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DISAGGREGATING U.S. INTERESTS IN INTERNATIONAL LAW

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I

INTRODUCTION

After decades on the margins, international law is becoming a prominent force in virtually every area of domestic law. Teaching subjects such as procedure, bankruptcy, antitrust law, tax, and family law is increasingly difficult without some reference to international settings, instruments, and cases. Globalization would hardly allow otherwise. The growing density of transnational contacts requires transnational solutions. To the extent that individuals, families, corporations, and judicial proceedings inhabit transnational spaces, some regulation will naturally occur somewhere other than at the national level. The trajectory toward a higher incidence of such straddling contexts and corresponding transnational institutional responses is giving the lie to the very category of "domestic" law. Nearly all of today's law school graduates will at some point in their careers encounter issues of international law and policy. In the legal academy, important scholarship is focusing on the peculiar challenges posed by transnational settings.

Constitutional law has proved something of a laggard in this trend. For the most part, constitutional law remains an insular affair, or at least it has been so perceived. This is a product of both the nature and the culture of constitutional law. Constitutional law has confronted straddling contexts, but the presentation of constitutional law questions tends to elude the necessity of coordination with other states and international actors, at least as presented in particular cases. The mechanics of constitutional law, constrained and legitimated by an indigenous instrument and executed by judicial institutions with no operational responsibilities, have trouble processing the external inputs.

This in turn has cemented a culture of constitutional law fiercely resistant to such inputs. The Constitution is so central to American identity that any concession of external constitutional constraints may constitute a threat to national self-determination. This explains the relative intensity of objections to international norms and institutions

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thought to compromise constitutional discretion, at least in the absence of countervailing interests. Sovereignty becomes the bulwark of constitutional autonomy.

But autonomy may no longer present a sustainable strategy, in constitutional law or in any other area. This essay first adapts the tools of International Relations (IR) theory to the question of how international law might be incorporated into U.S. law, the putative global dominance of the United States notwithstanding. IR theory has informed an important strain of recent international law scholarship.[1] It provides a useful frame for situating international law as a matter of institutional interactions rather than a matter of doctrine. "By situating legal rules and institutions in their political context, IR helps to reduce the abstraction and self-contained character of doctrinal analysis and to channel normative idealism in effective directions."[2] It is not typically deployed to explain internal state dynamics salient to the initial incorporation of international law, focusing more on domestic politics as an independent variable.[3] Nor has IR theory been prominently deployed to explain or to project the relationship of the United States to international law. This Article describes how discrete elements of the United States, including private actors and disaggregated governmental components beyond the traditional foreign policy apparatus, may be developing an institutional interest in the acceptance of international regimes. This Article thus suggests a future in which international law is absorbed into U.S. law not because it is good—although it may well be that, too—but because rational institutional action will pull in that direction.

II

BRINGING IR THEORY HOME

IR theory has until recently been about states, their interests, and their power. Departures from the once-dominant Realist school have recognized the salience of non-state actors, but only to the extent that they either exercise political power within domestic structures (Liberal IR theory) or seek to persuade states to adhere to particular norms (Constructivist IR theory). State action remains the ultimate unit of analysis in all three approaches, which misses the independent consequentiality of non-state action.[4] While Constructivist approaches recognize that non-state actors operate on a transnational basis, they attribute non-state influence to the force of ideas rather than to power. This Article will attempt to marry Constructivist foregrounding of transna-

1. *See, e.g.*, Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

2. Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts*, 93 AM. J. INT'L L. 361, 362 (1999).

3. *See* Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 369 (1998) (noting use of IR by international legal scholars "to diagnose substantive problems and frame better legal solutions, to explain the structure or function of particular international legal rules or institutions, and to reconceptualize or reframe particular institutions or international law generally").

4. *See* Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT'L L. & POL. 567, 582-86 (2000) (highlighting IR's failure to account for non-state actors).

tional actors with Liberal premises of institutional self-interest and domestic power politics.

International law has long suffered a sort of ontological challenge among political scientists as to whether it really qualifies as "law" at all. This difficulty dates to Austinian notions of law and power, under which rules qualify as law only when they are enforced by superior institutions able to back commands with the legitimatized use of violence.[5] The system of rules among nation-states did not fit with this pyramidal conception of law. States were not subject to command from above. The enforcement model of the law of nations, as it was known, was a horizontal one among formal equals. Of course, formal equality did not translate into equality on the ground. To the political scientists of the mid-twentieth century, international law thinly masked power relationships and state interests. The Realist school of IR theory was particularly devastating in its critique of international law as lacking consequence. Posing an anarchic system of interstate relations, definitionally counterposed to one governed by the rule of law, the Realists framed a world in which rational self-interest and geopolitical capacities, not law, explained the global dynamic.[6]

In fact, Realism did a good job of explaining the Cold War world. The Cold War marked the zenith of state-centered power. It was a context in which studying the state, to the exclusion of all other actors, comported with power realities. The domination and antagonism of the two superpowers, moreover, made it almost impossible to establish a broadly effective regime of international norms, at least not one that significantly constrained state discretion. The superpowers rejected norms inconsistent with their interests, and nobody else could do anything about it. This created a glaring gap between the formal instruments of what purported to be the new, post-World-War-II dawn of international law—the United Nations Charter and the UN Declaration on Human Rights, for instance—and the actual practices of states. International law appeared to be a system of mere paper guarantees, an epiphenomenon of interstate relations. States pursued perceived self-interest, whether or not it complied with international law. States did what they could get away with.

Hence the traction of Realist approaches in the latter half of the twentieth century and the corresponding poverty of norm-driven or positivist models. On such issues as the use of force and human rights the law, it was power that determined state action. Realism also enjoyed intuitive analytical appeal to the extent that it worked from notions of self-interest rather than obligation. In the absence of systematic enforcement and in the face of high stakes, it was not easy to explain why states would or should observe rules that competitors were flouting, at least not where the observance of such rules would diminish relative strength.

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5. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1-31 (H.L.A. Hart ed., 1954) (rejecting characterization of international law as such).

6. *See, e.g.*, HANS J. MORGENTHAU, POLITICS AMONG NATIONS 278 (3rd ed. 1960) (stressing problems of decentralized character of international law; "[w]here there is neither community of interest nor balance of power, there is no international law"). The characterization of international law as such was also questioned by legal theorists. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 217 (2d ed. 1994) ("[I]f . . . the rules of international law are not 'binding,' it is surely indefensible to take seriously their classifications as law; for however tolerant the modes of common speech may be, this is too great a difference to be overlooked.").

Realism faces a more difficult challenge processing the contemporary realities of late-modern world politics. It is hard now to deny the consequentiality of international norms. The number and scope of international instruments; the attention that states and others direct to their negotiation, refinement, and application; and the prominence of international regimes and institutions in important policy debates all point to an enhanced position for international law.[7] Realism might be able to explain some of this activity. In the security context, for instance, state power and self-interest would explain non-proliferation regimes, especially those that privilege more powerful states. In such cases, law may still be more of an indicator rather than a driver.

But there are other new global issues in which Realism comes up short, human rights presenting the most obvious case. Human rights regimes have nothing to do with material reciprocal benefits. One country's refraining from torturing its own citizens does not pose a direct benefit to other countries. It is not clear why, from a Realist perspective, states would undertake human rights commitments and then live up to them, especially if other states were unwilling to marshal significant resources in their universal enforcement. It is for this reason that Realists may be cheap in conceding that human rights regimes have in fact deepened. To the extent that human rights regimes now govern state behavior with no correlation to power relationships, traditional Realist conceptions of international relations are undermined.

Hence the emergence of strong competing schools of International Relations theory. Liberal international relations theorists break open the "black box" of the state to allow the salience of domestic political actors. In this scheme, international relations becomes a two-stage process in which foreign policy outcomes are explained by the pursuit of state preferences, as determined through domestic politics and as constrained by strategic interactions with other states.[8] In a more radical break from the Realists, Constructivist IR theorists assert the consequentiality of ideas, as pressed by norm entrepreneurs in transnational political spaces.[9] In this view, international relations adds up to more than the sum of rational interests.

It is not my purpose here to undertake anything more than a crude primer of international relations theories; nor do I offer a freestanding alternative. It does seem possible, however, to extract some utility from all three major strands of IR theory. Realism offers the logic of self-interested behavior and the inevitability of relationships defined by power. But Realism fails to recognize power outside of the state. Indeed it refuses to acknowledge power outside of the traditional foreign policy apparatus of states. Constructivist IR theorists highlight the salience of other actors, especially

7. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 186-87 (1995).

8. *See, e.g.*, Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 544 (1997).

9. *See, e.g.*, Martha Finnemore & Kathyrn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

transnational social movements,[10] but only insofar as they are propagators of new ideas. Liberal theorists, meanwhile, understand that "individuals and private groups"[11] are political actors of consequence to the development and effectiveness of international regimes, but only so long as they are enclosed within the confines of "domestic society" and work at the international level only through their allocated state agents: the possibility of their transnationality goes unacknowledged. As much as Realism, Liberal IR reifies the territorial state and hews to the primacy of states on the international scene. Even when states act in a disaggregated manner—that is, through component units—they are characterized as maintaining unitary preferences.

As yet unrepresented among major IR strains is a model that centers the powers and interests, as opposed to the principles, of transnational non-state actors. Such a model would take the rational-actor, materialist premises of Liberal IR theory and broaden it to include the Constructivist focus on transnational social movements as well as on corporations and subnational authorities. The model abandons Liberalism's state-delimited conception of "society" and Constructivism's elevation of norms over material interests. It rejects the essentialization of the state in which all IR theory continues to be grounded, arguing that transnational non-state activity can be of independent consequence, whether or not it affects state behavior. The resulting dynamic, which might run under the label *liberal transnationalism*, would highlight the rational interests and capacities of various institutions in charting global developments. One might retain the billiard ball metaphor for international relations[12] —in which states are conceived as acting on each other with a predictability approaching the laws of physics—by extending actor status to entities other than states. To the extent that the balls are of variable mass, perhaps the cosmos supplies the more useful image.

The result may not lend itself to the refined modeling of state interaction.[13] Alone, states present a small universe of isomorphic entities, mostly working along the same metrics of interest and power (both ultimately relating to military and economic might and the control of persons and territory). The new actors of international relations, by contrast, project different capacities with differing objectives, and their interactions are complex, especially insofar as states no longer serve a dominant channeling function. Explaining incentive structures beyond state-to-state interactions, a model recognizing the interests and power of non-state actors—both independently and as determinants of state power—might complement normative justifications for participation in international legal regimes. The model, in other words, supplies a polycentric, interest-based explanation of how international law comes home, to stand

10. *See* MARGARET KECK & KATHYRN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS ch. I (1998) (describing impact of transnational advocacy networks on state behavior).

11. Moravcsik, *supra* note 8, at 519.

12. *See* ARNOLD WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 19-24 (1962) (claiming "Billiard Ball" model . . . leaves no room for non corporate actors other than nation state").

13. The result notably precludes use of 2x2 matrix games (such as the Prisoners' Dilemma) that tend to dominate Realist/rational-choice analyses of international law. *See, e.g.*, Jack Goldsmith & Eric Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (making extensive use of game theoretic models involving interactions between two states only).

alongside those which assert or assume that international law should triumph as an inherent good.

III

THE EXCEPTIONAL CASE OF THE UNITED STATES

Incorporating institutional power and self-interest at levels other than the state, this model could predict the more complete assimilation of the United States into the system of international norms. Unlike most other developed countries, the United States has assumed a skeptical, sometimes openly hostile posture to international law and institutions.[14] The United States assumes an à la carte model of international law, asserting its prerogative to elect those regimes in which it will participate.[15] In some cases this approach drives non-participation in important but discretionary international regimes, as with the Kyoto accords on climate change and the establishment of an International Criminal Court. In other cases, the approach results in non-compliance with a mandatory norm, that is, one from which a state may not opt out, as with the continuing use of capital punishment against juvenile offenders and other practices implicating human rights norms.[16] As the sole superpower, Realists would expect this non-participation and non-compliance when regimes do not further U.S. self-interest. Some elements of the Bush Administration clearly work from these sorts of "might makes right" assumptions. The United States, the argument runs, can and should eschew international norms contrary to its national interest.

It is possible that absorption will not occur, and that the United States will successfully resist the imposition of international norms not consistent with its interests and continue to act unilaterally. Empire stands as an alternate basis of global governance going forward, with a hegemonic United States dictating international standards rather than submitting to them.[17] To the extent, however, that the United States consents to regimes not of its devising and inconsistent with its interests and preferences, some other explanation would be required.

This question is most starkly presented in the context of constitutional law. Constitutional law categorically implicates supreme law. It is constitutive of the legal system. In the case of the United States, it is arguably constitutive of the community.

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14. *See, e.g.*, Stanley Hoffman, *The High and the Mighty: Bush's National Security Strategy and the New American Hubris*, AMERICAN PROSPECT, Jan. 13, 2003, at 28.

15. *See* Thom Shanker, *White House Says US Is Not a Loner, Just Choosy*, N.Y. Times, July 31, 2001, at A1 (quoting Bush Administration characterization of "a la carte multilateralism" in which treaty obligations are assessed on a case-by-case basis against American national interests).

16. Non-compliance may also result when the United States violates an obligation to which it has consented. Much of the IR literature considers this kind of compliance with international norms. *See., e.g.*, Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993). Compliance in this sense is less interesting in the U.S. context insofar as the United States has for the most part been careful to limit its formal international obligations in ways to maximize compliance with them at the same time that it has aggressively rejected some norms enjoying near-universal international support. In projecting the possibility of participation and compliance, this Article confronts the possibility that international regimes will be imposed on the United States and constrain its freedom of action—that is, it considers how international law will emerge as a constraint on U.S. decisionmaking even in the absence of consent.

17. *See, e.g.*, The Revival of Empire, 17 ETHICS IN INTERNATIONAL AFFAIRS 34 (2003).

Absent any other metric for membership, a standard liberal argument runs, it is constitutional faith that binds Americans together. In Michael Walzer's conception, "If the manyness of America is cultural, its oneness is political . . . ."[18] To tether constitutional law to some other source of law is to demote it so that it is no longer supreme. The proposition itself appears self-contradictory: if the Constitution is supreme, then to bend it to other law is unconstitutional. It presents more than just a doctrinal dead-end. If the Constitution does define what it means to be an American, then to cede its interpretation to another body of law is to cede the very terms of the national identity.

This perhaps explains why "sovereignty" has become so effective a political and even intellectual rallying call in the United States as compared to its weak resonance in Europe and elsewhere.[19] Once sovereignty is surrendered, America enjoys no other organic support. It also explains the intensity of the debate over the appropriate place of international law as a part of U.S. law. There is near-universal agreement that the Constitution stands supreme, in the sense that international law can never be played as a trump.[20] The debate has concerned whether international law can be used as an interpretive tool of constitutional law: that is, whether international law can be recognized as a secondary source in defining constitutional norms. Even though as framed this poses no frontal challenge to constitutional supremacy, the issue has provoked heated controversy in the courts and in the academy.[21] To the extent the question of interpretive relevance presents a possible wedge for the elevation of international norms above constitutional ones, this first-round contest is a crucial one.

Players in this debate mostly assume that U.S. acceptance of international law is a matter of choice. My purpose here is to suggest that the choice may become increasingly constrained as the costs of non-participation and non-conformity increase for and are increased by various actors within and outside the state. Pressures from multiple quarters will build on disaggregated components of the United States to submit to various international regimes. These pressures will progressively limit opt-out possibilities. This will be true in the constitutional realm as in others. There will likely come a point at which domestic constitutional law is effectively, if not formally, subordinated to international law.

The proposition might be advanced under a Constructivist or Liberal IR analysis. Constructivism would highlight the influence of transnational activism on U.S. practices, making the shift from what were once characterized as "public interest groups" acting within national parameters to non-governmental organizations (NGOs) acting across national borders. Transnational NGOs may act on any state, including the

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18. MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 29 (1996).

19. *See* Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 COMMON MARKET STUD. 743 (2002); Peter J. Spiro, *The New Sovereigntists*, FOR. AFF., Nov.-Dec. 2000, at 9; *cf.* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 542 (2003) (suggesting that "sovereignty in American law is intimately bound up with the basically procedural nature of our constitutional commitments.")

20. *See* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 1999-2000 (2003) (describing consensus supporting constitutional supremacy).

21. *See infra* text accompanying notes 69-74; *see, e.g.*, *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004) (with contributions by Harold Hongju Koh, Roger Alford, Michael Ramsey, Gerald Neuman, and Alexander Aleinikoff).

United States. Constructivists would highlight the role of ideas in persuading states to accede to international regimes and press them on others. The solidification of these regimes would in turn define the parameters of legitimacy for states. In this sense, international regimes construct (hence the tag for this brand of IR) what it takes to be a state, and states are socialized by those regimes.[22] Insofar as those parameters are defined in legal terms, states will be drawn into compliance with international law. In the U.S. case, the analysis would assert the possibility that participation with various international regimes will be pressed by transnational NGOs, directly and through other states, and that U.S. interaction with other states and international organizations will draw it to participation in an iterative normative dynamic.[23] As a state, the U.S. will have to present itself in terms defined by other states.

Constructivism breaks down the wall between domestic and international politics. Unlike other IR theories, Constructivism accounts for the fact of globalization. But Constructivism does not seem well equipped to explain exactly what it will take to bring a behemoth such as the United States to heel. To the extent that Constructivism recognizes power, it is in the form of state power. As for socialization, Constructivism does not demonstrate how the bully is socialized when he can afford not to be. It is not clear how the United States will perceive its legitimacy to be defined or diminished by the standards of other states, international institutions, or international norms. Many in the United States seem quite content to establish legitimacy in contrast to rather than consistency with external phenomena. The United States is not among those states that "are keenly aware of the approval of other states,"[24] nor would the label "rogue state" give many Americans much pause.[25] The well-established tradition of American exceptionalism makes it a hard case for the Constructivists.

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22. This element of constructivism figures centrally in norm-driven International Legal Process theory. *See* Chayes & Chayes, *supra* note 7, at 27; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2650-51 (1997).

23. *See* Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 643 (1998) (systematizing international "interactions" as the first step to incorporation of international law).

24. 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 CHANGES 1, 38 (Thomas Risse et al. eds., 1999) (highlighting socialization as driving compliance with human rights norms).

25. *See, e.g.*, CLYDE PRESTOWITZ, ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS (2003); Thomas L. Friedman, *Noblesse Oblige*, N.Y. TIMES, July 31, 2001, at A19 (observing that "America is referred to as a 'rogue state' in Europe as often as Iraq"). Nor would the assertion that "connection to the rest of the world and the political ability to be an actor in it are more important than any tangible benefits in explaining compliance with international regulatory agreements," CHAYES & CHAYES, *supra* note 7, at 27, appear to apply to U.S. participation in such regimes. Recent events relating to U.S. mistreatment of detainees in Iraq might support the Constructivist socialization thesis as applied to the United States. Both U.S. government officials and the American public were deeply embarrassed by the Abu Ghraib prison episode; one might argue that compliance with international law norms against torture were thus evidenced to constitute an element of America's identity as a state. On the other hand, one could also ascribe the shame to indigenous norms against such conduct; that, in other words, Americans were embarrassed by the events because they were inconsistent not with international norms but with national ones. A presidential memo requiring the humane treatment of detainees notwithstanding the non-application of the Geneva Conventions supports either interpretation. *See Prisoner Abuse Bush Order*, Feb. 7, 2002, *available at* http://www.washingtonpost.com/wp-dyn/articles/A61651-2004Jun22.html ("Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment.").

From a Liberal IR perspective, two possible pathways might point to greater U.S. submission to international regimes. The first would depend on the willingness of other states to press compliance with international law as a matter of state-to-state relations. Unlike Realism, which has difficulty processing the assertion of something like a human rights agenda, Liberal IR theorists can explain this willingness in terms of the domestic politics of those states. A new European agenda centering international law may be driven by domestic European political interests. Once adopted as a matter of state policy, it is not conceptually difficult to play out the mechanisms by which international norms might be imposed on the United States. To the extent that other states have something of interest to the United States, international law will be injected into the bargaining mix. Depending on the intensity with which international law compliance were pressed by another state and the bargaining power of that state, the United States would incur costs from continued non-compliance. But other states would need to marshal substantial leverage over the United States and be willing to incur costs in pressing the United States to change its posture. In some contexts this might work, where the leverage is high and costs low. An example would be with respect to the application of the death penalty to persons whose extradition is sought by the United States; other states can extract U.S. undertakings at little cost, and their leverage is complete. But these contexts present the exception. The European response to the Iraq invasion supplies a counter-example. Even though some powerful European states considered the U.S. invasion to comprise a serious breach of international law, their leverage was insufficient to enforce that position against the United States.

IV

NEW CAUSAL PATHWAYS FOR INTERNATIONAL LAW

More promisingly, Liberal IR theorists would also consider the interests of domestic U.S. groups in particular international regimes as drivers of participation in those regimes. Liberal theorists can readily explain U.S. adherence to free trade regimes, given the strong U.S. corporate support for such regimes. But Liberal IR would consider this support in mercantilist terms. In this approach, U.S. corporations (and other groups supporting free trade) determine the "preference" of the United States. The source of that preference is assumed to be indigenous, that is, not impacted by politics beyond the water's edge. As Andrew Moravcsik writes, preferences are "causally independent of the strategies of other actors and, therefore, prior to specific interstate political actions."[26] Liberal IR also gives rise to an aggregated national position in relation to other nations. The state remains the basic unit of international relations, notwithstanding the Liberal recognition of disaggregated central government actors. In Liberal IR theory, the state continues to be a box, albeit one that has become transparent.

Liberal IR theory could be deployed to chart the more complete assimilation of the United States into international institutions. Almost all international regimes can now

26. Moravcsik, *supra* note 8, at 519.

be paired with some domestic U.S. constituency. In the Liberal view, U.S. accession would be expected when that constituency had an interest sufficiently intense to warrant pursuing participation in an international regime and domestic political power sufficient to secure that objective. Adoption of the Kyoto Protocol on climate change, for example, would be expected at the point when environmentalists were in a position, through the domestic political process, to garner the votes and contributions necessary to secure legislative and executive action. Likewise for human rights agreements, especially those (such as the conventions on race and gender discrimination) that have self-interested constituencies who might at some point have sufficient material incentive and wield sufficient power to secure accession.

But Liberal IR theory would seem to miss important additional causal pathways that may point to the more complete participation of the United States in international regimes.[27] The incompleteness of the Liberal IR account can be pinned to two core assumptions: (1) that state preferences are generated by domestic politics insulated from outside forces, and (2) that international relations is solely comprised of government-to-government interactions, rather than a more polycentric process in which non-state actors may engage in consequential norms activity even where states are not engaged.

On both counts, the more theoretically challenging "disaggregation" is taking place outside of the realm of central governments. No doubt the state is disaggregating, in the sense that components of the federal government are now directly involved in international relations activity. But society is disaggregating as well, so that it is more difficult to identify groups or corporations (or even individuals) as discretely "American." Although corporations and the organs of civil society once functioned for the most part within the parameters of particular states, they now represent partially distinct transnational identities and enjoy autonomous power. As they dissagregate from the state, these actors can mobilize transnationally to advance international regimes, both by pressuring state actors and by adopting those regimes into their own practices. In the case of the United States, disaggregation creates more effective alternatives to targeting a superpower. Although action against the United States as a whole would in most cases implicate formidable costs, discrete components may be vulnerable to transnational mobilization.

A. Transnational Pressure Points

The transnationality of social movements and corporations, first of all, changes the nature of their power and what they represent. Non-state actors apply leverage against governmental decisionmakers. This leverage can be applied directly, under a standard pressure-group model. Political actors respond to organizational power that can command votes, favorable media play, and money. But transnational dynamics open up

27. And indeed the leading exponent of Liberal IR theory has implicitly predicted that the United States will not accede to multilateral human rights conventions, barring a major restructuring of the U.S. political system and decline in its unilateral power. *See* Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, *in* MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 345 (Stewart Patrick & Shepard Forman eds., 2002).

indirect channels of influence that enhance domestic political power and extend domestic political power to non-domestic groups. To the extent that Amnesty International or Greenpeace has power within U.S. political structures, for example, it is not fully measured by the length of their U.S. membership rosters. Likewise, the influence of the foreign-based multinationals is not dependent on the size or existence of U.S. subsidiaries.

Because they operate transnationally, these groups can pursue avenues of influence outside of domestic political structures that will enlarge their powers within those structures. They will be in a position to enlist other states to advance their agendas. Constructivists describe a "boomerang" effect in which domestic social movements work with transnational partners to enlist other states and international organizations to pressure their own governments (human rights activity in Latin American providing a paradigmatic example).[28] The U.S. elements of these transnational networks can themselves undertake parallel efforts in foreign and international institutional settings to bolster their domestic political undertakings. A U.S.-based group such as Human Rights Watch will work to enlist other states to influence U.S. human rights practices.[29]

In pressuring the United States, that strategy will make a difference, at least at the margins. When U.S. action depends on some level or form of multilateral support, and that support is politically controversial in other states, transnational NGO activity can tip the balance. One might suppose, for instance, that the United Kingdom would not support application beyond Iraq of the Bush Administration's preemption doctrine; that British non-support was generated in part by transnational activists (including American ones); and that the United States would not proceed with additional military incursions without British participation. Insofar as U.S. elements in the transnational political coalition contributed to British decisionmaking, those elements secured through transnational channels what they could not secure through ordinary domestic ones.

More subversive of both Constructivist and Liberal IR models are efforts by transnational social movements to advance international law-related agendas by pressuring corporate actors on the expectation that they will in turn work to secure appropriate

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28. *See* Keck & Sikkink, *supra* note 10, at 13.

29. *See, e.g.*, Kenneth Roth, *Show Trials Are Not the Solution to Saddam's Heinous Reign*, GLOBE & MAIL (Canada), July 18, 2003, at A13 (Human Rights Watch executive director calling on Canada to oppose proposed war crimes trials for former Iraqi officials); James Ross, *What Tony Blair Must Say in Washington*, THE GUARDIAN/OBSERVER ONLINE, July 13, 2003, *available at* http://observer.guardian.co.uk/comment/story/0,6903,997066,00.html (New York-based counsel to Human Rights Watch calling on British Prime Minister Tony Blair to press Bush Administration on its treatment of terror suspects); Kenneth Roth, *Allies' Postwar Panic Puts Justice in Doubt*, INT'L HERALD TRIB., May 23, 2003, at 6 (calling on European governments to oppose blanket U.S.-approved exemption for U.S. peacekeepers from jurisdiction of new International Criminal Court); Kenneth Roth, *Fight the Good Fight: Before Joining the US in a War on Iraq, Blair Must Lay down the Law on Key Human Rights Principles*, GUARDIAN, Oct. 22, 2002, at 8 (calling on Blair to insist on non-use of cluster bombs as a condition for British participation in the invasion of Iraq). An example of such NGO activity (although as yet not successfully applied against the United States) is the Ottawa process that resulted in the land mines treaty. *See* Raymond Bonner, *How a Group of Outsiders Moved Nations to Ban Land Mines*, N.Y. TIMES, Sept. 20, 1997, at A5 (describing the process by which NGOs enlisted the support of foreign government officials to spearhead the campaign for a multilateral ban).

governmental action. In this model, NGOs mobilize (or threaten to mobilize) the buying power of sympathetic consumers. Target companies may sometimes be singled out because of their identification with a particular country whose conduct the NGO seeks to change, entangling them, in effect, as innocent bystanders. The boycott of Beaujolais wine in the face of French nuclear tests during the 1990s presents one example.[30] Action directed at U.S. companies having no direct connection to global warming because of the U.S. refusal to accept Kyoto present another.[31] In other cases, the target is implicated in the policy whose modification is sought. The continuing boycott campaign against ExxonMobil relating to climate change fits into this category. ExxonMobil has been singled out both because of the impact of its own corporate policies on climate change (it, unlike Beaujolais wine, is part of the problem) and because of its leverage in Washington. If ExxonMobil faces significant lost profits as a result of U.S. non-participation in Kyoto,[32] it could be expected to desist from its support of the Bush administration's refusal to pursue ratification of Kyoto. The campaign against ExxonMobil may have spurred other major oil companies to come out in favor of the protocol.

In the face of economic globalization, this channel for securing governmental action should become more effective. When transnational corporations are the target, this mechanism politically empowers non-state actors (individuals and organizations) outside of the United States, typically in partnership with U.S. cohorts. A consumer exercising choice at European pumps will be casting a sort of virtual vote in Washington. In the wake of successful consumer campaigns, moreover, transnational activist groups wield power without resort to boycotts, actual or threatened; they have secured what appear to be permanent seats at the table.[33] Coupled with direct use of domestic political channels, these entry points open up new opportunities for actors seeking to advance U.S. participation in international institutions and compliance with international norms. If U.S. companies face lost business as a result of the Bush Administration's unilateralist orientation, as they fear they will,[34] they will work to change it.

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30. *See* Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace*, 18 CARDOZO L. REV. 957, 960 (1996). More recently, the boycott of French wines among Americans in the wake of France's opposition to the invasion of Iraq, while not enough to turn around French policy, was reported to have softened the French stance. *See* James Graff, *Can France Put a Cork In It? With the U.S. Boycott Hurting Wine Sales, Chirac Quiets Down and Tries to Make Nice*, TIME, Apr. 28, 2003, at 42.

31. *See* Andrew Marshall, *Boycott Targets Friends of Bush*, CHRISTIAN SCI. MONITOR, Apr. 20, 2001, at 6 (describing Kyoto-related boycotts directed at U.S. corporations like Coca-Cola, having nothing to do with emissions activity).

32. *See, e.g.*, *Activists at the Gates: Whether They Like It or Not, Companies Cannot Afford to Ignore Campaigning Groups*, FIN. TIMES, June 5, 2002, at 12 (suggesting damage to ExxonMobil as a result of campaign).

33. *See* Alan Cowell, *Advocates Gain Ground in a Globalized Era*, N.Y. TIMES, Dec. 18, 2000, at C19 (reporting corporate perception of increased NGO power).

34. *See Dire States*, INDEPENDENT (London), July 17, 2003, at 2 (noting that the "[big] worry inside boardrooms, from New York to Atlanta and Chicago, has been [whether] the unpopularity of George Bush's America—whether we are talking his attack on Iraq or his inaction on global warming—[will] impact on the fundamental appeal of their brands in global markets"); Jeffrey E. Garten, *Anger Abroad is Bad for Business*, BUS. WEEK, Nov. 10, 2003, at 30 (calling on "American CEOs [to] press Washington to change trade policies that reinforce America's image of arrogance and hypocrisy"); Stephen Fidler & Mark Huband, *Bush Foreign Policy "Is Creating Risks for US Companies*," FIN. TIMES, Nov. 11, 2003, at 13. *But see* Simon Romero, *War*

This offers a more viable channel for applying pressure than has prevailed at the state-to-state level, where the costs of discipline will be high. Non-geopolitical channels will present lower thresholds. The strategy is divide-and-conquer, both enabled and generated by the disaggregating tendencies of globalization.

B. Non-State Norm Regimes

Equally significant is activism whose objective is to change the behavior of corporate or other non-state entities without securing the modification of governmental policy. This strategy is being deployed increasingly in the many contexts in which corporate or other non-governmental[35] conduct is the source of a perceived harm. The emergence of social responsibility and refined "voluntary" codes of conduct evidence this trend toward advancing agendas outside of public institutions.[36] Much of this activity has been occurring in the context of transnational corporate conduct, and much of it has clear salience to international norms. Prominent examples are worker rights and carbon emissions. With worker rights, competing codes of conduct have emerged to set and monitor standards on such issues as child labor, minimum wages, and other working conditions.[37] Major manufacturers as well as important licensers, especially universities, give these codes significant coverage.[38] On emissions standards, environmental groups are securing commitments from some major energy corporations,

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and Abuse Do Little Harm to U.S. Brands, N.Y. Times, May, 2004, § 1, at 1. As one observer put it, the decline in U.S. brand power is

> just an extension of the phenomenon we've already seen of people voting with their wallets on a number of political issues. . . . [P]eople will factor in a guilt by association, so companies need to realise that the environments in which they are operating—and playing a part in shaping—can have an impact on their bottom line. Companies need to revise their political lobbying strategies in the wake of these kinds of findings. It is not enough for them to use their political clout to lobby for favours. They will increasingly need to take a position on political [ ] as well as social and environmental issues in order that the consumer continues to support them.

Id. (quoting Noreena Hertz).

35. Including, for instance, religious organizations on such issues as the ordination of women or gays.

36. *See, e.g.*, John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, *in* TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE (David Held & Mathias Koenig-Archibugi eds., 2003); Gary Gereffi et al., *The NGO-Industrial Complex*, FOR. POL'Y, July-Aug. 2001, at 125; Spiro, *supra* note 30, at 958-62. The trend towards corporate codes of conduct has been coupled with the innovation of corporate "social reporting," in which corporate practices relating to the environment, labor rights, human rights, and other social practices are reported (and audited) parallel to traditional financial accountings. *See* Amy Cortese, *The New Accountability: Tracking the Social Costs*, N.Y. TIMES, May 24, 2002, § 3, at 4. Such reporting is likely to impact corporate behavior even in the absence of externally devised codes of conduct.

37. *See* Alex Gourevitch, *No Justice, No Contract: The Worker Rights Consortium Leads the Fight Against Sweatshops*, AMERICAN PROSPECT ONLINE, June 29, 2001, *available at* http://www.prospect.org/web/page.ww?section=root%name=ViewWeb&articleId=399 (describing differences between two leading codes of conduct for the apparel industry, sponsored by the Fair Labor Association and the Worker Rights Consortium); *see generally* Eliot J. Schrage, *Promoting International Worker Rights Through Private Voluntary Initiatives: Public Relations or Public Policy*? (2004), available at http://www.uichr.org/content/act/sponsored/gwri_report.pdf (describing labor codes of conduct in various global industries).

38. The Fair Labor Association includes such major producers and retailers as Eddie Bauer, Nike, Reebok, Nordstrom, and Liz Claiborne. *See* http://www.fairlabor.org/all/companies/index.html. More than 125 colleges and universities are affiliated with the Worker Rights Consortium, pursuant to which they agree to license their logos only to manufacturers complying with the Consortium's code of conduct. *See* http://www.workersrights.org/as.asp.

including giants Shell and British Petroleum, to reduce their emissions of greenhouse gases.[39]

Insofar as these initiatives succeed in changing target entity behavior, they diminish the importance of multilateral governmental action.[40] Success is contingent on coverage and effective monitoring (neither of which is seamless in any regulatory scheme, public or private). Coverage is facilitated by competitive incentives within industries and the risk of being stung by NGO "naming and shaming" boycott campaigns launched on a transnational basis.[41] Though initial subscriptions to conduct codes may be hard won for so long as a particular industry shows a united front, as more entities within the targeted community sign on, the non-state equivalent of a "norm cascade" or "tipping point" occurs, after which participation is voluntary in name only.[42] The establishment of conduct regimes advances international regimes even in the absence of state participation. Every additional manufacturer signed on to a worker rights code of conduct represents an incremental gain for international worker rights. If all major energy producers reduced their greenhouse gas emissions, that might represent a significant step toward accomplishment of the reduction set by Kyoto, whether or not the protocol were to come into force. In other contexts, direct action against other private actors could obviate altogether the need for U.S. governmental participation. International Relations theorists could not process this result in-

39. *See* JOSEPH F.C. DIMENTO, THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW 66, 69 (2003); *Pew Center on Global Climate Change, Climate Change Activities in the United States: 2004 Update*, at 21-50 (available at http://www.pewclimate.org /what_s_being_done/us_activities_2004.cfm) (documenting voluntary corporate undertakings relating to global warming). Other examples of private regulatory regimes include labeling and certification schemes in the coffee, forest products, toy, and chemical industries. *See generally* Gereffi, *supra* note 36. In 2000, United Nations Secretary General Kofi Annan launched the UN Global Compact, an undertaking in which more than 1500 corporations have directly subscribed (that is, in their own capacity and not through home states) to nine principles relating to human rights, labor rights, and environmental protection. *See* The Global Compact, *available at* http://www.unglobalcompact.org. Participating U.S. companies include Amerada-Hess, Dupont, Nike, and Pfizer. *Id.*

40. *See, e.g.*, A. Claire Cutler et al., *The Contours and Significance of Private Authority in International Affairs*, *in* PRIVATE AUTHORITY AND INTERNATIONAL AFF. 333, 369 (A. Claire Cutler et al. eds., 1999) (highlighting "the increasing relevance of the private sector in organizing the international system and increasingly in establishing the rules of the game"); Karsten Ronit & Volker Schneider, *Private Organizations and Their Contribution to Problem-Solving in the Global Arena*, *in* PRIVATE ORGANIZATIONS IN GLOBAL POLITICS 1, 18 (Karsten Ronit & Volker Schneider eds., 2000) ("[P]rivate organizations become alternatives to governance by the state or governance by the market—and influence the ways in which public authority is exercised and economic exchanges are performed in the marketplace").

41. *See* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER 99 (2002) (noting the vulnerability of multinationals to consumer campaigns). Notable examples of boycott efforts successful in securing changes in corporate practices include those against Shell, for its proposed decommissioning in place of an offshore oil rig (the Brent Spar episode), *see, e.g.*, Nathaniel Nash, *Oil Companies Face Boycott Over Sinking of Rig*, N.Y. TIMES, June 17, 1995, § 1, at 3; against Nike, for its labor practices, *see, e.g.*, Steven Greenhouse, *Rights Group Scores Success With Nike*, N.Y. TIMES, Jan. 27, 2001, at C2; and against Starkist for practices endangering dolphins, *see, e.g.*, Anthony Ramirez, *From Coffee to Tobacco, Boycotts are a Growth Industry*, N.Y. TIMES, June 3, 1990, §4, at 2. Threatened boycotts succeeded in securing the withdrawal of corporations doing business in Burma. *See* Naomi Klein, *Students Win the Pepsi Challenge*, TORONTO STAR, Feb. 3, 1997, at A15 (describing how Pepsi and other companies pulled out of Burma in the face of consumer activism). On increased negotiated resolution of NGO-corporate differences, see *Living with the Enemy*, ECONOMIST, Aug. 9, 2003, at 49; Debora L. Spar & Lane T. LaMure, *The Power of Activism: Assessing the Impact of NGOs on Global Business*, 45 CAL. MGMT. REV. 78, 94 (2003) ("[I]t is clear . . . NGOs are increasingly focusing their powers of persuasion on firms and that firms, in turn, have become increasingly responsive.")

42. *See* Finnemore & Sikkink, *supra* note 9, at 895.

sofar as they all aggregate the state for purposes of compliance. An aggregated approach may produce the conclusion that the "United States" is not participating in an international regime when in fact much (or even all) of what comprises the United States has signed on.[43]

Once major corporations are implicated in codes of conduct and similar regimes, however, they have an incentive to press for their adoption as law. Corporate actors seek certainty, even if certainty means entrenching norms that are costly over the short term, and public law regimes promise greater certainty than do private ones.[44] To the extent that codes of conduct are pressed more effectively on large, multinational manufacturers than on others, the lack of universality gives rise to competitive disadvantages.[45] Those disadvantages can be corrected by universalizing norms generated in the private scheme. The result will be corporate pressure for legalization. In the U.S. context, this may mean pressing the U.S. government to accede to relevant international regimes. This was an important element in U.S. acceptance of international accords limiting the use of CFCs.[46] DeBeers was a crucial advocate of the Kimberley Process and related U.S. legislation to address the problem of African blood diamonds.[47] The CFC model could be repeated with respect to the Kyoto accords in the context of greenhouse gases.[48] To the extent that major energy concerns are being held to Kyoto-like requirements as a result of activist pressure at the same time their smaller counterparts slip under the radar screen, they can be expected to advocate U.S.

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43. *Cf.* Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1484 (2003) (noting that the U.S. failure to accede to human rights treaties obscures near-complete compliance with obligations thereunder).

44. *See* Daniel Litvin, *Needed: A Global Business Code of Conduct*, FOREIGN POL'Y, Nov.-Dec. 2003, at 68 (calling for a U.N.-sponsored code of conduct: "[P]rominent firms have a strong incentive to create a global set of rules by which all multinationals should play—a set of rules that is fair, realistic, and, above all, clear"); Andrew C. Rivkin & Neela Banerjee, *Some Energy Executives Urge U.S. Shift on Global Warming*, N.Y. TIMES, Aug. 1, 2001, at C1 (reporting that corporations "want the predictability that comes from quick adoption of clear rules," even if it involves global regulation of emissions).

45. Possible exceptions could persist when a limited number of corporate players reduces the danger of free riding. *See* Karsten Ronit, *The Good, the Bad or the Ugly: Practices of Global Self-Regulation Among Dyestuff Producers*, *in* RONIT & SCHNEIDER, *supra* note 40, at 83, 89.

46. *See* RICHARD BENEDICK, OZONE DIPLOMACY 30-33(1998).

47. *See* Robert I. Rotberg, *Conflict Diamonds Aren't Forever*, CHRISTIAN SCI. MONITOR, Oct. 25, 2001, at 9 (noting DeBeers support of Kimberley for fear of consumer boycott against diamond industry).

48. *See* Lucas Assunçao, *Turning Its Back to the World? The United States and Climate Change Policy*, in UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 297, 298 (David M. Malone & Yuen Foong Khong eds., 2003) (predicting "significant bottom-up pressure" by corporations for ratification); William Drozdiak, *U.S. Firms Become 'Green Advocates,'* WASH. POST, Nov. 24, 2000, at E1 (noting increasing number of large corporations supporting Kyoto: "[T]he shift in American business opinion could be decisive if and when the Senate votes on ratification of the Kyoto treaty"); Harold K. Jacobson, *Climate Change: Unilateralism, Realism, and Two-Level Games*, *in* MULTILATERALISM AND U.S. FOREIGN POLICY, *supra* note 27, at 415, 429 (doubting that Kyoto will be adopted by the U.S. in present form, but still noting that "[o]ver time the Senate might respond to pressure from U.S. businesses that are turning to support the agreement"); *see also*, *Govt to Ratify Kyoto Pact*, DAILY YOMUIRI (Tokyo), Nov. 4, 2001, at 1 (reporting Japanese government decision to ratify Kyoto in part because of "the risk of consumer boycotts of Japanese products in European and other countries that support the protocol if Japan failed to move for ratification"). Corporate interests have also been motivated to support these environmental protection accords insofar as they see an opportunity to reap profits under the new regimes. *See* Assunçao, *supra*, at 311 (noting "tremendous opportunities for market expansion" by U.S. corporations in wake of Kyoto); Drozdiak, *supra*, at E1 (describing the electric utility's support for Kyoto because of carbon credits for which it would be eligible under the treaty).

support for the multilateral regime. In the meantime, the success of social responsibility campaigns dilutes the significance of current U.S. intransigence.

Unlike Constructivist models and their equivalents in the legal scholarship, this descriptive analysis works from rational actor premises. Unlike Liberal IR Theory, it allows for the transnational determination of "domestic" interests. The analysis is not meant to dismiss the consequentiality of ideas, which at some level (not always primary) invariably figure in the success of efforts to secure adoption of an international regime. But in confronting the massive power of the United States, it is important to pose an interest-based scenario for the more complete integration of the United States into international legal institutions. The plausibility of such integration is enhanced by recognizing transnational in addition to intergovernmental and domestic political determinants.

V

DISAGGREGATE AND CONQUER

The importance of causal pathways involving private actors is coupled with the emergence of newly paved or widened pathways among governmental ones. These include state and local governments, the courts, Congress, and executive agencies outside the traditional foreign policy apparatus. These governmental entry points can be visited through both domestic and international channels. This disaggregation of governmental entities facilitates the incorporation of international law into U.S. practice by lowering the pressure thresholds for institutional action and exploiting the institutional self-interest of disaggregated entities to participate in or conform with international regimes.

Liberal IR acknowledges—indeed it has foregrounded—the role of disaggregated components of central governments.[49] This work has been of breakthrough magnitude in describing the actual conduct of international relations and posing a rich set of normative questions. On the theoretical side, it further undermines Realist conceptions of unitary state actors. It is less clear how disaggregation fits into Liberal conceptions of international relations. Liberal IR theorists stress the representative nature of disaggregated governmental entities, working from the premise that political preferences within putative domestic society are prior. In effect, if Liberal theory generally poses "the state as agent," it appears to process disaggregated activity as "the agent of the state as agent."[50] The liberal transnationalist analysis that follows, by contrast, high-

49. *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 505 (1995); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 11, 19 (2002).

50. *See* Moravcsik, *supra* note 8, at 519 (noting that disaggregated governmental elements can "conduct semi-autonomous foreign policies in the service of disparate societal interests," and "nonunitary state behavior can be analyzed 'as if' it were unitary and rational."); Slaughter, *supra* note 49, at 534 (noting that disaggregated "institutions operate in a dual regulatory and representative capacity with respect to individuals and groups within society"); Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 12, 28 (Yves Dezalay and Bryant G. Garth, eds., 2002) ("[Q]uasi-autonomous" action by governmental agencies at the international level "is not meant to suggest that these institutions do not represent

lights the transnational determination of disaggregated governmental interests, that is, how they are affected by forces that do not come under the umbrella of "domestic society." The explanatory distinction may promise the facilitation of U.S. submission to international regimes on a more accelerated basis than other theories would predict.

A. Subnational Actors

First of all, IR theorists appear to almost completely ignore the salience of substate actors to international relations and the incorporation of international law, perhaps because their role is subversive of IR's continued privileging of the state. But subfederal jurisdictions in the United States now face weighty, discrete interests on the global stage, interests that create leverage for international actors. The leverage may be exercised to advance international regimes. As I have written elsewhere, noncompliance with entrenched international law norms may result in lost economic opportunities for subnational units, crucial to economic prosperity in a globalized economy.[51] Local jurisdictions in the United States are relatively fungible. International actors can target resources away from jurisdictions thought to stand in violation of international norms. The approach increases leverage insofar as it can exploit inter-state competition in a dynamic resembling consumer and shareholder action against corporations. (Indeed, it may include action against corporations that are identified with a particular state by way of securing a change in state practices.) Although it would be difficult to sanction the United States as a whole for non-compliance with an international law standard, it might be possible to single out particular subnational jurisdictions.

As with action against private actors, when subnational governmental conduct is the ultimate object of a standard of conduct, securing action at that level will diminish the significance of non-participation at the national level. If, for example, all states of the United States are persuaded to modify death penalty practices (over which they command almost complete responsibility) to comport with international standards, then it makes less difference whether such persuasion succeeds in federal institutions.

B. Congress

Congress, executive branch agencies, and the courts also present discrete entry points for international regimes. At the federal level, disaggregation creates fewer competitive pressures, at least not on anything less than a national scale. It is more costly to exercise economic leverage against the United States as a whole than against territorial subunits or corporate elements. But transnational forces may nonetheless prove increasingly influential with component parts of the federal government, resulting in more effectively applied pressures towards participation in international regimes.

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their national interest, only that they represent a particular conception of national interest that is shaped by their particular institutional/professional interests, values, and goals.").

51. *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 672 (2002); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1227 (1999).

Congress remains most resistant to these forces. Its default position continues to be one of non-participation. Congress has historically stood at the center of American exceptionalism, and it will likely suffer exceptionalist tendencies into the future. But it can be moved from these tendencies through the standard channels of legislative influence (money and votes), as in the international economic law context. Much of this influence will be undertaken on behalf of identifiably domestic interests, including U.S. citizens and corporations, thus appearing to fit neatly within the Liberal IR paradigm. But even these channels are no longer cleanly "American." All publicly traded corporations will now include foreign shareholders, and many will include other significant non-U.S. stakeholders. Many U.S. citizens hold additional citizenships in other states.[52] And these elements, even if dominantly American, can be the agents of transnational influence, as when U.S. corporations face the sort of transnational consumer pressure described above.

More clearly outside the "domestic" box are campaign contributions by resident aliens and the wholly-owned U.S. subsidiaries of foreign corporations.[53] Foreign corporations are independently active lobbyists on the Hill, where they can exercise influence by delivering information, if not dollars.[54] This activity will tend to support participation in international regimes insofar as such regimes benefit foreign entities in the U.S. and global context. Progress may lag in contexts lacking corporate advocates. It will be especially difficult to budge Congress on meaningful participation in human rights regimes, on which the most intense contemporary manifestations of modern American exceptionalism have focused, from the Bricker Amendment episode forward.[55] As Liberal IR theorists have highlighted, the structure of Congress creates minority veto opportunities, and those opportunities will continue to be exercised in the international human rights context. To the extent that domestic interests mobilize in support of participation, one could expect an evolution in practice towards participation. The change would be accelerated if U.S. corporate interests began to face related transnational activist pressure along the lines of the "innocent bystander" model sketched above. Action broadly equating U.S. corporate activity with U.S. non-participation in human rights regimes remains a long way over the horizon. But one can construct scenarios in which Congress becomes more institutionally amenable to pressure to participate in international human rights and other non-economic international regimes.

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52. *See generally* Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997) (describing the implications of the growing incidence of plural citizenship).

53. *See, e.g.*, Carter Dougherty, *The American Way: German Firm Chooses Charity to Have Impact on Capitol Hill*, WASH. TIMES, Apr. 30, 2002, at C7 (reporting a contribution involving the purchase of wheat from North Dakota, represented by the chairman of the Senate Budget Committee).

54. *See, e.g.*, Nancy Dunne, *Guardian Angel in U.S. Watches Over Foreign Groups*, FIN. TIMES, May 3, 2000, at 13 (describing a lobbying group established to further the interests of foreign subsidiaries in the United States).

55. *See generally* NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE (1990) (describing history of legislative resistance to human rights regimes).

C. Executive Branch Agencies

Closer to the core of disaggregation theory, executive branch agencies beyond the traditional foreign policy apparatus now have institutional incentives to incorporate international legal regimes. Though this incorporation is largely out of the public eye, it points to the globalization of regulatory activity. The emergence of transnational government networks are at the leading edge of disaggregation. The U.S. nodes of these networks comprise another discrete entry point for international law. Here, too, are transnational determinants of institutional interests that should point to increased U.S. participation in international regimes over the long run. Although agencies cannot be directly plied with contributions, foreign entities can supply them with information. Especially when coordinated with U.S.-based entities,[56] these deliverables can affect outcomes.[57] Regulatory constituencies are likely to be transnational, even if they are not organized as such. For instance, the U.S. Securities and Exchange Commission now protects a significant number of foreign shareholders in U.S.-based corporations. Insofar as SEC regulatory effectiveness is contingent on global harmonization, one could expect that transnational constituency to press both U.S. and foreign regulators to undertake regulatory coordination. That the resulting regime is largely (though not completely) of the SEC's devise does not render it representative only of U.S. interests. The transnational constituencies will press for the adoption of transnational regulatory regimes.

The regulators will have a strong independent interest in coordinated action in that, in an increasing number of regulatory spaces, regulation will be ineffective if undertaken on a domestic territorial basis only.[58] Together, these forces should lead component elements of the federal executive branch to buy into transnational regimes. Although a U.S. regulator will often be the most powerful player in a transgovernmental network, even when the regulator dominates, the process of coordination will involve compromises. As adopted by the United States, then, the harmonized regime—whatever the vehicle, a form of international law—will comprise an incorporation of international law standards. As disaggregated from the central organs of foreign policy, agencies pose another entry point for international law.

D. The Judiciary

Even though they are not directly subject to interest-based politics, federal judges and the courts are also developing institutional interests that point toward greater ori-

56. For an example, see Letter from the [U.S.] National Foreign Trade Council, Confederation of British Industry, Federation of German Industries, & E.U. Committee of the American Chamber of Commerce in Belgium, to Robert B. Zoellick, U.S. Trade Representative & Pascal Lamy, E. Trade Commissioner, (May 13, 2003), *available at* http://www.nftc.org/default/trade/final%20changes%20to%20joint%20association%20letter%20on%20DDA1.pdf (urging joint U.S.-E.U. action to advance Doha Round trade negotiations).

57. *See, e.g.*, Maria Green Cowles, *The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 213 (Mark A. Pollack & Gregory C. Shaffer eds., 2001) (describing impact of concerted lobbying activity by U.S. and E.U. corporate elements).

58. *See* Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1355 (2003).

entation to international law standards. In the context of life tenure, judges may be more focused on reputational standing. As domestic courts come increasingly to identify themselves as part of a global community of courts,[59] this interest should open up the courts as an additional entry point for international law.

Federal judges may now define their peer group to include foreign and international jurists, as a result of increasingly structured contacts with those counterparts. This identification gives U.S. judges an incentive to act in a way that will enhance their reputation with those groups. The incentive can play out at the level of individual contact; judges will naturally want to garner respect rather than opprobrium when they find themselves, on a repeat basis, interacting with non-U.S. judges.[60] To the extent that judging involves dialogue among courts—with citation frequencies as a measurement of both individual and institutional reputation[61]—federal judges may come increasingly to value the attention of foreign and international tribunals.

On both counts, the interests of federal judges will be served by the deployment of international law norms. Recognition is, first of all, a two-way street, especially among those who are not assigned a formal hierarchical relationship. Foreign and international tribunals are more likely to take notice of U.S. judicial decisions to the extent U.S. judges take notice of them. Second, U.S. jurists have lagged in their comfort with and use of comparative and international law sources relative to their non-U.S. counterparts. In the context of twentieth-century America, that was never a problem; indeed, it may have been a badge. Today, U.S. judges may be more responsive to the harsh critiques launched by global jurists highlighting the failure of U.S. courts to take account of international law.[62]

This amenability to international law sources is being reinforced among domestic audiences. Litigants are coming increasingly to cite international law sources to U.S. courts; gone are the days when litigants resorted to international legal authority because none was to be had among domestic sources. Leading U.S. legal academics, including some who would identify themselves as constitutional rather than international law scholars (another group with which many judges will seek to build reputational capital), are asserting the salience of international and foreign law to the task of judging domestically.[63] Federal judges now enjoy significant backup support as they begin to shed their blinders. But that support is itself far from indigenous, for it will have been transnationally generated. Litigants and law professors are them-

59. *See, e.g.*, Anne-Marie Slaughter, *The Global Community of Courts*, 44 HARV. J. INT'L L. 191 (2003).

60. *See* Tony Mauro, *Supreme Court Opening Up to World Opinion*, LEGAL TIMES, July 7, 2003, at 1 (describing how justices'international travel may have affected their approach to citing international authority).

61. *Cf.* RICHARD POSNER, CARDOZO: A STUDY IN REPUTATION 71 (1989) (correlating historical standing of judges to citation frequency).

62. *See, e.g.*, Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 27 (1998) (a Canadian jurist criticizing the Rehnquist Court for failing to account sufficiently for international norms).

63. It is particularly significant that it is not only international law theorists who are pressing the use of international sources in domestic judging. *See, e.g.*, Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) (noting that the constitutional experiences of other nations may assist the Supreme Court in interpreting the U.S. Constitution); Sanford Levinson, *Looking Abroad When Interpreting the Constitution: Some Reflections*, 39 TEX. INT'L L.J., 353 (2004).

selves increasingly situated in transnational spaces and being buffeted by transnational forces.

Long emerging, these influences are showing results in U.S. judicial decisionmaking. Opinions in two important recent Supreme Court decisions have adverted to international norms. The majority in *Atkins v. Virginia* noted the near-global consensus against executing the mentally retarded.[64] In *Lawrence v. Texas*, the Court highlighted decisions of the European Court of Human Rights and other nations on the way to striking down a state measure criminalizing homosexual sodomy.[65] One might expect to see a growing number of cases in which majority opinions from the Court cite international law sources as support. Such deployment of international and foreign law may continue to draw ferocious dissents[66] and scattered other opposition.[67] The possibility of provoking anti-internationalist elements in Congress, which would have some capacity to fight the practice, will likely find the Court treading lightly for now. But the trend toward the judicial incorporation of international norms is unlikely to be reversed.

As the state is disaggregated and made permeable to discrete international activity, these actors beyond the foreign policy organs of the central government will render the United States vulnerable to the imposition of international norms. As permeability broadens, actors whose interests will be served through international norms will be afforded multiple strategic opportunities denied them in the era of highly channeled state-to-state relations. The United States is no longer a monolith for purposes of international law and relations; it is now, rather, an arena in which global forces can play at the game of transnational politics and rational institutional action.

That is not to say that traditional, aggregated models of state action all reject the possibility of more complete U.S. participation in international regimes. Long-established models of international relations working from standard statist geopolitical premises and focusing on the White House and traditional foreign policy agencies, including State, Defense, and Treasury, still apply on a non-exclusive basis, and in an increasing number of contexts implicate international law. To the extent that other states press an international law agenda on the United States, the traditional foreign policy apparatus may have cause to accept international legal regimes that it would otherwise reject. Assuming rational decisionmaking, it all depends on what is on the table; if the cost of the action threatened by the other state outweighs the benefit of

64. 536 U.S. 304, 316 n.21 (2002) (bolstering a finding of national consensus on the issue by noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

65. 539 U.S. 558, 576 (2003).

66. *See Lawrence*, 539 U.S. . at 598, (2003) (Scalia, J. dissenting) ("This Court . . . should not impose foreign moods, fads, or fashions on Americans."); *Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting) ("[T]he viewpoints of other countries simply are not relevant"); *id.* at 346 (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."); *see also* Antonin Scalia, *Commentary*, 40 ST. LOUIS L.J. 1119 (1996).

67. *See, e.g.*, *Courting Foreign Ideas, Justices Set a Troubling Precedent in Considering Other Nations' Rulings*, OMAHA WORLD HERALD, July 11, 2003, at 8B (editorial); *see also* H.R. Res. 568, 108th Cong. (2004) (expressing sense of House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments of foreign institutions).

nonparticipation in the regime, then one would expect a change in the U.S. posture toward the regime.

Such discipline has been difficult to apply because the United States looms so powerful and because other states have been unwilling to expend significant resources to back international law when it does not promise direct payoffs. But some examples may appear over the horizon. In the post-9/11 context, for example, European states have been turning up the heat on the Guantanamo detentions in such a way as to secure action consistent with their view of applicable human rights standards. Left to its own devices, the United States would likely continue the detentions indefinitely (or at least so long as the terrorist threat persisted), affording the detainees no process of any kind. The detentions have generated growing opposition among other states. European states may threaten to withhold important cooperation along other fronts in the war on terrorism if the detentions persist without process. That could tip the balance in favor of proceedings (military or otherwise).[68] Insofar as compliance here would require proceedings rather than release, the cost of compliance will be relatively low. It is possible that a similar equation will emerge with respect to the use of military commissions in place of ordinary criminal proceedings. Given that this, too, involves a matter of process rather than result, it is possible that foreign-state pressure could be consequential, and that only minimal use will be made of the military commission option.

VI

IMPLICATIONS FOR CONSTITUTIONAL LAW

Interest-based explanations for a trajectory toward more complete participation by the United States in international regimes apply in the realm of constitutional as well as ordinary law. I assume, as do others, the constitutional consequence of actors beyond the federal courts. If all states of the Union barred the execution of juvenile offenders, that would be of constitutional significance even if the Supreme Court had not so dictated.[69] If the Drug Enforcement Agency accedes to the demands of other states that it comport with procedural mandates of the International Covenant on Civil and Political Rights when undertaking enforcement actions on their territory, that may effectively override the Supreme Court's ruling that the Fourth Amendment does not apply to non-citizens located outside the United States.[70] If Congress deems a treaty regime consistent with the Constitution, that may be the last word on the subject; even if it is not, the institutional position will weigh heavily with any court considering the question. As is now being recognized in the historical domestic context, the positions

68. For an elaboration, see Peter J. Spiro, *Realizing Constitutional and International Norms in the Wake of September 11*, *in* THE CONSTITUTION IN WARTIME (Mark Tushnet ed., forthcoming 2004).

69. The Court itself would find such a state practice salient to the definition of federal constitutional standards insofar as it reflected a national consensus. Even those justices who resist the use of international sources would thus have no choice but to recognize them.

70. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (finding Fourth Amendment not applicable to search of non-citizen's residence outside the United States).

of private actors such as social movements may figure as constitutionally consequential.[71]

Through these non-judicial channels, then, the Constitution is likely to be increasingly entangled in the tentacles of international norms. As a formal matter, of course, the Constitution will remain supreme. However deeply the courts drink from international waters, for example, it will ostensibly be for interpretative purposes only: it would be constitutional nonsense, at least in the face of persistent constitutional nationalism, to deem international norms constitutionally constraining.[72] But the formal subordination of international sources may mask their growing constitutional consequence. Even though many cases will involve choices between domestically and internationally established norms, few cases will present an inescapable conflict between them. International norms can thus be adopted under cover of constitutional supremacy. To the extent that institutional interests point to acceptance of norms as determined at the international level, institutions will orient themselves accordingly. This trend will be most obviously detected at the Supreme Court, but is also likely to ramify through the full spectrum of disaggregated governmental entities.

That is emphatically not to say that all constitutional law will be made at the international level. These trends remain in their embryonic stages, dating roughly to the end of the Cold War and the advent of globalization. International law itself remains in a state of institutional ferment; the interpretative function of many institutions remains in flux. Substantive law also remains highly unstable. These observations hold true even in the area of international human rights, of greatest salience to domestic constitutional law. The so-called treaty committees, for instance, may emerge as definitive interpreters of the human rights conventions, especially as an increasing number of states-party accept their jurisdiction over cases initiated by individuals; in the meantime, however, their status remains contested.[73] The substantive coverage of the human rights agreements is both broad and deep, but refinement through application remains thin. The scope of customary norms (that is, those established outside of treaty relationships), especially those qualifying as *jus cogens* (customary norms from which states may not opt out), is also in flux. In the short term, there will be few cases in which domestic constitutional decisionmakers are visibly constrained by international constitutional standards.

Even in the long term, there will be considerable room for the exercise of constitutional autonomy. As in the U.S. federal system, rights can in some cases be adjusted

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71. *See, e.g.*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419 (2001) ("The modern meaning of the Equal Protection Clause owes much more to the power and norms of the civil rights and women's liberation movements than to the original intent of the 14th Amendment framers.").

72. As those pressing the use of international sources are themselves careful to note. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari) ("Obviously this foreign authority does not bind us. After all, we are interpreting a 'Constitution for the United States of America.'").

73. *Compare* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 337-67 (1997) (describing increasing efficacy of the Human Rights Committee charged with interpreting the International Covenant on Civil and Political Rights) *with* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PENN. L. REV. 399, 463-64 (2000) (questioning Committee's authority).

to local conditions. In the terms of international law, these possibilities are reflected in the doctrines of subsidiarity and the margin of appreciation. An appropriate candidate for such treatment vis-à-vis the United States, for example, might emerge in the First Amendment context. This will create further space for maintaining formal constitutional supremacy, even for reconciling American exceptionalism with hardening human rights norms.[74] And when domestic constitutional norms are changed to conform with international ones, the move will invariably be overdetermined, attributable to domestic forces as well as transnational ones. That may further obscure the infiltration of international law.

Below the surface, however, U.S. constitutional decisionmaking may nonetheless be increasingly constrained by internationally determined standards. Some international norms will harden, supported by something approaching an international consensus, cases in which it will be difficult to argue the law, as it were. Some will not be amenable to local variation. Finally, in some cases the impact of international norms will be difficult to disguise. The death penalty context may prove such a case on all three points. The trajectory towards abolitionism is clear; it is one that, once established, will allow for no derogation; and when the United States falls into line (to the extent federal compliance means anything, in the wake of conformed conduct at the state level), the impact of the international standards will almost surely be identifiable. At the macro level, the level of U.S. participation in international institutions and conformity with international standards will likely rise, the bluster of the present Administration notwithstanding. If so, that will further demonstrate the value of the model proposed here for thinking about the interplay of U.S. and international law.

VII

CONCLUSION

Existing models of international law and international relations are ill-equipped to project the more complete assimilation of the United States into international norm regimes. On the one hand, norm-driven theories fail to explain how international actors will overcome entrenched U.S. resistance to international lawmaking. The United States does not require the approbation of other states by way of maintaining a sense of national legitimacy. On the other hand, rationalist theories systematically underestimate the incentives that the United States may have for buying into international regimes. By segregating interests and actors along national lines, these models miss transnational accelerents of international norms. The interests of the full spectrum of U.S. actors—disaggregated governmental and private entities—are increasingly determined in transnational political spaces. Transnationality affords non-domestic actors enhanced leverage in pressing U.S. participation in international regimes. By this model the United States could be more fully drawn into international law as a matter of rational institutional action.

Constitutional law will not be immune to these developments. Judges and other constitutional actors will face incentives to incorporate international norms in their

74. *See* Koh, *supra* note 43, at 1483.

constitutional decisionmaking. To the extent that the Constitution becomes transnationally determined, self-determination will be limited, not only in law making but also, in the American case, in sustaining a distinctive national identity. This by itself is something to be neither lamented nor valorized. But the prospect should draw greater attention to the global institutions in which increasingly consequential norms are being contested and generated.