰¹

196. *Id.* at 229.

197. *See generally id.* at 109–286.

198. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

199. *See* RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* (rev. ed. 1989) (noting factors driving compliance with presidential orders).

200. CHAYES & CHAYES, *supra* note 4, at 228.

201. *See id.* at 112 (“The essence of the international legal process is a dialectic that, by emphasizing assent at every stage, operates to generate pressure for compliance.”); *id.* at 123 (“The discursive elaboration and application of treaty norms is the heart of the compliance process.”); *id.* at 231 (stating that treaty process has evolved from “review and assessment of past discrete actions to the shaping of future plans, policies, and programs”). Indeed, the Chayeses even analogize the managerial process to a lawsuit, arguing that

the formal structure of the discourse [within the treaty regime] may be compared to that of a lawsuit, in which the claims and defenses of the parties are stated serially, exchanges of

While appealing on one level, the managerial model seems incomplete in four respects. First, by emphasizing the power of the managerial model and the weakness of the enforcement model, the Chayeses create the false impression that the two are alternatives. In fact, they strongly complement one another. The public law litigation model succeeds not just because the parties talk through the judge, but because the judge wields the power of ultimate sanction.²⁰² In treaty regimes, the managerial model similarly succeeds not just because of the power of discourse, but also because of the possibility of or “shadow of” sanctions, however remote that prospect might be.²⁰³ As I elaborate in Part III, a fuller picture is needed of the range of possible institutional *interaction* that can trigger discourse among the parties to a treaty regime, thus leading to norm-enunciation, settlement, compliance, and eventually obedience.

Second, the Chayeses suggest that the ultimate impetus for compliance comes from fear not of sanction, but of loss of reputation. But as they elsewhere recognize, this loss of reputation will not occur unless the noncomplying party defies a mutually accepted *interpretation* of the treaty norm.²⁰⁴ Indeed, a key function of the treaty regime is to serve as a definitive interpreter of regime norms.²⁰⁵ Much as the public law judge construes a statute, the regime interprets the treaty to see if a violation has occurred. Yet with respect to many norms of international law, in areas such as international human rights, the interpretive community that determines whether a norm has been violated is far larger than just the nation-states who are parties to the treaty.²⁰⁶ Take, for example, the global norm against

“pleadings” and pretrial procedures narrow and refine the issues, and the resulting framework limits both the scope of the argument and the range of relevant proof.

Id. at 122.

202. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 57 (1983) [hereinafter Cover, *Nomos and Narrative*] (explaining that “the interpretive acts of judges [are aligned] with the acts and interests of those who control the means of violence”); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986) [hereinafter Cover, *Violence and the Word*].

203. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (noting that prospect of judicial interpretation and enforcement hangs over domestic bargains and promotes settlement and compliance with legal norms).

204. See CHAYES & CHAYES, *supra* note 4, at 120 (noting that in treaty context, “[t]he parties have agreed in advance to the standards by which the conduct is to be judged: the text not only identifies relevant norms but also provides an authoritative formulation for them”).

205. See *id.* at 118 (suggesting that “interpretation, elaboration, application, and ultimately, enforcement of international rules is accomplished through a process of (mostly verbal) interchange among the interested parties”); *id.* at 123 (“The dynamic of justification is the search for a common understanding of the significance of the norm in the specific situation presented.”). Nor does a norm have any prospective power unless it is clearly enunciated and plausibly interpreted by a forum whose interpretation is entitled to political deference.

206. See Cover, *Nomos and Narrative*, *supra* note 202, at 45 (contending that in creation of legal meaning, interpretive “community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law”); Nadelmann, *supra* note 50, at 479–86 (describing how interpretive communities build “global prohibition regimes” which “amount to more than the sum of the unilateral acts, bilateral relationships and international conventions that constitute them”).

genocide. Although the state parties to the United Nations Convention on the subject (the treaty regime) may have authority to construe its words, that authority does not also give them exclusive authority definitively to interpret the contours of the broader norm. Other credible interpreters of the norms of genocide are domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities (such as the U.N. Security Council or the President of the United States); international publicists; and nongovernmental organizations.²⁰⁷ In short, the *norm's* "interpretive regime," that is, those who interpret and elaborate upon the meaning of the norm, often embraces a far larger and more complex group than those institutions and parties that comprise the treaty regime.²⁰⁸

Third, the Chayeses' process picture omits any detailed description of how the member states *internalize* the constraining norms. It says nothing about means such as judicial incorporation,²⁰⁹ legislative embodiment, or executive acceptance, by which a complying state will signal its internal acceptance of the relevant international standard. As the authors recognize, the process of treaty compliance must be understood as a two-level game, in which a member's relations with its treaty partners occur on an international chessboard, and its bargaining about compliance with its internal domestic

207. The norm against genocide, for example, is set forth in the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force for the United States, on Feb. 23, 1989) [hereinafter Genocide Convention]; but also has been implemented by the United States Congress in a statute, the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1994); been construed by a U.S. federal appellate court, *see* *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); been condemned by the U.N. General Assembly, *see* G.A. Res. 96 (I), U.N. GAOR, 1st Sess., pt. 2 at 188–89, U.N. Doc. A/64/Add.1 (1946); been the subject of U.N. Security Council Resolution 827, which established the International Criminal Tribunal for the Former Yugoslavia, *see* U.N. SCOR, 3217 mtg. at 1, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993); been the subject of a number of indictments and arrest warrants before that tribunal, *see* International Criminal Tribunal for the Former Yugoslavia: International Arrest Warrants and Orders for Surrender for Radovan Karadžić and Ratko Mladić (July 11, 1996), *reprinted in* 36 I.L.M. 92 (1997); been made the subject of an ongoing suit before the International Court of Justice, *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia & Montenegro)), 1993 I.C.J. 325 (Order of Sept. 13); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia & Montenegro)), 1993 I.C.J. 3 (Order of Apr. 8); and is the concern of numerous human rights organizations as well as the subject of massive examination by various official and quasi-official scholarly groups, *see, e.g.*, Draft Article 19 on State Responsibility provisionally adopted by the International Law Commission, 2 Y.B. INT'L L. COMM'N 32 (1980); 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 36, at § 702 reporter's note 3.

208. The Chayeses recognize this when they broadly define a treaty regime as "a hugely complex interactive process that engages not only states and their official representatives but also, increasingly, international organizations and their staffs, nongovernmental organizations, scientists, business managers, academics, and other nonstate actors, and that . . . penetrates deeply into domestic politics." CHAYES & CHAYES, *supra* note 4, at x.

209. Although the Chayeses are themselves experts on the nature and functioning of domestic courts, ironically, their discussion of the "instruments of active management" says nothing about the role that domestic courts—for example, those U.S. courts construing the Alien Tort Statute—can play as enforcers and internalizers of international norms. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that Paraguayan human rights victims may sue Paraguayan official under Alien Tort Statute, 28 U.S.C. § 1350, in U.S. court for civil damages arising from official torture).

constituencies transpires on a domestic chessboard.²¹⁰ Yet the Chayeses do not closely examine how the transnational legal link between the domestic and international levels operates, even though it is that very link that often determines the extent to which the “managerial process” of interstate bargaining at the global level will actually reshape the national interests and identities of the participants.²¹¹ As I elaborate below, a greater focus on internalization would have allowed the Chayeses to apply their procedural and managerial insights outside the realm of positive, treaty-based law to the vast and growing realm of customary and declarative international law.²¹²

Fourth and finally, by focusing so intensely on process, the Chayeses pass too lightly over the substance of the rules being enforced by the managerial process.²¹³ Yet all treaties are not created equal.²¹⁴ Nor is securing greater compliance with treaties always good per se. Indeed, securing compliance may even be undesirable if the treaties are themselves unfair or enshrine disingenuous or coercive bargains. Cognizant of this critique, the Chayeses concede that the “legitimacy” of their managerial approach depends on the procedural fairness, equal and nondiscriminatory application, and substantive fairness and equity of the rules being applied.²¹⁵ But what remains unspecified is precisely how the process should account for such fairness considerations. By what means can managerial processes be adjusted to improve compliance with underenforced treaties with which states may have low incentives to comply (for example, human rights treaties), and by what means should unfair or illegitimate regime norms be rendered unenforceable? It is on this linchpin of “fairness,” understood both as “legitimacy” and as distributive justice, that Franck’s book appropriately turns.

B. *Legitimacy and Distributive Justice: Franck’s Fairness Approach*

The question posed by Thomas Franck’s *magnum opus*, *Fairness in International Law and Institutions*, is not “Why do nations obey?” but “Is international law fair?”²¹⁶ Franck asks that question against a background assumption that nations have little incentive or obligation to obey rules that fail

210. See CHAYES & CHAYES, *supra* note 4, at 201–07.

211. Cf. Robert D. Putnam’s influential *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988). I am suggesting that the Chayeses could and should have devoted more analysis to the logic and interaction of two-level *legal*, as opposed to diplomatic and political, games.

212. See *infra* Part III.

213. This is the most common critique of process-based theories. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

214. States may have greater incentives to comply with some treaties, but greater obligations to comply with others, for example, those enforcing *jus cogens* norms.

215. They specifically acknowledge that “fairness considerations can hardly fail to play a major role in [the discursive] process.” CHAYES & CHAYES, *supra* note 4, at 127.

216. FRANCK, *supra* note 6, at 6.

his fairness criteria. In his universe, illegitimate rules have little "compliance pull."

Like *The New Sovereignty*, which grew out of the Chayeses' earlier work on international legal process, *Fairness* must also be read in light of its intellectual progenitor, Franck's influential *The Power of Legitimacy Among Nations*.²¹⁷ Like the Chayeses, Franck emphasizes the transformation of international law since World War II, which has accompanied the transformation of sovereignty.²¹⁸ Yet unlike the Chayeses, Franck does not restrict his gaze to treaty-based law, reviewing as well the power of customary rules.²¹⁹ Because international law has entered its "post-ontological age," Franck optimistically asserts, we no longer must defend its existence and can afford to look to its content to evaluate whether existing rules of law are effective, enforceable, understood, and fair.²²⁰ Although the core of Franck's answer remains Kantian liberalism, his argument draws eclectically upon each of the dominant historical strands of compliance reasoning.

Like the rationalists, Franck acknowledges that nations obey rules when the benefits of complying exceed the costs. But like international society theorists, he sees a transnational actor's impulse to comply as deriving not from a multitude of cost-benefit calculations regarding particular rules, but as more broadly rooted in the solidaristic, "communitarian peer pressure" that nations feel as members of a club.²²¹ Moreover, like the constructivists, Franck accepts the power of norms to reshape national interests. Finally, like process theorists, Franck sees the legitimacy of rules as largely dependent upon state perceptions of whether they were promulgated in accord with accepted principles of fair process.²²² Like the Chayeses, Franck embraces what one might call "the discourse discourse," understanding international law more as a *process* than as a system of *rules*, whose fairness is determined by a "process of discourse, reasoning, and negotiation."²²³

217. FRANCK, *supra* note 7. Indeed, *Fairness's* opening and closing theoretical chapters draw directly from the analysis in *Legitimacy*.

218. See FRANCK, *supra* note 6, at 3 ("Sovereignty has historically been a factor greatly overrated in international relations."); *id.* at 4 (noting "concomitant opportunity and challenge: not only to assess the extent to which international law has modified 'sovereign' state behavior, but also to examine critically whether this advance represents genuine progress, and how 'progress' is to be measured").

219. As Franck has recently observed, the international system is "the progenitor of a vast amount of specialized law that has very little to do with the law of international organizations or the constitutional law of the global system." Thomas M. Franck, Book Review, 90 AM. J. INT'L L. 519, 519 (1996).

220. See FRANCK, *supra* note 6, at 6, 9 (arguing that new maturity and complexity of international law call for more thoroughgoing critique of its content and consequences); *id.* at 11 (noting that "moment is ripe for fairness discourse").

221. International "[o]bligation," he asserts, is "uniquely rooted in the notion of community." FRANCK, *supra* note 7, at 196; *id.* ("Nations, or those who govern them, recognize that the obligation to comply is owed by them to the community of states as the reciprocal of that community's validation of their nations' statehood."); cf. INTERNATIONAL RULES, *supra* note 166, at 21 n.10 (suggesting that Franck "arguably fits within the International Society approach").

222. See FRANCK, *supra* note 6, at 7.

223. *Id.* at 14. Franck acknowledges that "much of the attempt at interaction is discursive: an interlocutory process of exhortation, expiation, explanation, and exposition." *Id.* at 477; see also Franck,

Yet while the Chayeses volume is a quintessential exercise in applied legal process theory, Franck's book fundamentally represents applied Rawlsian philosophy, with occasional policy recommendations sprinkled throughout.²²⁴ The most controversial aspect of Franck's *Legitimacy* analysis came in his prior effort to deal with the issue of justice in international law. Responding to early critics, Franck's final chapter, entitled "Why Not Justice?," applied the methodology of Rawls' theory of justice to international law and concluded that justice among nations cannot be constructed by analogy to the Rawlsian original position.²²⁵ Legitimacy, not justice, he reasoned, should be the prime goal of an international rule system. "[L]egitimacy, which is about *process*, has its own morality," and is unlike "the moral order manifest in justice, because it is a belief in right *process* rather than in right (substantive) outcomes."²²⁶

Franck's "denial of justice" aroused considerable criticism, particularly from other Kantian analysts, who charged that he had privileged barren process values and the appearance of legitimacy over Rawls' own ideal of justice as fairness.²²⁷ In *Fairness*, Franck finally revisits the question, and takes a more adventurous course. Following *Legitimacy*, Franck isolates two aspects of fairness: his prior concept of legitimacy, or "right process" in the creation and enforcement of rules, and a substantive Rawlsian notion of distributive justice. These two aspects of fairness, he notes, are frequently in tension: The former favors the status quo, while the latter favors change. Franck then uses this bifocal concept of fairness as his analytical filter to unveil a large body of international law doctrine and institutions.

Franck examines the procedural and institutional structures of the United Nations, including the Secretary General, the role of the Security Council,²²⁸ and the International Court of Justice,²²⁹ under the rubric of procedural

supra note 219, at 519 ("Above all, this system . . . is a process.").

224. See, e.g., FRANCK, *supra* note 6, at 483–84 (recommending "modest proposal" to reform U.N. General Assembly into two-chamber forum in which one chamber is constituted as present, and the other is elected by proportional universal suffrage).

225. See FRANCK, *supra* note 7, at 208–46. The chapter is derived from Thomas M. Franck, *Is Justice Relevant to the International Legal System?*, 64 NOTRE DAME L. REV. 945 (1989); and Thomas M. Franck & Steven W. Hawkins, *Justice in the International System*, 10 MICH. J. INT'L L. 127 (1989).

226. FRANCK, *supra* note 7, at 288 n.545. Franck reasoned that the Rawlsian analysis sensibly applies only to persons, not states. See *id.* at 233. The existence of different values and radically different conceptions of right, he concluded, made it imperative to postpone considerations of justice, and to establish the "lexical priority of legitimacy over justice." *Id.* at 236; see also Franck & Hawkins, *supra* note 225, at 161 ("[L]egitimacy of a rule or principle does not necessarily ensure its justice, and conversely, the justice of a rule need not correlate with its degree of legitimacy.").

227. See, e.g., Tesón, *supra* note 45, at 93–99. Franck's earlier work was criticized for excluding considerations of justice from the definition of legitimacy. See Georgiev, *supra* note 150, at 555 (stating that Franck's approach "runs the danger of equating legitimacy with effectiveness").

228. Compare FRANCK, *supra* note 6, at ch. 9 ("Collective Security: Sharing Responsibility and Burdens"), with THOMAS M. FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT ch. 9 (1985).

229. For prior Franck work on the Permanent Court of the International Justice and the World Court, see THOMAS M. FRANCK, JUDGING THE WORLD COURT (1986) [hereinafter FRANCK, JUDGING THE WORLD COURT]; THOMAS M. FRANCK, THE STRUCTURE OF IMPARTIALITY: EXAMINING THE RIDDLE OF ONE LAW

fairness, in a manner resembling the generic process examination found in the Chayeses book. The substantive international law rules of equity, self-determination and territoriality, war and collective security, environmental law, trade and development, and international investment, by contrast, Franck presents and criticizes by reference to their effectiveness as agents of distributive justice.²³⁰

Like *The New Sovereignty*, *Fairness* shows a remarkable mastery of the divergent public and private fields of global law.²³¹ As one might expect from a synthetic treatise of this type, various chapters derive from earlier important work.²³² Despite undeniable defects,²³³ taken as a whole, Franck's volume admirably mirrors and complements the Chayeses' approach. Indeed, Franck displays depth precisely in the substantive issues that the Chayeses skirt and less rigor in the process area that is their forte. *Fairness* shows a striking shift and expansion in Franck's thinking—from legitimacy to fairness—in an effort to try to find an ever broader rubric through which to understand international rules. For if *Legitimacy* was fundamentally positivistic and process-oriented, focused on developing a test to assess the compliance pull of international norms as a function of their perceived procedural legitimacy, *Fairness* deliberately invokes Kant, Rawls, and Dworkin in an effort to tackle normative questions, and to hazard opinions on emerging substantive issues of distributive justice.

IN A FRAGMENTED WORLD (1968) [hereinafter FRANCK, THE STRUCTURE OF IMPARTIALITY].

230. FRANCK, *supra* note 6, at 351–473.

231. Franck was formerly Director of the United Nations Institute for Training and Research (UNITAR), served as counsel for Chad in the Libya-Chad case before the International Court of Justice, and is currently counsel for Bosnia in the Bosnia-Yugoslavia case before the International Court. As director of the Center for International Studies at New York University School of Law, Franck has organized regular seminars with United Nations officials on a wide range of substantive international law problems. In the same way as the Chayeses' volume reveals their practical background as U.S. government lawyers and policy officials, Franck's sharp observations about the strengths and weaknesses of the United Nations system evoke his past as a U.N. insider and advocate before the International Court of Justice.

232. For example, chapter 6 on the U.N. Secretary-General borrows from Thomas M. Franck, *The Good Offices Function of the U.N. Secretary-General*, in UNITED NATIONS, DIVIDED WORLD (Adam Roberts & Benedict Kingsbury eds., rev. ed. 1993); FRANCK, *supra* note 228, at ch. 7 ("The Secretary General Invents Himself"), *id.* at ch. 8 ("Filling the Void: Action by the Secretary General in the face of inaction by everyone else"). Chapter 10 on the International Court of Justice similarly draws on FRANCK, JUDGING THE WORLD COURT, *supra* note 229; and FRANCK, THE STRUCTURE OF IMPARTIALITY, *supra* note 229. Chapter 4 on the Democratic Entitlement draws on Franck's pathbreaking 1992 piece, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992), which places his work squarely in the tradition of Kant's *To Perpetual Peace*. See *supra* text accompanying notes 44–46.

233. *Fairness's* philosophical analysis at times borrows too heavily from the work of Franck's NYU colleague Ronald Dworkin. See FRANCK, *supra* note 6, at 45. It says relatively little, for example, about human rights, almost nothing about refugees and regionalism in international trade, and too little about emerging questions of ethnic conflict, all dominating features of the post-Cold War world. The last topic, however, is the focus of Franck's current research. See Thomas M. Franck, *Clan and Superclan Loyalty, Identity, and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996). Moreover, the Hague Academy "General Course" format creates inevitable stylistic awkwardness, as each chapter opens by briefly addressing the fairness theme before venturing off into a new and discrete doctrinal realm. One senses, accurately, that the core theory has been worked out elsewhere, and summarized at the start of each chapter as a necessary prologue to bring the slower students up to speed.

Unfortunately, for all the range and force of Franck's substantive discussion, his description of *why* a discursive process adds to the obligatory force of norms is even less well-specified than the Chayeses' account. Apart from the various fora created by the United Nations and its attendant institutions, Franck says little about the various modes of institutional *interaction* that lead to *interpretation* of norms in a post-ontological age. Although Franck, too, is a bona fide expert on the foreign relations law of the United States, and the role of domestic courts and other institutions in the transnational order,²³⁴ he also declines to illuminate here the mode by which international norms are *internalized* into, or otherwise interpenetrate, domestic legal systems.

"If a decision has been reached by a discursive synthesis of legitimacy and justice," Franck argues, "it is more likely to be implemented and less likely to be disobeyed."²³⁵ But why is this so? By what process does this "implementation" take place, and how does this "discursive synthesis" end up modifying the incentives and priorities of transnational actors? In the end, I believe, the missing causal element is neither management nor fairness, but transnational legal process.

III. TRANSNATIONAL LEGAL PROCESS

Despite their methodological differences, both Franck and the Chayeses ultimately reach the same intuitive answer to why nations obey. If our goal is better enforcement of global rules, they reason, voluntary obedience, not coerced compliance, must be the preferred enforcement mechanism.²³⁶ If nations internally "perceive" a rule to be fair, says Franck, they are more likely to obey it. If nations must regularly justify their actions to treaty partners in terms of treaty norms, suggest the Chayeses, it is more likely that those nations will "voluntarily" comply with those norms. Both analyses suggest that the key

234. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992); THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* (2d ed. 1993).

235. FRANCK, *supra* note 6, at 481.

236. Not surprisingly, this is also the conclusion reached by social psychologists who study why individuals obey the law. See, e.g., TYLER, *supra* note 13 (concluding, after extensive empirical study, that people comply with law not so much because they fear punishment as because they feel that legal authorities are legitimate); see also *id.* at 4 (urging authorities who seek to promote voluntary compliance with laws to apply "[a] normative perspective [which] leads to a focus on people's internalized norms of justice and obligation," rather than "an instrumental perspective [which] regards compliance as a form of behavior occurring in response to external factors"); cf. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 126 n.8 (1991) ("Whatever the origin of self-enforced moral rules, there is broad agreement that the overall system of social control must depend vitally on achieving cooperation through self-enforcement."); *id.* at 132 ("A person who has 'internalized' a social norm is by definition committed to self-enforcement of a rule . . ."); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 44 (1989) (arguing that primary system of social control is "first-party system of social control that would operate without external enforcers").

to better compliance is more *internalized* compliance, or what I have called *obedience*. But by what process does norm-internalization occur? How do we transform occasional or grudging compliance with global norms into habitual obedience?

As I have already suggested, such a process can be viewed as having three phases.²³⁷ One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.²³⁸

The Anti-Ballistic Missile Treaty Reinterpretation Debate represents one recent example of this phenomenon from United States foreign policy.²³⁹ To simplify a complex story, in 1972, the United States and the U.S.S.R. signed the bilateral Anti-Ballistic Missile Treaty (ABM Treaty), which expressly banned the development of space-based systems for the territorial defense of our country.²⁴⁰ Thirteen years later, in October 1985, the Reagan Administration proposed the Strategic Defense Initiative (SDI), popularly called "Star Wars," which amounted to a space-based antiballistic missile system for American territorial defense. To skirt the plain language of the

237. What follows is a necessarily sketchy view of my position, which will be fleshed out in much greater detail in my forthcoming book. That book will sketch a broader theory of compliance with international law, treating the various explanations described above as complementary, not competitive. The book will seek to specify: (1) what constitutes "compliance" with international law; (2) the various factors that influence compliance (such as level, magnitude, and complexity of interaction among actors, variety of actors and interests involved, receptivity of different societies to internalization of international norms, and so forth); (3) a causal mechanism (such as internalization and institutionalization of norms) whereby these factors will produce or fail to produce compliance in particular situations; and (4) predictions that follow if the theory is correct (for example, the form and content of the norms and actions that will emerge). The argument will necessarily span both a wide range of disciplines, including game theory, international relations theory, political economy, and sociological and anthropological theories of legal compliance; and a range of contextual settings, such as international trade, human rights, environment, arms control, and peacekeeping.

238. Upon examination, this process explanation comports with both the Chayeses' managerial approach and Franck's fairness approach. The "discursive process" to which the Chayeses refer is simply a multiply iterated version of the transactional approach I describe. Moreover, the parties to the transaction will typically view an internalized rule that emerges from such a process with the "internal" sense of fairness and legitimacy that Franck deems necessary for that rule to have "compliance pull."

239. The history of the debate is reviewed in Harold Hongju Koh, *The Treaty Power*, 43 U. MIAMI L. REV. 106 (1988).

240. For a detailed analysis of the text and purpose of the ABM treaty, see Chayes & Chayes, *supra* note 194.

ABM Treaty, the Reagan Administration proposed to “reinterpret” it to permit SDI, essentially amending the treaty without the consent of either the Senate or the Soviet Union. That decision triggered an eight-year battle in which numerous present and former government officials, including six former Secretaries of Defense and numerous key Senators (principally Sam Nunn, Chairman of the Senate Armed Services Committee),²⁴¹ rallied in support of the original treaty interpretation. One key player in the fight against the ABM treaty reinterpretation was Gerard C. Smith, the chief American negotiator at SALT I and principal negotiator of the ABM Treaty, who chaired the boards of two influential nongovernmental organizations, the Arms Control Association and the National Committee to Save the ABM Treaty.²⁴²

The ABM controversy raged in many fora: Senate hearings, debates over other arms control treaties, journal articles, and op-ed columns. In the end, Congress withheld appropriations from SDI tests that did not conform with the treaty; the Senate reported the ABM Treaty Interpretation Resolution, which reaffirmed its original understanding of the treaty; and in 1988 the Senate attached a condition to the Intermediate-Range Missile Treaty, which specified that the United States would interpret the treaty in accordance with the understanding shared by the President and the Senate at the time of advice and consent.²⁴³ In response, the Reagan and Bush Administrations maintained that their broad reinterpretation was “legally correct,” but announced that they would comply with the original understanding as a matter of “policy.” In 1993, the episode ended, when President Clinton repudiated the unilateral Reagan reinterpretation and announced that his administration would abide by the original ABM treaty interpretation.²⁴⁴

None of this legal dispute reached any court. Indeed, had one stopped tracing the process of the dispute in 1987, one might have concluded that the United States had violated the treaty and gotten away with it. But in the end, the ABM Treaty Reinterpretation Debate demonstrates how the world’s most

241. See 133 CONG. REC. S6809–31 (daily ed. May 20, 1987) (statement of Sen. Nunn).

242. For a personal account of Smith’s role, see GERARD C. SMITH, *DISARMING DIPLOMAT* 169–73 (1996).

243. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 43 (1990).

244. During a May 1993 hearing on the START II Treaty, the then-Chair of the Senate Foreign Relations Committee asked the Acting Director of the U.S. Arms Control and Disarmament Agency whether the Clinton Administration held the position that the narrow interpretation was the proper and legally correct interpretation of the ABM Treaty. In a written response for the record, the Acting Director sent the Chairman the following statement:

It is the position of the Clinton Administration that the “narrow” or “traditional” interpretation of the ABM Treaty is the correct interpretation and therefore that the ABM Treaty prohibits the development, testing, and deployment of sea-based, air-based, space-based, and mobile land-based ABM systems and components without regard to the technology utilized.

U.S. Arms Control and Disarmament Agency, *Traditional Interpretation of Antiballistic Missile Treaty Endorsed by Clinton Administration* (July 14, 1993) (press release, on file with author).

powerful nation, the United States, returned to compliance with international law.

Standing alone, neither interest, identity, or international society provides sufficient explanation for why the United States government obeyed the original ABM Treaty interpretation. Presumably, the U.S. national interest in deploying SDI remained roughly the same under either legal interpretation, as did the liberal identity of the American polity. If the response of international society, in the form of allies' and treaty partners' resistance to the reinterpretation, was not enough to block the reinterpretation in 1985, it is unclear why that resistance should have become overwhelming by 1993.

In my view, a transnational legal process explanation provides the missing link. Transnational actors such as a U.S. Senator (Sam Nunn), a private "norm entrepreneur" (Gerard Smith),²⁴⁵ and several nongovernmental organizations (the Arms Control Association and the National Committee to Save the ABM Treaty) formed an "epistemic community" to address the legal issue.²⁴⁶ That community mobilized elite and popular constituencies and provoked a series of interactions with the U.S. government in a variety of fora. They challenged the Administration's broad reinterpretation of the treaty norm with the original narrow interpretation in both public and private settings, and succeeded in internalizing the narrow interpretation into several legislative products. In the end, the executive branch responded by internalizing that interpretation into its own official policy statement. Thus, the episode proved normative (or to use Robert Cover's term, "jurisgenerative")²⁴⁷ and constitutive of U.S. national interests supporting the original ABM treaty interpretation.²⁴⁸ In this dynamic process, the episode established a precedent for the next debate over the antiballistic missile issue, which may arise again during the second Clinton term.²⁴⁹

245. See *supra* note 53 (defining this term).

246. Peter Haas has defined an epistemic community as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area." Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992). Haas's Introduction leads off a volume of ten articles that explore the role that various epistemic communities play in the making and coordination of international policy.

247. See Cover, *Nomos and Narrative*, *supra* note 202, at 40 (describing "jurisgenerative process" as one in which real interpretive "communities do create law and do give meaning to law through their narratives and precepts"); see also Cover, *Violence and the Word*, *supra* note 202, at 1602 n.2 (arguing that legal interpretation or "the creation of legal meaning is an essentially cultural activity which takes place (or best takes place) among smallish groups"); cf. Albert S. Yee, *The Causal Effects of Ideas on Policies*, 50 INT'L ORG. 69, 94-101 (1996) (making similar point with respect to intersubjective meanings of language among members of community).

248. For a fascinating parallel case study of how norm entrepreneurs and norms reconstituted U.S. interests with respect to South Africa, see Klotz, *supra* note 135, which states that "[t]ransnational anti-apartheid activists' extraordinary success in generating great power sanctions against South Africa offer ample evidence that norms, independent of material considerations, are an important factor in determining states' policies." *Id.* at 451.

249. During the last Congress, the Defense of America Act was introduced, which would once again have authorized Congress to select and deploy an antiballistic missile system. Through filibuster,

This example reveals that the various theoretical explanations offered for compliance are complementary, not mutually exclusive. In his classic statement of neorealism, *Man, the State and War*, Kenneth Waltz posited three levels of analysis, or "images," at which international relations could be explained: the international system (systemic); the state (domestic politics); and the individuals and groups who make up the state (psychological/bureaucratic).²⁵⁰ These images are not mutually exclusive, but sit atop one another like a layer cake; thus, interest and international society theorists seek to explain compliance primarily at the level of the international system, while identity theorists seek to explain it at the level of domestic political structure. Transnational legal process analysts, by contrast, seek to supplement these explanations with reasons for compliance that are found at a *transactional* level: *interaction*, *interpretation*, and *internalization* of international norms into domestic legal structures. While the interest, identity, and international society approaches all provide useful insights, none, jointly or severally, provides a sufficiently thick explanation of compliance with international obligations.

Instrumentalist interest theories, by specifying variables such as payoffs and costs of compliance, discount rates, and transactions costs, seek to reduce complex habits and patterns of compliance into a large reiterated game-theoretic, in which all societies are the same and decisionmakers respond only to sanctions, not norms.²⁵¹ The theory works best in such global issue areas as trade and arms control law, where nation-states remain the primary players,²⁵² but essentially misses the transnational revolution.²⁵³ Not surprisingly, interest theory has thus far shown relatively little explanatory power in such areas as human rights, environmental law, debt restructuring, or international commercial transactions, where nonstate actors abound, pursue multiple goals in complex nonzero-sum games, and interact repeatedly within

Democratic opponents prevented the bill from reaching the Senate floor, but it may yet resurface during the second Clinton term. See *Does America Need a Missile Defense?*, WALL ST. J. EUR., July 5, 1996, at 6 (detailing views of various defense experts debating the need for such system). Significantly, however, the debate has now shifted away from the question whether the ABM Treaty should be reinterpreted to whether the United States should withdraw from the treaty in order to deploy an ABM system, a mark of the jurisgenerative power of the earlier reinterpretation episode.

250. See KENNETH N. WALTZ, *MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS* (1959); see also *NEOREALISM AND ITS CRITICS* (Robert O. Keohane, Jr. ed., 1986) (exchanges between Waltz and his critics); Barry Buzan, *The Level of Analysis Problem in International Relations Reconsidered*, in *INTERNATIONAL RELATIONS THEORY TODAY* 198 (Ken Booth & Steve Smith eds., 1995); J. David Singer, *The Level-of-Analysis Problem in International Relations*, in *THE INTERNATIONAL SYSTEM: THEORETICAL ESSAYS* (Klaus Knorr & Sidney Verba eds., 1961).

251. See generally DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994) (enumerating limitations of rational choice school of political science).

252. See, e.g., Abbott, *The Trading Nation's Dilemma*, *supra* note 173 (international trade); Abbott, *'Trust but Verify'*, *supra* note 173 (arms control).

253. See Risse-Kappen, *supra* note 121, at 7 (arguing that domestic structures and international institutionalization interact in determining ability of transnational actors to effect policy change).

informal regimes.²⁵⁴

Similarly, "liberal" identity theory, in my view, has missed the *neomonist* revolution represented by both human rights and international commercial law. Its essentialist analysis treats a state's identity as somehow exogenously or permanently given. Yet as constructivist scholars have long recognized, national identities, like national interests, are socially constructed products of learning, knowledge, cultural practices, and ideology.²⁵⁵ Nations such as South Africa, Poland, Argentina, Chile, and the Czech Republic are neither permanently liberal nor illiberal, but make transitions back and forth from dictatorship to democracy, prodded by norms and regimes of international law.²⁵⁶ Identity analysis leaves unanswered the critical, constructivist question: To what extent does compliance with international law itself help *constitute the identity* of a state as a law-abiding state, and hence, as a "liberal" state?²⁵⁷ Furthermore, the notion that "only liberal states do law with one another" can be empirically falsified, particularly in areas such as international commercial law, where states tend to abide fastidiously by international rules without regard to whether they are representative democracies.²⁵⁸ Moreover, like the discredited "cultural relativist" argument in human rights,²⁵⁹ the claim that nonliberal states somehow do not participate in a zone of law denies the universalism of international law and effectively condones the confinement of nonliberal states to a realist world of power politics.

A constructivist, international society approach at least recognizes the positive transformational effects of repeated participation in the legal

254. See CHAYES & CHAYES, *supra* note 4, at 123 (noting new prominence on international agenda of "the environment and human rights—'third wave' issues that do not yield so readily to the calculus of power and interest, in contrast to 'first and second wave' preoccupation with physical and economic security").

255. See, e.g., THE CULTURE OF NATIONAL SECURITY, *supra* note 179; FINNEMORE, *supra* note 54; WENDT, *supra* note 179.

256. For numerous illustrations of how this occurs, see generally the case studies presented in THE INTERNATIONAL DIMENSIONS OF DEMOCRATIZATION: EUROPE AND THE AMERICAS (Laurence Whitehead ed., 1996).

257. See Klotz, *supra* note 135, at 478 ("Constructivist theory argues that global norms are part of the explanation for the definition of state and individual interests.").

258. An example is the uniform execution of transnational letters of credit around the world under the "new law merchant." See Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1620 (1995). He states:

The exporters and importers of the world, the shipowners of the world, the bankers of the world, the marine insurance underwriters of the world, and others associated with them . . . form a world community that, over the centuries, has made, and continues to make, the law by which their various types of transactions are governed.

Id.; see also Harold J. Berman & Felix J. Dasser, *The 'New' Law Merchant and the 'Old': Sources, Content and Legitimacy*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW MERCHANT LAW 21–36 (Thomas E. Carbonneau ed., 1990).

259. For materials on the human rights debate between universalism and cultural relativism, see generally HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 166 (1996); *East Asian Approaches to Human Rights*, 89 AM. SOC'Y INT'L L. PROC. 146–71 (1995); and STEINER, VAGTS, & KOH, *supra* note 132, at 366–91.

process.²⁶⁰ But it does not isolate, much less fully account for, the importance of process factors that arise, not merely from the *existence* of international community, but from countless iterated transactions within it. As governmental and nongovernmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically. To the extent that those norms are successfully internalized, they become future determinants of why nations obey. The international society theorists seem to recognize that this process occurs, but have given little close study to the "transmission belt," whereby norms created by international society infiltrate into *domestic* society.

These explanations can be used together as complementary conceptual lenses to give a richer explanation of why compliance with international law does or does not occur in particular cases. Take, for example, a recent episode in the evolving Middle East peace process: the signing of the 1997 Hebron disengagement agreement. As opposition leader of Israel's right-wing Likud party, Benjamin Netanyahu had pledged never to meet Palestinian Authority leader Yasser Arafat.²⁶¹ Netanyahu declared himself unalterably opposed to the extension of Palestinian sovereignty and ran for and won the Prime Ministership on a platform opposing any negotiation with the Palestinians.²⁶² In particular, he denounced as "failed" the so-called Oslo Accords, a series of peace agreements signed by the Labor government starting in 1993. Even after those accords were concluded, Netanyahu urged their abrogation and even led street protests against the signing of further Oslo agreements.²⁶³ Yet remarkably, as Prime Minister of Israel in January 1997, Netanyahu completed and implemented an agreement with Arafat and the Palestinian Authority called for by the Oslo accords: to redeploy Israeli troops from the Arab sections of the West Bank town of Hebron.²⁶⁴ Netanyahu's staunchest supporters ferociously condemned the redeployment and key members of his governing coalition resigned in protest.²⁶⁵ Yet under Netanyahu's leadership, a Likud-

260. See, e.g., Hurrell, *supra* note 73, at 59.

261. See Judith Colp Rubin, *Diverging Roads: Hard Line to Cross*, JERUSALEM POST, May 23, 1996, at 11 (stating that Netanyahu had "vowed never to meet with Palestinian Authority head Yasser Arafat, whom he branded as a murderer").

262. See Connie Bruck, *The Wounds of Peace*, NEW YORKER, Oct. 14, 1996, at 64.

263. See, e.g., Sarah Honig, *Netanyahu: Elections Are Referendum for Peace*, JERUSALEM POST, Mar. 20, 1996, at 1 (reporting Netanyahu speech to Likud central committee, in which he stated that "[t]he Oslo concept is what failed"); Sarah Honig, *Netanyahu: Likud Won't Honor Deals Since PLO Has Breached Agreement*, JERUSALEM POST, Jan. 4, 1994, at 1 (reporting Netanyahu statement that future Likud government would not honor Oslo); Herb Keiron & Liat Collins, *Zion Square Flooded with Oslo 2 Protesters*, JERUSALEM POST, Oct. 6, 1995, at 1 (reporting Netanyahu address to Jerusalem crowd of 30,000 protesters against Oslo II accord).

264. See Serge Schmemann, *Mideast Accord: The Overview; Netanyahu and Arafat Agree on Israeli Pullout in Hebron*, N.Y. TIMES, Jan. 15, 1997, at A1.

265. See Serge Schmemann, *Mideast Accord: The Implications; A Softening of the Hawk*, N.Y. TIMES, Jan. 15, 1997, at A1 (reporting remarks of Moshe Ben-Zevra, spokesman for Hebron Jewish settlers: "The agreement that was signed here today is a complete capitulation by Benjamin Netanyahu."). Science Minister Ze'ev Begin resigned from Netanyahu's cabinet immediately following the Cabinet's 11 to 7

led coalition of religious and nationalist conservatives acquiesced in a process that they had fiercely resisted for nearly four years.

Why did Israel choose to obey the Oslo accords? Interest, identity, and international society each provide parts of the explanation. Before becoming Prime Minister, Netanyahu had expressed his doubts as to whether continued extension of power to the Palestinian authority served any Israeli interest. Yet Oslo brought economic benefits to Israel in the form of foreign investment and improved relations with Europe and moderate Arab states.²⁶⁶ Once the Oslo process began, it came to involve other actors besides Israel and the Palestinians, most significantly the United States, Jordan, and Egypt. These countries developed strong expectations that Oslo provided the only framework within which peace could be achieved and greeted Netanyahu's early attempts to back away from Oslo with strong pressure and criticism.²⁶⁷ Thus, Israel's entry into an "international society," not just with the Palestinians, but with other nations committed to the peace process, helped to reshape and reconstitute its national interests.²⁶⁸

Once this interest-shaping process began, the relative openness of Israel's liberal democratic society created multiple channels to spur it forward: through public opinion, the news media, and other mechanisms of public accountability faced daily by Netanyahu and his party.²⁶⁹ As important, the transnational

approval of the Hebron accord, charging that Netanyahu had "ced[ed] the historic 'Jewish homeland.'" David Makovsky & Jon Immanuel, *Knesset to Vote on Hebron Pact Today; Cabinet Passes Accord, Begin Quits*, JERUSALEM POST, Jan. 16, 1997, at 1. According to one commentator:

To say yes to Hebron, Mr. Netanyahu had to jettison 50 years of revisionist orthodoxy about the indivisibility of the Land of Israel. He had to renounce his own previous writings and speeches, to break ideologically with the father he venerates, to alienate the West Bank settlers who helped elect him and to infuriate many in his Likud Party.

Ze'ev Chafets, *Netanyahu Does the Politic Thing*, N.Y. TIMES, Jan. 19, 1997, § 4, at 15.

266. Bruck, *supra* note 262, at 84.

267. As one reporter noted,

Israel has much more to lose today than it did when it was a quasi-pariah state in the early '90s. In the wake of Oslo, it now has relations with a good portion of the Arab world, and therefore the risk of isolation and deterioration with unexpected consequences is much more evident.

David Makovsky, *Netanyahu's Road to Oslo*, JERUSALEM POST, Dec. 27, 1996, at 7. Another observed:

To Mr. Netanyahu's dismay, the Hebron issue all but paralyzed his Government. The tender ties with moderate Arab states froze, and feelers to Syria produced nothing. Relations with Europe worsened. The American Administration said nothing, but it left no doubt whom it held responsible for the heightening tensions.

Schmemmann, *supra* note 264.

268. See David Grossman, *Israel's Flight from Real Peace*, N.Y. TIMES, Sept. 28, 1996, at A23 ("The peace process has created another decisive fact. Israel has become a part of the Mideast, part of the region's political system, not just its military system.").

269. Thomas Friedman described Netanyahu's action as a response to democratic forces:

Mr. Netanyahu's willingness to withdraw from Hebron, in accordance with Oslo, is . . . the rational (but grudging) act of a politician who understands where the majority of his people want to go. Mr. Netanyahu knows that some 50 percent of Israelis, those on the left who voted Labor, already embrace Oslo and accept any Hebron deal. He knows another 25 percent—the security hawks to the right of center—voted for him because they wanted a better Oslo, with stronger security, and he's satisfied them.

Thomas L. Friedman, *Foreign Affairs: Half-Pregnant in Hebron*, N.Y. TIMES, Jan. 5, 1997, § 4, at 13; see also Thomas L. Friedman, *Foreign Affairs: What Hebron Tells Us*, N.Y. TIMES, Jan. 15, 1997, at A19

legal process set in motion under the Oslo accords called for and established a negotiation mechanism and structure that committed the parties to interact with each other repeatedly over many months.²⁷⁰ The repeated interaction of the parties against the shadow of the future *interpreted* the core norms of the Oslo accords, which came to frame the relationship between the parties. Israel and Palestine began repeatedly to invoke the terms of the accords against one another, and thus became further bound to obey the core interpretation.²⁷¹ A third step came when the Israeli Parliament (the Knesset) formally approved Oslo under the predecessor Rabin government, thereby legislatively internalizing the norms required under the Oslo agreement.²⁷² This legal internalization had the effect of making Oslo a *fait accompli*, dramatically raising the domestic costs of Netanyahu's noncompliance.²⁷³ These factors worked together to impel Netanyahu to sign the Hebron deal with Arafat, which forced the Likud party effectively to "take ownership" of Oslo. The Hebron deal made it even more difficult for Israel to attack frontally a process with which it had become so tightly enmeshed.²⁷⁴ In short, an interactive process linking state interest, national identity, international society and internalization worked to override the vehement political opposition that

[hereinafter Friedman, *What Hebron Tells Us*] ("When the Israeli silent majority felt that Mr. Peres was going too quickly and incautiously in [the peace process], it yanked him back, and when it felt Mr. Netanyahu was going too reluctantly into that test, it yanked him forward.").

270. Much of the significance of the Oslo agreements was a commitment by both Israel and the Palestinian Authority to resolve further issues (such as the Hebron pullout) at later dates. The Hebron deal itself specified a timetable for three more stages of Israel troop withdrawals from the rural areas of the West Bank, save for a yet-to-be-negotiated troop presence as necessitated by Israel's security. Most importantly, perhaps, Oslo committed both parties to "final status" talks beginning in 1997, with an ultimate goal of reaching agreement by 1999. See Serge Schmemmann, *Mideast Accord: The Overview; Netanyahu and Arafat Agree on Israeli Pullout in Hebron*, N.Y. TIMES, Jan. 15, 1997, at A1 (describing background of Hebron accords); *Middle East Accord; Looking Ahead: Two U.S. Documents*, N.Y. TIMES, Jan. 17, 1997, at A12 (describing future negotiations).

271. See, e.g., Evelyn Gordon, *Gov't: PA Charter Must Be Amended*, JERUSALEM POST, Jan. 27, 1997, at 12 (reporting Netanyahu government statement that PLO failure to amend its charter was a "gross violation of the Oslo accords"); David Makovsky & Jon Immanuel, *PM, Arafat Trade Accusations*, JERUSALEM POST, Nov. 29, 1996, at 1 ("Arafat has frequently called on the superpower sponsors who are signatories of the Oslo agreements to arbitrate in the Hebron dispute and has even threatened to take the case to the International Court in the Hague since he views the Oslo agreement as a document sanctioned by international law."); Serge Schmemmann, *Middle East Conflict: The Overview; Leaders of Israel and Palestinians Due in Washington*, N.Y. TIMES, Sept. 30, 1996, at A1 (noting Netanyahu's insistence on tighter security provisions in Hebron deal due to Palestinian violations of Oslo); Serge Schmemmann, *Tension in the Middle East: The Israelis; Netanyahu Reported Ready to Make Gesture to Palestinians*, N.Y. TIMES, Oct. 4, 1996, at A12 ("[W]e are insisting [Israel] implement accurately and honestly what has been agreed upon and what was signed.") (remarks of Yasser Arafat).

272. See David Makovsky & Jon Immanuel, *Knesset to Vote on Hebron Pact Today*, JERUSALEM POST, Jan. 16, 1997, at 1.

273. See Sarah Honig, *Netanyahu: We'll Continue Peace Process*, JERUSALEM POST, Apr. 22, 1996, at 12 (reporting Netanyahu's comments that he considered Oslo "a bad deal, though we cannot ignore the *faits accomplis* it has yielded").

274. See *One Battle Over, On to the Next*, ECONOMIST, Jan. 18, 1997, at 41 ("By concluding the [Hebron] agreement, Mr Netanyahu has enmeshed his government, his Likud party and himself in the Oslo peace process."); Friedman, *What Hebron Tells Us*, *supra* note 269, at A19 ("From here on, [Netanyahu] becomes an owner of Oslo . . .").

Netanyahu had initially voiced against Oslo.²⁷⁵ The episode shows the power of transnational legal process to promote interaction, generate and reinforce norms, and to embed those norms into domestic legal systems.

Process is not panacea, of course, and at this writing, the future of the Mideast peace process remains shaky.²⁷⁶ But even if the Oslo process ultimately collapses, the Hebron incident still illustrates how international norms and transnational process can permeate and influence domestic policy. As transnational actors interact, they create patterns of behavior that ripen into institutions, regimes, and transnational networks. Their interactions generate both general norms of external conduct (such as treaties) and specific interpretation of those norms in particular circumstances (such as the narrow interpretation of the ABM Treaty), which they in turn internalize into their domestic legal and political structures through executive action, legislation, and judicial decisions. Legal ideologies prevail among domestic decisionmakers and cause them to be affected by perceptions that their actions are, or will be seen as, unlawful. Domestic decisionmaking becomes "enmeshed" with international legal norms, as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes.²⁷⁷ Domestic institutions adopt symbolic structures, standard operating procedures, and other internal mechanisms to maintain habitual compliance with the internalized norms.²⁷⁸ These

275. See generally Robert S. Greenberger, *Netanyahu and Arafat Go from Antagonism to Working Together*, WALL ST. J., Feb. 14, 1997, at A1.

276. Shortly before this Review Essay went to press, Netanyahu and his cabinet voted to break ground on Har Homa, a controversial Israeli housing project in Arab East Jerusalem. While making it clear that he did not necessarily approve of Netanyahu's action, President Clinton vetoed a U.N. Security Council resolution condemning Israel for this act, even while a similar resolution passed the U.N. General Assembly by a vote of 130 to 2. Arafat called a conference of American, European, and Arab diplomats, but pointedly excluded the Israelis. Peace talks have been suspended, and Netanyahu himself just narrowly avoided indictment on a charge of corruption in the appointment of an Attorney General. It remains unclear whether the opposition Labor Party will attempt to bolster the sagging Netanyahu government in an effort to save the Oslo process. According to polls, 75% of all Israelis continue to support the peace process. Meanwhile, Netanyahu complained that he was "fed up with the idea that everything we do is a violation of the [Oslo] agreement, and everything the Palestinians say is in compliance." See Russell Watson & Joseph Contreras, *Bringing Up Bibi*, NEWSWEEK, Mar. 24, 1997, at 52. Yet by so saying, he only demonstrated how far he had moved from outside to inside the interpretive framework established by those agreements. Cf. Klotz, *supra* note 135, at 462 (using anti-apartheid example to show how "global norms can affect the reconstitution of interests directly through transnational processes, without interstate interaction or multilateral coercion"); Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INT'L ORG. 31 (1997) (demonstrating how norms changed domestic policy with respect to use of force during World War II). Although domestic and regional politics undeniably affect, and may even force the eventual dissolution of, the Oslo process, the micro-example of Netanyahu's participation in the Hebron agreement shows how transnational legal process can help explain compliance in a particular instance where other theoretical explanations appear inadequate.

277. See Robert O. Keohane, Jr., *Compliance with International Commitments: Politics Within a Framework of Law*, 86 AM. SOC. INT'L L. PROC. 176, 179 (1992) (discussing "institutional enmeshment," which "occurs when domestic decision making with respect to an international commitment is affected by the institutional arrangements established in the course of making or maintaining the commitment").

278. For treatment of this phenomenon, see generally the work of Lauren Edelman and her colleagues, cited *supra* note 13, and the work of Charles O'Reilly and his colleagues, cited *supra* note 3.

institutions become "carriers of history," and evolve in path-dependent routes that avoid conflict with the internalized norms.²⁷⁹

These institutional habits lead nations into default patterns of compliance. Thus, in Henkin's words, "almost all nations observe almost all principles of international law. . . almost all of the time."²⁸⁰ When a nation deviates from that pattern of presumptive compliance, frictions are created.²⁸¹ To avoid such frictions in a nation's continuing interactions, national leaders may shift over time from a policy of violation to one of compliance. It is through this transnational legal process, this repeated cycle of interaction, interpretation, and internalization, that international law acquires its "stickiness," that nation-states acquire their identity, and that nations come to "obey" international law out of perceived self-interest. In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society.

As I have described it, transnational legal process presents both a theoretical explanation of why nations obey and a plan of strategic action for prodding nations to obey. How, then, to study this process? Although a full account will require book-length interdisciplinary treatment, let me identify some basic inquiries, using international human rights as an example. In the human rights area, treaty regimes are notoriously weak, and national governments, for reasons of economics or *realpolitik*, are often hesitant to declare openly that another government engages in abuses.²⁸² In such an area, where enforcement mechanisms are weak, but core customary norms are clearly defined and often peremptory (*jus cogens*), the best compliance

279. See generally Sue E.S. Crawford & Elinor Ostrom, *A Grammar of Institutions*, 89 AM. POL. SCI. REV. 582, 582 (1995) (explaining that "institutions are enduring regularities of human action in situations structured by rules, norms, and shared strategies, . . . [which are] constituted and reconstituted by human interaction in frequently occurring or repetitive situations") (emphasis omitted); Paul A. David, *Why Are Institutions the 'Carriers of History'? : Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205 (1994); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (explaining path dependence).

280. See HENKIN, *supra* note 1, at 42.

281. Thus, when a developing nation defaults on a sovereign debt, for example, that activity impairs its ability to secure new lending. When a government denies the jurisdiction of the International Court of Justice in a suit in which it is a defendant, that decision impairs its ability to invoke the Court's jurisdiction as a plaintiff.

282. For that reason, in this area, neither Franck's fairness approach nor the Chayeses' managerial strategy had much compliance "bite." As the debacle in Bosnia shows, the mere fact that the NATO allies perceived the norm against genocide as "legitimate" does not ensure that they would seriously inconvenience themselves to apprehend or prosecute its perpetrators. Nor, as I have suggested above, did the existence of a treaty regime surrounding the Genocide Convention, *see supra* note 207, ensure that gross violators would be called to account by the Chayeses' managerial process of "discursive elaboration and application of treaty norms," CHAYES & CHAYES, *supra* note 4, at 123.

strategies may not be "horizontal" regime management strategies, but rather, vertical strategies of interaction, interpretation, and internalization.

If transnational actors obey international law as a result of repeated *interaction* with other actors in the transnational legal process, a first step is to empower more actors to participate. It is here that expanding the role of intergovernmental organizations, nongovernmental organizations, private business entities, and "transnational moral entrepreneurs" deserves careful study.²⁸³ How, for example, do international human rights "issue networks" and epistemic communities form among international and regional intergovernmental organizations, international and domestic NGOs on human rights, and private foundations?²⁸⁴ How do these networks intersect with the "International Human Rights Regime," namely, the global system of rules and implementation procedures centered in and around the United Nations; regional regimes in Europe, the Americas, Africa, Asia, and the Middle East; single-issue human rights regimes regarding workers' rights, racial discrimination, women's rights; and "global prohibition regimes" against slavery, torture, and the like?²⁸⁵ Within national governments and intergovernmental organizations, what role do lawyers and legal advisers play in ensuring that the government's policies conform to international legal standards and in prompting governmental agencies to take proactive stances toward human rights abuses?²⁸⁶

Second, if the goal of interaction is to produce *interpretation* of human rights norms, what fora are available for norm-enunciation and elaboration, both within and without existing human rights regimes? If dedicated fora do not already exist, how can existing fora be adapted for this purpose²⁸⁷ or new fora, such as the International Criminal Tribunal for Rwanda and the former Yugoslavia, be created?

Third, what are the best strategies for *internalization* of international human rights norms? One might distinguish among *social*, *political*, and *legal* internalization. Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it.²⁸⁸ Political internalization occurs when political elites accept an international norm, and

283. See *supra* notes 53–54.

284. See Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993).

285. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 205–28 (1989); Nadelmann, *supra* note 50.

286. See Antonio Cassese, *The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards*, 14 MICH. J. INT'L L. 121 (1992); Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 282 (1992) (calling lawyers "specialists in normative ordering").

287. Take, for example, bringing international human rights issues before the European Court of Justice. See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2417–19 (1991).

288. For example, consider the norm of global racial equality, discussed in Klotz, *supra* note 135; or in Israel, the norm of compliance with the Oslo Accords, discussed *supra* text accompanying notes 261–76.

adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three. The ABM Treaty controversy thus exemplified the incorporation of a norm (narrow treaty interpretation) into U.S. law and policy through the executive action of the President, acting through his delegate, the U.S. Arms Control and Disarmament Administration. Judicial internalization can occur when domestic litigation provokes judicial incorporation of human rights norms either implicitly, by construing existing statutes consistently with international human rights norms,²⁸⁹ or explicitly, through what I have elsewhere called "transnational public law litigation."²⁹⁰ Legislative internalization occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law²⁹¹ that officials of a noncomplying government must then obey as part of the domestic legal fabric.

The relationship among social, political, and legal internalization can be complex. In the Haitian refugee case,²⁹² for example, U.S. human rights advocates failed to achieve judicial internalization of an international treaty norm, but in tandem with the growing social outrage about the treatment of Haitian refugees, eventually achieved political internalization: a reversal of the Clinton Administration's policy with respect to Haiti.²⁹³ Similarly, beginning with *Filartiga v. Pena-Irala*,²⁹⁴ U.S. human rights litigators began to promote domestic judicial incorporation of the norm against torture in a manner that eventually helped push President Bush to ratify the U.N. Convention against Torture and Congress to enact the Torture Victim Protection Act of 1991.²⁹⁵

289. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."), discussed in Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990). For a discussion of the unsuccessful effort to embed the U.N. Refugee Convention's norm against extraterritorial *nonrefoulement* of refugees into judicial construction of the Immigration and Nationality Act through litigation on behalf of Haitian refugees, see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

290. See generally Koh, *supra* note 23 (discussing efforts of victims of human rights abuse to use "transnational public law litigation" in United States federal courts to enforce norms of international human rights law against their abusers). For an example of such litigation, see *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

291. The national constitutions of Ireland, the Netherlands, and Italy, for example, refer to the recognition of international legal principles as a broad policy goal, thereby requiring policymakers to take account of foreign policy guidelines deriving from international law. See CONST. art. 29, § 3 (Ir.); COST. [Constitution] art. 10 (Italy); GRW. NED. [Constitution] art. 90 (Neth.).

292. See *Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993).

293. See Koh, *supra* note 11 (discussing this process); see also Klotz, *supra* note 135 (discussing social, political, and eventually legal internalization of norm favoring global racial equality and sanctions against South Africa).

294. 630 F.2d 876 (2d Cir. 1980).

295. 106 Stat. 73 (1992) (codified at 28 U.S.C.A. § 1350 (West 1996)). See generally S. REP. NO. 102-249 (1991), reprinted in BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 255-69 (1996); H.R. REP. NO. 102-367 (1992), reprinted in 1992 U.S.C.C.A.N. 84-90. For discussions of internalization in other legal systems, see Eyal Benvenisti, *The*

In the United Kingdom, the issue of legislative internalization has similarly been brought to the fore by the first general election in five years, in which the opposition Labour party has promised, if elected, to incorporate the European Convention on Human Rights into U.K. law. This issue has been a major human rights issue in British politics since the Clement Attlee government first ratified the Convention in the early 1950s. Since then, the Convention has been internalized in part through judicial construction. Yet judicial refusal to recognize explicit incorporation has given new impetus to a political internalization movement that at this writing seems likely to bring about legal internalization of the European Convention into U.K. law by an act of Parliament.²⁹⁶

Thus, the concept of transnational legal process has important implications, not just for international relations theorists, but also for activists and political leaders. For activists, the constructive role of international law in the post-Cold War era will be greatly enhanced if nongovernmental organizations seek self-consciously to participate in, influence, and ultimately enforce transnational legal process by promoting the internalization of international norms into domestic law. Nor can political leaders sensibly make foreign policy in a world bounded by global rules without understanding how legislative, judicial and executive branches can and should incorporate international legal rules into their decisionmaking.²⁹⁷

Influence of International Human Rights Law on the Israeli Legal System: Present and Future, 28 ISRAEL L. REV. 136 (1994); Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of their State"*, 5 EUR. J. INT'L L. 423 (1994); Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451 (1994); Henry G. Schermers, *The Role of Domestic Courts in Effectuating International Law*, 3 LEIDEN J. INT'L L. 77 (1990); and Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427 (1994).

296. The debate over incorporation of the European Human Rights Convention is the subject of a voluminous literature. For a political history of the incorporation effort, see generally MICHAEL ZANDER, *A BILL OF RIGHTS?* (4th ed. 1997). For a comparative study, see ASPECTS OF INCORPORATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS INTO DOMESTIC LAW (J.P. Gardner ed., 1993); ANDREW Z. DRZEMCZEWSKI, *EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY* 177-87 (1983); and Jorg Polakiewicz & Valerie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law*, 12 HUM. RTS. J. 65-85, 125-42 (1991). For discussion of compliance without incorporation, see DAVID KINLEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COMPLIANCE WITHOUT INCORPORATION* (1993). See also 8 HALSBURY'S LAWS OF ENGLAND (4th ed. 1996) (including human rights law as part of constitutional law). For the latest in a long line of bills urging incorporation, see *Human Rights Bill*, 577 PARL. DEB., H.L. 1726 (1997). For arguments as to why the Convention should be incorporated, see generally HUMAN RIGHTS IN THE UNITED KINGDOM (Richard Gordon & Richard Wilmot-Smith eds., 1996); Hon. Sir John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?*, 1992 PUB. L. 59; Lord Lester, *The Mouse that Roared: The Human Rights Bill 1995*, 1995 PUB. L. 198; and Rt. Hon. Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights*, 1992 PUB. L. 397.

297. In my forthcoming book, I suggest such an internalization strategy for officials of the U.S. government. In particular, I specify policy proposals regarding compliance with international law that can be implemented by each of the branches of national government. I suggest, for example, that national legislatures should legislate with a presumption that statutes will apply extraterritorially, should ratify treaties with a presumption that they are self-executing, and should act affirmatively to incorporate various international human rights norms into domestic law (as, for example, many legislatures of the European

IV. CONCLUSION

"Why is it," Oran Young asked in 1992, "that an actor acquires and feels some sense of obligation to conform its behavior to the dictates or requirements of a regime or an institution? . . . I think that there are differences in being obligated to do something because of a moral reason, a normative reason and a legal reason."²⁹⁸ Although Young did not further specify, I would argue that these moral, normative, and legal reasons are in fact conjoined in the concept of *obedience*. A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system. Both Franck and the Chayeses, exemplars of the philosophical and process traditions, respectively, recognize that transnational actors are more likely to comply with international law when they accept its legitimacy through some internal process.

It was precisely this "internal acceptance" that H.L.A. Hart found to be missing when he denied that international law satisfied the concept of law. Yet in Hart's own terms, a transnational legal process of interaction, interpretation, and internalization of global norms can provide both the "secondary rules" and the "rules of recognition" that Hart found missing from the international legal order.²⁹⁹

This Review Essay has demonstrated that, far from being novel, domestic obedience to internalized global law has venerable historical roots and sound theoretical footing. Participation in transnational legal process creates a normative and constitutive dynamic. By interpreting global norms, and internalizing them into domestic law, that process leads to reconstruction of national interests, and eventually national identities. In a post-ontological age, characterized by the "new sovereignty," the richness of transnational legal process can provide the key to unlocking the ancient puzzle of why nations obey.

Union countries have done). Domestic courts should apply canons of interpretation that construe domestic statutes consistently with international law, specifically weigh international system concerns when balancing conflicts of jurisdiction, and develop federal common law rules to incorporate certain international procedural standards. Where appropriate, courts should employ international human rights norms to guide interpretation of domestic constitutional norms—for example, by using evolving international standards of "cruel and inhuman treatment" to help determine what constitutes "cruel and unusual punishment" for purposes of the Eighth Amendment. The executive branch should embed a mandate to comply or justify noncompliance with international legal norms within the legal advising apparatus of the national government (for example, the Legal Adviser's office at the State Department, the Office of Legal Counsel at the Department of Justice, and the General Counsel's Office of the National Security Council).

298. *International Law and International Relations Theory: Building Bridges*, 86 AM. SOC'Y INT'L L. PROC. 172, 175 (1992) (remarks of Oran R. Young).

299. See *supra* text accompanying note 71.