



Institute for International Law
and Justice

IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

Professors Benedict Kingsbury and Joseph Weiler
Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.
Thursdays 4.00pm-5.50pm

Provisional Semester Program - Attached Paper is shown in Bold

- January 17 – Jeremy Waldron, NYU Law School
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*
- January 24 - Catharine MacKinnon, University of Michigan Law School
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department
Topic: *Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School
Topic: *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*
- February 14 - Joseph Weiler, NYU Law School
Topic: *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century*
- February 21 - NO COLLOQUIUM
- February 28 - Sungjoon Cho, Chicago-Kent College of Law
Topic: *Constitutional Adjudication in the WTO*
- March 6 - Robert Howse, University of Michigan Law School
Topic: *Beyond Compliance: Rethinking Why International Law Really Matters*
(paper co-authored with Ruti Teitel)
- March 13 - Martti Koskenniemi, University of Helsinki/NYU Law School
Topic: *International Law and Raison D'état; Rethinking the Prehistory of International Law*

Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see iilj.org)

- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School
Topic: *The Argentine Crisis and Foreign Investors: A Glimpse into the Soul of the Foreign Investment Regime* (paper co-authored with Kathryn Khamsi)
- April 3 - Ryan Goodman, Harvard Law School**
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute
Topic: *Indicators in Global Governance*
NOTE: This session will meet in Furman Hall, Room 212
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

Program and papers available at: <http://iilj.org/courses/2008IILJColloquium.asp>

Dear IILJ Colloquium participants:

My paper contains excerpts of a book manuscript co-authored with Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, forthcoming).

In accord with the theme of the IILJ Colloquium, I wish to focus on the following:

Chapter 9: Domestic Legal Systems

Part 1. Incorporating Treaties as Federal Law

Part 2. Steering Judicial Borrowing of Foreign Law

Chapter 11: State Socialization and Compliance

I have included sections of earlier chapters (Introduction, Chapter 2, and Chapter 3) to lay the foundation for Chapters 9 & 11. Readers familiar with our general project or with an earlier article—Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke Law Journal* 621 (2004)—are advised to skip or skim the Introduction, Chapter 2, and Chapter 3.

I look forward to the discussion.

Ryan Goodman

INTRODUCTION

How, if at all, does international law influence state behavior? Of course, there are good reasons to think that like-minded states, at times, coordinate their response to common problems through international law. But, is there any good reason to contemplate a more ambitious role for international law in global politics? Might international law, under certain conditions, encourage meaningful changes in state behavior or even state preferences? Might law help promote a global cultural commitment to humane, effective governance? These are central questions for students and practitioners of international politics because the design of effective international legal regimes requires an understanding of how law influences states (and other relevant actors). That is, regime design choices in international law turn on empirical claims about how states behave and under what conditions their behavior changes. Addressing them requires nothing short of understanding the social forces that shape the behavior of states—whether rewards and penalties, reasoned arguments, or concerns about status might influence recalcitrant states.

In this book, we identify three specific mechanisms for influencing state practice: coercion, persuasion, and acculturation. We also describe the distinct, and sometimes competing, logic of each mechanism. Our approach helps produce a more complete explanation of the emergence of human rights regimes. It also helps to build effective global institutions and to prescribe strategies for various actors to exploit those institutions to promote human rights.

Optimal regime design, we contend, is impossible without identifying and analytically foregrounding the mechanisms of influence and their discrete characteristics. We consider in detail how these mechanisms of social influence might occasion a rethinking of fundamental regime design issues in international human rights law. We apply these insights to formal and informal aspects of the contemporary human rights regime including the structure of multilateral treaties, the role of transnational advocacy groups; and the domestic incorporation of global norms. Through a systematic evaluation of three formal design problems—conditional membership, precision of obligations, and enforcement methods—we elaborate an alternative way to conceive of regime design. We also consider some of the ways in which a richer theory of social influence might inform debates about how nongovernmental organizations might best promote international human rights norms, and how best to conceive the relationship between international and domestic law.

We maintain that acculturation is an overlooked, conceptually distinct social process through which state behavior is influenced; and the regime design recommendations issuing from this approach defy conventional wisdom in international human rights scholarship. Our analysis not only recommends reexamination of policy debates in human rights law; it also provides a conceptual framework within which the costs and benefits of various design principles and advocacy strategies might be assessed. Our aim is to improve the understanding of how norms operate in international society with a view to improving the capacity of legal institutions to promote respect for human rights.

The increasing exchange between international relations theory and international law illuminates some difficulties involved in regime design and offers some useful insights to resolve them. Inspired by the theoretical frameworks and empirical findings of international relations research, legal scholars have begun to develop empirically-oriented legal analyses of international human rights regimes. This groundbreaking “first

generation” of empirical international legal studies demonstrates that international law “matters.” Nevertheless, the existing literature does not adequately account for the regime design implications of this line of research. Regime design debates often turn on unexamined or undefended empirical assumptions about foundational matters such as the conditions under which external pressure can influence state behavior, which social or political forces are potentially effective, and the relationship between state preferences and material and ideational structure at the global level. Moreover, prevailing approaches to these problems are predicated on a thin and underspecified conception of the mechanisms for influencing state practice. What is needed is a “second generation” of empirical international legal studies aimed at clarifying the processes of law’s influence. This second generation, in our view, should generate concrete, empirically falsifiable propositions about the role of law in state preference formation and transformation.

First-generation scholarship in international human rights law, in our view, provides an indispensable but plainly incomplete framework. Prevailing approaches suggest that law changes human rights practices either by coercing states (and individuals) or by persuading states (and individuals) of the validity and legitimacy of human rights law. In our view, the former approach fails to grasp the complexity of the social environment within which states act, and the latter fails to account for many ways in which the diffusion of social and legal norms occurs. Indeed, a rich cluster of empirical studies in interdisciplinary scholarship documents particular processes that socialize states in the absence of coercion or persuasion. These studies conclude that the power of social influence can be harnessed even if: (1) collective action problems and political constraints that inhibit effective coercion are not overcome and (2) the complete internalization sought through persuasion is not achieved. We contend that this scholarship now requires a reexamination of the empirical foundations of human rights regimes.

Our aim is to provide a more complete conceptual framework by identifying a third mechanism by which international law might change state behavior—what we call *acculturation*. By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. More specifically, this mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self. Acculturation encompasses a number of micro-processes including mimicry, identification, and status maximization. The touchstone of this mechanism is that identification with a reference group generates varying degrees of cognitive and social pressures—real or imagined—to conform. We do not suggest that international legal scholarship has completely failed to identify aspects of this process. Rather, we maintain that the mechanism is underemphasized and poorly understood, and that it is often conflated (or even confused) with other constructivist mechanisms such as persuasion. Differentiating the mechanism of acculturation and specifying the micro-processes through which it operates are profoundly important, however, for addressing questions pertaining to the adoption of international legal norms. Indeed, each of the three mechanisms—coercion, persuasion, and acculturation—is likely to have distinct implications along a number of dimensions including the durability of norms, the rates and patterns of adoption, and the depth of compliance.

Additionally, we demonstrate how a close analysis of the characteristics and function of each mechanism matters for regime design. We link each of the three mechanisms of social influence to specific regime characteristics—identifying several ways in which identifying acculturation as distinct from the better-understood mechanisms of coercion and persuasion may occasion a rethinking of fundamental design problems in human

rights law. In short, we reverse engineer structural regime design principles from the salient characteristics of underlying social processes. We maintain that the regime design recommendations issuing from understanding the distinct role of acculturation defy conventional wisdom in international human rights scholarship. Without this understanding, several characteristics of international society will persistently frustrate regime design models that seek compliance with human rights law solely by coercing and persuading non-complying states.

Careful readers may argue that the best approach to regime design should incorporate elements of all three mechanisms. This argument reflects the view that the identified mechanisms reinforce each other through a dynamic relationship that is sacrificed when a regime emphasizes one mechanism to the exclusion of others. This is an important point, and it is almost certainly correct. However, the kind of analysis contemplated by this line of criticism (i.e., the development of an integrated theory of regime design accounting for each mechanism) first requires, in our view, identification and clear differentiation of these mechanisms. This conceptual clarification is a first step, which enables subsequent work aimed at identifying the conditions under which each of the mechanisms would predominate, potentially reinforcing or frustrating the operation of the others. Moreover, we think it useful to link specific mechanisms to concrete regime design problems. Doing so illustrates the design features suggested by each and further clarifies the conceptual commitments of each mechanism. Our analysis of regime design problems yields three models of human rights regimes—one built on each of the mechanisms. But we do not suggest that any regime does or should exhibit all of the features of a single mechanism.

PART I. A THEORY OF LAW'S INFLUENCE

Chapter 1

The Case for a Mechanism-based Theory

[Omitted for IILJ Colloquium]

Chapter 2

Three Mechanisms of Social Influence

We identify three distinct mechanisms of social influence that drive state behavior: coercion, persuasion, and acculturation. With respect to each mechanism, we detail its conceptual core, the social processes that propel it, and some of the evidence suggesting its presence.

Coercion refers to the process whereby target actors are influenced to change their behavior by the imposition of material costs or the conferral of material benefits. Coercion need not involve any change in the target actor's underlying preferences. Persuasion refers to the process whereby target actors are convinced of the truth, validity, or appropriateness of a norm, belief, or practice. That is, persuasion occurs when actors actively assess the *content* of a particular message—a norm, practice, or belief—and “change their minds.” Persuaded actors “internalize” new norms and rules of appropriate behavior and redefine their interests and identities accordingly. Acculturation is the process by which actors adopt the beliefs and behavioral patterns of the surrounding culture, without actively assessing either the merits of those beliefs and behaviors or the

material costs and benefits of conforming to them. Cognitive and social pressures drive acculturation. These pressures induce change because actors are motivated to minimize cognitive discomfort (such as dissonance); and social pressures induce change because actors are motivated to minimize social costs. This is not to say that actors calculate these cognitive and social costs in any precise way. Indeed, we suggest that actors hoard cognitive comfort and social legitimacy under certain conditions.

In describing these discrete modes of social influence, we draw on research in political science, economics, psychology and sociology. We also explain how our typology relates to and differs from similar typologies. The heart of this Chapter is the theoretical proposition that law potentially influences actors through acculturation—and that this influence differs importantly from the coercive or persuasive capacity of the law. In the existing human rights literature, acculturation has been largely overlooked, conflated with persuasion, or simply misunderstood. In this Chapter, we point out with some precision how acculturation differs from coercion and persuasion—as a conceptual and an empirical matter. We turn specifically to the study of these mechanisms at the individual and collective level. In the following chapters, we extend these lessons to the organization of states.

Coercion

The first and most obvious social mechanism is coercion—whereby states and institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through material rewards and punishments. Of course, coercion does not necessarily involve any change in the target actor's underlying preferences. For example, even if state A would prefer to continue practice X, it may discontinue the practice to avoid the sanctions threatened by states B, C, and D. Note that the coercive gesture of states B, C, and D would prove ineffective if state A perceived that the expected benefit of practice X exceeded the expected cost of the threatened sanctions. Take a more concrete example. The United States, under the Foreign Assistance Act, denies foreign assistance to states “engag[ing] in a consistent pattern of gross violations of internationally recognized human rights.” Any state refused assistance on this basis is thereby coerced to alter its behavior. Under the logic of coercion, states and institutions change the behavior of other states not by reorienting their preferences but by changing the cost-benefit calculations of the target state. Also, although international institutions do not reconfigure state interests and preferences, they may, under certain conditions, constrain strategic choices by stabilizing mutual expectations about state behavior. Thus, even if international institutions do not further the coercive enterprise directly, they might define more clearly what counts as a cooperative move.¹ Coercion might then be deployed to target defections. Put simply, under a coercive approach, states change their behavior because they perceive it to be in their material interest to do so.

Theories suggesting the predominance of coercion build on more general theories about the character of international politics. Proponents of this school often contend that

¹ E.g., Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 51-55 (1984).

the material distribution of power among states essentially determines state behavior.² Normative and institutional developments thus reflect the interests of powerful states,³ and compliance with these norms is largely a function of powerful states' willingness to enforce them.⁴ Consistent with this view, international institutions facilitate state cooperation and coordination by reducing transaction costs and overcoming other collective action problems. This perspective is typically, though not exclusively, associated with "rationalist" or rational choice approaches to international relations. As we explain earlier, however, coercion plays an important role in constructivist models of state behavior as well.⁵

Persuasion

What is persuasion and how might it apply in a transnational context? Persuasion is a mechanism of social influence documented principally by psychologists and sociologists, and applied by others to the spread of norms across states.⁶ Persuasion theory suggests that the practices of actors are influenced through processes of social "learning" and other forms of information conveyance that occur in exchanges with transnational networks.⁷ Persuasion "requires argument and deliberation in an effort to change the minds of others."⁸ Persuaded actors "internalize" new norms and rules of appropriate behavior and redefine their interests and identities accordingly.⁹ Professor of social psychology Herbert Kelman describes a process of internalization that occurs with persuasion:

[A]n individual accepts influence because [of] the content of the induced behavior—the ideas and actions of which it is composed. . . . He adopts the induced behavior because it is congruent with his value system. He may consider it useful for the solution of a problem or find it congenial to his needs. Behavior adopted in this fashion tends to be integrated with the

² See generally Neorealism and Its Critics (Robert O. Keohane ed., 1986).

³ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (2001); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113, 1174-75 (1999); Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005).

⁴ Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in *Regime Theory and International Relations* 139, 165-67 (Volker Rittberger ed., 1993); A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 Colum. J. Transnat'l L. 45, 101-11 (1999).

⁵ See Chapter 1.

⁶ Rodger A. Payne, *Persuasion, Frames, and Norm Construction*, 7 EUR. J. INT'L REL. 37, 38 (2001) ("[P]ersuasion is considered the centrally important mechanism for constructing and reconstructing social facts."); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 51 (2002) ("[W]hen networks promote regulatory change, change occurs more through persuasion than command."); Thomas Risse, *Let's Argue!: Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

⁷ E.g., MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 141 (1996); KECK & SIKKINK; Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

⁸ Alastair Iain Johnston, *The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors*, in *LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS* 145, 153 (Daniel Drezner ed., 2003).

⁹ E.g., Jeffrey T. Checkel, *Norms, Institutions, and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 98-99 (1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2646 (1997).

individual's existing values. Thus the satisfaction derived from internalization is due to the *content* of the new behavior.¹⁰

The touchstone of the overall process is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice.¹¹ That is, persuasion occurs when actors actively assess the content of a particular message—a norm, practice, or belief—and “change their minds.”¹²

Consider two microprocesses through which the content of a message may succeed in changing a target actor's views: “framing” and “cuing.” In terms of the former, the persuasive appeal of a counterattitudinal message increases if the issue is structured to resonate with already accepted norms.¹³ This microprocess is especially important because it can help explain variation—when actors are likely to be persuaded and when not. Three factors appear to have a significant impact on frame resonance: centrality, experiential commensurability, and narrative fidelity.¹⁴ Centrality concerns how essential the beliefs, values, or ideas associated with a message are to the target.¹⁵ Experiential commensurability concerns the extent to which the message is congruent with the life and experiences of the target (or whether the message, instead, is too abstract and distant).¹⁶ Narrative fidelity concerns the extent to which the message accords with fundamental assumptions and ideologies already embedded in the target's social context.¹⁷ Importantly, variation along each of these three axes can affect whether a proposed norm, belief, or practice is accepted or rejected.

In addition to successful framing, persuasion may occur as a result of “cuing” target actors to “think harder” about the merits of a counter-attitudinal message. Cuing is based on the idea that the introduction of new information can prompt actors to “engage in a high intensity process of cognition, reflection, and argument.”¹⁸ Substantial empirical evidence suggests that actors often change their beliefs when, faced with new

¹⁰ Herbert C. Kelman, *Compliance, Emulation, and Internalization: Three Processes of Attitude Change*, 2 J. CONFL. RES. 51, 53 (1958); Herbert C. Kelman, *Interests, Relationships, Identities: Three Central Issues for Individuals and Groups in Negotiating Their Social Environment*, 57 Annual Review of Psychology 1-26 (2006).

¹¹ E.g., CARL IVER HOVLAND ET AL., *COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE* (1953)).

¹² E.g., Johnston.

¹³ E.g., KECK & SIKKINK, at 16–18; David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, in FROM STRUCTURE TO ACTION: COMPARING SOCIAL MOVEMENT RESEARCH ACROSS CULTURES 197 (Bert Klandermans et al. eds., 1988); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 467–75 (1986). Mayer N. Zald, ___, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS (Doug McAdam et al. eds., 1996).

¹⁴ Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 619-222 (2000).

¹⁵ Benford & Snow, at 621 (citing WK Carroll & RS Ratner, *Master Frames and Counter-hegemony: Political Sensibilities in Contemporary Social Movements*, 33 CAN. REV. SOCIOL. ANTHROPOL. 407 (1996); JH Evans, *Multi-Organizational Fields and Social Movement Organization Frame Content: The Religious Pro-Choice Movement*, 67 SOCIOL. INQ. 451 (1997)).

¹⁶ *Id.* at 621-22.

¹⁷ *Id.* at 622 (citing WR Fisher, *Narration as a Human Communication Paradigm: The Case of Public Moral Argument*, 51 COMMUN. MONOGR. 1 (1984)).

¹⁸ Johnston, at 496.

information, they systematically examine and defend their positions.¹⁹ Systematic assessment and “careful consideration of the merits of the arguments” are associated with changes in opinion that are more resistant to counter-persuasion and that are more likely to remain persistent over time.²⁰

Acculturation

An important mechanism of social influence is acculturation. In using the term acculturation, we intend to group together a set of related social processes identified by a growing interdisciplinary literature.²¹ Whereas persuasion emphasizes the *content* of a norm, acculturation emphasizes the *relationship* of the actor to a reference group or wider cultural environment. Professor Kelman usefully describes some of the processes that characterize this mechanism:

Identification can be said to occur when an individual accepts influence because he wants to establish or maintain a satisfying self-defining relationship to another person or a group. . . . The individual actually believes in the responses which he adopts through identification, but their specific content is more or less irrelevant. He adopts the induced behavior because it is associated with the desired relationship.²²

Accordingly, acculturation encompasses processes such as mimicry and status maximization. The general mechanism induces behavioral changes through pressures to conform.²³ Individual behavior (and community-level behavioral regularity) is in part a function of social structure—the relations between individual actors and some reference group. Actors are impelled to adopt the behavioral practices and attitudes of similar actors in their surrounding social environment.

The touchstone of acculturation is that varying degrees of identification with a reference group generate varying degrees of cognitive and social pressures—real or imagined—to conform. The operation of this mechanism is best understood by reference to well-documented individual-level phenomena. One of the central insights of social psychology is that individual behavior and cognition reflect substantial social influence. Actors, in an important sense, are influenced by their environment; indeed, this generalized influence is one important way that “culture” is transmitted and reproduced.

¹⁹ See ZIMBARDO & LEIPPE, at 192–97; Alexander Todorov, Shelly Chaiken, & Marlone D. Henderson, *The Heuristic-Systematic Model of Social Information Processing*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 195 (J. P. Dillard & M. Pfau, eds. 2002) [hereinafter THE PERSUASION HANDBOOK]; Steve Booth-Butterfield & Jennifer Welbourne, *The Elaboration Likelihood Model: Its Impact on Persuasion Theory and Research*, in THE PERSUASION HANDBOOK, *supra* at 155.

²⁰ Booth-Butterfield & Jennifer Welbourne, at 157; *cf. id.* at 167–68.

²¹ E.g., Elvin Hatch, *Theories of Social Honor*, 91 AM. ANTHROPOLOGIST 341 (1989); Johnston, *supra* note __, at 499–502; *see also* ROMANO HARRE, SOCIAL BEING: A THEORY FOR SOCIAL PSYCHOLOGY (1979).

²² Kelman, at 53.

²³ E.g., THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, at 1–38; W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS: STRUCTURAL COMPLEXITY AND INDIVIDUALISM 100–10 (1994); John W. Meyer & Brian Rowan, Institutionalized Organizations: Formal Structure as Myth and Ceremony, 83 Am. J. Soc. 340, 348–58 (1977); Lynne G. Zucker, Institutional Theories of Organization, 13 Ann. Rev. Soc. 443, 450–60 (1987); Lynne G. Zucker, The Role of Institutionalization in Cultural Persistence, 42 Am. Soc. Rev. 726, 730–41 (1977).

Although culture is typically understood as “learned behavior,” much of what actors absorb from their social environment is not simply “informational social influence.” Social influence is a rich process—one that also includes “normative social influence” whereby actors are impelled to adopt appropriate attitudes and behaviors. We explain here the cognitive and social aspects of normative social influence. We also identify evidence suggesting their presence and form. We do not intend to dwell on points that will strike many readers as obviously true. Our objective here is only to identify, with some conceptual precision, the salient general characteristics of the acculturation process.

First, acculturation is propelled by cognitive pressures. Actors in several respects are driven to conform. These internal pressures include (1) social-psychological costs of nonconformity (such as dissonance associated with conduct that is inconsistent with an actor’s identity or social roles),²⁴ and (2) social-psychological benefits of conforming to group norms and expectations (such as the “cognitive comfort” associated with both high social status²⁵ and membership in a perceived “in-group”²⁶). “Cognitive dissonance”—defined broadly as the discomfort caused by holding two or more inconsistent cognitions—is a useful example.²⁷ This phenomenon is part of a family of cognitive processes related to the basic human need to justify one’s actions to oneself and others.²⁸ Substantial empirical evidence demonstrates that individuals experience discomfort—including anxiety, regret, and guilt—whenever they confront cognitions about some aspect of their behavior inconsistent with their self-concept (including any social roles central to their identity).²⁹ Individuals are highly motivated to minimize this dissonance by either changing their behavior or finding ways to justify their past behavior.³⁰ Therefore, there are internal pressures driving actors to act and think in ways consistent with the social roles and expectations internalized by such actors. An implication of this pressure is that, once actors internalize some role (or any other identity formation), they are impelled to act and think in ways consistent with the highly legitimated purposes and attributes of that role.³¹ As a consequence, orthodoxy and social legitimacy are internalized as authoritative guides for human action.³²

²⁴ E.g., John C. Turner, *Rediscovering the Social Group: A Self-Categorization Theory* 68-69 (1987); Robert Axelrod, *Promoting Norms: An Evolutionary Approach to Norms*, in *The Complexity of Cooperation* 44, 55-57 (Robert Axelrod ed., 1997); Christopher Barnum, *A Reformulated Social Identity Theory*, 14 *Advances in Group Processes* 29 (1997).

²⁵ E.g., Robert H. Frank, *Choosing the Right Pond: Human Behavior and the Quest for Status* 31-33 (1985); see also Robert H. Frank, *Passions Within Reason: The Strategic Role of the Emotions* 71-95 (1988).

²⁶ E.g., Robert B. Cialdini, *Influence: The New Psychology of Modern Persuasion* 163-99 (1984).

²⁷ See generally Leon Festinger, *A Theory of Cognitive Dissonance* (1957); see also generally Elliot Aronson, *Dissonance, Hypocrisy, and the Self-Concept*, in *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology* 3, 3-19 (Eddie Harmon-Jones & Judson Mills eds., 1999).

²⁸ See Aronson et al., *supra* note 55, at 173-212.

²⁹ See *id.* at 174-76.

³⁰ E.g., Shelley E. Taylor, *Positive Illusions: Creative Self-Deception and the Healthy Mind* 123-33 (1989); Frederick X. Gibbons et al., *Cognitive Reactions to Smoking Relapse: The Reciprocal Relations Between Dissonance and Self Esteem*, 72 *J. Pers. & Soc. Psychol.* 184, 192 (1997).

³¹ E.g., E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, in *The Self in Social Psychology* 152-71 (Roy F. Baumeister ed., 1999); E. Tory Higgins, *The “Self Digest”: Self-Knowledge Serving Self Regulatory Functions*, 71 *J. Pers. & Soc. Psychol.* 1062, 1067-72 (1996); E. Tory Higgins & John A. Bargh, *Social Cognition and Social Perception*, 38 *Ann. Rev. Psychol.* 369, 382-87 (1987).

³² E.g., W. Richard Scott, *Institutions and Organizations* 124-28 (1995).

Second, acculturation is also propelled by social pressures—real or imagined pressures applied by a group. These pressures—which are no doubt more familiar to many readers—include (1) the imposition of social-psychological costs through shaming or shunning and (2) the conferral of social-psychological benefits through “back-patting” and other displays of public approval.³³ In short, actors hoard social legitimacy and social status, and they minimize social disapproval. Consider, for example, social-psychological studies of conformity. Substantial empirical evidence demonstrates that, in the face of real or perceived social pressure from a reference group, actors often change their behavior to conform to the behavioral patterns of the group.³⁴ Moreover, actors systematically conform (under the right conditions) even if the group is clearly wrong and even if there are strong incentives to be accurate.³⁵ Because this variant of acculturation results from external pressure, it often leads to public compliance with, but not private acceptance of, social norms.³⁶

Importantly, actors obviously do not always bow to social pressure. The well respected “social impact theory” provides one useful way to condense the empirical record into a small cluster of factors that determine the likelihood of success for social pressure. Social impact theory suggests that the likelihood of conformity turns on the strength, immediacy, and size of the group.³⁷ Each of these variables is positively correlated with effective social influence: (1) conformity with group norms becomes more likely as the importance of the group to the target actor increases (and as the importance of the issue to the group increases); (2) conformity increases as the target actor’s exposure to the group increases; and (3) conformity increases—up to a point—as the size of the reference group increases.³⁸

³³ E.g., Cialdini, *supra* note 61, at 23-27; Richard E. Petty et al., *Attitudes and Attitude Change*, 48 *Ann. Rev. Psych.* 609, 612-20 (1997). These microprocesses are well represented in the international law literature—though they are typically embedded in a coercion model of social influence. E.g., Risse & Sikkink, *supra* note 24, at 11-35.

³⁴ E.g., Aronson et al., *supra* note 55, at 250-97.

³⁵ E.g., Robert S. Baron et al., *The Forgotten Variable in Conformity Research: Impact of Task Importance on Social Influence*, 71 *J. Pers. & Soc. Psychol.* 915, 924 (1996).

³⁶ E.g., Aronson et al., *supra* note 55, at 264.

³⁷ E.g., Bibb Latané et al., *Measuring Emergent Social Phenomena: Dynamism, Polarization, and Clustering as Order Parameters of Social Systems*, 39 *Behav. Sci.* 1, 1-22 (1994); Bibb Latané, *The Psychology of Social Impact*, 36 *Am. Psychologist* 343, 343-54 (1981).

³⁸ This last point requires some clarification. The empirical record suggests that group size is positively correlated with social influence/conformity up to a certain point (typically from three to eight or so), but then the effect diminishes rapidly. In other words, going from two to three group members matters far more than going from twenty-two to twenty-three or ninety-two to ninety-three. See Aronson et al., *supra* note 55, at 275-77.

Three Mechanisms of Social Influence

	Coercion	Persuasion	Acculturation
Basis of Influence	Interest	Congruence with values	Social expectations Cultural identity
Behavioral Logic	Instrumentalism	Active assessment of the validity of a rule	Social role Social status Mimicry
Forms of Influence	Material rewards and punishment	Framing Cuing to think harder Convincing Teaching	Social rewards and punishment (shaming, shunning, back-patting) Cognitive costs and benefits (orthodoxy, dissonance)
Result	Compliance	Acceptance	Conformity

Chapter 3 **State Socialization?**

In this Chapter, we address the question whether socialization occurs in any meaningful sense on a global level—and whether there is any evidence suggesting that state policies and practices reflect global social influence. Because the evidence supporting global-level coercion and persuasion is well known and substantial, this Chapter emphasizes the evidence of acculturation on the global plane. In general, evidence of acculturation—much of it drawn from social psychology and cultural sociology—concerns the relationship between individuals and their immediate social setting. Does the acculturation process also apply to large-scale organizations—such as states—situated within a surrounding cultural environment? We argue that it does. Indeed, substantial interdisciplinary research documents that institutional environments influence, via acculturation processes, the goals and structure of formal organizations such as corporations, universities, and public hospitals. Such macro-level processes also shape the goals and structure of states and other globally legitimated organizational actors. We describe this burgeoning body of evidence highlighting the empirical findings that suggest acculturation—as opposed to persuasion or coercion—best accounts for the observed world-level patterns. In doing so, we synthesize dozens of empirical studies demonstrating the significance of acculturation in the diffusion of global norms, especially including international human rights norms.

We also supplement the existing research by exploring cases that can further illuminate surprising and significant effects of acculturation. First, we examine domains in which, according to conventional perspectives, acculturation is unlikely to operate: (1) the formulation of national security agendas and strategies (where leading theories suggest coercion predominates) and (2) the reliance on foreign law by judges in adjudicating constitutional cases (where leading theories suggest persuasion predominates). Second, we examine particular national institutions that governments establish, sometimes to accept and other times to resist, international pressure to conform to global norms. In particular, we study the advent of national human rights commissions and ombudsmen. We show how these institutions—in their structural forms and practices—are often the product of global processes of acculturation.

* * *

According to an array of sociological studies, acculturation processes can explain significant aspects of the structures and practices of complex organizations (such as civil service reforms and corporate management techniques). Under certain conditions, such organizations conform to expected behaviors that are legitimated in the wider institutional environment. In organizational sociology, theories of acculturation predict that socialization processes will press organizations toward increasing “isomorphism”—that is, structural similarity across organizations. As recent scholarship in this field explains, “[o]ne mechanism leading to institutional isomorphism is mimesis by organizations that purposively model themselves on other similar organizations (especially those regarded as superior or more successful) by adopting similar or identical decisions and structures.”³⁹ These theoretical models also predict that increasing homogenization will not reflect the functional task demands of organizations. Rather than correlating with local tasks, the structural attributes and goals of an organization will correlate with contemporaneous attributes and goals of other organizations. When institutional conditions are favorable for acculturation, the evidence suggests that the types of cognitive and social pressures identified in Chapter 2 will encourage compliance with social norms.

Drawing on existing empirical research, one can begin to specify empirical patterns suggesting that acculturation (rather than persuasion or coercion) explains the diffusion of a particular norm. The following list presents the type of empirical findings that indicate the influence of acculturation on the global plane. That is, the list points to evidence that can arbitrate between acculturation and alternative theories of change. We subsequently turn to empirical cases of transnational diffusion that correspond with these factors. In other words, we use the list to argue, as a descriptive matter, for the significance of acculturation on state human rights policy and practices. Presenting a list serves prescriptive purposes as well. That is, this exercise sheds further light on how acculturation works. It accordingly identifies conditions and processes that efforts at institutional design might exploit to promote socialization.

³⁹ Francisco J. Granados, *Intertwined Cultural and Relational Environments of Organizations*, 83 SOCIAL FORCES 883, 885 (2005).

1. *Isomorphism across states*

Institutionalization presses organizations toward increasing isomorphism, that is, structural similarity. On the global level, the worldwide isomorphism of state organizational structures and formal policies could suggest the presence of world cultural processes and provide some evidence of how these processes work. Isomorphism, however, is not a sufficient indicator of acculturation. It may suffice when accompanied by particular forms of internal decoupling.

2. *Decoupling within states*

Decoupling involves the adoption by a state of organizational structures and formal policies that are disconnected from internal functional demands and implementation.⁴⁰ A worldwide configuration indicating acculturation is (i) extensive structural isomorphism across states alongside (ii) variations in national resources, social histories, and economic development within states. In other words, an important factor is whether states adopt similar policies or organizational structures despite enormous differences in functional needs and national interests.

Such empirical patterns undermine alternative accounts of state practice including persuasion-based accounts of transnational influence and more general social construction theories that posit “bottom-up” social change. For instance, the twin finding—structural isomorphism and internal decoupling—discredits theories that expect the timing and rate of adoption of a norm to be nationally patterned. According to a persuasion account, adoption of a governmental policy or structural design choice should correlate with local (economic, social, political) conditions. That is, actors should pursue a course of action if it is congruent with prevailing local values and functional interests. Additionally, the persuasion theory would expect *tight coupling*, at least over the course of time. That is, a close correlation with national conditions is expected because the adopted practice presumably serves and will be integrated with existing values and functional needs. Hence, nations should tailor an available model to meet their particular or idiosyncratic interests (including the interests of locally dominant political and social groups). Patterns of significant decoupling defy those theoretical expectations.

An alternative explanation to acculturation might also postulate that isomorphism reflects parallel but independent developments within different states. On this view, isomorphism in legal institutions might result from “the fact that in resolving a pervasive or perhaps universal problem several legal systems, independently of each other, have reacted in similar fashion and have given legal recognition to the same human needs and aspirations.”⁴¹ This alternative explanation would be discredited by the existence of (i) cross-national adoption of a similar form in a generally contemporaneous or compressed time period (ii) despite the lack of a shared, universal, or pervasive problem. That pattern

⁴⁰ Meyer, et al., at 154-56; George M. Thomas, *Sociological Institutionalism and the Empirical Study of World Society*, in *Observing International Relations: Niklas Luhmann and World Politics* 72, 73 (Mathias Albert & Lena Hilkermeier eds. 2004); cf. Filippo Carlo Wezel & Ayse Saka-Helmhout, *Antecedents and Consequences of Organizational Change: “Institutionalizing” the Behavior Theory of the Firm*, 27 *Organization Studies*, 265-86, 269 (2006).

⁴¹ Schlesinger, et al. at 37.

would mean states have *en masse* extended “legal recognition to the same human needs and aspirations” despite diverse internal conditions, i.e., in the face of different social, economic, and cultural concerns. Put another way, the alternative explanation to acculturation suggests that as states proceed through a particular stage (e.g., economic development or urbanization) their formal structures will change accordingly. After different states pass a similar stage, their formal systems should be expected to resemble one another. Such an explanation is accordingly undermined if it can be shown that states adopt the same formal structures around the same time in world history while at vastly different stages of internal development.

In a similar vein, it is important to underscore the significance of *persistent* decoupling: the endurance of an adopted practice despite its inefficiency in meeting local needs.⁴² It is fair to assume that state actors engage in dynamic learning over time. On that assumption, states should modify or jettison inefficient practices. The maintenance of such practices, however, can be explained if it serves goals other than internal efficiency. What might those goals be? According to sociological institutionalism, one objective of organizations is “social fitness,” which is measured in comparison with similar organizations in the wider institutional environment (in this case, other states). In other words, the persistence of an internally inefficient practice is consistent with the theory that “organizations are evaluated in terms of their ‘social fitness’ as well as their performance: legitimacy and accountability are as important as, if not more so than, reliability and efficiency.”⁴³ Evidence of isomorphism and *persistent* decoupling is accordingly consistent with the theory that state actors seek to attain legitimacy and, more generally, social fitness by doing what their peers (other states) do.⁴⁴

Patterns of persistent decoupling can also help sort between acculturation- and coercion-based explanations. In a situation regulated by coercion, international audiences are presumably interested in the satisfactory implementation of a norm. It is fair to assume that these actors also engage in dynamic learning over time. Accordingly, there is no convincing theory to explain why formal policy convergence without effective implementation on the ground would appease powerful states and institutions. In an environment characterized by decoupling at least the credibility of mimicking a global model would substantially degrade over time. In other words, external audiences should learn that formal mimicry is often disconnected from concrete change on the ground. Persistent decoupling thus suggests that isomorphic change is not driven by external coercion.

We discuss below other empirical patterns that can help distinguish between coercion and acculturation.

[Omitted for IILJ Colloquium]

* * *

In the remaining part of this Chapter, we discuss findings across numerous empirical

⁴² Cf. Alan Watson commentary in Schlesinger, et al. at 13-14.

⁴³ Doug McAdam & W. Richard Scott, *Organizations and Movements in Social Movements and Organization Theory* 8 (Gerald F. Davis, et al. eds., 2005).

⁴⁴ See Meyer et al., *World Society and the Nation State*, at 163.

studies suggesting that the global institutional environment shapes state behavior through processes of acculturation. States are highly legitimated actors in world society, and their formal structures and agendas (e.g., governmental ministries, policy commitments) derive substantially from institutionalized models promulgated at the global level.⁴⁵ Many of these studies generally proceed by collecting quantitative data for all available states over several decades and employing analytic techniques—including events history analysis, regression analysis, and process tracing—to test predictions of acculturation. The studies demonstrate that states imitate standardized models of structural organization in areas such as education,⁴⁶ market liberalization,⁴⁷ the environment,⁴⁸ arms control,⁴⁹ the laws of war,⁵⁰ science policy,⁵¹ and human rights.⁵² The extent of contemporaneous convergence in these issue areas is remarkable given the vast differences in technological, economic, and social conditions across states.⁵³ Indeed, the studies do not suggest that this structural isomorphism necessarily reflect actual practices or effects on the ground. The convergence (across states) is accompanied by substantial and persistent decoupling (within states): official purposes and formal structure are disconnected from functional demands. Rather than correlating with local task demands, structural attributes and official goals of the state correlate in important ways with attributes and goals of other states in the world.

With respect to human rights, extensive research identifies these patterns of diffusion in fundamental areas of governance including welfare and labor policy,⁵⁴ civil and

⁴⁵ E.g., Meyer et al.

⁴⁶ E.g., Evan Schofer & John W Meyer, *The Worldwide Expansion of Higher Education in the Twentieth Century*, 70 *American Sociological Review* 898 (2005).

⁴⁷ Witold J. Henisz, Mauro F. Guillén & Bennet A. Zelner, *The Worldwide Diffusion of Market-Oriented Infrastructure Reform*, 70 *American Sociological Review* 871, 886-88 (2005).

⁴⁸ David John Frank et al., *Environmentalism as a Global Institution*, 65 *Am. Soc. Rev.* 122, 122-26 (2000); David John Frank et al., *The Nation-State and the Natural Environment over the Twentieth Century*, 65 *Am. Soc. Rev.* 96, 100-03 (2000).

⁴⁹ E.g., Dana P. Eyre & Mark C. Suchman, *Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach*, in *The Culture of National Security: Norms and Identity in World Politics* 79, 86-87 (Peter J. Katzenstein ed., 1996); Strang ___.

⁵⁰ E.g., Martha Finnemore, *Rules of War and Wars of Rules: The International Red Cross and the Restraint of State Violence*, in *Constructing World Culture: International Nongovernmental Organizations Since 1875*, at 149 (John Boli & George M. Thomas eds., 1999).

⁵¹ *Science in the Modern World Polity: Institutionalization and Globalization* (Gili S. Drori, John W. Meyer, Francisco O. Ramirez, Evan Schofer, eds. 2003); Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 *Int'l Org.* 565 (1993).

⁵² E.g., Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 *AM. J. SOC.* 1373, 1378 (2005); Wade M. Cole, *Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966–1999*, 70 *American Sociological Review* 472-495 (2005).

⁵³ Meyer et al., at 144-45; David John Frank et al., *What Counts As History: A Cross-National and Longitudinal Study of University Curricula*, 44 *Comp. Educ. Rev.* 29, 31-32 (2000); Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 *Int'l Org.* 325, 338 (1996).

⁵⁴ Andrew Abbott & Stanley DeViney, *The Welfare State as Transnational Event: Evidence from Sequences of Policy Adoption*, 16 *Soc. Sci. Hist.* 245, 266 (1992); David Strang & Patricia Mei Yin Chang, *The International Labor Organization and the Welfare State: Institutional Effects on National Welfare Spending, 1960-80*, 47 *Int'l Org.* 235, 235 (1993); George M. Thomas & Pat Lauderdale, *State Authority and National Welfare Programs in the World System Context*, 3 *Soc. Forum* 383, 383 (1988).

political rights guarantees,⁵⁵ and public order maintenance.⁵⁶ ... [Omitted -- IILJ Colloquium]

PART II. APPLICATIONS: REGIME DESIGN

Chapter 7 Multilateral Organizations

Chapter 8 Transnational Rights Promotion Strategies

Chapter 9 Domestic Legal Systems

The incorporation of international and foreign law into domestic legal systems remains one of the most controversial and important areas of human rights law. In this Chapter, we discuss domestic regime designs that might facilitate the principled introduction of human rights norms into domestic law.

1. Incorporating Treaties as Federal Law

Many countries grapple with how to regulate the incorporation of international legal obligations in domestic law. International human rights law poses some of the most complex challenges in this respect. Constitutional approaches to incorporating international law are often predicated on empirical assumptions about the ways in which human rights practices emerge and diffuse across states and the capacity of supranational institutions to shape those developments. It is therefore important to interrogate those empirical assumptions with regard to specific domestic arrangements. One of the most important areas involves constitutional schemes regulating the incorporation of human rights treaties in federalist systems. Another area involves constitutional structures limiting the power of national authorities to accede to supranational organizations and obligations.

First, consider relationships between human rights agreements and federalism. Two of the most significant international developments in the past century have been globalization and the codification of international law through multilateral organizations. These developments have pressured federalist countries to make internal

⁵⁵ Francisco O. Ramirez et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990*, 62 *Am. Soc. Rev.* 735, 738-39 (1997); John Boli-Bennett & John W. Meyer, *The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970*, 43 *Am. Soc. Rev.* 797, 804 tbl.1 (1978). Darren Hawkins & Melissa Humes, *Human Rights and Domestic Violence*, 117 *Pol. Sci. Q.* 231, 235 (2002); John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970*, in *Institutional Structure: Constituting State, Society, and the Individual*, supra note 78, at 72-73; see also David John Frank & Elizabeth H. McEneaney, *The Individualization of Society and the Liberalization of State Policies on Same-Sex Sexual Relations, 1984-1995*, 77 *Soc. Forces* 911-12 (1999).

⁵⁶ Connie L. Mcneely, *Constructing the Nation-State: International Organization and Prescriptive Action 55-57* (1995); Meyer et al., supra note 78, at 158.

accommodations in order to participate as full members of the international community.⁵⁷ Most federal constitutional systems invest certain domains of law-making authority exclusively in subnational governments. The national constitution, however, permits the federal government to enact a treaty that encroaches upon traditional state or provincial authority while precluding such intrusions through ordinary federal legislative power.⁵⁸ In other words, the federal government can pass laws to implement a treaty in fields in which legislative competence otherwise rests with subnational governments.

As we describe shortly, human rights treaties are often considered suspect in this regard. Even though a general constitutional rule may assign human rights treaties the same domestic legal status as other treaties, that formal equality often rests on tenuous or controversial grounds. Accordingly, while a constitution might formally permit all treaties to trump state and provincial authority, special structural arrangements may be developed to regulate the acceptance or full incorporation of human rights agreements.

Treaty-based encroachments on subnational governments are generally justified on the ground that subjects concerning the intercourse among nations should not be left to the vagaries of local authorities. Collective action problems at the international level require coordination and cooperation of governments that are able to represent and commit (at the very least, formally) their countries as a whole. Hence, allegiance to traditional state and local power yields to the imperatives of international law-making. In highly influential remarks at the American Society of International Law, Charles Evan Hughes contended that state and local law are subordinated “in regard to the treaty-making power where concerns, which perhaps under former conditions had been entirely local, had become so related to international matters that an international regulation could not appropriately succeed without embracing local affairs as well.”⁵⁹ Hughes famously suggested that the treaty power should thus be subject to an implied limitation—the treaty power can be exercised only for matters of “international concern.”⁶⁰ According to Professor Louis Henkin, Hughes’ remarks constituted the “modern underpinnings” of the subsequent school of thought that would limit the treaty power.⁶¹

The implication of this line of thinking for human rights is unmistakable. First, the mere fact that two or more states enter a human rights treaty is not sufficient to classify such an agreement as a matter of “international concern” according to many commentators. All treaties would, by definition, satisfy such a “test.” The rationale for trumping state and local prerogatives, on this view, must be based on more substantive grounds than simply respecting a formal act of agreement among states. Second, human rights agreements are conventionally thought to diverge from traditional treaties because the improvement of rights practices in one country does not turn on the practices in another. That is, human rights do not involve a collective action problem at the international level requiring coordination or cooperation between nations. As a leading commentator explains, if the treaty power were limited to matters of international concern, “external” affairs, or reciprocal relationships, the domestic status of human

⁵⁷ See, e.g., John M. Kline, *Australian Federalism Confronts Globalization: A New Challenge at the Centenary* 61 *Australian J. of Public Admin.* 27 (2002) (*); [r.a.]

⁵⁸ John Trone, *Federal Constitutions and International Relations* 114 (2001).

⁵⁹ *Proceedings of The American Society of International Law* 195 (1929).

⁶⁰ Hughes, at 195.

⁶¹ Louis Henkin, *Foreign Affairs and the United States Constitution* 471 (2d ed. 1996).

rights treaties would be dubious because such treaties “regulate the relationship between nations and their own citizens, often on subjects that have historically been considered matters of local concern ... [and] they are not reciprocal in the traditional sense, in that the incentives to comply with them are not substantially dependent on other nations’ compliance.”⁶²

As we discuss in the following pages, these common conceptions disregard the cross-national relationships of domestic human rights norms and practices. These common conceptions do not adequately account for how governmental practices influence similar practices in other countries, and the need for international agreements to manage those externalities. Furthermore, a useful limiting principle can be developed, on the basis of our model of global culture, to determine which treaties involve “international concerns.” That is, a matter of international concern can be identified when the relevant issue or practice becomes a constituent element of global culture. We explore these points with respect to the legal regimes of different federalist countries.

In 1920, the US Supreme Court established a constitutional doctrine permitting treaties to encroach upon traditional state prerogatives and outside Congress’s ordinary legislative powers. In the case of *Missouri v. Holland*, the President, with the Senate’s consent, had entered a treaty to protect migratory birds. The treaty required the subordination of conflicting state and local laws, and the state of Missouri objected. Missouri argued that the US Constitution did not equip Congress with legislative power to override state law in this arena and that the national government could not employ a treaty to make an end run around those federalism constraints. The Supreme Court upheld the treaty and, inter alia, emphasized the functional imperative in having international agreements tackle transnational problems. Justice Holmes, writing for the Court, explained that the relevant interests “can be protected only by national action in concert with that of another power.”⁶³

Leading U.S. foreign affairs scholars and other commentators have since debated whether *Holland* applies to human rights treaties, and, if so, whether the decision should be overruled or narrowed. Professor Curtis Bradley has become the most prominent and eloquent critic of *Holland*. An analysis of his critique helps to illuminate the empirical underpinnings of the doctrinal controversy.

Professor Bradley argues that *Holland* applies to human rights treaties and, for that reason, the decision should be countermanded. First, he acknowledges that human rights abuses affect other countries—though, as we describe shortly, he minimizes and misestimates cross-national externalities. He also claims that reducing rights violations may require states to act in concert through international agreements. As a consequence, these dual features—transnational externalities and the need for collective action—show the arbitrariness of any distinction that would limit *Holland*’s extension to human rights treaties. On normative grounds, however, Bradley claims that this expansive power was not envisioned by the Justices in *Holland*. He focuses on the domestic ramifications of extending federal power over a broad range of human rights concerns, and he proposes applying federalism constraints to the treaty-making power.

⁶² Bradley II, at 108 (citing Jack Goldsmith, International Human Rights Law and the United States Double Standard, 1 Green Bag 2d 365, 369-71 (1998)); see also Henkin, Foreign Affairs and the U.S. Constitution 197.

⁶³ [cite]

Importantly, Bradley's analysis suggests that human rights issues only marginally satisfy the threshold requirements set by *Holland*. On his account, the transnational effects of human rights violations are "abstract and emotional" (he notes the moral and emotional response of U.S. citizens to foreign abuses) as well as rare and remote (he notes potential refugee influxes and instability). Indeed, his effort in identifying these types of effects is to show that "almost any issue can plausibly be labeled 'international.'" Bradley concludes:

The Court in *Holland* also appeared to assume that treaties would deal only with matters concerning *truly international relations*. Thus, the Court emphasized that the treaty there concerned a problem that "can be protected only by national action in concert with that of another power." Since then, however, we have seen the rise of international human rights law, which regulates the relations between nations and their citizens.⁶⁴

Indeed, Bradley has also joined Professor Jack Goldsmith in presenting a less complicated, more direct argument for placing federalism constraints on human rights treaties. Bradley and Goldsmith argue that human rights agreements defy historic conceptions of the treaty power because such agreements do not involve matters of interstate reciprocity or arrangements for achieving mutual gain:

The constitutional treaty-making process was designed with a particular type of treaty in mind. In the late eighteenth century, treaties were primarily bilateral agreements that focused on relations between nations, regarding such issues as trade and peace. Nations entered into reciprocal relationships with other nations to achieve mutual gain. By contrast, many modern treaties do not regulate relations between nations and do not confer specific reciprocal benefits on the parties. Instead, they are multilateral instruments, open for ratification by all nations and designed to regulate the intra-national relations between nations and their citizens. This distinction is most pronounced with respect to human rights treaties.⁶⁵

Bradley and Goldsmith note that "*Holland* was decided before ... the development of modern human rights treaties."⁶⁶ Notably, they also suggest that human rights treaties are appropriate exercises of the treaty power only if that power "encompass 'domestic' matters" since "[t]hese treaties regulate the internal relationships between governments and their citizens ... [and] do not impose reciprocal obligations in any meaningful sense."⁶⁷

Bradley and Goldsmith's positive account of the human rights regime is drawn too narrowly. They fail to examine the potential magnitude of the effect of foreign human rights practices on the United States (and vice versa), how foreign rights practices

⁶⁴ (emphasis added).

⁶⁵ Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 400 (2000).

⁶⁶ *Id.* at 454 n. 250.

⁶⁷ *Id.* at 450.

directly affect domestic rights practices through transnational social influence, and the significant frequency or common occurrence of these interactions. Were human rights practices to exhibit such characteristics, human rights treaties would more closely match traditional international agreements that require cooperation and coordination. Human rights treaties would, therefore, have greater legitimacy in trumping state and local law and in approaching the kinds of concerns that motivated the Court in *Holland*.

Our argument in this book has been that the diffusion of human rights practices does exhibit such transnational characteristics. As a consequence, human rights treaties are sufficiently analogous to agreements “reciprocal in the traditional sense, in that the incentives to comply with them are ... substantially dependent on other nations’ compliance.” Specifically, widespread or severe human rights violations in Foreign State (State F) directly affect the pressures and tendencies within Home State (State H) to conform to shared standards of behavior regulating the same sort of practices. For instance, the promulgation (and subsequent abolition) of laws against homosexuality throughout Western Europe potentially affects whether the United States enacts (or abolishes) similar laws. These interactions also operate in reverse: the U.S. decision to embrace certain domestic rights practices affects whether other states pursue a parallel course of action. This model of interstate behavior thus reflects a functional need for coordination—to deal with externalities and spillover effects from under-protection (or over-protection) in national systems. Indeed, if State H secures a legal agreement from States F not to engage in particular conduct, it helps State H ensure against the commission of similar conduct within its own country. Also, State H may accept an obligation to avoid certain practices if it is in State H’s interest to ensure that other states also refrain from those actions. Hence, the reciprocal nature of human rights regimes: decisions to comply with respective treaty obligations turn in part on other nations’ compliance. Human rights agreements thus regulate relations between nations and provide a device for achieving mutual gains.

This reconceptualization of human rights norms—and the treaties that regulate them—implicates the legal systems of various federalist countries. Narrow conceptions of how human rights norms develop and spread has shaped not only academic debates, but also law and policy of the United States, Australia, Canada, and Germany

In the United States, Bradley and Goldsmith are far from alone in their conception of human rights treaties. Similar views have shaped how the legal order regulates treaty incorporation. According to Bradley, “[i]f the U.S. treaty power were limited to ‘international’ or ‘external’ matters, or to truly reciprocal arrangements, human rights treaties might be suspect. Indeed, this is precisely what a committee of the American Bar Association argued in a widely-discussed 1967 report.” Indeed, a prominent view maintains that human rights norms are not truly international, external or reciprocal in nature, and such treaties should therefore not obtain the same domestic legal status assigned ordinary international agreements. The 1967 ABA report, for example, states that “many human rights treaties ... concern the relationship of the citizen to the government of his own country, and are accordingly ‘essentially within the domestic jurisdiction,’ and have no direct relationship to the external affairs of the United

States.”⁶⁸ The report concludes that such human rights issues should form the subject of UN recommendations, but “not of international compacts.”⁶⁹

More fundamentally, this conception of human rights shaped efforts in the mid-twentieth century to amend the U.S. Constitution to limit the treaty power and reverse *Holland*: the so-called Bricker Amendment controversy. These efforts almost succeeded, and their after-effects have been felt ever since. The Eisenhower Administration fended off the amendment proponents by convincing Senators that such changes would damage the government’s ability to cooperate with other states in foreign affairs.⁷⁰ Human rights treaties were not part of that line of argument, however. On the contrary, the Administration promised not to support ratification of human rights conventions.⁷¹ The Administration took the position that the treaty power could not properly address subjects “which do not essentially affect the actions of nations in relation to international affairs, but are purely internal.”⁷² In other words, political forces favoring the proposed amendments were defeated by arguments that (i) insistence on federalism constraints would interfere with actions the United States needed to undertake in concert with other nations and (ii) human rights treaties were outside the zone of activities requiring transnational coordination.

This understanding of human rights treaties has had a lasting impact on U.S. treaty practices. The decades-long reluctance to ratify the Genocide Convention, for example, resulted in part from concerns whether the treaty power should encompass subjects that do not fit conventional modes of inter-state reciprocity, coordination, or cooperation. According to political scientist Lawrence LeBlanc, a “question raised early in the Senate deliberations was whether or not the subject matter of the Genocide Convention was truly a matter of international concern. ... If genocide were not a matter of genuine international concern, then the use of the treaty-making power to deal with it would be at least improper, if not unconstitutional.”⁷³ “[T]he question always demanded attention,” explains LeBlanc, and “issues raised by critics of the convention ... continued to plague the deliberations over ratification during the 1970s and 1980s.”⁷⁴ The same questions also impeded the ratification of other human rights agreements. According to political scientists Natalie Kaufman and David Whiteman’s study, “[t]he arguments that germinated during the Genocide Convention hearings later blossomed into full-fledged opposition to all human rights treaties.”⁷⁵ Indeed, after Eisenhower’s pledge not to ratify human rights accords, no administration submitted a major human rights treaty to the Senate until Nixon’s (ineffectual) endorsement of the Genocide Convention in 1970 and Carter’s (similarly unsuccessful) support of the principal human rights covenants in the late 1970s.

⁶⁸ [cite]

⁶⁹ [cite]

⁷⁰ Tananbaum, at 139-43, 148, 153; Natalie Hevener Kaufman, *Human Rights Treaties and the Senate* 96, ___ (1990); Golove, at 1276.

⁷¹ Tananbaum, at 89, 199; Kaufman ___.

⁷² Bradley I, 122 (quoting Hearing on S.J. Res. 1 Before a Subcomm. of the Senate Judiciary Comm., 84th Cong., 183 (1955)) (internal quotation marks omitted); Kaufman ___.

⁷³ Leblanc, 135-36.

⁷⁴ Leblanc 136 & 137.

⁷⁵ Natalie Hevener Kaufman and David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 *Human Rights Quarterly* 309, 312 (1988).

Many of the concerns that animated the proposed Bricker Amendments have also shaped subsequent U.S. reservation practices.⁷⁶ When the United States finally ratified major human rights treaties, it submitted multiple reservations, understandings, and declarations—including a federalism proviso. According to this stipulation, a human rights treaty “shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments.” What had not been accomplished through the failed Bricker amendments was thus secured through treaty ratification and reservation practices. This state of affairs results from a misguided conception of human rights agreements dating back to Charles Evan Hughes.

An overly narrow conception of the cross-national diffusion of human rights norms has also shaped the Australian legal system. Under the Australian Constitution, Parliament can pass legislation relating to “external affairs.” This authority expands the federal government’s legislative power to domains otherwise reserved to state governments. In a series of cases in the 1980s and 1990s, the High Court interpreted the external affairs power to include implementing legislation for all treaties *regardless of their subject matter*.⁷⁷ The application of that “general rule” to human rights treaties, however, was and remains contentious. The uncertain status of human rights treaties is due in part to the perception in Australia that such agreements are not “truly international.”⁷⁸ As a result, the Australian system employs sub-constitutional arrangements to restrict the acceptance and full incorporation of human rights treaties.

The opinions of High Court judges reflect a narrow conception of the mechanisms by which human rights norms spread. These opinions do not comprehend how governmental rights-related practices might involve cross-national transactions that necessitate cooperation and coordination between states. This limited vision helped shape a series of high profile cases. In a 1983 landmark decision concerning an environmental treaty, the High Court established a general (trans-substantive) rule that all treaties, regardless of subject matter, activate Parliament’s external affairs power.⁷⁹ And the Court more recently reaffirmed this rule in a case involving an ILO convention.⁸⁰ However, a year before the landmark decision, the Court had squarely considered a human rights treaty and handed down an ambiguous result.⁸¹ That case concerned the constitutionality of

⁷⁶ Kaufman; Bradley & Goldsmith.

⁷⁷ Brian R. Opeskin & Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 *Case Western Reserve Journal of International Law* 1, 33-36 (1995); Andrew C. Byrnes, *The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism*, 8 *B.C. Int'l & Comp. L. Rev.* 275, 294, 302 (1985); Donald R. Rothwell, *International Law and Legislative Power*, in *International Law and Australian Federalism* 104, 112 (Brian R Opeskin & Donald R. Rothwell 1997); Trone, at 87.

⁷⁸ Greg Craven, *Federal Constitutions and External Relations*, in *FEDERAL RELATIONS AND FEDERAL STATES* 9 21 (Brian Hocking ed. 1993) (“Two different views have been taken of the Australian Constitution’s external affairs power Federalists ... have tended to argue that the Commonwealth Parliament can legislate in the implementation of a treaty under section 51 (29) only where the subject matter of that treaty is truly ‘international’ in character, and thus properly to be described as an ‘external’ affair.”); cf. Stuart Harris, *Federalism and Australian Foreign Policy*, in *RELATIONS AND FEDERAL STATES*, at 91, 103.

⁷⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1. [note intervening cases involving environmental treaties]

⁸⁰ *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

⁸¹ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

federal legislation implementing the Convention on the Elimination of Racial Discrimination (CERD). A four-three majority upheld the legislation but on divergent grounds.⁸² Three of the judges in the majority (Mason, Murphy, and Brennan) concluded that the ratification of any treaty triggered the external affairs power. A different alignment of judges (one concurring in the judgment and three dissenting) concluded that a ratified treaty does not per se satisfy the “external affairs” requirement; rather the subject matter of the treaty must independently implicate international concerns or relationships.⁸³ Only the concurring judge concluded that CERD met that test.

The three dissenting judges (including Chief Justice Gibbs) expressed a narrow conception of the cross-national dimensions of human rights practices. Chief Justice Gibbs, for example, set forth a general understanding of matters concerning external affairs: “Any subject-matter may constitute an external affair, provided that the manner in which it is treated in some way involves a relationship with other countries or with persons or things outside Australia. A law which regulates transactions between Australia and other countries, or between residents of Australia and residents of other countries, would be a law with respect to external affairs....”⁸⁴ The Chief Justice then submitted that human rights do not fit within this realm: “The fact that many nations are concerned that other nations should eliminate racial discrimination within their own boundaries does not mean that the domestic or internal affairs of any one country thereby become converted into international affairs.”⁸⁵ To satisfy the Chief Justice’s test, discriminatory law or practice within one nation would need to influence the rights protections in another nation. Absent that relationship, human rights treaties should not override the prerogatives of provincial authorities.

Paradoxically, judicial support for the trans-substantive rule also reflects anxiety about the classification of human rights as subject to the external affairs power. The dissenting justices were defeated not because their colleagues all considered human rights sufficiently international. Rather, justices in the majority concluded that the Court lacked the institutional competence to determine whether a matter is international. An architect of the general rule, Justice (later Chief Justice) Mason explained: “[T]he Court would undertake an invidious task if it were to decide whether the subject-matter of a convention is of international character or concern. ... [These] are not questions on which the Court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the executive government for determination.”⁸⁶ Additionally, reflecting on his opinion in the CERD case, Justice Mason later suggested that he and his colleagues who endorsed the general rule actually considered human rights a purely internal matter: “[The implementation legislation] ... dealt with matters that were purely domestic affecting the conduct of people in Australia in relation to each other, having no relationship with other countries except in so far as the sections gave effect to an obligation imposed by an international convention. ... Murphy J., Brennan J. and I thought that it was enough that by entering into a genuine

⁸² Andrew Byrnes & Hilary Charlesworth, *Federalism and the International Legal Order: Recent Developments in Australia*, 79 AM. J. INT’L L. 622 (1985).

⁸³ J. M. Finnis, *Power to enforce treaties in Australia—the High Court goes centralist?*, 3 Oxford Journal of Legal Studies 126, 127-29 (1983).

⁸⁴ at 201-02.

⁸⁵ at 202.

⁸⁶ at 125.

international treaty Australia had assumed an international obligation to enact domestic laws of the kind already described, notwithstanding that they were purely domestic in character.”⁸⁷ Given these views on the part of *supporters* of the general rule, it is little wonder that human rights treaties—even if formally equivalent to other treaties—have lacked legitimacy in Australian implementation practices.

Notably, leading Australian scholars have supported, sometimes unwittingly, a tenuous position for human rights treaties. They have done so by embracing a balancing approach. These commentators include proponents of an expansive external affairs power. The balancing approach that they endorse, however, weighs sub-national governmental interests against the need for Australia to act in concert with other nations. This approach concedes that only “some treaties”⁸⁸ should trigger the external affairs power—treaties that address problems requiring inter-state action—and only in some instances. Accordingly, a relevant factor is the degree to which the acceptance of reciprocal treaty obligations can help governments reduce undesirable practices within and between their countries. Professor George Winterton, for example, argues that political constraints ensure Parliament will not excessively exercise its authority to implement treaties.⁸⁹ Winterton then contends that constricting the use of the external affairs power to protect sub-national interests must be “balanced against the national interest in effective Australian participation in world affairs, bearing in mind that requiring the Commonwealth to rely upon the States to implement some treaties necessarily involves some impairment of its conduct of foreign relations.”⁹⁰ Human rights agreements should, in theory, fare well under such scrutiny given what we have learned from the empirical record discussed in earlier chapters. Legal and policy actors, however, often fail to appreciate those empirical patterns; and human rights treaties are thus not considered “truly” or sufficiently international. The failure to perceive human rights as a collective action problem on the international side of the balance strongly favors deferring to sub-national governmental interests on the other side.⁹¹

Indeed, the Australian Parliament’s limited use of the external affairs power in the human rights arena has inspired efforts to reform the process of treaty ratification.⁹² In the first communication filed against Australia under Optional Protocol 1 of the ICCPR, the U.N. Human Rights Committee concluded that Tasmania’s criminal sodomy statute violated the Covenant. A major controversy erupted when the Parliament, invoking the U.N. Committee’s decision, enacted legislation overriding Tasmania’s law.⁹³ The

⁸⁷ [*]; at 121.

⁸⁸ George Winterton, Limits to the Use of the “Treaty Power,” in *Treaty-Making and Australia: Globalization versus Sovereignty* 29, 38 & 50 (Philip Alston & Madelaine Chiam eds. 1995).

⁸⁹ See, e.g., Winterton, Limits to the Use of the “Treaty Power,” at 38-39 & 40. Other scholars criticize High Court judicial opinions that favor limiting the external affairs power on the ground that the judges did not properly balance the international concerns involved in implementing treaties. See, e.g., Byrnes, *supra*; Byrnes & Charlesworth, *Federalism and the International Legal Order*, *supra*.

⁹⁰ A Framework for Reforming the External Affairs Power, in *Upholding the Australian Constitution*, Vol. 5: Proceedings of the Fifth Conference of the Samuel Griffith Society 18, 24 (1995); George Winterton, Limits to the Use of the “Treaty Power,” at 40.

⁹¹ Cf. John M. Kline, Australian Federalism Confronts Globalization: A New Challenge at the Centenary 61 *Australian J. of Public Admin.* 27 (2002) (*).

⁹² [explain *Teoh* decision and CRC ratification]

⁹³ Gabriel A. Moens, The constitutional protection of human rights, *Australia & World Affairs* 30 (spring 1996); UN takes on Tassie over gays, *The Advertiser*, April 14, 1994; Joel Magarey, Landmark UN ruling

controversy helped catalyzed a grand parliamentary review of the external affairs and treaty power.⁹⁴ The following year, a Senate committee unanimously adopted a report entitled *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.⁹⁵ The report analyzed proposed constitutional amendments to restrict the scope of the external affairs power. Various proposals, expressly or implicitly, excluded human rights from the power. The parliamentary committee concluded that such amendments were “unlikely to succeed at the current time, in the absence of bipartisan support. However, the Committee recognises that the concerns raised about the external affairs power may be addressed by instituting a range of mechanisms to improve the process by which Australia’s treaty obligations are entered into and implemented.”⁹⁶

In 1996, Australia instituted broad structural reforms based on the committee’s recommendations.⁹⁷ Any proposed treaty action now requires a National Interest Analysis (NIA), akin to an environmental impact statement. The proposed treaty and NIA must be tabled before Parliament. A new all-party committee, the Joint Standing Committee on Treaties (JSCOT), has authority to review any treaty action during the period of negotiation and following its completion. JSCOT is also empowered to expand public access to information and civic participation in the deliberative process. Accompanying the treaty reforms, the national government and the states agreed to “Principles and Procedures for Commonwealth-State Consultation on Treaties.”⁹⁸ That agreement creates new bodies, such as a Standing Committee on Treaties, to foster consultation with local authorities in negotiating and ratifying treaties of “particular sensitivity and importance to the states.”⁹⁹ The agreement also provides that “[t]he Commonwealth will consider relying on State and Territory legislation where the treaty affects an area of particular concern to the States and Territories and this course is consistent with the national interest and the effective and timely discharge of treaty obligations.”¹⁰⁰

The impact of these reforms on actual treaty practice is still uncertain.¹⁰¹ Public anxiety about human rights treaty ratification appears to have eased subsequent to the treaty reforms.¹⁰² Stiff resistance, however, remains to legislation implementing human

on gay rights claim, *The Advertiser*, Apr. 12, 1994 (quoting federal Attorney-General, “I’m very loath to rely on external (affairs) powers and I’m not going to rush in with legislation.”).

⁹⁴ Katharine Gelber, *Treaties and Intergovernmental Relations in Australia: Political Implications of the Toonen Case*, 45 *Australian Journal of Politics and History* 330 (1999); Ann Capling & Kim Nossal, *Parliament and the Democratization of Foreign Policy: The Case of Australia’s Joint Standing Committee on Treaties*, 36 *Canadian Journal of Political Science* 835, 839-41 (2003); Charlesworth, Chiam, Hovell & Williams at 54-55; * *Scrutiny and Approval: The Role for Westminster-Style*, 55 *International & Comparative Law Quarterly* 121, 132 [explain *Teoh* decision and CRC ratification]

⁹⁵ *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, (Canberra: Senate Legal and Constitutional References Committee, Parliament of the Commonwealth of Australia, 1995).

⁹⁶ at 5.92-5.93.

⁹⁷ Charlesworth, Chiam, Hovell & Williams, et al, at 41-48; Uwe Leonardy,, *Federal Practice: Exploring alternatives for Georgia and Abkhazia* __, 160 (Bruno Coppieters, David Darchiashvili & Natella Akaba eds. 1999); Cyril Robert Emery, *Treaty Solutions from the Land Down Under: Reconciling American*, 24 *Penn State International Law Review* 115 (2005).

⁹⁸ Council of Australian Governments’ Communique, 14 June 1996 att. c. <http://www.coag.gov.au/meetings/140696/attachment_c.htm>

⁹⁹ *Id.* at 5.2 & 5.5

¹⁰⁰ *Id.* at 8.4.

¹⁰¹ Charlesworth, Chiam, Hovell & Williams at 47; Gelber.

¹⁰² Charlesworth, Chiam, Hovell & Williams at 47.

rights agreements. The federal government retains the legal authority, but lacks the political power, to legislatively implement human rights treaty obligations.¹⁰³ The lack of political power—despite formal equality of human rights and other treaties—can be attributed to a narrow understanding of relationships between human rights and external affairs. As Hilary Charlesworth explains: Although the arguments of the dissenting judges in the CERD decision “were firmly rejected by High Court majorities, they have continued to have a grip on Australian political practice with respect to human rights.”¹⁰⁴ In short, the Australian legal order reflects a failure to appreciate how human rights norms spread transnationally and how treaties serve as instruments to regulate those transactions.

2. Steering Judicial Borrowing of Foreign Law

Does judicial borrowing—a national court’s reliance on foreign law in adjudicating constitutional cases—promote desirable human rights outcomes? Is the process of borrowing legitimate? These questions turn in part on the answer to empirical inquiries. In Chapter 3, we analyzed competing explanations of judicial borrowing. The prevailing view holds that judicial borrowing is driven principally by persuasion. The basis for that explanation, however, is contradicted by equally, if not more, compelling evidence of acculturation. That empirical analysis has both descriptive and prescriptive implications. The degree to which the practice is driven by acculturation challenges both the proponents and opponents of borrowing. It also suggests different approaches to regulating the judicial practice. Once the structure of acculturation-based borrowing is understood, different institutional designs can help steer it in appropriate directions—to minimize process-based concerns about its legitimacy and to promote its tendency to produce desirable results.

Both advocates and critics of judicial borrowing make numerous claims that have not been subject to sufficient empirical inquiry. Indeed, the acculturation model debunks some of their most important contentions. For example, as we discuss below, acculturation-based borrowing would override certain forms of national diversity that a persuasion account assumes judges would respect. Also, acculturation-based borrowing can help to construct and perpetuate essentialist beliefs and attitudes, while, in contrast, persuasion-based borrowing would ostensibly deconstruct or unsettle prevailing beliefs and attitudes.

That said, opponents and skeptics of judicial borrowing have also made claims based on reasonable, but incorrect, empirical assumptions regarding the practice. Indeed, prominent opponents and skeptics make key assumptions that are inconsistent with acculturation-based judicial borrowing. For example, as discussed shortly, the acculturation account suggests that judicial borrowing is frequently sincere and potentially determinative of judicial outcomes. The practice is not principally organized

¹⁰³ Hilary Charlesworth, *International Human Rights Law and Australian Federalism*, in * 280, 291 (“Both Liberal and Labor Commonwealth governments have been reluctant to fully exploit the legislative potential of the external affairs power to protect human rights because of political pressure from the states. In this sense, the legal account of the relationship between human rights and federalism has been at odds with the political version and has had limited impact on political practice.”).

¹⁰⁴ Charlesworth, at 291.

through an elite (judge-to-judge or inter-court) network. Rather, it reflects broader involvement in the creation and transmission of constitutional norms. Furthermore, contrary to some critics, acculturation-based borrowing under existing global conditions will tend to forestall, rather than engender or perpetuate, illiberal outcomes.

A. Challenging Proponents of Judicial Borrowing

The leading advocates of judicial borrowing offer a persuasion-based account of the practice. Accordingly, acculturation-based borrowing should contradict or substantially qualify some of their descriptive and prescriptive assessments of the practice. We consider two of their most important claims.

i. Does judicial borrowing accommodate diversity?

An acculturation-based account potentially contradicts claims about the extent to which, and the conditions under which, judicial borrowing accommodates diversity. Proponents of judicial borrowing contend that judges tailor or reject foreign law in accordance with local needs and conditions.¹⁰⁵ Acculturation, however, expects that in certain circumstances judges will adopt global models despite divergent national needs and conditions. Indeed, the ability to decouple formal commitments and local needs often facilitates the spread of norms. Additionally, a common feature of a “legitimacy-generating transplant,” as Jonathan Miller explains, is adoption without revision.¹⁰⁶ As a result, the wholesale adoption of a foreign or global model by a receiving state is in tension with preserving diversity. Indeed, tailoring or rejecting foreign models on the basis of national incongruence with the content of the foreign law assumes that the content of the model and not other factors—such as status maximization, community membership, or identity formation—is the paramount consideration. In acculturation, those other factors prevail.

ii. Does judicial borrowing unsettle prejudicial beliefs and attitudes?

Acculturation challenges the view that judicial borrowing will tend to unsettle prejudicial beliefs and attitudes of judges. Proponents of judicial borrowing contend that judges who engage foreign law will be inspired to reexamine preconceived assumptions on matters relevant to their decisions. The encounter with foreign law purportedly cues judges to think harder about their own attitudes and beliefs as well as the collective attitudes and beliefs reflected in their constitutional system. Indeed, these expected effects are perhaps essential to the dialogical mode of judicial borrowing discussed in Chapter 3. Acculturation, however, suggests that the opposite may be true.

The acculturation process may make beliefs and attitudes that are culturally contingent appear natural and necessary. For example, the existence of a globally uniform practice may encourage judges to conclude that the practice is intrinsic to modern states. Foreign state practice need not be universal to have this effect. That is, widespread or common adoption of a practice by a subset of states—liberal democracies, for example—

¹⁰⁵ [Weinrib, *supra* note __, at 4]

¹⁰⁶ Jonathan Miller [cite].

can influence jurists from similar states. The important point is that cognitive and social pressures that underpin an acculturation-driven process might push courts toward adoption or solidification of conventions. Similarly, the absence of a foreign practice can make a void seem natural or necessary. For example, if no country constitutionally protects the independence of state-owned media,¹⁰⁷ a court may be less likely to develop a novel constitutional doctrine.

One might question whether such results are likely if, in fact, surveying foreign law generally reveals diversity rather than uniformity across states. The empirical studies discussed previously, however, indicate the existence and continuing spread of isomorphism across constitutional systems. Significant areas of diversity are shrinking. Furthermore, the appearance of diversity against a backdrop of expanding uniformity may make some remaining differences seem essential. Indeed, the construction of essentialist beliefs about one's own culture may be fostered by an encounter with variation when other overarching aspects of life are shared across societies. A French jurist looking to England, for example, might not consider diverse practices evidence of the arbitrary and unnecessary nature of French conventions. She may, instead, conclude that the French practices are essential to her native system, that is, to being French.

B. Challenging skeptics and opponents of judicial borrowing

Acculturation also challenges fundamental assumptions of skeptics and opponents of judicial borrowing. We consider four issues frequently raised by these commentators. First, is judicial borrowing the product of an elite, nontransparent network? Second, to what extent is borrowing ever a sincere application of foreign law to decide a case? Third, why suppose that judicial borrowing serves liberal, as opposed to illiberal, outcomes? Finally, what constraints, if any, guide judicial borrowing?

i. Casual pathways: Is borrowing the product of an elite, anti-democratic judicial network?

The organizational structure of judicial borrowing, as described by Slaughter and others, has been criticized as a nontransparent, elitist network of judges.¹⁰⁸ Indeed, Slaughter and other commentators concentrate on judges' direct interactions and court-to-court dialogue as the principal subjects of analysis in judicial borrowing.¹⁰⁹ On this view, judges from different countries often meet together, influence one another in their

¹⁰⁷ Cf. Elster, *supra* note __, at 367 ("Even more striking is the absence from all constitutions (known to me) of constitutional provisions ensuring the independence of the state-owned media.").

¹⁰⁸ Essay Ken I. Kersch *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 Wash. U. Global Stud. L. Rev. 345 (2005); cf. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 Eur. J. Int'l L. 435, 441-42 (1997)

¹⁰⁹ See, e.g., GLENDON; McCrudden, *supra* note __, at 2. Slaughter; Waters. Other commentators have noted problems with confining one's analysis to court-to-court communication. Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 353 (2004) ("To what extent should those charged with interpreting national constitutions take into account the lessons that might be taught by foreign experience? In asking this question, I do not mean to confine myself to the relevance of such foreign legal materials as cases from other courts; there is no reason to confine oneself to such material if one is seriously interested in learning more about comparative approaches to similar problems.").

interactions, and consequently refer to one another's opinions. The focus here is on "transjudicial communication" and a network that provides structural opportunities for persuasion to occur.¹¹⁰ This descriptive account, however, is deficient in important respects. And those deficiencies obscure the ways in which judicial borrowing may be a more open and inclusive process.

First, an acculturation-based account of judicial borrowing suggests the processes that produce and transmit global models are not necessarily elite-driven. Many of the relevant exercises of borrowing by judges encompass a broad range of foreign law such as legislative acts, constitutional texts, and constitutional structures. Those alternative materials are generally distinct from court opinions in that they do not provide a clear, formal explication of the reasoning behind the relevant foreign legal outcomes. Accordingly, focusing on court-to-court communications creates an artificial sense that reason-giving and factors such as logical coherence of an argument are critical to the exchange. In contrast, a receiving courts' regard for a wider array of sources raises doubts about the extent to which judicial borrowing reflects concern for reasoned opinions and justifications rather than concern for general legal patterns and results among relevant foreign states. Consider, for example, judges' referring to foreign jurisdictions that do not use capital punishment (or referring to foreign jurisdictions that do not criminalize sodomy). The absence of these types of laws in foreign jurisdictions may result from judicial as well as legislative abolition (or from the law never having been enacted in the first place). The important point is that restricting a positive account to a receiving court's references to foreign judicial opinions biases the explanation in favor of the persuasion mechanism. It also creates the false impression that the network of judges and transjudicial communications are central to the practice of borrowing.

Moreover, acculturation-based borrowing does not hinge on, or consider fundamental, judges' meeting (often privately), collaborating, or otherwise directly interacting. Transjudicial intercourse is not considered the locus of influence in the acculturation model; and, as explained, foreign judicial opinions are not considered the necessary or primary "imported" material. Instead, the mechanics of acculturation involve national communities more generally interacting and judges' reflecting on the common practices and understandings reached by states and the global cultural environment. Notably, these understandings and practices are generally the outcome of national political process. They are relatively diffuse and public rather than restricted to (judicial) elites or concealed.

ii. Is judicial borrowing insincere and superficial?

The study of acculturation should reduce skepticism regarding the sincerity and significance of judicial borrowing. Some commentators question whether the invocation of foreign law ever influences the result of a court decision. Are there cases in which the outcome would have been different had the judges not consulted countervailing foreign precedent? Are invocations of foreign law not simply post-hoc justifications for decisions reached on independent grounds?

¹¹⁰ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

Several reasons suggest that judges are often guided by foreign law in constitutional adjudication. At a theoretical level, acculturation provides a plausible account of the reasons why foreign law may exert meaningful influence on decision-making. Under conditions of uncertainty, actors (including judges) may be guided by cognitive and normative frameworks that shape understandings of the purpose and prospects of modern constitutions. As an empirical matter, acculturation is a pervasive and significant driving force in constitutional formation. The empirical record suggests that in drafting and revising constitutions, global cultural models influence actors. Judges are presumably not impervious to those effects when made aware of a global consensus of opinion—especially in the context of addressing novel constitutional questions or making policy or legislative-like choices.

The specific evidence on constitutional review, discussed in Chapter 3, arbitrated between the two mechanisms of persuasion and acculturation. Our analysis suggested that observed patterns are equally, if not better, explained by acculturation-based rather than persuasion-based processes. Some of that evidence can also help arbitrate between sincere and insincere employment of foreign law—whether existing uses of foreign law are simply window dressing or meaningful instances of influence. First, the acculturation studies of the diffusion of law provide strong evidence that states are compelled under certain circumstances to emulate global norms, and courts often play a significant role in that process. Second, judicial opinions may indicate the force of global culture. For example, judicial efforts to distinguish foreign jurisprudence (or global norms) suggest that judges consider those sources meaningful. Such efforts do not necessarily suggest, as persuasion proponents contend, that courts consider the content of the rules important. The practice may suggest, instead, that courts consider the status of upholding global norms important and thus they struggle to explain their decision to diverge from prevailing, or globally legitimated, norms. Regardless, these examples are clearly not instances of using foreign law to support a preordained result. Third, the record suggests that courts often follow global norms regardless of whether the judges recognize connections to specific foreign countries' practices. For example, court invocations of abstract concepts of “civilized” and “modern” standards of governmental behavior implicitly depend on a background of widespread (perhaps isomorphic), historical state practice. When judges express their inspiration to follow “civilized standards” or “European standards” we have strong reason to think they mean it. Such sentiments may be normatively undesirable, but they appear to be genuinely held. Those expressions often fit within a more general cultural effort on the part of national actors to align with global and community norms. Institutional design could address the normative concerns by encouraging courts to develop more inclusive reference groups for articulating rights and obligations.

iii. Does borrowing promote liberal or illiberal outcomes?

Does judicial borrowing tend to favor liberal over illiberal legal outcomes? To what extent, if any, do the practices of illiberal, nondemocratic states influence the content of borrowed norms? Is Justice Scalia correct to be concerned that countries like Zimbabwe will be among the sources of foreign law? These questions focus on empirical

considerations; they require understanding the logic of social action that propels judicial borrowing and the global social structure that affects pathways of diffusion.

The discussion in Chapter 6 is intended, in part, to address these types of concerns. That discussion explains that such normative concerns may assume that the formal positions of illiberal states will reflect their internal preferences or privately held beliefs. Instead, these states generally engage in preference falsification espousing human rights models promulgated on the global plane. Additionally, contemporary global rights principles are not *tabula rasa*. The contemporary human rights corpus discourages illiberal practices. And, overarching principles encourage state practices to be justified in terms of stability, domestic public welfare, social equality, peace, and cooperation. Furthermore, the most institutionalized or legitimated rights involve fundamental protections such as prohibitions on systematic racism, torture, and executions without a fair trial. If a major product of acculturation-driven borrowing is to inspire states to achieve or maintain such fundamental protections, those benefits may far outweigh, from a global welfare perspective, any costs or slippage experienced by liberal democracies.

Finally, states whose practices are imbued with cognitive weight or cultural authority worthy of emulation are those with commitments to general human rights norms. Their global influence depends on their maintaining legitimacy (not coercive power) in these domains. Hence, Mugabe's Zimbabwe is generally not worthy of emulation. That Zimbabwe accedes to a transnational human rights trend, however, is further evidence of the existence and appeal of a normative global model. (The point is that *even* Zimbabwe safeguards a particular right in the face of competing public order concerns.) In contrast, whether liberal democratic states participate in the adoption of a rights practice may be crucial to its global institutionalization and diffusion particular. The source for illiberal change in the diffusion of a norm may have to arise from or pass through these states.

Any lingering concerns could be directed to the project of institutional design, namely, how best to regulate judicial borrowing. For example, it may be important to define carefully, and at the outset, the community of states worthy of consideration and emulation. It may also be more important to specify conditions under which borrowing is more or less beneficial. For example, consider a country emerging from an illiberal past with a learned distrust of national institutions and a fear of future illiberal rollbacks. Under those conditions, there may be especially strong reasons to rely more upon international currents by fastening the nation's fate to, or giving added weight to, human rights models promulgated through global institutional processes.

iv. Selectivity: What constraints, if any, affect borrowing choices?

The theoretical model and empirical analyses suggest that meaningful constraints will guide acculturation-based judicial borrowing. Persuasion theories create the impression that judges have enormous freedom to determine which foreign materials they find compelling. The liberty to pick and choose favored foreign precedents is partly a function of the structure of a "bottom-up" construction of norms. That is, the persuasion model emphasizes the role of individual agency in the consideration, acceptance, and spread of ideas. The acculturation model, however, suggests that sociopolitical factors will guide the judicial encounter with foreign law. Indeed, transnational norms that are spread through acculturation emphasize a "top-down" model of social constructivism. While

human agency plays a role, a significant dimension of the process is irreducibly social and accordingly constrained.

Specific aspects of social structure regulate the process and effects of acculturation-based constitutional borrowing. First, the constitutional norm must manifest a particular conceptual relationship to the group. The norm must be theorized, for example, in connection to universal notions of what it means to be a modern, liberal state.¹¹¹ Second, the influence of the norm will turn partly on its internal character. Norms of an obligatory, rather than a permissive, character are more likely to spread. Indeed, several studies suggest that certain practices diffuse because they are propelled by the concept of government's *responsibility* to pursue particular objectives (e.g., responsibility to promote science,¹¹² to protect children,¹¹³ and to safeguard the environment¹¹⁴). This factor should, for example, affect whether prohibitions on hate speech would spread through judicial borrowing. That is, the practice of prohibiting such speech is less likely to spread so long as the prohibition is understood by many as a permissible restriction that a government may choose to enact—and not an obligation for government to do so. Third, as discussed above, the degree of institutionalization of a norm at the global level determines the extent to which it achieves traction across a population of states.¹¹⁵ Thus, hate speech regulation should also be constrained by the fact that prominent governments have made exceptions to the norm in their treaty reservations and other international practices. Furthermore, this third factor—the degree of institutionalization—potentially reduces concerns one might have about the degree of micromanagement involved in transnational borrowing. Importantly, institutionalized global models often operate as organizing principles. They generally concern first-order norms (such as commitments to guaranteeing privacy rights of children) and do not delineate second-order specifications (such as whether to permit searches of school lockers). Finally, conditions of uncertainty are often essential to the attraction and spread of global scripts. Accordingly, the degree of domestic consensus and entrenchment of countervailing interests are independent factors that affect whether global influence can potentially produce social change.

In addition to these sociopolitical factors, judicial methods and legal materials associated with acculturation-based borrowing involve greater constraints than a persuasion model might suggest. The foreign legal materials are open to public scrutiny and the criteria for their incorporation are relatively well defined. A judge cannot simply identify the logic of a single foreign country that she finds convincing. Instead, general practices and trends among foreign jurisdictions are the object of analysis. The zone of countries may also be circumscribed by shared commitments to liberal democracy. It will

¹¹¹ *David Strang & John W. Meyer, Institutional Conditions for Diffusion, 22 *Theory and Society* 487 (1993); Thomas, Sociological Institutionalism and the Empirical Study of World Society, *supra* note __, at 76-77 (“Sociological institutionalism argues that an important process producing this isomorphism is one in which actors connect identities and actions to universal models.”).

¹¹² Martha Finnemore, International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy, 47 *Int'l Org.* 565 (1993).

¹¹³ John Boli-Bennett & John W. Meyer, The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970, 43 *Am. Soc. Rev.* 797 (1978).

¹¹⁴ David John Frank et al., Environmentalism as a Global Institution, 65 *Am. Soc. Rev.* 122, 122-26 (2000); David John Frank et al., The Nation-State and the Natural Environment over the Twentieth Century, 65 *Am. Soc. Rev.* 96, 100-03 (2000).

¹¹⁵ See *supra* note __.

certainly be more difficult, for instance, to emulate models that disproportionately include members outside that group. Additionally, claims that a particular standard reflects global norms are open to challenge and verification. These constraints should also restrict the ability of a judge to invoke a global model if the model does not, in fact, address the relevant issue directly. At the very least, these parameters appear more restrictive than those associated with persuasion-based borrowing. These methods are accordingly less susceptible to strategic use or abuse.

For expository purposes, consider Professor Roger Alford's argument against judicial borrowing and specifically his criticism of *Lawrence v. Texas*.¹¹⁶ Alford argues that judicial borrowing opens courts to "selective and incomplete presentations of the true state of international and foreign affairs."¹¹⁷ He uses the *Lawrence* opinion as a primary exhibit. Specifically, Alford contends that the Court relied on a partial assessment of foreign law, one that omitted the fact that "much of the civilized world" maintains laws disfavoring lesbian and gay rights.¹¹⁸ He cites, as evidence, studies showing that 80 countries have sodomy laws.¹¹⁹ As an artifact of legal analysis, Alford's very argument demonstrates that the Court's approach is subject to objective standards of scrutiny. It can be evaluated according to criteria associated with acculturation-based reasoning, and Alford's argument crosses analytic swords on that ground. Correspondingly, Alford's arguments may also be subject to the same sort of evaluative criteria. It is questionable, for example, whether Alford has correctly identified the zone of countries appropriate for consideration. One would want to know, for example, how many of the 80 states are clearly illiberal and outside a plausible zone of emulation. Indeed, the study he cites includes countries such as Bhutan, Burma, Iran, Libya, Sudan, and Uzbekistan.¹²⁰ Additionally, it is questionable whether the *Lawrence* Court uses foreign law to provide an affirmative argument for following a new global norm. The opinion may, instead, be understood better as using foreign law to demonstrate that no global model exists and thus to discredit Chief Justice Burger's invocation that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."¹²¹ Finally, Alford's criticism indicates current ambiguities—though perhaps only on the outer boundaries—in conducting acculturation-based borrowing. Alford adopts a static concept of foreign law by identifying the current number of states prohibiting or permitting a practice. He does not consider whether state practices reflect a global trend or (unidirectional) change over time. Those considerations, however, are suitable for an acculturation-based approach. They also

¹¹⁶ Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 65-66 (2005).

¹¹⁷ *Id.* at 64.

¹¹⁸ *Id.* at 66.

¹¹⁹ *Id.* (citing Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 250-51 (1993); International Gay and Lesbian Human Rights Commission, *Sodomy Fact Sheet: A Global Overview*, at <<http://www.iglhrc.org/files/iglhrc/reports/sodomy.pdf>>).

¹²⁰ Tielman & Hammelburg, *supra* note __, at 262-342; International Gay and Lesbian Human Rights Commission, *supra* note __.

¹²¹ *Id.*, at 572 ("The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction."); *id.* at 576 ("To the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere.").

might be said to guide *Lawrence's* analytic method—a form of teleological reasoning. In other words, one can infer, from an unfolding process across actors in a social system, the purposeful development toward a normative end. Indeed, at some point in the upward curve of normative diffusion these are the types of projections that some actors make in deciding whether to join an emergent norm or developing consensus. At that point, however, acculturation-based reasoning becomes more tenuous. This is an area in need of new and clearer rules to develop such an inquiry. Specifying those rules is important to regulating the practice.

PART III. THE PROMISE AND PROBLEMS OF STATE SOCIALIZATION

Chapter 11 State Socialization and Compliance

Most of the discussion thus far emphasizes how our project challenges and supplements prevailing theories of the social influence of international law. Three related questions frame our analysis. How are states influenced, if at all, to improve their human rights practices? What are the varieties and mechanics of this influence? How might international human rights law better account for this variety and better harness these mechanisms? At bottom, then, ours is a theory of compliance with international law. And, as we make clear in Parts I and II, our approach differs importantly from the standard theories of compliance. One cluster of important theories maintains that law has little or no effect on state behavior. These theories, on our view, undervalue or disregard evidence of global social processes that propel states to adopt norms that do not serve, or even contradict, their material self-interest. Our analysis helps explain these empirical patterns and suggests how international law can harness such social processes. Our approach also serves as a corrective to another cluster of important theories that overpredicts the effectiveness of international law. Some theories, for example, emphasize reputation costs or civil society mobilization to explain legal compliance. We show how assumptions of material self-interest often underpin those explanations and we analyze empirical evidence of social change that demands a more nuanced account. Leading theories often do not adequately address, for example, the ways in which promoting change through material interest might undercut other social processes propelling actors toward the same ends. Our approach, in short, reconsiders how existing research programs approach the problem of compliance—calling into question a range of policy prescriptions predicated on these approaches.

In this Chapter, we consider a potential weakness in our theory of acculturation-based compliance. A major concern is whether acculturation processes leave a gap between formal commitments by states and actual practices on the ground. Recall that acculturation studies often document persistent forms of decoupling—suggesting that formal commitment to the organizational features of global culture often fails to change the concrete practices of local actors. In the human rights context, this is particularly troubling given the familiar problem of seemingly “shallow” or disingenuous embrace of international human rights law by many states. The central concern, therefore, is simple: Acculturation should not guide the design of international human rights regimes since any such regime would promote only shallow reforms—further entrenching the gap

between formal commitments and actual practices.¹²² The balance of this Chapter addresses this concern.

First, as we explain, this concern is predicated in part on conceptual misunderstandings of acculturation. Acculturation-driven changes are not necessarily characterized by decoupling; many instances of acculturation include complete internalization of global scripts. Additionally, acculturation may also be accompanied by decoupling—but not of the variety that raise compliance concerns. Second, even when acculturation results in forms of decoupling that hinder compliance, acculturation-led social change can set in motion other domestic- and international-level processes that reduce gaps between human rights commitments and local practices. In other words, domestic systems may undergo a two-step process in which decoupling is simply the first stage that helps lead to the progression of more meaningful change over time. Third, to the extent that troubling patterns of decoupling persist, several reform strategies could facilitate effective management, and gradual elimination, of these gaps between formal commitments and actual practice. We address each of these points in turn.

1. Acculturation without Decoupling

Although gaps between structural commitments and concrete practices constitute important evidence of acculturation, the process of acculturation may, in other circumstances, foster complete internalization of a norm. In earlier chapters, we analyze studies that also demonstrate just this sort of internalization. Importantly, our argument turns on the distinction between the *concept* of acculturation and *evidence* used to document its existence. We employ a conception of acculturation as a causal process; acculturation is not an outcome.¹²³ This process, as a conceptual matter, need not result in incomplete or shallow internalization. All socially-legitimated actors routinely internalize, via acculturative processes, the cognitive frames and behavioral expectations of socially-relevant others. Accordingly, state actors often embrace common beliefs and practices because they reflect taken-for-granted scripts of how “liberal” or “modern” states behave. For instance, state actors consider particular organizational structures and practices to be inherent features of the modern state. They accept, for example, that states engage in instrumentalist modes of planning, follow the dictates of science, and promote the general public welfare.¹²⁴ Such commitments are deeply held self-understandings of the purpose and character of modern statehood. That acculturation-driven processes also generate some rigidly decoupled outcomes does not mean that such outcomes are inevitable or even common.

¹²² See, e.g., Alvarez, Duke Law Journal (2005); cf. Koh, Duke Law Journal (2005) (arguing that acculturation might be understood as incomplete persuasion).

¹²³ See generally John W. Berry, *Conceptual Approaches to Acculturation*, in ACCULTURATION: ADVANCES IN THEORY, MEASUREMENT, AND APPLIED RESEARCH (Kevin M. Chun et al. eds., 2003) (describing process- and outcome-based conceptions of acculturation).

¹²⁴ See, e.g., John Boli, *World Polity Sources of Expanding State Authority and Organization, 1870–1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL 71, 75–80 (George Thomas et al. eds., 1987); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 145 (1997); Meyer 2000*; GREGORY J. KASZA, ONE WORLD OF WELFARE: JAPAN IN COMPARATIVE PERSPECTIVE (2006). See generally GILI S. DRORI ET AL., SCIENCE IN THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION (2003).

Although we focus heavily on patterns of decoupling in detailing acculturation in international society, we do so only because of the specific evidentiary value of these patterns. Coercion, persuasion, and acculturation can all result in behavioral change. Hence, behavioral change itself does not indicate which of these mechanisms is at work. The question then is what evidence suggests the presence or absence of any of the mechanisms. As we develop more fully in Chapter 3, evidence of incomplete internalization tends to support acculturation-based explanations and discredit persuasion-based explanations. In other words, such evidence can help arbitrate between competing theoretical accounts of why a particular norm diffuses. Furthermore, patterns of decoupling can provide useful information about micro-processes and conditions that propel acculturation. We explore the patterns of decoupling for those descriptive purposes as well. Decoupling is indicative and informative of acculturation, acculturation is not indicative of decoupling. In sum, even if incomplete internalization is best understood in certain circumstances as acculturation’s empirical footprint, it is ultimately an empirical, rather than conceptual, question whether acculturation is often or typically associated with decoupling.

2. Acculturation with “Benign” Decoupling

Acculturation can also result in different types of decoupling. On our analysis of existing empirical studies, there are at least four varieties of decoupling. Table X displays the types of decoupling that can result from acculturation. Each type provides evidence of acculturation under conditions that we discuss in Chapter 3. Each also has different implications for effectuating compliance. In the balance of this chapter, we first discuss forms of decoupling that do not hinder compliance and, in fact, may foster it. We then address a form of decoupling that raises more vexing compliance concerns.

Types of Decoupling

1. Form (of global script)	v. Functional task demands
Examples: supersonic aircraft purchases absent external security threats (Eyre & Suchman); educational curricula mismatched with agrarian labor economy (Ramirez, et al.); national science bureaucracy boards absent domestic scientific community (Finnemore); scientific research approaches not configured to national technical and economic needs (Shenhav & Kamens)	
2. Public conformity (to global script)	v. Private acceptance
Examples: treaty ratification by illiberal states (Hafner-Burton, Kiyoteru Tsutsui, Meyer, manuscript); educational curricula disassociated from local elite preferences (Ramirez, et al.; Meyer)	
3. Material demands (of global script)	v. Resource capacity
Examples: child rights regimes absent capacity to monitor or regulate (Boli-Bennett & Meyer); environmental impact assessments absent capacity to conduct reviews (Hironaka & Schofer 2002)	
4. Abstraction (of global script)	v. Concrete instantiation

At the outset we should note that all forms of decoupling may require initial significant commitments by states to meet global scripts. As the studies presented in earlier chapters show, category 1 and category 2 constitute the principal forms of decoupling identified in empirical research. In such situations, the degree of isomorphic change across countries will be, in part, a function of the depth of commitments required to attain legitimacy in the community of states (social pressure) or to fit prevailing conceptions of the modern state (cognitive pressure). Indeed, much of the research that we employ throughout this book traces its origins to an earlier body of work that attempted to explain “the expansion of the state.”¹²⁵ Borrowing from that research line, we contend that models of domestic governance institutionalized at the international level task states with agendas for action. In many important respects, states are enactors and enactments of models that are substantially organized and legitimated through global culture. States are assigned significant responsibility in such domains as education, welfare, and the environment. The scope of responsibility within these domains has been extensive, and the scripts for particular policy programs are often onerous. Empirical studies have also documented changes with respect to worldwide adoption of specific policies and laws, including environmental impact assessments and ecological set aside programs,¹²⁶ rape laws,¹²⁷ child labor protections,¹²⁸ and health and pension policies.¹²⁹ When discussing forms of decoupling that hinder compliance, we should not lose sight of the fact that the gap is relative, and that the initial commitment may on its own be substantial.

One of the prevalent types of decoupling—decoupling between form and functional task demands (category 1)—does not impede compliance. Indeed, this type of decoupling may very well facilitate it. The human rights script that governments adopt can have substantial effects, which need not serve the material task demands of the state. This is true as a conceptual matter. As an empirical matter, existing research strongly suggests such decoupling has fostered major restructuring of states including bureaucratic organizational changes and legal reforms. That these transformations override material interests of the state indicates the potential power of the acculturation mechanism to achieve great change.

Consider two examples that illustrate such effects: an empirical study of the “costs of global isomorphism” in state administration¹³⁰ and another empirical study of the “costs of institutional isomorphism” in the scientific arena.¹³¹ The former examines state expansion due to global scripts that prescribe the differentiation and specialization of governmental ministries. The researchers conclude that “with the growing importance of the global system, peripheral countries are likely to continue to copy existing models and

¹²⁵ See, e.g., George M. Thomas & John W. Meyer, *The Expansion of the State*, 10 *Annual Review of Sociology* 461-482 (1984).

¹²⁶ Frank, et al.

¹²⁷ Frank, et al.

¹²⁸ Boli and Meyer.

¹²⁹ Katerina Linos.

¹³⁰ Young S. Kim, Yong Suk Jang & Hokyu Hwang, *Structural Expansion and the Cost of Global Isomorphism: A Cross-national Study of Ministerial Structure, 1950-1990*, 17 *International Sociology* 4: 481-503 (2002).

¹³¹ Yehouda A. Shenhav & David H. Kamens, *The “Cost” of Institutional Isomorphism: Science in Non-Western Countries*, 21 *Social Studies of Science* 527-45 (1991).

incur the ‘cost of isomorphism’. Consequently, young and developing nation-states would likely continue to experience over-expansion and suffer from a subsequent financial burden” which “at times ... is untenable in their national economies.”¹³² Notably, this study is consistent with other research, discussed in Chapter __. That research details the spread of ministerial structures and, within those ministries, the emulation of educational programs, environmental regulatory regimes, and welfare systems which necessitate allocations of significant resources.

The second study examines the emulation of modes of scientific research that have been legitimated in economically developed western countries. These institutionalized modes of scientific inquiry, including the generation of research topics and the scholarly production of ideas, are poorly designed for the concerns of developing, non-Western countries. The researchers find, however, that these countries emulate prevailing forms of scientific inquiry to the detriment of their national economies. The detrimental effects include opportunity costs and the misdirection of limited scientific resources. The study concludes, for example, that among non-Western nations and underdeveloped countries, conformity to institutionalized models of scientific activity is associated with poor economic performance.¹³³

Both studies of the costs of isomorphism illustrate how and why states would enact global models at a steep material cost. As we discuss in Chapter __, actors often disregard or devalue the content of the norm and how well it functions in their existing system. Instead they favor or highly value following (i) cognitive frames and (ii) social expectations prescribing how to act. Steadfast adherence to institutionalized conceptions of sovereign territory, for example, may drive governments toward bloody conflicts and political downfall. Such results may be due to an incommensurability factor. That is, material costs are not weighed against cognitive benefits. The processes of identify formation and identity maintenance are guided by cognitive frameworks that are not subject to rational cost-benefit analysis. Similarly, material costs may not be weighed against social benefits. Social preferences are often, as we explain in Chapter __, practically incalculable. And actors often engage in materially costly, risky, and self-destructive practices to avoid societal stigma or to maintain self-respect. Additionally, even if there is a frontier in which tradeoffs between material and social interests are calculable, actors may decide not to deviate from legitimated modes of behavior due to a set of competing priorities. For example, it may simply be more important to maintain a sense of belonging in a regional community or in international society than to avoid material costs of a particular program of action. In those cases, the scale of governmental commitments required to assure good standing will influence the degree of change states pursue.

In sum, decoupling occurs in different forms and may not negate the prospect of substantial reforms. Under certain conditions, states can be expected to follow human rights models, promulgated at the international level, even if doing so sacrifices their material interests, involves extraordinary risks, or undermines the political interests of governing elites. Certainly, some human rights norms will conflict with the functional interests of governments and ruling elites. For example, the right to free and equal education does not serve the interests of many authoritarian or patriarchal governments.

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¹³³ Shenhav & Kamens, *supra* at 536.

Yet decoupling can facilitate the acceptance of these and other human rights norms. Category 1 decoupling, in particular, provides a potentially powerful vehicle for change in such circumstances. Illiberal regimes can be motivated to follow human rights models—to acquire standing, self-respect, or a cognitive fit with the global institutional environment—despite conflicting task demands of the political regime. The failure of actors to scrutinize the merits of a human rights norm or rationally calculate whether it fits the government’s existing interests may have distinct advantages. Put more provocatively, acculturation-led human rights promotion can capitalize on “flawed” decision-making resulting from social and cognitive pressures from the global institutional environment. These insights provide reason not to be dubious about the prospect for compliance with global norms involving widespread (category 1) decoupling. They also provide cause to be attentive to significant domestic tradeoffs that can result despite the shield against internalization that one might have otherwise expected with decoupling.¹³⁴

3. Decoupling and “Deep” Reform

The potentially more troubling result of acculturation is category 2 decoupling—public conformity disconnected from private, local practices. Yet, pessimism about such decoupling may be based on a logical fallacy. The size of the gap—between official human rights commitments and local practices—can remain the same within a state, without precluding absolute improvements in human rights. The question is whether the standards/commitments strengthen over time. Consider a stylized example in which (a) a state constantly lags behind its commitments by a certain amount (e.g., lags by 50 percent) (b) while those commitments progressively increase over time (requiring 100, 105, 110 units of effort). The state appears to be perpetually trailing behind on one account. Nevertheless, the absolute conditions on the ground are improving. India, for example, may be as far below its commitments to fair trial rights now as it was 30 years ago. The conception and expectation of what it means to provide a fair trial, however, may have substantially evolved over that period. Moreover, decoupling may even *expand* (a state lags behind by 50, 55, 60 percent over time), and absolute human rights conditions will still improve if the standards evolve enough (e.g., requiring 100, 115, 130 of effort). In short, a persistent relative gap between formal positions and actual performance within states may obscure absolute gains in performance.¹³⁵

Notably, these distinctions between absolute and relative gains are important to general discussions of compliance. An observer, for example, may erroneously evaluate India’s trial procedures in the 1970s by interpreting those practices through 21st Century conceptions of the relevant rights. This lens would potentially miss the country’s slip in compliance—increased decoupling over time—despite absolute gains. Similarly, World

¹³⁴ Of course, these “tradeoffs” may raise normative concerns about the priority assigned human rights models in domestic political processes. Those concerns we address in Chapter __. The important point here is that that spreading global human rights models through acculturation provides a potentially powerful force for change.

¹³⁵ Cf. Frank, Hardinge, & Wosick-Correa, *supra* at 11 (finding, among late adopters with weak domestic infrastructures, that absolute rape “reporting rates still rose during the period, but the results clearly indicate a loosening of the coupling between rape-law reforms and police reporting with global institutionalization over time”).

War II military commissions may have been more tightly coupled with global standards at the time than current international war crimes tribunals are with current standards. The former were far less rights protective than the latter, but only if measured by modern international law standards. The WWII trials were arguably more “rights protective” when measured by contemporaneous international standards. These cases also illustrate that decoupling—whether persistent, expanding, or contracting over time—does not sufficiently determine whether (absolute) human rights performance within states is improving.

In discussing category 2 decoupling and compliance, two transnational effects due to the organization of the global institutional environment deserve mention. First, we just described how absolute human rights conditions can increase if the standards/commitments increase over time. It is important to note that if the evolution of standards results from progressive institutionalization at the global level, the mean performance of all states can increase—despite constant or expanding decoupling. In other words, acculturation, even with internal decoupling in states, can produce powerful system-wide improvements.¹³⁶

Second, law reform in one set of countries, especially if it helps institutionalize the norm globally, can affect legal *outcomes* in other states. This social effect of public action may hold true even if the former law reforms are shallow (decoupled from practice).¹³⁷ The social effect of China signing up to the ICCPR, for instance, may have greater impacts on Malaysia, Singapore and South Korea’s own human rights practices than those nations signing or ratifying themselves. Indeed, the global institutionalization of a norm may produce the inverse form of category 2 decoupling: positive outcomes in local practices in states that never adopt the structural reform. In other words, the global institutionalization of a norm prohibiting torture can lead to the reduction in torture even in states that have not ratified the Torture Convention or adopted anti-torture laws. A recent statistical study of the global diffusion of rape laws (structural reform) and police reporting (local practices) finds such patterns.¹³⁸ Describing this pattern as “loose coupling at the nation-state level (outcomes without reform),” the researchers explain at the outset that they “expect the forces of global institutionalization to encourage heightened police reporting even absent national statutory changes – as individualized conceptions of rape grow institutionalized over time. ... As rape was reinterpreted under emerging global-institutional conditions, local peoples (and officials) everywhere were individualized – by education and mass media, for example – and their conceptions of rape altered accordingly. We expect increased police reporting as a result, independent of local reforms.”¹³⁹ In short, global-level scripts can effectuate significant outcomes on the ground in the event of both forms of category 2 decoupling.

¹³⁶ Notably, as a methodological aside, cross-country comparisons of relative performance between nations might overlook such aggregate outcomes. It is also questionable whether country case studies could detect these systemic effects.

¹³⁷ See *in*far, Chapter 2; cf. Miller & Prentice, pluralistic ignorance bias.

¹³⁸ Frank, Hardinge, & Wosick-Correa, at 11-12.

¹³⁹ Frank, Hardinge, & Wosick-Correa, at 7; *id.* at 7 n. 12 (referencing similar findings in cross-national studies of mass education) (citing Meyer, Ramirez, & Soysal (1992)).

4. Moving beyond Decoupling: The progression of acculturation

In cases in which acculturation yields a large, troubling gap in implementation between human rights commitments and local practices (e.g., category 2 decoupling), a question that still remains is whether the gap may narrow over time. On this question, we detail processes by which formal, even if shallow, commitments to global legal norms might be translated into meaningful change over time. These processes include: shifts in domestic political opportunity structure, the “civilizing force of hypocrisy,” and state learning.

First, “shallow” structural reform—such as the ratification of a human rights treaty or the enactment of a constitutional rights provision—often constitutes an important shift in the domestic political opportunity structure of the reforming state. These shifts often disproportionately empower groups and individuals committed to the cause of human rights—perhaps by imbuing human rights nongovernmental organizations with social legitimacy or by emboldening private citizens to seek formal redress for human rights violations.¹⁴⁰ In more extreme cases, these shifts may enable such groups to secure more meaningful policy reforms through the political process.¹⁴¹ In other words, formal changes create opportunities for private actors to promote the observance of human rights norms irrespective of whether the reforming government has any interest in doing so. Although these changes typically do not cause dramatic, immediate reductions in human rights violations, formal organizational changes do produce tangible effects on the ground.

Second, acculturation triggers what Professor Jon Elster calls the “civilizing force of hypocrisy.”¹⁴² One aspect of this idea is that public preference falsification is difficult to sustain over time because of two important audience effects. First, various constituencies will provide incentives for public actors to live up to their “hypocritical” endorsement of a norm. The publicity of their acts creates expectations in relevant audiences, and the failure to meet these expectations will generate various forms of political and social pressure to do so. Second, public conformity signals to other recalcitrant actors that social opposition to the norm in question is declining (or, put differently, that social support for the norm is rising). In other words, public conformity, even without private acceptance, exerts collateral influence on other actors in the social system. Cognitively, acculturation narrows the gap between public acts and private preferences: “under certain conditions people change their beliefs to avoid the unpleasant state of cognitive dissonance between what they profess in public and what they believe in private.”¹⁴³

¹⁴⁰ Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 11–35 (Thomas Risse et al. eds., 1999).

¹⁴¹ See, e.g., Darren Hawkins & Melissa Humes, *Human Rights and Domestic Violence*, 117 *POL. SCI. Q.* 231, 242 (2002).

¹⁴² Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 111 (Jon Elster ed., 1998); see also Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 99 *AMER. J. INT’L L.* (2006) (describing “blowback effects” by which the justificatory practices of states ultimately constrain state action irrespective of whether the justifications are pretextual).

¹⁴³ Jon Elster, *Timur Kuran: Private Truths, Public Lies: The Social Consequences of Preference Falsification*, 39 *ACTA SOCIOLOGICA* 112, 115 (1996) (book review); see also LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

Third, acculturation, when coupled with the dynamics of state learning, encourages states to make increasingly meaningful change. Although shallow acts of public conformity might yield some short-term social benefit to the conforming state, other states will learn over time that these acts do not necessarily signal genuine acceptance of the norm in question. As a consequence, conforming states will be required to enact increasingly meaningful reforms to capture the same social benefit. For example, the simple act of ratifying a human rights treaty might initially generate some social and political capital for the ratifying state, but failure to improve human rights conditions on the ground will erode, over time, the importance of this signal (both for the ratifying state itself and for all future would-be ratifying states). To capture the same social and political capital in the future, states might have to enact domestic legislation implementing treaty obligations. This learning dynamic, therefore, triggers an iterative process in which states may be eventually required to embrace remarkably robust institutional commitments. Indeed, the day may come when only a demonstrably strong human rights record on the ground will capture the same social and political benefit generated initially by superficial reforms. Recent empirical work suggests that shallow ratifications trigger a range of social dynamics that ultimately improve states' actual human rights practices.¹⁴⁴

5. Managing Decoupling: Designing institutions to reduce the gap

The above processes may be set in motion by the emergence of decoupling within a state's domestic system. To the extent that a gap nevertheless remains, policy interventions and legal structures can be designed to reduce or close it. Indeed, institutional design could harness other mechanisms such as persuasion (e.g., through local social movements) and coercion (e.g., through international agencies) after global-level acculturation has inspired governmental commitments to human rights. Our approach to regime design problems facilitates more effective management of persistent decoupling in two ways. First, it makes possible an integrated theory of regime design by providing an account of all three mechanisms of social influence. As we develop more fully in the next Chapter, acculturation must play a central role in any such theory. The crucial point for now is that regimes need not be designed around only acculturation-based strategies. That is, our approach need not rely on acculturation throughout; other mechanisms can be used at different points to manage decoupling. Second, our approach makes possible a richer understanding of the varieties of decoupling—an understanding that facilitates targeted interventions organized around one or more of the mechanisms of social influence. In the following section, we discuss a range of possible interventions.

In fashioning such interventions, it is important to keep in mind the varieties of decoupling. The four types of decoupling have different implications for designing strategies to effectuate compliance with international human rights norms. Understanding these differences, for example, can help to identify the relevance and extent of actors' motivations in failing to fulfill promises to protect human rights. In particular, these

¹⁴⁴ Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1378 (2005); Gili S. Drori, *Governed by Governance: The Institutionalization of Governance as Prism for Organizational Change*, in *WORLD SOCIETY AND THE EXPANSION OF FORMAL ORGANIZATION* (Gili S. Drori et al. eds., 2006); Gili S. Drori et al., *Sources of Rationalized Governance: Cross-National Longitudinal Analyses, 1985–2002*, 50 ADMIN. SCI. Q. (2005).

different forms of decoupling reveal the hazards of inferring particular motivations with limited data or limited theorization. In other words, one needs more information than the general existence of “decoupling” to ascertain the reason for compliance failures. For example, torture is widely employed by government agents despite its formal prohibition. This discrepancy may reflect a lack of normative support for the prohibition (category 2 decoupling), a lack of state capacity to control the practice (category 4), or a combination of both. Of course more information may permit one to determine which type of decoupling predominates in a given situation and what ideational or material forces motivate local actors and institutions. The important point is that obtaining such information is necessary to building effective human rights institutions.

Some of the implications for institutional design are obvious; others are less so. First, reform strategies should be attuned to different forms of decoupling in deciding which material or social resources to bring to bear on a situation. Gaps in implementation due to material resource constraints (category 3), for example, might require financial assistance or technical and advisory support from international organizations. Gaps due to normative dissension (category 2) may require strategies for exposing multiple levels of society to global models of “appropriate” human rights behavior. As an example of the latter, a study by Professors Evan Schofer and Ann Hironaka suggests that exposure of multiple layers of actors and institutions within a country to a global model reduces the gap between globally inspired environmental policies and environmental degradation.¹⁴⁵

Second, understanding the different types of decoupling can help assess the nature of global support for a norm—a determination that may prove vital to regime architects in promoting compliance. For instance, widespread acceptance of a human rights standard despite particular types of decoupling (such as category 1 decoupling) can indicate the symbolic appeal of a global script. Professors Eyre and Suchman’s study of purchases of technologically advanced aircraft (category 1 decoupling), for example, indicates the existence and strength of global social expectations for particular national security practices.

Such insights may be important for a regime design that requires the preexistence (or prospect) of a favorable cultural environment at the international level. For example, world-wide or regional support for a human rights (or a national security) norm may determine the durability of institutions that attempt to regulate those practices. Also, as we discuss in the following chapter, culturally inspired adherence to a norm may negatively interact with the use of material incentives to promote the same behavior (due to “motivation crowding out” effects). In short, ascertaining whether, and to what extent, decoupling is driven by such social influences would be important for institutional designs that employ material rewards and punishments. Indeed, contrary to predominant views in international law, limiting the use of material sanctions may be highly conducive to closing some implementation gaps.

Of course, as discussed earlier, category 1 decoupling is essentially “benign.” However, it may be accompanied by other forms of implementation gaps if the script does not impose deep enough reform, needs updating at the local level, or is spread unevenly across states. Indeed, some states may not have adopted the script. The question becomes what interventions to pursue in these contexts. The important point is that

¹⁴⁵ Evan Schofer and Ann Hironaka, *The Effects of World Society on Environmental Protection Outcomes*, 84 *Social Forces* 27 (2005).

category 1 decoupling helps regime architects assess the nature of global support for the norm. That assessment can inform decisions concerning how to build on gains made through benign decoupling and whether to employ material incentives that might very well crowd out those gains.

Third, understanding the different types of decoupling can help determine whether a norm has achieved the status of customary international law. Customary international law is conventionally defined as a general and consistent practice of states followed out of a sense of international legal obligation. How might sociological insights inform the identification of such a norm? The spread of worldwide isomorphism with category 2 decoupling may indicate that a common state practice is the product of a script enacted out of a sense of global normative expectations. In the human rights arena, those expectations generally involve notions of state duties and responsibilities. Thus these particular patterns of state conformity support the existence of a customary international law norm. Indeed, our model of global culture would predict that customary international law norms often emerge through top-down pressure and that such pressure would be manifested by states' exhibiting outward conformity despite internal disagreement with the norm. The striking pattern of system-wide isomorphism and internal decoupling is indeed a configuration that reflects how societal norms emerge and regulate actors within a community.

This sociological understanding should correct for an error of under-inclusiveness in identifying customary law. A common assertion is that decoupling provides negative evidence of an existing or emergent customary international law norm. The US Supreme Court, for example, relied on such reasoning in *Sosa v. Alvarez-Machain*. The Court held that the prohibition on arbitrary detention does not constitute customary international law. According to the Court, "that a rule as stated is as far from full realization as [arbitrary detention] is evidence against its status as binding law." Following *Sosa*, leading scholars have observed that "courts will be less likely to recognize the rule or cause of action when there is a large gap between it and actual state practice."¹⁴⁶ Yet a large gap between a *universally endorsed* human rights rule and state practice may very well suggest the globally legitimated status and normative power of the rule. Such a gap is at least consistent with—if not affirmative evidence of—the existence of a customary international legal norm.

An accurate assessment of the social acceptance of a norm in the international community and the existence of its legal pedigree has additional relevance for designing institutions to effectuate compliance. The global legitimacy or legality of a state practice—and the process for gaining such status—may affect the beliefs and attitudes of officials who monitor and enforce the norm. Effective institutional design often relies on international and local monitors and enforcers, and the willingness of those actors to perform their roles may turn on their perception of the legitimacy or legal authority of a norm. Indeed, coercion-based theories of international relations generally depend on such actors to exercise the levers of control. Powerful states and intergovernmental bodies may sanction states; members of civil society may employ consumer and other boycotts against foreign countries; companies and financial organizations may disinvest from

¹⁴⁶ Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869, 900 (2007).

particular projects; professionals (including workplace superiors, peers, and whistleblowers) may penalize violators within their institutional settings. The costs of both monitoring and sanctioning human rights violations may be considerable. What motivational forces, therefore, inspire actors to monitor and sanction? How might the global status of the relevant (human rights) norm affect those motivations?

Note the relationship of these questions to the problem of implementation deficits due to decoupling. First, a coercion-based approach to reducing compliance gaps is incomplete without answers to these questions. And, as we describe below, acculturation helps provide the answers. Second, coercive mechanisms may be needed to close decoupling gaps that result from acculturation. Nevertheless, the creation of preferences for monitoring and sanctioning must be formed through mechanisms of social influence other than coercion itself (else an infinite regress problem). Third, based on the following analysis, a stronger claim can be made that acculturation is often a prerequisite for motivating actors to administer coercive interventions that do not serve their direct material interests.

A rich research program in empirical economics examines sanctioning behaviors and social norms. This research demonstrates that particular members of social groups—“strong reciprocators” or “cooperators”—are motivated to sanction others based on the perceived legitimacy or collective endorsement of a social norm. They are willing to incur costs to themselves to punish violators when adherence to the norm is an expectation for how all actors in the group ought to behave. These social dynamics work well in settings in which violators deviate from the social norm due to privately held interests. That is, this form of social enforcement operates effectively when actors breach a social convention because they have not fully internalized the norm due to category 2 decoupling. Strong reciprocators may pay the costs of monitoring and sanctioning even when they are not directly affected by the violation. They are willing to expend their own resources to penalize actors who violate a norm of fairness or justice in interactions with others.¹⁴⁷ The social legitimacy of the norm may also be important in determining whether sanctioned actors either retaliate or realign their behavior in response to being punished.¹⁴⁸ Those responses—realignment or retaliation—can affect the long-term viability of the system. Accordingly, if mechanisms of coercion are employed to close the compliance gap, it is important to consider (i) the prior sequencing of mechanisms of social influence and (ii) the forms of decoupling in which such coercive devices can operate effectively.

Human rights norms generated through acculturation and its universalizing principles may produce the conditions upon which strong reciprocators are prepared to act. In other words, (rationalist) models of state behavior that rely on coercive mechanisms for altering state practices take actors’ beliefs and preferences as a given. But what actors have the interest in levying sanctions and the willingness to pay the costs for such monitoring and enforcement? (If they already had a material self-interest in monitoring

¹⁴⁷ Notably, the micro-processes of acculturation turn on identification between similar actors. Identification between actors can also mediate how likely and how heavily penalties will be initiated by strong reciprocators to promote social norms. Acting as a third party, strong reciprocators are generally biased toward members of their own group. See, e.g., Gintis. It is thus important whether the strong reciprocator identifies with perpetrators, victims, or both. Those factors should also inform institutional design strategies.

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and levying sanctions, they would have done so.) Acculturation-driven processes may constitute a precondition for forming the background beliefs and preferences of actors who are willing to penalize others' failures to comply with globally prescribed human rights norms.

Finally, regime architects can reduce gaps created through decoupling by resorting to persuasion mechanisms. And, once again, acculturation may serve as a cultural predicate for these acts of persuasion to succeed. Indeed, some of the most interesting diffusion studies demonstrate that states that are late adopters of a global norm (e.g., in women's rights) join the international community without local social movements pressing for such changes. Once the global model has been adopted, however, it may be most useful to foster social movements to ensure the government's consistency in commitments. These actors can persuade others by framing their cause as congruent with human rights principles that are now part of the existing value system. The act of adoption of the global model can also help human rights advocates to cue target audiences, within the government and civil society, to think harder about the merits of the advocates' message. These devices notably work well in conjunction with the civilizing force of hypocrisy and political opportunity windows, which can accordingly help empower persuasion based campaigns to succeed. We turn to such relationships between the different mechanisms, including negative interactions and sequencing effects, in the following Chapter.

Chapter 12

Toward an Integrated Theory of Law's Influence

[Omitted for IILJ Colloquium]