Judicial Power in Domestic and International Politics*

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Abstract

Although scholars have made considerable progress on a number of important research questions by relaxing assumptions commonly used to divide political science into subfields, rigid boundaries remain in some contexts. In this essay, we suggest that the assumption that international politics is characterized by anarchy whereas domestic politics is characterized by hierarchy continues to divide research on the conditions under which governments are constrained by courts, international or domestic. We contend that we will learn more about this process, and do so more quickly, if we relax the assumption and recognize the substantial similarities between domestic and international research on this question. In making this argument, we review four recent books that highlight contemporary theories of the extent to which domestic and international law binds states are bound by law, and discuss whether a rigid boundary between international and domestic scholarship can be sustained on either theoretical or empirical grounds.

Alter, Karen J. 2009. *The European Court's Political Power: Selected Essays.* Oxford: Oxford University Press.

Guzman, Andrew T. 2008. *How International Law Works: A Rational Choice Theory.* Oxford: Oxford University Press.

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*, Cambridge: Cambridge University Press.

Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany*, Cambridge: Cambridge University Press.

1 Introduction

For some time now, scholars have been arguing that common analytical distinctions drawn between the study of domestic and international politics are misplaced. Indeed, Helen Milner[1] begins a recent essay in *International Organization* by quoting Wolfram Hanrieder who, writing in 1968, colorfully describes the self-imposed conceptual prisons in which comparative politics and international relations scholars had confined themselves, rendering each deaf and mute to the work of the other.[2] Thirty seven years later Milner declares the locks shattered and the inmates liberated, at least among a relatively large group of scholars working in each field.[3]

The liberation, such as it was, resulted from the willingness of scholars to consider alternatives to three assumptions on which the separation between the two fields rested: 1) that states are unitary actors, 2) that states are the most (and often the only) important actors in the international system, and 3) that anarchy describes international politics while hierarchy describes domestic politics. Relaxing the first two assumptions presented a clear path

[1]Milner (2005)

[2]Hanrieder (1968).

[3]Indeed, David Lake most recently echoed this position in his 2010 Presidential Address to the International Studies Association (Lake, 2010).

toward analyzing how intra-state and non-state differences might influence the outcomes of international political phenomena, and in that way, invited work at the boundary of international and domestic politics. Yet, the rigid subfield division did not turn critically on the unitary actor and state-centric assumptions. Though it might be said that comparativists and international relations scholars can better engage each other by relaxing them, even if states are collectivities, and say, non-governmental organizations matter, if international politics are carried out under anarchy while domestic politics are carried out under hierarchy, then we are still talking about very different subjects of inquiry. For that reason, the series of conceptual challenges to the anarchy/hierarchy distinction, notably reflected in work by Milner and David Lake, raises even more significant questions about the usefulness of maintaining our traditional subfield boundaries.[4] If problems of anarchy have to be resolved at the domestic level, in largely the same way as they must be resolved in the international system, then it is unclear whether the division between the fields has anything more to do with the proper names of the actors. And if this is correct, then the lack of cross-fertilization will be particularly harmful.

We have learned a great deal about important questions by relaxing the assumptions Handreider, Lake, and Milner have questioned. The most prominent example of a blurring of distinctions between domestic and international politics involves models built on the assumption that politicians want to retain office. This assumption is widely adopted in the study of interstate conflict,[5] as well as the study of civil conflict.[6] The successful use of bar-

[4]Milner's essay "probe[s] the sharp dichotomy between domestic and international politics that is associated" with the assumption that anarchy is a fundamental feature of international politics (p. 68). She argues that the assumption is "degenerative, posing anomalies and inhibiting new insights by separating international politics too radically from other politics" (p. 68). Lake has more recently made a very similar point. First in the context of the mini-renaissance of sovereignty Lake (2003*a*, pp. 303-7), second in the context of theories of conflict, Lake (2003*b*, pp. 84-5), and third in IR generally Lake (2010). Lake argues that the conceptualization of anarchy/hierarchy as two values in a binary concept is harmful to inquiry in both domestic and international politics.

[5]See Smith (1996); Bueno de Mesquita et al. (2003); Clark (2003).

[6]See Mukherjee (2006); Tarar (2006).

gaining models of strategic interaction provide an even better illustration. Fearon launched a remarkably vibrant literature on interstate conflict with his essay on the value of such models,[7] and they feature equally prominently in the study of legislatures and policymaking.[8] Finally, as Milner observes, the focus on institutions (whether democracy v. autocracy or mechanisms such as audience costs) has led scholars of both domestic and international policy to reference one another's work.[9]

Despite this progress, it is not clear that Handreider's inmates have been fully liberated. There are a number of pockets of research, some quite extensive, in which one or more of the old assumptions continue to guide scholarship.[10] In this essay, we discuss research on the conditions under which courts come to meaningfully constrain governments from violating their international and domestic legal obligations. Specifically, we address whether, and if so why, courts (defined below) endowed with formal powers to review the actions of states come to constitute binding constraints on governments. We refer to this work as research on *judicial power*. In this context, the hierarchy/anarchy assumption suggests that international and domestic courts confront fundamentally different problems in the construction of their authority. We contend that they do not. For this reason, scholarship in this area can benefit considerably from bringing our subfields into a more direct dialogue.

Four recent books published by influential scholars tell us much about what we know—and more importantly, what we do not yet know—about how governments can be bound to their legal commitments by courts. Karen J. Alter's *The European Court's Political Power* collects a series of essays that extend and consolidate her theory of how the domestic social and political contexts of European countries have influenced the power of the European Court of Justice (ECJ).[11] Alter's primary idea is that the ECJ successfully leveraged the

[7] Fearon (1995).
[8] See Austen-Smith and Banks (1988); Groseclose and McCarty (2001).
[9] See, for example, the discussion in Rogowski (1999).
[10] For a discussion of several such pockets, see Lake (2010).
[11] Alter (2009).

power of domestic judiciaries to increase its own authority. Andrew T. Guzman's *How International Law Works* focuses on international law and describes how simple mechanisms of reputation, reciprocation and retaliation carried out by states against states render international obligations enforceable. States' varying interests in maintaining a reputation in the international system accounts for the conditions under which international law will bind them.[12] By extension, the power of international courts is limited to the boundaries defined by inter-state enforcement.

The other two books center on domestic courts as their objects of inquiry. Gretchen Helmke's *Courts under Constraints* seeks to understand why judges hand-picked by powerful executives aiming to eliminate constraints on their authority sometimes challenge their appointers, often over salient political controversies.[13] Helmke argues that government or regime instability can induce judges to defect from their appointers in an effort to keep their posts after a transition. Empirical tests of this argument are conducted on Latin American courts, especially the Supreme Court of Argentina. Georg Vanberg's *The Politics of Constitutional Review in Germany* considers how political battles between the judiciary and the executive can be mediated by the public. On Vanberg's argument, the power of courts depends on the transparency of the conflicts they resolve, which make it possible for public pressure for compliance to be brought to bear on potentially recalcitrant politicians.[14]

Together these books raise questions about the value of imposing a strict divide between research on judicial power in international and domestic politics. They also highlight the insularity of our subfields with respect to understanding judicial power. A standard approach of domestic judicial scholarship is to ignore work on power in international relations. Helmke's *Courts under Constraints* contains no discussion of the problems of power confronted by international courts, how the solution to those problems might inform her

[12]Guzman (2008).
[13]Helmke (2005).
[14]Vanberg (2005).

question, or how the argument around which her book turns might apply in the international context.[15] Vanberg's *The Politics of Constitutional Review in Germany* contains two paragraphs in the conclusion on the debate over the European Court of Justice's power, but it would be a stretch to claim that the international scholarship he discusses informs the book's central argument.[16] In so far as CP scholars make use of the IR literature, it is largely as a means of investigating the ways in which international law may be used to resolve domestic legal problems.[17] Research on international law and courts frequently takes the opposite approach, addressing how domestic judiciaries can be used by international courts to advance their goals. This is, in fact, the central theme of Alter's research, summarized in *The European Court's Political Power*.[18] Yet an even more familiar approach in international relations is to draw distinctions between the fundamental problems that international and domestic courts confront, and on those grounds, assume away the possibility that international courts are, or can become, more powerful than originally intended. This is the approach taken by Guzman in his *How International Law Works*.[19] In none of these ways do the lessons of power construction in one context inform or condition meaningfully our understanding of power in another. In each of these ways, scholars are uncritically, if sometimes only implicitly, accepting the anarchy/hierarchy assumption. We believe that there are good reasons to proceed differently.

Failing to recognize essential similarities between the problems international and domestic courts face as they attempt to constrain governments retards our progress in understanding judicial power. Empirically, it does so by unnecessarily limiting the set of courts on which scholars think to test their claims. Theoretically, it does so by obscuring critical research

[15]Helmke (2005). Quite obviously it would have been impossible for Helmke (or Vanberg for that matter) to cite the Alter and Guzman books we have selected. However, these books reflect recent work in a long line of scholarship, which pre-dated the Helmke volume.

[16]Vanberg (2005, pp.171-172)

[17]Maveety and Grosskopf (2004, p.465).

[18]Alter (2009). Also see the discussion in Burley and Mattli (1993, pp. 62-65).

[19]Guzman (2008).

questions. Most obviously, if legal hierarchy is constructed domestically, then it is reasonable to ask whether it can be constructed internationally. Yet if international legal hierarchy depends on its construction domestically, as much of the international judicial literature suggests, then understanding the processes by which domestic courts come to constrain governments is essential. Assuming that international courts will be powerful when domestic courts are powerful is an incomplete explanation. Relaxing the hierarchy/anarchy assumption also identifies puzzles in the literature on international judicial power, which require a revision to either our understanding of international law, domestic law or both.

Why should we care to understand judicial power? The constraining capacity of courts has immediate implications for our theories of why states comply or ignore domestic and international law. This is because courts are core pieces of the formal enforcement mechanisms for both international and domestic legal regimes. But for precisely this reason, understanding judicial power matters for our theories of political cooperation, as well. To be clear about this in the context of international relations, if we understand international judicial power better, we should understand better why states respect their international obligations and why they seek to bind themselves via cooperative international agreements in the first place.

1.1 Overview: The Road Ahead

Put most directly, we argue that scholars writing about judicial power at the domestic and international levels are, and should be, writing in one coherent literature. We can learn more from engaging each other's work seriously than from making use of untested assumptions about essential differences across levels. This can mean testing the predictions of theories developed in either literature on data typically reserved for the other, but it can also mean, and here we think lies the real advantage, building more general, internally consistent models, which could be applied to courts in the international or domestic systems. Recent scholarship

suggests that the literature may be moving in this direction. Indeed, Voeten's analysis of decision-making on the European Court of Human Rights provides a lucid example of the first approach,[20] whereas Carrubba's analysis of federal and international courts suggests how the latter approach might proceed.[21] This essay documents the theoretical and empirical justifications for continuing to move our literatures in this direction.

We first characterize the scope of our analysis by defining what we mean by a "court," and what we mean by "judicial power." We then develop our argument in three sections, framed around three types of reasonable objections, which if sustained, would certainly support a more rigid subfield boundary. The first objection is that international courts and domestic courts confront fundamentally different enforcement challenges. This is precisely the kind of claim that follows immediately from the anarchy/hierarchy distinction advanced in Guzman, among many, many others.[22] To evaluate it we consider the enforcement problem at the domestic level and suggest that international and domestic courts are subject to analytically identical challenges. In this section we put aside (only for the moment) questions of whether courts at both levels solve their enforcement problems in precisely the same way, or whether one level does a better job than the other. The key implication of the section is that if there are reasons to question the accuracy of the anarchy/hierarchy distinction, we should only continue to use it to sustain a rigid subfield boundary if we gain some sort of theoretical or empirical leverage by doing so.

A second plausible objection is that the theories scholars have proposed as explanations of judicial power are distinct across the international and domestic levels. If that is correct, then even if the courts on which we focus confront the same enforcement challenges, the domestic—international subfield division can be rationalized by suggesting that power on these courts is constructed and maintained via different processes, and so cordoning-off one

[20] Voeten (2008).
[21] Carrubba (2009).
[22] Guzman (2008, p. 49). See, also, Waltz (1979) and the critical discussion in Milner (1991).

class of courts from another risks little in the way of empirical or theoretical innovation. Our primary aim in this section is to illuminate the near identical classes of theoretical models across the subfields. We do not claim that precisely the same arguments have been made. They have not. Nevertheless, while we will indicate unique features of the literatures, the bottom line is that the fields' fundamental commonalities suggest that there will be gains from a more direct dialogue.

The third challenge we consider is that the empirical propositions emerging from our theories receive different support across the international and domestic levels. We argue that the empirical evidence is inconsistent with this kind of claim in two ways. First, there is evidence of strong, related political effects at both levels. Second, we are not aware of any study that identifies the different causal effects of particular concepts across domestic and international courts. In part, as we will argue, this is because our fields do not yet have the data necessary to evaluate such claims. In the sense that we are studying similar phenomena, are guided by similar theoretical arguments, yet confront considerable empirical challenges associated with insufficient data, there is a real opportunity to pool resources across our fields in search of better data.

The objections to breaking down our subfield boundaries, which we consider, are general. They provide a useful framework within which we can consider more specific, potential distinctions between judicial power at the domestic and international levels, distinctions we address as we proceed. Nevertheless, certainly there are alternative ways of framing a discussion of research on international and domestic judicial power. Notably we do not frame our discussion around the rules that structure appointment, removal, jurisdiction, legal effects, and access, much less the substantive rules that govern the adjudicative process. Although we do not frame around these institutional features, their relevance emerges in our discussion of theories of power below. What is more, there is one institutional feature, which must be addressed from the start. In order to define the scope of our essay, we will

have to say something about the nature of constitutional review across the levels, an issue that Stone Sweet[23] has addressed at some length. Specifically, we must address whether international and domestic courts are engaged in substantially similar activities when they are reviewing state actions in light of some higher law commitment (e.g. a constitution or an international agreement). In the end, the core point is that we can construct a near infinite set of similarities and differences between international and domestic courts, just as we could for any two entities. For this reason, it is not so much that there are no other dimensions of similarity and difference, which might be relevant to some research purpose. Instead, the question is whether the dimensions we have identified are useful to evaluating our discipline's effort to build a robust understanding of judicial power. Critically, the general distinctions around which we frame the essay reflect our sense of the grounds on which scholars commonly divide the subfields, so we are writing about issues that are profoundly material to the subfield boundary question.

The remainder of the essay is divided into five sections. The first section defines key concepts. The next three sections develop our argument, in the order we have just described. The fifth section considers the implications of our argument for future scholarship. It describes three open theoretical questions in the study of judicial power, which we might pursue fruitfully together, and considers how understanding judicial power better can contribute to broader questions in international relations.

2 Concepts: Courts and Judicial Power

In this section we first identify the domain of inquiry by defining what courts we have in mind, and then we define the term judicial power.

[23] Stone Sweet (1999)

2.1 International and Domestic Courts

Our remarks most directly target scholarship on courts with the power to review the actions of states. The courts we have in mind at the domestic level are states' highest appellate courts with constitutional jurisdiction, or constitutional courts in the states that create them.[24] Internationally, we limit ourselves to what Romano calls international judicial bodies.[25] These are permanent tribunals, created by an international legal instrument, which resort to international law for the resolution of cases, use pre-existing rules of procedure that cannot be altered by the parties, and issue legally binding decisions. Romano divides them into five categories: general; international criminal law/humanitarian law; human rights; trade, commerce and investments; and regional economic and political integration.[26] Because of our focus on courts that have the authority to review states' contemporary actions we exclude the criminal tribunals established to prosecute abuses in the former Yugoslavia and Rwanda, but the other bodies in the Project on International Courts and Tribunals' Synoptic Chart fall within the scope of our discussion.[27] These bodies include, for example, the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Court, the World Trade Organization, and the Court of Justice of the African Union.

Of course, both international judicial bodies and domestic high courts with constitutional jurisdiction engage in a variety of activities, some of which have nothing to do with evaluating the behavior of states with respect to limits on their power. The scope of our claims are limited to constitutional review. We follow Stone Sweet[28] who considers a constitution to be "a body of metanorms, [or] rules that specify how legal norms are to be produced, applied and

[24] Ginsburg (2003).
[25] Romano (1999, pp. 713-14).
[26] See the Project on International Courts and Tribunals' Synoptic Chart for a listing of the bodies that meet this definition (Romano, 2004).
[27] Romano (2004).
[28] Stone Sweet (1994, p. 444).

interpreted." In so far as international judicial bodies evaluate the actions of governments subject to international metanorms, which limit governmental power, they are engaged in constitutional review. It is in this sense that Alter refers to the ECJ as "a constitutional court for Europe in all but name."[29]

2.2 Judicial Power

Judicial power is a concept that is similar to, but distinguishable from, several similar concepts that are often discussed in the literature: "judicial autonomy," "judicial effectiveness," and "judicial independence." The four books that motivate our essay exhibit a broad array of conceptual usage, ranging from a lack of interest in precise definitions (Helmke, 2005), to varied positions on the importance of studying effectiveness (Guzman, 2008 and Vanberg, 2005, respectively), through use of all of the terms as effective synonyms (Alter, 2009). We submit that useful analytic distinctions can be drawn among theses terms and do so here. Our objective is not to establish definitive denotations for each, but instead to precisely specify our usage and then, below, make a case for how these distinctions can assist us to more quickly make progress mapping unknown terrain with respect to the construction of judicial power.

We begin with "independence" because, though it has no consensus definition[30] most definitions can be divided into one of two groups: those that emphasize "judicial autonomy" and those that focus upon "judicial effectiveness."[31] Briefly, "autonomy" refers to judges' ability to develop their opinions independent of the preferences of other political actors. "Effectiveness," on the other hand, refers to the extent to which courts can compel the state

[29] Alter (2009, p.6). The same interpretation, for a wider set of international judicial bodies is given by Stone Sweet (1999, p. 631).

[30] For a review of concepts, see Burbank and Friedman (2002).

[31] We focus on *de facto* concepts of judicial independence. Posner and Yoo (2005, p. 7) invoke a *de jure* concept, where judicial independence is a set of legal institutions, which are assumed to influence particular kinds of behavior. We discuss some of these well-known institutions (e.g. appointment and removal rules) in the section on theories of judicial power.

to comply with adverse decisions. We elaborate on each, and then use the discussion to define "power."

Addressing litigation as a means of vindicating human rights, Simmons 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.[32]

The independence concept Simmons has in mind captures the extent to which a court is free from external political influence, such that the outputs of the court (i.e., its decisions) reflect the sincere evaluations of the judges sitting on it. Similarly, Howard and Carey define judicial independence as

> The extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force, money, or extralegal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside government.[33]

As with Simmons, independent judges for Howard and Carey are those who issue decisions that reflect their sincere preferences. As Kornhauser suggests, judges ought to be the "authors of their own decisions."[34] For us, the property that this definition of independence reflects is "autonomy." The more a court's decisions reflect that court's sincere evaluation of

[32]Simmons (2009, p. 132).
[33]Howard and Carey (2004, p. 286).
[34]Kornhauser (2002).

the legal questions presented to it, irrespective of external pressures, the more autonomous it is.

Although many conceptualizations of independence emphasize autonomy, others draw our attention to effectiveness. For example, when writing about the enforcement of human rights commitments, Hathaway contends

> 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.[35]

Here the emphasis is on the capacity to *enforce* obligations. Similarly, Keith's effort centers on the extent to which judicial decisions are final, rather than subject to revision outside of the normal appeals process.[36] Only courts for which this is true can be considered independent. Following Helfer and Slaughter, we denote the property that this definition of independence reflects as "effectiveness."[37] The greater a court's ability to compel parties to implement judicial decisions with which they do not agree the more effective it is.[38]

With that background we can now define "judicial power" as a two dimensional concept that is greater the greater the level of autonomy *and* effectiveness that court possesses. That is, we define a court as "powerful" if it is both autonomous and effective. An autonomous court that is not effective borders on being irrelevant to political outcomes: it makes sincere decisions that are then ignored. Similarly, in the extreme, a court that is not autonomous may appear effective, but is in fact either a lackey doing others' bidding or engaging in

[35]Hathaway (2007, p. 593).
[36]Keith (2002).
[37]Helfer and Slaughter (1997).
[38]Effectiveness in this sense is closer to the way in which Raustiala and Slaughter (2001, p.539) define compliance, though the critical distinction is that a court may only be considered effective if it is capable of compelling compliance when a party would rather defy a resolution.

strategic prudence to the same effect. To exercise power a court must both be able to rule free from outside influence *and* have that ruling obeyed by the state, regardless of whether the state approves or disapproves of the decision.

3 The Domestic Enforcement Problem

The primary rationale for maintaining a strict division between research on international and domestic judicial power is that international and domestic politics are themselves fundamentally distinct. As Waltz suggests, international politics are anarchic, while domestic politics are hierarchical.[39] This distinction hinges on the existence of governments in domestic polities and the absence of a government in the international system. As Wagner puts it, "under government there is someone to enforce contracts and property rights and in anarchy there is not."[40]

In the context of judicial research, the anarchy/hierarchy assumption supports the belief that international and domestic courts confront fundamentally different problems of enforcement. Guzman offers a representative statement.

> The critical difference between domestic and international courts is that the former are backed by the state and a system of coercive enforcement... A party who refused to comply with her obligations can be forced to do so or to pay damages... International tribunals lack this ability to summon coercive enforcement...[41]

In her work on the ECJ, Alter expresses similar confidence in the ability of domestic courts to enforce their rulings, writing:

[39] Waltz (1979, p.88).
[40] Wagner (2007, 123).
[41] Guzman (2008, p. 49). Similarly, Mitchell and Powell (2009, p. 100) argue that "International courts do have not the same types of enforcement mechanisms as domestic courts..."

> While national governments appeared to be willing to ignore ECJ jurisprudence, ignoring their own courts was a different matter entirely. Citizens might trust their government when it says that an international tribunal's ruling is unsound, and they may actually prefer having national interests take precedence over an international obligation. But few governments want to claim a right to ignore their own courts, and few citizens want their governments to have such a right.[42]

On both accounts, the difference between international and domestic politics is stark. International courts confront serious challenges to their effectiveness, whereas domestic courts do not.

In our view, this distinction is highly 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 contract under the shadow of the state, at least relative to the constraints states face at the international level.

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.[43] Although we may grant without much

[42] Alter (2001, pp.219-220). It is worth stressing that Alter does express a position in other work that it will be inappropriate to assume that domestic courts will influence meaningfully political behavior in all contexts (see for example, Alter, 2009, p.134). Nevertheless, even when limiting her account of international judicial power to domestic contexts characterized by the rule of law, Alter does not evaluate explicitly how rule of law characteristics, like judicial power, are constructed.

[43] Hamilton, Madison, and Jay (2009); Weingast (1995).

harm that domestic, private contracting is carried out under the shadow of the state, carrying the assumption to the enforceability of state promises is deeply problematic. In the domestic context the state does not contract under the shadow of anything. For this reason, theorists that wrestle with the domestic problems associated with the enforceability of state obligations find themselves on precisely the same conceptual footing as theorists who tackle problems that emerge out of anarchy in the international system.

Perhaps there is a way back to the Waltzian distinction in our context 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 has incentives to follow through with its promises and that these incentives are common knowledge.[44] 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 an autonomous and effective system of courts.[45] Such courts induce credible commitments because they constitute genuine constraints on government behavior. If we can assume that a state has a powerful 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. Lacking financial and violent means of coercion, judiciaries are uncommonly weak institutions that depend on outside political actors to implement their decisions.[46] This is a 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

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

[45]North and Weingast (1989, p. 13). See, also, the critique in Stasavage (2002).

[46]Hamilton, Madison, and Jay (2009).

do.

In a variety of ways, this issue is at the center of the separation of powers (SoP) literature in law and social science, within which Helmke and Vanberg write.[47] Though we will have more to say about particulars below, it is enough here to note that identifying the ways in which domestic judiciaries might come to constrain the state is the central contribution of each book. Domestic legal hierarchy, on their accounts, is constructed in both Argentina and Germany. Of course, we might be tempted to dismiss Helmke's analysis of the Argentine Supreme Court as being driven by her selection of an authoritarian, or at best a transitioning, state. However, Vanberg's analysis of the German Constitutional Court cannot be rejected on those grounds. Moreover, the essential point of the larger SoP literature, much of which conducted on the Supreme Court of the United States, is that courts should be able to influence public policy outcomes only under certain, politically constructed conditions.[48] This scholarship strongly suggests that the Waltzian distinction is in-apposite. The key implication is really quite simple: The essential problem that animates the literature on inter-state relations, that a state's legal obligations are not obviously enforceable, is the same problem that animates the literature on intra-state relations.

To summarize, the construction of judicial power, or otherwise put, the construction of hierarchy, is a generic problem for all courts empowered to review state actions. From a theoretical perspective to simply assume that domestic courts are powerful due to hierarchy and that international courts have little power due to anarchy is to assume an answer to key questions. Why do governments delegate formal powers to courts? Why do governments only sometimes comply with their obligations to respect decisions of the courts to which they have delegated power? Why does the power of some courts seem to expand over time, while the power of other courts contract? Variation in judicial power across courts should be an

[47] Helmke (2005); Vanberg (2005).

[48] See Martin (2006) for the basic SoP logic and citations to related scholarship

important object of inquiry, not something about which we assume an answer. The domestic SoP literature represented by Helmke and Vanberg embraces this view, but proceeds largely without incorporating the lessons of international courts.[49] Guzman explicitly invokes the assumption we are challenging. As noted above, Alter appears to be moving from the Guzman position toward that represented in Helmke and Vanberg, but as we shall see, Alter stops far short of a serious engagement with existing theory of domestic power.[50]

4 Explanations of Judicial Power in International and Domestic Judicial Politics

In this section we review central theoretical approaches in both the international and domestic literatures on judicial power, noting that the fields are providing very similar arguments. The purpose of this discussion is to put to rest a concern that the two fields are simply too conceptually distinct to support meaningful cross-fertilization. We discuss three major theoretical accounts of judicial power, each of which is represented in the four books featured here, and demonstrate that scholars studying both domestic and international courts are asking the same types of questions and proposing theories that highlight similar causal mechanisms.

4.1 Delegation-Centered Arguments

Scholars of both domestic and international courts have isolated the process by which states delegate judicial review as important to understanding whether those courts are, or become, autonomous from, and effective vis-à-vis, the states that delegate that authority. On these accounts, judicial power is essentially constructed by institutional design.

[49] Helmke (2005); Vanberg (2005).
[50] Guzman (2008); Alter (2001, 2009).

In the domestic literature, for example, Landes and Posner suggest that legislators construct independent judiciaries in order to more credibly signal to interest groups that current legislative deals will stick in the future.[51] As discussed above, the influential North and Weingast tradition suggests that powerful judiciaries credibly commit states to respect property rights, and by so doing ensure the financial stability of the state and drive economic growth.[52] Moustafa has even argued that authoritarian states permit courts to exercise a significant measure of control over human rights issues in order to communicate to foreign and domestic investors a commitment to property rights.[53]

A very similar argument in IR suggests that states adopt international obligations, and presumably delegate authority to judicial bodies empowered to enforce these agreements, in order to signal commitments to particular policies or to the international order itself.[54] Just as Landes and Posner or North and Weingast or Moustafa have argued that the delegation of power to domestic courts induces credible domestic commitments, Alter suggests that the delegation of power to international courts, like the ECJ induce the credibility of state promises to their international obligations.[55] On these accounts, the central logic of delegation that induces powerful courts is one of ensuring that promises will be perceived as credible.

In contrast to the credible commitment logic of delegation, other scholars have argued that powerful courts are constructed during periods of political uncertainty in order to insulate current political majorities, or their policies, from being undermined by current minorities in the event of a government transition. Both Ginsburg and Finkel argue that domestic actors delegate or expand constitutional review authority to courts in order to provide insurance against possible future losses of power, essentially locking-in their current

[51] Landes and Posner (1975).
[52] North and Weingast (1989).
[53] Moustafa (2007).
[54] Alter (2009); Simmons (2000); Mansfield and Pevehouse (2006).
[55] Alter (p. 242 2009).

policy initiatives.[56] This "lock-in" logic is familiar to students of international relations, where scholars have argued that legal regimes are developed in order to insulate current, newly won domestic democratic norms during periods of political uncertainty.[57] On these accounts, judicial power emerges by design yet is aimed at insulating the interests of current political coalitions from the vagaries of democratic turnover.

A final delegation logic centers on information. IR scholars have argued in various ways that international courts should be conceptualized as "agents" of contracting states in the international system, and that their primary role is to help uncover hidden information about whether states are behaving consistently with their obligations.[58] Guzman, in fact, envisions two, not necessarily mutually exclusive, informational roles for international courts. The first is to clarify the meaning of international obligations. The second, as we have just suggested, is to identify violations.[59] On Guzman's account, international law is enforced endogenously via state-to-state relations and operates most effectively via the mechanism of reputation. International courts, when operating autonomously, can play a highly important role in maintaining the system of reputation. The important point is that, on these accounts, courts only exercise power in so far as their creators allow it. The constraint on autonomy operates via (re)appointment and removal institutions,[60] whereas the constraint on effectiveness operates via the implicit threat of non-compliance.[61]

Domestic scholars have similarly suggested that constitutional review can provide an important information-gathering function, essentially allowing governments to engage in more creative policy-making: powerful courts can set aside policies that turn out to be ineffective or ill-suited to the problems of the day, but which could not be reformed through

[56]Ginsburg (2003); Finkel (2008).
[57]Moravcsik (2003); Reinhardt (2002).
[58]Garrett and Weingast (1993); Carrubba (2005); Posner and Yoo (2005).
[59]See discussion on pages 51-54.
[60]Posner and Yoo (2005).
[61]Guzman (2008); Carrubba (2005).

the legislative process.[62] Although the precise mechanism is less about monitoring than reducing uncertainty about unknowable states of the world, a court's information provision role is central. Governments give up power in order to take advantage of the information judges can provide via *ex post* review.

In three kinds of ways, across both international and domestic levels, scholars suggest that judicial power is created by institutional design. That is not to say that the various arguments of this sort are wholly simpatico. Scholars of comparative politics continue to debate whether judicial reform is primarily about insulating parties from power transfer or about inducing credible commitments. And of course an interesting debate has emerged among IR scholars regarding whether delegation–centered accounts should be constructed within the principal–agency framework of neo-institutional economics, as in Garrett and Weingast or Posner and Yoo,[63] or within what Alter calls the "trustee" model.[64] On Alter's account we should conceive of international courts as "trustees" to whom states delegate enforcement authority as a means of rendering credible various promises to fulfill their international obligations, not as the constrained agents of contracting parties. International courts, in their role as trustees, can behave autonomously and can compel compliance, precisely because overt political influence on judicial decision-making or refusal to implement legally binding orders undermines the credibility of the promise, which was the entire reason for creating the court in the first place.

It is not our aim to attempt to resolve these important debates. Instead, the take away point is this: regardless of one's position on them, delegation–centered research on courts ought to be viewed as part of a larger theoretical literature than it is presently considered. It can be usefully understood as a debate about how courts at any level construct judicial power. This is important because it not only expands the empirical scope of the theory (i.e.,

[62] Rogers (2001).
[63] Garrett and Weingast (1993); Posner and Yoo (2005).
[64] Alter (2009, pp. 237-262).

that part of the world the theory seeks to explain), but it thereby necessarily expands the population of courts we ought to be studying empirically. One benefit of such an expansion of the population is an increase in the time that courts have existed. Judicial power is presumably not static (though a delegation–centered account might expect it to be sticky). And the ability to study courts over time could yield important insights. To summarize, a focus on the problem of how courts construct judicial power reveals commonalities in literatures that have traditionally been considered distinct.

4.2 External Political Arguments

Not all accounts of the variation in judicial power across different courts are centered upon institutional design at the moment of delegation. Indeed, many scholars have suggested that political conditions subsequent to institutional design condition the power that international and domestic courts exercise. These conditions are "external" in the sense that they are best conceptualized as exogenous to the choices that judges make—though judges may be influenced by them, they cannot, strictly speaking, control them.

The primary argument of this sort suggests that judicial power is politically determined—that power is a function of political context. On this kind of account, judicial power turns on the choices political coalitions (or leaders) make during the appointment process or in response to particular decisions. For example, Helfer and Slaughter draw on Steinberg to develop a "constrained independence" model for international courts.[65] They suggest that international court autonomy and effectiveness is affected by what they call *ex ante* and *ex post* tools of influence. Obvious *ex ante* tools include formal appointment institutions and procedural rules that limit jurisdiction. *Ex post* constraints include removal institutions and control over the judicial budget. Further, simple non-compliance can be conceptualized as an *ex post* tool, as can be global norms regarding the appropriate behavior of international

[65]Posner and Yoo (2005); Helfer and Slaughter (2005); Steinberg (2004).

judges.[66] These factors influence the size of the so-called judicial "strategic-space," which we take to define the boundaries of the court's power.[67]

Cavallaro and Brewer develop an external political model, in which the ability of international courts to effectively compel compliance depends upon media attention of and domestic public support for their decisions.[68] In the absence of support for the policies international court decisions imply, it is unlikely that international courts will meaningfully influence state behavior. But even if public support existed, if the media does not cover resolutions, it will be difficult to mobilize public opinion in support of the decision.

Domestic scholars have developed nearly identical theoretical arguments, yet there has been little cross-fertilization. The oldest argument of this sort focuses on institutions that should insulate judges from external pressure (e.g., life tenure, super-majoritarian removal institutions, or independent budget authority) and can thus induce autonomous judicial behavior.[69] This argument 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,[70] though studies of rights outcomes measured at the country level have uncovered such effects.[71]

Scholars writing in the literature on the separation of powers (SoP) in domestic legal

[66] Terris, Romano, and Swigart (2007); Mitchell and Powell (2009).

[67] Additional *ex ante* tools might include procedural or substantive rules that increase access to the judiciary or caseloads. In so far as judges care about having cases to resolve, such tools might be quite effective (Helfer and Slaughter, 1997, p. 301). Importantly although there are differences across levels, it is unclear how fundamental the differences are. For example, international judicial bodies like the ICR or the WTO limit standing to states, whereas individuals typically have access to their own constitutional courts. This is not true universally, though. Indeed, until a major reform in 2008, individuals had absolutely no direct access to the French Constitutional Council. See the discussion of French Constitutional Council in Stone Sweet (2000). More broadly, particular legal actions in the domestic context are often restricted to entities of the state. See the discussion in Navia and Ríos-Figueroa (2005).

[68] Cavallaro and Brewer (2008).

[69] The intellectual basis for this argument can be found in Hamilton, Madison, and Jay (2009); Montesquieu (1752); Locke (1965).

[70] See for example Herron and Randazzo (2003) and Smithey and Ishiyama (2002).

[71] For examples, see Cross (1999) and Keith (2002); Keith, Tate, and Poe (2009).

systems offer a second, related argument: the combination of multiple veto points and fragmented politics induces judicial autonomy by making it difficult for political authorities to coordinate on an appropriate response to unfavorable judicial decisions.[72] 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. Helmke notes that the Supreme Court of Argentina challenged the military junta even in *habeas corpus* cases in the early 1980s.[73] She argues that in the context of regime or government instability judges 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 greater autonomy, precisely because removal institutions create incentives for judges to take risks.

Finally, other students of domestic judiciaries have argued that public support for constitutional courts, which can derive from beliefs in procedural fairness and other norms of appropriate judicial behavior exercised by these courts,[74] or from beliefs that judges are more faithful agents of the public,[75] can serve to induce judicial power by incentivizing governments to accept unfavorable decisions.[76] The logic of this 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 notes, however, this public support

[72]See Ferejohn and Shipan (1990); Spiller and Gely (1992); Ríos-Figueroa (2007). Importantly, Cox and McCubbins (2001) and Stasavage (2002) have argued that the presence of multiple veto points is not sufficient to induce the credibility government may be seeking. In particular, if the holders of these points share government preferences, then although there may be a separation of powers, there will be no "separation of purpose."

[73]Helmke (2005).

[74]Gibson, Caldeira, and Baird (1998).

[75]Carrubba (2009); Stephenson (2004).

[76]Weingast (1997); Vanberg (2005). A more recent take on this account considers how policians can manipulate their superior information about public preferences in order to reduce judicial constraints on their power (Clark, 2011 (forthcoming).

mechanism can only work if the cases that courts resolve are sufficiently transparent.[77] Echoing Cavallaro and Brewer's identification of media attention, without transparency, it is not possible to monitor non-compliance. Consistent with these arguments, Staton argues that judges attempt to influence the transparency of their resolutions through public relations strategies, but critically, where judicial autonomy is compromised, greater transparency can threaten judicial power.[78]

As with the delegation–centered literature, there are considerable similarities among the arguments advanced by students of domestic and international courts. Scholars have emphasized the impact of divided governments on judicial power, and though the argument is more strongly developed among students of domestic courts, Cavallaro and Brewer's recent study of the Inter-American Court on Human Rights (IACHR) also emphasizes the importance of the mobilization of public support to pressure governments to respect courts' decisions.[79] The take-away point remains the same. What divides our literatures is less about the general problems that domestic and international courts confront, and more about the very particular ways in which we theorize about judicial power.

4.3 Judge-Centered Arguments

A third type of argument that can explain variation in judicial power across courts centers attention on judges and considers how they might influence the parameters that external theories of judicial power believe matter so dearly. Again, we see similar mechanisms being emphasized in the literatures on international and domestic courts. In IR two arguments take prominence: strategic partnering with powerful domestic courts,[80] and courting legal activists.[81] A venerable literature on public interest law laid the foundation for the latter of

[77] Vanberg (2005, pp.19-60).
[78] Staton (2010)
[79] Cavallaro and Brewer (2008).
[80] As again we know to be the case in Alter (2009, Chapter 5).
[81] See Harlow and Rawlings (1992); Simmons (2009).

these two arguments,[82] and a more recent literature on domestic courts emphasizes judges who build power over time via strategic prudence.[83] The argument about strategic judges has been echoed recently by Terris and colleagues as well as Cavallaro and Brewer's recent study.[84] Yet, the cross-fertilization is less than would be the case if these scholars thought of themselves as working in the same literature.[85]

Again, consider Alter, who develops further Burley and Mattli's argument that the ECJ was able to build what we call power by forming partnerships with domestic courts throughout the region.[86] Reflecting existing arguments, Alter suggests that the ECJ invited domestic courts to become active enforcers of European law by ruling that, in certain circumstances, the Treaty of Rome created individual legal rights for European citizens and that European law was supreme even to domestic law changed after ratification.[87] Of course, such doctrines would only be meaningful if domestic courts were willing to make use of them and presumably if domestic political actors were willing to accept such a change in the nature of the community. Addressing the first concern, Alter suggests that competition among domestic courts provided an incentive for lower court judges to make use of ECJ jurisprudence inviting them to refer directly questions of European law to the ECJ. The gradual process of requesting ECJ opinions on matters of European law as they arose in ordinary law suits eventually resulted in the ECJ interpretation of community commitments becoming supreme. The core theoretical problem, of course, is, why would domestic political actors allow this to happen. Here, Alter argues that European politicians acceded largely because judges have longer time

[82] See Vose (1957, 1958); Caldeira and Wright (1988, 1990).

[83] See Ginsburg (2003); Carrubba (2009).

[84] Terris, Romano, and Swigart (2007, chapters 4 and 5), Cavallaro and Brewer (2008).

[85] As an example, Terris, et al. (2007, p. 103) argue that the "International judges... face somewhat different problems from their national peers. Unlike national judges, international judges do not inherit courts of law; they need to build them." While some of their point involves administrative capacity, they are also referring to what we are calling judicial power. We doubt that justices in contemporary Pakistan, Venezuela, or Zimbabwe (or many other countries) would agree that they inherited powerful courts.

[86] (Alter, 2009, pp. 92-136).

[87] Together, these are known as the doctrines of *direct effect* and *supremacy*.

horizons than politicians: the former focused on decisions that would provide autonomy and effectiveness in the long run while not threatening the latter's short-run electoral interests.

The ECJ accomplished this second task via a clever, and yet ultimately familiar domestic doctrinal strategy. As Hartley writes,"A common tactic is to introduce a new doctrine gradually: in the first case that comes before, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established."[88] The idea, as Alter suggests, is to "build doctrinal precedent without arousing political concerns."[89] Of course, domestic scholars also have proposed that judges have some measure of control over their power. Ginsburg offers a representative argument. He suggests that nascent courts frequently follow John Marshall's template in *Marbury v. Madison* and attempt to build power by establishing legal principles, which can lead to a significant expansion in power over the long-run, but which do not impose short-run costs on ruling coalitions, thus producing a stream of compliant choices from the political branches.[90] Over time, the argument goes, this sequence of compliance becomes convention. In this way, old legal principles become binding constraints. Carrubba (2009) suggests that the reason such a stream of results can evolve into a norm of general compliance is that courts only challenge governments when the implementation of their decision would be net beneficial for the public generally. For this reason, over time, people can begin to believe that systematic judicial control over fundamental legal principles is preferable to allowing their representatives to ignore certain kinds of decisions.

The second thrust within this literature argues that judges are able to construct power by anticipating the impact of their decisions upon networks of interest groups and potential litigants. In the European context, this kind of argument has been advanced most clearly by

[88]Alter (As quoted in 2009, p.119)
[89]Alter (2009, p.119)
[90]Ginsburg (2003).

Cichowski.[91] The domestic public interest law literature emphasizes the impact of litigants who use courts to empower groups rather than individuals or corporations. The United States, with its *amicus* briefs and class action suits, is the quintessential case, and much of this literature developed to explain the impact of US groups such as the American Civil Liberties Union and the National Association for the Advancement of Colored People.[92] Shapiro, and especially Harlow and Rawlings, document how judges in domestic courts outside of the United States also consider how their rulings can empower groups, and that interest groups recognize this and forum shop among courts and legislatures in their effort to change public policy.[93] Indeed, Epp has argued that courts have little capacity to impact social change absent an active, well-organized network of legal activists ready to take advantage of expansive doctrine.[94]

In addition to documenting the considerable history of public interest law in the UK, Harlow and Rawlings also dedicate a chapter to European judges' strategic public interest decision making in international law.[95] Terris and colleagues and Cavallaro and Brewer make similar arguments.[96] The latter, in particular, emphasize the care that IACHR justices have taken to determine which cases to hear. That issue is surely an understudied area: these arguments suggest that whether courts have control of their docket would strongly and positively co-vary with their power. Courts that have to hear the cases assigned to them have considerably less discretion to act strategically, as these arguments recommend, than those that have considerably more cases than they could possibly hear, and thus select which cases come before them. This would appear to be a ripe area for empirical work studying domestic and international courts using a single theoretical framework.

[91] Cichowski (2007).
[92] See Vose (1957, 1958) and Caldeira and Wright (1988).
[93] Shapiro (1981); Harlow and Rawlings (1992).
[94] Epp (1998).
[95] Harlow and Rawlings (1992, chap. 6).
[96] Terris, Romano, and Swigart (2007, chapters 4 and 5), Cavallaro and Brewer (2008).

4.4 Summary

We submit that international and domestic arguments for judicial power reflect each other in critical ways. Both literatures develop delegation-centered models. Both identify similar exogenous, post-delegation factors that should influence powers. And both consider how courts might develop their own power. Having said that, it is important to stress that the similarities we have highlighted operate at the level of general classes of models, and it would be unfair to suggest that there are no unique arguments in each subfield. Of course, there are. For example, we are not aware of any argument developed at the domestic level, which operates precisely as Alter's account of the expansion of ECJ authority. Stone Sweet has suggested that the Italian Constitutional Court relies on the cooperation of other elements of the judiciary to ensure the implementation of its resolutions, but the account is not identical in all respects to the explicit coalition-building argument Alter constructs.[97] Similarly, we are not aware of an argument in IR that mirrors exactly Helmke's strategic defection account.

Nevertheless, we think it would be possible to apply these accounts to either level, if a scholar were so inclined. Moving Alter's story to the domestic level would be particularly straightforward in the context of a federal state, in which jurisdiction is divided across national and sub-national judicial units. Applying Helmke's argument would require some conceptual changes. In particular, it is deeply unclear why we would want to imagine that an international judge contemplates the simultaneous failure of all governments whose states are parties to the treaties she is charged to interpret – the conceptual analog of Helmke's domestic judges who contemplate government or regime failure. That said, if international judges face pressures from their home governments,[98] then it seems entirely sensible that an international judge might contemplate the failure of that government while ignoring the fates of the rest.

[97] Stone Sweet (2009, p. 635) and Stone Sweet (2000).
[98] See discussion in Voeten (2008).

It is possible to continue identifying particular aspects of each argument we have reviewed above, and by so doing characterize the uniqueness of each model. Yet this is possible in every theoretical literature, as scholars borrow from and build upon the work of their colleagues. In so far as they sit within general classes of arguments that have been applied to both levels, we are confident that there is enough theoretical overlap between the "unique" arguments to promote meaningful cross-fertizlation. For this reason, if we are going to sustain the rigid subfield boundary it must be because international and domestic courts operate in fundamentally different empirical environments, such that the predictions our general models provide will only apply at either the international or domestic levels, but not both. It is to that issue that we now turn.

5 Empirical Differences across Contexts?

The last objection to building a unified literature on judicial power that we address is that the empirical propositions derived from the theoretical models discussed in the prior section receive different support in the international and domestic contexts. We address this issue in two ways. First, we discuss why fundamental data limitations undermine our current efforts to say something definitive about differences across the levels. Second, we consider two highly salient empirical distinctions scholars have raised in prior work. These distinctions deal with the *ex post* and *ex ante* mechanisms of influence on judicial behavior that Helfer and Slaughter identify.[99] What we hope to suggest is that whereas the concepts of *ex post* and *ex ante* tools are surely useful, it is unhelpful to assume that the effects of these tools vary systematically across levels. Since none of the four books featured here address these issues directly we look to other works within the field for examples with which to build and illustrate our case.

[99] Helfer and Slaughter (1997, 2005).

5.1 The General State of Affairs

Consider the following hypothesis associated with multiple public enforcement models of constitutional review. A court (international or domestic) is more likely to declare that a policy of a sovereign state violates a higher law commitment when the public of that state endows the court with considerable legitimacy than when the public endows the court with little. We might reasonably ask a number of questions about the support this hypothesis has received in the empirical literature. For example, we'd like to know: Is the effect of legitimacy stronger among domestic courts? Is it stronger for international courts? Is it null in both cases? Is it null only in one? And assuming that we observed an effect, was it positive, consistent with the directional prediction in the hypothesis, or negative?

What is remarkable is that we are unaware of a study that systematically estimates these effects in a way that would allow for even the most causal comparison across levels. What is more, we do not even possess systematic data around the world, which would allow for some basic descriptive inferences. Although there are cross-national estimates of judicial autonomy, they are derived from expert summaries, not actual judicial behavior. Further, though scholars write about compliance patterns, we are far from being able to conclude anything specific about the frequency of compliance across the domestic and international levels. While we can marshal examples suggesting that decisions of international legal bodies are easily ignored sometimes,[100] we can just as easily marshal examples of domestic defiance.[101] To be sure, some exciting new projects are beginning to shed some light on the matter, at least at the international level,[102] but our present state of knowledge about these basic facts is best described as one of belief drawn from assumption or anecdotal observation rather than information based on systematic observation.

[100]The United State's open defiance of an International Court of Justice decision prohibiting the mining of Nicaraguan harbors is a common example (Alter, 2009, p. 252-254).

[101]Bavarian public schools apparently responded to a German Constitutional Court order banning crucifixes in classrooms by adding them to classrooms from which they had previously been absent (Vanberg, 2005).

[102]Cavallaro and Brewer (2008); Hawkins and Jacoby (2009).

Additionally, it is generally understood that inferring power merely from compliance is fallacious. But ignoring compliance in our estimates of power is equally problematic, precisely because an autonomous court can be quite ineffective. Though not insurmountable, getting a good estimate of judicial power, which will allow for careful cross-national comparison, represents a significant empirical challenge, a challenge that has yet to be solved in any way necessary to sustain a claim that international (domestic) courts are more (less) powerful than their domestic counterparts. In summary, we do not have systematic evidence about the extent to which states are bound more or less by domestic or international courts to their legal obligations; absent that evidence, it is unclear why we would assume an answer.

5.2 Empirical Differences?

Although we do not yet possess the kind of data that would allow us to systematically address the possibility that theoretically derived empirical relationships differ across levels, we can nevertheless consider the possibility via a thought experiment. In what follows, we address two empirical claims in the literature, which suggest there is something fundamentally different about the domestic and international levels. In particular, we discuss the effects of two classes of tools of government control.

5.2.1 Ex ante controls

Even IR scholars who fall on opposing sides of key debates on international courts seem to agree that there are important differences between the international and domestic levels with respect to the controls that political authorities can exercise on judicial behavior through *ex ante* tools, the appointment process being the most obvious example. But what is more intriguing is that they come to different conclusions about the nature of the differences.

Consider an exchange between Alter and Posner and Yoo. Alter suggests that domestic appointers are relatively unconstrained in their ability to shape the output of their courts

through the appointment process. Posner and Yoo contend the opposite. For example, Alter argues that since the appointment process at the international court level cannot be controlled by one state, "international judges are institutionally less subject to appointment politics than their domestic counterparts."[103] In direct contrast, Posner and Yoo write "A distinctive feature of domestic courts... is their separation from politics. While not completely immune to political influence, such courts are less prone to manipulation by elected officials than are ordinary government institutions."[104] By "appointment politics" and "political manipulation," we understand a process of naming judges in which the appointer fills vacancies such that the court's output will reflect the interests of the appointer perfectly or arbitrarily so.

As a first step toward resolving this debate, we might consider the domestic literature on appointments. Critically, Moraski and Shipan have shown that one cannot make unconditional statements about actors' ability to constrain courts through the appointment process; and further, the list of conditions is long.[105] Specifically, they demonstrate that the institutional rules governing appointments, the number of appointments available, and the distribution of preferences across the political branches involved in the process influence how constrained an appointer is likely to be. What is more, even absent a veto constraint, the appointer is powerfully constrained by the distribution of preferences of the remaining judges. In short, the best that the appointer can do is alter the court's output within a limited range.[106]

[103]Alter (2008, p. 46).
[104]Posner and Yoo (2005, p. 12).
[105]Moraski and Shipan (1999).
[106]Given limited space we do not detail the model here, however, the essential characteristics are as follows. Moraski and Shipan build their argument around a model of collegial judicial policy-making, where they take the position of the median judge to reflect the policy output (or average policy output if you like) to be expected from the Court in session. Their appointment process follows the U.S. rules for Supreme Court appointments (though the rules can obviously be relaxed), and is modeled as a one-vacancy appointment via a take-it-or-leave-it bargaining game, played between the president and the Senate. In light of a vacancy, the goal of the appointer, the president, is to move the median of the court as close as possible to his ideal policy, reflected in this context as a point on a line. Sensibly, president's ability to do this is influenced by

The critical upshot of Moraski and Shipan's work is that it is reasonable to question the claims that Alter and Posner and Yoo make. In so far as we cannot draw any general conclusions about the *ex ante* constraints appointment places on domestic courts, it is unclear that we wish to *assume* that a generic international court is more or less influenced by appointment politics than a generic domestic court.

This is not to say that we could never say anything specific about the effects of the appointment process, but we want to be careful when we do so. Consider one simple example—an international court in which judges are filled basically by state-by-state selections—in other words there is no significant inter-state voting process required for appointments (e.g. the ECJ or ECHR). This would seem like the least likely process through which the court as a whole will be subject to significant appointment dynamics. This is largely because with n appointers for n judges it is unclear that any appointer can exercise any meaningful control over the ideological (or legal philosophical) structure of the court. But what if a majority of states have correlated preferences over a salient dimension (e.g., limitations on religious practice as understood say via the appropriateness of wearing religiously meaningful garments in public workplaces)? If this is true, then absent a veto structure for appointments, it would seem entirely transparent that this majority will exercise complete control, via the appointment process, of future court decisions. Of course, to know whether this claim holds, we would need a carefully specified theoretical model, which could then be used to compare outcomes across different institutional structures—some of which will reflect common domestic processes and some of which will reflect common international processes. It is this sort of model we envision being developed when scholars start thinking about our literatures as inherently similar.

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the preferences of the Senate relative to his own and the existing structure of the court.

5.2.2 Ex post controls

The most obvious *supposed* difference between *ex post* tools across the domestic and international courts is that non-compliance is easier for governments faced with international court decisions than with domestic court decisions. As Posner and Yoo suggest, states really can simply ignore these decisions.[107] On Alter's account, however, we might expect the opposite.[108] If courts are trustees, non-compliance undermines the commitment strategy, and so we might expect that non-compliance is highly costly for states that establish what we might call a trustee court. Yet such a claim seems to imply that international courts might enjoy higher levels of compliance than domestic courts (unless they, too, are trustee courts). It seems reasonable to imagine that it is more difficult for a German government to ignore an ECJ decision than it would be for the current Venezuelan president to ignore the Venezuela Supreme Court. Yet, given the fragmented nature of national Mexican politics since the late 1990s, it seems quite likely that the Mexican president is far more constrained by the Mexican Supreme Court than, say, the Guatemalan president is constrained by the Inter-American Court of Human Rights.[109] The point we wish to highlight is that the field lacks the evidence we would need to establish that *ex post* constraints on judicial power are stronger at either level.

Of course, there are other mechanisms of *ex post* control. Political officials can remove judges from the bench, they can refuse to (re-)appoint, and they can influence budgets, jurisdiction and other institutions we might imagine that judges care about. On a number of domestic accounts, whether these potential constraints are likely to influence judicial autonomy, depends on how reasonable it is to assume that they can be effectuated in particular circumstances. Importantly, Voeten has recently provided evidence consistent with a theory

[107] Posner and Yoo (2005, p. 14).
[108] Alter (2009, Chapter 11).
[109] See discussions of Mexican judicial effectiveness in Finkel (2008) and the effectiveness of the IACHR in Cavallaro and Brewer (2008).

of European Court of Human Rights judicial behavior in which judges are more partial to their appointing states as the differential between their current income and what could be expected at home if they are removed increases.[110] Similarly, the discussion in Terris and colleagues indicates that a number of international judges are sensitive to the need to consider the response to their rulings of governments with reappointment responsibilities.[111] Thus, there is evidence that some international judges behave as if removal authority functions as an influence on their behavior.

Another tool of *ex post* control involves the political override of judicial decisions, which scholars argue might serve to undermine judicial autonomy.[112] The domestic logic of political fragmentation is crucial in this regard.[113] If judges care about being overridden, then if the political branches are unable to coordinate on a response to an unfavorable judicial decision, judicial autonomy expands. Empirically, super-majority voting rules or increasing veto points make coordinating on a response more difficult. Thus, we should expect greater autonomy when courts are protected by favorable veto structures.[114] Of course, this is precisely the logic at the international level for why it might be difficult to discipline a court for overstepping its bounds.[115] Importantly, Carrubba *et al* provide evidence suggesting that the ECJ is more likely to defer to states as the likelihood of an override increases.[116]

We would not claim that we have evidence that the ECJ is actually as constrained by *ex post* controls as, say, the average domestic supreme court, but it is unclear why we want to *assume* that it is not. More broadly, it is simply not clear why we would want to assume that international court autonomy, in general, is more or less constrained by *ex post* tools than domestic courts.

[110] Voeten (2008).
[111] Terris, Romano, and Swigart (2007, chaps. 4 and 5).
[112] Garrett and Weingast (1993).
[113] Chavez (2004).
[114] See Ríos-Figueroa (2007).
[115] See Scharpf (1998).
[116] Carrubba, Gabel, and Hankla (2008).

6 Implications

In the preceding sections, we have suggested that the common rationales for treating work on judicial power in international and domestic politics as separate analytical endeavors are not convincing. We have suggested that existing theoretical models are similar enough to support meaningful dialogue and that the empirical record does not support the inference that domestic and international courts resolve their power concerns differently. However, the critical claim around which this essay revolves is that our understanding of the impact of law upon politics will be considerably enhanced if we no longer assume, if only implicitly, that international politics takes place in a context of anarchy whereas domestic politics takes place under hierarchy.

What remains is a consideration of whether anything meaningful is likely to be gained by discarding the assumption. In other words, what opportunities do we miss by making the hierarchy/anarchy assumption? What misconceptions does it support? We begin by considering these issues. Yet, even if we are right, and we will understand judicial power better by discarding the assumption, we must ask what this better understanding would imply for our sense of core questions in comparative politics and international relations? Insofar as courts are central pieces of the formal enforcement mechanism for legal regimes, understanding better the process by which courts can successfully constrain governments is directly related to questions about why governments respect their legal limits. In other words, understanding judicial power better is not only about understanding why governments accept unfavorable judicial rulings. It is also about compliance with law and more. The key for recognizing the broad implications of our argument hinges on accepting that actors' expectations about the likelihood of a state's compliance with its legal obligations, both international and domestic, influences a broad swath of politically relevant behavior. If this much is assumed, then courts are not just important for compliance but for the choices of

governments to bind themselves to legal limits, and to a variety of human welfare outcomes, which depend on constraining opportunistic government behavior.

6.1 Implications for Judicial Power

The primary implication of relaxing the hierarchy/anarchy assumption is that it would allow us to work together and more efficiently on open theoretical and empirical questions. It strikes us as non-controversial to observe that our theoretical models have outpaced our empirical tests. Some models are even in tension with each other, such that we are in great need of reconcilliation.[117] Just as important, perhaps more so, is that relaxing the assumption would eliminate a key misconception about the nature of domestic judicial power, one which influences the questions we ask and the answers we give in international relations.

To consider the second point in more detail, let us return to Guzman.[118] Guzman's key distinction, that international courts cannot compel compliance whereas domestic courts can, depends on restricting our attention to citizen-to-citizen contracts. Yet once we consider the extent to which the state can be bound to its own promises, we will be in need of an explanation of enforcement domestically, not an assumption. Absent this argument, there is no reason to look for a special explanation for why international law ever binds states. Of course, to be fair to Guzman, his argument about how international law works implies only that the enforcement mechanism will involve state-on-state pressure via the mechanisms of reputation, retaliation and reciprocation. For that reason, though, the nature of the international constraints that international courts can place on governments could never

[117]Consider the argument that courts with judicial review powers are constructed as a form of insurance against losses of political power. A delegation of this sort is most likely when politicians envision losing a veto over future legislation. To insure themselves against such a scenario, they establish judicial review – a new veto point. Yet, if the SoP argument concerning fragmentation is correct, then politicians delegating new judicial power per the insurance argument should expect their veto to be weakest precisely when they need it most. What is more, if the politician under the insurance model anticipated having the political strength in the future necessary to ensure that the new court was empowered in practice, the court would not be necessary to constrain the opposing politician.

[118]Guzman (2008).

grow beyond the kinds of constraints possible in the absence of such courts. It must be for this reason that Guzman largely ignores courts.

By relaxing the hierarchy/anarchy assumption, we uncover a primary way through which research on domestic courts ought to influence research on international law and thereby enrich Guzman's account: it reminds us that some domestic courts have gained the capacity to constrain governments to their legal obligations in settings in which there is no other government to assist in enforcement. This is not to argue that domestic courts are often or ever really completely powerful. There may still be fundamental limits on their authority. Yet it would appear that a number of domestic courts have expanded their power beyond what was intended initially.[119] If domestic judicial power is possible in the absence of the mechanisms Guzman proposes, then *a fortiori*, it seems that it would be possible for international courts to develop power, where the Guzman mechanisms and others are possible. So, in this sense, Alter's work, which turns on answering how international courts might expand their authority beyond what was originally intended is a critical question to answer, reinforced by our understanding of domestic judicial power.[120]

Having said that, Alter's explanation for the power expansion of the ECJ itself relies on a version of the hierarchy/anarchy assumption, which if relaxed further sharpens the questions we should be asking. To review, Alter argues that the ECJ gained power by leveraging the capacity of domestic courts to constrain their own governments. Insofar as this is correct, then an explanation of international judicial power depends critically on our understanding of domestic judicial power. Of course, Alter recognizes this concern, writing "[T]he critical role of national courts as enforcers of ECJ decisions also implies that in countries where national courts are less legitimate, less vigilant, and a rule of law ideology is not a significant domestic political factor, politics would be more likely to use extralegal means to circumvent

[119] Ginsburg (2003).
[120] Alter (2009).

ECJ jurisprudence."[121] Yet noting the extent to which the argument is conditioned by domestic judicial politics is not quite the same thing as explicitly modeling that process. And it does not appear fruitful to invoke Alter's own "time horizons" logic in this context. If politicians are always guided by longer time horizons than judges, then all domestic judges should be able to take advantage of the differential in order to advance their power. This has just not been the case. The bottom line is if Alter is right about the nature of international judicial power, then a complete understanding requires unlocking the puzzles of domestic judicial power.

What is more, if Vanberg and other SoP models are essentially correct, then the ECJ case raises an important puzzle of its own. If the German Constitutional Court is constrained by domestic political conditions, how is it that the ECJ built its power on the back of the German Constitutional Court? How can the ECJ escape the German government generally when the German Constitutional Court can only do so given strategic calculation of political and technical contexts? Instead of limiting the power of the ECJ (or international courts more generally) to states characterized by the "rule of law," the more precise limitations will be to the conditions (e.g., transparency, fractionalized government, inclusive appointment procedures, etc.) that explain how domestic courts construct and maintain judicial power.

Alter's account itself suggests that the ECJ may be limited in this way. Specifically, since the German Constitutional Court considers itself the final arbiter over the limits of European law in Germany,[122] though European law may be supreme, it will be a domestic court that ultimately interprets the boundaries. If this is correct, then we sharpen a final point of inquiry. Scholars looking for international limits on international courts, as say via the coordination of states on override votes, are likely looking for constraint in the wrong place. Put plainly, if states can constrain international courts via the pressures they place on their

[121] Alter (2009, p. 134).
[122] Alter (2001, pp. 98-123).

own courts to interpret international law favorably, then whether it is possible to construct a unanimous coalition of states in an international community for the purposes of overriding particular decisions may be irrelevant to the ability of states to insulate themselves from international law with which they disagree. The relevant political battles will be domestic.

6.2 Broader Implications: Compliance, Cooperation and Human Welfare

Having addressed what we can learn about judicial power by relaxing the hierarchy/anarchy assumption, we now turn to why understanding judicial power better might matter for more general concerns in international relations and comparative politics. Doing so, especially with respect to international relations, requires a broader sense of compliance than that with which we have been concerned so far. In this essay, we have limited our discussion of compliance to "compliance with judicial rulings," largely because such compliance is an essential component of power. Yet, a ruling is a very special element of international law, and when IR scholars consider compliance with international law, they have in mind something far broader. Characteristically, Raustiala and Slaughter define compliance as "a state of conformity or identity between an actor's behavior and a specified rule."[123] Typically, when this definition is invoked, we are not so much interested in the reaction of governments to judicial decisions, but rather whether governments comply with their legal obligations absent legal proceedings. The question is what the construction of judicial power, and its focus on effectiveness, has to do with compliance with international law more generally. Our view is that they can have a great deal to do with one another, and that this in turn has implications for cooperation more broadly.

Consider the general problem of compliance Guzman develops, a problem which judicial scholars have argued can be addressed by courts. In explaining the limits of a reputational

[123]Raustiala and Slaughter (2001, p. 539).

mechanism for the enforcement of international obligations, Guzman reminds us that we should expect non-compliance on occasion. He writes:

> [T]here are situations in which compliance is not to be expected. It follows that reputational sanctions will be quite modest in those circumstances. To see why this is so, imagine the position of a state negotiating an environmental agreement. Compliance with the agreement will impose a cost on the signatories, but all parties prefer mutual compliance to mutual noncompliance. The signatories expect compliance in many states of the world, but not in every such state. For instance, assume that every signatory recognizes that a country will abandon its obligation if it goes to war because the environmental obligations are simply too costly to accept during wartime... As long as all parties expect breach in the event of a war, there is no reason that past conduct consistent with this expectation would affect the negotiation.

The point is that there will be contexts (e.g. when states are at war), in which compliance will be too costly for a signatory. As long as these contexts are clear, that is, as long as signatories can tell whether the context is such that noncompliance is expected, the parties can enforce agreements on their own, as Guzman anticipates. The war example would seem the most obvious scenario in which the relevant context is clearly observable. But if there is uncertainty about whether a state is truly prohibited from complying because of some particular state of affairs, the compliance problem is significant. In brief, how is State A to tell whether State B is failing to comply in good faith, which should not trigger a retaliatory response, or doing so opportunistically, which should? Absent complete information about context, the best signatories can do is punish all forms of noncompliance, but since some noncompliance is such that reciprocation or retaliation will not be sufficient to incentivize compliance, ineffective punishment ensues.

Carrubba has suggested that courts can help address this problem by providing a monitoring function.[124] The idea is that insofar as courts are autonomous, and insofar as they issue decisions that will be respected, they offer parties an independent evaluation of the extent to which another has violated both explicit and implicit terms of a legal agreement. This informational provision mechanism allows signatories to concentrate punishment (retaliation or reciprocation in Guzman's sense) only on states that violate terms opportunistically. A number of features of the argument are critical for our purposes. By solving the parties information problem, Carrubba's court decreases the costliness of sustaining cooperation. It does so by ensuring that state-to-state retaliation will be targeted on contexts in which retaliation can be effective, i.e. when a violation of a legal term is set to occur in a context where the parties would have expected compliance. This does not mean that states will never violate formal terms of agreements in the context of a powerful court—only that violations will be limited to contexts that the parties understand implicitly to be outside the boundaries of the agreement. In this sense, courts should reduce opportunistic forms of non-compliance.

Empirically corroborated theoretical accounts of the construction and maintenance of judicial power can also help add meat to core models of international cooperation. If powerful courts are part of the enforcement architecture for international political agreements, they will alter the dynamics of international negotiation. Indeed, on Carrubba's account, because powerful courts lower the costs of enforcement, they also expand the conditions under which states will wish to bind themselves to a cooperative legal agreement in the first place. In this sense, powerful courts might induce more international cooperation.

Yet there is another possibility. Although they are likely to reduce the costs of enforcement, they simultaneously raise the costs of compliance for particular parties in particular circumstances. And as Fearon has suggested,[125] for exactly this reason, by increasing the

[124]Carrubba (2005).
[125]Fearon (1998).

stakes of the agreement, they complicate bargaining over the substance of these agreements. Abbott and Snidal made this observation about all international treaties, and Hathaway as well as Powell and Staton report evidence consistent with it when studying human rights treaties.[126] Put plainly, once they exist and have become powerful, courts make *ex post* compliance more likely. But for this reason, they stress the process by which parties come to agreements in the first place.

Thus, from the perspective of understanding the total effect of a powerful court on the incentive to engage in political comprise in the international setting, we are left with a tradeoff. Courts decrease the costs of enforcement in the event that there has been an allegation of non-compliance, but they may also increase the costs of faithful implementation. For this reason, knowing the total effect of judicial power on international cooperation will require theoretical work evaluating how this tradeoff ought to be evaluated in particular contexts, and we will need to develop empirical strategies designed that are sensitive to the way that powerful courts pull states in different directions.

Beyond the context of international compliance and cooperation, there are a number of reasons why understanding judicial power should matter beyond the community of scholars for whom the issue is a professional concern. A consierable body of research has suggested that courts that can constrain states from violating fundamental limits on their powers establish conditions for growth and development,[127] promote the expansion and protection of individual liberty,[128] and ensure political order itself.[129] And on normative grounds, of course, courts that can independently resolve conflicts are considered key elements of the rule of law, which can be understood as a virtue in and of itself.[130] Thus, whether we care about the capacity of courts to constrain governments because constraint is an unalloyed normative

[126]Abbott and Snidal (2000); Hathaway (2005); Powell and Staton (2009).
[127]Barro (1997).
[128]Epp (1998).
[129]North, Summerhill, and Weingast (2001).
[130]Raz (1997).

good or because we believe that constraint is a means of advancing critical elements of human welfare, understanding judicial power is essential.

To summarize, we hope that the primary implication of relaxing our subfield boundaries is that we learn more, and more efficiently, about the conditions under which powerful political authorities come to be bound by the courts empowered to enforce their legal commitments. In addition to being valuable in their own right, the books by Alter, Guzman, Helmke, and Vanberg provide a useful lens through which to focus our attention on how these subfield distinctions have limited the cross-fertilization we believe is both possible and desirable.[131] More specifically, if leading international theories of judicial power, which stress the role of domestic judiciaries, are correct, then international scholars themselves have good reason to turn their attention to understanding domestic judicial power. But this is a two-way street. If international courts confront problems of enforcement similar to those confronted by domestic courts, then domestic scholars have an incentive to study this phenomenon at the international level, both theoretically and empirically. Further, there are reasons to care about moving forward on the issue of judicial power efficiently even if one does not care particularly about judicial politics itself. The reason is that by understanding judicial power, we might open ourselves to richer understandings of international cooperation and ultimately compliance.

7 Conclusion

Scholars of international and domestic courts have been writing in a single, if not entirely coherent, literature on judicial power. The lack of coherence derives from our subfields' (implicit) choice to view the separation of judicial power research in international relations and comparative politics as appropriate. We argue above that there are good reasons to

[131] Alter (2009); Guzman (2008); Helmke (2005); Vanberg (2005).

discard the primary assumption around which the divide is constructed: that domestic politics are carried out under hierarchy, whereas international politics are carried out under anarchy. Beyond that, we see no solid theoretical justification to proceed separately. In truth, we have been developing nearly identical arguments in each subfield. What is more, we simply do not have the data necessary to sustain an empirical rationale for dividing the international from the domestic.

Although we might easily become enmeshed in the important theoretical and empirical challenges that remain, our efforts would be profitably aimed at learning about institutional design in the real world. In this context, it is worth considering a final potential objection to our argument: whether the project we advocate is immediately guilty of an inappropriate "domestic analogy," in the sense of Suganami.[132] That is, have we mistakenly inferred an understanding of the world of states from our understanding of the world of individuals? Concerning the design of international institutions, Suganami has famously argued against creating international judicial bodies with compulsory jurisdiction. He advances three reasons: 1) there are some international obligations, which no state will ever respect under the right conditions, 2) the lack of enforcement mechanisms for international judicial decisions renders compulsory jurisdiction meaningless, and 3) compulsory jurisdiction might exacerbate political conflicts by giving aggrieved parties an additional complaint in the event that a state fails to comply with a decision.

Our proposal addresses the Suganami position in two ways, by addressing directly the three concerns with granting international courts compulsory jurisdiction, but also more broadly by addressing the domestic analogy process. Relaxing the hierarchy/anarchy assumption undermines immediately the first two rationales. If the lack of an enforcement mechanism is reason enough to counsel against compulsory international jurisdiction, then at least as jurisdiction regards state obligations to its citizens, the reason counsels against

[132]Suganami (1989, pp.170-173).

compulsory jurisdiction at the domestic level, as well. Likewise, we can surely recognize that there are some scenarios in which states cannot be constrained to their legal obligations, international or domestic. Yet it is not clear why this implies that courts should be denied compulsory jurisdiction. In short, Suganami's first two rationales argue too much. His third implication, that compulsory jurisdiction will increase political conflict is an empirical question, which can be evaluated validly domestically and internationally under the project we advocate. The issue of empirics leads us to the final point.

Although we certainly believe that research on domestic judicial power is relevant for research on international judicial power, what we are advocating, a more coherent literature on judicial politics, is most certainly not a "domestic analogy." Suganami writes:

> A domestic analogy, then, may broadly be defined as presumptive reasoning (or a line of argument embodying such reasoning) about international relations based on the assumption that since domestic and international phenomena are similar in a number of respects, a given proposition which holds true domestically, but whose validity is as yet uncertain internationally, will also hold true internationally. A... domestic analogy therefore assumes explicitly or implicitly that there are some similarities between domestic and international phenomena, that there already exist some propositions which hold true domestically and internationally. It also asserts that a certain other proposition is valid with respect to the domestic sphere. And, without being able as yet to demonstrate the truth of the proposition with regard to the international sphere, it concludes, presumptively, that the proposition will hold true internationally also.[133]

The key distinction between what we advocate and a domestic analogy involves the the role of inference—the process of learning about facts we do not know from facts that we do. To be guilty of invoking the analogy one must engage in presumptive reasoning: the assumption

[133]Suganami (1989, p.34).

that simply because the domestic and international contexts are similar in some regards, they will be similar (or identical) in some new regard, for which we have no evidence. The core problem with this kind of reasoning is that it not grounded in empirical evidence. On this dimension, we could not agree more with the reasonable concerns Suganami raises.

Indeed, were one to propose a set of specific international institutions based on our current understanding of both domestic and international judicial power we would expect such an effort to necessarily involve a great deal of error. Our theoretical models are in need of refinement, reconciliation, and more systematic testing. As we have discussed, the empirical record simply does not support any clear inference over whether the international and domestic courts really do confront their political problems differently. Evaluating whether they do ought to be a goal of future research.

What we envision, what we hope for at least, is a more robust, theoretically guided empirical research programme in judicial politics—one that does not make strict divisions between work on international or domestic courts. If and when that programme provides the kind of empirical evidence we would need to conclude that international and domestic courts confront identical problems of power, we might be in a position to advocate for institutional reforms that would be inter-changeable across levels. We doubt that this will be the ultimate conclusion. Nevertheless, we believe that our institutional prescriptions will be all the better for our decision to leave behind the hierarchy/anarchy assumption in this context.

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