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# Modeling Domestic Politics in International Law Scholarship

Katerina Linos\* and Jerome Hsiang†

## Abstract

*In this review essay, we use Eric Posner and Alan Sykes' Economic Foundations of International Law as a springboard to highlight key analytical contributions of rational choice models to the field of international law and to suggest avenues for future research. We argue that Economic Foundations is unusually comprehensive and that, as a result, the field can now respond to a major criticism. Critics have long argued that rational choice models are too abstract to make useful predictions about most issues relevant to international lawyers. We show that this critique is no longer justified, in part through a systematic classification of all articles published in the last decade in two of the flagship journals of the fields of international law and international relations, the American Journal of International Law and International Organization, respectively.*

*That said, we also argue that scholars working in this research tradition can make much progress by relaxing the most troubling assumption of existing rational choice models: the unitary state assumption. We show how two types of models widely used in other fields—principal-agent models and domestic distributional conflict models—can be fruitfully applied to international law debates. Our critique is thus internal; we suggest that it is possible to keep the simplicity and clarity typical of game-theoretic models while assuming that key constituencies within the state, rather than the state itself, can rationally pursue interests. Moreover, we also argue that some important policy implications of earlier rational choice models change when we weaken the unitary state assumption. Finally, even though our critique is internal to the law and economics tradition, we also show how studies from more sociologically minded traditions often yield complementary, rather than conflicting, insights.*

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## I. INTRODUCTION

How has the use of rational actor models contributed to debates in international law? In reviewing Eric Posner and Alan Sykes's book *Economic Foundations of International Law* ("Economic Foundations"), we take the opportunity to highlight some key insights derived from rational actor models and to specify avenues for future inquiry. Section II of this review argues that *Economic Foundations* is an unusually comprehensive volume that breaks new ground by applying rational actor models to several understudied fields, including remedies, state responsibility, and the law of the sea. We document this claim through a brief review of articles published in two of the flagship journals of international law and international relations, the *American Journal of International Law* ("AJIL") and *International Organization* ("IO"), respectively.

At the same time, we argue that scholars can make much progress by relaxing the most troubling assumption of the rational actor models currently used in international law: the unitary state assumption. Scholars who adopt this assumption posit that states can be elegantly understood as singular entities that act to maximize a well-defined national interest. In Sections III and IV, however, we show that disaggregating the state does not require abandoning the simplicity and rigor of rational actor models. In Section III we apply principal-agent models commonly used in many other disciplines to key debates in international law; disaggregating the state into voters (principals) and government officials (agents) can yield useful insights. In Section IV we compare unitary state models to models of domestic distributional conflict among key interest groups within each state. We illustrate how different rational actor models yield different conclusions for international law debates. That is, we suggest that some of the most controversial implications of earlier rational choice studies stem from the unitary state assumption in particular, rather than from the broader assumption that actors act rationally in pursuit of their interests. Disaggregating the state in this fashion also allows us to highlight similarities between economic and sociological accounts of international law, seemingly disparate perspectives. Our primary contribution here is showing that international legal scholarship has much to gain by applying alternative but workhorse models from political economy to several subfields of international law.

## II. DOCUMENTING *ECONOMIC FOUNDATIONS*' CONTRIBUTIONS

*Economic Foundations* is a comprehensive scholarly project that neatly presents the insights derived from rational actor models to almost every subfield of international law. In doing so, Posner and Sykes not only summarize prior material but also present new arguments about previously understudied areas. The result is a noteworthy book that will undoubtedly serve as a keystone

reference for future scholars. Here we highlight three interrelated achievements. First and foremost, the book is unusually comprehensive when applying the rational actor model to international law.<sup>1</sup> Posner and Sykes identify and analyze sixteen distinct substantive international legal fields to varying depths. This is no small achievement and is made all the more impressive by the clarity and parsimony in exposition.

Second, even though *Economic Foundations* reads as a broad survey, Posner and Sykes are not merely summarizing the state of the field; the authors are advancing and solidifying the field in important ways. Here we believe the book breaks new ground by applying the rational actor model to several areas of international law that are relatively understudied, including remedies, state responsibility, and the law of the sea. As we will show below, both international lawyers and especially international relations scholars have written little in these subfields. By extending rational actor models to these subfields, Posner and Sykes open up new research agendas.

Third, *Economic Foundations* moves forward the methodological debate between scholars who employ the rational actor model and those who are critical of the approach. Traditionally, one major critique of applying rational actor models to international law is that they are too abstract to be useful, as they do not make concrete predictions about specific doctrinal questions and controversies.<sup>2</sup> *Economic Foundations* addresses this concern by applying theoretical concepts to a very broad range of specific topics that interest international lawyers. Of course, not every topic is covered: important omissions include international tribunals, international labor law, international law governing migrants and refugees, European Union law, and international financial regulation.<sup>3</sup> And the debate between rational actor scholars and others

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<sup>1</sup> Previous scholarly works have synthesized the main insights of rational choice theory as applied to international law in general. See, for example, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

<sup>2</sup> See, for example, Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 10 (1999). Dunoff and Trachtman highlight a common criticism of rational actor models: "that the model either ignores—or cannot explain—many of the most important phenomena on the international legal scene, including the rise of non-state actors; the importance and, at times, relative independence, of international organizations; and the binding force of international law." See also Jan Klabbbers, *The Relative Autonomy of International Law, or The Forgotten Politics of Interdisciplinarity*, 1 J. INT'L L. & INT'L REL. 35 (2004).

<sup>3</sup> Others have employed rational choice or institutionalist frameworks to analyze these fields. See, for example, Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008); Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257 (2011).

will certainly not end with the publication of this book. Instead, we expect that it will take a new and more productive form. International lawyers interested in remedies, state responsibility, or the law of the sea to take a few examples, will no longer be able to claim that employing rational actor models produces no insights into these subfields. More importantly, scholars of all stripes will be able to comparatively evaluate the insights derived from the rational actor approach with the insights from other approaches. In short, Posner and Sykes help prop the door open so that future efforts can delve deeper, rather than expend energy relitigating whether the rational actor model is a useful analytical tool for international law.

In order to better understand *Economic Foundations'* contribution to the international law and international relations literature, we survey the topics that interested scholars in these two fields over the past decade. To systematize our search, we focus on flagship journals in international law and international relations: the *American Journal of International Law* and *International Organization*, respectively. The articles in these two journals represent state of the art scholarship in international law and international relations, evidenced by the fact that both journals enjoy high prestige and broad readership. To that end, we review every article published in *AJIL* and *IO* from January 2002 to April 2013 and classify all journal articles that address the sixteen topical international law categories that appear in *Economic Foundations*. Finally, we tally the total articles that fall into each category.

The classification process is fairly straightforward. As a threshold matter we first determine whether each article engages international law in a substantive way. Those that did not are classified as "Others." Almost all articles in *AJIL* and a substantial minority in *IO* meet this threshold criterion. We then sort all those articles that meet the threshold criterion by their primary substantive focus as they correspond to the sixteen topical categories in *Economic Foundations*.<sup>4</sup>

Tables 1 and 2 summarize our findings. For each journal, the first column reports the raw number of articles that fell into each category. The second

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<sup>4</sup> Some articles have multiple substantive foci; we identify their predominant focus and classify them based on this. Articles that focus on an aspect of international law that did not fall within the sixteen substantive categories we classify as "Others." Few articles fall in this category, which speaks again to the comprehensiveness of *Economic Foundations*. Out of the four articles from *AJIL* that fall into the "Others" category, two are methodological surveys about the turn towards empirical research and the influence of political science on international law scholarship, one is dedicated to biotechnological intellectual property rights, and one tries to pin down the exact meaning of the proportionality principle. The number of *IO* articles that fall into the "Others" category is much larger because *IO* is a political science journal, and thus many of its articles simply have no connection to international law. Nonetheless, it is striking that so substantial a fraction of articles in *IO* relate to topics that also interest international lawyers.

column lists each category as a percentage of the articles relevant to international law in each journal.<sup>5</sup>

**Table 1—Topics in American Journal of International Law Articles: 2002–2013**

<b>Topics</b>	<b><i>AJIL</i> Articles</b>	<b>%Total <i>AJIL</i></b>
International Institutions	12	21%
Human Rights	7	12%
Criminal Law	6	11%
Domestic and International Law	5	9%
War	5	9%
Treaties	4	7%
Int'l Investment, Antitrust & Monetary Law	4	7%
State Responsibility	3	5%
Force	3	5%
Customary International Law	2	4%
Aliens, Foreign Property & Foreign Debt	2	4%
Attributes of Statehood	1	2%
International Environmental Law	1	2%
Law of the Sea	1	2%
International Trade	1	2%
Remedies	0	0%
Others	4	
Total:	61	

<sup>5</sup> This adjustment reflects the fact that *AJIL* is a dedicated international law journal while *I.O.* covers far more topics. For the *IO* calculation, we use the 166 entries that focused on international law as the denominator, and set aside the remaining 144.

**Table 2—Topics in International Organization Articles: 2002–2013**

<b>Topics</b>	<b>IO Articles</b>	<b>%Total IO</b>
International Institutions	66	40%
Int'l Investment, Antitrust & Monetary Law	32	19%
International Trade	18	11%
Treaties	12	7%
Domestic and International Law	12	7%
Human Rights	12	7%
Attributes of Statehood	4	2%
War	4	2%
Force	2	1%
Criminal Law	2	1%
International Environmental Law	2	1%
Customary International Law	0	0%
State Responsibility	0	0%
Remedies	0	0%
Aliens, Foreign Property & Foreign Debt	0	0%
Law of the Sea	0	0%
Others	144	
<b>Total:</b>	<b>310</b>	

Prior to conducting the survey we held three initial expectations about the state of the literature. First, we expected to find that several areas of international law and international relations were well studied; we predicted that these would include international institutions, the laws of war, human rights, and trade. Second, and conversely, we expected to find that several categories of international law had received limited attention, from both international law scholars and (especially) international relations scholars. We predicted that these categories might include the law of the sea, remedies, and the two separate amalgam categories of aliens, foreign property and foreign debt, and international investments, antitrust and monetary law. Third, we expected international law scholars and international relations scholars to be interested in different aspects of international law.

We find that the topics receiving the most attention from both groups of scholars are in fact international institutions, human rights, and trade. This is consistent with our initial expectations. Interestingly, while we had expected that



certain categories would receive less scholarship than other categories, we were not expecting such a dramatic difference. For example, we find that there is very little scholarship on remedies, state responsibility, and aliens, foreign property and foreign debt. Even more strikingly, we discover that *AJIL* and *IO* contained no articles on remedies since 2002.

We also find that, consistent with our third initial expectation, international law scholars and international relations scholars are largely interested in different aspects of international law. To be sure, scholars in both fields pay substantial research attention to international institutions. Similarly, to a much lesser extent, scholars in both fields also pay attention to treaties, the interaction between domestic and international law, human rights, and international investments, and antitrust and monetary law.

Nevertheless, there are significant differences in the research interests of the two fields. Given that we limit our focus to topics in international law, it is perhaps unsurprising that the scholarship produced by international law scholars encompasses a much broader set of international law categories. Indeed, we found that fifteen of the sixteen topical categories enumerated in *Economic Foundations* were represented by at least one article in *AJIL*. By contrast, not a single article out of 310 published in *IO* since 2002 engages the topics of customary international law, state responsibility, remedies, aliens, foreign property and foreign debt, and the law of the sea. The scarcity of international relations articles on these topics simply underscores *Economic Foundations'* contributions to international law. Since international relations scholars do not appear to engage extensively with these subfields, and few international law scholars use rational choice models, Posner and Sykes must be among the first to introduce rational actor models to these subfields. Indeed, Posner (with Jack Goldsmith) and Sykes previously produced the foundational rational actor-based international law articles on customary international law and the law of the sea.<sup>6</sup> Some other legal scholars have used rational actor models to engage state responsibility.<sup>7</sup> But we do not know of other scholarship that has utilized the rational actor model to analyze remedies, or the treatment of aliens, foreign property and foreign debt. Thus the contribution of *Economic Foundations* to international law theory is especially pertinent in these understudied subfields.

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<sup>6</sup> See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569 (2010).

<sup>7</sup> See Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276 (2004); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475 (2008).

## III. PRINCIPAL-AGENT MODELS

While *Economic Foundations* makes major progress by extending the scope of law and economics to many new areas of international law, we believe there remains ample open space for future research. This is because the analysis in this volume—which coincides with the approach most commonly used in the international law and law and economics literature—relies on a set of particularly rigid assumptions about state behavior.<sup>8</sup> In the pages that follow, we explore what progress can be made when we relax the foremost (and perhaps most problematic) assumption inherent to their model: the unitary state assumption. This assumption treats the state as a single entity pursuing the “national interest”; it assumes away cleavages between different interest groups, or between leaders and citizens.<sup>9</sup> We contend that scholars can make much progress in the study of international law by first relaxing the unitary state assumption and then applying principal-agent models and domestic distributional conflict models. Indeed, scholars have already successfully and widely used such models in the study of international organizations.<sup>10</sup> We explain why these models can serve as useful tools for analyzing many other aspects of international law as well.

To support our contention, we begin Section III by summarizing key insights derived from applying the principal-agent models to other fields. We then explain how *Economic Foundations* helpfully employs these models to explain the laws of state responsibility, but does not extend this same analysis to important debates on international debt. We show how major conclusions on topics such as odious debt change radically when we move from a unitary state framework to principal-agent analysis. We continue by exploring the study of international organizations, another field where the principal-agent model has already yielded important insights. Finally, we conclude Section III by examining the potential of the principal-agent model in explaining the laws of war. At first glance, the laws of war may seem like an unlikely candidate for principal-agent analysis. After all, the assumption that there exists a single national objective that unites a country’s government, people, and interest groups is perhaps strongest

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<sup>8</sup> See ERIC A. POSNER & ALAN O. SYKES, *THE ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 18 (2013) (stating “[t]he assumption that states have well defined preferences and act rationally to maximize their welfare in relation to those preferences is concededly simplistic”).

<sup>9</sup> For critiques arguing against assuming away cleavages, see, for example, Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT’L L. 127 (2010); KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013).

<sup>10</sup> See, for example, *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* (Darren G. Hawkins, David A. Lake, Daniel L. Nielson, & Michael J. Tierney eds., 2006).

during wartime. Nevertheless, we show that principal-agent models can be a helpful analytical tool, even during extraordinary crisis. In Section IV we turn to domestic distributional conflict models and demonstrate their potential for international law scholarship.

## A. Overview of Principal-Agent Theory

Scholars have long found principal-agent models useful for exploring the problems that arise from delegation. For instance, principal-agent models have been used extensively by scholars working on administrative law, employment law, and corporate law.<sup>11</sup> A starting assumption of principal-agent model analysis is that the principal and agent often hold divergent interests. Although the principal wants the agent to act in furtherance of the principal's interests, the agent will often find it profitable to act in his own interests. Moreover, the agent will be able to do so because the agent has additional private information about the task assigned to him and the situation on the ground. This information is largely unavailable to the distant principal. Therefore, depending on the circumstances, the principal may find it difficult and costly to closely monitor the agent's performance. This dual phenomenon of information asymmetry and suboptimal monitoring creates "agency slack," a term that describes the amount of room that an agent has to carry out action independent from the principal's control. Ultimately, substantial agency slack can allow the agent to take large risks whose consequences will be borne primarily by the principal.<sup>12</sup>

Because of this fundamental tension, the principal must find ways to induce the agent to act on her behalf. The principal can do this in various ways: for example, by promoting organizational discipline, modifying agent incentives through rewards and punishments that reduce shirking and opportunistic agent behavior, and by better monitoring the agent.<sup>13</sup>

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<sup>11</sup> See, for example, Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 76 (2008); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with applications to the SEC)*, 44 PUBLIC CHOICE 147 (1984); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571 (2005); Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J. L. ECON. & ORG. 24 (1991).

<sup>12</sup> See Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney, *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 10, at 501.

<sup>13</sup> See generally D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991); Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241 (2003).

## B. State Responsibility and Odious Debt

Principal-agent models can be very useful for analyzing concepts in international law. *Economic Foundations* demonstrates this by exploring the concept of state responsibility through the principal-agent lens. Because the analysis in the state responsibility chapter is thought provoking and useful, our main task here is to extend it to other chapters. We start by arguing that applying principal-agent models would change the analysis and conclusions of a set of closely related chapters examining when states are responsible for paying back their debts<sup>14</sup> and when these debts can be repudiated as odious.<sup>15</sup>

The underlying puzzle that drives the chapter on state responsibility is this: Why and when does legal responsibility attach to states? Posner and Sykes answer this question by turning to a domestic law analogy. To begin, they suggest that the logic behind state responsibility is much like the logic of vicarious liability in domestic law.<sup>16</sup> The basic principle behind domestic vicarious liability is straightforward. By legally attaching liability to employers (principals) for wrongs committed by employees (agents) during the scope of employment, vicarious liability induces firms to internalize much of the cost of their activities. This happens through two pathways. First, employers are incentivized to monitor and make sure that their employees are behaving in nondestructive ways. Second, even if monitoring efforts are poor, “it is possible that vicarious liability is nevertheless useful because of its effect on prices alone.”<sup>17</sup> That is to say, even in situations where employers have limited ability to monitor their employees, the price of final products and services should reflect the additional costs that firms incur by paying legally mandated compensation for harms. Over time—and as long as these firms are operating in a competitive market—firms that pay less legally mandated compensation by inflicting fewer harms on third parties should be able to sell cheaper goods and expand their market share.

From this starting point, Posner and Sykes draw the analogy to the international arena. The government is an entity (the agent) that serves the interests of domestic constituencies (the principal). However, this is a somewhat uncomfortable analytical fit. In theory, voters and interest groups are the principals in a democracy. By contrast, it is more difficult to assess the principal-

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<sup>14</sup> See Posner & Sykes, *supra* note 8, at 113–38, 155–62.

<sup>15</sup> For an overview of the odious debt debate, see Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development, and Democratization*, 70 *LAW & CONTEMP. PROBS.* 115 (2007); see also Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 *AM. ECON. REV.* 82 (2006).

<sup>16</sup> See POSNER & SYKES, *supra* note 8, at 113–17.

<sup>17</sup> *Id.* at 115.

agent relationship in autocracies. Regardless of regime type, Posner and Sykes note that it is “unclear in some cases whether any entity has the capacity to monitor state ‘agents.’”<sup>18</sup> Because the analogy is problematic, Posner and Sykes conclude, and we agree, that *as long as monitoring is possible*, attaching responsibility to states for the acts of government officials is desirable. In these situations, domestic principals will endeavor to monitor state agents in order to limit costly violations, thus producing the prudential behavior that minimizes liability.<sup>19</sup>

If monitoring is ineffective (or nonexistent), principal-agent models suggest a second mechanism through which entity liability can increase societal welfare: the pricing mechanism. Unfortunately, Posner and Sykes also make it clear that the pricing mechanism does not work well—if at all—in the international arena. Posner and Sykes state that “[s]tate activity is not in general ‘priced,’ and the determinants of the scale of state activity in equilibrium are much less clear.”<sup>20</sup> This is because states do not operate in competitive marketplaces as firms often do. Interest group politics, rather than market pressures, determine the scale of government activity. As a result, Posner and Sykes conclude that “[w]here monitoring is unlikely to occur or to be effective, the case for state responsibility is weak unless one can somehow be confident that the scale of government activity is excessive in the absence of state responsibility.”<sup>21</sup> This general analysis of state responsibility is persuasive.

Given this broad theoretical framework, Posner and Sykes’s analysis of state responsibility for debts, and in particular their critique of the odious debt doctrine, is surprising. That is, the chapters on state responsibility and odious debt seem inconsistent because their odious debt critique relies on an argument they previously rejected: that the pricing mechanism can lead governments to operate at the optimal size. In general, international law makes governments responsible for debts incurred by prior administrations and does not allow unilateral renunciation. The odious debt doctrine is a possible exception to this rule. Under this controversial doctrine, successor regimes are not responsible for paying the debts of prior regimes if three conditions are met: (1) “a ‘despotic ruler’ incurs a debt which is not in the interest of the state, (2) the debt produces no benefit for the populace, and (3) the creditor knows about the odious purpose of the funds they are advancing.”<sup>22</sup>

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<sup>18</sup> *Id.* at 116.

<sup>19</sup> *See id.* at 118–19.

<sup>20</sup> POSNER & SYKES, *supra* note 8 at 116.

<sup>21</sup> *Id.* at 121.

<sup>22</sup> *See* Christoph G. Paulus, *Debts*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, ¶ 27, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690->

Posner and Sykes concede that monitoring is unlikely to have any impact on unaccountable dictators.<sup>23</sup> Indeed, they argue that the dictator actually becomes the principal and subverts any domestic mechanisms that would hold him accountable for his violations of international law—an inversion of the traditional principal-agent relationship.<sup>24</sup>

Instead, they make an argument about the size of government activity, suggesting that while some corrupt dictators use foreign loans entirely for personal consumption, others become rich by skimming off the profits of public works projects. For example, a dictator might take out a \$10 million loan, use \$9 million to build a bridge that will benefit the public, and pocket the extra \$1 million.<sup>25</sup> Posner and Sykes thus worry that the odious debt doctrine might reduce valuable lending for public works to developing countries with autocratic regimes.

Our view is that this is precisely an argument that state responsibility can somehow bring the scale of state activity closer to the optimal level, the argument they persuasively rejected earlier on. Put simply, it is problematic to rely on competitive market pressures to induce any government—including a government in a well-functioning democracy—into providing the optimal number of bridges. Even in a democracy, and much more in a dictatorship, it is very hard to tell whether an additional bridge will contribute to societal well-being, or whether it will be a bridge to nowhere.

That said, we share the concerns articulated by Posner and Sykes and by many scholars in the development community that the odious debt doctrine is one that needs to be precisely delimited, lest a broad version of this doctrine frighten investors and decrease investment in broad swaths of the developing world.<sup>26</sup> One way to identify precisely the scope of the odious debt doctrine is by returning to core concepts of principal-agent analysis. For example, effective monitoring has long been identified as vital to protecting the principal's interests. Are any autocratic regimes at least partially monitored? Barbara

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e1525?rskey=jNZofs&result=1&prd=EPIL (last visited May 9, 2014) (discussing Alexander Sack's theory of odious debt).

<sup>23</sup> See POSNER & SYKES, *supra* note 8, at 119.

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* at 160.

<sup>26</sup> *See, for example*, Robert Howse, *The Concept of Odious Debt in Public International Law* 5–7 (UNCTAD Working Paper No. 185, July 2007), available at [http://unctad.org/en/docs/osgdp20074\\_en.pdf](http://unctad.org/en/docs/osgdp20074_en.pdf) (last visited May 9, 2014) (examining the limits of past invocations of the odious debt doctrine and exploring the promise of a unified international tribunal to determine odiousness); ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE* (forthcoming 2014); Jayachandran & Kremer, *supra* note 15, at 83 (noting that loan sanctions would only work in some instances).

Geddes and Jessica Weeks usefully differentiate between many autocracies in which the regimes are beholden to interest groups such as party elites or the military and “personalistic” dictatorships in which a dictator has absolute control and is only responsible to himself.<sup>27</sup> This suggests that monitoring of state agents should be possible not only in democracies but also in some autocracies whose leaders are beholden to party elites or the military. By contrast, it is implausible to argue that personalistic dictators can effectively monitor themselves. Thus the clearest case for the application of the odious debt doctrine should thus concern debt incurred by personalistic dictatorships.

### C. International Organizations

Principal-agent models are widely used to understand one important subfield of international law: the study of international institutions. *Economic Foundations* claims that “international law rests on only a handful of weak international institutions”<sup>28</sup> and that “the argument for international delegation . . . has been rejected” outside of the EU.<sup>29</sup> We disagree with these assertions. At a minimum, many scholars believe international organizations are increasingly important.<sup>30</sup> Indeed, Tables 1 and 2 above suggest that international institutions are by far the most studied topic in both international law and international relations. That said, we agree with Posner and Sykes that when states delegate power to international bodies, they incur significant sovereignty costs. To explore these costs and how they can be limited, we briefly review some of the key articles applying principal-agent models to the study of international organizations. We then showcase the promise of principal-agent models in this field, their limits, and the ways in which economic and sociological analyses can be fruitfully combined.<sup>31</sup>

States (the principals) are thought to empower international organizations (the agents) to improve individual states’ welfare through multilateral coordination. States empower international organizations when the cost of

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<sup>27</sup> BARBARA GEDDES, PARADIGMS AND SAND CASTLES: THEORY BUILDING AND RESEARCH DESIGN IN COMPARATIVE POLITICS 50–51 (2003); Jessica L. Weeks, *Autocratic Audience Costs: Regime Type and Signaling Resolve*, 62 INT’L. ORG. 35, 45 (2008).

<sup>28</sup> POSNER & SYKES, *supra* note 8, at 79.

<sup>29</sup> *Id.* at 84.

<sup>30</sup> See, for example, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 1–4 (2006); Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998).

<sup>31</sup> International organizations are the prime candidates for principal-agent analysis in part because it is relatively easy to keep the unitary state assumption intact. Even so, more nuanced analysis of international organizations casts doubts over the integrity of the assumption, as we will show below.

running and participating in an international organization is lower than the cost of producing the same benefits via direct state interaction.<sup>32</sup> Principal-agent analysis suggests important obstacles that can reduce or even eliminate these anticipated welfare gains. International organizations are often subject to a tremendous amount of agency slack because states do not have the resources or political coordination to closely monitor the internal workings of international organizations.<sup>33</sup> In turn, international organizations can exploit this agency slack and pursue agendas that diverge from states' interests.<sup>34</sup>

Concerns about agency slack are most intense in an international organization such as the EU: the European Commission and the European Court of Justice have both made important decisions contrary not only to individual states' interests, but also to the positions of all of the EU's state members. Indeed, a very typical debate pits some member states, eager to retain power in national capitals, against powerful EU institutions looking to centralize power in Brussels. We highlight Mark Pollack's work as a particularly nuanced way of understanding how principals can monitor strong agents.

Pollack identifies four mechanisms member states have introduced to monitor the EU bureaucracy, and the EU Commission in particular: (1) "police-patrol" oversight, realized in the EU as "comitology;" (2) "fire-alarm" oversight; (3) ex post sanctions; and (4) and revision of the constitutive agreements.<sup>35</sup> The comitology system is an oversight scheme in which E.U member states serve on committees with advisory, management, and regulatory functions to modify EU rules.<sup>36</sup> It is a form of oversight that requires extensive resources and participation from the member states. Fire-alarm oversight allows states and even individuals to bring complaints against specific Commission decisions. Other EU organs also have a role in monitoring the Commission. Ex post sanctions are typically only pursued if both comitology and fire-alarm oversight has failed to change behavior. In such cases, member states can cut financial

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<sup>32</sup> See Abbott & Snidal, *supra* note 30, at 9; Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

<sup>33</sup> In response, some scholars have argued that nontrivial delegation is rare. See Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693, 1694–95 (2008).

<sup>34</sup> See Roland Vaubel, *Principal-Agent Problems in International Organizations*, 1 REV. INT'L ORG. 125 (2006); Daniel L. Nielson & Michael J. Tierney, *supra* note 13. *But see* Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: the ILO Experience*, 71 LAW & CONTEMP. PROB. 193 (2008) (arguing that states have gradually expanded the International Labor Organization's monitoring power, contrasting with traditional principal-agent predictions about states seeking to discipline and restrict "rogue" IO agents); Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006).

<sup>35</sup> Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community*, 51 INT'L ORG. 99, 113–14 (1997).

<sup>36</sup> *Id.*



support, refuse to comply, and even try to force the resignation of EU commission members.<sup>37</sup> Finally, EU member states can revise the treaties constituting the EU—this has happened four times in the last twenty-five years. This is a particularly costly process, as treaty revisions require the unanimous approval of all EU member states and national referenda in several countries. One such treaty revision, the introduction of the Barber Protocol, was clearly intended to limit the European Court of Justice's ability to impose large financial burdens on national pension systems.<sup>38</sup>

However, even complex monitoring schemes cannot fully solve the principal-agent problem. This is because international organizations, by definition, report to multiple principals. Achieving sufficient unity among these states so that they can operate as a collective principal is often a tall order. Moreover, international organizations often interface with multiple subdivisions *within* each state party, some of which may have overlapping spheres of influence. Daniel L. Nielson and Michael J. Tierney explore these dynamics in detail by examining the World Bank and its fitful environmental reforms during the 1980s and 1990s.<sup>39</sup> Nielson and Tierney argue that traditional paradigms cannot explain why an international organization such as the World Bank would sometimes act with such a large degree of independence from its powerful principals and yet at other times prove quite willing to bend to its principals' preferences. Instead, they theorize that the World Bank's behavior can be better explained in part by the World Bank's ability to exploit schisms among its member state principals. When state principals and substate actors were disunited in preference, the World Bank could capitalize on this and act to further its own interests.

To bookend our discussion of principal-agent models and international organizations, we point out that these models have not been cabined to economic approaches to law. Sociologically minded scholars have made major progress on the study of bureaucracies, including international bureaucracies. Both the sociological and economics approaches understand that agents (bureaucrats) sometimes act against the preferences of the principals (states). While economists tend to emphasize rational shirking, sociologists tend to highlight bureaucratic inertia and devotion to the logic of routine and standardization.<sup>40</sup>

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<sup>37</sup> *Id.* at 116–18.

<sup>38</sup> Treaty Establishing the European Community, Protocol No. 2 concerning Article 119, July 29, 1992 (C191).

<sup>39</sup> Nielson & Tierney, *supra* note 13, at 502.

<sup>40</sup> See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999).

The application of principal-agent models in the study of international organizations offers several lessons for extending the model to other areas. First, complicated organizational structures can be helpfully elucidated through principal-agent analysis. Second, principal-agent problems are especially severe in the presence of multiple principals, a common feature of the international sphere. Finally, several disciplinary traditions, including sociology, highlight the importance of the principal-agent problem.

#### D. The Laws of War

In the previous section, we explored the subfield of international law in which principal-agent models have been most widely used. We now turn to a subfield in which principal-agent models are hardest to apply: the laws of war. We suggest that even in the area of war, the field in which the unitary state assumption is easiest to sustain, principal-agent models remain useful as an analytical tool.

The unitary state assumption is particularly strong when states fight wars because of the baseline assumption that nothing unites a people as much as a shared enemy threatening to attack.<sup>41</sup> Moreover, institutional structures greatly facilitate state unity when it comes to fighting wars; the military is the paradigmatic example of a hierarchical control structure. Given the strength of the unitary state assumption, models of interstate interaction based on reciprocity, reputation, and retaliation concerns are most persuasive in the area of war.

In traditional accounts, including the one put forth in *Economic Foundations*, laws of war exist to reduce the cost of fighting wars for all states. For example, joint ratification of laws of war signals that state parties plan to comply and will reciprocally enforce the laws by retaliating against states that breach.<sup>42</sup> Once a war starts, states will continue to cooperate so long as both parties know that the short-term gain from opportunistic defection is outweighed by gains from long-term cooperation.<sup>43</sup> This presupposes that wars will not be resolved as one-off encounters and that states will fight many battles before achieving limited victory. If this were not the case, and an army were on its way to an absolute

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<sup>41</sup> See, for example, Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, 1 POL. SCI. & POL. 37 (2003) (explaining how in the days following the September 11 terrorist attacks, president George W. Bush's approval soared, from 51 percent to 86 percent, as Americans rallied round the flag).

<sup>42</sup> See James D. Morrow, *When Do States Follow the Laws of War*, 101 AM. POLI. SCI. REV. 559, 559–60 (2007).

<sup>43</sup> See GUZMAN, *supra* note 1, at 42.

victory, a state would have little incentive to obey the laws of war as its counterpart would never be able to retaliate.<sup>44</sup>

Despite the strength of the unitary state assumption in this context, we believe there is still much to be gained from disaggregating the state and applying the principal-agent model to the laws of war. One way to do so is to reconceptualize the military (at least in non-autocracies) as an agent of the people, thereby opening up new avenues of inquiry. When might the goals of civilian leadership conflict with those of the military? Civilian leadership might want to pursue a “hearts and minds” strategy that involves minimizing enemy casualties even at some risk for the home country’s soldiers. In turn, combat commanders may be unwilling to tolerate this risk to their units, and prefer aggressive on-the-ground operations. Indeed, some criticize American operations in Afghanistan on exactly this basis and suggest that overall US strategies were undermined by US soldiers’ reluctance to take risks that would minimize Afghan casualties.<sup>45</sup>

Eyal Benvenisti and Amichai Cohen develop a more general theoretical framework and argue that, contrary to established explanations for the laws of war, principal-agent analysis suggests that states enter into laws of war to control the conduct of *their own* military forces.<sup>46</sup> The civilian leadership must do this to head off intrastate conflicts that may arise when the military pursues aims that do not benefit the civilian government. States agree to observe the laws of war in order to impose a measure of vertical control by monitoring their military agents and consequently lowering agency costs. Counterintuitively, Benvenisti and Cohen argue that states “outsource” a major part of the monitoring and enforcement to counterpart states.<sup>47</sup>

Even if, at the macro level, the threat of retaliation by a foreign army is a key factor explaining state compliance with the laws of war, principal-agent dynamics may helpfully explain micro-level decisions of individual soldiers to follow or violate international rules. Laura A. Dickinson argues that the US military has created an organizational structure that uses multiple and nested principal-agent relationships to promote a culture of compliance with the laws of

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<sup>44</sup> POSNER & SYKES, *supra* note 8, at 194.

<sup>45</sup> PAUL FISHSTEIN & ANDREW WILDER, FEINSTEIN INTERNATIONAL CENTER, WINNING HEARTS AND MINDS? EXAMINING THE RELATIONSHIP BETWEEN AID AND SECURITY IN AFGHANISTAN 36 (2012).

<sup>46</sup> Eyal Benvenisti & Amichai Cohen, *War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective*, \*5 (forthcoming 2014), available at <http://ssrn.com/abstract=2199016>.

<sup>47</sup> *See id.*

war.<sup>48</sup> In times of peace, Judge Advocate General's Corps ("JAG") lawyers run educational programs that train US troops and officers in the laws of war. In times of war, JAG lawyers are assigned to individual units as advisors in the field; soldiers are trained to seek JAG authorization before key targeting decisions.<sup>49</sup> In turn, chains of command are structured to allow JAG lawyers some independence in making these assessments. For example, JAG lawyers are answerable to their superiors within the JAG corps. This sociological account makes it at least plausible that compliance with the laws of war is shaped at least in part by organizational structure and culture.<sup>50</sup>

While we focus here on the laws of war as they apply to state-to-state conflicts, we believe that relaxing the unitary state assumption will also yield important insights for conflicts that involve nonstate actors. It is not difficult to imagine a situation where various internal government interests groups and departments prosecute nonstate enemies in noncomplementary ways. Principal-agent analysis may be useful as an analytical frame. More importantly, as the actors who participate in modern warfare become more diverse to include a growing number of separatist movements and terrorist groups, the limits of the unitary state assumption will likely become increasingly apparent.<sup>51</sup>

#### IV. DOMESTIC DISTRIBUTIONAL CONFLICT MODELS

In this final section we turn to domestic distributional conflict models and explore how they may help advance international law scholarship by relaxing the unitary state assumption. There are potentially any number of ways to model domestic distributional conflicts. For the purposes of this review, however, we focus on two widely used approaches. The first is a political model describing how interest groups with political clout can exercise disproportionate influence on government policies, famously articulated by scholars, including Mancur

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<sup>48</sup> Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 2 (2010).

<sup>49</sup> *See id.* at 10.

<sup>50</sup> For alternative sociological approaches to culture and compliance in international law, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

<sup>51</sup> *See, for example*, M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008). For an in depth examination of the interactions between law, domestic politics, and non-state conflicts, see GABRIELLA BLUM & PHILIP B. HEYMANN, *LAW, OUTLAWS, AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM* (2010).

Olson, Gene Grossman and Elhanan Helpman.<sup>52</sup> The second model explores why some countries unilaterally raise their regulatory standards and then seek to export these heightened standards beyond their borders. For this model we turn to the work of David Vogel and Anu Bradford, both of whom have argued that under certain market conditions, states can unilaterally and successfully set high regulatory standards for much of world. Vogel's version, termed the "California Effect," describes California's tremendous leverage in setting high US environmental standards, particularly in relation to automobile emissions. Bradford's version, termed the "Brussels Effect," describes how the European Union has successfully set de facto global standards in several fields. In the section below, we explore how these models can be extended and illustrate how their predictions sometimes differ from those of international law models that assume unitary sovereign states.

### A. Unitary States, Interest Group Politics and TRIPS

The unitary state assumption is central to many game-theoretic models of international relations. Closely related principles of state sovereignty and state consent are also fundamental to international law doctrine. We suggest that a closer look at models of domestic distributional conflict leads us to question what inferences we can draw from the fact that a state has consented to a particular international agreement.

In his book, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Olson argues that small groups with shared interests, such as producers, will organize easily and effectively to lobby policymakers. By contrast, large and dispersed groups, such as consumers, will face difficulty in coming together for political purposes.<sup>53</sup> As a result, governments will often develop policies that do not maximize aggregate welfare, but instead disproportionately favor the interests of well organized groups. Hundreds of political scientists have applied this intuition to diverse policy fields.

Grossman and Helpman's models extend a similar intuition to trade policy.<sup>54</sup> Governments often adopt protectionist trade policies at the behest of well-organized domestic producers who fear competition from abroad, even in cases where this reduces overall welfare.<sup>55</sup> This result stems from the fact that

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<sup>52</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); GENE M. GROSSMAN & ELHANAN HELPMAN, *SPECIAL INTEREST POLITICS* (2001).

<sup>53</sup> See OLSON, *supra* note 52, at 11.

<sup>54</sup> See GROSSMAN & HELPMAN *supra* note 52, at 10–13. See also Gene M. Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994) [hereinafter Grossman & Helpman, *Protection for Sale*].

<sup>55</sup> Grossman & Helpman, *Protection for Sale*, *supra* note 54, at 834 & 848.

the vast majority of a country's citizens are not represented by specialized lobbying groups. For our purposes this means that broad statements about whether a country gains welfare by adopting a certain trade policy are problematic, especially when (1) ownership of industries is highly concentrated; (2) these industries are able to make large monetary contributions to politicians; (3) a large percentage of the population is not represented by competing interest groups; and (4) a country is simply undemocratic. Any of these four factors may severely skew a country's policy choices towards the preferences of well-organized interest groups. In short, the assumption that states maximize aggregate welfare is problematic when analyzing many governments, especially those of highly politically unequal or undemocratic states found in much of the developing world.

Scholars who apply the unitary state assumption are undoubtedly aware of these insights on interest group politics. Nonetheless we believe that these concerns are often set aside for convenience, leading to erroneous analyses. We take the analysis of the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in *Economic Foundations* as an example. Posner and Sykes acknowledge that it is not obvious that global harmonization of intellectual property laws produces the best outcome for the international system as a whole.<sup>56</sup> Nevertheless, they suggest that we can infer quite a lot about whether individual states benefit from the fact that their governments consented to this agreement. Posner and Sykes write:

The ultimate willingness of developing nations to accept TRIPS was a consequence in large part of their ability to obtain market access concessions on other sectoral issues, such as textiles and agriculture. Their acquiescence suggests that as whole, developing countries believed that they gained more from accepting TRIPS and its quid pro quo than by rejecting it.<sup>57</sup>

A domestic distributional conflict model leads one to question how much can be inferred from developing country acquiescence to TRIPS. TRIPS increases patent, copyright, and trademark protections globally. In the short term, this benefits companies with valuable patents, such as pharmaceutical companies located in the global north. But it harms the consumers of pharmaceuticals, who find it more difficult to obtain cheaper generic versions and are often located in the global south. In distributional conflict models, consumers are the paradigmatic poorly organized group that cannot obtain their fair share of policy benefits because of the difficulty of collective action. In other words, just because a conscious tradeoff is made does not mean we can automatically

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<sup>56</sup> See POSNER & SYKES, *supra* note 8, at 280–81.

<sup>57</sup> *Id.* at 281.

conclude that it was welfare enhancing.<sup>58</sup> Let us assume, as Posner and Sykes assert, that governments of developing countries obtained important concessions in the fields of textile and agriculture in exchange for accepting TRIPS. Textile and agriculture liberalization benefits many groups, including first and foremost textile and agriculture producers who will be able to export their products to more markets. Distributional conflict models suggest that governments will often find it advantageous to trade off a benefit for a particular set of producers (in this case the agriculture and textile industries) against a larger harm for a big number of disorganized domestic consumers (in this case the consumers of pharmaceuticals).

Of course, we are not asserting that this necessarily results in an aggregate welfare-reducing loss. Instead, we are merely suggesting that it is difficult to draw strong inferences from state consent, especially in areas that pit well organized domestic producers against poorly organized consumers and in cases of developing country governments with high levels of inequality and low levels of democracy. It is possible that governments of states in both the global north and especially the global south may be prioritizing the protection of entrenched industries and well organized interest groups over consumers and more diffuse interest groups. Whether this is an aggregate welfare gain remains, of course, an empirical question.

## B. Unitary States, Unilateral Regulatory Moves, and Global Environmental Challenges

In direct contrast to the idea that international law is (or should be) based on explicit state consent, scholarship has identified that some states can take a leadership role in promoting de facto global standards through unilateral regulations ostensibly aimed at domestic industries.<sup>59</sup> Vogel and Bradford have in fact identified two broad strands of this phenomenon, referred to as the California Effect and the Brussels Effect. We highlight these models as their predictions are directly at odds with more common race-to-the-bottom or race-to-the-top models of regulatory competition common in the literature that assume unitary states. We also believe that taking these models seriously suggests

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<sup>58</sup> See, for example, Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1 (2011) (arguing that while it is unclear whether developing countries as a whole are better off under TRIPS, developing countries have accrued some actual benefits, often in unpredictable ways).

<sup>59</sup> But see Mark Wu & James Salzman, *The Next Generation of Trade and Environmental Conflicts: The Rise of Green Industrial Policy*, 108 N.W. U. L. REV. (forthcoming 2014) (highlighting the drawbacks and conflicts that emerge when states unilaterally pursue industrial policy aimed at promoting green industries).

that it is particularly important to disaggregate both early mover states as well as states that are critical to international environmental protection because of their size and influence.<sup>60</sup>

Both the California Effect and the Brussels Effect describe economically powerful and motivated markets setting domestic regulatory standards that are higher than those found in other markets. Both models require several steps. First, for domestic political reasons, an economically powerful state implements internal standards that are higher than standards elsewhere. Next, this powerful state requires foreign exporters to either comply with these standards or lose access to the market. Once this happens, foreign exporters may have to make a choice between setting up a separate production process to accommodate the economically powerful market or adopting the higher standard across the board. Sometimes it makes economic sense for these exporters to take advantage of economies of scale and adopt the higher standard wholesale.<sup>61</sup> When this happens, the powerful state has in effect unilaterally raised global standards.

Ancillary mechanisms may also facilitate the de jure harmonization of global standards at a high level. Once one country has adopted a high regulatory standard, domestic interest groups in other countries may point to the foreign regulation and start demanding higher domestic standards as well.<sup>62</sup> Those exporters that have adopted the higher standard wholesale will likely support these demands as they have already invested in the change and would thus have a (at least short-term) competitive advantage against smaller firms selling to the domestic market that have not yet adopted the higher standard.<sup>63</sup> And finally, large export-oriented firms from various countries may seek to harmonize global rules at the higher standard in order to reduce competition from firms content to operate in smaller markets with lower standards.<sup>64</sup>

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<sup>60</sup> These states often include the EU, the US, China, etc. For an example of how to disaggregate and open the “black box” of the state, see Daniel Abebe & Jonathan S. Masur, *International Agreements, Internal Heterogeneity, and Climate Change: The “Two Chinas” Problem*, 50 VA. J. INT’L L. 325 (2010).

<sup>61</sup> See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 250–56 (1995) [hereinafter VOGEL, *CONSUMER & ENVIRONMENTAL REGULATION*]. See also David Vogel, *Trading Up and Governing Across: Transnational Governance and Environmental Protection*, 4 J. EUR. PUB. POL’Y 556, 561–62 (1997).

<sup>62</sup> See Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897 (2009); LINOS, *supra* note 9; Katerina Linos, *Diffusion through Democracy*, 55 AM. J. POLI. SCI. 678 (2011).

<sup>63</sup> These would include firms that do not export to the economically powerful market. See VOGEL, *CONSUMER & ENVIRONMENTAL REGULATION*, *supra* note 61, at 6.

<sup>64</sup> For an example of how similar domestic interest group mechanics may combine with competitive pressures to produce policy coordination in other international legal fields, see Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT’L L.J. 447, 451–55 (2008).



Bradford spells out important scope conditions for these effects to occur: she suggests that countries can externalize their domestic regulations when those countries have a large domestic market, have sufficient regulatory capabilities, have the political will to enforce regulations, and regulate industries that are relatively inelastic.<sup>65</sup> For example, the EU is able to externalize a significant amount of consumer product safety regulations; however, it is not particularly successful at exporting financial regulation—a field where capital can flee to jurisdictions with lower standards with relatively little cost.<sup>66</sup>

An extension of these models to the environmental realm offers some reasons for optimism. We believe that understanding how international environmental protection can result from the actions of substate actors enriches our ability to craft meaningful environmental protections in the future. For example, scholars have traditionally explained the Montreal Protocol as an exemplar of successful state-to-state cooperation.<sup>67</sup> We argue that substate actors were critical to the development of the Montreal Protocol and that lessons drawn from this successful effort can show how substate actors can be mobilized to help solve future challenges.

So how can we better explain the development of the Montreal Protocol, “the most important and successful environmental treaty?”<sup>68</sup> This is a huge puzzle for models that assume unitary state actors, including those presented in *Economic Foundations*. These explanations of the Montreal Protocol fall short in two respects, both of which stem from taking states to be unitary. First, they do not offer a particularly robust explanation for why it was in the United States’ interests to unilaterally pursue a ban on chlorofluorocarbons (“CFCs”). While we agree that in some instances it may not be necessary to explore how state preferences are endogenously set, in this case domestic interest group politics have direct consequences on how the Montreal Protocol ultimately came about. It is difficult to explain US behavior both before and during negotiations without understanding the interplay between environmental groups, chemical firms, and regulatory agencies. Second, *Economic Foundations* offers little in way of explaining why the European states eventually signed onto the agreement. What is curious here is that Posner and Sykes note that the United States offered side payments to developing states—but not to European ones—to secure their

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<sup>65</sup> See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 (2012).

<sup>66</sup> *Id.* at 17.

<sup>67</sup> See, for example, Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular*, 19 UCLA J. ENVTL. L. & POL’Y 49, 49 (2000); Donald Kaniaru, Rajendra Shende, Scott Stone, & Durwood Zaelke, *Strengthening the Montreal Protocol: Insurance Against Abrupt Climate Change*, 7 SUSTAINABLE DEV. L. & POL’Y 3, 3 (2006).

<sup>68</sup> POSNER & SYKES, *supra* note 8, at 229.

cooperation on the ban.<sup>69</sup> If side payments were not the mechanism that induced European cooperation, what was?

We believe that suspending the unitary state assumption and applying models such as those advanced by Vogel and Bradford more straightforwardly explain the development of the Montreal Protocol. Once the United States unilaterally implemented CFC regulations, European chemical firms lost access to the US market. To access the US market, the European chemical firms had to develop substitute chemicals and implement their attendant production processes. Whether European chemical firms thought this would be a profitable venture is an empirical question, although the evidence suggests that these firms were initially reluctant.<sup>70</sup> After all, the European domestic market for CFCs was large, and European chemical firms could continue to export to developing countries. Yet once the United States succeeded in convincing developing countries to agree to a CFC ban, the position taken by the European chemical firms was no longer tenable.<sup>71</sup> At this point, European firms had to anticipate losing access to all markets except their own. And while they would remain competitive within Europe domestically for a time, they feared they might find themselves at a competitive disadvantage should European public opinion ever turn against CFCs. This outcome seemed likely as holding out against a CFC ban would make European chemical firms obvious targets for environmental advocacy groups.

While the Montreal Protocol is only one case (and a particularly successful one at that), we believe that it shows that the prognosis for environmental cooperation is perhaps rosier than what *Economic Foundations* concludes.<sup>72</sup> Under some circumstances, unilateral shifts in domestic regulatory focus can produce global effects. Both the European Union and California have already made some costly unilateral efforts to fight climate change. Exporting these standards will undoubtedly prove incredibly challenging, as will negotiating a global climate change treaty. But at a minimum, if we suspend the unitary state assumption, the toolbox for global environmental protection expands.

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<sup>69</sup> See *id.* at 230.

<sup>70</sup> Richard Elliot Benedick, *The Improbable Montreal Protocol: Science, Diplomacy, and the Ozone Layer*, in *THE MONTREAL PROTOCOL: CELEBRATING 20 YEARS OF ENVIRONMENTAL PROGRESS: OZONE LAYER AND CLIMATE PROTECTION* (Donald Kaniaru, ed.) 43, 44–46 (2007).

<sup>71</sup> *Id.*

<sup>72</sup> See SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING* (2003).

## V. CONCLUSION

*Economic Foundations* succeeds in marking rational actor models (and the attendant economic analysis) as mature approaches to international law. Before the publication of this book, it seemed fair to criticize these models for their inability to speak to many debates in international law; many international lawyers had misgivings about whether analysis based on these models could generate actionable predictions. We believe this concern is no longer justified. Posner and Sykes have gone a long way towards putting that concern to rest.

That said, as the discussion matures, it is both important and possible to relax the most troubling assumption of rational choice models in international law: the unitary state assumption. This development is timely as international law scholarship gives increasingly greater prominence to nonstate actors while international relations scholarship gives greater consideration to domestic politics. Our review suggests two ways to structure future scholarship that will maintain the simplicity and analytic rigor that characterizes rational actor models. First, we present some ways in which scholarship can explore the relationship between the government and the governed through principal-agent models. Second, we examine the how domestic distributional conflict models can helpfully guide analysis of relationships among interest groups and international law. Yet these suggestions are only a beginning; there is much fertile ground in international law for further exploration.