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Liberal versus Political Models of Global Governance

Abstract

Scholarship on international law in political science is dominated by a liberal paradigm that seeks to distinguish legal forms from political ones. The liberal approach offers a consensual model of international law in which legalization is a manifestation of intergovernmental cooperation in the pursuit of mutual goals. These two assumptions - that law is cooperative and that cooperation is a normative good - lead liberal global governance scholars away from key political questions about international legalization: namely, who wins and who loses. This results in the pathologies that Judith Shklar identified as 'legalism,' when legal processes appear as charmed and neutral alternatives to politics. This article examines the liberal framework on global governance and law and contrast it with a competing political view. I show the differences between the two and outline the competing research agendas and policy advice that follow from them. The liberal model leads to the policy suggestion that decision-makers should comply with international law, for self-interested and for more universal reasons, while the political alternative sees compliance as advancing some interests against others. With different theories of how law and politics are related, the two lead to competing interpretations of history as well as different policy prescriptions.[1]

Keywords: International law; Global governance; Liberalism; Liberal internationalism; Legalism, World politics.

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Introduction

The international rule of law is often seen as the central pillar of contemporary global order. It is said to support international institutions, binds governments to global rules, and gives a stable and peaceful means for resolving international disputes. The rule-of-law ideal, which aspires to "a set of rules… applied even-handedly between weak and strong… on all occasions," (Higgins cited in Scott, 1994, p. 8) may never be fully realized in practice but it remains powerful as a goal and a guide for policy-makers.

This article examines the political content that is hidden in this liberal model of the international rule of law. In liberal thinking, law is seen as a cooperative project that rests on mutual gain, and courts are understood as impartial and apolitical precisely because they operate with legal rather than political resources and reasoning. The separation of law and politics is common in liberal approaches but it leaves scholars without any tools to study the politics of law itself: whose goals, values, and interests are advanced by following these rules and whose are harmed? It is not enough to simply assert, as Stephen Kocs (2019, p. 231) does, that "an international system constructed on liberal principles benefits all participating states."

The separation of "what is political and what is legal" (Fyfe, 2018, p. 989) is at once the starting point for liberal analysis of international law and its great source of trouble. When Anne-Marie Slaughter (2013) says that it is "better to resolve boundary issues in the South China Sea multilaterally by agreed-upon rules of the game than unilaterally by the strongest nation," she is offering a distinction between law and power that imagines that legal processes are consensual and egalitarian, and distinct from power politics. Her preference for the former over the latter rests on the premise that power favors a select few while law reflects the common good. Her policy advice - 'follow the rules!' - follows directly thereafter.

If we begin instead from the assumption that rules and institutions serve some interests but harm others then the policy advice that ensues is much less clear: before deciding that a government should comply with a rule, we would want to know what interests will be advanced with that choice and whose will be harmed. This is the opening to an alternative paradigm to liberalism in the study of law and global governance, and it directs attention to how international law affects people and groups differently across a spectrum of interests.

I examine the legal practices and controversies that arise in global governance and set out two ways of thinking about law and politics. The first is a familiar liberal approach that is something like the conventional wisdom in International Relations and the second is a political view that is more conceptually and empirically persuasive but that leads to less comforting policy prescriptions. Scholars from a law-and-society background may be surprised how pervasive the liberal approach remains in the field of International Relations, and this provides an opening for bringing some of the conceptual resources from legal sociology into contemporary debates on international law and politics.

A liberal theory of law is central to liberal internationalist accounts of international law and of the 'rules-based global order' more generally. It appears in three ways: as an assumption about the ontology of the social world, as a historical device that is used to explain post-WWII global history, and as a normative prescription that is meant to guide government policy toward better outcomes. These variations make it at once pervasive in scholarship on global

governance and also somewhat elastic at is morphs in the service of different intellectual or political purposes. For the study of international law and courts it has the unfortunate effect of representing these institutions as standing outside of politics, as being either neutral among political disputes or defending goals that are so universally held that they are not subject to political contestation[2]. It produces an "enchanted" (Hurd, 2016) view of international law and institutions as inherently progressive and beyond controversy.

The alternative approach begins with the idea that law contains political choices that have been encoded into legal forms. Law makes tradeoffs among competing interests and necessarily produces winners and losers. The winners are those whose interests are advanced by how the law is written, interpreted, and changed, and losers are those who wished for other outcomes. For International Relations as a field of study, the political approach suggests a research program that is directed toward understanding how the international legal system distributes gains and losses among competing interests. It leads to a more nuanced appraisal of the international rule of law, holding back on normative endorsement until one can assess empirically how the legal system affects the distribution of welfare. It's not self-evident that following international law will always be the right answer.

My goal is neither to endorse nor to criticize the international rule of law. I aim instead to understand its politics. These explorations lead to a more political sensibility for the analysis of global law and politics - if law is understood to empower specific interests rather than an imaginary universal welfare, then scholarship on international law can open more easily to research on who gains and who loses by international legalization, and awareness of the uneven costs and benefits results in a more realistic appraisal of the political power of law.

I. The Liberal Approach: Cooperation, Constraint, and Mutual Payoffs

In her recent book on international courts, Leslie Johns (2015, p.13) provides a clear summary of a familiar view of international law and politics. She says:

> "As the modern world grows more interconnected through globalization and social movements, there is a greater need for states to cooperate in areas like foreign investment, international trade, financial regulation, environmental protection, human rights, and other issue-areas. International organizations can help states to capture the benefits of cooperation. For states to cooperate, they must first have common expectations about appropriate behavior and the consequences for inappropriate behavior. International law and organizations help states to articulate and uphold those expectations."

Johns' identifies a real-world need for inter-governmental cooperation and suggests that better outcomes are possible when governments stay within cooperative and legalized parameters.

[2] This second danger is demonstrated when Michael Zûrn (2018, p.11) says that the influence of 'politics' risks undermining the legitimacy of global governance. He finds it "not surprising that politicization by societal actors is rapidly increasing and that rising powers are questioning many global governance arrangements". Politics, here, is seen as undermining the consensus on which global governance depends for its authority.

The bounds of appropriate behavior are defined by the international laws, rules, and courts that governments agree to. The reward for complying is a share of the "benefits of cooperation."

The idea of cooperation is at the heart of the liberal perspective[3]. It is traceable through the long history of state-of-nature thinking in liberal political theory that interprets political institutions as a consequence of free-will, but for IR scholarship in particular it can be seen to originate in the rise of rationalist IR analysis in the 1970s and 80s. The turn to liberal rationalism as framework for describing international politics and institutions brought with it the idea that "international institutions constituted mutually beneficial arrangements" for governments (Stein, 2008, p. 204-205). Under the influence of the "classically liberal argument of economists about individuals and firms engaging in mutually beneficial exchanges,"[4] IR liberals constructed a school of research centered on the twin goals of identifying why governments sometimes choose cooperation and encouraging them to do so in place of violation. [5]

There are two ways in which liberal theory sees international law as essentially cooperative: in its founding and in its operation. Both follow from the rationalist assumption that states are self-regarding units that have the free will to advance their goals using the tools available to them, and both end up merged in the substantive claim that law is in fact consensual and mutually beneficial.

Cooperation is evident first in the process by which governments negotiate, agree on, and ratify treaties, rules, and agreements. Law is produced when negotiations result in agreements - and thus the existence of an agreement is itself conclusive evidence of successful cooperation. The failure to agree leaves an empty place in the web of international law, an ungoverned, 'no-rule' space where governments retain the full autonomy that is understood as their default condition (Hurd, 2017a). Barbara Koremenos (2016), for instance, analyzes international agreements as devices that help states overcome certain obstacles to cooperation such as cheating, monitoring problems, uncertainty, and asymmetry. For her, 'legalization' is terminologically interchangeable with 'cooperation'.[6]

Second, governments are said to be cooperating with each other when they choose to comply with a rule. The opportunity - indeed, the need - to choose between cooperation and violation comes up frequently because so many government decisions implicate their international obligations. The potential dataset of compliance decisions is therefore very large. Behavioralist scholars code compliance as cooperation and violation as non-cooperation.[7] Leslie Johns (2015, p. 177) says "legal regimes are designed with an eye to both enhancing

[3] See the critical appraisal in Hakimi 2017.

[4] Ibid. 2008, p.205.

[5] Chayes and Chayes 1993. Downs, Rocke, and Barsoom 1996. Hathaway 2002. McLaughlin and Hensel 2007. A new wave of scholarship contests the assumption that the power of law is measured by 'compliance' and looks at its broader effects in a world where compliance and violation are not so clearly distinguished. See for instance Peevers 2013, Dill 2015, and Saunders 2018.

[6] Koremenos, B. seeks to understand how international agreements are "affected by the particular characteristics of the actors cooperating," and sees her data on legal agreements as a subset of broader 'international cooperation data sets".

[7] Koremenos 2016, esp. Appendix 2 on compliance coding. Oona A. Hathaway and Scott J. Shapiro code compliance with the ban on war in Hathaway and Shapiro 2018. Other work is reviewed in Shaffer and Ginsburg 2012.

cooperation today among members of the regime and ensuring that these states cooperate in the future by remaining members of the regime". For Andrew Guzman (2008, p. 22), international law can be said to 'matter' - that is, have an effect - when states choose to follow it. This implies of course that they could also choose not to, and so Guzman's 'theory' of how international law works aims to understand how and when governments make the choice to comply. For Guzman, deference to the law is understood as cooperation.

The cooperative assumptions of liberal theory were, in the 1980s, the dividing line between the realist and liberal sub-groups in International Relations theory. Arthur Stein (2008, p. 204) documented the scholarly split in the following way: "Realists after all focus on conflict and minimize the prospect for, and the nature of, international cooperation…. [while liberals] focused on the cooperation that underlay the new post-Second World War international arrangements." This is a common way of describing the difference between the two groups, and it rests on different estimates of the empirical likelihood that 'power' will be replaced by 'cooperation' in inter-governmental relations: to see world politics in terms of cooperation among governments made one a 'liberal;' to see it in terms of power politics made one a 'realist.' This disciplinary self-definition puts cooperation and law together under the heading of Liberalism, and power and conflict on the opposite side as Realism. I explore later in this paper the substantive implications that ensue from grouping law/cooperation against power/conflict.

For liberals, the payoff to international cooperation is that it promises better outcomes than what follows from acting non-cooperatively. This begins as an assumption, deduced from the internal premises of liberal theory, but it quickly becomes a substantive claim about international politics and the desirability of rule-following. When states are modeled as *choosing* to cooperate through law, liberals infer that they are doing so because they see some benefit from it. Without the promise of a benefit they would presumably not choose to cooperate. Methodologically, the existence of specific benefit is deduced from the observation that governments are engaging in the practices of international law. Trade treaties, for instance, are assumed to be good for both sides because no party would agree if it thought the deal harmed its interests. The existence of an international agreement is taken to be evidence that it produces gains for all parties.

Moreover, the presumed cooperative nature of international law means that liberals see this payoff as independent of the substantive content of the rules. Benefits follow from the existence of rules in themselves regardless of the actual content of the law. Michael Mastanduno (2018) summarizes this view, drawing on John Ikenberry's work:

> "By exercising self-restraint and especially by binding themselves within international institutions, dominant states can lock others into a durable order. Subordinate states, in this bargain, gain reassurance that they will not be dominated, and that hegemonic power will be exercised predictably and responsibly. The greater the power asymmetries, the greater the incentives for each side to strike a bargain resting on hegemonic restraint. Strategic restraint, Ikenberry argues, is the 'passport' away from imperial domination or balancing and towards more consensual or 'constitutional' forms of order."

This conclusion is reached without the need to look at the specifics of the rules and institutions in question - it is "content-independent" in Samantha Besson's terms (2011 and Hurd, 2018). It is enough to know that, as international institutions premised on consensual membership, their existence confirms that benefits must exist since without the benefits the parties would not have consented to them or they wouldn't exist.

Liberal internationalism uses this conceptual premise as the foundation for a political project to defend and enhance international institutions. The assumption that states are rational actors making free choices expands into a substantive claim about benefits presumed to flow from actually existing rules and institutions. It underpins the liberal internationalist interpretation of American power and its claim to progress and development.[8] The UN, NATO, and the WTO, among many others are said to be examples of global cooperation in practice. The United Nations constitute the collective the "guardians of the common good" (Guterres, 2018). NATO is a "pool of partners who… by and large share fundamental values" of cooperative security (Stavridis, 2019). The WTO is the "embodiment of an integrated, peaceful world" whose success "will serve us *all* well" (Medhora, 2017). Together, these institutions form a social system of nations "capable of rising above self-interested passions and entering into accord with other similarly constituted peoples for the sake of the general good - a common peace" (Smith, 2017). Max Boot (2019) accuses critics of global governance of "implacable hostility to international cooperation." The existence of international institutions is taken as evidence of that cooperation is taking place (Hakimi, 2017).

Subordinate states in the American orbit are understood by Ikenberry and others to have consented to the institutions of the post-WWII order and so their subordinate position under US influence should, he says, be interpreted as evidence of their 'autonomy' rather than as its negation. They are presumed to have participated in the negotiation of these institutions and to have made an informed choice when they go along with with them, and as a result Ikenberry (2011, p.26) argues that the world-order system is "a hierarchical order built around political bargains, diffuse reciprocity, provision of public goods, and mutually agreed able institutions and working relationships." It has "several features" that "give it a more consensual and agreed-upon character than imperial systems." Subordinate states consent to "supporting and abiding by agreed-upon rules and institutions" he says because these generate benefits that are shared among the players.[9]

Josh Rogin (2019) goes further: he merges a defense of legal institutions with his defense of human decency and good governance, assuming that the three are of a piece: "For too long, Western democracies have taken a laissez - faire approach to defending the rules of rules-based institutions, while authoritarian regimes work to shape them to do their bidding. Solving that problem is crucial to winning the grand strategic competition and preserving our security, prosperity and freedom." In a similar vein, Ikenberry (2011, p.12-13) makes grand historical claims about the benefits for human welfare from this 'cooperative' legal frame for global

[8] Tony Smith says "liberal internationalism - 'Wilsonianism' - has been a basic element of American foreign policy over the last seventy-five years, contributing decisively to the greatest achievements in the Republic's history in world affairs." Smith 2017, xii.
[9] Ibid. 2011, p.27.

affairs. He says "International order is manifest in the settled rules and arrangements between states that define and guide their interaction. War and upheaval between states - that is, disorder - is turned into order when stable rules and arrangements are established by agreement, imposition, or otherwise." In such a world, there are no losers from international legal agreements, except those who would deny international rules their proper power. Everybody wins.

The cooperative model of law implies that law should constrain the free-will of states. Law limits governments' scope of action and forecloses some options which otherwise would open to them, they say. This is evident when Koremenos (paraphrasing Goldstein, 2016) says legalization is "a particular kind of institutional design - one that imposes international legal constraints on states." The view of law as a consensual constraint reconciles for liberals' legal obligation with state sovereignty.[10] Moreover, it makes legal constraints seem more politically desirable than other limits on state choices because they are presumed to be chosen rather than imposed. Adam Bower (2015, p.346) says "law is typically held to be more technocratic and impartial in contrast to an unregulated political realm in which material power is expected to dominate." And John Ikenberry (2011, p.28) says, "a state bargains away some of its policy autonomy in order to get other states to operate in more predictable and desirable ways - all of it made credible through institutionalized agreements." A rule of law system is one in which the legal system constrains the political. Where the principle of legal supremacy is respected, legal institutions are insulated from political influence and are thus empowered to issue rulings that reflect legal rather than political considerations.[11] There is a deep mine of liberal theory on law behind the constraint idea and I discuss below how different things look if one begins from the premise that law is both constraining and empowering of states.

Liberal legal theory identifies the legal realm as a domain of consensual cooperation in pursuit of personal and mutual gains. This is distinct from the domain of politics which characterized by the use of power to gain advantage. It produces the normative presumption that legal processes are better than political ones, and the liberal idea of the rule of law imagines a social system built upon legal control over politics. Leslie Vinjamuri and Jack Snyder (2015, p.305) define the two in ideal-type form: 'politics' relates to "bargaining behavior based on power" while 'law' is characterized by "binding and authoritative rule-making, rule-following, and rule-enforcing behavior." Law "proceeds within the logic of a system of rules," and politics operates from "power, interest, prudence, and strategic interaction in light of expected outcomes".[12]They set out these two as distinct institutions or logics in a conceptual sense but their empirical analysis aims to show how they interlace. Andrea Bianchi (2016, p.51) says that "legal control over politics is a highly powerful notion in the collective imaginary" and it

[10] This resolves what critical legal theorists see as the "fundamental contradiction" in liberalism between "individual autonomy and the common welfare." Bianchi, A. 2016, 137.

[11] Anne-Marie Burley used the separation of law from politics as a feature by which liberal states are identified: "Courts within this [liberal] zone evaluate and apply the domestic law of foreign states in accordance with general pluralist principles of mutual respect and interest-balancing. Nonliberal states, by contrast, operate in a 'zone of politics,' in which domestic courts either play no role in the resolution of transnational disputes or allow themselves to be guided by the political branches." Burley, A. 1992, p.1910.

[12] Ibid. 2015, 305.

is widely proposed as a progressive accomplishment of modern times, replacing power with rules.

Liberal internationalists see the law/politics split as central to global governance. Shannon Fyfe (2018, p.996) notes "the great promise of international institutions is that they could bring all peoples under the rule of law where rights are protected regardless of where one comes from." Karen Alter (2014, p.114) says it began around the end of the 19th century and was institutionalized through the 20th century: "The Hague Peace Conferences were moments for legal idealists to crystalize their bold vision of subordinating power politics to an international rule of law."

Liberal theory generates the conclusion that compliance with international law is good for everyone. It promises, as Nagendra Signh (2019, p.384) hoped, the "salvation of mankind" because it is assumed to create both private and collective benefits. The existence of private benefits is inferred from the behavioral observation that states are choosing to cooperate in legal institutions - if there were no private benefits they would presumably choose otherwise; and collective benefits come out of the existence of a stable, rules-based environment. The dominance of law over politics in liberal theory is thus understood to be good for everyone, and everyone is thought to benefit from increasing compliance with international law.

This brings the practical implication that enhancing compliance is a worthy goal. Leslie Johns (2015, p.14) is explicit about this, as she says that "a key premise" of her book "is that policy-makers can and should design institutions to facilitate cooperation." The head of the Rule of Law unit in the United Nations said recently "the rule of law builds peace, contributes to sustainable development, and protects human rights" (Alvarez, 2019). 'Cooperation' is understood as naturally good, politically and normatively, and international law comes to look like a generalized good, all winners and no losers.[13]

To recap: liberal political theory posits that international law represents a consensual set of constraints on state behavior that, by logical deduction, are assumed to produce benefits for the state. They are assumed also to produce a stable decision environment that is beneficial for all actors in the system. The legal system knits together the mutual interests of states into a structure that channels political choices within legitimate limits. Sustained by the ideological commitment to a 'harmony of interests,' the liberal approach sees the rules and institutions of international law as a turn away from the power and coercion of politics. Liberalism "taps into the promise of the end of politics" that "promises to free us from the contingencies and uncertainties of political debates and policy choices" (Bianchi quoting Klabbers, 2016). Governments that follow international law are understood to be acting as good international citizens, 'cooperating' with others, and enabling the achievement of collective goals, while those that violate international law are cast as 'rogue' states, self-interested, and anti-social.

[13] Michelle Burgis-Kasthala observes that for scholars of international criminal law (ICL) "often there is no distinction between scholarship on ICL and ICL scholarship in support of the field itself." Cited in Powderly, J. 2019, 6.

II. The Political Approach: Winners, Losers, Power and Tradeoffs

The alternative to the liberal worldview starts with the assumption that people's preferences conflict with each other rather than being in harmony. This simple shift in premise leads to a different line of research questions, a different interpretation of history, and a different set of policy prescriptions. It sees law and governance as political engagements that entail conflicting interests, rather than as cooperative arrangements that lead to mutual benefits. It disputes the liberal effort to separate legal from political domains, as a conceptual, empirical, and political matter.

The discussion of alternatives to the liberal approach is complicated by the sometimes implausible straw targets often offered by liberal internationalists themselves. These make it harder to realistically assess the politics of international law. Anne-Marie Slaughter (2017) suggests that the "return to anarchy" is the alternative to liberal internationalism. Terry Halliday and Greg Shaffer (2015, p.7) see 'transnational legal order' as making "some order out of chaos, anarchy, unpredictability, or irregularity." Lassa Oppenheim (1908, p.303) for instance aspired to the "ultimate victory of international law over international anarchy." John Ikenberry (2011, p.12-13) contrasts "war and upheaval - that is, disorder" with the legalized order that emerges "when stable rules and arrangements are established by agreement." Liberal internationalists in US foreign policy frequently suggest that the alternative to contemporary global governance is a system dominated by Russia and China, either based on rules that those states prefer or on no rules at all.[14]

If the alternative to law is anarchy, chaos, and war and upheaval, then it is easy to make an emotive case that law should be defended at all costs. But these antinomies lack a connection to reality, just as liberal social contract theory has always relied on the imagined pathologies of the pre-contract world to make its case. It is a bit fantastical to defend the existing body international law and institutions on the grounds that a hypothetical world without any law or institutions would be worse. It is akin defending Hayekian monetary policy on the grounds that it's better than a world where money had never been invented. And the assumption that today's international law resolves problems better than 'politics' or better than Russia or China would presumes exactly the thing that we need to know first: what are the actual effects of following international law today, and how does this differ from following other interests?

The key conceptual difference is that the political approach does not aim to separate the 'legal' from the 'political' and instead begins from the premise that the two are mutually implicated. This is the starting point for a wide range of scholarship on law and politics that includes variants of Marxism, critical legal studies, legal pragmatism, legal realism, and practice theory.[15] These perspectives share the basic intuition that law repackages political disputes into new forms, new language, new settings, with new resources, and perhaps with new outcomes. It does not *resolve* the political disputes. These perspectives, while so different

[14] Anne-Marie Slaughter does both in 2017. See also Rogin 2019. For a similar view from Canada, see Heinbecker 2019.

[15] For works that situate and unpack these and other approaches to law and politics with an international emphasis, see Bianchi 2016, and Dunoff and Pollack (Eds), 2019, especially the contribution by Gregory Shaffer "Legal Realism and International Law" in which he advances version of 'legal realism' drawn from law and society approaches will implications for theories of international governance.

from each other in many ways, are useful for scholars of political science who seek to understand how legalization changes the frame for political activity without replacing politics with something else.

This article is not invested in the debates that these grand traditions (Marxism, pragmatism, CLS, and the others) raise or the differences among them. My more modest interest is in showing the broad differences between a liberal approach to law and politics and a more political one, and on this point all these traditions rest on the same non-liberal premise: governance involves taking sides in conflicts of interest, and law is a technique of governance. Rather than strive to isolate legal from political logics and forces in global governance, I show that the alternative intellectual tradition aligned with legal realism and empirical pragmatism provides useful tools for understanding the politicization of international law and the legalization of international politics.

This is both a conceptual and an empirical contribution, and by following it scholars of global governance will end up with a different set of research questions and methods as well as different policy conclusions. The political approach is not new - it puts to work familiar ideas about law, power, and politics in service of better understanding the controversies around international legal institutions and the international rule of law more broadly.

A political approach toward international law begins by recognizing that law is a mechanism of governance, and as such it is designed to advance certain interests and values at the expense of others. This is fundamental to what law is and does. Governance through law is one technology by which tradeoffs are imposed across competing interests - other mechanisms include markets, agenda-setting, and violence.

International law and global governance involve imposing outcomes on people, organizations, and society, to the benefit of some and at the expense of others. It takes sides among competing claims and requires that some interests win and others lose. Global governance is no different than domestic governance in this way. Scholarship on international law and politics seeks in part to understand global governance through law and so needs to start with an intellectual framing of law and politics that makes this possible.

In some sense this is uncontroversial, as things could hardly be otherwise: by making some things legal and others illegal, law distributes responsibilities and rights among members of a community depending on their relationship to legality. This starting premise directs attention immediately to the central question of whose interests are being advanced at whose expense. It points scholars to research questions that recognize competition among interests: which interests are encoded in the law, and who is empowered by it? Whose interests are not in the law, and what happens to them? How does the application of the law affect the welfare of both the 'winners' and the 'losers'? Daniel Nexon (2018) offers steps in this direction by noting that "for many who live outside its core, the liberal international order was never terribly liberal nor much of an order" - global governance looks different to different people, among different interests. This insight can be the start of a broad shift in how we assess the political impact of international institutions and rules.

The liberal approach, premised on a cooperative harmony of interests, misses these questions. To answer them requires that we look at the 'lived experience' of international law and

consider the real-world effects of specific international governance rules, at the 'lived experience' of international law. Contrary to Oppenheim view, quoted above, the relevant normative comparison is "'this law' versus 'that law'" rather than "'this law' versus 'no law.'"

The recognition that law encodes tradeoffs among political goals leads to three implications for research on international law and politics.

First, the neutral application of international law, fairly across all cases, is not politically neutral. International law is necessarily partial to some political goals and opposed to others and it will therefore have unequal effects. The rose-colored glasses that are often used to interpret the world of international law lead scholars to assume that international law enacts the best ideals of humanity, universally shared and therefore uncontroversial. Darryl Robinson (2013, p.138) takes this view: "I believe that cosmopolitanism resonates with the aspirations of ICL: a concern for human beings that extends beyond borders; a willingness to embrace alternative governance structures to supplement state structures; and inclusiveness of the concerns of the 'international community as a whole." Shashi Tharoor (2003) has called the United Nations "the best hope the world currently has" for its problems because it "brings all the countries of the world together to pursue collectively the security and welfare so essential to our common humanity." [16] Fernando Nuñez-Mietz (2019, p. 221) assumes that international law is naturally morally good: "the content of much of international law is a reflection of shared understandings of what is morally right." To liberals, international law can seem like a magical machine that takes in hot controversies and feeds out cool solutions.

The limits of this view are easy to see. If one were to take the same assumption into the study of tax law, the results would be equally weak. Tax law creates categories for different kinds of income and wealth and it sets rules to govern how each is taxed. It draws lines around types of person or institution and taxes them differently. These are understood as political in that they affect different interests differently, and they are fought over in legislatures and in the streets by the partisans of these interests. The law is politically productive in the sense that it creates inequalities which then present to individuals as incentives to get on one side or other of the law says Hussin (2014). In the US for instance, where religious institutions are not taxed, courts are required to monitor the distinction between religious and non-religious institutions so that the rule can be 'correctly' applied as various entities seek to be declared 'religious' for tax purposes (Sullivan, 2018). The social distinction between religious and non-religious is made into a legal distinction, governed by the state, with tax consequences. Tax law might be applied in a neutral manner in the sense that everyone is expected to follow the same rules equally, but the effect of application is not neutral because the law works to the advantage of some over others. It cannot be apolitical.

International law can be seen in the same light. It might put forward the interests of states over people, or powerful states or less powerful, or corporations over nature, or the opposite of these. It specifies which laws govern the Nepalese peacekeeper sent to Haiti by the United Nations, and it regulates how a Haitian who suffers harm by that peacekeeper can seek compensation and from whom (Pillinger, Hurd and Barnett, 2016). It assigns responsibilities

[16] https://www.independent.co.uk/news/world/politics/united-nations-it-may-not-be-perfect-but-its-the-best-hope-the-world-currently-has-121771.html

as well as irresponsibilities, as Scott Veitch (2007) has shown. And it could be written differently so that it would encompass different sets of winners and losers, just as tax law could. But it can't be written so that it benefits *everyone*.

Because international law reflects partial rather than universal interests, it is worth parsing out which interests are served and which are denied argue some experts (McKeown, 2017; Linarelli, 2018; Salomon, 2018; Sornarajah, 2018). The empirical, pragmatist research agenda that follows traces the actual distribution of welfare and power created by these rules or institutions explain Shaffer and Ginsburg (2012). David Kennedy (2014) has pursued this work in connection with humanitarian action, motivated by the idea that "once we see international humanitarians as participants in global governance - as rulers - it seems impossible not to be attentive to the possible costs, as well as the benefits, of our work." The simple assumptions of liberalism, of consent and mutual gains are bypassed. As David Lake (2018) says, "as a set of rules, international orders affect individuals and groups in different ways, and these actors pursue their interests to the extent of their abilities, including legitimating the rule of some foreign country or resisting that rule. International order is not simply Pareto-improving cooperation, as often theorized in international relations, but involves hard bargaining and winners and losers."

Second, because it has these political effects international law is a powerful tool for governments and others and it has come to occupy an important place in their strategic behavior. States and activists invoke international law strategically with an eye on its potential to help them achieve their goals. The instrumental use of law to advance interests is seen by some liberal theorists as the direct contradiction of the idea of the rule of law, but as a practice it is ubiquitous in international relations. Brian Tamanaha (2006) argues against instrumentalism in his book *Law as a Means to an End: Threat to the Rule of Law*. A similar complaint comes up around international courts. Shannon Fyfe (2018), noted above, seeks to root out "impermissible political influence" from the work of the ICC while allowing it the admittedly political goal of deterring or punishing perpetrators.[17] These complaints presume the separation of law from politics and they strive to keep each in its box.

A political approach to law recognizes that instrumentalism is an inescapable part of legalization. This is true of international law just as it is of domestic tax law. Countries bring cases to international tribunals when they believe that a legal judgment will help their cause, as Australia did over Japanese whaling (Hurd, 2017b) and the US did at Nuremberg (Overy, 2003 and Moyn, 2014) and governments do with self-referrals to the ICC (Hassanein, 2017). Contesting political disputes in legal form is the norm not an aberration. The turn to law, in the form of legal institutions, legal resources, and legal logics, is a political one, with characteristic effects on the shape of arguments, the roster of authorized actors, and the distribution of power and payoffs (Walker, 2015). "Law," said Judith Shklar (cited in Moyn, 2013, p.492), "is a political instrument" and Martti Koskenniemi (cited in McKeown, 2017, p.437) went on to say that every legal choice is a "politics of law."

[17] See also the case of Christoph Flügge, an international judge who resigned to protest the political influence over judges court cases. https://www.theguardian.com/law/2019/jan/28/international-criminal-court-icc-judge-christoph-flugge-quits-citing-political-interference-trump-administration-turkey

The instrumentalization of legal resources for political purposes follows naturally from elevating legal institutions to the authoritative position of deciding how things should go. [18] A regime of legal supremacy directs actors to fight their fights in the language of law. This is not particularly controversial as a conceptual point - indeed, it sits inside much liberal analysis of law - but the methodological commitment to separating legal from political makes it harder to recognize and study. Bower (2015, p.341) says that the goal of legal discourse is to "shift the strategic terrain [between contending parties] such that the other arguments are no longer sustainable." Even in a setting where courts are not available, legal argumentation is strategically powerful. David Luban (2010, p.576) identifies the expressive power of international prosecution as the main payoff to the ICC itself: "the most promising justification for international tribunals is their role in *norm projection*." The court's function is in a sense ceremonial, showing the values of the international community in vivid color. This is political theater, deployed instrumentally in pursuit of what he sees as universal goals.

The widespread commitments to rule-of-law ideology in world affairs means that being seen as acting lawfully is politically powerful - it gives legitimacy to the state and its policy (Scott, 1994, p.313-325). These are valuable benefits and we should expect actors to reach for them. The instrumental use of law is the international rule of law, not its opposite - and those who get good at using international law are likely to see most of the benefits (Hurd, 2017a).

This has the implication that international law will tend to favor those with the capacity to invoke it, shape it, and apply it, which is to say strong states rather than weaker states or non-state actors. The hope that law might be a weapon of the weak is widely shared among liberal scholars but it runs into empirical difficulty. Lee Seymour (2016, p.117) notes that the ICC prosecutor once declared "I believe in law as power for all; it is the ultimate weapon that the weak have against the strong." [19] Adam Bower (2015, p.359) also sees the ICC as empowering weaker players relative to the US. Harold Koh (2018) recently outlined his vision of "law as resistance" in a book on legal efforts to counter the Trump administration at home and abroad.

To be sure, there may be instances where less powerful actors can use the law to defend themselves against powerful states. Harold Koh's account of legalized resistance gives many success stories as does David Cole's (2017) similar book on domestic US constitutional issues, *Engines of Liberty*. But the capacity of law to serve the interests of the weak is likely incidental to its more common function of serving the power that makes it. Since international law is authored by states, and it is mainly developed, interpreted, and changed by strong states, its trajectory over time it likely to closely match the interests of those governments. This is certainly the case for international law on the use of force, which has evolved from its mid-20th century origins as a ban on war except for self-defense into a more permissive regime that sustains the contemporary turn to decentralized forms of 'counterinsurgency,' intervention, and targeted killing. [20] Tom Ruys (2011, p.511) says that treaty interpretation must take into account "evolutions in the international security environment" as it decides

[18] On the construction of authority - legal and political - in international courts, see the essays in Alter, Helfer, and Madsen 2018.

[19] The prosecutor went on to muddle things further by adding "the law sets one standard for everyone; it empowers all peoples and provides justice for all."

[20] See Ruys, T. 2011 and Hurd 2019, 2017c.

what is lawful and what isn't. Thomas Franck (2009) and W. Michael Reisman (1984) accepted this point and embedded it into their grand theories of international law, offering great-power interests a prominent role as a formal source of legal change. [21] The secular trend for international legal interpretation is toward the interests of the most powerful actors.

Finally, it is clear that the edict to 'comply with international law' is not politically neutral. Compliance is often suggested by liberal internationalists as the most sensible policy choice - it is presented as self-evidently better for the individual, for its partners in legal arrangements, and for the whole idea of a rule of law system. Judith Shklar (1986) described this normative attitude under the label 'legalism.' It produces an image of non-compliance as anti-social, self-interested, and a signal of bad character on the part of a state. A government that wishes to be seen as a member of international society in good standing is encouraged to comply with the legal regime regardless of the content of the rule in question.[22]

The pro-compliance policy recommendation helps advance the interests that are encoded in international law. Once we understand these as partial rather than universal interests the normative question regarding whether compliance is desirable or not is revealed to be a function of how we feel about the values of those partial interests. The normative issue is reopened for discussion, centered not on myths about the universal benefits of rules-based governance but instead on real-world assessments of the effects of specific rules on people with diverging interests.

[21] Franck says "a strictly literal interpretation of the Charter" is unworkable, and it must be read through the lens of great-power needs. Reisman says "one should not seek point-for-point conformity to a rule" that might transgress deeply held values or policies.

[22] For instance, Mary Ellen O'Connell (2008, p.14) has said "given the nature of the problems we face in the world, …. any effort to weaken international law only serves to undermine the prospects for achieving an orderly world and progress toward fulfillment of humanity's shared goals, including prosperity."

Conclusion

The flourishing scholarly discussion about international law and politics today is marked by a distinction between two schools of thought regarding how law and politics relate to each other as concepts and in practice. On one hand is the liberal approach that imagines law as a cooperative framework in which politics takes place. On the other is a political approach that pays attention to the political choices that are embedded in the legal system itself, encoded by specific rules or pervasive in in the basic idea of legal supremacy. These two represent alternative paradigms on law and politics. They rest on different intuitions about the nature of the world they are studying and highlight different kinds of scholarly research questions. They necessitate different kinds of research methods as well. When the two look at the same empirical phenomenon there is notable opportunity for misunderstandings, unproductive controversy, and cross-talk until these underlying philosophical or ontological differences are recognized.

This article encourages scholarship that inquiries into the tradeoffs in international law and politics - that is, into questions of who gains and who loses from legalization as it is actually enacted in global governance. I am neither celebrating nor indicting international law; instead, I aim to better understand its political effects by understanding the politics of law itself. Because legalization distributes gains and loses across society, it follows that different legal specifics will empower different winners and losers and also that the value of legalization depends on whose interests one has in mind. It can't serve all interests at once. As a result, the conceptual contrast between two ways of thinking about international law has immediate implications for very practical politics. A political theory of international law focuses on the tradeoffs that are hidden by the liberal theory of law.

Clarifying the models makes their attitude toward politics more clearly visible. The benefit of the political approach over the liberal is that the former opens onto a more empirically minded research program on the politics of law where the tradeoffs in law are central and their normative implications are considered from all sides rather than assumed from the start.

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