The Last Pillar to Fall? Domestic and International Legal Institutions*

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Abstract

The grip of Realism on the study of international politics has been considerably loosened over the past three decades, but one of the central assumptions of Realism remains unchallenged by scholars working within other approaches: the primary distinction between domestic and international politics lies in a sharp distinction between legal institutions. We propose that there is much to be learned by challenging this assumption. More specifically, we argue that the presumed difference between domestic and international legal institutions has been severely overdrawn. An examination of the institutional literature on comparative judicial politics reveals that this literature problematizes what IR scholars take for granted in domestic politics: delegation of authority to legal institutions, adverse rulings by those institutions, and government compliance with such rulings. Rather than assume that these processes simply work in the domestic setting, this scholarship demonstrates that it must be explained. Seen from this perspective, the distinction between the study of domestic and international legal institutions falls away, revealing that scholars interested in either arena are really working in a larger literature. To make this claim we review the existing work in the comparative judicial politics and international institutions literature pointing out areas of overlap, distinction, and opportunities for cross-fertilization.

1 Introduction

In an influential essay published in *International Organization* in 2005 Helen Milner argues that rational institutionalism[1] has eroded the analytic distinction drawn between the study of domestic and international politics. She begins her essay by quoting Wolfram Hanrieder, who colorfully describes the self-imposed conceptual prisons in which comparative politics and international relations scholars have confined themselves, rendering each deaf and mute to one the work of the other. Thirty seven years later Milner is able to declare the locks shattered and the inmates liberated, at least among a subset of scholars working in each field.

To make her case Milner contends that the rational institutionalist agenda sets aside two key assumptions invoked by IR scholars that served as pillars upon which the separation of the two fields rested: that states are unitary actors, and that states are the most (and often the only) important actors in the international system. We agree with Milner's insight, but contend that she overlooks a critical assumption that constitutes the third pillar upon which the long standing separation between comparative politics and international relations research rests: that domestic politics unfold in the shadow of a legal system that can enforce contracts while international politics do not. This essay makes the case that this commonly invoked, though often implicit, assumption has been overdrawn and has contributed to each community's self-imposed imprisonment.

Lake makes a very similar point, though he extends it beyond Milner's call. First in the context of the mini-renaissance of sovereignty (Lake, 2003*a*, pp. 303-7) and second in the context of theories of conflict (Lake, 2003*b*, pp. 84-5), he argues that the conceptualization

[1]Hall and Taylor (1996) distinguish "historical" and "sociological" from "rational choice" institutionalism. Like Milner, we are interested in what they refer to as rational choice institutionalism, though we do not wish to restrict ourselves to the brand of rational institutionalism that derived out of the classic social choice literature (Shepsle, 1979). The work we discuss here, indeed, much current rational choice institutional research, does not entirely or even mostly fall in the structure induced equilibrium (SIE) tradition (see Diermeier and Krehbiel, 2003).

of anarchy/hierarchy as two values in a binary concept is impoverished for both domestic and international politics. In one essay he focuses on the empirical presence of degrees of hierarchy in international politics (Lake, 2003*a*, pp. 303-7) and in the other upon the empirical existence of degrees of anarchy in domestic politics (Lake, 2003*b*, pp. 84-5). More specifically, Lake (2003*b*, p. 85) writes "Analytically, the endogenous nature of anarchy implies that the common and often prized distinction between international relations (the realm of anarchy) and comparative politics (the realm of hierarchy) evaporates, at least when we try to understand internal conflict."

Building upon Milner's identification of two pillars upon which the ontological distinction between domestic and international politics rests, we submit that Lake's essays point us toward a third pillar: that states can automatically generate hierarchy. Lake's work on variation in domestic hierarchy can be understood in a broader context if we think about the extent to which a state's legal institutions can regulate state–society relations. Put otherwise, we wish to suggest that the observed variation in the impact of the entire legal infrastructure upon the regulation of domestic politics needs to be explained. By drawing researchers' attention to the existence of this third pillar and making a case about why it should be torn down we wish to complete the revolution Milner and Lake have declared. Put another way, we are both pursuing and extending this work. The declaration that comparative politics and international relations are ontologically distinct and their analysis *requires* separate theoretical tools is not only intellectually bankrupt, it is demonstrably harmful. As both Milner and Lake so nicely describe, it prevents scholars from asking the right questions and hinders the accumulation of knowledge.

That said, we do not wish to replace an old orthodoxy with a new one.[2] We are not arguing that rational institutionalism is the only paradigm in which to conduct research, though

[2]We hope that this essay is not read as *yet another* requiem for Realism. The essay's value, as we see it, lies in our positive claims about future cumulative research, not in a negative critique of other research programs.

its analytical techniques are extremely helpful when scholars attempt to understand strategic interaction. We do not wish to fight that broad methodological battle here. Rather, we simply contend that we will produce more useful knowledge, using whatever theoretical toolbox we find helpful, when we stop assuming that the study of international relations *requires* a separate and distinct set of assumptions than are used in the other fields of political science.[3] Milner dispenses with two fundamental assumptions that support the Realist project; with Lake's assistance we wish to discard the third. We want to invite scholars in comparative politics and international relations to seriously engage each other's work, and not because we can learn something about Phenomenon A (e.g., conflict) by reading how others write about Phenomenon B (e.g., economic development), though that is certainly true. Rather we make this call because in many cases we are basically all writing about the same phenomena—the construction and allocation of power.

What specific work do we have in mind? Two increasingly robust literatures explore questions that, aside from the empirical labels associated with them, involve nearly (in some ways entirely) identical theoretical queries. A long line of scholarship in judicial politics has sought to explain two related institutional questions. Why would a government give up complete control over policy outcomes by delegating power to judges through a system of judicial review (Landes and Posner, 1975; Ramseyer, 1994; Rogers, 2001; Ginsburg, 2003, e.g.)? Why do governments subsequently comply with the decisions of the courts to which they delegated power (Weingast, 1997; Alter, 1998; Carrubba, 2003; Stephenson, 2004; Helmke, 2005; Vanberg, 2005; Staton, 2006)? The conceptual sibling of this literature lives in the voluminous rational institutional literature on international organizations, an obvious labelling issue notwithstanding (e.g. Simmons, 1994; Keohane and Martin, 1995; Leeds, 1999; Putnam, 1999; Rogowski, 1999; Abbott and Snidal, 2000; Martin, 2000; Sim-

[3]Milner draws our attention to some classic statements that are no longer widely read, but should be. For one that the fields are fundamentally distinct and need their own separate theories see Dunn (1949). Young (1972, esp. p. 195) offers a contrary opinion.

mons, 2000; Koromenos, Lipson and Snidal, 2001; Leeds, 2003; Donnelly, 2005; Martin and Simmons, 2005). In this literature, the judicial scholars' first question becomes: "Why would a state give up power (i.e. sovereignty) by adopting new international economic or human rights obligations (e.g. Downs, Rocke and Barsoom, 1996; Moravcsik, 2003; Simmons, 2000; Reinhardt, 2002; Mansfield and Pevehouse, 2006)? The second question becomes: What accounts for subsequent compliance with these obligations (e.g. Hathaway, 2002; Hafner-Burton and Tsutsui, 2005; Von Stein, 2005; Goodliffe and Hawkins, 2006; Hathaway, 2007; Morrow, 2007; Powell and Mitchell, 2007; Simmons, 2007; Hafner-Burton, N.d.)? To be sure there are conceptual differences here. For example, whereas the judicial literature is primarily concerned with the extent to which governments respect judicial decisions declaring that the government has violated a legal obligation, the international organizations literature focuses on choices to violate obligations in the first place. Thus, a feature of politics that is assumed in the judicial literature (i.e. governments violate their obligations) is the feature of interest for the international organizations literature. This is clearly a difference, but we think it is insignificant for our present purposes. If you simply assume that the choice to construct a system of judicial review carries an implicit promise to comply with subsequent decisions in the event that government has violated a substantive rights obligation, then the two literatures really are dealing with precisely the same behavior—keeping a promise.[4] The key point is this. Both literatures are concerned with choices to give up power formally and subsequent choices to comply with their formal promises.

With that as background, building on the work of scholars like Milner (2005) and Wagner (2007) we reject the claim that a fundamental ontological distinction exists between domestic and international legal institutions: scholarship in both fields is fundamentally interested in both the construction and allocation of power. For this reason, we should be

[4]We might also note that a literature exists on the border of these two fields that examines how domestic legal institutions influence state's compliance with their domestic and international legal obligations not to violate their citizens' rights (Davenport, 1996; Cross, 1999; Keith, 2002*a*; LaPorta et al., 2004)

thinking about our work as a part of a coherent theoretical literature. Our models may differ. The empirical tests surely will, as well. Nevertheless, we are asking the same theoretical questions. We develop this claim within the context of the literature on international human rights agreements and frame the discussion around two core questions in that field. What explains variation in states' adoption of international obligations that seemingly restrict their sovereignty? What explains variation in states' subsequent compliance with these commitments? We focus on these questions for three reasons. First, these questions and their corresponding answers are familiar enough that little background information should be necessary to build the argument. Second, scholars have increasingly highlighted the role domestic institutions (especially legal institutions) play in explaining ratification and compliance.

Third, and most importantly for our purposes, the third pillar of the assumed ontological distinction between domestic and international politics has yet to receive critical scrutiny, and we submit that the rational institutionalist research program forces us to investigate that pillar. Put simply, we should not assume that governments will faithfully implement whatever decision courts happen to produce, (and as we discuss below) even if these courts are free to author whatever decision they like. There are conditions under which judicial policy will be substantially altered by political officials, and worse, conditions under which it will simply be ignored. We highlight especially the latter concern, precisely because compliance is at the heart of the literatures in IO and judicial politics around which we have framed our discussion. In our view, it is important to recognize that compliance emerges as an outcome of political interaction. In a rational institutionalist account, whether or not scholars formally derive the conditions, compliant outcomes are products of equilibrium behavior. Governments comply with their domestic commitments when they confront the right set of incentives, precisely in the same way that states in the international system come into compliance with international law when incentives are right. Obviously, scholars

of domestic politics differ over exactly what kind of (mutually reinforcing) incentives induce robust compliance, but the key is that executives do not simply respect judicial decisions because domestic politics is hierarchical. Once this point is recognized, it becomes clear that international relations scholars and scholars of domestic judicial politics are really writing about the same theoretical processes. For this reason, they have much to learn from each other.

The remainder of the essay proceeds as follows. We first clarify why it is problematic to invoke "hierarchy" and assume that legal obligations are enforceable domestically. We then turn our attention to the literature on international human rights agreements and briefly describe why scholars in this literature have turned their attention to domestic legal institutions. Having identified the relevance of domestic legal institutions, we identify two features of the literature on judicial politics that might be profitably integrated with the international human rights literature. Specifically, we discuss research on the construction of judicial independence and the influence of legal doctrine on policy outcomes. In doing so we make our case that the study of the construction and allocation of power is at the center of both comparative and international politics, and more specifically, that the judicial and international human rights literatures have much to learn one from the other.

2 Anarchy and Hierarchy

The conventional contemporary quotation for erecting a wall between domestic and international politics can be found on p. 88 of Waltz (1979): "Domestic systems are centralized and hierarchical... International systems are decentralized and anarchic." This distinction hinges on the existence of governments in domestic polities and the absence of a government in the international system. As Wagner (2007, 123) puts it, "under government there is someone to enforce contracts and property rights and in anarchy there is not."

That the primary difference between domestic and international politics is the presence/absence of government is so deeply ingrained in IR scholars that it is rarely questioned (Lake, 2003*a*,*b*, is an obvious exception.). Indeed, this assumption is likely better understood as a "fact" undergirding *most* theories of international relations, not just Realist theories (Lake, 2003*a*, pp. 303-7).

In our view, this distinction is appropriate if what scholars mean to do is contrast [1] the absence of a third party to enforce contracts in international politics with [2] the presence of a third party to enforce *citizen-to-citizen* contracts in domestic politics. With respect to citizens violating their obligations to one another the hierarchy metaphor is apt and captures nicely the binding constraints that individuals confront when they live under the shadow of the state, at least relative to the constraints states face at the international level.[5]

But, the distinction breaks down when we turn our attention to the enforceability of state commitments themselves at the domestic level. Indeed, as *Publius* suggests in the *51st Federalist* and as Weingast reminds us in the modern era, a fundamental dilemma of institutional design concerns precisely what is assumed under the Waltzian distinction: Constructing a state that is powerful enough to enforce private obligations risks constructing a state that cannot be bound to its own promises (Madison, Hamilton and Jay, 1852; Weingast, 1995). The failure to resolve this dilemma can produce significant economic inefficiencies and undermine social order (North and Weingast, 1989; North, Summerhill and Weingast, 2001; Staton and Reenock, 2008). We grant that private contracting is carried out in the shadow of the state, but it is simply false that the Waltzian distinction between domestic and international politics holds when we evaluate the domestic enforceability of state obligations. In short, in the domestic context the state does not contract under the shadow

[5]We leave aside for the moment the possibility that states are simply unable, through diminished capacity or corruption, to enforce private contracts. This is, of course, a very real feature of the world, but focusing on the point only serves to further erode the Waltzian distinction. We should also note that this is the kind of anarchy problem Lake (2003*b*, pp. 84-5) seems to have in mind. That is, Lake highlights that the state itself only enjoys power via societal consent.

of anything. For this reason, theorists that wrestle with the domestic problems associated the enforceability of state obligations find themselves on precisely the same conceptual footing as theorists that tackle the problems that emerge out of anarchy in the international system.

Perhaps there is a way back to the Waltzian distinction precisely through the institutional argument North and Weingast develop. As is well-known, the North and Weingast solution to the fundamental dilemma requires government to make a credible commitment to respect rights, which requires that government have incentives to follow through with its promises and that these incentives are common knowledge.[6] That is, commitments are credible when they are self-enforcing. As North and Weingast suggest, one way by which commitments are rendered credible is through the development of a powerful, independent system of courts (North and Weingast, 1989, p. 13). Such courts induce credible commitments because they constitute genuine constraints on government behavior. So, if we can assume that a state has a powerful, independent judiciary, then perhaps the Waltzian distinction can by saved. In this sense, governments contract in the shadow of their judiciaries.

But here the *78th Federalist* injects another theoretical challenge to this line of argument. Lacking financial and violent means of coercion, judiciaries are uncommonly weak institutions that depend on outside political actors to implement their decisions (Madison, Hamilton and Jay, 1852). This is the fundamental problem of judicial policy-making. When the actor whose behavior is under review is the same actor responsible for implementation (i.e., the government), the problem is most acute. For this reason, it is not clear how courts come to constrain governments or even if they ever really do. In a variety of ways, this issue is at the center of the separation of powers (SoP) literature in law and political science. This literature identifies conditions under which courts should be more or less able to

[6]Strictly speaking North and Weingast focus on property rights, but their point is easily generalized to rights generally.

influence public policy outcomes in light of the legal measures available to elected officials (Ferejohn and Shipan, 1990; Spiller and Gely, 1992; Marks, 1989; Rogers, 2001) and the extralegal measures at their disposal, as well (Helmke, 2005; Vanberg, 2005). This scholarship strongly suggests that the Waltzian distinction is inapposite. The key implication is really quite simple: The fact of life that animates the literature on inter-state relations, that contractual obligations are not obviously enforceable, is the same fact of life that animates the literature on intra-state relations. On this account alone, there is a good reason to suspect that literatures in judicial politics and international relations are highly likely to inform each other in material ways.

3 Human Rights and Domestic Enforcement

To clarify this point, we now turn to the literature on international human rights agreements. We focus on two questions that have attracted much attention over the past decade. What explains variation in states' adoption of international obligations that seemingly restrict their sovereignty? What explains variation in states' subsequent compliance with these commitments?

As we suggested above, scholars in this field have come increasingly to look to domestic explanations for leverage (e.g., Hathaway, 2004; Von Stein, 2005; Hathaway, 2007; Simmons, 2007). The reason is that common theoretical explanations in international relations for the adoption of, and subsequent compliance with, international obligations do not explain well observed behavior in the human rights context. On one popular account, governments adopt international obligations in order to bind successors to normatively appealing policies (Moravcsik, 2003; Reinhardt, 2002). By "locking-in" preferred norms, treaties serve as a sort of insurance policy against future losses of power. A second common argument is that states adopt international obligations in order to signal commitments to particular policies

or to the international order itself (Simmons, 2000; Mansfield and Pevehouse, 2006). Adopting international norms, on these accounts, serves as a costly signal to interested parties. A third argument suggests that states only adopt new obligations when they are prepared to abide by them (Downs, Rocke and Barsoom, 1996). Finally, it has also been suggested states ratify human rights agreements because they reflect costless commitments - in so far as the enforcement mechanisms are largely ineffectual, there is nothing to lose through ratification (Hathaway, 2002).

The problem for the first three accounts is that states routinely violate their international human rights obligations (Forsythe, 2001, 55-80, Hathaway, 2002, Donnelly, 2003, 127-33, Hathaway, 2004; Hafner-Burton and Tsutsui, 2005). Indeed, seventy-eight percent of ratifiers of the *Convention Against Torture* violated the agreement *in the year of ratification* - forty-five percent of these states did so systematically (Powell and Staton, 2007). Popular theories struggle to explain this (Hathaway, 2004, 204-09). The Downs, Rocke and Barsoom argument, which was designed to better identify causal effects in an empirical context where states largely remained faithful to their obligations, obviously cannot help here. Turning to Moravcsik, if the lock-in argument anticipated subsequent non-compliance, it is unclear how a government sympathetic to the human rights regime would think that it was “locking-in" a policy, so the lock-in story fails, as well. Similarly, if the credible commitment argument anticipated subsequent non-compliance, it is unclear why ratification would constitute a credible signal of future behavior. At a minimum, these theories must predict that ratifying administrations will keep their international obligations, at least for a short period of time; and, we know that they do not. Finally, although the costless commitment argument can explain non-compliant behavior, it does not explain why some states place reservations on their ratification status and why others simply do not ratify. If compliance is costless, we should observe universal, unconditioned ratification. We do not.

From a rational institutionalist perspective this is not terribly difficult to explain. Ex-

tant theories of international treaty adoption and compliance were largely developed to explain economic agreements. Economic cooperation is a context in which we can identify gains from trade, and for this reason, international agreements promote (or at least describe) efficient patterns of behavior.[7] In the human rights context, in contrast, systematic compliance with international agreements may very well be inefficient. Are there collective gains for the contracting parties that derive out of Colombia respecting the human rights of Colombians while Nigeria respects the human rights of Nigerians?[8] It seems likely that an agreement in which Colombia and Nigeria are left to treat individuals under their control as they see fit might just be efficient (Moravcsik, 2003; Simmons, 2007). Thus, the very nature of the problem international agreements are set out to solve varies critically across economic and human rights contexts. For this reason, scholars have suggested that explanations of commitment and compliance should not look for reciprocal enforcement in the international system, but rather for enforcement at the domestic level (Hathaway, 2004; Goodliffe and Hawkins, 2006; Simmons, 2007). We share strongly this orientation toward domestic theories of commitment and compliance, and it is at that level that the opportunity to develop a robust interdisciplinary literature on human rights exists.

The first domestic institutional feature on which scholars focused was regime type. Rely-

[7]The difference between “promotion" and “description" here derives from a conceptual divide in rational choice institutionalism. While some institutional scholars take institutions as exogenous rules of the game (e.g. North, 1990; Shepsle, 1979), which are then used to help explain behaviors of interest, other scholars argue that institutions are endogenous to social interaction, and as such, they constitute targets of explanation and not just the analytical structures that channel human behavior (e.g Calvert, 1995). For this reason, an institutionalist in the former tradition might view an international agreement as a tool to promote cooperation, while an institutionalist in the latter tradition would likely see that arrangement as a description of an underlying understanding. We should note, however, that Diermeier and Krehbiel (2003) suggest that this divide is not theoretically useful. Theories of institutional emergence must incorporate a theory of how institutions will bind once adopted. Otherwise, it would be impossible for actors to know the consequences of the rules to which they were agreeing. Also, the endogenous institutional theory itself is comprised of higher order rules that restrict choices in a variety of ways, and so even an endogenous theory operates in the context of exogenous rules.

[8]That there are normative gains is quite obvious. That there are likely mutual gains for large numbers of individuals around the world is similarly transparent. We are asking whether the Colombian and Nigerian states gain as a consequence of one another’s compliance with their rights under a human rights treaty.

ing on empirical results suggesting that democracies largely keep their promises (e.g. Siverson and Emmons, 1991; Leeds, 1999), human rights scholars have suggested that democratic processes render ratification relatively costly for states, and as such, democracies should be careful about the agreements they adopt because they are more likely to comply with those agreements. It is useful to unpack this argument because it returns us to the Waltzian discussion above. As Von Stein (2005) suggests, democracies keep their promises for two reasons: 1) because constituents hold them to their commitments and 2) because even if they do not, domestic legal systems will provide enforcement. Davenport, Moore and Armstrong (2007), who suggest that democratic states under threat are no less likely than autocratic states under threat to engage in torture, raise a question about the plausibility of the first rationale for the democracy effect. However, for our current purposes, let us put that issue aside and focus on the legal system argument. As with the general democracy argument, the claim here is that governments that confront legal systems that enforce their international human rights commitments will be particularly careful about the kinds of agreements they ratify, precisely because they will ultimately comply with those agreements (e.g., Hathaway, 2004; Goodliffe and Hawkins, 2006).

Thus, we have come right back to the central distinction between international and domestic politics. Since international monitoring and enforcement mechanisms such as self reporting are largely toothless (Hathaway, 2002; Donnelly, 2003), the conceptual move in the human rights literature has been to find an institutional context in which obligations could be enforced (i.e. the domestic legal system). By doing so, scholars can identify the conditions under which ratification and subsequent compliance should be more or less costly. Of course, this move depends on the assumption that domestic legal institutions will actually enforce obligations. Thus, to ensure that this assumption is met, scholars have suggested that *judicial independence* is critical to the argument (Cross, 1999; Keith, 2002*b*; Hathaway, 2007; Simmons, 2007). The intuitive claim is that obligations will be enforced if courts are

independent. In as much as judicial independence matters to these IR arguments, and in so far as judicial independence is a major concern in judicial politics, these two groups of scholars really should be talking to one another. The question is whether the particular lessons of one literature might inform the other. We believe that they can. In the remainder of this essay, we address two kinds of lessons. First, we discuss the concept of judicial independence and theories about its construction. Second, we note that enforcement depends on much more than independence. Although there are a number of empirical frames through which we can develop the latter point, we will introduce the literature on legal doctrine, a literature that is experiencing a renaissance now and one that we believe bears importantly on the dynamics at interest in the human rights literature.

4 Judicial Independence

In this section, we make two straightforward points. In so far as the concept of judicial independence is perceived useful to the literature on the human rights regime, it will be helpful to clarify what exactly scholars mean. This is critical in so far as the conceptual definition we pick has different implications for the theoretical argument into which we want to plug judicial independence. Second, we wish to suggest that judicial independence, as we will define it, is constructed, and importantly there isn't consensus yet about how this process works. For this reason, judicial and IR scholars might profitably learn from each other about the process by which a court becomes a binding constraint on government. We will delineate two lines of theoretical inquiry, which we hope will help organize the field.

4.1 What do scholars mean by judicial independence?

While it is easy to locate measures of judicial independence in the human rights literature (e.g. Keith, 2002*b*), it is difficult to locate a broadly accepted conceptual definition. In some

cases, scholars simply invoke judicial independence but provide no definition at all (e.g. Hathaway, 2007). If there were complete consensus about the concept, this would not be a problem. Unfortunately, this is not the case (For examples see Burbank and Friedman, 2002). Because there are multiple concepts floating about the literature, it is not immediately clear what human rights scholars mean by independence. Of course, we can attempt to infer what authors have in mind from the way they write about it. We identify two primary versions of the concept.

Addressing the utility of litigation as a means of vindicating human rights, Simmons (2007, p. 22) notes

> One of the most important conditions for litigation to be a potentially useful strategy to enforce rights is judicial independence. For courts to play an important enforcement role, they must be at least somewhat independent from political control. The government or one of its agencies, representatives or allies is likely to be the defendant in rights cases, and unless local courts have the necessary insulation from politics, they are unlikely to agree to hear and even less likely to rule against their political benefactors. Anticipating futility, individuals or groups may decide to avoid the courts altogether.

It seems that the concept Simmons has in mind captures the extent to which a court is free from external political influence, such that the outputs of this court (i.e. its decisions) reflect the sincere evaluations of the judges sitting on it. In other words, as Kornhauser (2002) suggests, judges ought to be the "authors of their own decisions." As it turns out, judicial scholars commonly invoke this definition. For example, in a paper introducing a new, cross-national measure of judicial independence, Howard and Carey (2004, p. 286) define the concept as

> The extent to which a court may adjudicate free from institutional controls, in-

> centives, and impediments imposed or intimidated by force, money, or extralegal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside government.

Thus, under this concept, a court is independent when its decision process is free from external pressures, financial or otherwise. Although this is an accepted concept of independence, it is far from the only one, and it may not be what human rights scholars have in mind. For example, when writing about international mechanisms of enforcement, Hathaway (2007, p. 593) contends

> But this ignores a side of the legal enforcement of treaties that is at least as important as international enforcement - domestic legal enforcement. Every state is constrained to a greater or lesser extent by domestic legal and political institutions. How constrained it is depends on the degree to which those outside the government can enforce the state's legal commitments. Where powerful actors can hold the government to account, inter-national legal commitments are more meaningful.

Here the emphasis is on the capacity of domestic legal institutions to *enforce* obligations. Similarly, Keith (2002*a*) attempts to measure the extent to which judicial decisions are final, rather than subject to revision outside of the normal appeals process. This suggests a distinct concept of independence than that offered by Howard and Carey.

We would like to suggest that what many IR scholars have in mind here is the conceptualization of independence Cameron (2002) proposes. Following Dahl (1963) and Nagel (1975), Cameron provides a "power" definition of judicial independence. An actor is powerful if there is a causal relationship between her preferences and outcomes. Cameron writes, "In other words, an actor has power when a particular outcome is desired and causes that outcome to transpire. By extension, an actor (like a judge) has independence or autonomy

when he or she consistently has power over the relevant outcome" (p. 135). On this account, judicial independence is judicial power or influence.

Of course, we may be wrong about what IR scholars mean by independence. We would suggest, however, that Cameron's power conceptualization enjoys a conceptual advantage. This is especially true if scholars are concerned with whether courts constitute genuine constraints on state power, and as such materially influence ratification and compliance choices (Hathaway, 2007; Simmons, 2007). The reason is that the Cameron concept subsumes the Howard and Carey concept. If a judge's decisions are unduly influenced by external forces, then there will be no causal relationship between preferences and outcomes, so that a dependent court on the Howard and Carey account is a dependent court on the Cameron account. The advantage of the Cameron concept emerges when we consider what happens in the absence of undue external influences at the decision making stage. In such a scenario, the Howard and Carey concept would imply that a court is independent and as such it should meaningfully influence policy outcomes. Yet, a significant point of the judicial politics literature, indeed *the point* of the 78th Federalist, is that external actors can simply ignore judicial decisions, so that even if courts are free to sincerely resolve cases, the outcomes of these cases may not reflect their desires. And there is plenty of evidence from around the world of government non-compliance with adverse rulings. Under the ratification and compliance arguments, this matters dearly since a court that lacks power will not influence the behaviors of interest, even if its opinions are its own. For the remainder of this essay, unless we note otherwise, when we use the term "judicial independence" we are referring to Cameron's power conceptualization. For this reason, we will use independence and power interchangeably.

4.2 The construction of judicial power

It is not at all clear that courts will behave independently, even in highly democratic societies. Indeed, judicial scholars have demonstrated that even high courts as venerated as the contemporary United States Supreme Court and the General Federal Constitutional Court experience compliance problems (e.g. Kommers, 1997; Rosenberg, 1991; Spriggs, 1996), and their constitutional decisions can be explained by theories of inter-branch relations in which external political forces induce strategic judicial deference (Martin, 2006; Harvey and Friedman, 2006; Vanberg, 2001, 2005). Thus, even courts that are widely believed to constitute powerful constraints on state authority respond to political pressures and do not always authoritatively resolve the conflicts they adjudicate. Of course, this does not suggest that the United States Supreme Court is no more of a constraint than the Supreme Tribunal of Venezuela. Clearly, it is. The point is only that all courts are subject to some degree of pressure.

This discussion raises the following question: How is it that some courts constitute more binding constraints on their governments than others? Note that this question is important to ask when thinking about cross-case comparisons at one moment in time *and* temporal comparisons of the same case over time. A literature has developed in judicial politics that explores these questions. Yet, IR scholars of human rights seem largely unfamiliar with it.[9] And with the exception of Carrubba (2005) the judicial politics literature that takes the compliance problem seriously is paying little, if any, attention to the relevant work being done in IR. We briefly review this judicial politics literature, for the purpose of buttressing and elaborating our claim that among those of us working within the rational institutional research program both comparative and IR scholars are interested in the construction and allocation of power and are therefore working in the same literature. We find it useful

[9]We note that Alter (1998), an IR scholar of international judicial politics simply assumes away the compliance problem.

to distinguish exogenous theories that emphasize the importance of institutions and/or the behavior of non-judicial actors, and endogenous theories that focus on the strategic behavior of courts.

To introduce this distinction, we submit that a notable feature of the law and politics literature is that classic arguments about the emergence of independent judiciaries reflect traditional IR arguments about the adoption of international agreements. Just as Moravcsik (2003) suggests that human rights agreements are designed to lock-in preferred norms, Ginsburg (2003) and Gillman (2002) suggest that states (or parties) create independent judiciaries with constitutional review authority in order to lock-in the policy orientations of current ruling coalitions. Both arguments suggest that the respective institutions serve as "insurance" against losses of political power. Additionally, just as Simmons has argued that international agreements constitute credible signals of future behavior, Landes and Posner (1975) suggest that states construct independent judiciaries to signal to interest groups that current legislative deals will stick in the future. And of course the North and Weingast tradition suggests that independent judiciaries credibly commit the state to respect rights. But as with the traditional arguments in the human rights context, the classic arguments in the judicial independence literature struggle to explain the strategic deference and compliance problems we observe in courts around the world. If *independent* courts could simply be created by statute (as they are in these arguments), we would see universal compliance and influential courts in all places. Of course we do not. For this reason, scholars have sought alternative explanations for the emergence of independent courts. Some of those place the primary explanatory emphasis on rules or behavior that the courts cannot control; others place the explanatory emphasis on the decisions made by strategic courts. We review each in turn.

4.2.1 Exogenous Arguments

In exogenous models, independence is constructed by forces outside of judicial control. These conditions may be thought of as parameters of a theoretical model in the sense that judicial behavior responds to them, but judges have no control over the values that they take. The oldest argument of this sort suggests that rules that insulate judges from external pressure (e.g., life tenure, super-majoritarian removal institutions or independent budget authority) can induce independent judicial behavior. The intuitive version works like this: if governments do not have the tools to discipline courts, judges will behave independently and courts will constitute meaningful constraints on the state (The intellectual basis for this argument can be found in Madison, Hamilton and Jay, 1852; Montesquieu, 1752; Locke, 1965). This argument quite obviously assumes away the compliance problem and it is no small historical puzzle that *Publius* advances it on one hand while claiming that courts are not to be feared on another. Empirical tests of this argument have produced mixed results. Studies of judicial decision-making have not found formal institutional effects (e.g. Blasi and Cingranelli, 1996; Herron and Randazzo, 2003; Smithey and Ishiyama, 2002), though studies of rights outcomes measured at the country level have produced such effects (e.g. Cross, 1999; Keith, 2002*a*).

A second, related argument, which derives out of the SoP literature, is that the combination of multiple veto points and fragmented politics induces judicial independence by making it difficult for political authorities to coordinate on an appropriate response to unfavorable judicial decisions. As an example of this type of argument, consider a presidential system under divided government where mutual consent is required to discipline a high court for a particular decision and where no veto-proof majority exists. As long as partisans across the divide feel differently about a judicial decision, the court will be safe from attack. Indeed, under such circumstances, compliance itself is advanced because there will be allies in the elected branches – either the branch whose cooperation is required for implementa-

tion will favor the decision or the branch that is not required will pressure for compliance. Under unified government, this mechanism falls apart. This argument finds considerable support in the comparative literature on judicial politics (Smithey and Ishiyama, 2002; Ríos-Figueroa, 2007; Andrews and Montinola, 2004; Staton, 2006).

Despite the explanatory power of the SoP framework, it is nevertheless true that courts have challenged powerful political officials over salient issues even when the conditions that should have induced judicial constraint were met. This is especially likely when courts have cause to expect a considerable change in executive preferences. For example, Helmke (2005) notes that the Supreme Court of Argentina challenged the military junta even in *habeas corpus* cases in the early 1980s. Helmke argues that judges in the context of regime or government instability may begin ruling against sitting governments in a bid to save their positions after the pending transfer of power. Thus, even though current conditions suggest that courts should be deferential, the dynamics of regime transition can induce independence.

Finally, other scholars have argued that public support for judicial review itself can serve to induce judicial independence by incentivizing governments to accept unfavorable decisions (Weingast, 1997; Stephenson, 2004; Vanberg, 2001). It is important to recognize that this mechanism is not bound to democratic regimes, though this is largely where the argument has been developed. As long as the state responds to a particular set of individual, those individuals can create incentives for compliance (See Bruce Bueno de Mesquita et al., 2003, for a discussion of authoritarian constituencies). Still, since the argument has only been used in democratic settings, let us keep that frame. The simple logic of the idea is that if sufficient numbers of voters are unwilling to accept noncompliance and they are able to coordinate on a response, governments confront incentives to respect the rule of law even in response to a decision that is unpopular to the public on policy grounds. As Vanberg (2001) notes, however, this public support mechanism can only work if the cases that courts resolve

are sufficiently transparent. If the former condition does not hold, the mechanism will fail. If the latter does not hold, then it will be difficult to monitor non-compliance, and again the mechanism fails.

By our accounting then, there are at least four variants of exogenous accounts of cross-case and temporal variation in judicial power: institutions prevent executives and legislatures from disciplining courts; multiple veto players sufficiently fracture power that courts gain independence; expectations of future changes in government preferences and/or responsiveness to publics can produce independent behavior; and, finally, government responsiveness to publics can produce independence.

4.2.2 Endogenous arguments

Endogenous models of judicial independence suggest that judges themselves can influence their future authority. Staton (2006) builds on the exogenous public enforcement account and shows that high courts can engage in a variety of public relations activities to publicize decisions over which noncompliance is a potential problem, thus advancing the condition Vanberg raises. Although judicial power on this account continues to be limited in ways suggested by the SoP system (e.g. there will be some policies that are salient enough that the public backlash for non-compliance will be relatively trivial), clever judges can manipulate the limitations, and thus advance the conditions that can allow them to enhance their influence over public policy outcomes.

Other endogenous arguments suggest that by strategically resolving cases, courts can construct power. Ginsburg (2003) offers a representative argument. He suggests that nascent courts can follow John Marshall's template in *Marbury v. Madison* and attempt to build independence by refusing to challenge governments over salient policies, or at least by structuring their resolutions such that the serious policy implications are not felt in the short run. That is, they establish an important legal principle but they leave the *status*

quo policy alone in the particular case. Alter (1998) makes precisely the same argument about the European Court of Justice's early doctrinal choices, suggesting that this strategy works because judges have essentially longer time horizons than politicians. For that reason, politicians do not particularly care if their successors are constrained by the formal expansion of judicial power, which is exercised at some undefined moment in the future. They care about the present and in the present, the *status quo* is left untouched. It is, of course, unclear on Alter's account how it is that the legal principle that could not be exercised in the short run is turned into a binding constraint in the long run. Ginsburg provides a potential answer, suggesting that if courts generally follow this sort of strategy, the result is a sequence of decisions that are always obeyed. Over time, the argument goes, this sequence of compliance becomes convention. Once this is true, courts gain independence and can control policy outcomes that once induced strategic deference. In this way, old legal principles become binding constraints.

Although the Ginsburg argument is plausible, it is not clear how precisely the sequence of compliance over low salience policy losses is translated into a convention whereby government is expected to comply over all types of cases. Carrubba (2007) provides one answer to Ginsburg's puzzle, which links this type of argument to the public enforcement mechanism above. What Carrubba suggests is that by carefully structuring the kinds of decisions a court makes, by only challenging governments when removing the *status quo* policy is insufficiently costly and ultimately beneficial to the public, courts can convince people generally that adhering systematically to the rule of law is preferable to allowing government to disregard courts on occasion. Once the public comes to believe that this is true, judicial independence grows considerably.

We thus have three endogenous accounts that feature strategic judges constructing independence over time. These accounts focus on temporal change: they draw our attention to explaining how initially weak courts become strong (read independent) courts. These

models are manifestly of interest to students of international human rights and the debates in the literature about norms versus black letter law (e.g., see Forsythe, 2001, pp. 91-3). Further, these models make it clear that research on the efforts of international courts to gain independence is equally of interest to judicial politics scholars. Among other things, the empirical domain of the theories is considerably larger than these scholars seem to have recognized, and access to data is considerably stronger today than in the past.

4.3 Judicial Independence: Conclusions and Opportunities

We began this section by examining two major conceptual definitions of judicial independence. Rather than provide a comprehensive review of a considerable literature (Burbank and Friedman, 2002), we argue that Cameron's (2002) definition of independence as power is likely superior given the intellectual goals of the IR human rights literature, because it not only encompasses the Howard and Carey (2004) alternative of freedom from influence, it also gets directly at what most interests scholars working within that research program. By focusing our attention on the extent to which courts' decisions affect policy this definition leads us to study the construction and distribution of power. More explicitly, both the judicial politics literature and the international human rights literature are engaged in largely non-intersecting debates about the extent to which courts are able to check executive and/or legislative compliance.[10] Judicial independence, qua power, is a useful concept for helping one explore this question.

Having selected a useful conceptualization we observe that judicial independence varies both across cases (whether those are local, regional, or national jurisdictions) and over time within cases. Both of these points directly contradict the hierarchy/anarchy dichotomy, or third pillar, upon which rests the traditional distinction between the comparative and IR

[10]As we briefly noted above, the judicial literature conceptualizes compliance as the extent to which executives and/or legislatures comply with adverse rulings whereas the international human rights literature conceptualizes compliance as the extent to which states live up to the terms of treaties.

fields: domestic politics are not strictly hierarchical. To account for this variation the judicial politics literature has proposed a set of exogenous models and a set of endogenous ones.

IR scholars have yet to pay heed to this literature, and since IR arguments turn importantly on behavior under analysis in the judicial literature, we hope to have identified some reasons for paying attention to it. That said, prior to concluding we wish to suggest how the judicial politics literature might benefit greatly from the IR literature. A branch of judicial scholarship has considered the effect of activist networks on the proliferation of rights in a society (e.g., Epp, 1998). The idea in this literature is that independent courts are insufficient to expand the set of rights that states are willing to protect in practice. What matters is a network of legal activists (e.g. lawyers, interest groups, law professors, judges at all levels, etc.) willing and capable of influencing the kinds of cases that make it to court and the doctrinal choices that judges make over the meaning of rights. This literature may be of some use to the IR human rights community, as well, but we believe that the exciting opportunity here is that activist networks could plausibly constitute a central piece of an exogenous model of judicial independence. Recent events suggest that networks can play an important role in this process. Indeed, the continuing conflict in Pakistan over the President Pervez Musharraf's dismissal of the Supreme Court seems to be turning in important ways on what Epp would have identified as a legal rights network. Repeated protests from lawyers and judges, in conjunction with a new opposition political coalition, seems to be paving the way for the Court's reinstatement. Thus, we believe it is possible that independence is being constructed by activists.

This phenomenon is suggestive of the public enforcement mechanism for judicial power, but identifiable interests (i.e. activist lawyers) seem to be driving the process rather than the public in general. Importantly, the process by which interest groups influence power is a process IR scholars are familiar with (e.g., Finnemore and Sikkink, 1998; Ropp and Sikkink, 1999; Clark, 2001; Finnemore and Sikkink, 2005). For this reason, it seems clear

to us that judicial scholars may have much to learn from the IR community. Further, as we suggest below, this is one potential avenue where one might profitably think about the intersection of activist networks, their impact on legal doctrine, and temporal change in judicial independence.

Having made our case that the study of the development of judicial independence—within and across jurisdictions—is an important area of intersection that demonstrates some of what is to be gained by abandoning the traditional distinction between comparative and IR we turn our attention to a nascent area of inquiry in comparative judicial politics: legal doctrine.

5 Doctrine

In this section, we discuss the role of legal doctrine in judicial deliberation. Since international agreements require state parties to incorporate substantive terms into the domestic legal environment, the design calls upon domestic courts to enforce international obligations. This inevitably asks judges to evaluate whether policy choices violate fundamentally a state's legal obligations, and when judges engage in this sort of activity, they are guided by doctrine. Even without explicit incorporation of international norms, many rights at the heart of the international human rights regime are already a part of the domestic human rights infrastructure (e.g. gender equality, due process, voting rights, etc.). Importantly, doctrine is a feature of the domestic legal landscape that is capable of influencing human rights outcomes independently of judicial independence. Even if we assume a fully independent court in the Cameron sense, the extent to which human rights are vindicated domestically will depend on doctrinal choices.[11]

[11]A similar point, of course, could be made about many other features of the domestic legal system (e.g. accessibility and efficiency). Chief among these other relevant factors is ideology. A century of ink has been spilled in law and judicial politics over the effect of ideology on judicial decision-making (for an exhaustive list of studies, see Segal and Spaeth, 2002). The simple point is that the doctrinal structure of the domestic

5.1 What is Legal Doctrine?

In principle, judicial deliberation is carried out within the context of an institutional structure that, at a minimum, informs a judge about the kind of information that is relevant to a legal conclusion. Doctrine provides this structure by establishing guidelines for evaluating the validity of legal arguments. Questions such as “Does Statute X prohibit government from engaging in Behavior Y?" “Is Person A the correct person to ask this question or is it really Person B" are answered by appealing to doctrine. Put simply, doctrines are frameworks designed to guide judges in the resolution of legal questions (Tiller and Cross, 2006; Lax, 2007). That said, doctrines are rarely as clear as a grammar (e.g., Deutsch, English, Français, etc.) and certainly not as clear as a formal syntax (e.g., Algebra, C^{++}, Calculus, Geometry, Perl, Symbolic Logic, etc.). In other words, doctrine may be articulated more or less clearly and for this reason, its practical implications can be contested. As we describe briefly below, the contestable nature of doctrine has considerably influenced its standing as a concept in political science.

A common doctrinal distinction is often made between “rules" and “standards." Rules provide a relatively specific mapping between observable facts and the legal answer that these facts should compel. For example, a rule might say something like, “A statute that restricts written communication prior to publication is an invalid limitation on the right to free speech." Notice here that once it is demonstrated that the state has restricted the written word prior to publication (the relevant fact), the rule more or less determines the outcome (the policy is invalid). In contrast, a standard suggests a method for balancing facts against other facts. A standard might say something like, “A statute that restricts written communication prior to publication does not violate the right to free speech *if the goal of the limitation reflects a substantial state interest and no other less restrictive means of*

judiciary can undermine human rights goals (or advance them) even in the presence of a fully independent judiciary. We focus on doctrine because we anticipate that the concept will be more foreign to the IR community and thus more important to put on the table.

advancing this interest are available." Here, the standard merely gives the judge a guideline for balancing collective interests and individual interests in light of the empirical connection between the restriction and the state's interests.

Both rules and standards can be constructed in ways that make it more or less difficult for governments to violate rights. For example, consider a state policy that purportedly violates the right to freely exercise one's religion—say a dress code requirement for public employees that prohibits the wearing of clothing of a religious nature. Standards that require a showing of an unusually important collective interest or an extremely tight empirical relationship between the restriction and the interest being advanced make it more difficult for states to violate religious rights than standards with less strict elements. A bright line rule that prohibits all forms of restrictions on the free exercise of religion (without exception) would have a similar effect. For these reasons, doctrine can influence importantly the way that human rights are protected in a state, in principle at least.

Critically, the use of doctrine is not limited to common law states or even to the domestic level. To put a fine point on it, despite their varied legal traditions the European Court of Human Rights, the German Federal Constitutional Court, the Canadian Supreme Court, and the Israeli Supreme Court all use the "doctrine of proportionality" to evaluate state restrictions on fundamental rights (Barak, 2007; Jackson and Tushnet, 2006). Proportionality analysis of a public policy that restricts a fundamental liberty involves a three-step process, whereby the judge evaluates: 1) whether the means used by the state are legitimate, 2) whether the ends sought by the state are of significant value, and 3) whether the gains induced by the restriction are proportional to the losses. Only restrictions that survive these prongs are valid. Despite the shared use of proportionality analysis, the way that the doctrine is implemented across these courts is distinct. For example, when evaluating the second prong of the test, the Canadian Supreme Court asks whether the restriction is "sufficiently important to warrant overriding a constitutionally protected right of freedom,"

whereas the German Constitutional Court merely asks whether the restriction advances a "legitimate purpose," by which it means a purpose that is not otherwise prohibited by the Basic Law (Grimm, 2007). In this way, it is more difficult for a policy to satisfy the second prong in Canada than it is in Germany—two states that we would typically code as possessing relatively independent judiciaries.

Defining doctrine and suggesting how it might vary across states puts us in position to ask the key question: Does doctrine actually influences case outcomes? We now turn to that issue.

5.2 Does Doctrine Matter?

Legal scholarship is dominated, both in the United States and abroad, by doctrinal analysis. In some cases, this involves considering the appropriateness of particular doctrinal approaches in light of the legal challenges judges confront (e.g. Sunstein, 1996), but it often simply involves an effort to describe the doctrinal steps courts have taken. In whatever form, it is clear that legal scholarship is overwhelmingly doctrinal. And this makes sense. Doctrine is a core language of law. Yet, nearly a century ago legal realists questioned a critical empirical assumption supporting this research agenda: that legal doctrine has any influence on the outcomes of cases. Legal realists argued that the flexibility and multiplicity of doctrines afforded ideologically-driven judges the ability to pick favored doctrines or at least manipulate them to reach desired results.[12]

Over the last decade, however, scholars have provided evidence that doctrine matters. Two problems infected the analyses suggesting that doctrine was irrelevant. First, scholars were too focused on decision-making at the level of the highest appellate court and placed

[12]For a review of legal realism, see Duxbury (1995). By the 1990s, it would not be a stretch to claim that social scientists of law, those guided by the behavioral revolution at least, had effectively come to ignore doctrine altogether (but see Gillman, 2001). It was either irrelevant to judicial decision-making or not falsifiable (Segal and Spaeth, 2002).

nearly all energy on testing a highly strict notion of the doctrine of *stare decisis*. As empirical studies turned to the lower tiers of the judiciary, scholars uncovered doctrinal influences that could not be explained by judicial ideology (e.g. Cross, 2003). In addition, scholars have uncovered a powerful influence of substantive doctrines even on high and international courts. For example, Richards and Kritzer (2002) have demonstrated that justices on the United States Supreme Court weighed differently the importance of particular facts concerning restrictions on free speech prior to and after a major shift in 1st Amendment doctrine. Thus, what doctrine does on Richards and Kritzer's account is determine what sorts of facts should be considered in judicial deliberation.

Second, and in a completely different context, Skach (2008) has suggested that by adopting a fundamental misunderstanding of the empirical connection between the wearing of religious headscarves and the public order, European constitutional and human rights courts have unjustifiably restricted the freedom of religious exercise. Critical for our purposes here, Baldez, Epstein and Martin (2006) have shown that the varying standards judges use in gender discrimination cases have substantial effects on the probability that a woman successfully advances an equal protection claim. Unsurprisingly, the probability that a woman loses a suit against the state increases monotonically in the deference afforded to the state by the legal standard used. Surprisingly, this effect is substantial even controlling for judicial ideology's direct effect on the case outcome and its indirect effect on the choice of legal standard. To be clear here, more conservative courts are more likely to pick doctrines that afford higher deference to the state and they are less likely to support a woman's discrimination claim; however, even controlling for these influences, doctrine drives case outcomes in a substantial way. The literature is currently wrestling with questions about when doctrine should be more or less influential and whether the influence of doctrine is conditioned by ideological and external political factors. Nevertheless, we can conclude that the frameworks judges adopt to evaluate legal questions seem to influence their answers.

5.3 Doctrine: Implications and Opportunities

Note that whereas the endogenous models of judicial independence illuminated change over time consideration of doctrine strikes us as more likely to illuminate change across jurisdictions. At least that is where we believe the low hanging fruit lies: it strikes us as likely to be far easier to locate and establish—to the satisfaction of dubious readers—that the doctrine that is relevant across various national jurisdictions is different, and if one can show that different outcomes (perhaps ratification and/or compliance with human rights treaties) co-varies with such differences, then one has something of interest.

That said, we do not wish to close off the possibility of useful models of change over time in doctrine and similar change in policy outcomes. In fact, our initial speculation is that scholars are more likely to find such doctrinal impact in new areas of the law in established legal systems (international treaties might produce such innovation) and in new legal systems (such as those following dramatic changes in domestic political institutions).

Beyond these observations we see at least two additional fruitful avenues of investigation through which the IR and comparative judicial politics communities might engage each other on the issue of doctrine, both of which link back to the judicial independence concern. First, since there is evidence that doctrine influences the ways that judges evaluate legal questions and since doctrine varies across states, it seems that doctrinal differences might just influence the extent to which human rights are vindicated across states. In the language of the IR community, doctrine should affect states' compliance with international treaty obligations. In particular, states might be more likely to discriminate, to fail to provide due process, to restrict political rights, to exploit children, to violate physical integrity where courts are more deferential. For this reason, among states with relatively independent courts, doctrine might just matter a great deal to ratification choices for precisely the reason IR scholars invoke judicial independence—that is, doctrine influences the costs of ratification through its influence on the kinds of restrictions courts will place on government.

For judicial scholars, the international law of human rights offers a wonderful cross-national empirical context for investigating the influence of doctrine on case outcomes.[13] Additionally, scholars of comparative constitutional law have taken great interest in the diffusion of rights doctrine (e.g. Choudhry, 2006), and the attention IR scholars place on the role of non-state actors (e.g., Clark, 2001; Ron, Ramos and Rodgers, 2005) might be extremely useful here.

Second, consider the endogenous models of judicial independence summarized above. The claim in those models is that courts can develop independence over time through careful patterns of decision-making (Alter, 1998, e.g.). Newly constructed or newly empowered international courts (e.g., the International Criminal Court or the European Court of Human Rights) present excellent opportunities to evaluate how a nascent court goes about building influence. Of course, as Ginsburg (2003) suggests, if this argument is correct, we will see the strategic pattern of deference take shape in the doctrine judges use to guide their work. Along these lines, Staton and Vanberg (N.d.) suggest that courts can manipulate their doctrinal language in order to address compliance problems and inherent uncertainties about the relationship between judicial decisions and the policy outcomes courts desire. The human rights context, where compliance is clearly a problem and where courts may be genuinely uncertain about the effects of decisions on policy outcomes, is again an excellent context to test a model of this sort.

6 Conclusion

The false claim about an ontological distinction between domestic and international politics has limited our ability to see similar processes at work in both domestic and international politics, but a growing group of scholars working in the rational institutionalist research

[13] As the low hanging fruit is picked, expansion of the agenda to exploring the impact of temporal change will become more feasible.

program have been recognizing similarities. The last pillar of that false ontology is, we submit, the belief that domestic hierarchy and international anarchy fundamentally shape the extent to which legal institutions can regulate political relations in each domain. As we remove the unnecessary assumption that domestic and international politics are fundamentally distinct domains with their own causal processes we create exciting opportunities for the growth of each field (Lake, 2003*a*,*b*; Milner, 2005). In this essay we have illustrated that claim by arguing that scholars of international organizations and scholars of judicial politics are asking fundamentally similar questions.

More specifically, in the human rights context the emerging literature on compliance is pointing toward a domestic enforcement dynamic. In so far as this is true, it is not just that the questions we are asking are merely similar. Rather, the answers that scholars in one field have direct implications for the answers that scholars are giving in the other. We have spent considerable time here developing a case for why these literatures might engage each other, and we admit that we have placed considerable weight on the relevance of judicial politics scholarship for the scholarship carried out in the IR human rights field. We have highlighted a need to clarify concepts of judicial independence and suggested a conceptual orientation that we believe can be highly useful in light of the theoretical aims in human rights work. We also suggested that scholars might consider the role doctrine plays in constraining the state as an alternative factor in anticipating the potential costs of ratification and compliance (a special case actually of a general point about paying attention to judicial behavior).

Nevertheless, we have also tried to underscore opportunities for judicial scholars to learn about the questions that animate their work by engaging the human rights world. In particular, we have suggested the IR literature's careful attention to non-governmental organizations and their impact on power can provide valuable insight into how domestic courts gain authority. Alter (1998) and Mattli and Slaughter (2003) have both suggested that in-

ternational courts can gain authority through the support of a network of domestic legal actors (including national high courts). It is entirely possible that domestic courts might gain authority through an international network of legal actors. In addition to the Pakastani example, the experience of the Chilean judiciary in the wake of the Pinochet extradition battle in the United Kingdom is another possible example of how international forces induce domestic judicial independence.

Most importantly, we hope to have suggested that both literatures might tackle the same questions together. Indeed, the review of judicial independence models suggest a wide array of theoretical arguments. Given the need to explain the emergence of independent judiciaries that can credibly bind the behavior of governments *in equilibrium* these arguments should be cast such that they can explain the behavior of both domestic and international courts. For this reason, if we are interested in the extent to which legal institutions bind state authority, it does not matter fundamentally whether we were trained originally in international relations, comparative politics or American politics. We have the theoretical tools necessary to answer our questions. And by conceptualizing the empirical scope of our projects differently we might just learn more about what interests us.

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