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THINKING BEYOND THE DOMESTIC-INTERNATIONAL DIVIDE: TOWARD A UNIFIED CONCEPT OF PUBLIC LAW

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INTRODUCTION

For many years, legal scholars and political scientists have studied domestic public law and international public law as separate subjects, treating them as if they were intrinsically different phenomena.² This approach is highly institutionalized in the legal and political science academies.³ In law schools there are, of course, separate courses and casebooks for international public law on the one hand, and domestic public law topics such as administrative law and constitutional law on the other hand. In political science departments, to the extent law is taught at all, domestic public law is usually taught by American politics scholars,⁴ and international

¹ Christopher A. Whytock is a Ph.D. student in the political science department at Duke University. He earned his J.D. and M.S.F.S. at Georgetown University. For their helpful comments and criticisms on earlier drafts of this article, the author thanks Shlomo Griner, Martín Hevia, Robert Keohane, Brian Murphy and Imke Risopp-Nickelson, as well as participants at the workshop on Rationality and Institutions organized by the Institute for Humane Studies, at the University of Virginia, June 19-25, 2004.

² Black's Law Dictionary defines public law as "[a] general classification of law, consisting generally of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another." BLACK'S LAW DICTIONARY 1106 (5th ed. 1979). Similarly, according to one leading public law scholar, "[p]ublic law governs the internal processes of government bodies and their relations to one another and to the citizens." Martin Shapiro, *Public Law and Judicial Politics*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II 365, 366 (Ada W. Finifter ed., 1993). The argument I make in this article is meant to apply to those aspects of public law, whether domestic or international, which prescribe appropriate government behavior. Although it might be possible to extend my argument further, I do not attempt to do so here.

³ According to Brierly,

The recognition of international law as a separate object of study dates from the latter part of the sixteenth century. Earlier writers had written on some of the topics which fall within modern international law, especially on the usages of war and on the treatment of ambassadors; but they did not separate the legal from the theological and ethical, or the domestic from the international aspects of such questions. J.L. BRIERLY, *THE LAW OF NATIONS* 25 (6th ed. 1963). *But see* FRIEDRICH V. KRATOCHWIL, *RULES, NORMS, AND DECISIONS* 5 (1989) for a different interpretation:

None of the original founders of the 'law of, and among nations' (*ius gentium, ius inter gentes*) limited his investigation to narrow legal issues in international life, and for good reasons. From Grotius to Vattel and Triepel, treatises on international law were always inquiries about law in general, and they concerned a wide variety of historical, political, and philosophical issues. (internal citations omitted).

More recently, Martin Shapiro noted that although the "public law" subfield of political science included not only constitutional and administrative law, but also international law, during one period lasting until the 1950s, even then international law was considered a "distinct entity." Shapiro, *supra* note 2, at 365. Both domestic and international public law arguably have their roots in ancient times. The study of the questions underlying the current field of domestic public law can be traced as far back as Plato's *The Republic* and Aristotle's *The Politics*, and rudimentary forms of international public law emerged in ancient times among the Greek city-states. CHARLES G. FENWICK, *INTERNATIONAL LAW* 5-6 (3rd ed. 1948).

⁴ See Shapiro, *supra* note 2, at 365. In some political science departments (e.g. Berkeley and Princeton), domestic public law subjects like constitutional law, jurisprudence, and judicial politics are studied and taught by a dedicated

public law by international relations scholars. Academic journals in both law and political science generally mirror this distinction between domestic and international public law.⁵

A traditional theoretical basis for this separate treatment has been what might be called the “structural/functional distinction.”⁶ This distinction holds that domestic law is a hierarchical system with centralized enforcement whose primary function is to constrain behavior, whereas international law is an anarchic system relying on decentralized enforcement or self-help that primarily performs functions other than constraint. An assumption, that hierarchy and centralized enforcement are necessary for law to systematically constrain behavior, connects the structural and functional elements of the distinction.

In this article, I reexamine the traditional approach and propose, as an alternative, a unified concept of public law. I do so in four parts. First, I explain the structural/functional distinction, giving examples from both law and political science. Second, I demonstrate the distinction’s limitations. By drawing from recent international relations scholarship that highlights structural variation both within international politics and across domestic political systems, and by conceptually disaggregating the state, I attempt to highlight the weaknesses of the domestic-international dichotomy upon which the structural/functional distinction is based. I argue that the structural differences between domestic and international public law generally are differences of degree, not kind. Moreover, I attempt to illustrate the theoretical problems posed

public law faculty. See, e.g., http://www.polisci.berkeley.edu/Grad/SubFields/Pub_Law.html and <http://web.princeton.edu/sites/politics/grad/gradfields.shtm>.

⁵ In general political science journals, domestic public law articles are not infrequent, but international law articles are rare. For example, Beth Simmons noted in 2001 that the words “international law” could be found in article titles only five times this century, and only once since 1953, in the *American Political Science Review*. Beth Simmons, *International Law and International Relations: Scholarship at the Intersection of Principles and Politics*, 2001 PROC. OF THE ANN. MEETING OF THE AM. SOC’Y OF INT’L L. 271, 272. Instead, political science articles on international law ordinarily are found in journals dedicated to international politics. General law journals appear to be more open than their political science counterparts to articles on international law, but there are numerous law journals that focus specifically on either domestic public law (e.g. constitutional law or administrative law) or international public law.

⁶ Of course, there also are a variety of doctrinal differences between the two realms of public law that make their separate study convenient. For example, the sources of domestic and international public law are different, the former in constitutions and legislation, and the latter primarily in international treaties and international custom. See IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* ch. I (5th ed. 1998) for a discussion of international custom and other sources of international law. Moreover, the scope of government activity regulated by domestic public law is primarily domestic, while that of international public law is primarily international. Note, however, that this distinction has always been somewhat blurry, and is becoming increasingly so. Domestic public law includes rules governing foreign relations, such as constitutional requirements for entering treaties and declaring war (see, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972)), and international public law includes rules that apply to the domestic behavior of governments, such as human rights law. In addition, domestic public law is often understood as primarily regulating relationships between individuals and the government, whereas international public law mainly regulates relationships between governments. But this also is not a clean distinction. Domestic public law can regulate relationships between governmental entities (for example, among executives, legislatures, judiciaries and bureaucracies and, in federal systems, among states and between state and national governments), and public international law is increasingly extending its reach to individuals (for example, in the area of human rights). Although these differences provide a convenient basis for separating the study of public law into domestic and international components, they do not provide a compelling theoretical justification for treating the two realms of public law as fundamentally different.

by the assumption that hierarchy and centralized enforcement are necessary for law to constrain behavior systematically.

But highlighting the flaws of the structural/functional distinction is not enough to justify a new approach; all useful concepts simplify certain aspects of reality. The question is whether the theoretical advantages of a concept's simplifications outweigh the disadvantages. I suggest that in the case of the structural/functional distinction in public law, the answer is probably "no." My claim is that the traditional distinction, with its emphasis on hierarchy and centralized enforcement, obscures other important variables and causal mechanisms relevant to the functions of public law, and misleadingly suggests that the values of the relevant variables necessarily depend on whether the public law system being studied is domestic or international.

In the third part of the article, I support this claim by surveying a variety of rational choice oriented theories advanced by both scholars of domestic law and scholars of international law who are asking essentially the same question: how can public law constrain government behavior in the absence of hierarchy and centralized enforcement? Importantly, these scholars, from different sides of the domestic-international divide, and from both law and political science, are giving similar answers suggesting similar causal mechanisms, including reputation and credibility, focal points and coordination, issue breadth and time horizon in interest calculations, and norms and domestic politics. This theoretical convergence points to interesting possibilities for interdisciplinary scholarship and suggests that public law may influence governments in similar ways in the domestic and international realms.

This theoretical convergence leads me, in the fourth part of this article, to call on public law scholars in both law and political science to think beyond the domestic-international divide. To support this type of thinking, I propose a unified concept of public law as an alternative to the traditional structural/functional distinction. I do so cautiously, heeding H. L. A. Hart's warning in *The Concept of Law* against succumbing to the temptation of treating domestic and international public law as the same.⁷ If the problem with the traditional approach is that it ignores important similarities between domestic and public international law, the risk of a unified concept is that it might overlook relevant differences. With these cautions in mind, I argue that public law scholars should explore the potential, as well as the limits, of a unified concept of public law, and that doing so may yield important theoretical, pedagogical and policy benefits.

⁷ Hart notes that "some theorists, in their anxiety to defend against the skeptic the title of international law to be called 'law,' have succumbed to the temptation to minimize these formal differences, and to exaggerate the analogies which can be found in international law to legislation or other desirable formal features of municipal law." H.L.A. HART, *THE CONCEPT OF LAW* 232 (2nd ed. 1994). In some cases, analogizing between domestic and international politics may be counterproductive. See, e.g., Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics* 2 (March 16, 2004) (unpublished manuscript, available at <http://www.poli.duke.edu/people/faculty/keohane.html>) (criticizing the analogy of domestic democratic accountability as a basis for designing accountability mechanisms in world politics). Laurence Helfer's thought-provoking recent article on constitutional analogies to international law is reason for optimism that heeding such warnings is not incompatible with productive thinking across the domestic-international divide. Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 *LOY. L.A. L. REV.* 193 (2003). In it, he acknowledges the risks of analogizing, *id.* at 198, but carefully navigates around them to produce interesting insights that would have been unlikely if he had strictly adhered to the traditional structural/functional distinction.

To be clear about the scope of my argument, I do not make any empirical claims in this article about the relative efficacy of domestic and international public law.⁸ My argument is about how, not how much, public law may influence government behavior. Nor do I attempt to contribute to either side of the monist-dualist debate,⁹ or to current debates regarding the extent to which domestic courts should apply international law.¹⁰ My argument is not that domestic public law and international public law are, or should be conceived as, a single system, but rather that the two realms of public law may operate in similar ways. Finally, I do not directly address ongoing scholarly discussions regarding the continued vitality of the private-public distinction in law and politics.¹¹ Those discussions are important, but as long as governments continue to be among the most powerful actors in domestic and world politics, I believe it will also be important to devote focused scholarly attention to systems like public law that might help mitigate the problem of abuses of public power.

I. THE STRUCTURAL/FUNCTIONAL DISTINCTION

A principal theoretical justification for the separate study of domestic and international public law has been the traditional structural/functional distinction. As noted above, this distinction holds that domestic law is a hierarchical system with centralized enforcement whose primary function is to constrain behavior, and international law is an anarchic system relying on decentralized enforcement or self-help that primarily performs functions other than constraint.

The structural component of the distinction can be traced to the nineteenth century legal positivist John Austin. According to his “command theory of law,” law is the command of a sovereign backed by sanctions.¹² In domestic legal systems, the government issues commands and applies sanctions for violating them. In the international legal system, however, there is no

⁸ For an overview of contending theories and empirical findings about the causal impact of international law, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002).

⁹ In one version of this debate, monists argue that domestic and international law are part of a single legal system in which international law is supreme, and dualists reject this claim, insisting that domestic and international public law are separate systems. For more detailed discussions of monism and dualism, see LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 140-141 (2nd ed. 1987), MALCOLM SHAW, INTERNATIONAL LAW 100-102 (4th ed. 1997), and BROWNLIE, *supra* note 6, at 31-32.

¹⁰ For different takes on the question of international law in domestic courts, see, for example, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991); A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475 (2003).

¹¹ See Shapiro, *supra* note 2, at 366 for a brief summary of some of the ways the private-public distinction has been challenged. Examples of work questioning or reassessing the private-public distinction include BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 2 (1991), Robert Post, *Constitutional Law: The Challenge of Globalization to American Public Law Scholarship* 2 THEORETICAL INQUIRIES IN LAW 323-325 (2001), and Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001). Wayne Sandholtz and Alec Stone Sweet's forthcoming work also seems to imply that the private-public distinction is unnecessary. See Wayne Sandholtz & Alec Stone Sweet, *Law, Politics and International Governance*, in THE POLITICS OF INTERNATIONAL LAW (Christian Reus-Smit ed., forthcoming) (manuscript available at <http://hypatia.ss.uci.edu/ps/personnel/sandholtz/Papers.htm>). Although it might be possible to modify and extend my argument to include private law, I do not attempt to do so in this article.

¹² Brian Bix, *John Austin*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2002) at <http://plato.stanford.edu/archives/sum2002/entries/austin-john/> (last visited Sept. 27, 2004).

sovereign to issue commands and back them with sanctions. “[H]ence,” Austin argues, “it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.”¹³ Although Austin’s command theory has been challenged on many fronts, perhaps most famously by the legal philosopher H.L.A. Hart,¹⁴ his emphasis on the distinction between domestic legal systems with a sovereign able to impose sanctions and international legal systems lacking these features has survived as a core element of the structural/functional distinction.

Political scientists have traditionally made the same structural distinction, albeit with less concern for the debate over international law’s status as “positive” or “real” law. In the words of Hedley Bull, a leading figure in the English school of international relations theory, “Whatever the difficulties of the Austinian view, it does help to bring out the fact that international law, whether or not it is ‘law’ properly so-called, differs from municipal law in one central respect: whereas law within the modern state is backed up by the authority of a government, including its power to use or threaten force, international law is without this kind of prop.”¹⁵ Leading realist international relations theorists also make this distinction. For example, as Hans Morgenthau argues, “Domestic law can be imposed by the group that holds the monopoly of organized force; that is, the officials of the state. It is an essential characteristic of international society, composed of sovereign states, which by definition are the supreme legal authorities within their respective territories, that no such central lawgiving and law-enforcing authority can exist there.”¹⁶

According to the traditional distinction, these intrinsic structural differences between domestic and international legal systems have an important functional implication. The primary function of domestic legal systems is to constrain behavior, a function made possible by hierarchy and centralized enforcement. However, since the international legal system lacks these features, it is forced to rely on decentralized enforcement through either individual or collective self-help. Even if decentralized enforcement may, under certain circumstances, permit international law to constrain behavior, it cannot do so systematically.

An assumption thus links the structural and functional elements of the traditional distinction: that hierarchy and centralized enforcement are necessary for law to systematically constrain behavior. For example, Morgenthau reasons that “[w]hen individual A violates the rights of individual B within the national community, the law-enforcement agencies of this state will intervene and protect B against A and compel A to give B satisfaction according to the law. Nothing of this kind exists in the international sphere. . . . There can be no more primitive and no weaker system of law enforcement than this; for it delivers the enforcement of the law to the

¹³ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 177 (1861). Shaw summarizes a modern version of this view as follows: “Virtually everybody who starts reading about international law does so having learned or absorbed something about the principal characteristics of ordinary or domestic law. What are those identifying marks? A recognized body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws and an accepted system of enforcing those laws. Without a legislature, judiciary and executive, one cannot talk about a legal order. How can one accept a universal system of international law therefore if this is the case?” SHAW, *supra* note 9, at 2-3.

¹⁴ HART, *supra* note 7.

¹⁵ HEDLEY BULL, *THE ANARCHICAL SOCIETY* 130 (3rd ed. 1977).

¹⁶ HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 281-282 (5th ed. 1978).

vicissitudes of the distribution of power between the violator of the law and the victim of the violation. It makes it easy for the strong both to violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy. A great power can violate the rights of a small nation without having to fear effective sanctions on the latter's part."¹⁷

Interestingly, the structural/functional distinction is widely accepted not only by "skeptics" about international law's influence on government behavior and its status as "real" law, but also by "defenders" of international law.¹⁸ Skeptics define effective legal systems as requiring certain characteristics (such as a sovereign to issue commands and sanction violations), and then distinguish what they observe: domestic systems that possess these characteristics, and an international system that does not. On that basis, skeptical legal philosophers have argued that international law is not really law,¹⁹ and skeptical political scientists argue that international law does not have an important independent influence on government behavior.²⁰

In contrast, some defenders distinguish what observers should be looking for in the first place: domestic legal systems that constrain behavior, and an international legal system that performs other important functions. This allows them to accept the structural/functional distinction, but resist the skeptics' conclusions regarding the relevance of international law. In what Raustiala and Slaughter call "the standard move," defenders reason that "[e]nforcement requires an enforcer, which the international system manifestly does not have. Law, however, can and does perform many functions other than constraint."²¹ For example, the policy-oriented approach inspired by Myres McDougal and Harold Lasswell sees law not simply as a limit on power, but as a tool used to promote values. According to Richard Falk's "world order" approach, international law performs important international systemic functions such as facilitating crisis communication and enabling cooperation. The "managerial school" of international law, exemplified by the work of Abram and Antonia Chayes, argues that international law affects the course of international affairs not only as a constraint, but also as a basis of justification or legitimization for action and by providing organizational structures, procedures and forums within which international political decisions may be reached.²²

In summary, according to the traditional structural/functional distinction, domestic legal systems are characterized by hierarchy and centralized enforcement and, because of these features, they are able to perform a constraint function. Lacking these features, the international legal system is unable to systematically perform that function, leading skeptics to deny an important role for international law, and defenders to assert that international law performs alternative, but nevertheless important, functions in world politics. The connection between the

¹⁷ *Id.* at 297-298.

¹⁸ The labels "skeptics" and "defenders" are not meant to carry normative implications. Indeed, I have refrained from referring to "realists" and "idealists" (or "liberals") not only because they do not always accurately describe the participants in the debate, but also because they have become loaded terms that often serve as straw men.

¹⁹ This is Austin's argument. See AUSTIN, *supra* note 13, at 177.

²⁰ For overviews of the skeptical approach, see LOUIS HENKIN, *HOW NATIONS BEHAVE* 22-25 (1979), Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75, 79-80 (1998), and Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207-209, 214-217 (1993).

²¹ Raustiala & Slaughter, *supra* note 8, at 540.

²² For an overview of these approaches, see Slaughter Burley, *supra* note 20, at 209-214.

structural and functional elements of the distinction is the assumption that the constraint function relies on hierarchy and centralized enforcement.

II. THE LIMITATIONS OF THE STRUCTURAL/FUNCTIONAL DISTINCTION

The structural/functional distinction suffers, however, from important weaknesses. By highlighting structural variation both within international politics and across domestic politics, recent international relations scholarship has challenged the domestic-international dichotomy upon which the structural/functional distinction is based. Moreover, conceptually disaggregating the state suggests that contrary to the traditional distinction, important areas of domestic and international public law are in fact structurally similar. Finally, the assumption that hierarchy and centralized enforcement are necessary for public law to perform a constraint function is problematic.

A. *Polyarchy in Domestic and International Politics*

The structural/functional distinction between domestic and international public law is based on a dichotomy between domestic and international politics that was once widely accepted by international relations theorists. In his influential *Theory of International Politics*, Kenneth Waltz states that “domestic political structure has to be examined in order to draw a distinction between expectations about behavior and outcomes in the internal and external realms.”²³ More specifically, he argues that domestic systems are centralized and hierarchic, and the international systems are decentralized and anarchic.²⁴

However, recent international relations scholarship has challenged the Waltzian dichotomy by highlighting structural variations both within international politics and across domestic political systems. First, critics show that hierarchy and centralization in international politics vary, among other things, by issue area, time, and groups of countries. In other words, international politics is not uniformly or intrinsically anarchical and decentralized. For example, international relations theorist Helen Milner asks, “Where along the continuum [between hierarchy and anarchy] does the international system fit? The answer to this depends on two factors: what issue we are discussing (e.g., fishing rights, the use of nuclear weapons, or control of the seas) and what time period we have in mind.”²⁵ Today, for example, economic relations among European Union members exhibit a considerable degree of hierarchy and centralization.

Second, critics show that domestic politics is not uniformly or intrinsically hierarchical and centralized. According to Milner, a view of domestic politics as hierarchic “is hard to maintain. Who is the highest authority in the US? The people, the states, the Constitution, the executive, the Supreme Court, or even Congress. *De jure*, the Constitution is; but, *de facto*, it

²³ KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 81 (1979).

²⁴ *Id.* at 88. In addition to structural realists like Waltz, neoliberal institutionalism generally assumes this distinction. See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY* 62 (1984) [hereinafter KEOHANE, *AFTER HEGEMONY*]. It is important to note that the term “anarchy” as used by international relations theorists generally has a strictly structural meaning, and does not suggest a necessary lack of political order or stability.

²⁵ Helen Milner, *The Assumption of Anarchy in International Relations Theory: A Critique*, 17 *REV. INT’L STUD.* 67, 76 (1991).

depends upon the issue. . . . Authority in some states may be fairly centralized, while in others it is highly decentralized, as in the debate over ‘strong’ and ‘weak’ states. But the central point is that states exhibit a very broad range of values along this continuum, and not all of them—or perhaps [not] even the majority—may be more centralized than the international system.”²⁶

Milner therefore advocates a more general understanding of politics: “Domestic politics, and I would argue international politics as well, varies along a continuum from hierarchy to anarchy, with most politics resembling polyarchy, which lies in between these extremes.”²⁷ In contrast to the traditional structural/functional distinction based on the Waltzian dichotomy, which treats the structural differences between domestic and international public law as intrinsic and categorical, Milner’s continuum implies that those differences are of degree, not kind, and that they depend on a variety of factors other than whether a system of public law is domestic or international.

B. *Disaggregating the Concept of the State*

I propose a further, related critique that is of particular relevance to the question of public law. A strict domestic-international dichotomy suggests that hierarchy and centralization is uniform not only across domestic polities but also within them, that is, that all aspects of domestic politics are hierarchic and centralized. However, conceptually disaggregating the state in order to consider the relationships among its internal parts reveals important aspects of domestic politics that are structurally anarchic and decentralized.

Consider, for example, the relationships between coequal branches of government. These relationships are structurally anarchic and decentralized. There is, for example, no sovereign that sits above the judicial, legislative and executive branches of the United States government, and therefore no central enforcer of the constitutional rules that govern their relationships with each

²⁶ *Id.* Similarly, Wayne Sandholtz and Alec Stone Sweet point out that Colombia, Sierra Leone, and Somalia are hardly states at all, in the Waltzian sense of being centralized; while in the international system there exist zones constituted by highly institutionalized modes of governance. Further, national politicians, interacting in domestic political contexts, can be more jealous of their prerogatives than statesmen negotiating with one another on the global stage; and supranational courts can be more effective on a day-to-day basis than many national jurisdictions.

Sandholtz & Stone Sweet, *supra* note 11, at 267. In mid-2004, for example, the European Union and World Trade Organization are arguably more hierarchic and centralized than the government of Haiti.

²⁷ Milner, *supra* note 25, at 774. See also Alec Stone, *What Is a Supranational Constitution? An Essay in International Relations Theory*, 56 THE REVIEW OF POLITICS 441, 469-470 (1994) (rejecting the fundamental distinction between domestic and international society and arguing that “the supposed contrast between ‘law and order’ domestic society and ‘anarchic’ international society is a caricature”); David A. Lake, *Anarchy, Hierarchy, and the Variety of International Relations*, 50 INT’L ORG. 1, 6-8 (1996) (arguing that international security relationships vary on a continuum ranging from anarchy to hierarchy but, citing Waltz, agreeing that as a whole “the international system remains anarchic”); G. John Ikenberry, *Constitutional Politics in International Relations*, 4 EUR. J. INT’L REL. 147, 147-150 (1998) (calling the hierarchy-anarchy distinction “deeply flawed” as part of his argument for the importance of constitutional orders in world politics). Interestingly, classical realists who preceded Waltz seemed to recognize the fundamental similarities of domestic and international politics, even though they foreshadowed the structural distinction that would become a central assumption of structural or “neo” realism. See, e.g., MORGENTHAU, *supra* note 16, at 37 (“The essence of international politics is identical with its domestic counterpart. Both domestic and international politics are a struggle for power, modified only by the different conditions under which this struggle takes place in the domestic and international spheres”).

other. Similarly, there is no hierarchically superior entity above the federal government that centrally enforces the constitutional rules that prescribe limits on its power vis à vis the states and individual citizens. For example, to what centralized enforcement mechanism can states look for protection against encroachments by the federal government on powers reserved to the states by the Tenth Amendment? The Supreme Court itself has narrowly interpreted the amendment, calling it a mere “truism.”²⁸ Even if the Supreme Court more expansively interpreted the Tenth Amendment, there would be no higher sovereign to enforce the court’s decisions against an offending branch of the federal government.

The point is that contrary to the assumptions of the structural/functional distinction, some of the most important areas of domestic public law—including constitutional rules governing separation of powers, federalism, and civil liberties—are structurally anarchic and decentralized, and in that sense structurally similar to important areas of international public law.²⁹

C Structure and Constraint

By assuming that hierarchy and centralized enforcement is necessary for public law to systematically constrain behavior, the traditional distinction also suffers from a theoretical limitation. Other legal and political science scholars have already argued against this assumption, showing that there are other important causal mechanisms that explain how public law can constrain behavior, and that in any event, centralized enforcement is not as effective as commonly supposed.³⁰ Therefore, I will simply attempt to illustrate this problem as it applies to public law.

As discussed above, by conceptually disaggregating the state and considering the governmental relationships that are internal to domestic political systems, one observes that important aspects of domestic public law, including rules governing relationships among coequal branches of government and limiting government powers vis à vis the states and individuals, are not centrally enforced. Yet it is widely understood that constitutional rules regarding separation of powers, federalism, and individual liberties do constrain government behavior. Thus, a puzzle is posed for adherents to the structural/functional distinction. How can public law constrain government behavior in the absence of hierarchy and centralized enforcement?

The existence of a constitutional court is not an entirely satisfactory answer. For example, the United States Supreme Court, having established itself as the ultimate interpreter of

²⁸ *United States v. Darby*, 312 U.S. 100, 124 (1941).

²⁹ Consistent with this analysis, John Brehm discusses “inter-state” compliance issues or “compliance problems that arise between political units” as encompassing both compliance problems in international relations and compliance problems among branches of domestic government. John Brehm, *Steps Toward a Political Science of Compliance: Common Insights and Recurring Problems* 8-10 (Apr. 9, 1996) (unpublished manuscript, *available at* <http://polmeth.wustl.edu/papers/96/comply.pdf>).

³⁰ *See, e.g.*, Carter & Trimble, *supra* note 11, at 8 (“[T]he emphasis on courts and a police force is misleading. Law derives its force from sources other than those two institutions”); Brehm, *supra* note 29, at 12 (arguing that sanctions are “gross[ly] inefficien[t]” and “rarely more effective than educational or exhortatory forms of supervision”); JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE*, ch. 2 (1997) (explaining why supervision of bureaucracies fails to induce compliance); and TOM TYLER, *WHY PEOPLE OBEY THE LAW*, ch. 1 (1990) (advancing a normative theory of compliance that does not rely on punishment).

federal law, may take cases involving public law issues and declare a governmental entity to be in violation, but it has no independent power to enforce its decisions.³¹ Nor is there any higher power to compel the Supreme Court to take such cases and make decisions in accordance with the law. The typical case reaches the Supreme Court by writ of *certiorari*, acceptance of which is entirely at the Court's discretion and which is, given the number of petitions filed yearly, an extremely high hurdle.³² Likewise, treating the central government as a unitary actor that acts as a single unit to enforce public law against states, government officials, or other branches of government fails to provide a satisfactory solution to this puzzle. Such unified action cannot be assumed, as it involves collective action problems that are not always easily solved, particularly since different branches of government often have different interests and political agendas.³³

My point, of course, is not that domestic public law is ineffective. Nor am I suggesting that centralized enforcement is unimportant. Rather, my claim is that structural differences between domestic and international public law are differences of degree, not kind. Moreover, contrary to what is assumed by the structural/functional distinction, public law can constrain government behavior even in the absence of hierarchy and centralized enforcement, and the conditions under which this might be possible do not depend on intrinsic differences between the domestic and international realms.

³¹ For example, in the 1832 case of *Worcester v. Georgia*, 31 U.S. 515 (1832), the state of Georgia arrested and convicted two missionaries in Cherokee territory for violating a Georgia state law requiring them to have a license from the governor. The Supreme Court, holding that Georgia had no authority to apply its laws in Cherokee territory, reversed the conviction. Georgia, failing to comply, refused to release the missionaries, and the federal government, under President Andrew Jackson, who was no sympathizer with the Cherokees, did not enforce the court's decision. Jackson may not have actually said, "John Marshall has made his decision. Now let him enforce it." But he did comment in correspondence that the "the decision of the supreme court has fell still born and they find it cannot coerce Georgia to yield to its mandate." Keith E. Whittington, *The Construction of Constitutional Regimes* 48 (unpublished manuscript, available at http://www.princeton.edu/~kewhitt/chapter_two.pdf). Similarly, after the Supreme Court's desegregation ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), Arkansas governor Orval Faubus sent the state's national guard to keep black students from entering Little Rock's Central High School. President Eisenhower then federalized the guard and sent federal troops to patrol the high school, and in September 1957 black students, under military escort, were able to enter. But by September 1958, Faubus had managed to shut down Little Rock's public high schools rather than comply with the desegregation ruling. Only in August 1959, after a recall election that resulted in the removal of three segregationists from the school board, were the high schools reopened and a plan for desegregation put into place. PAUL S. BOYER ET AL., *THE ENDURING VISION* 933-934 (1996). See also Little Rock Central High 40th Anniversary Home Page at <http://www.centralhigh57.org/index.html>.

³² JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* 13 (1986).

³³ For example, impeaching and convicting a United States president in order to remove him from office requires collective action by the House of Representatives and the Senate and, nominally, the Chief Justice of the Supreme Court (see U.S. CONSTITUTION, art. I, § 2 and § 3, and art. II, § 4), and imposition of sanctions against a state requires collective action by the federal judicial and executive branches. To return to the two examples *supra* in note 31, collective action did yield an attempt to enforce the Supreme Court's desegregation ruling in *Brown v. Board of Education* by sending federal troops to Arkansas, but this was insufficient; local political developments were necessary to secure compliance. And resistance by the executive branch prevented collective action to enforce the Court's decision in *Worcester v. Georgia*. Conceptually, collective action problems among coequal branches of government are not entirely unlike the collective action problems faced by nation-states attempting to act together to provide for decentralized enforcement in international law. On the concept of decentralized enforcement in international relations, see, for example, KEOHANE, *supra* note 24, at 103 and George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?* 50 *INTERNATIONAL ORGANIZATION* 379, 387 (1996).

D. Assessing the Significance of the Objections

In summary, I have attempted to demonstrate the limitations of the traditional structural/functional distinction by highlighting structural variations both within international politics and across domestic political systems, by conceptually disaggregating the state, and by challenging the assumption that hierarchy and centralized enforcement is necessary for public law to constrain government behavior. However, all useful theories must make simplifying assumptions. The question is whether, when applied to the study of public law, the theoretical advantages of the assumptions embodied in the structural/functional distinction outweigh their disadvantages.³⁴

I suggest that the answer is no, because the traditional distinction obscures variables and causal mechanisms that do not depend on their domestic or international status, yet nevertheless may help explain how public law influences government behavior. It is necessary to understand more than levels of hierarchy and centralized enforcement to understand the functions of public law. To state the problem more formally, if the dependent variable is the extent to which public law influences government behavior, theories based on the structural/functional distinction rely on two explanatory variables, hierarchy and centralization, which in turn depend on whether the context is domestic or international (in essence, a domestic-international “dummy” variable). Such theories, although having the advantage of parsimony, thus exclude other potentially important variables and causal mechanisms that may provide better explanations for variations in public law’s influence, regardless of whether the context is domestic or international.

III. THEORETICAL CONVERGENCE IN DOMESTIC AND INTERNATIONAL PUBLIC LAW

But merely discarding the structural/functional distinction will not get us very far. The traditional approach may obscure important variables, but one cannot study every variable and consider every type of variation. If one sets aside the traditional structural/functional distinction, one needs to find alternative roadmaps for identifying which variables and which causal mechanisms to examine. As I demonstrate below, there are a variety of rational choice oriented theories separately advanced by scholars of domestic law and scholars of international law that might serve this purpose.³⁵

³⁴ Waltz is, of course, well aware that his dichotomy does not perfectly reflect empirical reality. However, he makes an explicit tradeoff hoping for increased theoretical power: “Increasing the number of categories would bring the classification of societies closer to reality. But that would be to move away from a theory claiming explanatory power to a less theoretical system promising greater descriptive accuracy.” WALTZ, *supra* note 23, at 115. See *generally id.* chap. 5 for a thorough discussion of Waltz’s understanding of real-world deviations from his simplifying assumptions.

³⁵ The theories discussed in this section are intended to illustrate theoretical convergence across the domestic-international divide, and to suggest that the causal mechanisms through which public law influences government behavior may be similar in the domestic and international realms. This article does not attempt to exhaustively survey critiques of these approaches or to empirically evaluate their validity. For a general critique of rational choice applications in political science, see DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994). Nor is the focus on the theories in this section meant to imply that there are not other potentially fruitful rational choice approaches to understanding public law, or that approaches from outside the rationalist

These scholars, from different sides of the domestic-international divide, and from both law and political science, are asking essentially the same question: how can public law constrain government behavior in the absence of hierarchy and centralized enforcement?³⁶ And, importantly, they are giving similar answers suggesting similar causal mechanisms, four of which I will discuss below: reputation and credibility, focal points and coordination, issue breadth and time horizon in interest calculations, and norms and domestic politics. Thus, there is an emerging common language, inchoate as it may presently be, for a unified approach to the study of domestic and international public law.³⁷ This theoretical convergence is important not only for its implications for the future of interdisciplinary scholarship in law and politics, but

tradition cannot also contribute to a unified understanding of public law. For a leading constructivist's treatment of law, see KRATOCHWIL, *supra* note 3.

³⁶ For example, international legal scholar Thomas Franck posed his central question as "Why do powerful nations obey powerless rules?" THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 3 (1990). Similarly, Stephen Holmes, a scholar of domestic law and politics, frames the issue like this: "[W]hy do people with power accept limits to their power? . . . [W]hy do people with guns obey people without guns?" Stephen Holmes, *Lineages of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 19, 24 (José María Maravall & Adam Przeworski eds., 2003). The same question drives the recent volume edited by comparative political scientists José María Maravall and Adam Przeworski on rule of law, José María Maravall & Adam Przeworski, *Introduction*, in *DEMOCRACY AND THE RULE OF LAW* 1, 1 (José María Maravall & Adam Przeworski eds., 2003), and has long interested positive political theorists. See, e.g., Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 *J. INSTITUTIONAL & THEORETICAL ECONOMICS* 286 (1993) [hereinafter *CONSTITUTIONS*]; Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 *J.L. ECON. & ORG.* 213, 220 (1990). J. L. Briery, in his classic treatise on international law, recognized the centrality of this question in both domestic and international politics:

The fundamental difficulty of subjecting states to the rule of law is the fact that states possess power. The legal control of power is always difficult, and it is not only for international law that it constitutes a problem. The domestic law of every state has the same problem, though usually (but not, as the persistence of civil wars proves, invariably) in a form less acute. In any decently governed state domestic law can normally deal effectively with the behavior of individuals, but that is because the individual is weak and society is relatively strong; but when men join together in associations or factions for the achievement of some purpose which the members have in common the problem of the law becomes more difficult.

BRIERLY, *supra* note 3, at 48.

³⁷ Others have previously hinted at such a possibility. See, e.g., Milner, *supra* note 25, at 81; Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 *AM. POL. SCI. REV.* 819, 828 n.20 (2000) [hereinafter Simmons, *State Behavior*]. One team of scholars has developed an interesting theory of dispute resolution and governance that, while not specifically focused on public law, has general applicability to domestic and international rules systems. See Alec Stone Sweet, *Judicialization and the Construction of Governance*, in *ON LAW, POLITICS AND JUDICIALIZATION* 55 (Martin Shapiro and Alec Stone Sweet eds., 2002); Sandholtz & Stone Sweet, *supra* note 11. In fact, Sandholtz and Stone Sweet seem to go further than I do, suggesting that the concept of domestic and international rules in general, legal and non-legal, public and private, could be unified. They "see institutions as rule structures" then "deny any inherent, theoretically significant, distinction between how international and domestic regimes operate." Sandholtz & Stone Sweet, *supra* note 11, at 240, 269. Brehm, *supra* note 29, suggests the possibility of a general theory of compliance, extending not only across the domestic-international divide, but also across individual, individual-state, and inter-state relations. Even the classic realist Edward Hallett Carr asserted in a similar vein that "the relation of law to politics will be found to be the same in the international as in the national sphere." EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 172 (1964). The work of FRANCK, *supra* note 36, and KRATOCHWIL, *supra* note 3, respectively based on factors of legitimacy and communicative action, both of which factors arguably operate in similar ways domestically and internationally, also suggests the possibility of a unified approach.

also because it suggests that the causal mechanisms through which public law influences government behavior may be similar in the domestic and international realms.³⁸

A. *Reputation and Credibility*

One causal mechanism is related to reputation and credibility. A government may comply with domestic or international public law to enhance its reputation for law-abidngness. Such a reputation makes a government a more attractive partner in mutually beneficial cooperative undertakings with citizens or other governments. In contrast, a reputation for violating public law can be costly for a government, since it may deter potential partners and thus cause the government to forego the benefits of cooperation. With relatively little reference to each others' literatures, scholars of international public law and scholars of domestic public law have separately developed similar theories using this same basic logic, representing one area of convergence across the domestic-international divide.

According to some international relations³⁹ and international legal⁴⁰ scholars, reputation is the central mechanism for compliance with public international law. In an early formulation of this logic, Robert Keohane explained as follows: “[G]overnments will decide whom to make agreements with, and on what terms, largely on the basis of their expectations about their partners’ willingness and ability to keep their commitments. A good reputation makes it easier for a government to enter into advantageous international agreements; tarnishing that reputation imposes costs by making agreements more difficult to reach.”⁴¹

In what may be the most empirically rigorous work to date on compliance with international law, Beth Simmons found governments that declared adherence to Article VIII of the International Monetary Fund’s Articles of Agreement (which prohibits current account restrictions) were less likely than other governments to restrict their current accounts, controlling for regional policies, policy inertia, and a variety of macroeconomic factors that could put pressure on a government to impose such restrictions.⁴² She argues that governments commit to and comply with Article VIII “to enhance their credibility to markets that doubt their ability or willingness to maintain current account policy liberalization into the future. Governments that are interested in efficiency gains from international transactions have good reasons to establish their credibility through such a commitment.”⁴³ More generally, Simmons argues that governments comply with legal commitments “to preserve their reputation for predictable behavior in the protection of property rights.”⁴⁴

³⁸ See the fourth part of this article for a more thorough discussion of the implications of this convergence.

³⁹ See, e.g., Simmons, *supra* note 20, at 81.

⁴⁰ See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1861-1867 (2002).

⁴¹ KEOHANE, AFTER HEGEMONY, *supra* note 24, at 105-106. In his 1968 book *How Nations Behave*, Louis Henkin anticipated this type of explanation by noting that one reason governments observe international legal commitments is that they “generally desire a reputation for principled behavior” and that their “foreign policy depends substantially on its ‘credit’—on maintaining the expectation that it will live up to international mores and obligations.” HENKIN, *supra* note 20, at 52.

⁴² Simmons, *State Behavior*, *supra* note 37, at 829-32.

⁴³ *Id.* at 821.

⁴⁴ *Id.* at 820.

Mancur Olson has made an argument in the domestic context that is strikingly similar to Simmons' argument about compliance with international public law. Olson assumes that governments are rationally self-interested in maximizing tax revenues and, therefore, in maximizing income generated in the economy; and that an economy generates its maximum income only if there is a high rate of investment which, in turn, requires secure property rights. If people fear expropriation, they will invest less, and in the long run the government's tax collections will be reduced. For this reason, rational governments seek a reputation for protecting private property. But a government's promise not to expropriate property is not credible unless it is backed by law and an independent judiciary.⁴⁵

Although Olson does not expressly extend his argument this far, the implication is that a rational government has an incentive not to violate public law (say, for example, the Fifth Amendment's "takings clause" which prohibits government taking of private property except for a public purpose and with just compensation) because doing so would damage its reputation for protecting property, and ultimately reduce its tax revenues.⁴⁶ Moreover, this argument can be extended to apply not only to security of property rights and generation of tax revenues, but also to cooperation between a government and its subjects in general, particularly since "[e]ven the most powerful government cannot enforce any rule it chooses," but "must elicit compliance from the majority of the governed."⁴⁷ According to José Maravall and Adam Przeworski, "following Machiavelli's advice, self-interested rulers willingly restrain themselves and make their behavior predictable in order to obtain a sustained, voluntary cooperation of well-organized groups commanding valuable resources."⁴⁸

Kenneth Shepsle also has argued that even though "[t]he ex ante prospect of ex post cheating strongly qualifies the ability of agents to exhaust gains from cooperation . . . [a]ll is not lost," partly because in situations of repeated play the reputational mechanism can make cooperation self-enforcing. "[I]f A develops a reputation for renegeing, then even those agents who have never been personally victimized by A will not enter into coalitions with him."⁴⁹ Similarly, David Kreps asks what is the source of faith in organizations that leads people to grant organizations authority over them, and answers that it is reputation. "The organization, or, more precisely, those in the organization who have decision-making authority, will have an interest in preserving or even promoting a good reputation to allow for future beneficial transactions."⁵⁰

Even if the reputational mechanism helps explain how public law works both domestically and internationally, it must be noted that this mechanism is far from perfect. Shepsle notes, for example, that difficulties with "[t]he identification of cheaters, free-riding behavior, and problems with imposing sanctions (who will do the punishing?)," as well as the

⁴⁵ Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 571-572 (1993).

⁴⁶ Violating a specific public law rule like the Fifth Amendment's taking clause may more broadly affect the government's reputation for abiding by property-protecting public law rules in general.

⁴⁷ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 155 (1984). See also Brehm, *supra* note 29, at 12.

⁴⁸ Maravall & Przeworski, *supra* note 36, at 3 (paraphrasing Stephen Holmes).

⁴⁹ Kenneth A. Shepsle, *Institutional Equilibria and Equilibrium Institutions*, in *THE SCIENCE OF POLITICS* 51, 71 (Herbert F. Weisberg ed., 1986).

⁵⁰ David M. Kreps, *Corporate Culture and Economic Theory*, in *PERSPECTIVES ON POSITIVE POLITICAL ECONOMY* 90, 92-93 (James E. Alt & Kenneth A. Shepsle eds., 1990).

fact that “[c]heating is not dichotomous (cheat, not cheat),” can reduce the efficacy of reputation as a form of self-enforcement.⁵¹ Similarly, as Andrew Guzman argues in the international context, the impact of reputational concerns depends on factors including the severity of the violation, the reasons for the violation, the extent to which other actors know of the violation, and the clarity of the commitment and the violation.⁵² In some cases a government simply may find that the benefits of violating public law may be greater than the ensuing reputational costs. In other cases, a government may find that other types of reputations (such as for pursuing one’s interests, helping one’s friends, punishing one’s enemies, or being tough) are more beneficial than a reputation for law-abidingness, or it may be strong enough to extract benefits from other actors no matter how bad its reputation for law abidingness may be.⁵³ Finally, George Downs and Michael Jones argue that the power of reputation to enforce compliance is usually modest because actors “have reason to revise their estimate of a state’s reputation following a defection or pattern of defections . . . only in connection with agreements that they believe are (1) affected by the same or similar sources of fluctuating compliance costs (or benefits) and (2) valued the same or less by the defecting state.”⁵⁴ As a result, governments may have a variety of different reputations related to different regimes or different commitments within a regime.⁵⁵

B. Focal Points and Coordination

Focal points are the key element of another causal mechanism for public law’s influence that has been identified by both scholars of domestic law and scholars of international law. The theory is that public law influences government behavior by providing focal points that are necessary for coordinated behavior. Although focal point explanations of law vary, the basic concept is rooted in game theory. According to the folk theorem of repeated games, there can be many equilibria in a single game.⁵⁶ When the folk theorem applies, there may be “multiple paths toward capturing the gains from cooperation and no obvious way for a set of decentralized actors to converge on one of them.”⁵⁷ Focal points provide a solution to this problem by singling out one coordination point and distinguishing it from others.⁵⁸

⁵¹ Shepsle, *supra* note 49, at 72.

⁵² Guzman, *supra* note 40, at 1861.

⁵³ Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 497-498 (1997) [hereinafter Keohane, *Two Optics*].

⁵⁴ George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002).

⁵⁵ *Id.*

⁵⁶ HERBERT GINTIS, *GAME THEORY EVOLVING* 129 (2000).

⁵⁷ Geoffrey Garrett & Barry Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in *IDEAS AND FOREIGN POLICY* 173, 175 (Judith Goldstein & Robert O. Keohane eds., 1993).

⁵⁸ Thomas Schelling gave the following example in his seminal treatment of focal points:

Two people parachute unexpectedly into the area shown, each with a map [showing a river, some roads and buildings, a pond and a bridge] and knowing the other has one, but neither knowing where the other has dropped nor able to communicate directly. They must get together quickly to be rescued. Can they study their maps and “coordinate” their behavior? Does the map suggest some particular meeting place so unambiguously that each will be confident that the other reads the same suggestion with confidence?

THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54-55 (1980). Schelling’s answer is yes. In his unscientific sample, almost all people playing this game, without being able to discuss the matter with each other, nevertheless were able to coordinate by meeting at the bridge, which emerged as the natural focal point. *Id.* at 55-56.

Legal rules can act as focal points by identifying which coordination points actors will adopt.⁵⁹ Indeed, according to Richard McAdams, legal rules may work particularly well as focal points because they have the advantages of being highly public (“[t]he publicity frequently accorded law means it is more likely to create the expectations necessary for coordination”) and unique (law’s special status “causes its message to ‘stand out’ against the background of public discourse”).⁶⁰

There are two versions of the focal points causal mechanism, one relating to the benefits of coordination facilitated by an existing focal point and the costs of re-coordination around a new focal point, and another relating to the role of focal points in solving coordination problems among prospective decentralized enforcers of public law.

According to the first approach, a public law focal point may make possible beneficial cooperation between a government on the one hand, and its citizens, other branches of government, governmental subunits (such as states), or foreign governments on the other hand. A government then has three choices: it can comply with the public law focal point and continue to benefit from the cooperation; it can violate the public law focal point and forego the benefits of cooperation; or it can attempt to negotiate re-coordination of cooperation around a different focal point. According to this approach, the government’s decision will depend on the benefits of noncompliance and the costs of re-coordination, relative to the benefits of coordination around the preexisting focal point. To the extent re-coordination is costly and cooperation is beneficial to the government, it has an incentive to comply with the public law focal point.⁶¹

On the international side, although other scholars have recognized the focal point function of international public law,⁶² one of the few systematic discussions of this function is Geoffrey Garrett and Barry Weingast’s 1993 chapter on the European common market. According to them, member states had powerful incentives to liberalize trade within the European Community (EC), but since there was no single obvious path toward that goal, members faced a formidable coordination problem. The European Court of Justice (ECJ) solved that coordination problem in its *Cassis de Dijon* case by promulgating a focal point: the principle of mutual recognition, according to which goods that have been legally produced and marketed in one member state should have unrestricted access to other member states’ markets. The ECJ did not force EC members to adopt and comply with this principle; rather, “the court’s decision acted as a focal point around which EC members could coordinate their bargaining.”⁶³

⁵⁹ Lewis A. Kornhauser, *The Normativity of Law*, 1 AM. L. & ECON. REV. 3, 21 (1999).

⁶⁰ Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1668 (2000).

⁶¹ These arguments may also be supported by theories of institutional path dependence. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE ch. 11 (1990). The focal point literature sometimes seems to imply an assumption that the costs of re-coordination are prohibitively high, but as Gerard Alexander argues, it is not a safe assumption to make without careful empirical investigation. Gerard Alexander, Power, Interests and the Causal Effects of Institutions 16-20 (March 2004) (unpublished manuscript, available at http://www.europenet.org/conference2004/papers/A2_Alexander.pdf).

⁶² See, e.g., Keohane, *supra* note 53, at 493, and Simmons, *supra* note 20, at 81. Robert Keohane elaborated the basic logic for this approach in the international context, reasoning that states may comply with regime rules because they are easier to maintain than they are to create: “In these terms, international regimes embody sunk costs, and we can understand why they persist even when all members would prefer somewhat different mixtures of principles, rules, and institutions.” KEOHANE, AFTER HEGEMONY, *supra* note 24, at 100-103.

⁶³ Garrett & Weingast, *supra* note 57, at 189. Garrett and Weingast also argue that focal points help solve the puzzle posed by an ECJ with very limited sanctioning powers that nevertheless has been able to powerfully affect the

Similarly, in the domestic context, Russell Hardin reasons that “[o]nce a coordination is in place and people are following it, the cost of re-coordinating is the chief obstacle to moving to any supposedly superior order. This cost can block re-coordination even if it would be in virtually everyone’s interest to be in a new order.”⁶⁴ Similarly, David Kreps links the concept of focal points to reputational mechanisms (discussed above), thus providing another reason why it may be in the interest of hierarchical superiors to adhere to focal point rules even when doing so might not be efficient in the short-term.⁶⁵

The second approach emphasizes the role of focal points in coordinating cooperation among prospective decentralized enforcers of public law. According to Barry Weingast, governments comply with limitations on their power when they believe that violating those limitations will lead to concerted action by citizens to depose the government or withdraw support.⁶⁶ However, if the government believes that citizens are unable to act in concert to defend their rights, those limitations will not be self-enforcing.⁶⁷ Maintaining limits on government is therefore a “massive social coordination problem.”⁶⁸ Citizens must coordinate on which limits on governmental power are to be defended and how they are defined. Otherwise,

domestic politics of EU members, who have acquiesced as the court’s power has increased. “The logic of constructed focal points provides a simple and powerful answer,” they explain. The Treaty of Rome, which provides the legal basis for the ECJ, is difficult to amend because of the unanimity requirement, and even if it could be amended it is unlikely that EC members would be able to agree on an alternative arrangement. *Id.* at 197.

⁶⁴ RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 16 (1999) (emphasis omitted). As Hardin elaborates, “Although its rationale in part is similar, this is not the system of checks and balances envisioned by Montesquieu. It is a finer grained application of Madison’s injunction: ‘Ambition must be made to counter ambition’ (*Federalist*, 51). . . . To be sure, I block your action because I think it is wrong. But I do so with substantial support that makes my action costless or even beneficial to me. Similarly, I do my job well because others will generally support and reward me for working well. Moreover, it would be difficult to disrupt this system to anyone’s benefit, including that of a national president or prime minister.” *Id.* at 26. But Hardin is not completely optimistic: “Such a conventional norm system may not work equally well at all levels or in all circumstances” and he does not claim that “such a system can never be abused for essentially self-interested purposes.” However, “its force can be seen in recent decades in the forced removal from office of legislators, high-ranking bureaucrats, presidential advisers, a president, and a vice-president in the United States, and of ministers and other high-ranking officials in Japan and several European nations, most notably Italy in recent years.” *Id.* at 26. Moreover, if a constitution provides coordination on a central program, “there is much less need to have an external force to control the government to make it comply with the constitutional order. Hence, constitutional government is feasibly workable. It can fail, however, if the central coordination requires great power that can be used for purposes other than managing the programme on which we have coordinated. In that case, the constitutional order can fail utterly.” *Id.* at 28. Adam Przeworski makes a similar argument, although not with reference to coordination or focal points: “[C]ompliance can be self-enforcing if the institutional framework is designed in such a way that the state is not a third party but an agent of coalitions of political forces.” ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 25 (1991). See also Maravall & Przeworski, *supra* note 36, at 11-12 (“[A] system of checks and balances leads the government as a whole to act in ways that are predictable and moderate when (1) these institutions have means and incentives to check one another and (2) when their institutional prerogatives are backed by support from organized interests”).

⁶⁵ Kreps, *supra* note 50, at 124-131.

⁶⁶ See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997) [hereinafter *Foundations I*]; Barry R. Weingast, *A Postscript to “Political Foundations of Democracy and the Rule of Law,”* in DEMOCRACY AND THE RULE OF LAW 109 (José María Maravall & Adam Przeworski eds., 2003) [hereinafter *Foundations II*].

⁶⁷ *Foundations I*, *supra* note 66, at 246.

⁶⁸ *Id.* at 261.

collective action will be impossible.⁶⁹ Constitutions can provide a focal solution to this problem by specifying “widely accepted and unambiguous limits on the state.”⁷⁰ Under these circumstances, the rule of law will be self-enforcing, since the government factors the risk of losing citizen support into its interest calculations. Although this second version of the focal points theory of public law’s influence has not been as well developed in the international context, the same logic would seem to apply: that international public law focal points can help governments solve coordination problems associated with decentralized enforcement.⁷¹

C. Issue Breadth and Time Horizon in Interest Calculations

A third area of theoretical convergence across the domestic-international divide involves the relationship between public law and the definition of issue breadth and time horizon in governments’ interest calculations.⁷² When governments consider violating a public law rule in isolation from other issues and only in terms of short-term consequences, compliance is less likely than when the violation is weighed in light of other issues and in terms of long-term implications. Theories of domestic and international institutions suggest that systems of public law can make the long-term interest calculation, and hence compliance, more likely.

In the international context, Robert Keohane argues that institutions can help solve the problem of “myopically” defined interests:

The puzzle of compliance is why governments, seeking to promote their own interests, ever comply with the rules of international regimes when they view these rules as in conflict with what I will call their ‘myopic self-interest.’ Myopic self-interest refers to governments’ perception of the relative costs and benefits to them of alternative courses of action with regard to a particular issue, *when that issue is considered in isolation from others*. An action is in a government’s myopic self-interest if it has the highest expected value of any alternative, apart from the indirect effects that actions on the specific issue in question would have on other issues. . . . [However,] [t]his begs the question of whether the national interest is defined myopically, without regard to the effects of one’s actions on other issues or other values, or in a more farsighted way, taking into account the impact of violating international rules and norms on other state objectives. . . . [T]he crucial issues are precisely those of how interests are defined, and how institutions affect states’ definitions of their interests.⁷³

⁶⁹ *Foundations II*, *supra* note 66, at 111. Moreover, absent an effective focal point, a government may attempt to “divide and conquer” citizens by co-opting certain groups to form coalitions against others, thereby blunting citizen attempts to enforce compliance. *Id.*

⁷⁰ *Foundations I*, *supra* note 66, at 261.

⁷¹ For example, “[i]ndividuals and groups can zero in on international court decisions as focal points around which to mobilize, creating . . . [an] intersection between transnational litigation and democratic politics.” Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 478 (2000). See also discussion *infra* Part III.D.

⁷² Precommitment theory, which is based on a similar concept—foresight—has been used to explain why governments would bind themselves to legal rules in the first place. A 2003 symposium published by the Texas Law Review includes discussions of precommitment theory’s applicability to both constitutional law, *see, e.g.*, Jon Elster, *Don’t Burn Your Bridge Before You Come to It*, 81 TEX. L. REV. 1751 (2003); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003), and public international law, *see, e.g.*, Steven R. Ratner, *Precommitment Theory and International Law*, 81 TEX. L. REV. 2055 (2003).

⁷³ KEOHANE, AFTER HEGEMONY, *supra* note 24, at 99-100.

One way that institutions can affect these definitions is by linking the issue that is being myopically contemplated by a government to other issues that are covered by the institution, and by connecting the immediate costs or benefits of violating a rule related to that issue to the future costs and benefits of the overall institution.⁷⁴ Similarly, a government that finds the overall system of international public law to be in its long-term interests may be less likely to violate specific rules of public international law. In other words, a government may forego an immediate advantage from violation because it has an even greater interest in maintaining the overall system.⁷⁵

Adam Przeworski has made a similar argument about public law in the domestic context. According to him:

Democratic institutions render an intertemporal character to political conflicts. They offer a long time horizon to political actors; they allow them to think about the future rather than being concerned exclusively with present outcomes. . . . Some institutions under certain conditions offer the relevant political forces a prospect of eventually advancing their interests that is sufficient to incite them to comply with immediately unfavorable outcomes. Political forces comply with present defeats because they believe that the institutional framework that organizes the democratic competition will permit them to advance their interests in the future.⁷⁶

Thus, “losers may comply not because they recognize the decision as legal or just but only because they do not want to threaten the institutions.”⁷⁷ Under these circumstances, compliance may constitute “the equilibrium of the decentralized strategies of all relevant political forces,” making compliance self-enforcing, and eliminating the need for third party enforcement, or the normative pull of rules, to explain compliance.⁷⁸

D. Norms and Domestic Politics

Theorizing by both scholars of domestic public law and scholars of international public law suggests that public law’s influence on government behavior may also be explained by domestic political factors and by understanding public law as norms.⁷⁹ This represents a fourth area of convergence across the domestic-international divide.

⁷⁴ “Institutions that lengthen the shadow of the future or link otherwise separate issues together may create incentives to cooperate now for the sake of promoting cooperation by others later.” *Two Optics*, *supra* note 53, at 500.

⁷⁵ *Id.* at 490.

⁷⁶ PRZEWORSKI, *supra* note 64, at 19.

⁷⁷ Maravall & Przeworski, *supra* note 36, at 14.

⁷⁸ PRZEWORSKI, *supra* note 64, at 24 and 26.

⁷⁹ A norm may be understood as “a standard of appropriate behavior for actors with a given identity.” Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INTERNATIONAL ORGANIZATION 887, 891 (1998). Rules of public law may therefore be understood as norms: they provide standards of appropriate behavior for governments whether in domestic politics (domestic public law) or international politics (international public law). There are two general models for understanding the effects of norms. According to the rationalist model, “actor behavior [is] governed by rational means-ends logics; norms alter these calculations. In their presence, actors recalculate how best to achieve given interests.” Jeffrey T. Checkel, *International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide*, 3 EUR. J. INT’L REL. 473, 475 (1997). According to the constructivist model, “agent behavior is rule governed; strategic, instrumental calculations are replaced by so-

The most direct and explicit manner in which domestic and international public law work the same way is when international law is internalized into a domestic legal system. For example, international agreements may be enforced by domestic courts when they are self-executing or when they are incorporated into domestic law through implementing legislation.⁸⁰ Robert Keohane, Andrew Moravcsik and Anne-Marie Slaughter have hypothesized that “[o]ther things being equal, the more firmly embedded an international commitment is in domestic law, the more likely is compliance with judgments to enforce it,” especially in liberal democracies which are “particularly respectful of the rule of law and most open to individual access to judicial systems.”⁸¹ When international law has been internalized, “[g]overnments that do not comply face a new calculus: in addition to the international costs of breaching a legalized commitment, they must now face the much more serious reputational and political costs of breaching legal commitments before their own citizens.”⁸²

Even if an international legal norm has not been internalized into the domestic legal system, individuals and groups may still use it to exert political pressure on governments—just as they use domestic norms to do so. “An opposition party, an independent and ubiquitous press, a scholarly community, various pressure groups—all vigilant to criticize the government—will . . . seize on violations of international law, particularly those of political import.”⁸³ In effect, such groups can translate international public law into domestic political pressure through lobbying and mobilization techniques that are well known to students of domestic politics.⁸⁴ The basic logic is that domestic groups whose interests would be served by compliance will organize to influence the government in favor of compliance.⁸⁵ Thus, “[l]egalization has its principal effect on compliance and international cooperation through the mobilization of individuals and groups in domestic politics” referred to as “compliance constituencies.”⁸⁶ This political

called logics of appropriateness, derived from social norms. . . . [N]orms are constituting actor identity/interests, and not just constraining behavior.” *Id.*

⁸⁰ Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 533 (1995). But this cannot be taken for granted. In addition to the raging academic debate about whether or not international law should be applied by domestic courts (see above), courts themselves vary in their willingness to apply international legal norms.

⁸¹ Keohane et al., *supra* note 71, at 478. Similarly, Harold Koh argues that governments obey international law when it has been incorporated into the domestic legal system through a transnational legal process of interaction, interpretation and internalization. Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L. J. 2599 (1997); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

⁸² Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INTERNATIONAL ORGANIZATION 661, 675 (2000).

⁸³ HENKIN, *supra* note 20, at 64.

⁸⁴ Finnemore and Sikkink use a similar concept of “norm entrepreneurs” and argue that they are strategic political actors that maximize their own utilities by “changing other players’ utility functions in ways that reflect the normative commitments of the norm entrepreneurs.” Finnemore & Sikkink, *supra* note 79, at 910.

⁸⁵ Conversely, it should be noted, domestic groups whose interests would be served by noncompliance will lobby the government for noncompliance. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 398 (2000).

⁸⁶ *Id.* at 397-98. Louis Henkin made a similar argument some time ago: “Some international arrangements also enjoy the support of a special ‘constituency’ that seeks to assure that the government will observe them; for example, the international trade community is concerned for good relations generally and for compliance with international law, particularly for the observance of commercial treaties and trade arrangements,” while in other cases pressure groups may be forces for violation of international law. HENKIN, *supra* note 20, at 64, 74.

mechanism works in essentially the same way for domestic public law norms and international public law norms.⁸⁷

Norm-oriented theories of public law have also been developed outside the rational choice tradition. For example, both domestic and international public law may derive normative force from legitimacy. In the international context, Thomas Franck has developed a theory of legitimacy according to which governments may obey a rule of international public law “[b]ecause they perceive the rule and its institutional penumbra to have a high degree of legitimacy. In this hypothesis, legitimacy is assigned the role of an independent variable, one which controls the extent to which a rule is perceived to exert a powerful pull toward compliance on those to whom it is addressed.”⁸⁸ In the domestic context, Tom Tyler finds that the law’s legitimacy has an independent effect on compliance by individuals.⁸⁹ Other scholars using normative theories to explain the influence of law on individual behavior include Lawrence Lessig and Cass Sunstein and, as Martha Finnemore and Kathryn Sikkink note, “[t]he processes through which [domestic legal scholars such as Sunstein and Lessig] claim that norms work domestically—involving norm entrepreneurs, imitation, ‘norms cascades,’ and ‘norm bandwagons’—are entirely consistent with the research done on norms by [international relations] scholars.”⁹⁰

There may also be psychological explanations for compliance with public law norms. In the domestic context, John Brehm argues that such psychological explanations for compliance may include the drive to maintain behavioral consistency, obedience to authority, and social proof.⁹¹ In the international context, Finnemore and Sikkink argue that the importance of self-esteem and conformity for individuals provides the psychological “microfoundations” for the influence of norms on government behavior. While they acknowledge that it is difficult to

⁸⁷ Theoretical claims about how domestic public law and international public law are used strategically are consistent with legal practice. Public law litigation has been well documented with similar aims and using similar strategies based on domestic public law, *see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), and international public law, *see* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). Similarly, human rights lawyers use “impact or test litigation, advice, counseling, referral, or legislative advocacy” to pursue their agendas, using both domestic and international norms and domestic and international tribunals. *See* RICHARD J. WILSON & JENNIFER RASMUSSEN, PROMOTING JUSTICE: A PRACTICAL GUIDE TO STRATEGIC HUMAN RIGHTS LAWYERING 60-67 (2001), at http://www.globalrights.org/site/DocServer/pj_3-4.pdf?docID=365. And as Hedley Bull notes, “[i]nternational law as a practical activity does in fact have a great deal in common with municipal law. The language and procedure of the one are closely akin to those of the other. The modern legal profession is one that embraces international law as well as the municipal law of other countries.” BULL, *supra* note 15, at 136.

⁸⁸ FRANCK, *supra* note 36, at 25. According to Franck, there are four indicators of a rule’s legitimacy: (1) pedigree (“the depth of the rule’s roots in a historical process”), (2) determinacy (“the rule’s ability to communicate content”), (3) coherence (“the rule’s internal consistency and lateral connectedness to the principles underlying other rules”), and (4) adherence (“the rule’s vertical connectedness to a normative hierarchy”). Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 51 (1992).

⁸⁹ TYLER, *supra* note 30, at 58-59.

⁹⁰ Finnemore & Sikkink, *supra* note 79, at 893. *See also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE ch. 2 (1997). There does not appear to be extensive work applying normative theories to domestic public law specifically, but I believe such work might be fruitful. For example, BREHM AND GATES, *supra* note 30, incorporate normative considerations into their theory of compliance by government bureaucracies.

⁹¹ Brehm, *supra* note 29, at 10-11.

generalize to the government level from psychological research done at the individual level, they argue that “norm entrepreneurs frequently target individual state leaders for criticism. Because much norm advocacy involves pointing to discrepancies between words and actions and holding actors personally responsible for adverse consequences of their actions, one way to think about norm entrepreneurs is that they provide the information and publicity that provoke cognitive dissonance among norm violators.”⁹²

IV. A UNIFIED CONCEPT OF PUBLIC LAW AND ITS ADVANTAGES

Because of the limitations of the traditional structural/functional distinction, and in light of the considerable theoretical convergence across domestic public law and international public law scholarship, public law scholars in both law schools and political science departments should begin systematically thinking beyond the domestic-international divide.⁹³ To support such thinking, I propose a unified concept of public law as an alternative to the traditional structural/functional distinction.

The unified approach has four primary characteristics. First, the unified concept is based on a basic understanding of domestic and international public law as *law that prescribes appropriate government behavior*.⁹⁴ This prescriptive function is a fundamental similarity between domestic and international public law, and one of the principal reasons for studying the two realms of public law as like phenomena.

Second, the unified concept, unlike the traditional distinction, recognizes the possibility of structural and other similarities between different areas of domestic and international public law. There are areas of both domestic and international public law that are relatively hierarchic and centralized, and there are areas of both domestic and international public law that are relatively anarchic and decentralized. As Milner argues, most domestic and international politics are polyarchic, and both vary along the same hierarchy-anarchy continuum.⁹⁵

Third, the unified concept, while not denying the importance of hierarchy and centralized enforcement, does not assume that these features are necessarily essential for public law to constrain government behavior. Unlike the traditional approach, it takes seriously the possibility that other causal mechanisms may allow public law to perform a constraint function, and it looks to areas of theoretical convergence across the domestic-international divide for clues about what those causal mechanisms may be.

Fourth, the unified concept does not assume that the variables relevant to an understanding of public law’s influence on government behavior are different, or that they necessarily have different values, depending on whether the context is domestic or international.

⁹² Finnemore & Sikkink, *supra* note 79, at 904. See also HENKIN, *supra* note 20, at 60 (“Nations observe law, in part, for what may be called ‘psychological’ reasons”).

⁹³ Some scholars with an interest in international law are already taking steps in this direction. See, e.g., Sandholtz & Stone Sweet, *supra* note 11; Helfer, *supra* note 7.

⁹⁴ These prescriptions include limitations on the exercise of government power. As noted above, this definition does not necessarily encompass all of what is traditionally considered to be public law. See BLACK’S LAW DICTIONARY 1106 (5th ed. 1979).

⁹⁵ Milner, *supra* note 25, at 774.

To the contrary, the unified concept supposes that the variables and causal mechanisms that explain variations in public law's influence on government behavior may be similar in the domestic and international spheres, as suggested by the survey of rational choice oriented theories in the third part of this article.⁹⁶

There are certainly differences between domestic and international public law, and to the extent those differences both help explain the influence of public law on government behavior and are intrinsic to domestic or international politics, the unified concept is, like the traditional distinction, flawed. If the problem with the traditional distinction is that it glosses over important similarities between domestic and international public law, the risk of the unified concept is that it may neglect significant differences.⁹⁷ Therefore, one should proceed cautiously, keeping in mind that only further theoretical and empirical work will determine whether scholarship based on a unified concept of public law can be productive in ways that scholarship based solely on the traditional structural/functional distinction cannot. With these cautions in mind, I argue that public law scholars should proceed to explore the potential, as well as the limits, of a unified concept of public law, and that doing so may yield important theoretical, pedagogical and policy benefits.

A. *Theoretical Advantages*

A unified concept of public law can support thinking across the domestic-international divide by focusing efforts to build upon and formalize the considerable areas of theoretical convergence between domestic public law and international public law scholarship. This, in turn, has the potential of leading to a general theoretical approach that uses a common set of variables and causal mechanisms to explain variations in public law's influence regardless of whether the context is domestic or international.⁹⁸

One specific area of public law studies for which a unified concept has implications is compliance studies.⁹⁹ As Kal Raustiala and Anne-Marie Slaughter argue, the study of compliance is a central issue in international relations theory:

⁹⁶ To reiterate, my focus on rational choice oriented theories is not meant to imply that other approaches are unlikely to be useful. To the contrary, I believe that a similar review of constructivist theories may reveal additional, perhaps even more fundamental, explanations for public law's influence on government behavior that transcend the domestic-international distinction. Constructivism also offers important critiques of approaches, like the one I have generally taken in this article, that focus on notions of "constraint" and "causal mechanisms." See, e.g., Friedrich V. Kratochwil, *How Do Norms Matter?* in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 35, 53 and 56-57 (Michael Byers ed., 2000) (criticizing "the uncritical and often incoherent acceptance of logical positivism as an epistemology" and the rationalist's exclusive focus on "regulative" rather than "constitutive" rules).

⁹⁷ For this reason, I argue that a unified concept of public law is an alternative to, not necessarily a replacement for, the traditional approach. In fact, because of their respective strengths and weaknesses, it seems that the two approaches could productively complement each other.

⁹⁸ Approaches from outside the rationalist tradition would also be important to supplement (or challenge) the focus on causal mechanisms, by adding to the analysis a better understanding of the constitutive role of rules and the normative foundations of public law.

⁹⁹ For an overview of the compliance literature, see Raustiala & Slaughter, *supra* note 8. For an interesting discussion of the different meanings of compliance and how they are related to different theories of law, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998). Among other things, Kingsbury challenges the conventional definition of compliance

[It] implicitly examines the foundations of international institutions and of international order. If compliance with international rules is ephemeral, or results purely from the exercise of power and coercion, the ability of international law and institutions to order world politics is greatly limited. Conversely, if compliance is empirically demonstrable, theoretically understandable and prescriptively manageable, then the case for the role of international law and institutions in achieving global order is strong. IR [international relations] and IL [international law] scholars have a joint agenda in compliance research, an issue that now lies at the heart of international relations theory.¹⁰⁰

A unified concept of public law suggests that compliance is as important an issue for scholars of domestic politics as Raustiala and Slaughter claim it is for international relations scholars. Moreover, a unified concept might help scholars move toward a “synthesis of compliance as a problem that cuts across multiple levels,” both domestic and international, as called for by John Brehm.¹⁰¹

A unified concept of public law also has heuristic and interdisciplinary implications. As Helen Milner has argued, one problem with the view that international relations is unique is that “one is less likely to use the hypotheses, concepts, and questions about politics developed elsewhere. International politics must then reinvent the wheel, not being able to draw on other political science scholarship. The radical dichotomy between international and domestic politics seems to represent a conceptual and theoretical step backwards. . . . Conceptions unifying, and not separating, these two arenas are heuristically fruitful.”¹⁰² Likewise, a unified concept of public law can help facilitate and structure interdisciplinary dialog between legal scholars and political scientists, and between public law scholars in both disciplines with a domestic (American or comparative) focus and those with an international focus. The sustained efforts of Anne-Marie Slaughter helped transform the study of international law by bringing international relations theorists and international legal scholars together as part of a “dual agenda.”¹⁰³ A unified concept of public law suggests that scholars of domestic law and politics have an equally important role to play in this interdisciplinary dialog.

A unified concept also has theoretical implications for the interpretation of various empirical claims about public law’s influence. As noted in the introduction to this article, I have not made any empirical claims about the efficacy of public law. However, few observers would disagree with the proposition that the efficacy of public law varies substantially across domestic polities, within domestic polities, and within the international system. Since the traditional structural/functional distinction relies on explanatory factors that it assumes are intrinsic to either domestic or international politics, it has difficulty explaining these variations. The unified

as “correspondence of behavior with legal rules.” *Id.* at 346. See also Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387 (2000) (distinguishing effectiveness from compliance) and Koh, *supra* note 81, at 2600-2601 n.3 (distinguishing obedience from compliance).

¹⁰⁰ Raustiala & Slaughter, *supra* note 8, at 553.

¹⁰¹ Brehm, *supra* note 29, at 20. However, by provisionally maintaining the private-public distinction, I may not be going as far as Brehm would like.

¹⁰² Milner, *supra* note 25, at 81. In a later article, Milner made a similar argument, emphasizing the role of rationalist approaches in an emerging synthesis in the study of international, American and comparative politics. Helen V. Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52 INT’L ORG. 759 (1998).

¹⁰³ See generally Slaughter Burley, *supra* note 20.

concept, on the other hand, has the advantage of accommodating theoretical approaches, such as those reviewed in the third part of this article, that do not rely on intrinsically domestic or international explanatory factors and which therefore may be able to offer coherent explanations for these variations.

More specifically, I have not made any empirical claims about the relative efficacy of domestic and international public law.¹⁰⁴ Yet many observers would assert that on average, domestic public law systems (at least in well-established democracies) are more effective than the international legal system taken as a whole. The traditional approach would attribute international public law's allegedly inferior efficacy to a lack of hierarchy and centralized enforcement. A unified concept, on the other hand, would look beyond these structural considerations and consider other variables that do not necessarily have intrinsically different values in the domestic and international realms.¹⁰⁵

Finally, few observers would deny that there are at least some areas of international public law that appear to influence government behavior more systematically than some areas of public law in certain domestic systems. Moreover, as illustrated in the second part of this article, there are important areas of domestic public law that lack hierarchy and centralized enforcement but nevertheless appear to constrain government behavior. These kinds of cases are anomalous for the traditional approach. With its assumptions that there can be structural similarities between areas of domestic and international public law and that there may be causal mechanisms other than centralized enforcement that operate similarly in both the domestic and international spheres, the unified concept has the potential to make sense of such cases.

B. Pedagogical Advantages

The unified concept of public law also has pedagogical implications. For example, some faculties may find it worthwhile to supplement dedicated constitutional law, administrative law and international law courses with one or more integrated public law courses.¹⁰⁶ If, as I suggest,

¹⁰⁴ In fact, if my overall argument is convincing, then the question itself may be misguided by insisting on domestic public law and international public law as theoretically significant categories. Rather, the appropriate question would be, "Why does public law system A, defined by issue, time, actors, and other relevant factors (but without respect to whether the system is domestic or international), exert more (or less) influence on government behavior than public law system B, defined with reference to similar factors?"

¹⁰⁵ For example, perhaps domestic public law systems are more effective because, on average, people, including government officials, are more normatively committed to their own domestic public law than to international law. Consider the normative importance that Americans attach to the United States Constitution. Is there a comparable global normative commitment to any given body of international public law? Another explanation might begin with the premise that public law's influence on government behavior is enhanced when there is a court system to interpret the law and resolve disputes about its meaning and application (regardless of whether or not the court has independent enforcement powers or is able to coordinate with another branch of government that possesses a police power). The reasoning would then be that domestic law is more effective because domestic court systems are, on average, more expansive and highly developed, allowing them to perform their interpretive and dispute resolution functions more effectively than their international counterparts.

¹⁰⁶ Georgetown's innovative "curriculum B" for first year law students is an interesting and significant step in this direction. One of the curriculum's required courses is "Democracy and Coercion" which, among other things, draws broadly from constitutional law, criminal procedure and political philosophy to examine the problem of "limits on the coercive authority of the state." A unified concept of public law suggests that international public law provides another important source of material for exploring that problem, since it too prescribes limits on government

domestic and international public law work in similar ways, then those interested in studying and teaching how either of these realms of public law work would benefit from studying and teaching them together. Indeed, the legal regulation of certain areas of government activity, such as the treatment of individuals (implicating both constitutional civil rights and international human rights) and the use of military force (implicating both constitutional foreign relations law and international law governing the use of force), are already difficult to teach without incorporating both domestic and international public law.

In particular, the unified approach may provide a valuable conceptual foundation for law school courses aimed at training aspiring lawyers to develop and implement coherent legal strategies using both domestic and international legal rules and both domestic and international legal forums. This type of training would seem especially valuable for students interested in engaging in what Harold Koh refers to as “transnational public law litigation.”¹⁰⁷ Practical training in human rights advocacy already often incorporates both domestic and international legal strategies, thus implicitly taking a unified approach.¹⁰⁸

C. Policy Advantages: Institutional Design and the Fundamental Problem of Governance

Policy-oriented legal and political science scholars may also benefit from an exploration of a unified concept of public law. In both domestic and world politics, institutions, including states, branches of domestic government, and international organizations, have power that allows them to provide public goods. However, “any concentration of power carries immediately the danger of arbitrariness, of abuse, corruption and advancing self-interest by those in control.”¹⁰⁹ The problem, which might be called the “fundamental problem of governance,” is how to design institutions that are able to provide essential public goods, but whose potential for abusing their power is minimized.¹¹⁰

Public law, which prescribes appropriate government behavior, is one way of trying to mitigate the fundamental problem of governance. However, since this problem transcends the

behavior. For an overview of Georgetown’s “curriculum B,” see <http://www.law.georgetown.edu/curriculum/jdprog.cfm#First>.

¹⁰⁷ Koh, *supra* note 87. Transnational public law litigation merges traditional domestic and international litigation. “Private individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently, domestic courts. In these fora, these actors invoke claims of right based not solely on domestic or international law, but rather, on a body of ‘transnational’ law that blends the two.” *Id.* at 2348-2349.

¹⁰⁸ See, e.g., the recent practice-oriented guide to human rights lawyering published by the International Human Rights Law Group, *supra* note 87.

¹⁰⁹ Kees Van Kersbergen & Frans Van Waarden, “Governance” as a Bridge Between the Disciplines, 43 EUR. J. POL. RESEARCH 143, 156 (2004).

¹¹⁰ See also, Robert O. Keohane, *Governance in a Partially Globalized World*, 95 AM. POL. SCI. REV. 1, 1 (2001) (“[a]lthough institutions are essential for human life, they are also dangerous . . . We must ask the question that Plato propounded more than two millennia ago: Who guards the guardians?”); Weingast, *supra* note 36, at 287 (arguing that the “fundamental political dilemma of an economic system” is that “a government strong enough to protect property rights is also strong enough to confiscate the wealth of its citizens”); Przeworski, *supra* note 64, at 25-26 (“the threat of the autonomization of the state is perpetual and . . . institutional frameworks for controlling state autonomy are [therefore] of fundamental importance in any democracy”). For a major effort to address this problem in world politics using accountability mechanisms, see Grant & Keohane, *supra* note 7.

domestic-international distinction, designing appropriate public law systems to mitigate this problem is an endeavor that should involve some level of collaboration among scholars and policymakers focusing on its domestic manifestations and those focusing on its international manifestations. Area expertise is important, and each governance problem has its unique characteristics. But those involved in efforts to design constitutions,¹¹¹ to improve administrative law,¹¹² and to design accountable international institutions,¹¹³ would benefit from the structured dialog, focused on sharing and collaborating on data, methods, theory and experience, that a well developed unified concept of public law could facilitate.¹¹⁴

Finally, a unified concept implies a more useful and diverse policy “toolbox.” The traditional structural/functional distinction suggests that the only way that public law can help mitigate the fundamental problem of governance is in a hierarchical setting with centralized enforcement; otherwise, public law is unlikely to be a significant constraint on government behavior. This poses two problems, however. First, it may not be desirable or practicable in certain situations to establish a hierarchical and centralized framework. Second, even if such a framework were established, the new enforcement institution would itself have to be constrained. In contrast, a unified concept of public law draws attention to solutions that do not necessarily rely on hierarchy and centralized enforcement. Exactly which policy tools are appropriate depends on the specific situation, but they are not necessarily limited to creating hierarchical structures and systems of centralized enforcement, and they do not necessarily depend on whether the context is domestic or international.

V. CONCLUSION

The separate study of domestic and international public law is highly institutionalized in both law and political science. A principal theoretical justification for this separate treatment has been the traditional structural/functional distinction. However, as I have attempted to demonstrate, the distinction is flawed. It exaggerates the differences between the two realms of

¹¹¹ See, e.g., THE ARCHITECTURE OF DEMOCRACY (Andrew Reynolds ed., 2002) and GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING. (2d ed. 1997).

¹¹² See generally Richard H. Pildes & Cass. R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

¹¹³ See, e.g., Keohane, *supra* note 110.

¹¹⁴ An example of such dialog is an interesting colloquium project led by Benedict Kingsbury and Richard Stewart at the New York University School of Law exploring, among other things, the possibility of applying principles of domestic administrative law to the international realm. See Benedict Kingsbury & Richard Stewart, *Globalization and Its Discontents Colloquium: Toward Global Administrative Law?* (2004), available at <http://www.law.nyu.edu/kingsburyb/spring04/globalization/>; see also Richard B. Stewart, *U.S. Administrative Law: A Resource for Global Administrative Law?* (Jan. 2004) (unpublished manuscript, available at http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart_012604.pdf). As John Ikenberry argues:

Both domestic and international order can take many different forms. In some countries, politics can be extremely ruthless and coercive, while some areas of international politics are remarkably consensual and institutionalized. Indeed, the most useful insight might be that both realms of politics—domestic and international—face similar problems in the creation and maintenance of order, and the solutions that emerge are also often quite similar.

Ikenberry, *supra* note 27, at 148. For a critique of efforts to design international accountability mechanisms based on analogies to domestic democratic accountability see Grant & Keohane, *supra* note 7.

public law, obscures theoretically relevant similarities, and has difficulty explaining the influence of public law in the absence of hierarchy and centralized enforcement.

Therefore, public law scholars in both law and political science should think beyond the domestic-international divide. A unified concept of public law can support this type of thinking, and facilitate efforts to build upon and formalize the considerable areas of theoretical convergence between domestic public law scholarship and international public law scholarship. Perhaps most importantly, a unified concept can help policymakers and scholars of domestic and international public law benefit from each others' theories, data, methods and experiences as they jointly address the important issues of law and governance that confront our world today.