Dear workshop participants,

The attached draft contains an extended prospectus for a book that I am co-authoring with Derek Jinks. Readers familiar with an earlier article—Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 Duke Law Journal 621 (2004)—should feel free to skip or skim Chapter 2.

I am looking forward to our discussion.

Best,

Ryan

*Extended Prospectus*

# SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW

(forthcoming Oxford University Press)

Ryan Goodman & Derek Jinks

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## 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

In this chapter, we explain the central question addressed in the book: By what mechanism does international law influence actors? The goal of understanding better how international law influences states requires developing models that explain the processes that produce outcomes. We explain the distinctiveness and advantages of this mechanism-based approach compared, for instance, against prevailing forms of correlation-based analysis. Correlation-based approaches emphasize the co-variation of various observed phenomena (e.g., democracies are less likely to violate human rights). In contrast, mechanism-based approaches emphasize the causal processes that account for observed phenomenon (e.g., elected officials' accountability reduces rights violations; participatory political processes develop an ethic of respect for other citizen's rights). Given certain specified inputs, the mechanism produces some specified observable outcome.

Although scholarly and policy analysis of human rights law has necessarily relied on various causal mechanisms, the features and implications of these mechanisms have not been subject to direct and rigorous examination. More sustained analysis of causal mechanisms would illuminate untested (and often unexamined) assumptions in leading empirical studies of the effectiveness of human rights law. It also reveals untested (and, again, often unexamined) assumptions in prescriptions for reforming global institutions

and for structuring national commitments to international law. Finally in a more fundamental sense, mechanism-based analysis helps transcend the increasingly tired debates in international relations between realist and constructivist approaches. Indeed, we maintain that an integrated model of law's influence *must* account for the important empirical insights of both realist and constructivist approaches to global politics. An emphasis on mechanism-based analysis can help accomplish that goal.

## 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 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

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

[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

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 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,

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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).

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).

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 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

[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.
[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).

> 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. 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 status[25] and membership in a perceived "in-group"[26]). "Cognitive dissonance"—defined broadly as the discomfort caused by holding two or more inconsistent

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[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).

[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).

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]

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

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[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).

[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.

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]

**Three Mechanisms of Social Influence**

| | **Coercion** | **Persuasion** | **Acculturation** |
|---|---|---|---|
| **Basis of Influence** | Interest | Congruence with values | Social expectations<br><br>Cultural identity |
| **Behavioral Logic** | Instrumentalism | Active assessment of the validity of a rule | Social role<br><br>Social status<br><br>Mimicry |
| **Forms of Influence** | Material rewards and punishment | Framing<br><br>Cuing to think harder<br><br>Convincing<br><br>Teaching | Social rewards and punishment (shaming, shunning, back-patting)<br><br>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

[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.

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 confirm 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

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

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.

*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

[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).

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 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

[41] Schlesinger, et al. at 37.
[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.

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.

*3. Integration correlation*

The twin findings of isomorphism and decoupling are the primary, but not the only, evidence that supports inferences that acculturation drives transnational diffusion of a norm. Another consideration is whether the extent of linkages that a state establishes with world society covaries with the state's adoption of a norm.[45] Such an association can be quite important. It suggests that the global institutional environment exerts greater influence on a state the more the state is integrated into world culture. This correlation is also consistent with the understanding that connection to a reference group (as opposed to the substantive content of a norm) determines conformity to a social norm. Accordingly, this relationship (linkage to word society) also helps to explain variation: it predicts when an individual state is more likely to emulate or resist a global model. States that have fewer linkages to world society (e.g., North Korea) will be less likely to enact global cultural forms. This theoretical understanding does not assume that all domestic actors will embrace global cultural scripts as links develop. Greater linkages with world cultural order, however, can produce dynamic effects within countries by propelling some domestic actors to align with global norms in opposition to other actors or institutions. Such shifts can, as we discuss later, ultimately produce important political outcomes—even if initially only at the level of formal conformity to global standards.

*4. Institutionalization correlation*

To be consistent with an acculturation account, institutionalization of a norm at the international level should be associated with the worldwide spread of governmental policies and structures associated with the norm. Institutionalization involves the process by which rules and shared meanings move from abstractions to specific expectations and, in turn, to "taken for granted" frames and relatively uncontested scripts. In the international context, such expectations become global "institutional logics"—"'the belief systems and associated practices that predominate in an organizational field.'"[46]

A specific example from available research can illustrate the point. In the environmental realm, a leading study analyzes the institutionalization of "national

[45] David John Frank, et al.; Beth Simmons & Zachary Elkins, On Waves, Clusters, and Diffusion: A Conceptual Framework, 598 Annals of the American Academy of Political and Social Science No. 598, 33-51 (2005).
[46] McAdam & Scott, at 15.

environmental protection" in world society. [47] The study measures the following activities as indicators of institutionalization: the expansion of intergovernmental bureaucracy dedicated to national environmental protection, the proliferation of relevant multilateral treaty regimes, and the growth of professional and nongovernmental organizations promoting environmentalism.[48] These indicators, the study finds, are associated with widespread adoption of similar environmental practices across the world. Institutionalization of a norm, therefore, helps to explain another form of variation: under what conditions a particular practice will spread more widely across a population of states.

*5. Interactive effects* ─ adoption by other states is a predictor of subsequent adoption

If acculturation exerts influence on state behavior, one might expect to observe "neighborhood effects:" the likelihood that a state will adopt a practice depends on whether the practice has been adopted by other states in its region or reference group. These patterns may also occur on the global scale (sometimes referred to more generally as "contagion effects"). That is, the aggregate number of states adopting a practice around the world is associated with a greater likelihood of subsequent adoption by other states.

Although these patterns might support aspects of an acculturation account, they do not provide proof of acculturation per se. They suggest that global influence is important to the practice spreading. That pattern of diffusion, however, could result from interstate competition or conveyance of information and rational learning across a regional or global social network.[49] That said, one can infer acculturation if each state's adoption is associated with rates of adoption by *culturally* similar states (and not by states that share similar economic and political characteristics).[50] Additionally, in a statistical analysis of state practice, acculturation may be indicated if (i) states are more likely to embrace a practice adopted by states with which they share dense social interactions and (ii) the statistical analysis controls for economic competition between states.[51]

Finally, while the existence of neighborhood and contagion effects may not provide affirmative proof of acculturation, the *absence* of such correlations could be significant. It could suggest that other states' practices do not significantly influence a state's adoption of a norm and that national, instead of global, factors have greater explanatory power.

*6. Absence of correlations with geopolitical vulnerability or with powerful states' interests*

[47] David John Frank, Ann Hironaka & Evan Schofer, The Nation-State and the Natural Environment over the Twentieth Century, 65 AM. SOC. REV. 96 (2000).
[48] Id. at 97-101; Cf. Keiko Inoue & Gili Drori, The Global Institutionalization of Health as a Social Concern: Organizational and Discursive Trends, 21 International Sociology, 199-219 (2006).
[49] Daneil W. Drezner, Globalization and Policy Convergence, 3 INT'L STUDIES REV. 53 (2001).
[50] Beth Simmons & Zachary Elkins, The Globalization of Liberalization: Policy Diffusion in the International Political Economy, 98 American Political Science Review 171-89 (2004).
[51] E.g., Witold J. Henisz, Mauro F. Guillén & Bennet A. Zelner, The Worldwide Diffusion of Market-Oriented Infrastructure Reform, 70 American Sociological Review 871 (2005).

One can incorporate other variables or particular subject areas to determine whether and to what extent material coercion or social-cognitive pressure drives the diffusion of a norm. Specifically, a coercion explanation predicts that mimicry (and, hence, isomorphism) varies depending on the presence, power, and influence of relevant audiences. In contrast, some forms of acculturation, predict isomorphism will occur irrespective of whether there is political pressure to conform. Hence, evidence of acculturation (and how it operates) can be gleaned from domains in which powerful actors and institutions express trivial or no interest in adoption of a norm and situations in which the diffusion of a norm serves to counter hegemonic power. Furthermore, a coercion explanation would also anticipate that weaker countries would be more susceptible to coercive efforts to promote a norm. Accordingly, the lack of a correlation between such national-level characteristics and adoption of a norm can help demonstrate the absence of coercive influence. Finally, statistically controlling for such characteristics can reveal the significance, if any, of other forms of social influence.[52]

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In the remaining part of this Chapter, we discuss findings across numerous empirical 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.[53] 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,[54] market liberalization,[55] the environment,[56] arms control,[57] the laws of war,[58] science policy,[59] and human rights.[60] The extent of contemporaneous

[52] E.g., Witold J. Henisz, Mauro F. Guillén & Bennet A. Zelner, The Worldwide Diffusion of Market-Oriented Infrastructure Reform, 70 American Sociological Review 871 (2005).
[53] E.g., Meyer et al.
[54] E.g., Evan Schofer & John W Meyer, The Worldwide Expansion of Higher Education in the Twentieth Century, 70 American Sociological Review 898 (2005).
[55] 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).
[56] 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).
[57] 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 __.
[58] 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).
[59] 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).

convergence in these issue areas is remarkable given the vast differences in technological, economic, and social conditions across states.[61] 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,[62] civil rights guarantees,[63] and public order maintenance.[64] For example, the number of constitutions that include provisions committed to the state management of childhood and the right to education has increased dramatically.[65] A study of every national constitution in effect during 1870-1970 shows that the adoption of such constitutional provisions over time does not correlate with local forms of social organization (such as urbanization and national wealth) or with technical capacities of the relevant states. Moreover, each group of newly established states shows a significantly higher probability of adopting such constitutional provisions than the preceding group of entrants. According to these researchers, the overall findings suggest that "[n]ational constitutions do not simply reflect processes of internal development," but rather "reflect legitimating ideas dominant in the world system at the time of their creation."[66]

Consider, also, state convergence with respect to women's rights. A leading study uses sophisticated analytic techniques to examine state definitions of political citizenship over a hundred-year period.[67] According to the study, once universal suffrage became a legitimating principle associated with the modern nation-state, adoption of women's

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[60] 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).

[61] 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).

[62] 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).

[63] 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).

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

65 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).

[66] Id. at 805.

[67] 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).

suffrage followed a pattern anticipated by theories of acculturation. After an initial stage of early adopters, the number of states providing women the right to vote increased steeply and included most states before the rate of adoption tapered off; the likelihood that a state would adopt women's suffrage correlated with world trend lines; and adoption correlated far less with domestic political conditions once significant isomorphism took hold. Additionally, an important finding indicates a contagion effect: once the norm was institutionalized, a strong predictor for whether an individual state would enact women's suffrage was whether other states in its region had done so in the past five years. The overall findings suggest that, compared with local conditions such as the strength of domestic women's rights groups, "[c]ountries apparently are affected much less strongly by internal factors and much more strongly by shifts in the international logic of political citizenship."[68]

These results are consistent with studies concerning other areas of women's rights. For example, a separate study of states in the western hemisphere examines how these governments made roughly contemporaneous commitments to eradicate violence against women.[69] Within a relatively short time span, "[n]early all American states . . . created national women's councils that include[d] domestic violence problems among their priorities, . . . approved legal changes that define[d] domestic violence as a crime, . . . launched educational campaigns to combat the problem, and . . . created social services for victims."[70] States also made these advances uniformly; no state substantially exceeded, or distinguished itself from, the average set of commitments. The extent of this isomorphism despite wide variations in national-level political, cultural, and social conditions is remarkable. Specifically, once the obligation to address domestic violence was institutionalized at the regional level, states joined the bandwagon despite dramatic differences in women's political power or access to economic resources at the national level. Indeed, the study concludes that, at this stage of institutionalization, "international socialization is more important than domestic politics" in getting "nonconformist states to change their policies to meet the standards of new international norms."[71]

Additionally, national constitutions exhibit remarkable isomorphism across a number of more general rights-related dimensions. First, virtually every state has its own written, single-document constitution.[72] Second, all existing constitutions focus on a similar set of purposes: "[n]ot only are [existing constitutions] all packaged in a single written document, they all specify in one way or another the organization of political power, the division of governmental labor, the major principles and goals for governance, and so on."[73] The second dimension—having a common set of purposes—is also increasingly characterized by a common set of responses. That is, decisions about how to organize political power are increasingly identical. So too are choices involving the designation of judicial authority (e.g., creating a constitutional court) and the content of constitutionally protected rights. Nearly every constitution adopted since the Universal Declaration of

[68] Ramirez et al., at 742.
[69] Darren Hawkins & Melissa Humes, Human Rights and Domestic Violence, 117 Pol. Sci. Q. 231, 235 (2002).
[70] Id. at 234.
[71] Id. at 256.
[72] Julian Go, A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000, International Sociology, Vol. 18, No. 1, 71-95 (2003).
[73] Go, at 72.

Human Rights (1948) has contained some set of rights provisions.[74] By 1991, 97 percent of all states had a national constitution with substantial human rights provisions.[75]

The processes by which ideas and practices diffuse have the potential to spread deleterious as well as salutary constitutional norms. We, therefore, also consider how acculturation may, for example, foster the transnational emulation of excessive national security laws (pre and post 9/11), and how these developments correspond with the adoption of other rights-restrictive practices. We consider the degree of convergence (and decoupling) within each of these domains. …

In general, the adoption of structural commitments or official policy goals in human rights does not necessarily entail concrete implementation. On the contrary, when states copy an internationally legitimated model that does not fit their local needs, one should expect a continued disjuncture between structural isomorphism (across states) and technical demands and results (within states). For example, the authors of the study of state management of childhood "d[o] not argue that constitutional rules in particular countries are likely to be 'implemented,' but, rather, that prevailing world ideologies are likely to be incorporated both ideologically and organizationally."[76] The fact that local social and economic drivers do not explain when states adopt the observed constitutional provisions, and the fact that adoption of such constitutional guarantees does not correlate with technical capacities to implement the provisions, suggests that decoupling might persist. Similarly, the study of domestic violence finds that many of the official commitments remain "woefully underfunded"[77] and that subsequent implementation of these programs "is still unclear."[78] Indeed, as explained above with respect to the sociology of organizations in general, the theory of acculturation predicts cross-national isomorphism irrespective of local circumstances.[79] Because these models have developed universal authority and legitimacy, states follow the global scripts as members of world society despite the ineffectiveness (or even dysfunctionality) of resultant organizational forms.

Critics might accept that the empirical evidence indicates an external source of state organizational formation but argue that the external source could be powerful actors compelling states through material incentives to adopt particular practices. This view, however, does not provide an adequate account of the evidence. First, although one would assume that poorer countries are more susceptible to such external coercion, the empirical studies discussed above also show that norm adoption does not correlate with the economic wealth or development of countries. Notably, recent research directly examines coercive versus cultural influences on the diffusion of norms though not in the

[74] Go, at 72, 80; Lawrence W. Beer, Conclusion: Towards Human Rights Constitutionalism in Asia and the United States?, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 707, 708 (Lawrence W. Beer, ed. 1992).

[75] Beer, at 708-09; Julian Go, Modeling the State: Postcolonial Constitutions in Africa and Asia, 39 SOUTHEAST ASIAN STUDIES 558, 575 (2002); but cf. HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 13 (2000).

[76] John Boli-Bennett & John W. Meyer, Constitutions as Ideology, 45 Am. Soc. Rev. 525, 526 (1980); cf. Boli-Bennett & Meyer, supra note 105, at 809.

[77] Hawkins & Humes, supra note 114, at 236.

[78] Id. at 257.

[79] See supra text accompanying notes 89-92.

specific context of human rights. Consider a study of liberalization and privatization in electricity and telecommunication sectors.[80] The researchers use measures of a state's exposure to multilateral lenders (susceptibility to "international coercion") and a state's ties with other states that have adopted the same practice (susceptibility to "normative emulation"). They find that, controlling for external coercion, normative emulation provides a strong, independent mechanism influencing the adoption of similar practices. Their results are replicated by studies using similar research designs in other domains.[81]

Second, as we explain above, an explanation based on international coercion should predict that mimicry (and, hence, isomorphism) would vary depending on the presence, power, and influence of relevant audiences. Substantial evidence, however, shows that isomorphism will frequently occur regardless of whether there is external political pressure to conform. For example, governments follow global scripts concerning state management of children—even though powerful states do not exhibit a strong interest in monitoring or forcing others to adopt such an ideology. Third, powerful states are often late adopters in some issue areas, including women's suffrage for example.[82] Fourth, counterhegemonic norms exhibit the same pattern of diffusion as prohegemonic norms, suggesting that conventional conceptions of global power politics provide an inadequate descriptive account. One important example is the norm of self-determination (understood as a fundamental human right), which supported decolonization and motivated many indigenous rights campaigns.[83] Finally, the coercion explanation cannot account for persistent decoupling. As mentioned above, there is no convincing theory to explain why formal policy convergence without effective implementation on the ground would appease powerful states or powerful institutions interested in satisfactory change.

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[In this section, we will 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).]

## Chapter 4
## *State* Socialization?

Even if socialization, including acculturation, occurs on the global level—and even if evidence of this is found in the organizational characteristics of states—it is unclear whether *states* socialize in any meaningful sense. Is it states that are socialized? Does the state in our analysis constitute simply a conceptual device or an empirically meaningful

[80] Witold J. Henisz, Mauro F. Guillén & Bennet A. Zelner, The Worldwide Diffusion of Market-Oriented Infrastructure Reform, 70 American Sociological Review 871 (2005).
[81] E.g., Simone Polillo & Mauro F. Guillén, Globalization Pressures and the State: The Worldwide Spread of Central Bank Independence, 110 American Journal of Sociology 1764–1802 (2005).
[82] E.g., Finnemore & Sikkink, at 895-96; see also Ramirez et al., at 737- 38.
[83] See David Strang, From Dependency to Sovereignty: An Event History Analysis of Decolonization 1870-1987, 55 Am. Soc. Rev. 846, 847-48 (1990); David Strang, Global Patterns of Decolonization, 1500-1987, 35 Int'l Stud. Q. 429, 442 (1991).

agent of action? We argue that (1) states are purposive actors susceptible to empirical analysis as such; and (2) specific state practices are ultimately the product of socialization of relevant actors who in turn alter, or effect an alteration of, state policy. Thus, we distinguish our argument from schools of thought that call for completely disaggregating the state as an empirical subject of analysis. Nevertheless, we acknowledge that "state socialization" is a process grounded in the beliefs, conduct, and social relations of relevant individuals. We, therefore, identify various "causal pathways" through which global norms are internalized by states—providing specific examples of each.

**Chapter 5**
**Socialization and the Puzzle of Formal Human Rights Regimes**

In this Chapter, we discuss several reasons why international human rights regimes are a particularly important and instructive domain in which to examine state socialization. Several common features of international legal regimes are not found in human rights regimes. Most regimes, for instance, generally seek to facilitate cooperation or coordination among states. The global promotion of human rights, however, is importantly different from those types of regimes. The prevalence of human rights violations is not reducible to a simple collective action problem. Furthermore, structural characteristics of international society undercut the potential effectiveness of enforcement strategies that predominate in other regimes. For example, international human rights norms are not self-enforcing. Thus states have no clear, direct interest in securing human rights protection in other states. Additionally, good faith participants in such regimes are generally unwilling or unable to shoulder the enforcement costs necessary to coerce recalcitrant states to comply with human rights norms. This "enforcement deficit"—exacerbated by high enforcement costs and negligible direct returns—is a political reality of the current international order.

Understanding the structural features—and impediments—of human rights regimes carries two important lessons. First, these insights underscore the importance of investigating diverse modes of social influence for promoting human rights norms. In particular, we contend that the combined characteristics of international society and human rights regimes will frustrate efforts to obtain compliance with human rights law solely by coercing and persuading non-complying states.

Second, a richer understanding of the mechanism of social influence would help explain the puzzling origins of regional and global human rights regimes. Other scholars have provided sophisticated descriptive accounts of various efforts to establish formal human rights systems. Leading accounts tacitly rely on shared background interests and identities among state actors. For example, one account emphasizes the role of domestic actors in creating supranational human rights institutions to "lock in" liberal policy gains. Such an account, however, presupposes existing conditions of thick cosmopolitanism, shared understandings of core human rights norms, and legitimated models for entrenching those norms. Similarly, other accounts suggest the importance of transnational governmental networks in building the foundation for new global regimes. Those accounts also rely implicitly on antecedent conditions that shape common agendas that help construct the very identity of similar actors in the network. In this regard, our

approach provides a more complete and nuanced explanation of the global social processes behind the emergence of collective efforts to create these institutions.

# PART II. APPLICATIONS: HUMAN RIGHTS REGIME DESIGN

## Chapter 6
## Framing the Normative Analysis

In the following chapters we consider various applications of mechanism-based analysis for international human rights law. We analyze the structure of intergovernmental organizations, the strategies of transnational NGOs, and the composition of domestic legal systems. Our goal is to determine, in each of these domains, how best to design organizations and institutional arrangements to promote the transmission of global human rights norms in a principled manner.

Across these various domains, a common set of normative concerns may arise with respect to our mechanisms analysis—especially our emphasis on acculturation. Some concerns relate to the appropriateness of using the acculturation process as a method of influence. Other concerns relate to the predicted results of acculturation. We turn to the former set of concerns in Chapter 10 after examining concrete applications of the mechanism-based approach. However, it is worth considering the latter concerns before discussing particular applications. Specifically, if state actors are motivated to emulate orthodoxies and conventional behaviors, do institutional designs that exploit those motivations necessarily produce normatively desirable outcomes? For example, does employing acculturation tend to promote liberal over illiberal practices in international society? What are the distributional effects of this approach?

The operation of acculturation at the global level can promote undesirable state practices. First, under certain conditions these processes may foster illiberal and other deleterious norms. Indeed, existing studies indicate the potential significance of acculturation in the development of dangerous arms races, excessive internal security practices, and the mismanagement of public education. Some results are more ambiguous. Consider, for example, the worldwide surge to set up a uniform model of a constitutional court. This structural mimicry despite different national political contexts may undermine legitimate government authority or the early stages of democratization in some countries. In short, the mechanism as such is neutral—under different conditions, it may yield normatively attractive, unattractive or ambiguous results.

Second, under certain conditions acculturation-driven processes may inhibit liberal states from improving their human rights practices. That is, the emulation and enactment of global models can produce a "race to the middle"—states that would otherwise aspire to heightened levels of rights protection gravitate to lower expectations or standards of success. Recent research suggests such effects in the context of higher education and women's rights.[84] These policy outcomes may occur, for example, when questions of state performance are measured against what other countries have accomplished. Admittedly, different theoretical explanations might account for any "regression to the

[84] Evan Schofer & John W Meyer, The Worldwide Expansion of Higher Education in the Twentieth Century, 70 American Sociological Review 898 (2005); Darren Hawkins & Melissa Humes, Human Rights and Domestic Violence, 117 Pol. Sci. Q. 231, 235 (2002).

mean" among actors in a community. It is, therefore, crucial to identify the mechanisms that give rise to such behavioral patterns.

The lesson for all these situations—illiberal and deleterious norm promotion and the race to the middle—is clear. Once the conditions and mechanisms responsible for such results are better understood, strategies can be devised to manage relevant actors' expectations and behavior.[85] In Chapter 12's discussion of an integrated model for fostering normative change, for example, we examine strategies that could be introduced to check against irrational implementation of norms spread via acculturation.

Of course in certain cases, there will be little or no foundation for concern about promoting illiberal outcomes. First, for some of the applications that follow, we can assume that regime architects have agreed upon the desired norm and that the relevant design choices concern the effectiveness of competing strategies for promoting the norm. Indeed, regime architects may have arrived at the normative goals through processes of persuasion or other mechanisms. The following exercises in institutional design demonstrate the importance of understanding the separate mechanisms for promoting any (non-specified) norm and provide lessons for building effective institutions once those norms have been determined. Second, the normative plane for human rights is not tabula rasa. The contemporary human rights regime is embedded in certain core commitments, and institutional design questions can usefully explore how to promote those commitments and regulate deviance in a principled manner.

In addition, social structures at the global level and the properties of the various mechanisms influence what types of norms might prosper. For example, one might be concerned that the participation and practices of illiberal states will influence which norms diffuse. Those types of concerns, however, may presume that persuasion-based, bottom-up norm formation will characterize the processes of diffusion. In particular, the concern that illiberal states will influence the substantive content of diffused norms assumes that those state actors' formal positions will reflect their internal preferences or privately held beliefs. Instead such actors, as we explain further below, often falsify their preferences and espouse human rights principles. They call their state a republic, they contend that they meet accepted standards of political representation, and they ratify human rights treaties. Moreover, concerns about forms of reception may also assume, in accordance with a persuasion-based model, that the transfer of ideas will involve the import and implementation of well specified practices. An acculturation model, however, would expect the diffusion of ideas to take place more at the level of abstract public positions, general policy commitments, and idealized conceptions of modernity and statehood.

More fundamentally, the social structures and cultural dynamics discussed in earlier chapters suggest that acculturation related to global human rights models will generally tend to favor liberal outcomes and to overcome illiberal tendencies. There is good reason to think that these structures will circumscribe which norms are adopted and which actors influence the spread of ideas. Specifically, actors (states) often conform to community (global) norms through preference falsification—public expressions of preferences that do not accurately reflect privately held interests and beliefs. Timur Kuran's description of social order and individual preferences is helpful: "Every society produces abundant

[85] Cf. Christine Jolls & Cass R. Sunstein, Debiasing Through Law, 35 Journal of Legal Studies 199-241 (2006).

issues on which some people's private preferences come into conflict with those of others; attempts to resolve the clashes generate social pressures that result in preference falsification."[86] International society exhibits important similarities. As our analysis of decoupling indicates, states exhibit a public self (e.g., outward and structural conformity) and a private self (e.g., internal deviance). Decoupling also reveals important effects of community-driven and internally-driven pressures to conform. That is, international society promotes public-regarding ideals, and states often adopt corresponding formal commitments that do not necessarily fit their internal preferences and practices. In this institutional environment, the explicit advocacy of principles and practices that conflict with public-regarding ideals is uncommon, and preference falsification is typical. States accordingly tend to emulate shared, community ideals over divergent preferences or deleterious forms of implementation. Even actors (states) that do not share community preferences conform outwardly to community (global) models of appropriate behavior.

The tendency to subscribe to public-regarding ideals and the promotion of public goods thus constitutes another factor influencing which global models flourish through acculturation. A question, then, is whether the directives of international society—the global models of appropriate behavior—are too general to provide desirable limits on normative change. Periods of colonialism and nationalist aggression, for example, did not promote liberal governance as a public good. The shared ideals of contemporary international society, however, privilege models associated with stability, domestic public welfare, social equality, peace, and cooperation. The boundaries are defined by a range of norms and a set of actors committed to such general principles. These parameters are admittedly quite broad. Different programs and policies might fit within those principles—such as market liberalization and social welfare. However, such alternatives are publicly defended in terms of the overarching principles. The form of market liberalization must be justified, for example, as "trickle down economics"—raising the overall wellbeing of society and improving the lives of poorer citizens. In short, the public-regarding criteria can set broad but meaningful boundaries on normative change. Having to justify actions publicly should thus provide another constraint that guides state actors toward overall desirable outcomes.

## Chapter 7
## Multilateral Organizations

We demonstrate how a close analysis of the characteristics and function of each mechanism matter for designing multilateral institutions such as human rights treaties and global human rights bodies. We link each of the three mechanisms to specific design choices—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

[86] Timur Kuran, Social Mechanisms of Dissonance Reduction, in SOCIAL MECHANISMS: AN ANALYTICAL APPROACH TO SOCIAL THEORY supra note __, at 147, 166; see also Timur Kuran, Private Truths, Public Lies : The Social Consequences of Preference Falsification (1997). Our reference to Kuran's work on the impetus for preference falsification should not imply agreement with his analysis of the social consequences (or lack thereof) for norm internalization. For a strong refutation of the latter, see Jon Elster, Timur Kuran: Private Truths, Public Lies: The Social Consequences of Preference Falsification, 39 ACTA SOCIOLOGICA 112, 115 (1996) (book review).

structural design principles from the salient characteristics of underlying social processes. We consider four foundational problems in designing global human rights institutions. First, we consider levels of institutional authority—whether to invest regulatory power at the international or national level. Second, we address the problem of membership—how best to define the preferred community and articulate organizational boundaries. Third, we consider the ways in which each mechanism would approach the problem of defining the substantive obligations around which a legal community is built. As an important instance of this broad problem, we analyze the value of rule precision in defining prescribed and proscribed conduct. Fourth, we discuss how each mechanism would approach the problem of compliance and effectiveness—specifically how multilateral institutions might directly discourage undesirable behavior and encourage desirable behavior. In short, we assess the implications of each mechanism for common design problems in human rights law by analyzing the ways in which design recommendations issue from the underlying theory of social influence.

We consider specific examples in a sustained fashion, including recent efforts to reform international human rights machinery. For instance, we discuss membership requirements for the newly minted U.N. Human Rights Council and we analyze the inclusion of national human rights commissions in the monitoring and enforcement apparatus for the new Convention on the Rights of Persons with Disabilities. We also analyze distributional consequences of such regime designs. That is, we identify which states might be more susceptible to various mechanisms of social influence and which states might be disproportionately affected by particular institutional devices.

**1. Level of Institutional Authority**

An acculturation model can help determine whether to invest international institutions, especially IGOs, with regulatory authority. As a threshold matter, regime architects may consider it necessary to decide upon the value of an IGO compared with domestic institutions—for example, whether to dedicate limited political and economic resources to support an Optional Protocol for individual complaints under the ESCR Covenant or instead to support domestic-level institutions in this domain. Second-order questions involve managing relationships between IGOs and national legal systems—for example, whether an IGO should require a high or low threshold for exhaustion of domestic remedies before reviewing state practices.

Many commentators question whether international supervisory bodies are well positioned to review decisions taken by national governments and whether governments would substantially adjust their practices due to the intervention of such a body. Michael Dennis and David Stewart, for example, argue that the ESCR Committee is poorly positioned, relative to national institutions, to judge governmental practices: "Even assuming unparalleled skill, energy, expertise, and impartiality on the part of the members of an international adjudicative body, there is still no reason to believe that they would, in fact, have … [the] ability to make more informed or effective choices about the allocation of limited resources in a malfunctioning economic system."[87] Dennis and Stewart also question the prospect of the ESCR Committee influencing states: "Should it

[87] Michael J. Dennis & David P. Stewart, Justiciability of Economic, Social, and Cultural Rights, 98 Am. J. Int'l L. 462, 515 (2004).

be the function of the adjudicators to 'second-guess' deliberate decisions concerning the use of scarce resources … [a]nd how likely is the government to adhere to such a decision?"[88]

Under an acculturation model, it is important to invest monitoring authority in IGOs. First, global institutions often exert special symbolic influence in the articulation and application of international norms. Two significant findings of acculturation studies are that normative change often takes place "top-down"—inspiring and accelerating national efforts to pursue agendas legitimated at the international level—and that these changes often occur in the absence of legally binding authority or forcible measures. Global institutions accordingly serve as key vehicles for expressing international praise and criticism of state practices and thus applying global pressure to conform. These effects may be more pronounced, for instance, when a supervisory body is considered the agent of an intergovernmental principal. As the agent of an Assembly of State Parties, for example, a treaty body can issue decisions that carry special significance for state actors who are concerned to emulate and meet other governments' commitments and expectations.

Second, as a result of monitoring and scrutinizing myriad state practices, international institutions are well positioned to set progressive goals for rights regarding behavior. Setting such goals can provide a global target—a community expectation—that pulls states toward it. An international body may also occupy a good vantage point, superior to decentralized national authorities, to gauge the potential effects of such a goal across a population of states—whether it raises all boats, lifts only the most desperate cases, or outstrips the ideational and material commitments of different categories of countries. It is questionable whether IGOs possess all of the requisite capacity and willpower to perform these functions. However, the question concerning which level of authority—national or international—is theoretically better equipped to perform these functions leaves less to doubt.

Third, IGO monitoring bodies are perhaps the best suited institutions, certainly far better than most national authorities, to collect comparative state practices and exploit that information to promote human rights. In reviewing many governmental practices over time, institutions such as treaty bodies can also claim a level of expertise and authoritativeness in comparative human rights. Treaty bodies can accordingly employ such information to inspire recalcitrant states to emulate others' best practices. Various gradations of criticism and praise that treaty bodies currently employ in concluding observations already involve implicit cross-national comparisons. As we discuss below, treaty bodies ought to invoke, much more explicitly and frequently, exemplary models of comparative state practice in the performance of their monitoring and supervisory responsibilities. In general, IGOs are structurally well equipped to undertake such initiatives.

Fourth, IGOs are uniquely able to encourage self-reporting by states, a process that yields considerable benefits from an acculturation perspective. States have no obligation to respond to the criticisms of international nongovernmental organizations (INGOs), let

[88] Dennis & Stewart, at 498; Id. at 466 ("Nothing persuades us that the aspirational goals set forth in the ICESCR can be achieved--or can be achieved more effectively--only by means of an international adjudicative mechanism for individual complaints. … We see no convincing evidence that a legally binding adjudicative mechanism would lead to greater compliance by states with their ICESCR obligations.").

alone a duty to report proactively to INGOs. The authority to compel state reports is the special preserve of IGOs, and treaty bodies in particular. Encouraging states to submit periodic reports and to provide official responses to individual complaints can help propel the spread of human rights vertically and horizontally. Vertically, reporting practices foster a "culture of justification" in which state actors are encouraged to expound how their government conforms to global models of human rights behavior. Additionally, the associated processes, including the preparation of official reports, can prompt internal reflection in which state actors, including members of national bureaucracies, are compelled to consider whether national laws match global standards and whether governmental representatives can justify the status quo before a body of international experts. Also, once states make positive representations before an international body, they may be less likely to backslide or take retrogressive steps. In short, in these institutional environments, state actors are likely to make efforts to be seen by others, and to see themselves, as conforming to shared norms. These are the types of efforts associated with the diffusion of norms via acculturation, and procedures for self-reporting provide considerable opportunities to foster such efforts.

Horizontally, reporting procedures build a public record of states' espousing and striving discursively to meet international human rights standards. Of course these official representations may not reflect true preferences or may be decoupled from local conditions on the ground. Borrowing from work on social conformity and preference falsification,[89] such representations nevertheless can help create an environment that signals community intolerance of rights violations and shapes the social meaning of official hostility to core human rights norms. This horizontal dimension can affect the expectations and conformity of even those states who fail to report routinely, if ever, to the IGO.

All these lessons are notably also instructive for deciding how to structure self-reporting before IGOs. First, multiple, and even "redundant," opportunities for reporting interactions should be encouraged. Second, current proposals to unify and streamline the UN treaty body system, whether to gain efficiency or to focus on the worst abuses, may exact an intolerable cost. Multiple treaty bodies provide opportunities to explore more issues in greater depth than a single, condensed report would likely provide. It is also important not to focus on violations of greatest concern, as a unified and streamlined approach might do, but also to create an impressive record of self-reported compliance and praise for preferred practices. Third, the lack of an individual complaints procedure for the ESCR Covenant precludes advances that could be made in that human rights domain. The ESCR Committee, in short, has structural advantages that cannot be replicated through diffuse national-level monitoring. Finally, IGOs should not be evaluated solely in terms of state interaction directly with the institution. The collateral effects on third-party states (e.g., those that do not regularly report to a treaty body) may be among the most important.

Once an IGO is operative, second-order questions concern how to balance relationships between the international body and national legal systems. First, the analysis above raises some difficult questions about the standards that IGOs employ in

[89] Elster; Jeffrey J. Rachlinski, The Limits of Social Norms, 75 Chicago-Kent Law Review 1537, 1547-56 (2000).

evaluating state parties. Consider, for instance, whether the ESCR Committee should (as some national courts have chosen to do) require states to provide only a minimally rational justification for distributional decisions affecting social and economic rights. On the one hand, a de minimus review captures acculturation-related benefits by fostering a culture of justification in which states are encouraged if not compelled to defend their practices before external audiences. And, a de minimus review avoids some concerns of ESCR pessimists who generally consider supranational scrutiny of ESCR intrusive. On the other hand, such a minimalist standard may, according to the dynamics of acculturation, encourage a race to the middle. States that would otherwise be considerably more progressive may orient themselves to the lower standard, for instance, by eschewing only the most offensive or irrational choices affecting ESCR. Various actors, the Committee included, would need to take actions to ensure that such minimalist tests are understood to be products of the relationship between supranational review and national authorities, not a substantive component of the norm itself.

Second, the model of acculturation suggests the potential effectiveness of other rules of decision and presumptions involving deference to national authorities. Consider, for instance, one of the most precise and rare affirmative obligations in the ESCR context: the principle that states should not adopt deliberately retrogressive measures. As mentioned above, once states make public, positive representations before an international body, they may be less likely to backslide or take retrogressive steps. The ESCR Committee's suggestion that retrogressive measures require especially strong justifications by state parties to rebut a presumption of illegality (General Comment No. 3) can strengthen global social pressure and make backsliding more difficult to initiate. …

**2. Conditional Membership**

The first global human rights institution of the twenty-first century—the U.N. Human Rights Council—provides an especially good case for illustrating the significance of our project. The Council's architects rejected proposals to create a human rights body composed of all UN member states. The Council instead limits admission to 47 states; no state may serve on the Council for more than six consecutive years; and the criteria for selection and retention of Council members potentially includes evaluation of a state's commitments to human rights. UN officials, several states, and virtually all major international human rights NGOs are now trying to ensure that the human rights criteria for membership are employed and strengthened over time. These efforts are inspired partly by the belief that membership bestows legitimacy on governments (a reason to exclude the Libyas and Sudans of the world), that states will improve their records to achieve the status of membership, and that states will similarly make changes to avoid a stigma associated with ostracism from the Council. These views are predicated on assumptions about how states behave and the power of particular forms of social influence to affect that behavior.

Our project clarifies those assumptions and illuminates the costs and benefits of such a regime design. For example, although substantial empirical evidence now suggests that the forms of influence envisioned by the Council's architects are socially meaningful, countervailing effects which operate according to the same social logic have not received

adequate consideration. That is, the same body of empirical work provides strong reasons for bringing recalcitrant states into the fold. Specifically, processes of assimilation suggest that illiberal states will begin to imitate the group in which they are included. This "identification" with a group—not banishment from the group—is perhaps more likely to propel the legal and political systems of illiberal states toward conformity with prevailing norms.

Additionally, the acculturation approach differs from the other approaches in how it evaluates "defections" by states inside such an organization. An acculturation approach predicts certain patterns of defection not envisioned by the other approaches, and it accordingly assesses the cost of defection for regime maintenance very differently. The coercion approach, for example, raises the concern that including states with lower commitments to regime objectives will prove unworkable due to frequent defections within the forum. The persuasion approach predicts that few meaningful defections will occur and considers defection in unequivocally unfavorable terms. An acculturation approach, in contrast, predicts that defections will occur and may have salutary features. Specifically, it predicts that pressure to conform will produce a particular form of defection: decoupling, in which structural adherence to globally institutionalized models does not correspond to actual state practices on the ground. As we explain in Chapters 2 and 3, this disconnect between local circumstances and universal models is not an impediment to the diffusion of global norms, as other theories would suggest. Rather, this form of decoupling, in important respects, makes possible the diffusion of global models and the resultant convergence of official policies and organizational structures. The important points here are that the acculturation mechanism predicts a peculiar form of defection and that this form of defection assists the transnational diffusion of norms.

Problems with restrictive membership rules may be especially acute for IGOs that conduct "peer review" of state human rights practices. An empirical assumption favoring peer review is that states will be especially responsive to criticisms by their counterparts. Proponents of the new Human Rights Council have expressed that view and prognostication. Admittedly, an acculturation model of state interaction generally considers peer review a constructive arrangement. However, the effectiveness of review will depend on whether the configuration is truly "peer"-based or instead involves a select group of insiders evaluating outcasts and outsiders. The social and cognitive pressure of peer review is likely to be effective when an IGO provides universal membership and subjects all member states to review or when an IGO provides an independent opportunity for states to opt into a peer review process (e.g., the New Partnership for Africa's African Peer Review Mechanism). Problems arise with IGOs that restrict membership and empower admitted states to review the practices of nonmembers as well as members (the Human Rights Council). In practice, membership rules may systematically exclude certain states due to a government's failure to comply with the normative criteria or due to a government's lack of geopolitical power to secure votes for admission. This excluded class will presumably comprise countries whose human rights abuses may be of the greatest concern—a potentially troubling result for any institutional design.

Although "peer" review coupled with restrictive membership might achieve benefits related to other social mechanisms, it is likely to be ineffective or counterproductive in harnessing social and cognitive pressures associated with acculturation. Indeed, outsiders

with little or no prospect of admission may be likely to disregard criticisms by the insider group or, worse, they may be more likely to resist particular ideas because those ideas originate from the insider group. For example, a state excluded from the Human Rights Council in part because it fails to embrace ESCR may be even less likely to change its practices in the face of criticism by Council members. Reducing or terminating the price of admission and conducting peer review of the state's practices as a consensual, equal member of the organization could provide greater prospects for success.

If the Council in particular continues to combine peer review with restrictive membership, the above concerns can be ameliorated by strengthening the so-called special procedures (e.g., Special Rapporteurs). The special procedures are generally perceived as relatively independent, are not considered the handmaiden of Council members, and are thus viewed to be more fully representative of the UN as a whole. Indeed, it might be highly important to insulate special procedures to an even greater degree from the Council's political cabal. At the very least, given their ability to overcome some of the structural deficiencies of the Council, the special procedures should not be subsumed or replaced by the peer review system as some states have advocated.

**3. Precision of Obligations**

**4. Implementation: Monitoring and Enforcement**

## Chapter 8
## Transnational Rights Promotion Strategies

Much of human rights advocacy does not take place within treaty-based multilateral institutions. Other important tools for promoting human rights include governmental foreign policy and transnational civil society initiatives. According to conventional wisdom, these efforts are most effective when they employ coercive force. Measures such as the European Union's use of economic sanctions or NGO threats to the electoral survival of a government are considered among the most effective means of advancing human rights. Similarly, the value of civil and criminal liability for foreign human rights violations—such as the Alien Tort Statute in the United States and the Pinochet extradition case in Britain—is conventionally assessed by the severity and certainty of judicially imposed sanctions.

In this Chapter, we assess these efforts specifically, as well as other similar measures, through the lens of all three mechanisms. We identify the potential for transnational governmental and civil society initiatives to harness persuasion- and acculturation-based processes in building a human rights culture. We examine the potential for NGOs to harness such mechanisms across the full spectrum of human rights—economic and social as well as civil and political rights. We also suggest how coercive measures may *undermine* other forms of social influence on directly targeted states and third party states. Indeed, under certain conditions, coercive measures may substantially reduce aggregate levels of desirable behavior among the population of relevant state actors. Finally, we discuss strategies that governmental and nongovernmental actors may adopt to harness different mechanisms at different stages of the institutionalization of a norm.

## 1. Transnational advocacy groups

International nongovernmental organizations (INGOs), such as Amnesty International and Human Rights Watch, constitute important components of the global human rights regime. An obvious defining feature of INGOs is their lack of coercive authority. Evaluating their potential role and effectiveness requires exploring other mechanisms of influence that these organizations can directly exploit in dealing with state actors.

A contemporary controversy within the NGO community provides a productive starting point for engaging this set of issues. Heads of leading INGOs have expressed reluctance to address ESC rights on the ground that their organizations' capacities to promote change are not well suited for this particular arena.[90] Consider a recent set of well argued articles by Kenneth Roth, Executive Director of Human Rights Watch. Roth's argument relies on three principal but flawed claims. First, targeted state practices must be susceptible to "the core of our methodology [which] is our ability to investigate, expose, and shame."[91] ESC rights elude these methods, according to Roth, because shaming requires precision, and the law on violations, violators, and remedies for ESC rights is generally unclear. Second, the most fertile conditions for spreading human rights require local civil society actors, such as national NGOs, who support the position of INGOs. More specifically, shaming involves exposing state actors to public opprobrium "and the relevant public is best when it is a local one—that is, the public of the country in question."[92] More strongly, Roth echoes concerns raised by Dennis and Stewart in writing: "We can argue that money should be diverted from less acute needs to the fulfillment of more pressing ESC rights, but little reason exists for a government to give our voice greater weight than domestic voices."[93] That is, Roth transfers doubts about international actors' involvement in ESC rights from the realm of IGOs to the INGO context. Third, international efforts such as technical assistance to promote human rights require that state actors already exhibit a genuine interest in respecting those rights. National governments often lack the political interest or will to justify enlisting INGOs for technical assistance.

A close analysis of the mechanisms of influence reveals flaws in these propositions. More fundamentally, this analysis provides lessons for fashioning INGO roles and strategies in general. That said, analyzing the mechanisms does support separate concerns raised by Roth and others. Those concerns, however, are best directed to the project of institutional design—to improve, rather than abandon, INGO efforts. We consider each of these claims and concerns in turn.

### *A. Alternative Forms of Social and Cognitive Pressure*

1. Shaming belongs to a family of social logics that motivate state behavior. That is, concerns about status and membership in a group, which underpin shame, can also

[90] Roth I; Roth II; Aryeh Neier, Taking Liberties: Four Decades in the Struggle for Rights (2003); Aryeh Neier, Social and Economic Rights: A Critique, 13/2 Hum. Rts. Brief (2006).
[91] Roth I, at 67.
[92] Roth I, at 67.
[93] Roth I, at 69.

motivate mimicry of other actors' practices. INGOs could accordingly use the same skills and levers of influence, with which they have become accustomed, to encourage states to emulate positive models of ESC rights protection. If shaming strategies influence states, presumably so shall these other techniques.

2. Precision may be essential only to shaming and other techniques that use social pressure; precision is not necessary to other acculturation processes that rely on cognitive impulses to conform. (See above discussion of precision with respect to IGOs).

3. Shaming strategies might be usefully restricted to situations involving the level of precision for this form of acculturation to work: serious violations of "core minimum obligations" of ESC rights.[94]

*B. Conditions for Diffusion I: Strength of National NGOs*

It is understandable that Roth claims that effective INGO campaigns on ESC rights need support from local advocates or domestic publics. Indeed, leading social scientific models of human rights advocacy suggest that INGOs should create synergies with local NGOs to move governments through progressive phases of human rights concessions and recognition. That model, however, relies in part on (i) persuasion, in which advocacy groups succeed in "bottom up" dialogical interactions with political elites and (ii) coercion, in which the survival of the ruling government is threatened. The model heavily emphasizes those techniques in the initial phases of pressing a government to accept global human rights standards. There are, however, other ways up that mountain.

Empirical studies tracking patterns of acculturation suggest top-down (global-level) change can influence state actors without significant local advocacy groups supporting that agenda. Consider a few related findings. For example, once the obligation to address domestic violence was institutionalized at the regional level in Latin America, states joined the bandwagon despite dramatic differences in (and sometimes the absence of) women's political influence and women's access to economic resources at the national level. The researchers conclude that upon regional institutionalization of the practice, "international socialization is more important than domestic politics" in getting "nonconformist states to change their policies to meet the standards of new international norms."[95] Similarly, consider women's right to vote. Once the norm of female suffrage was institutionalized at the international level, a strong predictor for whether an individual state would enact women's suffrage was whether other states in its region had done so in the past five years. The findings suggest that compared with local conditions such as the strength of domestic women's rights groups "[c]ountries apparently are affected much less strongly by internal factors and much more strongly by shifts in the

[94] Cf. Audrey R. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 Human Rights Quarterly 23, 38 (1996) ("[T]he stigma of being labeled a human rights violator is one of the few 'weapons' available to human rights monitors. A violations approach [based on core obligations] offers the possibility of wielding that weapon more effectively and fairly.").
[95] Id. at 256.

international logic of political citizenship."[96] Indeed, late adopters frequently had effectively no woman's social movement at the time of enactment. Additionally, states adopt educational reforms that do not reflect changes in relevant domestic social and cultural arrangements. Instead, governments adopt models of education promulgated at the international level.[97] States also adopt environmental conservation policies even in the absence of industrialization and degradation, which would presumably be required to mobilize domestic social movements.[98] Finally, states adopt a globally legitimated form of scientific bureaucratic organization; and the modal category of states doing so have less than 7 scientists in the country—essentially little or no scientific community to advocate for these changes.[99] The important point is that, under certain conditions, states may be motivated to make fundamental transformations due to global social and cognitive pressures in the absence of internal constituencies or national social movements advocating those changes.

*C. Conditions for Diffusion II: Governmental Interest in Respecting Human Rights*

The success of technical assistance programs does not require, as a precondition, a government committed to respect rights. First, state identity and preferences are not static. State identity and preference formation is endogenous to interactions with global organizations. The diffusion of innovations through global mimicry often involves solutions disconnected from problems, and solutions chasing problems. Governments embrace these "solutions" or legitimated models of behavior in the course of interacting with the global cultural environment. Consider Martha Finnemore's study of the world-wide diffusion of national scientific bureaucracies promulgated by UNESCO. States adopted the global model not because they already accepted the validity of the agenda but because that agenda was associated with what it means to be a modern state. Relatedly, studies by David John Frank, Anna Hironaka, and Evan Schofer show that states enacted global scripts on environmental policy without a preexisting domestic need or interest in making such transformations. The researchers also find that the greater degree to which a state is embedded in the international community (in part through INGO chapters) the more likely it will implement the global model: "More sociocultural ties to world society means greater likelihood of national implementation for every kind of environmental protection on which we have data."[100] Notably, these studies concern programmatic and administrative domains. Their findings are thus especially relevant to the prospect of governmental changes involving ESC rights.

Second, although a *genuine* governmental commitment to respect human rights may be ideal, it is not necessary to the diffusion of human rights norms. Roth contends that "the provision of technical assistance to a government that lacks a good-faith desire to respect rights can be counterproductive by providing a façade of conscientious striving that enables a government to deflect pressure to end abusive practices."[101] But, why are

[96] Ramirez et al., at 742.
[97] David John Frank, et al.; Ramirez; Evan Schofer & John W Meyer, The Worldwide Expansion of Higher Education in the Twentieth Century, 70 American Sociological Review 898 (2005).
[98] David John Frank, et al.
[99] Finnemore.
[100] Frank, et al., 106.
[101] Roth I, at 67.

states motivated to deflect pressure in the first place? And, how might INGOs tap those same motivations to apply follow-up pressure once a state has made initial, public commitments? Although shallow acts of public conformity might yield some short-term social benefit to the conforming state, INGOs are likely (and ought) to 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. More generally, public commitments by states to human rights norms can provide a useful entry point for international actors, a foundation for demanding consistency in commitments, and for ratcheting up pressure to conform as steps are taken over time. It should also not be overlooked that one of the features of technical assistance programs is to embed states directly in networks of IGOs and INGOs. There is ample evidence to suggest that those relationships would help diffuse human rights norms. …

## 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. Exercising Jurisdiction over Foreign Human Rights Violations

In Chapter 7, we analyze civil and criminal actions for foreign human rights violations as a form of norm promotion abroad. In Chapter 8, we analyze how these same efforts might indirectly foster norm internalization within the countries in which the cases are brought (e.g., Belgium, Spain, the United Kingdom, the United States).

### 2. Incorporating International Law as Domestic 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 important area 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 accommodations in order to participate as full members of the international

community.[102] 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.[103] 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, 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 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 and of international legal compliance. 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."[104] 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."[105] According to Professor Louis Henkin, Hughes' remarks constituted the "modern underpinnings" of the school of thought that would limit the treaty power.[106]

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 is based on more substantive grounds than simply respecting a formal act of international agreement. 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 which requires 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 rights treaties would be dubious because such treaties "regulate the relationship between nations and their own citizens,

[102] See, e.g., John M. Kline, Australian Federalism Confronts Globalization: A New Challenge at the Centenary 61 Australian J. of Public Admin. 27 (2002).
[103] John Trone, Federal Constitutions and International Relations 114 (2001).
[104] Proceedings of The American Society of International Law 195 (1929).
[105] Hughes, at 195.
[106] Louis Henkin, Foreign Affairs and the United States Constitution 471 (2d ed. 1996).

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."[107]

As we discuss in the following pages, these common conceptions disregard the cross-national relationships of domestic human rights norms and practices. The common understanding does 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 the United States, the Supreme Court established in 1920 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 U.S. 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 to 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."[108]

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 counteracted. Professor Curtis Bradley has become the most prominent and eloquent critic of *Holland*. An analysis of his critique helps to illuminate and evaluate 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 overruled or narrowed. 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.

Importantly, Bradley's analysis suggests that human rights issues only marginally satisfy the threshold requirements set by *Holland*. On his account, the transnational

[107] 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 Affiars and the U.S. Constitution 197.

[108] [cite]

effects of human rights violations are "abstract and emotional" (he notes the moral and emotional response of U.S. citizens to foreign abuses) or appear 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.[109]

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 inter-state reciprocity or arrangements for achieving mutual gain:

> The constitutional treatymaking 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.[110]

Bradley and Goldsmith note that "*Holland* was decided before … the development of modern human rights treaties."[111] 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."[112]

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, how foreign rights practices directly affect domestic rights practices, and the significant frequency or common occurrence of these interactions. Were human rights practices to exhibit such characteristics, human rights

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[109] (emphasis added).
[110] Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399, 400 (2000).
[111] Id. at 454 n. 250.
[112] Id. at 450.

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 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 influenced legal and political practices 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."[113] The report concludes that such human rights issues should form the subject of UN recommendations, but "not of international compacts."[114]

[113] [cite]
[114] [cite]

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.[115] 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.[116] 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."[117] In other words, political forces favoring the proposed amendments were defeated by arguments that (i) insistence on federalism constraints would interfere with actions the nation 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."[118] "[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."[119] 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."[120] 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 (fruitless) endorsement of the Genocide Convention in 1970 and Carter's (similarly unsuccessful) support of the principal covenants in the late 1970s.

Many of the concerns that animated the proposed Bricker Amendments have also shaped subsequent U.S. reservation practices.[121] 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

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[115] Tananbaum, at 139-43, 148, 153; Natalie Hevener Kaufman, Human Rights Treaties and the Senate 96, __ (1990); Golove, at 1276.
[116] Tananbaum, at 89, 199; Kaufman __.
[117] 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 __.
[118] Leblanc, 135-36.
[119] Leblanc 136 & 137.
[120] 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).
[121] Kaufman; Bradley & Goldsmith.

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.

A limited conception of the cross-national diffusion of human rights norms has also shaped the Australian legal system. Under the Constitution of Australia, the national Parliament can pass legislation relating to "external affairs." This constitutional license expands the national government's legislative power to domains otherwise reserved for state authorities. 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.*[122] The application of that "general rule" to human rights treaties, however, was and remains contentious. The troubled status of human rights treaties is partly due to the perception in Australia that such agreements are not "truly international."[123] 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 an incomplete understanding of how human rights practices involve cross-national transactions and require coordination among states. The High Court first established the general rule—that all treaties activate Parliament's external affairs power—in a landmark decision in 1983 involving an environmental treaty[124] and, more recently, reaffirmed the rule in a decision involving an ILO convention.[125] In 1982, however, the Court squarely considered a human rights treaty.[126] That case concerned the constitutionality of federal legislation implementing the Convention on the Elimination of Racial Discrimination (CERD). A four-three majority upheld the legislation but not for unified reasons.[127] Three 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

[122] 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.

[123] 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.

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

[125] Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416.

[126] Koowarta v Bjelke-Petersen (1982) 153 CLR 168.

[127] Andrew Byrnes & Hilary Charlesworth, Federalism and the International Legal Order: Recent Developments in Australia, 79 AM. J. INT'L L. 622 (1985).

international concerns or relationships.[128] In this latter group only the concurring judge concluded that CERD satisfied the separate criterion. 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, provided a straightforward understanding of 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...."[129] The Chief Justice then argued that human rights did not meet the criteria: "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."[130]

Importantly, not only resistance to the general rule but the general rule itself reflects anxiety about the characterization of human rights as a matter of external affairs. The dissenting judges were defeated not because the other judges all considered human rights truly or sufficiently international. Rather, other justices concluded that the Court lacked the institutional competence to determine whether a matter is international. One of the architects 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."[131] Moreover, 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 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."[132] With the expression of these views, 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, which they endorse, weighs sub-national governmental interests against the need for Australia to act in concert with other nations. This approach

[128] J. M. Finnis, Power to enforce treaties in Australia—the High Court goes centralist?, 3 Oxford Journal of Legal Studies 126, 127-29 (1983).
[129] at 201-02.
[130] at 202.
[131] at 125.
[132] at 121.

effectively concedes that only "some treaties"[133] should trigger the external affairs power—treaties that address problems requiring inter-state action. This analysis involves evaluating the degree to which the acceptance of reciprocal treaty obligations can help governments reduce undesirable practices within or across their countries. Professor George Winterton, for example, argues that fears about the far-reaching power of Parliament to implement treaties are misplaced, and that political constraints ensure against Parliament's excessively exercising its authority.[134] 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."[135] Given the empirical evidence discussed in earlier chapters, human rights agreements should, in theory, fare well under such scrutiny. However, legal and policy actors often fail to appreciate those empirical features of human rights regimes. Such treaties are thus not considered truly or sufficiently international. The perceived lack of a collective action problem on the international side of the scale strongly favors sub-national governmental interests and undercuts the legitimacy of efforts to override state and local authority.[136]

The actual use of the external affairs power in the human rights arena has resulted in calls to reform the process of treaty ratification.[137] 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 national Parliament, invoking the U.N. Committee's decision, enacted legislation overriding Tasmania's law.[138] The political reaction provided a catalyst for initiating parliamentary review of the external affairs and treaty power.[139] The following year, a Senate committee unanimously adopted a report entitled

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[133] 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).

[134] 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.

[135] 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.

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

[137] [explain Teoh decision and CRC ratification]

[138] 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 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.'").

[139] 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]

*Trick or Treaty? Commonwealth Power to Make and Implement Treaties*.[140] The report discussed 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."[141]

In 1996, Australia instituted wide-ranging structural reforms based on the committee's recommendations.[142] Any proposed treaty action now receives 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."[143] That agreement creates new bodies, such as a Standing Committee on Treaties, to facilitate consultation with local authorities in negotiating and ratifying treaties of "particular sensitivity and importance to the states."[144] 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."[145]

The impact of these reforms on actual treaty practice is still uncertain.[146] Public anxiety about human rights treaty ratification appears to have eased subsequent to the treaty reforms.[147] Stiff resistance, however, remains to legislation implementing human rights agreements. The federal government retains the legal authority, but lacks the political power, to legislatively implement human rights treaty obligations.[148] The lack of political power—despite formal equality of human rights and other treaties—can be

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[140] Trick or Treaty? Commonwealth Power to Make and Implement Treaties, (Canberra: Senate Legal and Constitutional References Committee, Parliament of the Commonwealth of Australia, 1995).
[141] at 5.92-5.93.
[142] 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).
[143] Council of Australian Governments' Communique, 14 June 1996 att. c. <http://www.coag.gov.au/meetings/140696/attachment_c.htm>
[144] Id. at 5.2 & 5.5
[145] Id. at 8.4.
[146] Charlesworth, Chiam, Hovell & Williams at 47; Gelber.
[147] Charlesworth, Chiam, Hovell & Williams at 47.
[148] 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.").

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."[149] In short, the Australian legal order reflects a failure to appreciate how human rights norms spread transnationally and how treaties serve as a device to regulate those interactions.

## 4. Steering Judicial Borrowing

Does judicial borrowing—reliance on foreign law by judges 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 through an elite (judge-to-judge or inter-court) network. Rather, it reflects broader involvement in the creation and transmission of constitutional norms. Finally, acculturation-based borrowing under existing global conditions will tend to forestall, rather than engender or perpetuate, illiberal outcomes.

### A. Challenging Proponents of Judicial Borrowing

[149] Charlesworth, at 291.

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 related to 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.[150] 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.[151] 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 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—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

[150] [Weinrib, supra note __, at 4]
[151] Jonathan Miller [cite].

protects the independence of state-owned media,[152] 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. 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.[153] Indeed, Slaughter and other commentators concentrate on judges' direct interactions and court-to-court dialogue as the principal subjects of analysis in judicial borrowing.[154] On this view, judges from different countries often meet together, influence one another in their 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.[155] This descriptive account, however, is deficient in important

[152] 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.").

[153] 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)

[154] 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.").

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

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 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 laws). 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 interacting. Trans-judicial 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 counteract 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 but for countervailing foreign precedent? Are invocations of foreign law simply post-hoc justifications for decisions reached on independent grounds?

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 or 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, 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 disturbing, 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 existing corpus of rights 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 authority) 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 institutionalization and diffusion by means of acculturation. The source for illiberal change in the diffusion of a norm would therefore have to arise from or pass through these states.

Remaining concerns may be addressed to the project of institutional design for regulating 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 continuing distrust of national institutions and fears of future illiberal rollbacks. Under those conditions, there may be especially strong reasons to trust in international trends by fastening the nation's fate to, or giving 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 notions of what it means to be a modern, liberal state.[156] 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,[157] to protect children,[158] and to safeguard the environment[159]). 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.[160] 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 variables 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 community commitments to liberal democracy. It will 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

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[156] 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.").

[157] 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).

[158] 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).

[159] 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).

[160] See supra note __.

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*.[161] Alford argues that judicial borrowing opens courts to "selective and incomplete presentations of the true state of international and foreign affairs."[162] 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.[163] He cites, as evidence, studies showing that 80 countries have sodomy laws.[164] As an exemplification of legal commentary, Alford's very argument demonstrates that the Court's analysis 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 properly 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.[165] 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."[166] 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 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

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[161] Roger P. Alford, Misusing International Sources to Interpret the Constitution, 98 AM. J. INT'L L. 57, 65-66 (2005).
[162] Id. at 64.
[163] Id. at 66.
[164] 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>).
[165] Tielman & Hammelburg, supra note __, at 262-342; International Gay and Lesbian Human Rights Commission, supra note __.
[166] 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.").

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.

### 4. Designing National Human Rights Commissions and Ombudsmen

Studies of global acculturation suggest that particular domestic arrangements can accelerate diffusion by providing "domestic receptor sites" for international norms. An important set of studies, for instance, shows that domestic receptor sites such as natural science associations and environmental institutes facilitate the local transmission of global models of environmentalism. In this section, we discuss setting up analogous institutions in the human rights context. Our principal subject of concern is national human rights commissions and ombudsmen—"national human rights institutions" (NHRIs) in UN parlance.

Mechanism-based analysis not only provides lessons for how NHRIs might accelerate the diffusion of human rights norms but also provides some cautionary notes for promoting such institutions. International efforts to encourage states to create and strengthen these institutions could employ various mechanisms of influence to propel that agenda. We discuss potential pitfalls in spreading NHRIs through processes of acculturation. As explained in Chapter 6, one of the potentially perverse effects of acculturation is a "race to the middle." That is, under certain conditions states that would otherwise aspire to advanced levels of human rights protection may gravitate to lower expectations or standards of "success." Accordingly, the promulgation of common UN standards for the promotion of NHRIs (the so-called Paris Principles) may produce some negative results. That is, although national political conditions would have produced a highly advanced NHRI in a particular case, the existence of a modest, common global standard may reduce the expectations and reforms that advocates can insist upon in the domestic political process. We identify patterns of NHRI adoption that indicate such results. We suggest addressing such situations through de-biasing political actors, developing graduated standards for different levels of NHRI performance, and promoting "best practices" based on models of leading or superlative NHRIs.

## PART III. THE PROMISE AND PROBLEMS OF STATE SOCIALIZATION

### Chapter 10
### State Socialization and Power

In this Chapter, we discuss several issues relating to the role of geopolitical power in state socialization. As a descriptive matter, we maintain that the evidence of acculturation discredits theories that explain state behavior solely in terms of global power politics. To clarify why this is so, we consider an important alternative explanation. Specifically, skeptics might accept that the empirical evidence indicates an external source of state organizational formation but might argue that the external source could be powerful actors compelling states through material penalties or rewards to adopt particular practices. We contend this account is unpersuasive. Available data indicate, albeit

indirectly, that acculturation provides a more compelling explanation of the relevant historical patterns of state practice.

As a normative matter, we reject the view that all forms of socialization exploit power disparities and reproduce forms of hegemonic power. We first compare the exercise of power associated with acculturation with the more severe and manipulative forms of power accompanying coercion and persuasion. We also explain how global processes of acculturation (and at times persuasion) facilitate the diffusion of counter-hegemonic norms such as decolonization; economic, social, and cultural rights; and women's suffrage. Finally, we discuss the opportunities for dissent and contestation that inhere in the substance of prevailing international human rights regimes. We also discuss strategies of institutional design for promoting these more beneficent outcomes.

**Chapter 11**
**State Socialization and Compliance**

In this Chapter, we discuss how our project challenges and supplements specific theories of compliance. A cluster of competing theories maintains that law has little or no effect on state behavior. These theories 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 of mechanisms helps explain such empirical patterns and suggests how international law can harness such social processes. We also criticize specific policy prescriptions that assume global politics lacks sufficient social mechanisms to generate legal compliance.

Our approach also serves as a corrective to certain theories maintaining, without sufficient qualification, that international law is effective. 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 undermine 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.

After identifying inadequacies in other theories of compliance, we consider potential weaknesses in our own 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. Although such gaps constitute important evidence of acculturation, the process of acculturation may, in other circumstances, foster complete internalization of a norm. We analyze studies that document just this sort of internalization. That is, our argument turns on the distinction between the *concept* of acculturation and the *evidence* used to document its existence. We employ a conception of acculturation as a causal process, rather than a conception of acculturation as an outcome.[167] Clearly, this process, as a conceptual matter, need not result in incomplete or

[167] 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).

shallow internalization. Indeed, state actors often embrace norms because they reflect (taken-for-granted) global scripts of what "liberal" or "modern" states do.[168] Although we rely heavily on patterns of "public conformity without private acceptance" (decoupling) to document the presence of acculturation in international society, we do so only because of the evidentiary value of these behavioral patterns. Because coercion, persuasion, and acculturation all result in behavioral change, the presence or absence of these mechanisms must be inferred from some evidence other than the simple fact of behavioral change. The question is what type of evidence suggests the presence or absence of any of these mechanisms. As we develop more fully in Chapter 3, evidence of incomplete internalization is useful because it tends to support acculturation-based explanations and discredit persuasion-based explanations. In other words, such evidence can help arbitrate between competing, otherwise equally plausible, accounts of why a particular norm diffuses. Even if incomplete internalization is best understood as acculturation's footprint, it is ultimately an empirical, rather than conceptual, question whether acculturation is often (or even typically) associated with public conformity without private acceptance.

The remaining question is whether meaningful change might occur in circumstances in which acculturation does produce gaps between form and practice. 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.[169] In more extreme cases, these shifts may enable such groups to secure more meaningful policy reforms through the political process.[170] 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.

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[168] 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). See generally GILI S. DRORI ET AL., SCIENCE IN THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION (2003).

[169] 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).

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

Second, acculturation triggers what Professor Jon Elster calls the "civilizing force of hypocrisy."[171] 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."[172]

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.[173]

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[171] 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).

[172] 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).

[173] 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).

## Chapter 12
## Toward an Integrated Theory of Law's Influence

The ultimate objective of this project is to develop an empirically grounded approach that would integrate all three mechanisms in fashioning a human rights regime. Such an approach—which would appreciate the distinct qualities of, and interactions among, the processes of coercion, persuasion, and acculturation—is in our view essential to building an effective human rights regime. In this Chapter, we outline the general features of an integrated theory of law's influence.

First, an integrated model should take seriously the processes of acculturation. Indeed, acculturation has been systematically undervalued (and, at times, misunderstood) in debates about human rights regimes. In short, it should be expected that the prevailing approaches—coercion and persuasion—will prove ineffective in the human rights area. Furthermore, as the analysis of membership rules demonstrates, acculturation strategies greatly value the social effects generated by intergovernmental organizations. In contrast, both coercion and persuasion operate quite effectively outside formal organizational settings.

Second, an integrated model should account for negative interactions among the three mechanisms. Simply put, deploying one mechanism might undermine the ability to deploy another. For example, overt coercion can interfere with persuasion strategies by polarizing group deliberations. Coercion may also undercut acculturation by suggesting that the target behavior is not self-evidently appropriate—a "deinstitutionalization" or "crowding out" effect.[174] Regime architects might mitigate such deleterious effects by using positive rather than negative material inducements, or by abandoning the use of coercion in specified circumstances.

Third, an integrated model should endeavor to identify the conditions under which the various mechanisms operate successfully. For example, it is important to assess the structural capacities of states and multilateral institutions to monitor human rights practices and sanction human rights violations. The likelihood, feasibility, and costs of these measures will often determine which strategy (or strategies) should predominate. Another important variable is the character of the extant structural relations at the global or regional level. For example, the effectiveness of various mechanisms should turn on considerations such as the density of international interactions, the axes along which relevant states share important cultural characteristics (including religion, ethnicity, and language), and the distribution of military and economic power.

Finally, an integrated model should consider various "sequencing" effects. That is, an integrated model might emphasize different mechanisms at different stages of the institutionalization of a norm. For example, there may be reason to coerce states into formal organizations in which they are later subject to measures that rely on persuasion or acculturation. We provide a framework for synthesizing these various factors. This framework would improve positive theories of state practice in the human rights arena. It would also better guide the design of global institutions, advocacy strategies, and domestic modes of incorporating human rights law.

In discussing potential avenues for future research, we briefly explore how our argument applies beyond the human rights context—including the promise and perils of extending the analysis to other domains. We discuss these ideas as an illustration of

[174] Ernst Fehr & Armin Falk, Psychological Foundations of Incentives, 46 EUR. ECON. REV. 687, 694 (2002); Bruno S. Frey & Reto Jegen, Motivation Crowding Theory, 15 J. ECON. SURV. 589 (2001).

general lessons and potential further applications of the project. Indeed, the structural attributes of the human rights arena are especially useful for isolating, documenting, and understanding the mechanics of acculturation. That is, the empirical footprint of acculturation is discernable in the human rights context because of the obvious deficiencies of coercion- and persuasion-based explanations of the relevant patterns of state practice. We do not, however, posit that acculturation is limited to human rights. By addressing how acculturation works in the human rights context, the project ultimately aims to generate a general typology of the mechanisms of influence and an account of how they interact. Indeed, we note in earlier chapter existing research that also suggests the significance of acculturation processes in such diverse areas as arms control, science, and environmental protection. Our identification of the conditions under which acculturation operates and our analysis of how acculturation may be integrated with other (materially and ideationally based) mechanisms provide lessons that could be applied to other international legal regimes. The integrated model also allows us to consider how the extension of institutional design principles to other domains would need to contemplate factors such as direct material interests of states in the practices of other governments and the different symbolic effects associated with legal domains outside of human rights.

**Conclusion**