

From International Law and International Relations to Law and World Politics

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Introduction

Political scientists—primarily in the discipline’s international relations subfield—have long studied international law. After considering how political scientists and legal scholars define international law, this essay identifies five stages of political science research on international law, including the current interdisciplinary International Law and International Relations (IL/IR) stage, and it reviews three trends in political science research that may constitute an emerging sixth stage of interdisciplinary scholarship: a Law and World Politics (L/WP) stage. Moving beyond the “IL” in IL/IR scholarship, international relations scholars are increasingly studying domestic law and domestic courts, not only their foundational role in supporting international law and international courts, but also their direct role in core areas of international relations, including international conflict and foreign policy. Moving beyond the “IR” in IR/IL scholarship, political scientists are bringing research on law up to speed with the broader world politics trend in political science by studying types of law—including extraterritoriality, conflict of laws, private international law, and the law of transnational commercial arbitration—that govern the transnational activity of private actors, and can either support or hinder private global governance. And moving beyond the domestic-international divide, political scientists are increasingly rejecting international law exceptionalism, and beginning to take advantage of theoretical convergence across the domestic, comparative and international politics subfields to develop a better general understanding law and politics.

I. Defining International Law

Because political scientists do not always define international law in the same way, it may be helpful to begin with the question of definitions. Scholars often define international law in terms of the subjects to which it applies and the scope of activity it governs. Traditionally, this meant international law was the “law of nations,” the rules that apply to states (the subjects) in their relations with each other (the scope). But for political scientists there are two problems with this type of definition. First, definitions based on subjects and scope are unstable. International law’s subjects and scope have varied historically. The subjects of international law have expanded to include non-state actors (e.g., individuals are now subjects of international criminal law) and the scope of international law has expanded beyond simply relations between states (e.g., international human rights law governs how states treat their citizens). Second, there are types of norms other than international law—including other legally binding norms such as domestic law (sometimes called “municipal law”) and non-legally binding norms—that may also

apply to states as subjects (e.g. many aspects of constitutional law) and that govern the same activity as international law (e.g. the conduct of diplomacy and the use of military force). Therefore, definitions based on subjects and scope cannot analytically distinguish international law from other types of law or from non-legally binding norms.

An alternative is to define international law in terms of its sources, which include treaties, customary international law, and general principles of law. This is what international lawyers and international courts ordinarily mean when they use the term “international law,” and it is how international law defines itself in its law of sources, the most authoritative statement of which is Article 38(1) of the Statute of the International Court of Justice (ICJ) (Shaw 2008, 70). Article 38(1) provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International law’s sources are not completely static, but they probably are more stable than international law’s subjects and scope, which vary across both time and geographic space. Defining international law in terms of its widely accepted sources builds on the comparatively stable practical understanding of what counts as binding international law, and can be agnostic to (and therefore accommodate) variability in subject and scope while distinguishing international law from other types of international norms.

Treaties (also commonly called “conventions”) are legally binding written agreements between two or more states, and can be either bilateral or multilateral. The rules governing treaties—including treaty making, entry into force of treaties, treaty validity, and the interpretation, amendment and termination of treaties—are codified in the Vienna Convention on the Law of Treaties, the so-called “treaty on treaties” (Aust 2014).

Customary international law rules are rules that are reflected in the conduct of states (“state practice”) and accepted by them as legally binding (a sense of legal obligation or “*opinio juris*”). Customary international law rules are often difficult to establish. However, it is generally understood that to establish that a rule is a customary international law rule, both state practice and *opinio juris* must be demonstrated. The greater the duration, consistency and generality of the practice, the stronger the evidence that the state practice requirement is fulfilled. As to *opinio juris*, international courts sometimes insist on rigorous evidence that states follow a rule out of a sense of legal obligation, and sometimes are willing to infer *opinio juris* from general practice. Once established, a customary international law rule is legally binding on all states, except for states that persistently objected to the rule before its establishment and, for regional customary international law rules, for states outside the relevant region (Crawford 2008, 26-30).

General principles of law are principles of law that are recognized by the world's major legal systems (Cheng 2006). There are two views, not necessarily mutually exclusive, about how to establish that a given principle is a legally binding general principle of law. One is to demonstrate that a principle is shared by all or a majority of the world's domestic legal systems and to adapt the principle to the international context, while another is to demonstrate that it can be derived from the character of the international legal system itself (Crawford 2008, 35; Murphy 2012, 101-102; Thirlway 2014, 94-96). International lawyers and international courts ordinarily consider general principles of law as filling gaps left by treaties and customary international law, particularly in procedural matters (such as evidence and judicial process), and narrower in scope than either of the other two types of international law (Shaw 2008, 99).

The reference to "judicial decisions and the teachings of the most highly qualified publicists" does not mean that courts and scholars create international law. To the contrary, Article 38(1)(d) states that these sources are "subsidiary means for the determination of rules of law." Thus, international lawyers and international courts often use domestic court decisions, international court decisions, and the research of scholars and institutions of international law (notably, the United Nations International Law Commission) as evidence that a given rule is or is not an international law rule, or to ascertain the content of a rule (Buergethal and Murphy 2013, 33). Article 38(1)(d) refers to Article 59 of the ICJ Statute, which states that "The decision of the Court has no binding force except between the parties and in respect of that particular case." Nevertheless, international courts often follow their own and each other's conclusions about international law, even if they are not legally required to do so.

Although treaties, customary international law and general principles are the three well-established types of international law, there are theoretical debates about whether there are other sources of international law that currently or may one day exist (Thirlway 2014, 19-25). Moreover, international law does not include all international norms. To the contrary, non-legally binding norms are pervasive and important in world politics (Finnemore & Sikkink 1998; Kratochwil 1989; Sandholtz and Stiles 2009). Some scholars refer to these non-legally binding norms as "soft law" (Guzman and Meyer 2010; Pollack and Shaffer 2013). Without doubting the importance of these norms, others scholars find it analytically preferable to refer to them simply as "non-legally binding norms" to guard against conflating them with legally binding international law (Childress, Ramsey and Whytock 2015, 326-328; Murphy 2012, 111; Raustiala 2005, 588-591). One of the most important questions for political scientists and policy makers is whether "legal norms, as a type, operate differently from any other kinds of norms in world politics" (Finnemore 2000, 701). This inquiry requires an analytical distinction between what is and is not law. Even if the law of sources does not always yield obvious answers to what is and is not international law, it offers a well-established point of departure that is consistent with how international law itself defines what is legally binding and with how international lawyers and international courts themselves analyze what is and is not legally binding.

Political scientists have proposed concepts that are related to, but not the same as, international law. These include the concepts of "legalization," which has been defined as "a particular set of characteristics that institutions may (or may not) possess," namely obligation, precision, and delegation (Abbott et al. 2000, 37); and "judicialization," which has been defined

as “the infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside” (Vallinder 1995, 13). These concepts have already proven to be valuable for improving understanding of certain aspects of world politics. Other political scientists and legal scholars, however, have criticized these concepts for being based on excessively narrow understandings of law (Finnemore and Toope 2001). The essential point is that the concepts of legalization and judicialization are different from international law. Whether to use one of these concepts instead of the concept of international law as such depends on the research question being pursued.

II. International Law and Political Science

Political scientists have been studying international law since the birth of political science as a discipline. In the United States, for example, when the American Political Science Association (APSA) was founded in 1903, its constitution defined the organization’s goal as “the encouragement of the scientific study of Politics, Public Law, Administration and Diplomacy,” and “international law and diplomacy” was one of its seven founding subfields (Schmidt 1998, 81).

Since then, political science research on international law has developed in five stages. First, during a pre-World War II *formalist stage*, political scientists—not unlike their colleagues in law schools—focused largely on analysis of international law’s jurisprudential underpinnings and historical development and on systematic description of its content (Fenwick 1924; Gettell 1910; Wright 1922). Second, in a *realist stage*, political scientists challenged the formalist approach by insisting on the importance of international law’s social and political context, including the role of state power, in explaining the creation and impact of international law. One product of the realist stage was a deep skepticism about the potential of international law in the realm of high politics, but without denying international law’s importance in less political fields of activity (Carr 1939; Morgenthau 1940; Morgenthau 1948; Niemeyer 1941). In a third *theoretical stage*, political scientists moved beyond the realist critique of international law by using various theoretical approaches, including bureaucratic decision-making theory and systems theory, to develop accounts of how international law can play a role in world politics (Bull 1977; Deutsch and Hoffman 1968; Falk 1970; Kaplan and Katzenbach 1961). The fourth *international conflicts stage*, more empirical but nevertheless driven by legal scholars more than by political scientists, moved from theory to case-study research on the role of international law in international conflicts—the very realm of international relations where realists had the most doubt about a significant role for international law (Boyle 1985; Bowie 1974; Chayes 1974; Ehrlich 1974; Finnegan, Junn and Wilson 1979; Forsythe 1990; Henkin 1979).

The fifth and current interdisciplinary *international law and international relations* (IL/IR) stage of research on international law is a joint enterprise of political scientists and legal scholars. The emergence and refinement of three paradigms of international relations as alternatives to realism contributed to the reinvigoration of political science scholarship on international law in this fifth phase: institutionalism (Keohane 1984; Keohane 1997), constructivism (Kratochwil 1989; Onuf 1989), and liberalism (Moravcsik 1997; Slaughter 1995). Although the research in this current phase is diverse, it focuses largely on three topics: the creation of international law, including the emergence of international legal norms and the design

of treaties (e.g. Koremenos 2005; Finnemore and Sikkink 1998; Raustiala 2005; Sandholtz 2007); state compliance with international law (e.g. Simmons 2000); and international courts (e.g. Alter 2014; Helfer and Slaughter 1997; Stone Sweet and Brunell 1998). Substantively, it has focused largely on three topics: human rights (e.g. Hafner-Burton 2009; Simmons 2009), international economic law (e.g. Busch and Reinhardt 2001; Simmons 2000), and international conflict (e.g. Huth, Croco and Appel 2011). Methodologically, it complements the theoretical and case-study orientations of earlier stages of political science research with the occasional use of large-N statistical analysis to test hypotheses about the role of law in international relations (e.g. Kelley 2007; Simmons 2000).

There are already many excellent and comprehensive reviews of the IL/IR stage of political science research on international law (e.g. Arend, Beck and van der Lugt 1996; Byers 2008; Dunoff and Pollack 2013; Hafner-Burton, Victor and Lupu 2012; Raustiala and Slaughter 2002; Slaughter 2004; Shaffer and Ginsburg 2012; Simmons 2008; Simmons 2012). It would make little sense to duplicate them here.

Therefore, the remainder of this essay focuses on what may be an emerging sixth stage of political science research on international law, which I call “Law and World Politics” (L/WP) to distinguish it from two tendencies in IL/IR scholarship: a focus on one type of law, international law (the “IL” in IL/IR); and a focus on law that governs states and their relations with each other (the “IR” in IL/IR). L/WP scholarship pushes against these implicit borders of IL/IR scholarship. Pushing against “international law-centrism,” it incorporates the role of domestic law and domestic courts in international relations. Moving beyond IR, it adopts the “world politics” paradigm that is increasingly influential in political science by incorporating law governing not only international relations, but also transnational relations. In both of these ways, this emerging sixth stage is moving toward more fully realizing some of the promises of liberal international law theory (Moravcsik 2013; Slaughter Burley 1993). L/WP also questions the tendency in some political science scholarship on international law to treat international law as *sui generis*. Challenging this “international law exceptionalism,” L/WP theorizes across the domestic-international divide to develop a more general understanding of law and politics.¹

III. Beyond International Law: Foreign Relations Law and International Relations

As the “IL” in IL/IR suggests, IL/IR scholarship focuses primarily on a particular type of law, international law, and particularly on one type of court, international courts (Dunoff and Pollack 2013, 635). There are, however, two streams of interdisciplinary scholarship that are moving the research agenda beyond international law and international courts—that is, beyond the “IL” in IL/IR scholarship—by incorporating domestic law and domestic courts into the study of international relations. The first aims to improve accounts of the role of international law and international courts in international relations by incorporating into those accounts the domestic legal foundations of international law and international courts. The second stream breaks more sharply from the current IL/IR research agenda by focusing on the role of domestic law and

¹ Arguably, the field of socio-legal studies has advanced further than political science in these directions, as suggested by the work of Terence Halliday and Gregory Shaffer on transnational legal orders (Halliday and Shaffer 2015; Shaffer 2012).

domestic courts as independently significant in international relations, beyond their role as foundations for international law and international courts.

A. The Supporting Role: The Domestic Legal Foundations of International Law

The first stream retains IL/IR's primary focus on the role of international law and international courts in international relations, but turns to domestic law and domestic courts to help explain that role. While the role of international law and international courts in international relations remains the primary explanandum in this line of research, the domestic legal foundations of international law and international courts are increasingly part of the explanans. This line of research recognizes what international legal scholars have long understood: that domestic law and domestic courts are foundational to international law development, international law application, international law compliance, and the effectiveness of international courts (Shelton 2011).

International Law Development. First, domestic law and domestic courts are foundations of international law development. Domestic legal rules structure states' internal processes for treaty making, determining, among other things, which domestic political actors participate in the treaty making process and which have a right to approve a treaty once it has been negotiated.² These rules vary cross-nationally. In some states, at least some treaties may be made by the head of state or head of government alone. For example, in the United States, sole executive agreements may be made with other states on the authority of the president alone (Bradley 2013, 86-95). In other states, domestic law allows the head of state or government to take the initiative to negotiate treaties with other states, but requires legislative approval prior to ratification (Shelton 2011, 8). Some states with bicameral legislatures require both houses to approve, while others require only one (Shelton 2011, 8). For example, treaties made under Article II of the U.S. Constitution must be approved by two-thirds of the Senate, whereas executive-legislative agreements must be approved by a majority of both houses of Congress.

Political scientists and legal scholars have started to study how these domestic legal rules affect the form of treaties. For example, in the U.S. context, scholars have examined how these rules combine with domestic and international political factors to influence the President's choice between sole executive agreements, executive-legislative agreements, and Article II treaties (Hathaway 2008; Martin 2005; Setear 2002). Far more could be learned about the domestic legal foundations of treaty-based cooperation by using comparative data. By moving beyond single-nation case studies, IR scholars could empirically analyze the effects of cross-national legal variation on the treaty-making behavior of states, including treaty-making propensity and choice of available domestic treaty-making processes across different dyads or groups of states and across different issue areas. For example, Simmons (2009, 69, 87) presents evidence supporting the hypothesis that "the higher the ratification hurdle under domestic law, the less likely a government will be to ratify an international human rights agreement, even if it is sympathetic to its contents." Verdier and Versteeg (forthcoming) are gathering detailed cross-

² The Vienna Convention on the Law of Treaties contains rules governing the international level of the treaty-making process—for example, the steps that must be taken for a treaty to be legally binding on states under international law.

national data on the domestic rules governing treaty making that promises to open new avenues for empirical research on the relationship between domestic law and international law.

Domestic law can also influence the creation and evolution of two other types of international law: customary international law and general principles of law. The two required elements of a rule of customary international law are state practice and *opinio juris* (a sense of legal obligation) (see above). Domestic law might serve as evidence of either or both of these elements (Shaw 2008, 82-83). Domestic law also contributes to general principles (see above). Determining whether a putative general principle of law exists involves an exercise in comparative legal analysis to determine whether it is indeed common to the world's major legal systems (Janis 2008, 59). In these ways, domestic law can be understood as at least partially constitutive of international law.

Domestic courts also contribute to the development of international law. For example, domestic courts examine evidence of state practice and *opinio juris* to determine whether a putative rule of customary international law exists. These domestic court determinations may then be used as evidence of international law in later situations (Crawford 2008, 41-42). This is one sense in which judicial decisions are, as Article 38(1)(d) of the ICJ Statute provides (see above), a “subsidiary means for the determination of rules of [international] law.” In this way, domestic courts “help mold rules through the collection of evidence of customary international law or the general principles of law” (Janis 2008, 83-86). Domestic courts also contribute to the development of international law insofar as their decisions constitute state practice, which, along with a sense of legal obligation, is necessary for the establishment of customary international law (Conforti 1993, 79; Shaw 2008, 112). Indeed, according to one recent study, the number of domestic court decisions on matters of international law “easily outnumbers the decisions of international courts and tribunals” and these domestic court decisions have “a more profound effect for the actual application of international law, and the protection of the international rule of law, than do the decisions of international courts and tribunals” (Nollkaemper 2012, 8).

International Law Application. Domestic law and domestic courts also play a fundamental role in determining whether and how international law will be applied. Domestic legal rules govern the circumstances in which international law has domestic legal effect within states. These rules vary cross-nationally. Often this variation is described in a very rough binary fashion, with “monist” states in which international law is automatically deemed part of and perhaps supreme to domestic law, and “dualist” states in which domestic legal systems and the international legal system are considered separate, with international law having domestic application only when domestic law itself permits that (Shaw 2008, 131-133).

In fact, these rules vary in more complex ways than the monist/dualist distinction would suggest (Crawford 2012, 50). One dimension of variation is the required steps for international law to have domestic effect, ranging from automatic effect to a requirement that international law be implemented through domestic legislation before it has an effect. These requirements are typically different for treaties and for customary international law (Verdier and Versteeg forthcoming). To give one example, under U.S. law, a distinction is made between self-executing treaties (which have automatic domestic effect) and non-self-executing treaties (which are binding on the United States on the international plane, but have no domestic effect unless

implemented through legislation) (Shelton 2011, 9-11). Political scientists have started to analyze whether cross-national variation in these types of domestic rules affect compliance with international law. For example, Sandholtz (2012) finds that states have better human rights performance when they have constitutional rules making treaties directly applicable in domestic courts. Another dimension of variation is the extent to which international law takes priority over domestic law. For example, domestic law—often domestic constitutional law—may or may not make treaties superior to legislation and may or may not make customary international law directly applicable in the domestic legal system (Ginsburg, Chernykh and Elkins 2008, 209). In states that give treaties and legislation equal status, conflicts are generally resolved with a later-in-time rule, whereby the more recent of the two rules prevails (Shelton 2011, 5).

Domestic courts help determine how international law will be applied by interpreting treaties. The Vienna Convention on the Law of Treaties (VCLT) contains principles of treaty interpretation. However, domestic rules of treaty interpretation—whether enacted through legislation or common law—do not always follow them, and in any event states may interpret and apply the VCLT’s principles in different ways (Bradley 2013, 66). A sophisticated understanding of treaty interpretation by states thus depends on an understanding domestic law. Domestic law also allocates states’ internal international law interpretation authority. In most states, domestic courts are understood to be the principal interpreters of treaties (Shelton 2011, 10-11). But in other states—including the United States—domestic courts give considerable deference (“great weight”) to the executive branch’s views on the proper interpretation of a treaty (Bradley 2013, 67). Domestic courts may also give weight to the interpretive decisions of the domestic courts of other treaty signatories, giving rise to “a corpus of national court decisions . . . that implements, refines, and develops international law” (Murphy 2012, 169). Treaty interpretation is an important function, because the effects of international law depend not only on what international law says but also on how international law is interpreted when it is applied and because, when domestic courts interpret treaties—at least those that enjoy a degree of judicial independence—they may be able to limit the ability of the executive branch to engage in self-serving auto-interpretation of treaties and thus contribute to the effectiveness of international law. Political scientists might therefore find it useful to gather cross-national data on the domestic legal rules governing treaty interpretation to better understand how they interact with international legal rules of treaty interpretation in ways that might affect the impact of treaties on state behavior. Conant (2013) takes an important step in this direction by developing a theoretical account of factors that might influence domestic courts when applying international law.

International Law Compliance. Domestic courts and other domestic legal actors can contribute to (or inhibit) to compliance with international law. As Conforti (1993, 8-9) notes, “compliance with international law relies not so much on enforcement mechanisms available at the international level, but rather on the resolve of domestic legal operators such as public servants and judges to use to their limits the mechanisms provided by municipal law to ensure compliance with international norms.” Two potential mechanisms of state compliance with international law depend heavily on domestic courts: enforcement and internalization. Technically, neither domestic courts nor international courts can enforce international law (or any law) because they lack the tools of force to do so. However, they can and often do contribute to enforcement by applying international law, finding conduct in violation of international law,

and then ordering compliance or requesting enforcement by other bodies (such as the executive branch of government) to enforce. According to transnational legal process theory, an even more fundamental process leading to compliance is internalization. As Harold Koh argues, the key to compliance—or, as he calls it, “obedience”—is a process of “interaction and interpretation whereby international norms become domesticated and internalized into domestic law” (Koh 1997). One of the principal forms of internalization is judicial internalization, whereby “litigation in domestic courts provokes judicial incorporation of international law norms into domestic law, statutes, or constitutional norms” (Koh 1997); but legislators and executive agencies may also incorporate (or decline to incorporate) international law into legislation and regulations.

Empirical research findings support the proposition that these domestic legal foundations play a significant role in promoting compliance with international law. For example, Baumgartner (2011, 473) finds that states with certain domestic court access rights perform better in at least some fields of human rights; Lupu (2013) finds that independent domestic courts improve compliance with human rights agreements, but that this positive effect depends on domestic rules governing evidence; Keith (2002) finds that judicial independence has a positive effect on human rights performance; and Powell and Staton (2011, 162) find that the less effective a state’s domestic judiciary, the more likely it is to both ratify and violate the Convention Against Torture. Domestic courts also feature prominently in Simmons’ (2009) domestic politics theory of treaty compliance. One of the three causal mechanisms she explores is the ability of treaties to support domestic litigation. She argues that treaty-based litigation in domestic courts is a potentially important mechanism for human rights enforcement, at least if there is judicial independence (Simmons 2009, 132). Beyond domestic courts, another domestic legal institution may play a supporting role in international law compliance: legislatures. Lupu (2015) finds that the positive impact of human rights treaties increase when a state has more legislative veto players, and Hillebrecht (2012) likewise emphasizes not only the role of domestic courts in compliance with human rights, but also legislative actors. Hafner-Burton, Helfer and Fariss (2011) find that states where domestic courts exercise strong oversight of the executive are more likely to derogate from human rights commitments than other states.

The role of domestic legal institutions in compliance raise several research questions for empirical examination. Under what circumstances will domestic courts order enforcement when they find that there has been a violation of international law? Under what circumstances will enforcement bodies themselves comply with judicial enforcement orders? Under what circumstances do parties comply with domestic court decisions ordering compliance, even in the absence of an enforcement order? Under what circumstances do courts internalize international law by incorporating it into common law or into interpretations of domestic law, and under what circumstances do legislators internalize international law by implementing it through legislation? Answering these questions will require drawing on political science theories of domestic political behavior—including judicial decision-making theory and theories of legislative behavior—to shed light on the factors influencing the behavior of these domestic actors on matters of international law.

International Courts. Like international law, international courts have domestic legal foundations. These foundations are twofold. First, domestic legal factors may contribute to the caseload of international courts. Whether to agree or decline to consent to the jurisdiction of an

international court is a foreign policy decision made through a process governed by domestic law. Domestic courts can also contribute (or not) to the caseload of international courts such as the Court of Justice of the European Union (CJEU) by referring to them disputes about the meaning of international law (Helfer and Alter 2009; Stone Sweet and Brunell 1998). Second, domestic law and domestic courts can play a crucial role in determining the effectiveness and influence of international courts (Alter 2014, 61). Political scientists have found this to be the case for the CJEU and its predecessor, the European Court of Justice (Alter 2001; Burley and Mattli 1993; Helfer and Slaughter 1997; Stone Sweet and Brunell 1998). As political scientists have noted, however, domestic court support for international courts is not inevitable (Alter 2001, 61). Further research could inquire into the factors that determine levels of domestic court support.

More broadly, when a domestic court and an international court both purport to have jurisdiction over a dispute, the domestic court may either decline to exercise jurisdiction (thus supporting the international court's claim to authority), or it may exercise domestic jurisdiction notwithstanding the international court's claim to jurisdiction (Shany 2007). And when an international court asserts jurisdiction and decides a dispute, domestic courts may either recognize—and perhaps also order enforcement of—the international court's decision (again supporting the international court's claim to authority), or it may decline to do so (thus impeding the exercise of the international court's authority) (Whytock 2009, 83-88). Domestic court recognition of an international court decision may increase the likelihood of compliance because “governments find it much harder to disobey their own courts compared to international tribunals” (Weiler 1994, 519). More generally, Mitchell and Powell (2013) find that a state's legal tradition influences the durability of its commitments to international courts. For example, they find that a state's legal tradition—civil law, common law, or Islamic law—influences its acceptance of the jurisdiction of international courts. Simmons (2009, 83-84) finds that states with domestic legal traditions based on common law are less likely than other states to ratify human rights treaties and more likely to make reservations to those treaties that they do ratify.

B. The Direct Role: Domestic Law and Domestic Courts in International Relations

The second trend beyond the “IL” in IL/IR scholarship challenges the very definition of IL/IR as a research agenda by using political science theory and methods to build on what lawyers and legal scholars have long understood: that domestic law and domestic courts (and other domestic legal institutions) play a direct role in international relations, in addition to their role in supporting international law and international courts (Jessup 1956). This line of research has, for example, examined the relationship between constitutions and the use of force in international relations and the political and legal determinants of judicial foreign policy, and there are also other promising avenues of research along these lines.

Constitutional Law and International Conflict. IR scholars have long been interested in the causes of international peace and conflict (Levy 2002). They have already incorporated international law into their research on international peace and conflict (e.g. Huth, Croco & Appel 2011; Simmons 2002). Because international law is familiar to many IR scholars, and because international law contains rules governing the use of force (e.g. Article 2(4) of the United Nations Charter), this focus is unsurprising.

There is, however, another type of law that is directly relevant to international peace and conflict: the domestic constitutional rules of states governing their use of force (Slaughter Burley 1993, 228). As one legal expert on constitutions and use-of-force decision-making summarizes, “National constitutional law may have a constraining effect on the external behavior of states, both by restricting the circumstances in which military force may lawfully be deployed and by establishing the procedural framework for taking decisions to use force” (Damrosch 2003, 40). Given the traditional skepticism in IR scholarship about the efficacy of international law in the realm of high politics (e.g. Grieco 1993), constitutional law may be an even more important factor in international use-of-force decision-making.

A leading political science theory of the “democratic peace”—that is, the observation that armed conflict is less likely between democracies than between a democracy and an autocracy or between autocracies—emphasizes the institutional constraints that democracies place on executive decision-making (Russett & Oneal 2001, 53). However, the data used to measure those constraints—such as the Polity scale (e.g. Schultz 1999) and legislative veto points data (e.g. Choi 2010)—do not capture constraints on use-of-force decision-making specifically, which are often different from executive constraints in other policy areas. As a result, they are not ideal measures of theoretically relevant institutional constraints.

Jacobson and Ku (2002), Mello (2014) and Ginsburg (2012a; 2014b) are among the interdisciplinary scholars who have built on this work by specifically investigating the relationship between domestic constitutional rules governing the use of force and use-of-force decision-making. Jacobson and Ku (2002) provide a comparative analysis of the domestic processes for approving the use of military force under the auspices of international organizations (such as the United Nations and NATO) in Canada, France, Germany, India, Japan, Norway, Russia, the United Kingdom, and the United States and evaluate them from the perspective of democratic accountability. They find that “[d]ecisions about the use of military forces in international operations have been shaped by national constitutions,” including requirements for legislative approval (Jacobson and Ku 2002, 367).

Mello (2014) uses fuzzy-set qualitative comparative analysis of the constitutional and political features of 30 democracies to investigate the conditions under which they participated (or not) in the Kosovo War, Operation Enduring Freedom in Afghanistan, and Operation Iraqi Freedom in Iraq. He examined two constitutional features: “constitutional restrictions” (measuring cross-national variation in constitutional limitations on the types of military operations that are legally permitted or prohibited) and “parliamentary veto rights” (measuring cross-national variation in constitutional rules regarding legislative involvement in use-of-force decisions). He finds that constitutional restrictions on the use of force are a “structural veto to military deployments, irrespective of political preferences or systemic influences” and that “[t]he absence of constitutional restrictions was found to be a necessary condition for military participation in all three cases and across 30 democracies,” but that parliamentary veto rights do not have a discernible effect on the likelihood of participation (Mello 2014, 185).

Ginsburg (2014b) examines cross-national data on constitutional rules governing legislative involvement in use-of-force decision-making. He theorizes that legislative

involvement “implicates a bargaining process between the executive and legislature” that can affect the likelihood of the use of force. Using data on 893 constitutions (from the Comparative Constitutions Project) and militarized interstate dispute (using data from the Correlates of War project), he finds that constitutional rules involving the legislature in decisions to declare war reduces the likelihood that a state will initiate conflict (Ginsburg 2014b, 28).

Judicial Foreign Policy. Beyond international conflict, political scientists have long had a more general interest in foreign policy (Carlsnaes 2013). Legal scholars have long understood that domestic courts are frequently involved in foreign policy (Henkin 1996). As noted by Stephen Breyer, an associate justice of the United States Supreme Court, domestic courts are increasingly called upon “to consider foreign persons and activities, foreign commerce... and foreign threats to national security” (Breyer 2015, 3). Legal scholars refer to this role of domestic courts as “judicial foreign policy” (Dunfee and Freidman 1984; Garvey 1993; Sloss 2008).

There are two basic types of judicial foreign policy: judicial review of foreign policy and direct judicial foreign policy. A state’s domestic courts engage in judicial review of foreign policy when they determine whether another branch’s foreign policy decision complies with the requirements of law. These requirements include constitutional requirements such as the protection of individual rights, separation of powers and, in a federal system, federalism principles, as well as statutory, regulatory, and international legal requirements. Domestic courts can facilitate implementation of foreign policy by the other branches by overriding legal challenges, or they can impose barriers to implementation by validating them.

Domestic courts engage in direct judicial foreign policy when they make decisions not about the validity of another branch’s foreign policy decisions, but directly about matters that affect foreign states. These decisions include whether to allow lawsuits to proceed against foreign states; whether to assess the legality of a foreign state’s activity within its own territory; whether to apply domestic law to other actors in a foreign state’s territory; whether to recognize human rights claims involving foreign states; whether to recognize agreements reached by foreign states regarding their sovereign debt; whether to order enforcement of court judgments against foreign states; and, in a wide variety of contexts, whether to defer to the legal authority of foreign states (Dodge 2015). Domestic courts also engage in direct judicial foreign policy when they cooperate with foreign courts to resolve specific cross-border disputes, provide mutual legal assistance, or avoid duplicative litigation that could lead to conflicting judgments. (Slaughter 2004).

Political scientists in the discipline’s domestic politics branch have long treated courts as important policy-makers (Barnes 2007; Dahl 1957; Shapiro 1981), and one significant work from an earlier stage of political science research on international law analyzed one aspect of judicial foreign policy: the review by domestic courts of the legality of the acts of foreign states (Falk 1964). Moreover, the virtues of judicial foreign policy specifically are regularly debated in both legal and foreign affairs circles (Bork 2003; Cabranas 2015; Franck 1991; Franck 1992; Koh 1990; Leval 2013; Slaughter 1997; Slaughter and Bosco 2000). Perhaps most importantly, practical political and economic realities are giving domestic courts an increasingly important role in states’ responses to global problems (Breyer 2015). Slaughter (2004) has systematically described how domestic courts can be parts of networks with each other, cooperating to solve

transnational problems. As Michaels (2011) puts it: “We face an increasing number of problems that are essentially global in nature because they affect the world in its entirety: global cartels, climate change, crimes against humanity; to name a few. These problems require world courts, yet world courts in the institutional sense are largely lacking. Hence, domestic courts must function, effectively, as world courts. Given the unlikelihood of effective world courts in the future, our challenge is to establish under what conditions domestic courts can play this role of world courts effectively and legitimately.”

Yet even though political scientists are increasingly studying the role of domestic courts in supporting international law and international courts (see above), political scientists have devoted relatively little attention to domestic courts as independent actors directly involved in foreign policy. This is starting to change. Isaac Unah (1998), Jeffrey Davis (2006), Cass Sunstein (2008), Kirk Randazzo (2004; 2006; 2010), and Adam Chilton and Christopher Whytock (2015), are among the interdisciplinary scholars who are empirically investigating the determinants of various aspects of judicial foreign policy, and each of them has drawn on theory and methods from the judicial politics branch of political science to do so. In a book-length study, Unah (1998) analyzes the role of the United States Court of International Trade and the U.S. Court of Appeals for the Federal Circuit in supervising the implementation of U.S. trade policy and identifies legal, political and economic factors that influence the likelihood that courts will reverse agency action and the likelihood that their decisions will be protectionist.

In an empirical analysis of U.S. District Court and U.S. Court of Appeals decisions in international human rights cases, Davis (2006) finds that the likelihood of a pro-human rights ruling is greater when the alleged violation is a personal integrity violation such as torture, when an interest group is representing the alleged victim, and when there is legal precedent in the relevant judicial circuit that is favorable to human rights rulings. In contrast, he does not find that the ideology of judges significantly affects these decisions. In an empirical analysis of U.S. Court of Appeals decisions on national security matters, Sunstein (2008) finds that Republican appointees are less likely than Democratic appointees to invalidate executive and legislative action, and that invalidation rates did not significantly change after the 9/11 attacks.

Randazzo (2010), building on his earlier work (Randazzo 2004; Randazzo 2006), combines theories of international relations and judicial decision-making with empirical analysis to analyze the legal and political factors that influence the decisions of U.S. federal court decisions in foreign policy matters, with a focus on the balance struck by the courts between liberty interests and national security interests. He finds that after September 11, the effect of the judges’ ideologies on their national security decisions became more pronounced, with liberal judges more likely to support civil liberties challenges than conservative judges (Randazzo 2010, 83-84).

Drawing on both international relations theory and judicial decision-making theory, Chilton and Whytock (2015) empirically analyze foreign sovereign immunity decision-making by the U.S. District Courts and find that they are more likely to grant immunity to a foreign state that is sued in a U.S. court if the foreign state is a democracy. They also find that liberal judges are more likely to grant immunity than conservative judges, and that two factors that are legally relevant according to the law of foreign sovereign immunity—the commercial nature of the

foreign state's activity and the connections between that activity and U.S. territory—affect the likelihood of immunity in the direction one would expect from the law.

Taken together, these studies provide basic insights on the determinants of judicial foreign policy. However, they are limited by their focus on a relatively small number of aspects of judicial foreign policy and by their nearly exclusive focus on U.S. courts. This line of research could be advanced with studies of other examples of judicial foreign policy, and by comparative empirical research that may help develop more generalizable findings.

IV. Beyond International Relations: Law, Transnational Relations and Private Governance

IL/IR scholarship has also focused not only on international law, but on one type of international law: public international law. Public international law is international law that governs state actors as subjects. As Simmons (2008, 187) notes, the “overwhelming share” of political science research on international law has been on public international law. This focus—reflected in the “IR” of IL/IR scholarship—is understandable from the perspective of international relations scholarship's traditional focus on state behavior, because public international law is the body of international law that seeks to govern state behavior. It means, however, that even though IL/IR scholars have been attentive to the role of domestic and transnational private actors in making and enforcing public international law (Sandholtz & Stiles 2008; Simmons 2009; Finnemore & Sikkink 1998), they have devoted relatively little effort to understanding those areas of law that govern private actors in their transnational relations.

As a result, there is a mismatch between IL/IR scholarship's focus on law governing state behavior and broader trends in political science. It has been decades since Nye and Keohane (1971, 721) called for “a broader world politics paradigm”—one that encompasses not only international relations, but also transgovernmental relations (cross-border relations between governmental subunits such as administrative agencies, courts, legislatures) and transnational relations (cross-border relations among private actors). Although much IR scholarship continues to focus on states, the broader world politics approach is by now well established (Keohane and Nye 2001; Pollack and Shaffer 2001a), and much of it focuses on the behavior of private actors, including the role of private actors in governing transnational relations and the global economy (Büthe 2004; Büthe and Mattli 2011; Cutler, Haufler, and Porter 1999; Graz and Nölke 2008; Hall and Biersteker 2002). Moreover, liberal theories of international relations and international law provide foundations for attentiveness to non-state actors (Moravcsik 2013; Slaughter Burley 1993).

Several streams of interdisciplinary law-and-political science scholarship are starting to move beyond the “IR” in IL/IR, bringing IL/IR scholarship up to speed with this broader world politics trend in political science. They are doing so by examining four types of law that govern transnational relations and affect private governance: (1) extraterritoriality, which is the assertion by states of authority to govern activity outside their own territory; (2) conflict of laws, which is the body of legal rules governing the choices domestic courts make between applying domestic law to transnational activity or asserting domestic adjudicative authority over that activity, and applying the law of a foreign state with connections to that activity or deferring to the foreign

state's adjudicative authority; (3) private international law, which can take the form of treaties or transnational model laws, governing transnational relations and private actors as subjects, and (4) the law governing transnational arbitration.

A. Extraterritoriality

Much if not most transnational activity remains ungoverned (or inadequately or only partially governed) by international law and international courts, and states find it politically difficult to create new international law and international courts. Therefore, states often use their own domestic law and domestic courts to govern transnational activity (Putnam 2009, 459). As Kaczmarek and Newman (2011, 745) put it, “[d]omestic law increasingly serves as an important element of global governance.” Because transnational activity by definition transcends any given state's territory, this form of governance requires a state to assert authority to apply its law (“prescriptive authority”) or adjudicate disputes in its courts (“adjudicative authority”) extraterritorially.

Kal Raustiala (2009), Tonya Putnam (2009), and Sarah Kaczmarek and Abraham Newman (2011) are among the interdisciplinary scholars who are empirically studying the causes and effects of extraterritoriality. In an in-depth historical analysis, Raustiala (2009) finds that assertions of extraterritorial authority by the United States has been influenced by its relative power in the international system, as well as by other changes in world politics and the global economy. For example, as a relatively weak state in its early history, the United States preferred a Westphalian territorial approach that might help protect it from other states' assertions of extraterritorial authority; but as the United States grew stronger, it became more willing to assert jurisdiction over actors and activity within the territory of other states and less committed to territoriality.

Putnam (2009, 464) analyzes an original dataset of more than 438 cases heard by U.S. federal courts between 1945 and 2003, in which they decided whether to assert extraterritorial jurisdiction. Her data includes disputes involving 120 different states in issue areas ranging from antitrust, tax, intellectual property rights and labor, to racial and gender discrimination, torture, and other human rights violations. She finds that U.S. courts tend to apply U.S. law extraterritorially in two situations: “where extraterritorial conduct threatens to undercut the domestic operation of a regulatory rule or regime” or “where conduct is alleged to violate ... ‘basic’ rights at the core of U.S. political and legal identity.” In addition, she explores how a state's extraterritorial assertions of governance authority can influence international regulatory competition by exerting pressure on other states to change their own domestic law.

Kaczmarek and Newman (2011) examine the relationship between extraterritoriality by the United States and policy change in other states. Their empirical focus is on anti-bribery laws. Their dependent variable is whether a given state has prosecuted a case under its foreign bribery rules, and their key explanatory variable is whether the United States has previously brought bribery cases against that state's firms or citizens. They find that U.S. application of its anti-bribery laws in the territory of other states was associated with increased domestic enforcement of anti-bribery standards in those other states, suggesting that the extraterritorial “application of

domestic law can have significant international consequences” (Kaczmarek and Newman 2011, 764).

Together, these studies provide some initial empirical evidence of the causes and consequences of extraterritorial assertions of prescriptive and adjudicative authority by states to govern transnational activity. Moreover, the Putnam (2009) study draws further attention to the direct role of domestic courts in world politics. However, these studies have so far focused on U.S. assertions of extraterritorial governance authority and primarily on particular issues areas. Comparative analysis of extraterritoriality across a broader range of issues areas would help provide an empirical basis for more generalizable findings.

B. Conflict of Laws

Extraterritoriality decisions are decisions by a given state about *whether* it will assert governance authority over particular transnational activity. But because transnational activity by definition has connections with more than one state’s citizens or territory, more than one state may have a legitimate claim to assert its authority. These potential overlaps of authority often make it necessary for courts to make decisions about *which* state’s domestic courts or domestic law should govern transnational activity. The body of law that governs these decisions is called “conflict of laws” (Fawcett and Carruthers 2008; Hay, Borchers and Symeonides 2010; Richman, Reynolds and Whytock 2013; Symeonides 2014). In many legal systems outside the United States, conflict of laws is considered part of a broader field called “private international law” (discussed below). However, the term private international law can be misleading because even though conflict-of-laws problems are transnational problems, most conflict-of-laws rules are part of the domestic law of states and vary cross-nationally, rather than embodied in treaties or other types of international law. For this reason, this essay discusses conflict of laws and private international law separately.

Conflict of laws is generally understood as having three branches: jurisdiction, choice of law, and recognition and enforcement of judgments (Hay, Borchers, and Symeonides 2010). Domestic courts apply the rules of jurisdiction to determine whether to assert adjudicative authority over a dispute arising from transnational activity, or to defer to the adjudicatory authority of another state by declining to assert its own authority. They apply choice-of-law rules to determine whether to apply domestic law or another state’s law to transnational activity. And they apply the rules of recognition and enforcement to determine whether to recognize or enforce foreign judgments—that is, the decisions of the courts of other states. These three branches correspond to three dimensions of governance authority: authority to adjudicate, authority to prescribe, and authority to enforce (Whytock 2009a).

Conflict-of-laws rules help allocate governance authority among states by guiding domestic courts when they are required to decide whether to assert domestic governance authority or defer to a foreign state’s governance authority over transnational activity. Thus, conflict-of-laws scholars increasingly view conflict of laws as a distinctive approach to global governance (Muir Watt and Fernández Arroyo 2014; Whytock 2009b). International law tries to transcend national legal systems by creating a single body of international legal rules and a system of international courts to adjudicate transnational disputes, and harmonization seeks

convergence and ultimately uniformity of national laws. Conflict of laws accepts the leading role of national legal institutions in governing transnational activity (unlike international law's impulse), and it accepts cross-national legal diversity (unlike harmonization's impulse). Instead, conflict of laws responds by providing rules to help nations allocate governance authority among themselves (Whytock 2014). Thus, conflict-of-laws rules can be understood as "structural rules" that help "determine the effectiveness of transnational regulation" (Dodge 2002, 162), and as an attempt to mitigate "clashes between sovereigns, each attempting to impose its own regulatory scheme in furtherance of its own policies" (Roosevelt 1999, 2463).

What influence do conflict-of-laws rules have on domestic courts' conflict-of-laws decisions? And what political factors influence these decisions? Whytock (2011) explores these questions in the context of the *forum non conveniens* doctrine. The *forum non conveniens* doctrine is a common law doctrine that gives a court in one state the discretion to defer to the adjudicative authority of another state by dismissing the case in favor of that state instead of asserting adjudicative authority itself, and provides a set of legal factors to guide the exercise of this discretion. In the U.S. version of the doctrine, for example, the legal factors include the citizenship of the plaintiff (if the plaintiff is a non-U.S. citizen, this factor weighs in favor of dismissal) and various other factors that relate to the territorial locus of the alleged conduct and injury giving rise to the dispute (if the territorial locus is in another state's territory, this factor weighs in favor of dismissal). Analyzing more than 200 *forum non conveniens* decisions in the U.S. federal district courts in transnational cases between 1990 and 2005, he finds that dismissal is more likely when the plaintiff is a non-U.S. citizen and when the territorial locus is in another state, suggesting that legal factors influence decisions to defer (or not) to other states. He also finds that the courts are more likely to dismiss when the other state is a liberal democracy, suggesting, consistent with liberal international law theory (Slaughter 1995), that legal relations between democracies may be different than between other states.

Whytock (2009b) explores the determinants of another type of conflict-of-laws decision: choice-of-law decisions. Analyzing a dataset of more than 200 international choice-of-law decisions by U.S. federal district courts in transnational disputes between 1990 and 2005, he finds that these courts apply non-U.S. law (foreign law) rather than domestic U.S. law in well over 50% of cases, suggesting that U.S. courts are frequently willing to defer to the authority of other states to prescribe the rules governing transnational activity. Then, taking advantage of variation of choice-of-law rules across U.S. states, he finds that these rules are a significant determinant of the likelihood that foreign law will be applied. He also found that territorial connections between a transnational dispute and a foreign state increases the likelihood that a U.S. court will apply that state's law rather than domestic law, suggesting that territoriality influences decisions, and he finds evidence that conservative judges are somewhat less likely to apply domestic law, perhaps to deter efforts of transnational litigants to "forum shop" into U.S. courts in search of more favorable U.S. law.

Even if these studies are a first step in shedding light on the legal and political determinants of conflict-of-laws decision-making by domestic courts, they are limited by their focus on U.S. courts and on certain types of conflict-of-laws decisions. Next steps include comparative research and research on other types of conflict-of-laws decisions. Moreover, empirical research on the consequences of conflict-of-laws rules and decisions is needed to test

theories developed about the impact of conflict-of-laws rules and decisions on bargaining and forum shopping by transnational actors (Whytock 2009b), on the ability of states to achieve transnational regulatory objectives (Trachtman 1994; Wai 2002) and, more broadly, on global economic welfare (Carbonara and Parisi 2007; Guzman 2002; Muir Watt 2003; O'Hara and Ribstein 1999; Parisi and Ribstein 1998; Whincop and Keys 2001). Such research could shed light on the pervasive role of domestic courts in regulating transnational activity, which Whytock (2009a) refers to as “transnational judicial governance.”

C. Private International Law

Private international law consists of rules that govern private transnational activity, such as cross-border commercial transactions and family relationships (as noted above, outside the United States, conflict of laws referred to as or included as part of private international law). This is in contrast to public international law, which governs states as subjects. A brief look at the projects of the Hague Conference on Private International Law (<https://www.hcch.net/en/home>) and UNCITRAL (the United Nations Commission on International Trade Law) (<http://www.uncitral.org/uncitral/en/index.html>) provides a sense of the broad range of transnational problems governed by private international law, ranging from child abduction, adoption, and access to justice, to contracts, corporate securities, electronic commerce, insolvency, and arbitration.

Some private international law takes the form of treaties, and in that sense is properly understood as international law. Private international law treaties include the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), which provides rules governing contracts for the cross-border sales of goods between private businesses, including rules of contract formation, the obligations of buyers and sellers, and remedies for breach of contract, and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), which governs the carriage of goods by sea, and specifies the rights and obligations of shippers and carriers.

However, the use of the phrase “international law” in the term “private international law” can be misleading, because large portions of private international law take the form of domestic law, some of it based on “model” laws developed transnationally. Transnational model laws are negotiated by states or drafted by international organizations (often with the involvement of private actors), not for adoption as treaties but as templates for domestic legislation. One of the leading bodies for the development of transnational model laws is the United Nations Commission on International Trade Law (“UNCITRAL”), which aims to modernize and harmonize the rules governing transnational business. For example, in the realm of transnational electronic commerce, the Model Law on Electronic Signatures was adopted by UNCITRAL in 2001 and has so far been adopted as domestic law by 29 states.

More than two decades ago, Martin Shapiro (1993, 367) and Anne-Marie Slaughter (Slaughter Burley 1993, 230-232) called on political scientists to pay more attention to private international law, arguing that this area of legal doctrine was highly relevant to the study of the global political economy. Yet international relations scholars have so far paid relatively little attention to private international law. This is starting to change. For example, Edward Cohen

(2008, 777), building on the work of Claire Cutler (2003), argues that private international law rules “create the essential legal framework through which markets and corporations are constructed, and within (and around) which they operate in international transactions” and that “[t]he increasing impact of private international law in shaping relationships between states, markets and citizens requires closer attention.” He empirically traces global efforts to harmonize the law of secured credit, and finds that the leading role was played by the emergence of a “transnational harmonization coalition” in which “a set of powerful political and economic actors [concluded] that secured transaction law harmonization could advance their agendas for the reconstruction of the role of states in the global economy” (Cohen 2008, 787).

Asif Efrat and Abraham Newman (forthcoming) examine the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which requires a state where an abducted child is found to secure the return of the child to the child’s state of origin without resolving the custody dispute under its own law and in its own courts, but instead deferring to the authority of the state of origin to do so under its law and in its courts. Using event-history analysis of the decisions of existing parties to the convention to defer to new members by accepting their accession to the convention, they find that the bigger the gap between the accepting state’s rule of law and the acceding state’s rule of law, and the greater the gap in women’s parliamentary membership between the two states, the lower the likelihood of acceptance. Their findings suggest that deference in private international law arrangements depend significantly on the parties’ perceptions of each other’s procedural and substantive fairness.

Under what circumstances do private international law rule-making initiatives succeed in producing private international law treaties and transnational model laws, and what political and legal factors determine which states adopt them? There is considerable variation across each of these dimensions that could be fruitfully explored. And what are the consequences of private international law on the political economy, at the national, regional and global levels? These are among the questions that could be the focus of further theoretical and empirical investigation.

D. Transnational Arbitration

A fourth stream of interdisciplinary law-and-political science scholarship is contributing to the move beyond the “IR” in IL/IR: scholarship on transnational commercial arbitration (Blackaby and Partasides 2009; Born 2009; Moses 2008). Transnational commercial arbitration is a method whereby two or more parties agree to have a dispute between them resolved by a private arbitrator (or arbitrators) in accordance with rules selected by the parties, and to abide by the arbitrators’ decision, which is called an “award.” It is a widely-used alternative to litigation as a method for transnational dispute resolution.

Political science interest in transnational commercial arbitration is driven largely by the understanding that arbitration is an important and increasingly widespread form of private global governance (Gal-Or 2008; Stone Sweet 2006). By offering a mechanism for third-party interpretation and enforcement of contracts, it provides a means by which transnational actors can enhance the credibility of their commitments to each other. By providing a process for filling gaps in contracts, arbitration can mitigate the incomplete contracting problems routinely faced by transnational commercial actors. Transnational commercial arbitration can help transnational

actors manage the costs of conflict in commercial relationships. And, like litigation, arbitration involves disputes over the allocation of rights and resources. Thus, arbitral awards are part of the answer to one of the central framing questions of political science: “Who gets what?” (Lasswell 1936; Caporaso et al 2008, 406). This interest has spurred a number of major political science studies. Thomas Hale (2015) presents a theoretical and empirical account of institutional variation in transnational commercial arbitration. In an edited volume, Walter Mattli and Thomas Dietz (2014) collect recent interdisciplinary research on the evolution, consequences and legitimacy of transnational commercial arbitration as a system of private global governance.

If transnational commercial arbitration is becoming established as an area of political science research, IL/IR scholars should likewise consider examining the legal aspects of this form of governance. Although it is a private form of governance, transnational commercial arbitration depends largely on law and domestic courts for its effectiveness (Kerr 1997; Reisman 1992). This is because transnational commercial arbitration faces two fundamental enforcement problems: enforcement of *ex ante* arbitration agreements and enforcement of arbitral awards. Privately imposed reputational sanctions can help mitigate these problems, but they are likely to be effective only under certain conditions (such as the existence of a functioning mechanism for disseminating information about parties’ behavior and a relatively high likelihood of repeat interactions). Domestic law and domestic courts can support transnational commercial arbitration by enforcing agreements to arbitrate and by enforcing arbitral awards, or they hinder transnational commercial arbitration by declining to provide that support. Empirical evidence indicates that, in fact, private parties frequently seek enforcement of arbitration agreements and arbitral awards in domestic courts (Whytock 2010), and there is an entire field of law that governs how domestic courts decide these cases (Blackaby and Partasides 2009; Born 2009; Moses 2008).

The relevant law is a mix of treaties, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention)—which one expert (Kerr 1997, 127) calls “the foundation on which the whole of the edifice of international arbitration rests.” The New York Convention establishes a general rule (subject to enumerated exceptions) that signatory states shall, through their domestic courts, recognize and enforce arbitration agreements and arbitral awards when requested by a party. In addition, individual states have enacted domestic laws providing for domestic judicial enforcement of transnational commercial arbitration agreements and arbitral awards, some of which are based on the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law on International Commercial Arbitration.

Formal state support for transnational commercial arbitration has varied cross-nationally and over time (Hale 2015). For example, the number of state parties to the New York Convention increased from nine in 1960, to fifty-five in 1980, to 124 in 2000. As of 2009, the New York Convention had entered into force in 144 of the 192 members of the United Nations. Similarly, the number of states that have adopted domestic legislation based on the UNCITRAL Model Law has increased steadily from one in 1986, to thirty-five in 2000, to a total of sixty-one as of 2008 (Whytock 2010). These figures suggest broad and steadily increasing state support for the rules favoring enforcement of arbitration agreements and arbitral awards.

What are the legal and political determinants of judicial enforcement of transnational commercial arbitration agreements and arbitral awards? How do varying levels of state support for transnational commercial arbitration affect the processes, outcomes, effectiveness and legitimacy as a form of private governance? These are among the questions calling for theoretical and empirical investigation by political scientists. Understanding the role of law in transnational commercial arbitration promises to shed light not only on this particular form of governance, but on private-public interaction in global governance more generally.

V. Beyond International Law Exceptionalism: Theorizing Across the Domestic-International Divide

A third trend is underway as well, one that pushes against the view that international law is different in kind from domestic law because international politics is different in kind from domestic politics. Sometimes this view is explicit in political science research, and sometimes it is implicit in the tendency of much political science research on international law to draw primarily on international relations theory and less frequently on theories about law developed in the domestic politics and comparative politics subfields of political science.

A. Hierarchy and Anarchy

The principal basis for international law exceptionalism is the traditional structural distinction in international relations theory between hierarchical domestic politics, with centralized enforcement of law, and anarchical international politics, in which there is at best decentralized enforcement. As Morgenthau (1978, 281-282) puts it, “The decentralized nature of international law is the inevitable result of the decentralized structure of international society. Domestic law can be imposed by the group that holds the monopoly of organized force; that is, the officials of the state. It is an essential characteristic of international society, composed of sovereign states, which by definition are the supreme legal authorities within their respective territories, that no such central lawgiving and law-enforcing authority can exist there.” Bull (2002, 125) explains that “international law...differs from municipal law in one central respect: whereas law within the modern state is backed up by the authority of a government, including its power to use or threaten force, international law is without this kind of prop.” International lawyers have embraced this distinction, too. Higgins (1994, 1) argues that “there are important differences arising from the fact that domestic law operates in a vertical legal order, and international law in a horizontal legal order.” Shaw (2008, 6) explains that “[w]hile the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory...and recognizing no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states.” As Hoffman (1961, 205) puts it, “[i]nternational law is one of the aspects of international politics which reflect most sharply the essential differences between domestic and world affairs....International law...remains a crystallization of all that keeps world politics *sui generis*.”

The classic realist claim is that the anarchic structure of international relations means that one should not expect an important degree of effective international cooperation or international law. Much of the last decades’ international relations scholarship has been aimed at responding

to this claim by showing how there can be effective international cooperation even in the structurally anarchic environment of international relations (Keohane 1984). Others have challenged the stark hierarchy/anarchy distinction altogether, instead proposing a continuum between hierarchy and anarchy (Milner 1991; Milner 1998) or a regime continuum (Stone 1994). And Sandholtz and Stone Sweet (2004, 269) “deny any inherent, theoretically significant, distinction between how international and domestic regimes operate. Put simply, the range of variation is as great within categories of domestic and international as between these categories....”

B. A Category Mistake

There is, however, another critique of the hierarchy/anarchy distinction as it is applied to international law. The basic point is that it is based on a category mistake: the comparison is made, incorrectly, between international law governing states (international public law) and domestic law governing individuals. A more apt comparison would be between international law governing states (international public law) and domestic law governing states (domestic public law), which includes much of domestic constitutional law (Fisher 1981, 16; Fried 1968, 102). For example, domestic public law governs separation of powers among the executive, legislative, and judicial branches of government; it limits state power vis-à-vis individuals by specifying constitutional rights; and in federal systems, it limits federal power vis-à-vis the state’s constituent subunits (such as cantons, provinces, or states). Yet there is no higher domestic governmental authority that sits above the state, or above the executive, legislative and judicial branches, able to enforce domestic public law against the state. In this sense, international public law and domestic public law are similar—they both operate outside the structurally hierarchical setting imagined by international relations and international law scholars who use the hierarchy/anarchy distinction to treat international law as somehow *sui generis* (Whytock 2004).

C. A Unified Concept of Public Law

For this reason, a unified concept of public law might be more fruitful for political scientists, one that defines public law as law that prescribes appropriate state behavior (Whytock 2004). The concept thus includes those areas of both international law and domestic law (perhaps most importantly, domestic constitutional law) that govern states as subjects. Whytock argues that there are three advantages to the unified concept. First, he shows that when applied across the political science subfields of international relations, domestic politics, and comparative politics, the concept reveals a high degree of theoretical convergence across these subfields: on both sides of the domestic-international divide, scholars have identified similar causal mechanisms whereby public law can influence state behavior. This suggests that the theoretical foundations for political science research on public law are therefore already largely in place. Second, by rejecting the claim that there is a difference in kind between domestic public law and international public law, the unified concept of public law opens the door for potentially fruitful research on differences in degree across different settings of public law, not only across domestic and international settings, but also across time or cross-nationally across different domestic political settings and different regional or international political settings. Third, the unified concept of public law reveals a basic function shared by both domestic public law and international public law. In both domestic and international politics, institutions have power that

allows them to provide public goods, but they may also abuse that power, thus raising the perennial question: who guards the guardians (Keohane 2001, 1)? Public law is one tool, as imperfect as it is pervasive in both domestic and international politics, that attempts to mitigate this fundamental problem of governance.

Goldsmith and Levinson (2009) argue that there are additional fundamental similarities between domestic public law and international public law. Both of them have made progress toward reducing legal uncertainty, but not as much progress as has been made in domestic law governing private individuals; and both of them are plagued by similar normative problems. On these grounds, they agree that there are “constructive implications of assimilating international and constitutional law into a more unified vision of public law” (2009, 1799). Some scholars go even further, taking a unified approach to not only public law, but to law (or norms) in general (Kratowil 1989; Young, 1979). Scholars are thinking beyond the domestic-international divide in studying judicialization. Stone Sweet (1999) uses the concept of the triad, which he defines as “two contracting parties and a dispute resolver,” and applies it to an international case (the General Agreement on Tariffs and Trade) and a domestic case (the French Fifth Republic), to test his theory of the emergence of the triad as a mode of governance. Reviewing recent work on domestic courts and international courts, Staton and Moore (2011) argue that a unified approach that relaxes the hierarchy/anarchy distinction will allow scholars to learn more about judicial power in domestic and international politics, and approach endorsed and further developed by Roisman (2015). In a similar spirit, Hathaway and Shapiro (2011) develop a theory of “outcasting” as a method of enforcement that applies to both domestic law and international law.

VI. From International Law and International Relations to Law and World Politics

Rather than replicating the many excellent existing reviews of IL/IR scholarship, this essay has highlighted three trends in political science research that may constitute an emerging Law and World Politics (L/WP) stage of interdisciplinary scholarship. In many ways, this stage of research is moving closer toward realizing the promises of liberal theories of international law (Moravcsik 2013; Slaughter Burley 1993). Moving beyond the “IL” in IL/IR scholarship, political scientists are studying domestic law and domestic courts, not only their foundational role in supporting international law and international courts, but also their direct role in core areas international relations, including international conflict and foreign policy. Moving beyond the “IR” in IR/IL scholarship, political scientists are bringing research on law up to speed with the broader world politics trend in political science by studying types of law—including extraterritoriality, conflict of laws, private international law, and the law of transnational commercial arbitration—that govern the transnational activity of private actors, and that can either support or hinder private global governance. And moving beyond the domestic-international divide, political scientists are increasingly rejecting international law exceptionalism, and beginning to take advantage of theoretical convergence across the domestic, comparative and international politics subfields to think more creatively about law and politics generally.

One implication of L/WP is the opening up of new collaborations across fields of political science and law. Scholars of law and world politics will benefit from familiarity with the field of foreign relations law, which is the body of domestic law that governs the use of

military force, separation of powers among the executive, legislative and judicial branches in foreign policy, the role of courts in foreign affairs matters (and the limits on that role), treaty making, the balance between individual rights and foreign policy interests, and the status of international law in the domestic legal system (Bradley 2013; Corwin 1917; Henkin 1996; McLachlan 2004; Ramsey 2007; Silverstein 1997; Sloss, Ramsey and Dodge 2011; Wright 1922). The law of extraterritoriality governs when a state will apply its law or assert its adjudicatory authority extraterritorially to govern transnational activity. Conflict of laws includes the rules that guide domestic courts in transnational cases when they decide whether to defer to the adjudicative authority of another state, whether to apply domestic law or foreign law to decide cases, and whether to recognize or enforce the judgment of another state's court (Hay, Borchers and Symeonides 2010; Richman, Reynolds and Whytock 2013). Private international law is the body of law—some of it domestic and some of it international—that governs private actors in their transnational relations. Political scientists are for the most part less familiar with these areas of law than public international law; and legal scholars are generally less familiar with political science theories of methods. As in the IL/IR stage of research, interdisciplinary collaboration therefore promises to be important in the L/WP stage of research.

Of course, there is always a risk that a broadening of a research agenda will result in a loss of focus. But L/WP's shift from international law to law generally does not suggest a broadening of the core questions of international relations as a discipline, but rather only reflects a growing understanding that domestic law and domestic courts are also an important part of answering those core questions and, in some contexts, perhaps even more fundamental than international law and international courts. And L/WP's attentiveness not only to law governing states as subjects (such as public international law) but also to law governing private actors and affecting private governance is merely an effort to bring interdisciplinary research up to speed with political science's broader shift from an international relations paradigm to a world politics paradigm. The wager is that with a richer understanding of the diverse types of law and courts that are relevant to world politics, political scientists and legal scholars alike will be better able to develop a richer understanding of both law and world politics.

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