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The Politics of International Law

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1. The politics of international law
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Law structures politics and politics permeate law. The domain of politics and the realm of law are so intermeshed that any attempt to locate the boundary between them would be fruitless. Even the intuitive distinction between domestic and international politico-legal systems breaks down under scrutiny.[1] Domestic orders may be on average more legalized, and international relations may tend to be more subject to power politics. But sizeable zones of law exist in international relations (the European Union, the World Trade Organization) and life in a fiercely repressive autocracy (Argentina in the late 1970s) is as violent as 'anarchic' international relations are sometimes imagined to be. In domains from trade to human rights, and even in war, international legal norms affect the choices that actors make, in ways that are not simply reducible to the effects of power. In short, the relationship between politics and international law is not fixed. To the contrary, the relationship varies depending on the context, and the factors shaping it are not reducible to the traditional distinction between domestic systems and international systems.

The lack of a fixed relationship between politics and international law makes it difficult to generalize about politics and international law. This is not to say that general theorizing has been unproductive. Such work has generated considerable insights.[2] The most familiar theoretical perspectives – broadly classified as realism, liberalism and constructivism – capture important dimensions of international law and politics. The problem is not that the broad theoretical frames are wrong, the problem is that they are all right, at least for some stages of the governance

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[1] Wayne Sandholtz and Alec Stone Sweet, 'Law, Politics, and International Governance' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004); Christopher A. Whytock, 'Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law' (2004) 36 Georgetown Journal of International Law 155.

[2] E.g., Jeffrey L. Dunoff and Mark A. Pollack (eds), *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship* (Cambridge University Press 2013).

process, in some systems of governance, some of the time. These theories alert us to important variables and relationships. But they cannot be tested in any comprehensive way, and, so far, there does not appear to be any way to adjudicate among them empirically. This volume, then, is not organized around the '-isms'.

Instead, this volume is motivated by the central premise that the relationship between politics and law varies in important ways depending on the sites where the relationship unfolds. The challenge is to demarcate these sites and to explain the relationship between politics and law at these different sites of interaction. As our context-specific understanding improves, it may one day be fruitful to theorize more generally about the factors that shape the relationship between law and politics. In our view, however, at this stage it is probably more fruitful to focus on 'mid-range theorizing' that helps to bring intellectual order to the politics of international law in both its fundamental processes and in specific substantive domains.[3] As explained in more detail below, we believe that a promising path toward useful mid-range theory is comparative analysis of the relationship between law and politics at different stages of governance and in different governance systems.

In this introductory chapter, we first present the framework for comparative research in politics and international law that we propose, and around which the contributions to this volume are organized. We then draw out some of the broader implications of our framework. The chapter concludes with an overview of the contributions to the volume.

1.   SITES OF INTERACTION BETWEEN INTERNATIONAL LAW AND POLITICS

There are diverse sites of interaction between law and politics. Our central premise is that the nature, causes and effects of these interactions, and the relative influences of law and politics on outcomes, vary across these different sites. Our intuition is that this diversity lends itself more to comparative analysis than to general theorizing. Therefore, this volume takes a comparative approach. Our units of analysis are two-fold: *stages of governance* and *governance systems*. The stages of a governance process include rulemaking, interpretation, decision-making, implementation, and rule change. Governance systems are 'social mechanisms for

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[3]   Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 The American Journal of International Law 1, 1.

constructing rules and for applying them to concrete situations',[4] typically with the aim of facilitating or guiding collective action. We argue that interactions between law and politics may vary in important ways both (1) *across different stages of governance* within particular governance systems and (2) *across different governance systems*.

One of the promises of comparative socio-legal studies is that it can reveal 'how cross-national differences in law or legal institutions affect relatively similar social functions or types of enterprise'.[5] Comparative analysis, we suggest, can offer useful insights not just about law and legal institutions at the domestic level (comparative law) but also at the international level. A recent article in the *American Journal of International Law* notes a 'renewed interest' in '[t]he use of comparative approaches in international law'.[6] The piece calls for further development of comparative international law, whose objective is described as 'identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law'.[7] The key dimension of comparison is cross-national, focusing on 'similarities and differences' across states and how they engage and interact with international law.[8] We likewise advocate comparative analysis of the relationship between politics and law, but across *stages of governance* and *systems of governance*, both domestic and international, not just cross-nationally. Such an approach can improve our understanding of how politics influences law, how law mediates politics, and how law and politics together shape governance. In a similar spirit, Gehring and Faude call for comparative research on international regime complexes,[9] and Halliday and Shaffer call for the comparative study of transnational legal orders.[10]

The study of the politics of international law has much in common with comparative legal studies because both search for phenomena and

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[4]   Sandholtz and Sweet (n 1).
[5]   Robert A. Kagan, 'What Socio-Legal Scholars Should Do When There Is Too Much Law to Study' (1995) 22 British Journal of Law and Society 140, 145.
[6]   Anthea Roberts and others, 'Comparative International Law: Framing the Field' (2015) 109 American Journal of International Law 467, 468.
[7]   ibid 469.
[8]   ibid 473. See also the related articles in the same issue.
[9]   Thomas Gehring and Benjamin Faude, 'The Dynamics of Regime Complexes: Microfoundations and Systemic Effects' (2013) 19 Global Governance 119, 128.
[10]   Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015).

patterns that are at work in diverse settings. For cross-national comparativists, variation manifests itself across states. For scholars of the politics of international law, variation occurs across different stages of governance and different systems of governance.

1.1   Variation across Stages of Governance

The contributions to Part I focus on the interactions between law and politics at five different stages of the governance process. To understand how the relationship between politics and law varies across different stages of governance, it is important to identify the actors involved at each stage, their interests and values, and their power and resources. Each stage is characterized by contestation. We are not suggesting that the five stages of governance should necessarily be the focus of separate research agendas. In the spirit of comparativism, most research will probably combine perspectives on, and questions about, these different stages.

1.1.1   Rulemaking
The first stage of governance is *rulemaking*. Rulemaking may be formal or informal. Formal rulemaking may have several distinct aspects, including agenda setting, rule proposals, negotiation, deliberation and adoption. However, rulemaking may also be informal, as is the case with custom (including customary international law), which arises from the practice of actors. Scholarship on the rational design of law and legal institutions provides important insights on formal rulemaking, but is less useful for understanding informal rulemaking processes. Whether rulemaking is formal or informal, this stage of governance is political to the extent that different actors' power, interests and values influence the rulemaking process and are reflected in the resulting rules. Yet the rulemaking stage is also legal to the extent that pre-existing legal rules govern the rulemaking process itself or impose limits on acceptable rulemaking outcomes, and to the extent the rules made are legally binding, according to the applicable rules of recognition.

The focus on this stage of governance roughly corresponds to one of the central research agendas of socio-legal studies proposed by Kagan, in which law and institutional design are the phenomena to be explained, the 'dependent variables'.[11] Recent work has focused on the 'rational design' of legal institutions. In this perspective, actors collectively arrive at the optimal mix of precision, obligation and delegation given the

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[11]   Kagan (n 5) 143–4.

nature of the problem to be solved, the number of actors and other factors.[12] But other bodies of research offer different views of the emergence of new norms and their institutionalization. These include models of transnational networks, 'boomerang' effects and pressure 'from above and below'.[13] Epistemic communities and transjudicial dialogue likewise affect the shape and substance of legal regimes,[14] as do persuasive politics in speech communities.[15] In other words, the problem of constructing politico-legal institutions has attracted innovative scholarship along a number of productive lines.

1.1.2   Interpretation

A second stage of governance that is a distinct site of interaction between law and politics – a stage subsequent to the making of a rule – is *interpretation* of that rule. There are three varieties of interpretive issues, all of which may be highly contested for a particular rule: *legal obligation*, *legitimacy* and *meaning*.

- *Legal Obligation*: Is a purported norm legally binding (that is, does it impose a legal obligation)? This contestation is often existential in international law: the issue is often whether a purported rule of customary international law exists at all. Generally, contestation over the legally binding character of a rule unfolds in terms of the

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[12]   Kenneth W. Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 401; Barbara Koremenos, Charles Lipson and Duncan Snidal, 'The Rational Design of International Institutions' (2001) 55 International Organization 761.

[13]   Alison Brysk, 'From Above and Below: Social Movements, the International System and Human Rights in Argentina' (1993) 26 Comparative Political Studies 259; Alison Brysk, *From Tribal Village to Global Village: International Relations and Indian Rights in Latin America* (Stanford University Press 2000); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998); Thomas Risse-Kappen, Steve C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999).

[14]   Peter M. Haas, 'Epistemic Communities and International Policy Coordination: Introduction' (1992) 46 International Organization 1; Anne-Marie Slaughter, 'Judicial Globalization' (1999) 40 Virginia Journal of International Law 1103.

[15]   Thomas Risse, 'Let's Argue!: Communicative Action in World Politics' (2000) 54 International Organization 1.

applicable rules of recognition.[16] In domestic systems, the rules of recognition are often embodied in a constitution, and in the international system they are largely embodied in the doctrine of 'sources' of international law. There can also be contestation over the rules of recognition themselves – that is, over what are the proper rules of recognition to use to determine which rules constitute binding law (for example, the debate over the relative importance of state practice and *opinio juris* in the formation of binding customary international law). Domestically, too, issues can arise about the validity and binding nature of particular rules (for example, debates over the constitutionality of legislation or the domestic application of international law). Denying a rule's legal status does not render it irrelevant to governance. Non-legally binding rules – sometimes called 'soft law' – may also play an important role in governance, even if they do not impose enforceable *legal* obligations.

- *Legitimacy*: Even if a law is accepted as imposing a legal obligation, there can be contestation over the law's legitimacy. There can be unjust laws, and in both domestic and international law there are frequently debates over whether particular rules (including legal rules) are just or legitimate. There has been important work on what makes rules and rulemaking processes legitimate or fair.[17] The point here is simply that *whether* a law is just or legitimate (on process or substance grounds) is often contested, often to political ends and often with positions that depend on politics, but also with reference to the law's consistency with other laws and non-legal norms and to the processes – often themselves legally defined – that produced the law. There has been relatively little theorizing on the *contestation* of legitimacy. Challenges to the legitimacy of a rule can accompany non-compliance or be deployed in efforts for legal change (see below).
- *Meaning*: Language is imprecise. Therefore, the meaning of a rule – whether it is meant to apply to a particular situation and whether an actor's behavior conforms to the rule – is often highly contested. Even if a law is accepted as legally binding and legitimate, there

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[16]   H.L.A. Hart, *The Concept of Law* (2nd edition, Oxford University Press 1994).

[17]   Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990); Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 2006).

can be disputes over its meaning *and* over interpretive methods –
that is, the proper techniques for establishing a rule's meaning.[18]

1.1.3 Decision-making

A third stage of governance – and a third site of interaction between law
and politics – is *decision-making* by the subjects of rules, that is, the
actors whose behavior is governed by a rule. The subjects of a rule may
be state or non-state actors, and often the subjects of a rule are not the
same as, or at least more broadly defined than, the actors involved in the
rulemaking stage of governance. States – through treaty making and
custom – form rules to govern themselves, but of course many rules,
domestic and international, are made to govern other actors. Decisions
may be influenced by a logic of consequences, a logic of appropriateness,
or both.[19] Political factors, including a party's power, interests and
values, influence that party's decision-making and the extent to which
those decisions conform to rules. But so may legal factors, either because
they set standards of appropriate behavior that correspond to the party's
identity, or because the party expects advantages to flow from following
the legal rule or costs to result from violating it (whether in the form of
reputation costs or coercively imposed sanctions). There are several
plausible hypotheses about the relationship between the logic of conse-
quences and the logic of appropriateness in decision-making: the clearer
logic may dominate, major decisions may be based on one logic and
refinements on the other, and decision-making may over time evolve
from a logic of consequences to a logic of appropriateness with the
growing normative force of a rule.[20]

The focus on this stage of governance roughly corresponds to a second
research agenda identified by Kagan, which 'treats law and legal deci-
sions not as dependent but as "independent variables"' with the goal
being 'not to explain why laws and legal decisions vary, but to discover
and assess what effect legal processes … actually have on social life'.[21]
Perhaps especially with respect to the politics of international law – as
compared to the study of domestic legal systems or comparative public
law – there is sometimes a tendency to view law and legal institutions
simply as outcomes (dependent variables) to be explained. Looking at

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[18]   Matthew Adler, 'Interpretive Contestation and Legal Correctness' (2012)
53 William and Mary Law Review 1115.

[19]   James G. March and Johan P. Olsen, 'The Institutional Dynamics of
International Political Orders' (1998) 52 International Organization 943.

[20]   ibid.

[21]   Kagan (n 5) 144.

international law as an explanatory variable is equally important. Some political scientists and international law scholars do argue the contrary, that international law generally is only an effect and rarely a cause of state behavior.[22] Most students of the politics of international law are probably not prepared to adopt that position, and there are powerful theoretical arguments and empirical support for rejecting it.[23] Research on compliance[24] and internalization[25] fit under the rubric of the effects of international law and legal processes. And the growing body of empirical research on the effects of international human rights treaties on states' human rights performance has similarly contributed to the development of this research agenda.[26]

The perspective on international law as an independent variable, in order to identify and explain its influences on actors and political outcomes, should infuse each of the first two research agendas. The baseline expectation is probably that powerful actors shape legal regimes and institutions to favor their interests. Power clearly does affect the design of international legal institutions. But where the design and

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[22]   Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press 2005); John J. Mearsheimer, 'The False Promise of International Institutions' (1994) 15 International Security 5.

[23]   Robert O. Keohane and Lisa L. Martin, 'The Promise of Institutionalist Theory' (1995) 20 International Security 39; Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

[24]   Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995); George W. Downs, David M. Rocke and Peter N. Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 International Organization 379; Beth A. Simmons, 'Compliance with International Agreements' (1998) 1 Annual Review of Political Science 75.

[25]   Chayes and Chayes (n 24); Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181; Harold Hongju Koh, 'Internalization Through Socialization' (2005) 54 Duke Law Journal 975.

[26]   Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935; Todd Landman, *Protecting Human Rights: A Comparative Study* (Georgetown University Press 2005); Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 Journal of Conflict Resolution 925; Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most' (2007) 44 Journal of Peace Research 407; Simmons (n 23); Wayne Sandholtz, 'Treaties, Constitutions, Courts, and Human Rights' (2012) 11 Journal of Human Rights 17.

construction of *legal* rules and institutions are concerned, the nature and exercise of power are also shaped in part by the context of law. Two points are apropos. First, efforts to devise new legal norms and regimes do not take place in a law-free environment. Existing international legal norms, principles and institutions shape every new law-building project, from the framing of proposed rules to the structuring of the regimes that embody them. Though powerful actors will inevitably influence such projects, they do not somehow escape the existing framework of treaties, custom and organizations. This is true even for law-making in entirely new domains, like the use of space. When the first treaties regarding human activity in space emerged in the 1960s, there was no previously existing body of space law. But the treaties borrowed principles – like the 'common heritage of mankind' – from existing areas of international law. Second, even powerful actors need to frame proposed legal norms not as serving narrow or particular interests but as general rules that address common interests or shared challenges. The main approaches to identifying the characteristics that distinguish legal norms from other kinds of norms, or the features that confer legitimacy on systems of law,[27] all recognize that legal rules must be abstracted from underlying power relations. In short, studies of the design and construction of international legal rules and institutions must be sensitive not just to the role of power in shaping those institutions, but also to the effects of law in channeling and mediating power.

Similarly, power will be a central variable in the analysis of international law processes. The baseline expectation is, of course, that states and other actors will deploy power to bend legal processes, within international law institutions, to their advantage. But given that legal institutions and processes can also shape the exercise of power, we should not lose sight of the reverse question: how, and to what extent, do international law and legal institutions channel and mediate the effects of power? The more developed international rules and institutions are, the more politics should move from the direct exertion of material power toward other modes of politics, whether those are based on strategic action, pluralist politics (mobilizing winning coalitions), diffusion of knowledge and ideas or communicative rationality.

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[27] Lon L. Fuller, *The Morality of Law* (Yale University Press 1964); Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon Press; Oxford University Press 1980); Franck (n 17); Hart (n 16).

1.1.4   Implementation

A fourth site of interaction between law and politics is *implementation*. At this stage, the focus moves from the decisions of the subjects of rules to how others respond to those decisions. These responses may include legal arguments, either to justify or criticize decisions, to which subjects may reply with their own justifications. They may include processes of adjudication or alternative dispute resolution processes designed to apply rules and in some cases produce legally binding outcomes. And they may include formal or informal sanctions. '[B]ecause norms by definition embody a quality of "oughtness" and shared moral assessment, norms prompt justifications for action and leave an extensive trail of communication among actors that we can study'.[28] Thus, if a norm exists, we would expect to observe justificatory discourse on the part of actors, either 'offensive' (offered by an actor to rebut those who it believes are likely to claim its behavior violates a norm) or 'defensive' (offered by an actor after its behavior has already been criticized). The focus on implementation roughly corresponds to a third socio-legal studies research agenda identified by Kagan – what he calls the 'legal process' agenda – which seeks a better understanding of the behavior of legal institutions.[29]

1.1.5   Legal change

A fifth site of interaction between law and politics is *legal change*. Law – including international law – is rarely, if ever, static. Yet our understanding of how and why politico-legal norms and institutions change is underdeveloped. We have some tools for explaining the genesis of new norms, involving norm entrepreneurs, the mobilization of political coalitions within and across states, and pressure on governments. We have frameworks for explaining the design of international legal institutions. But what happens once legal norms and institutions are in place? In important respects, the emergence of new norms and institutions is the beginning of the story, not the end. The efforts of people – and firms, NGOs, agencies and states – to live under rules, and their need to apply general norms to the 'relentless particularity of experience'[30] guarantee that rules are in a continuous, never-ending process of change. The incessant unfolding of change occurs as international actors adapt rules to

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[28]   Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887, 892.

[29]   Kagan (n 5) 143.

[30]   Harry Eckstein, 'A Culturalist Theory of Political Change' (1988) 82 American Political Science Review 789, 795.

new factual situations, new challenges (climate change, digital communications) and new ideas. The processes and mechanisms of change are both legal and political. They are legal because they never take place outside a framework of existing norms. They are political because actors will seek to shape new rules, or reshape old ones, to favor their own interests. Processes of norm change are both pervasive and incompletely understood.

The development of customary international law (CIL) exemplifies the ongoing dynamic of change in international law. International law scholars have tools and methods for assessing customary international law, which emerges out of the regular practice of states and their beliefs about the obligatory nature of those practices. Political scientists have paid far less attention to customary international law, largely focusing on the creation and effects of treaty law. Even among international law scholars, the contemporary relevance of CIL is somewhat controversial.[31] We argue that customary international law captures a core dynamic in the broader politics of international law, namely, its constant evolution driven by practical experience and shaped by both political interests and normative structures.

The ideal-typical process involves a cycle in which actions, either carried out or proposed, trigger disputes about the meaning and application of international rules.[32] States and other actors put forward arguments as to the compatibility of the action with international norms. The outcomes of these disputes inevitably modify the rules themselves. In other words, disputes about norms are the motors of normative change, and international relations are a non-stop generator of such disputes. The degree to which disputes modify the rules depends on the responses of affected states and third-party states. Strong consensus – either that the action complied with or that it violated norms – generally means that the international norms in question become clearer, or more precise, or stronger (or all three). They do not remain static; they have changed as a result of the dispute. The modified rules are the normative framework in which the next round of actions and disputes will unfold.

Likewise, when an action triggers a dispute in which states are more evenly divided as to the conformity of the act with international norms, the rules necessarily change. More balanced sides in a dispute are a sign that the behavior in question constitutes a challenge to the rule. A lower

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[31]   See for example Goldsmith and Posner (n 22).

[32]   Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford University Press 2007).

degree of consensus generally leaves the norm more ambiguous, less precise, or weaker (or all three). If the balance of assessments leans toward finding the conduct acceptable, then the challenge to the rule is at least partially successful and the rule is in the process of being either modified or superseded by a new norm. If the balance tips toward finding the conduct impermissible, the rule has been affirmed but its status is weaker or more ambiguous. In either case, again, through the dispute the rules have changed. The modified norms then provide the context for subsequent actions and disputes.[33]

Every dispute over international norms, their meaning and application, produces changes in the rules. International law scholars have referred to this process of customary law formation as one of 'continuous claim and response'.[34] As Scharf puts it, '[o]ut of this process of claim and response, and third party reaction, rules emerge, are strengthened or degraded, or are superseded'.[35]

Everyday international relations constantly cast up such disputes and the cycle of international norm change is observable in a broad array of substantive domains.[36] The cycle is, of course, intensely political. States involved in such disputes marshal normative arguments that support their preferred outcomes, and they deploy a variety of political and material incentives to influence the positions taken by other states and actors.

It might seem that the cycle of change depicted here most clearly captures the essence of customary international law. But it is a dynamic that occurs in virtually every normative context. It unfolds in disputes over treaty law, as states contest the meaning and application of treaty provisions. When those disputes are handed to a court or tribunal for resolution, the cycle simply takes on its most formalized structure. In a court, the arguments are presented in terms that fit within established argumentation frameworks, and the process is structured by legal rules. But it is the same cycle of action, dispute and norm change leading to subsequent rounds of action and disputation.

In short, the processes of norm change occur everywhere in international law. This fifth site of interaction between law and politics, then, is closely related to the first four. As we seek to explain the design and

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[33]   ibid.

[34]   Myres S. McDougal and Norbert A. Schlei, 'The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security' (1955) 64 Yale Law Journal 648.

[35]   Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press 2013) 36.

[36]   Wayne Sandholtz and Kendall W. Stiles, *International Norms and Cycles of Change* (Oxford University Press 2009).

construction of governance systems, the processes that operate within them, and the effects of those systems on behaviors and outcomes, we need to be attentive to the ways in which all of these affect the content, the strength and the clarity of international norms.

1.2 Variation across Governance Systems

Just as interactions between law and politics may vary across different stages of the governance process *within* a particular governance system, these interactions may vary *across* different governance systems. Different systems of governance are demarcated by their subject matter, their scope, or both. Subject matter may be defined very broadly (for example, international peace and security[37]) or relatively narrowly (for example, international civil aviation[38]). Geographic scope may range from global (for example, the United Nations), to regional (for example, the European Union), to national (for example, the U.S. Federal Aviation Administration). Each contribution to Part II analyzes interactions between law and politics in a particular governance system, while focusing on one or more stages of the governance process in that system.

As our discussion of governance systems suggests, we do not think it is helpful to categorically distinguish domestic governance systems from international governance systems when analyzing interactions between law and politics. Traditionally, legal scholars and political scientists have made precisely this distinction, based on a conception of domestic governance as hierarchically structured and international governance as anarchically structured. However, this structural distinction is misleading, because certain crucial aspects of domestic law (particularly, constitutional law and other branches of public law) also lack hierarchical enforcement mechanisms.[39] This is not to deny differences between domestic and international systems of governance – but these differences are generally differences of degree, not kind.[40] In fact, we believe that 'the range of variation is as great within categories of *domestic* and *international* as between these categories'.[41] The stages of governance we have identified are as much a part of domestic governance as

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[37] UN Charter art 1(1).
[38] Convention on International Civil Aviation (7 December 1944, entered into force 4 April 1947) preamble.
[39] Whytock (n 1).
[40] ibid 169.
[41] Sandholtz and Sweet (n 1) 269.

international governance, and thus can facilitate comparative analysis across the traditional domestic-international divide.[42]

2. BROADER IMPLICATIONS

Beyond serving as a framework for analyzing the relationship between politics and international law, our approach has broader implications for understanding international law. First, our approach transcends the traditional – and in our view misleading – categorical distinction between the role of law in domestic and international politics. Second, our approach allows for a more nuanced and contingent understanding of the relationship between law and politics than debates about the primacy of politics (or law) typically produce. Third, our approach favors mid-range theorizing focused on the foundations of the relationship between law and politics in specific contexts.

2.1 Law and Politics beyond the Domestic-International Divide

The ideal-typical contrast between domestic institutions that mediate power but international institutions that do not is overdrawn in three ways. First, on the domestic side, it ignores the wide variation among states in the degree to which legal institutions mediate and constrain power. In fact, power is virtually unconstrained in two types of states, entrenched autocracies and failed states. In the first, concentrated power is not checked by law and institutional counterweights. Autocratic leaders are constrained by the need to satisfy the constituencies (the army, for example, or the national police) whose support is necessary to stay in power. In failed states, competition among groups resembles anarchic international relations, only it is probably even more unrestrainedly violent. In 2012, 47 countries (24 percent of all states) were rated 'not free' by Freedom House.[43] According to the Failed States Index for 2013, 16 countries around the world were either failed states or showed substantial risk of failure (scoring more than 100 on a 120-point scale).[44] In other words, autocracies and failed states are not isolated exceptions.

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[42]   Whytock (n 1).
[43]   Freedom House, *Freedom in the World* (2013), accessed 10 September 2016 at http://www.freedomhouse.org/report-types/freedom-world.
[44]   Fund for Peace, *The Failed States Index 2013* (2013), accessed 10 September 2016 at http://fsi.fundforpeace.org/rankings-2013-sortable.

Second, by the same token, substantial portions of international relations are subject to institutions that make, interpret and apply legal rules. For instance, treaty-making negotiations and conferences are an institutional form devoted specifically to the law-making function. Lawyers and social scientists alike assess the politics of treaty negotiations and, more recently, the 'design' of international agreements.[45] Studies of why states enter into treaty commitments are another relatively well-developed area of scholarship on the politics of international law-making.[46]

The interpretation function also occurs, increasingly, in islands of judicialized dispute resolution. The last two decades have seen a proliferation of international judicial bodies: the Project on International Courts and Tribunals lists 23.[47] The emergence of the ad hoc criminal tribunals, the creation of the International Criminal Court (ICC) and the development of the regional human rights courts have generated a voluminous body of research on their law and politics. The Dispute Settlement System of the World Trade Organization (WTO) is fully judicialized and the subject of a virtual sub-discipline. Arbitration – between states, between private parties and between states and private parties – has also flourished, and lawyers and political scientists have turned their attention to the work of the International Center for the Settlement of Investment Disputes (ICSID) and transnational commercial arbitration.

Enforcement likewise occurs in institutionalized contexts. At the global level, the United Nations Security Council authorizes enforcement activities, in the form of U.N. sanctions regimes (like that in place against Iran), as well as armed peace-making and peacekeeping missions. Regional organizations, like the African Union, the Economic Community of West African States (ECOWAS) and the North Atlantic Treaty

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[45]   Darren G. Hawkins and others (eds), *Delegation and Agency in International Organizations* (Cambridge University Press 2006); Koremenos, Lipson and Snidal (n 12).

[46]   Oona A. Hathaway, 'The Cost of Commitment' (2003) 55 Stanford Law Review 1821; Jay Goodliffe and Darren G. Hawkins, 'Explaining Commitment: States and the Convention against Torture' (2006) 68 Journal of Politics 358; Oona A. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 Journal of Conflict Resolution 588; James Raymond Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture' (2008) 62 International Organization 65; Simmons (n 23).

[47]   Project on International Courts and Tribunals, *Project on International Courts and Tribunals* (2013), accessed 10 September 2016 at http://www.pict-pcti.org.

Organization (NATO) have also sponsored or participated in armed multilateral enforcement activities.

A third reason that the domestic/international distinction is misleading is related to this question of enforcement. The stock argument for why international law is less effective than domestic law is that international law lacks what domestic law enjoys: centralized enforcement of legal rules. But as typically presented, this comparison mixes apples and oranges. On the international law side, the point is made that there is no higher authority above the state to enforce rules against it. On the domestic law side, the point is that there *is* a centralized system of law enforcement to enforce rules against individuals. Yet some of the most important branches of domestic law prescribe not the behavior of individuals, but the behavior of the state – and the state cannot be relied upon to enforce rules against itself. By definition, domestic public law – domestic law that prescribes appropriate state behavior, including most constitutional law (such as the law of individual rights, federalism and separation of powers) – suffers from the same lack of hierarchical enforcement that characterizes international public law.[48] Therefore, explanations for the varying relationship between law and politics in domestic and international systems must look beyond the traditionally drawn distinction between structurally 'anarchical' international politics and structurally 'hierarchical' domestic politics.

The foregoing considerations suggest not a dichotomy but rather a continuum that depicts the full range of variation in law and legal institutions.[49] Rules can be more, or less, formal, precise and authoritative, and they may be more or less tied to organizational supports, including enforcement mechanisms. Because rules vary along these dimensions, the institutions that they define do also. At the left end of the continuum are institutional settings that are relatively informal, with imprecise rules that are not binding on actors, and where there are no centralized monitoring or enforcement mechanisms. (This is not to say that these settings lack rules: social existence of any kind is impossible without norms, even if the norms in place are relatively informal and imprecise.) At the right end of the continuum are institutional contexts (local, domestic or international) defined by rules that are highly formal,

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48   Whytock (n 1).
49   An institution is a set of interconnected rules. We use the terms 'norm' and 'rule' interchangeably. Both are standards of behavior for a given set of actors in a given social context. The distinction typically drawn between the two usually boils down to differing degrees of formality: norms are less and rules are more formal.

specific and authoritative: these have the attributes that people associate with developed legal orders. International institutions would occupy different points on the spectrum.[50] Some international institutions are defined by rules that are highly formal, specific and authoritative. The European Union (EU), for example, now resembles, in important respects, a 'constitutionalized', quasi-federal polity.[51] The World Trade Organization (WTO) has similarly developed an important degree of formality, precision and authoritativeness.

'International law,' then, could not simply be placed as an undifferentiated unit on the continuum. In some domains, whether geographical like the EU or substantive like the WTO, international legal rules and processes are highly developed, and those institutions belong to the right on the continuum. Some parts of international relations in which the rules and institutions are informal, imprecise and minimally authoritative – classic balance of power systems, for instance – would be placed nearer the left. Still other areas of international law would be in between. This matters because politics tends to be a qualitatively different kind of activity within the framework of law than it is outside of it.[52]

2.2 The Contingent Nature of the Relationship between Law and Politics

Our approach also moves beyond categorical assessments of the relationship between international law and politics by accommodating and providing a framework for understanding the nuanced and contingent nature of this relationship. Politics within the framework of law differ from politics outside of law because legal institutions mediate power and channel behavior. Under law, rules configure the political institutions through which further rules and policies are defined and carried out and disputes resolved. This is not a claim that law-based institutions tame power or nullify power differences. On the contrary: the rules generally reflect the interests of those actors with the greatest political power, and powerful actors are better able to obtain the outcomes they prefer through a society's institutions. Law does not abolish the advantages of power. It

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[50]   Alec Stone, 'What Is a Supranational Constitution? An Essay in International Relations Theory' (1994) 56 Review of Politics 441.

[51]   Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; JHH Weiler, *The Constitution of Europe* (Cambridge University Press 1999).

[52]   Christian Reus-Smit, 'Introduction' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004).

does temper the exercise of power by requiring that it be exercised through institutions and by rule-defined processes. Institutions defined by legal rules moderate the raw exercise of power, and they do so at both the domestic and the international level. International law establishes frameworks of norms within which cross-border interactions of all kinds – from tourism to war – take place. The meaningful distinction, then, is not between domestic and international but rather between a greater or lesser role for law in mediating and channeling the exercise of power.

In some ways, international politics at the right end of the continuum have more in common with functioning rule-of-law states (also at the right end of the continuum) than they have with the anarchic power politics (domestic and international) at the left pole. Still, in general, the median international politico-legal institution probably falls to the left of the median state on the continuum. Another way of putting this is that whereas the most highly functional international politico-legal institutions seem exceptional or unusual, the most dysfunctional states are those that appear anomalous or atypical.

If politics within the framework of law differ qualitatively from politics outside it, then the relationship between politics and international law will shift as we move along the continuum toward greater legal institutionalization. The point is not to disentangle politics and law, to identify some behaviors or phenomena as 'political' and others as 'legal'. The two are so enmeshed that it makes more sense to think about politico-legal institutions and the ways in which they operate differently as we move toward greater institutionalization of law. By 'politics' we mean modes of interaction by which actors seek to influence collective (or 'public') outcomes (standards, policies, rules). In politics, multiple modes of influence are possible, ranging from physical compulsion (or the threat of it), to the offering of material inducements, to the deployment of expertise (or knowledge), to persuasion. Law is both a set of rules and the processes for producing, modifying, interpreting and bringing about compliance with those rules.[53] Legal rules differ from other kinds of rules (moral, technical) in that they are generated by legal processes. Legal process marks rules as legal. Within legal institutions,

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[53]   Legal theorists have offered and debated various frameworks for identifying law and legal processes; see Franck (n 17); Fuller (n 27); Hart (n 16); Raz (n 27).

argumentation frameworks establish boundaries for influence and persuasion,[54] broadly defining the range of claims, arguments and reasons that are acceptable or legitimate. The more developed are legal institutions, the more influence will be exercised through persuasion within argumentation frameworks and the less through compulsion or material power.

2.3   Mid-Range Theory and Micro-Foundations

The variegated nature of international law, with rules and institutions arrayed along the continuum from one pole to the other, makes generalizing difficult. In that respect, studying the politics of international law has a great deal in common with mid-range theorizing that characterizes much of the study of comparative politics. In comparative politics, the challenge is to draw general conclusions about states that vary widely in terms of their social, economic and political structures. What is the general theory that can explain politics in Brazil, Belgium and Burkina Faso? In the politics of international law, the same kind of challenge confronts efforts to account broadly for behaviors and outcomes in highly diverse domains and institutional arrangements – at different stages of the governance process or in different systems of governance. No general theory could explain the politics of international law in the WTO and with respect to drone strikes: indeed, no general theory is possible. Instead, research tends to focus on the 'mid-range', bounded in terms of the set of units to be analyzed or the scope of the phenomena to be explained. Similar strategies make sense for the politics of international law. The contributions to this handbook focus either on a particular stage of governance (rulemaking, interpretation, decision-making, implementation or legal change) or on a particular governance system (human rights, investment, the environment).

A mid-range approach lends itself to identifying the distinct institutional and micro-level factors that influence the varying relationships between politics and law, and different stages of governance and in different governance systems. These are generally similar to those that students of comparative politics find useful across empirical domains and across analytical questions:

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[54]   Alec Stone Sweet, 'Path Dependence, Precedent, and Judicial Power' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford University Press 2002); Sandholtz and Sweet (n 1).

1.   **Actors**: Who are they and what are their interests, values, power
      and resources? How many actors are engaged in this domain and
      what are their relative capacities to exercise influence?
2.   **Problems**: What is the nature of the problem or challenge at the
      center of interactions? Is it competition over a fixed resource, like
      territory? Is it management of a common pool resource? Is it
      coordinating standards to stabilize ongoing interactions?
3.   **Rules**: What are the rules developed by these actors to govern their
      interactions in this problem domain? Again, rules vary in their
      specificity, formality and authoritativeness.
4.   **Institutions**: What are the institutional structures, created by the
      rules and inhabited by the actors, to generate new rules, interpret
      and adapt existing rules, and monitor or motivate compliance? To
      what extent do the institutions mediate or channel actors' exercise
      of power and influence?

3.   THE STRUCTURE OF THE BOOK

In the chapters that follow, leading scholars explore variation in the
relationship between politics and international law across different stages
of governance and different governance systems. The chapters in *Part I:
Law, Politics and Institutions* investigate variation across stages of
governance from an institutional perspective.

In Chapter 2, Compliance: Actors, Context and Causal Processes,
Courtney Hillebrecht addresses the fundamental concept of compliance
with international law. Hillebrecht argues that compliance is best under-
stood as not only an outcome, but also a process, one with links to the
different stages of governance. Hillebrecht identifies the domestic and
international institutional actors in the compliance process and analyzes
the relationships among them. She finds that while compliance is most
obviously linked to the decision-making stage of governance, it is also
linked in important ways to the rulemaking and implementation stages.

Rachel Brewster, in Chapter 3, The Effectiveness of International Law
and Stages of Governance, distinguishes the concept of effectiveness
from the concept of compliance. Whereas compliance is the adherence of
state action to international law, effectiveness refers to the causal impact
of international law on policy. After specifying three types of effect-
iveness – 'change effectiveness', 'optimal effectiveness' and 'policy
effectiveness' – Brewster analyzes the relationships between effectiveness
and four stages of governance: rulemaking, decision-making, implemen-
tation and legal change. She shows that treaty effectiveness not only

depends upon political processes for support and development, but also shapes and reframes domestic and international policy processes.

In Chapter 4, International Law in Domestic Courts, David L. Sloss and Michael P. Van Alstine focus on a particular domestic institution: domestic courts. The chapter analyzes the role of domestic courts in the creation, interpretation, recognition, implementation and modification of international norms. Sloss and Van Alstine argue that this role varies not only across stages of governance, but also across three types of international norms: horizontal (state-to-state) norms, transnational (private-to-private) norms and vertical (state-to-private party) norms. They find that domestic courts rarely apply horizontal rules because they typically view them as 'political', not 'legal'; they routinely apply transnational rules because they typically view them as 'legal' rather than 'political'; and their receptiveness to vertical rules is mixed.

Kevin L. Cope, in Chapter 5, Treaty Law and National Legislative Politics, turns his attention to the role of another domestic institution, one that has so far received relatively little attention in the study of international law: domestic legislatures. Cope's central claim is that domestic legislatures play an important role in creating, interpreting and complying with international law. After analyzing legislatures' formal influence on treaty law across several stages of governance, he develops a series of conjectures about how legislatures systematically influence international cooperation.

In Chapter 6, Modes of Domestic Incorporation of International Law, Pierre-Hugues Verdier and Mila Versteeg draw on an original cross-national dataset to present a comparative analysis of the formal rules of domestic public law governing the relationship between international law and domestic law in more than 100 countries. They argue that these rules play a central role in allocating authority over international rulemaking and normative change, as well as interpretive, decision-making and implementation authority, among domestic political actors. Verdier and Versteeg make an important contribution by moving beyond the commonly used binary distinction between monist and dualist countries to uncover a wide variety of theoretically relevant dimensions of cross-national variation in the rules determining the domestic status of international law.

Benjamin Faude and Thomas Gehring, in Chapter 7, Regime Complexes as Governance Systems, focus on 'regime complexes', which are defined as overlapping and non-hierarchical institutions that govern a particular issue-area. They argue that the emergence of regime complexes has influenced the interaction of international law and international politics at different stages of governance. They explain how regime

complexes influence the making, changing and implementation of international law, and show how states not only strategically create and use the institutional overlap that characterizes regime complexes, but also participate in attempts to develop decentralized methods of inter-institutional coordination.

The chapters in *Part II: Sites of Governance* investigate the relationship between politics and international law in a variety of substantive fields of governance. In Chapter 8, The Power of the Implementers: Global Financial and Environmental Standards, Walter Mattli and Jack Seddon examine a particular stage of governance, implementation, in two substantive fields, global financial regulation and environmental governance. They focus on a particular implementation strategy used by international regulators, 'collaborative implementation', which involves enlisting private standard setting bodies, non-governmental organizations and other partners that have the regulatory competence, operational capacity or legitimacy needed for effective regulatory implementation. Mattli and Seddon argue, however, that collaborative implementation can have the unintended consequence of shifting power and authority from the recognized international regulator to the partner.

In Chapter 9, The European Court of Human Rights and the Politics of International Law, Mikael Rask Madsen analyzes the relationship between politics and international law at different stages of governance in an international court-centered governance system: the European human rights system, comprised of the European Convention on Human Rights and the European Court of Human Rights. Madsen brings a sociological perspective to the project, arguing that international politics is 'a broader and pre-existing general social phenomenon', and treating international law as 'a particular social construct only available in certain domains and with varying rigor and power'. Emphasizing that the five stages of governance appear not as successive stages but rather as recurring themes and sites for interactions between politics and international law, Madsen traces how these interactions have evolved as the system has developed over time.

In Chapter 10, The Law and Politics of WTO Dispute Settlement, Gregory Shaffer, Manfred Elsig and Sergio Puig examine the relationship between politics and international law in the World Trade Organization's (WTO) dispute settlement system with a focus on the selection of rule interpreters, rule interpretation and compliance with dispute settlement rulings. Emphasizing that it is insufficient to study these stages in isolation, the authors analyze the interaction between these stages of governance. Although they view the WTO dispute settlement system as arguably the most legalized international governance system in the world,

they find that politics nevertheless continues to play an important role across the system's stages of governance. They conclude that '[t]he precise mix of law and politics will shift over time; both will remain, affect each other, and together affect outcomes'.

In Chapter 11, The Politics of International Intellectual Property Law, Susan K. Sell explores the relationship between law and politics in the system governing intellectual property. She shows how actors have strategically framed intellectual property in different ways – as a public policy, a trade issue, a public health issue, a free speech and privacy issue and an investment issue – to gain the benefits of different institutions.

In Chapter 12, Non-State Actors and Human Rights: Legalization and Transnational Regulation, Suzanne Katzenstein presents a comparative analysis of the relationship between politics and law in two governance systems in the field of human rights: the system governing state practice (which is a form of legalization) and the system governing corporate conduct (which is a form of transnational regulation). Focusing on the role of NGOs and firms at the rulemaking and decision-making stages of governance, she finds that in both systems, NGOs promote accountability of other actors and act as core catalysts for rulemaking. However, Katzenstein argues that the dominance of market incentives and higher levels of flexibility and ease of amendment in transnational regulation lead to different law-politics dynamics as compared with legalization.

The next three chapters address governance in fields that have recently become highly salient. In Chapter 13, The 'War' on Terror and International Law, Jordan J. Paust discusses the system governing the use by states of armed force against non-state armed attacks and the treatment of captured persons, with a focus on interpretive claims made by states regarding the rules governing self-defense against non-state actors on foreign territory, the use of drones in connection with the exercise of that right, and detention and interrogation. In Chapter 14, An Emerging International Legal Architecture for Cyber Conflict, William C. Banks discusses the emerging system of governance for cyber conflict, arguing against an approach that depends too heavily on the United Nations Charter and the law of armed conflict. And in Chapter 15, Who Runs the Internet?, Anupam Chander provides an overview of how the Internet is governed, as well as some of the key controversies in both the procedure and substance of Internet governance.

In Chapter 16, Politics and Law in International Environmental Governance, M.J. Peterson argues that three factors shape the relationship between law and politics in the field of international environmental governance: the 'human-independent physical reality' of the environment, the mismatch of ecological and political boundaries and the multi-scalar

character of politics and law in environmental governance. She traces this relationship through the rulemaking, interpretation, decision-making, implementation and rule change stages of international environmental governance.

The chapters in this volume confirm that there is no fixed relationship between law and politics in global governance. They show that this relationship varies across different stages of governance – rulemaking, interpretation, decision-making, implementation and legal change – and across different systems of governance. Together, these contributions are a first step toward the development of a comparative approach to the analysis of politics and international law.