International organizations (or IOs)—intergovernmental entities established by treaty, usually composed of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited participation—are a twentieth-century phenomenon having little in common with earlier forms of institutionalized cooperation, including those in the ancient world. The relatively expeditious transformation of customary law that recognized this change from the preexisting regime (which required all treaty parties to accept a proposed reservation) was made possible by other institutional entities; namely, the International Law Commission and the subsequent UN conference that produced the Vienna Convention on the Law of Treaties.

The decisive move to institutionalize what heretofore had been only fitful attempts to codify discrete areas of international law, jointly administer the global commons (such as with respect to certain rivers and postal services), and peacefully settle interstate disputes, came, of course, in 1919, when the Covenant establishing the League of Nations was concluded. This was the break with prior practice that transformed ad hoc practice into more integrated institutions. The establishment of the League of Nations—a subject that understandably received considerable attention in this Journal—sought to make permanent the forms of great-power cooperation first seen in the course of World War I. It also sought to change, in rhetorical terms and in fact, the waging of war into the discourse of "dispute resolution."

As is clear from President Wilson's address—published in the Journal—when he presented the draft League Covenant at a Paris conference on February 14, 1919, those who built the League presaged many contemporary dilemmas:
how best to deploy law in the service of peace, how to further "democratic" representation in a body representing the "great body of the peoples of the world," how to construct a constitutive instrument that would also be a "vehicle of life" suited to "changing circumstances," how to ensure transparency in international relations, and how best to promote the development of the "helpless peoples of the world." n6 To a considerable extent, the post-World War II establishment of the United Nations and Bretton Woods systems was only a continuation, with midcourse corrections and embellishments (such as creating institutions to address problems of international finance and economy), of the (interrupted) hope to institutionalize the aspirations of the "international community." n7 The twentieth century's "move to institutions," as Kennedy describes it, constituted a move from utopian aspirations to institutional accomplishment; that is, a move to replace empire with institutions that would promote the economic development of the colonized, end war through international dispute settlement, affirm human rights and other "community" goals through discourse, advance "democratic" governance at both the national and the international levels, and codify and progressively develop, on the basis of "scientific principles," international rules—all by turning to the construction of proceduralist rules, mechanisms for administrative regulation, and forums for institutionalized dispute settlement. n8

Despite the collapse of the League of Nations, and revolutionary changes in foreign relations and technology, public international lawyers have today largely achieved their century-old dream to institutionalize. The nearly three hundred IOs—regional and global, presiding over both high-profile issues of war and peace and more prosaic "technocratic" matters—and nearly forty institutionalized international dispute settlers that now address virtually every field of human endeavor, including matters once regarded as exclusively subject to national law, reflect these lawyers' faith in technocratic and legal elites, neutral forms of adjudication modeled on the independent judiciary of rule-of-law states, Western models of governance and free markets, and functionalist needs as the drivers of international cooperation. n9 Although today's IOs [*326] differ in relation to many variables—from degree of legalization n10 to measurable real-world impact n11—they are the unmistakable progeny of the "Grotian tradition" memorably described by Hersch Lauterpacht in 1946. n12 The UN and Bretton Woods organizations, and other IOs that aspire to global participation, such as the World Trade Organization (WTO), institutionalize Lauterpacht's eleven features of the "Grotian tradition." They attempt to subject the totality of international relations to the rule of law; inspire conceptions of a new form of *jus gentium*; affirm the social nature of humankind; recognize that individual human beings (and not just states) are of direct concern to international law; seek to subject all states, including the most powerful, to the rule of law; reject the idea that the decision to wage a "just war" is ultimately the "supreme prerogative" of individual states; subject the privilege of remaining neutral to IO (e.g., Security Council) exception; rely on the binding force of treaty promises; affirm the foundational rights and freedoms of the individual; err on the side of pacifism; and reflect a tradition of "idealism and progress." n13

In large and small ways, IOs have accomplished more than their creators anticipated. As this Journal's other centennial essays begin to suggest, they have transformed the sources of international obligations as well as their content, the principal lawmakering actors, and even our understanding of what "international law" is and what it means to "comply" with its rules. n14

I. IOS AND THE RULES OF INTERNATIONAL LAW

Dinah Shelton's examination of "normative hierarchy" suggests some of the changes in modern sources of international obligation that are at least partly attributable to institutionalization. n15 *Jus cogens* and *erga omnes* obligations are products of the age of IOs precisely because they made real (or more real than ever before) the idea of a "community of states as a whole" on which such hierarchical concepts could be built. The articulation of *jus cogens*—in Article 53 of the Vienna Convention on the Law of Treaties n16—resulted from the kind of "package deal" that characterizes treaty making in institutionalized global venues involving UN expert bodies (in this instance, the International Law Commission [ILC]) and UN-authorized treaty-making [*327] conférences; that is, it placated, as Shelton indicates, the Soviet bloc and newly independent states, and was part of a single package that stabilized treaty relations through codification, as sought by the West, in exchange for softening the rigor of some preexisting rules, as sought by others. n17 Article 53 is also the kind of compromised provision that sometimes emerges from global IO venues when negotiators with fundamentally inconsistent desires find themselves under pressure to produce some tangible product within a preestablished time frame. n18 Little wonder that, as vaguely defined in Article 53 (or since), *jus cogens* remains a "concept in evolution." n19 It was also predictable that, as Shelton suggests, *jus cogens* and *erga omnes* obligations would be more likely to be cited by IOs, such as UN human rights treaty bodies, the ILC, and the International Court of Justice (ICJ), than by states. One would expect such concepts, evocative of community interests and inspired by Article 2(6) of the UN Charter, to be principally cited by that community's ostensible representatives. Indeed, the premise of hierarchically
superior norms assumes that the will of all should prevail over the renegade "other." This is the same premise that underlies Article 103 of the Charter, which posits that some community rules (and its principal institutional representative, namely the United Nations itself) are superior to others by dint of the claims of the United Nations to universal participation and its pursuit of universally desired goals. n20

The turn to these hierarchical norms also stems from the proliferation of international rules produced in the age of IOs. When an IO, such as the International Labour Organization (ILO), becomes such an effective treaty machine that states can no longer keep up with their respective reporting obligations, it is natural that the organization itself would need to enunciate the "core" obligations expected of all members, even though no such setting of priorities is explicitly authorized by its constitutive instrument or the underlying labor conventions. n21 Much of the impetus for attempting to elevate certain treaty obligations over others emerges as well from [*328] the sheer proliferation of IOs, the fact that most of them have engaged in various forms of "mission creep," and the consequent need for IOs to work out problems at the "joints" between their respective "regime complexes." n22 One way to resolve IO turf battles or boundary issues that can no longer be easily resolved through the mechanical application of the rules applicable to successive treaties is to suggest normative hierarchies--as between, for example, the WTO's trade rules, the ILO's labor norms, and quasi-institutionalized environmental regimes.

As IOs, whether prompted by the functionalist needs of their members or the desires of their bureaucrats, expand their original mandates, their normative reaches extend beyond what their creators had anticipated, generating yet more regulatory imperatives to resolve the resulting potential conflicts. Thus, the expanding range of institutionalized human rights regimes, which now address a dense set of individual and group rights in political, economic, cultural, and social domains, inevitably intrudes into the expanding missions of the World Bank (an institution that in turn no longer sees itself as confined to the financing of infrastructure projects) or the International Monetary Fund (IMF) (now no longer confined to maintaining states' fidelity to fixed exchange rates). n23 The predictable outcome is, first, a growing de facto acceptance of teleological interpretation of IO charters, permitting the expansion of IO mandates and making it possible for IOs to respond to them creatively, n24 and second, innovative regulatory phenomena as varied as World Bank operational policies relating to the treatment of indigenous peoples and IMF structural adjustment conditions intended to advance an alleged human right entitlement to "democratic governance." n25

The turn to various forms of "soft law," also addressed by Shelton, is in no small part attributable to IOs. n26 Given the lack of stare decisis in the international system, perhaps the largest [*329] body of emerging "soft law" today is the ever-increasing numbers of judgments issued by various permanent international courts and tribunals, as well as the myriad comments and views issued by institutionalized human rights treaty bodies and officials such as the UN special rapporteur on torture. n27 These judicialized, or at least reasoned, opinions, some formally binding (but only on parties to them) and many purely advisory, constitute attempts at treaty or customary law interpretation that--as can be said of the opinions issued by the WTO Appellate Body, the ICJ, and the ad hoc war crimes tribunals--are influential generally and, in any case, are treated as quasi-binding precedents by the bodies issuing them. For this reason, irrespective of their formally nonbinding status on nonparties, these manifestations of soft law cannot be ignored by international lawyers and, at the very least, form a subsidiary source of international obligation as much as any "judicial opinion" identified in Article 38 of the ICJ's Statute. The same might be said of many resolutions, codes of conduct, conference declarations, and similar products of IOs, some of which are mentioned by Shelton, that, even when not cited by governments as binding authority, are frequently deployed by other actors--nongovernmental organizations (NGOs), multinational corporations, and international secretariats--in lobbying, settling disputes, or assisting in the interpretation of binding law, both national and international. As Shelton suggests, recourse to such instruments, though belauded by traditional positivists like Prosper Weil, is characteristic of other institutions--from those of the administrative state to the modern corporation--that also develop informal mechanisms to enforce social norms in permanent iterative settings involving repeat players.

The changes in the forms of international obligation have been accompanied by IO-induced changes in their content. Many of the substantive normative principles most closely associated with modern public international law owe their existence to IOs. Consider the ostensible "duty to cooperate" or to negotiate multilaterally prior to undertaking unilateral action, as cited by European lawyers critical of recent U.S. attempts to forgo many multilateral regimes, or as deployed by the WTO Appellate Body in the Shrimp/Turtle case. n28 Whether or not such a duty exists generally or within certain regimes such as trade or environmental protection, it is premised on the existence of regularized (usually permanent) forums that concretize the broader "community" to which the duty is owed. n29 The same can be said of
other familiar treaty or customary law concepts, such as "common but differentiated responsibilities" and "duties to warn" or "to consult." n30

Many other changes in contemporary international legal process--the ways modern treaties and rules of custom arise or die--are also attributable to institutionalization. This should scarcely surprise since the majority of today's multilateral treaties are the product of institutionalized venues. They result from treaty-making conferences authorized by IOs with IO-dictated time frames and locales; are based on prior consideration by designated "experts" as diverse as those within UNCTIRAL, the ILC, and technocratic committees such as aviation law [*330] specialists within the International Civil Aviation Organization (ICAO); emerge from managerial forms of treaty making such as framework conventions elaborated by later protocols negotiated in quasi-institutionalized conferences of the parties (COPs) or meetings of the parties (MOPs); or rely on institutionalized reporting obligations that apply even prior to ratification or that require a state to "opt out" to avoid being bound. n31 These innovations have subverted the principle of state consent as legitimating norm, and transformed the negotiating dynamics as well as the specific outcomes of multilateral treaty negotiations. n32 IO venues have generally made it easier to conclude the ambitious multilateral treaties that characterize the modern era--treaties that both aspire to and sometimes require nearly universal participation to achieve their grandiose goals (such as to establish rules on the areas of the global commons, the interpretation of treaties, or the conduct of diplomatic relations). It is also to be expected that treaties that are themselves the outcome of modern institutionalized venues, unlike nineteenth-century interstate compacts, would sometimes establish yet more institutionalized forms of cooperation (such as the permanent International Criminal Court) that in turn rely on models (e.g., Security Council-generated ad hoc war crimes tribunals) or institutions (e.g., the Security Council or an "independent civil service") that are the unique progeny of the age of IOs.

Political scientists and economists further explain the success of such ambitious treaty ventures as the result of IO-derived path dependencies, increased access to or a lowering of costs with respect to information, reductions in transaction costs or the risks of free riders, and enhanced opportunities for the pooling of assets, expertise, issue linkage, and package deals. n33 Less abstractly, IO negotiating venues simply make it easier to conclude treaties that involve ever-larger numbers of states because they make it unnecessary to revisit basic rules of procedure or voting, permit reliance on "independent" secretariats for compromise formulations or final clauses (as with respect to entry into force or reservations), and provide a neutral central registry for ratifications and reservations. n34

But IOs do not just explain treaty successes; they also explain many contemporary treaty failures. Choosing between IO negotiating forums--part of a broader "forum shifting" phenomenon--is now a crucial strategic choice. Powerful states may choose to advance their interests through the shrewd sequential selection of negotiating forums--as the United States did regarding the regulation of corruption, by first negotiating bilaterally, later going to a regional organization sympathetic to its views (the Organization for Economic Co-operation and Development), and only thereafter moving to more globally representative institutions such [*331] as the WTO (and ultimately the General Assembly). n35 On the other hand, choosing the "wrong" IO--such as one whose diverse membership makes reconciling incompatible interests and devising a package deal impossible--may prove disastrous. Indeed, it has been suggested that both strong and weak states have been known to play the forum-shifting game, either to encourage a favorable outcome in a friendly venue or to undermine a regulatory venture they do not favor. n36 For better or worse, the involvement of IOs has demonstrably changed treaty making.

But IOs have also changed the ways we determine whether "success" has been achieved. Imprecision in treaty terms is no longer a potentially fatal defect in effectiveness--not if it is the result of the negotiators' decision to have their treaty-contract be completed by others, whether through institutionalized adjudication (as in the WTO) or other forms of delegated interpretation, both formal and informal (as through recommendations issued by a plenary body such as the ILO Assembly, opinions issued by IO legal counsel, views rendered by expert bodies, or protocols approved by MOPs). n37 For these reasons, the efficacy of multilateral treaties embedded in institutionalized regimes or entrusted to institutional interpreters can no longer be judged as through a single snapshot at an instant in time; such compacts are more akin to legislative enterprises whose progress can best be measured as through a video recording over time.

The complex (and evolving) regime that now applies to reservations to multilateral treaties is also the child of IOs. The initial decision to sacrifice the integrity of multilateral treaties in favor of encouraging universality of participation reflected a predictable ranking of goals by the General Assembly and its path-breaking Genocide Convention, together with the ICJ's advisory opinion of 1951 that interpreted the Convention. The relatively expeditious transformation of
customary law that recognized this change from the preexisting regime (which required all treaty parties to accept a proposed reservation) was made possible by other institutional entities; namely, the International Law Commission and the subsequent UN conference that produced the Vienna Convention on the Law of Treaties. n38

Furthermore, IOs remain the principal venues for the continuing evolution of the rules regarding treaty reservations. Thus, the effort to demarcate more restrictive rules for legitimate reservations to human rights treaties, as well as certain states' attempts to resist such a change, are both taking place within an institutionalized forum—the Human Rights Committee—more than through intermittent diplomatic exchanges between discrete pairs of states. In addition, to resolve this dispute, the community of states is turning—with as yet uncertain results—to yet another institutional forum, the ILC, which has an ostensibly broader and less self-interested mandate than the Human Rights Committee. n39 Another unique product of the age of IOs—the UN secretariat in charge of registering treaties—has become an agent of [*332] change; that office now appears to be modifying the very nature of treaty reservations by accepting reservations not proposed at the time of ratification unless other states object. n40

Of course, treaties are not the only traditional source of international law that have been transformed by IOs. Customary law in the age of IOs has been channeled away from historians consumed with surveying extensive state practice over decades or even centuries (as in The Paquete Habana) n41 to institutionalized shortcuts, including reliance on General Assembly resolutions, widely ratified multilateral treaties deemed to be expressions of "community" interests, and other institutionalized work products such as the ILC's draft rules on state responsibility and commentaries. This approach is as likely to be taken by national courts, as in Judge Kaufman's decision in the Filartiga case, as by scholars and international tribunals. n42 The "new" customary international law is most often the product of the interaction of organs that claim communal legitimacy based on neutral status (e.g., IO political organs, IO secretariats, and international courts), expertise (e.g., IO expert bodies), or universal participation (e.g., IO plenary bodies). n43 These rules differ from nineteenth-century forms of custom in the speed with which they form and evolve, the degree of participation claimed, and, often, the extent to which the rules substantively intrude on previously sacrosanct sovereign domains. While many have praised this new kind of "supranational," "world," "declaratory," or "universal" law as a new version of jus gentium, others have pointed to the same phenomenon to suggest new reasons to resist its domestic incorporation. n44 But neither the proponents of "new custom" nor its detractors deny the impact of the move to institutions.

II. IOS AND THE LAWMAKING ACTORS

Perhaps the biggest change in the ever more institutionalized international legal process concerns its lawmaking actors and subjects. IOs have "democratized" international lawmaking at least to the extent that they have encouraged the participation of more states, not merely the "civilized" ones, as well as nonstate actors, in the production of international rules. Moreover, since, as noted, international obligations are no longer limited to the formal sources of law listed in Article 38 of the ICJ [*333] Statute but embrace global forms of regulation that more closely approximate the law of the administrative state, these obligations involve in addition to states, as both lawmaking actors and subjects, IOs, individuals, NGOs, multinational corporations, and networks of regulatory officials. n45

IOs are surely part of the reason why, as Steve Charnovitz indicates, NGOs have joined states as instigators and enforcers of international law. n46 It is no accident that the most prominent NGO roles in the international legal process as, for example, behind-the-scenes treaty drafters and promoters of such contemporary global treaties as the 1989 Convention on the Rights of the Child, the Convention Against Torture, the Statute of the International Criminal Court, and the Ottawa convention banning land mines, or as agents of change, for instance, by backing the establishment of the UN High Commissioner for Human Rights, have involved IOs. The rise to international prominence of NGOs is necessarily the story of the symbiotic role of their erstwhile adversaries and abettors, the IOs, from the United Nations to the WTO, that have given them observer or consultative status, permitted them to opine as amici, or otherwise legitimized them (as by citing their reports). IOs have also empowered (or in some cases disempowered) other nonstate actors, including business associations, representatives of multilateral corporations, and trade unions, by permitting or denying them access to the inner sanctum of IO lawmaking. IO lawmaking processes, such as those producing (and enforcing) the Codex Alimentarius, have helped to "privatize" the international legal process. n47

The expansion of lawmaking actors and subjects is to be expected of institutions that are themselves a new kind of "international legal person" that, in the words of the ICJ, are neither equivalent nor superior to states, but, within the scope of their charters, can act as both lawmakers and law subjects. n48 Although some may prefer to describe them as
merely "arenas" for lawmaking action, IOs--whether traditional or not--are for all practical purposes a new kind of lawmaking actor, to some degree autonomous from the states that establish them. n49 IOs can now be seen not only as capable of concluding treaties with other international legal persons (other IOs or states) but as vehicles for the forms of regulation associated with the executive branches of government or national administrative agencies--and not just in technocratic fields of the law such as civil aviation and telecommunications; this aspect also bears on issues of "high politics," as through the fertile acts of improvisation that have transformed Chapters VI and VII of the UN Charter to permit the contracting out of the use of force, diverse types of multilateral sanctions, and peacekeeping/peace enforcement actions or determinations by [*334] the International Atomic Energy Agency (IAEA) with respect to arms control. n50 As constructivists have shown, although IOs are intergovernmental in nature and rarely accept nonstate parties as members, their organs and the individuals working within them (from secretaries general to IO-designated experts) are having an independent impact on international law.

IOs cannot be dismissed as the mere agents of their collective principals, namely their state members. n51 As Michael Barnett and Martha Finnemore point out, the "rational-legal" (or impersonal or technocratic) character of many IOs accords them a share of autonomy that can shape the behavior of others, including states. n52 While members of IO secretariats, like most international judges or arbitrators, are usually self-effacing when it comes to acknowledging their own authority--a modesty that may be essential to maintaining the myth that they are simply conduits for the desires of states--in practice they contribute to the "social constitution of the world," through the promotion of both law and social goods that are deeply and inescapably political. n53

IOs have also become adept at reproducing themselves, especially (but not only) through their delegated power to establish subsidiary organs. Organizations in the UN system in particular have generated, over the course of five decades, a bewildering number of organs and bodies; while today the pace of establishing new formally independent intergovernmental organizations appears to be slowing down, the urge to institutionalize remains. Each year produces more subsidiary IO organs and even an occasional proposal for another permanent IO to address a newly apparent functional need. n54 This growth includes the security field, as is suggested by the density of IOs involved in arms control or counterterrorism. n55 Indeed, the proliferation of IOs has overtaken international lawyers' ability to classify them. Scholars wrestle with growing uncertainty about the definition of "international organization," "international legal persons," and the parameters of the once narrowly demarcated field of "international institutional law." n56 While international lawyers used to assume, in accordance with the ICJ's advisory opinion in the Reparation for Injuries case, that IOs are both defined and limited by [*335] their "international legal personality," this view is now contested. Today, "autonomous institutional arrangements," such as COPs and MOPs under environmental framework agreements, appear to enjoy many of the capacities of traditional IOs, although they are not generally recognized as international legal persons. These COPs and MOPs are concluding treaties with international legal persons (such as traditional IOs and states) and appear to be deploying other "implied powers" pursuant to the principle of effectiveness--even without the attributes of traditional IOs such as permanency or their own secretariats. n57 Even as IOs have softened the contours of international law, they appear to be softening the categories of lawmaking actors themselves.

But perhaps the greatest impact IOs have had on lawmaking actors has been felt within the principal lawmakers: the states. As Antonia and Abram Chayes famously suggested, IOs have changed the nature of "sovereignty" into a status consideration, so that its enjoyment is no longer measured by degree of autonomy but by extent of membership and participation in IOs. n58 Indeed, the most powerful states in the world are to some extent constrained by these organizations or their organizationally based norms and find it necessary to turn to IOs to fulfill national goals. Thus, at this writing, the United States appears to be paying a price, at least in terms of the sharing of burdens, for the lack of explicit Security Council authorization for Operation Iraqi Freedom; even the present unilaterally inclined U.S. president has turned to the Council to legitimate the occupation of Iraq and to assist the United States in conducting the war on terrorism, as well as in controlling weapons of mass destruction (WMDs). n59 Other powerful states, such as France, which has attempted to exercise European leadership through its Security Council veto, has felt its power ebb and flow with its fortunes on that body. And smaller states, such as Bosnia-Herzegovina, Libya, and Nicaragua, remain dependent on the protection of the Council, and have tried to use other institutional entities, such as the ICJ, to level the playing field between themselves and the Council. n60 The economic policies that many states can apply to their own polities are delimited by, among other things, decisions of the World Bank, the IMF, and the WTO.

Participation in IOs has also helped to transform the internal structure of governments. For example, IOs have promoted the establishment of national civil aviation administrations to satisfy the ICAO's standards and recommended
practices, medical authorities to respond to the requests by the World Health Organization for information on the out-
break of communicable diseases and to give effect to its related global warnings, law enforcement units to implement [^336] the Security Council's counterterrorism regime or the requisites of the WTO's TRIPS Agreement, and independent national courts capable of satisfying an ever-growing array of demands—from respecting the rights of criminal defendants as interpreted by the Human Rights Committee and regional human rights courts to respecting property and contractual rights as required by the WTO and the IMF. n61 And if, as Anne-Marie Slaughter has suggested, states are something other than the opaque billiard balls described by some political scientists and consist of diverse internal interest groups, IOs like the ILO, which for decades has both empowered and delegitimated particular groups within states such as labor unions, have helped to inspire this insight. n62 IOs also work alongside (and may empower) the transnational networks of government regulators that increasingly cast doubt on the "unitary" intent of many governments. n63 IOs, no less than transnational networks of government regulators, have established symbiotic relationships with national subactors, which in turn has affected states' internal politics. n64

III. IOS AND LEGAL SCHOLARSHIP

For legal scholars, the most prominent impact of IOs has been on the nature of scholarship itself. David Bederman's tour d'horizon of the "peculiarly messianic" American brand of international legal scholarship within this *Journal*, for example, includes, as a prominent leitmotif, the periodic appeal of institutionalism, along with the ebbs and flows of faith in the "inexorable advancement of international law." n65 Indeed, the prominent breaks in his chronology of modes of scholarly discourse in the *Journal*—namely, 1914--1921, 1940--1946, the early and late Cold War periods, and the post--Cold War period—coincide not only with prominent global conflicts of the past century, but also with crucial institutional developments and the scholarly reactions prompted by them: faith in permanent arbitral mechanisms inspired by the Hague Peace Conference, approval and disapproval of the U.S. Senate's rejection of the League of Nations, the "explosion of interest" in international institutions inspired by the utopian visions of the interwar period and the subsequent establishment of the United Nations, appreciation of the growing pains of UN law in the early years of the Cold War, dissection of the fault lines revealed in the General Assembly and Security Council during the Cold War period, and, since 1990, the euphoria and dashed hopes regarding institutionalized multilateralism that ensued as the Cold War gave way to the "war on terrorism."

[^337] Richard H. Steinberg and Jonathan M. Zasloff's survey of the trajectory of the role of power in the various isms that have characterized scholarly discourse can easily be adapted to IO studies—a discipline that has also traversed a period of classicism and forms of realism, as well as sociological, rationalist, and liberal responses. n66 Indeed, as Steinberg and Zasloff imply, many of these competing isms are defined by the scholars' underlying approach to IOs. Some "structural realists," for example, have defined themselves, as well as their scholarly opposites (namely the classicists), by disparaging the prospects of institutionalized multilateral cooperation. n67 Realist-institutionalists like Lloyd Gruber have turned to the international financial institutions in particular to demonstrate the asymmetrical use of power. n68 The Chayeses' managerial model is based on reporting and other noncoercive mechanisms typical of institutional settings; in fact, the very definition of "sovereignty" that characterizes the international legal process school is premised, as noted, on the function of IOs. n69

Of course, IOs—as suppliers of needed forms of centralization and independence—assume prominent roles in the work of rationalist institutionalists like Robert Keohane, Kenneth Abbott, and Duncan Snidal. n70 Thomas Franck's centennial contribution to this *Journal* is very much in this tradition. His defense of the law on the use of force, directed principally at neorealist naysayers, is essentially a defense of the Charter of the United Nations and a reaffirmation of why states, even those inclined to use naked force, continue to need the multilateral legitimacy supplied by that institution. n71 Franck argues, consistently with his Grotian forebears, that even the foremost military power in the world must respond to community expectations about its use of unilateral force. n72

And even those not committed to explaining why states find IOs useful, such as law-and-economics scholars, sometimes ask the same questions about IOs that Ronald Coase asked about the business firm, that is, "Why do they exist and, if their existence is justified, why is there not just one big one?" n73 Accordingly, Joel Trachtman and Jeffrey Dunoff explain the need to establish institutionalized hierarchy as a functionalist response to situations of ever-rising levels of asset specificity, uncertainty, and complexity; they advance an ambitious agenda for law and economics that would help to explain the interactions between institutionalized dispute settlers and between IOs. n74
Similarly, liberal theorists, such as Andrew Moravcsik, have sought to explain the origin and function of institutionalized regimes like those governing human rights on the basis of the domestic interest groups. n75 And even Slaughter's reconceptualization of the nature of global governance, which does not rely on traditional IOs, defines the novelty of transnational networks of subgovernmental actors in part by what they are not; hers is a "New World Order" precisely to the extent that these networks avoid the strictures associated with permanent IOs. n76

The move to institutions has also resulted in alternative, and more hopeful, conceptions of why nations behave. As noted, many constructivists use, as prime examples of the malleable interests of states, the consequences of evolving institutional practices. n77 Work on compliance by such scholars challenges the traditional framework of liberals and realists, who posit that IOs merely serve the predetermined interests of rational states and are effective only to the extent that they serve these needs. These constructivists argue instead that states "must be understood . . . in relation to the institutions in which they are engaged" and that their engagement in these institutions--the interaction, communication, and discourse that occurs within IOs--helps to reconstruct states' interests, and indeed their identities, over time. n78 On this view, the ideas, shared understandings, and norms (soft and hard) that emerge from participation in IOs "constrain and enable choices" for states. n79 The sociological approaches to compliance pursued by scholars such as Jutta Brunnee, Stephen Toope, Ryan Goodman, and Derek Jinks, all rely to some extent on concepts of "socialization" based on, for example, membership in international organizations. n80 As described by Brunnee and Toope, IO-grounded "interactional" law has much in common with the new forms of national regulation described by "democratic experimentalists" in both the United States and Europe. n81 The claim is that some IO sources of law function at an "internalized, normative level" and "not merely at the level of rational calculation." n82 This understanding of the interaction between states and IOs expands the ways "compliance" with this new kind of "interactional" law occurs, altering perceptions of how international regulation is effected and the way its consequences ought to be measured. It changes the forms of the traditional "carrots" and "sticks" used to induce compliance with international law, but it also suggests that states may be induced to conform by institutional ethos, without explicit consideration of relative costs and benefits or coercive enforcement [*339] (such as binding adjudication). n83 It directs attention to "bottom-up" processes for encouraging compliance, as well as the "top-down" processes traditionally associated with international law and organization. It also suggests that when states do engage in institutionalized international adjudication, as they increasingly do in several regimes, the normative ripples may extend, thanks to the legitimacy conferred on multilateral dispute settlers, beyond solving the dispute at hand and, for example, may "socialize" national judges into greater acceptance of international rules. n84

IV. IO SCHOLARSHIP TODAY

Most of today's international lawyers continue to be engaged in the "progressive" Grotian tradition. For a motley group that includes neopositivists, liberal institutionalists, and even some neorealists, the turn to institutions remains a worthy objective, and the goal of policymakers and scholars remains the same as it was when the League of Nations was created: establishing yet more institutional forms for governing the world without world government. Theirs is the continuation of a century-old effort to perfect a more integrated, or at least more coherent, system of institutions that, as John Jackson puts it (no longer in Lauterpacht's Victorian terms), will transform "power-oriented" diplomacy, based on balance of power, to "rule-oriented" adjudication, based on the rule of law. n85

Accordingly, many international lawyers remain hard at work proposing new IOs or proposing institutional reforms to correct the "birth defects" of the IOs that we now have. The ever more porous nature of national borders leads lawyers to assume that there is more need than ever for yet deeper or more evolved forms of institutionalized international governance. n86 Like those who began the move to institutions, today's contributors to specialized journals like Global Governance continue to believe that "only with global governance will states and peoples be able to cooperate on economic, environmental, security, and political issues, settle their disputes in a nonviolent manner, and advance their common interests and values" and that "[a]bsent an adequate supply of global governance, states are likely to retreat behind protective barriers and re-create the conditions for enduring conflict." n87

Like those who pinned their faith on scientific progress through the League of Nations, n88 the majority of international lawyers and fellow travelers in international relations rarely see an [*340] IO, proposed or existing, that they do not like. IOs, after all, "bring out the best in the international community and rescue it from its worst instincts": n89 they "level the playing field" between the powerful and the weak, the rich and the poor, by promoting recourse to the delimited, "neutral" discourse of law. n90 Developments like the establishment of the International Criminal Court are
celebrated as a new "constitutional moment" for the international community; n91 the proliferation of institutionalized dispute settlers praised as a new judicial "branch" for global governance. n92 Like those who were present at the creation of the United Nations, today's liberal institutionalists and constructivists continue to believe

in the possibility, although not the inevitability, of progress; that modernization processes and interdependence (or, now, globalization) are transforming the character of global politics; that institutions can be established to help manage these changes; that democracy is a principled objective, as well as an issue of peace and security; and that states and international organizations have an obligation to protect individuals, promote universal values, and create conditions that encourage political and economic reform. n93

Key themes in IO scholarship continue to reflect this progress narrative, this faith in the possibility of continued scientific progress through an expanding domain of institutionalized international law. Much contemporary scholarship, at least in law, contains policy prescriptions for how best to "constitutionalize" IOs; n94 how best to use IOs to manage the "decentralization" of the state; n95 or how best to institutionalize compliance with international rules. n96 At the same time, the leading IO scholarship of our day wrestles with the structural and systemic challenges brought about by the prior century's successful move to institutions. n97 Within the United States, the present-day heirs of Grotius urge the current Bush administration, as League advocates did prior to the Senate's rejection of the Covenant, to continue to work within the UN system rather than act unilaterally, especially with respect to the war on terrorism and the use of force. They urge compliance with WTO Appellate Body rulings, recourse to the IAEA and common approaches with the European Union with respect to WMDs, and ratification of UN-sponsored multilateral treaties. The European heirs of Grotius urge much the same on [341] their own governments but also see IOs as the only means by which the superpower, "Gulliver-like, might be restrained." n98 Indeed, the uses of IOs lie at the center of recent disagreements between U.S. and European policymakers (and some scholars) with respect to the legitimacy of unilateral actions. n99 But, as is suggested by the differences between some contemporary U.S. and European scholars and policymakers, the institutionalization of international law has also provoked legitimacy concerns.

The most familiar challenge, invoked by opponents of distinct IOs on the right or the left and especially within the United States, concerns the "democratic" credentials of the new international law produced in the age of IOs. Much contemporary scholarship deals with a chorus of complaints that particular IOs, or IOs generally, fail to represent domestic constituencies in the way elected representatives within democracies do, that their processes for lawmaking are insufficiently transparent or insufficiently open to participation by national interest groups or members of transnational civil society, or that IOs fail to respect individual rights associated with democratic governments (from the rights to due process under the International Covenant on Civil and Political Rights to the welfare rights under the International Covenant on Economic, Social and Cultural Rights). Although these forms of democratic critiques are not consistent with each other, they challenge the bona fides of IOs as varied as the WTO and the International Criminal Court for failing to make the necessary "vertical" or top-down connections between their international forms of governance (including by international judges in the course of adjudication) and those at the national level. n100

Other critiques of IOs, most commonly made by developing countries, challenge them for failing to respect in practice the sovereign equality that is usually solemnly affirmed by their charters. n101 Whether directed at institutional organs with weighted forms of voting that elevate the rights of certain states over others (such as the UN Security Council, the World Bank, and the IMF) or institutions that more subtly privilege the interests of some states over others (such as the WTO Appellate Body and even ad hoc war crimes tribunals), these "horizontal" complaints often merge with "vertical" democratic critiques in practice. n102 The results may be incoherent, occasionally even violent, public protests (like those targeting recent WTO trade [342] rounds) or revisionist defenses of old-fashioned sovereignty, this time as a tool to protect against IO-inflicted inequalities. n103 In some quarters, IOs are no longer valued as useful mechanisms for pooling sovereign interests or as neutral appliers of the real interests of all states, but are seen as agents who have "run amok" in disregard of the interests of their collective principals or as overly faithful agents—though only of some of their most powerful members. Ironically, those IOs regarded as having been the most successful in the Grotian enterprise of creating or enforcing ever more international law, such as the WTO, have been the subject of the most vociferous complaints—precisely on the grounds that they have done the most to undermine the power of (some) states to govern themselves. n104

IOs also face challenges on ideological grounds. Many express the concern that the Bretton Woods institutions and even erstwhile voices of the developing world, such as UNCTAD, are now enforcers of a model of governance and de-
velopment premised on the "Washington consensus" or are proselytizers of "best practices" that invariably support the business interests of multinational enterprises, usually based in the West, at the expense of more equitable models of sustainable development. n105 Or they contend, more forthrightly, that some IOs are instruments of hegemonic control or devices to promote Gramscian collaboration on the part of the victimized. n106 Other forms of ideological critique focus on the gender politics of IOs or target the epistemic communities (e.g., "free traders") that have "captured" particular IOs. n107

The heirs of Grotius have been quick to respond with a wide range of potential remedies. Proposed reforms to address the various kinds of "democratic deficits" range from the radical and highly unlikely, such as creating a parliamentary assembly of elected representatives of the peoples of the world to function alongside the present General Assembly, to the more easily accommodated, such as greater acceptance of amicus briefs before institutionalized international adjudicators, enhanced parliamentary involvement in decisions to accede to institutional regimes and in IO processes thereafter, establishment of forms of ombudsmen within IOs, and greater transparency and access for members of international civil society. n108 Others [*343] propose dealing with the proliferation of IO-induced "global administrative law" head-on--by turning to analogous features within national administrative law that serve to patrol its domain. n109 Horizontal concerns over interstate equity have prompted proposals that, for example, would reform the weighted-voting schemes of the international financial institutions or expand the size of (or diminish the use of the veto within) the UN Security Council. Although critiques that IOs embody and promote particular ideologies pose more difficult challenges, those who have not entirely lost faith in the "transforming promise" n110 of IOs have responded by calling, among other things, for political or legal constraints on IOs, including those peculiarly subject to hegemonic control, such as the UN Security Council. n111

But the vertical, horizontal, and ideological complaints against IOs persist not only because most of the proposed Grotian reforms have yet to emerge. The push to enhance "voice" is so insistent precisely because international lawyers have been relatively successful in discouraging "exit." n112 Indeed, continued participation in IOs, and in UN and Bretton Woods institutions in particular, is regarded today as so intrinsic to the enjoyment of sovereignty that exit is no longer a real option for most states most of the time. n113 As this observation suggests, many of the critiques of IOs now being heard, whether on the streets where prominent IOs live or in the pages of scholarly journals, are inspired by the very success of the Grotian consensus that led to their establishment, proliferation, and growing legal clout.

More troubling for the future of IOs is that many of the challenges they now face strike at the very foundations of the "Grotian" tradition that produced them. Today's IO critiques go much further than those once advanced by realist skeptics of international law. Contemporary critiques do not merely question, as did President Wilson's critics, whether an "international community" sharing common values really exists. They do not question the merits of only those IOs that purport to deal with use of force at the heart of sovereignty, such as the League of Nations and the United Nations. Today, thanks in part to a very public (and not merely academic) backlash generated by institutionalization, every aspect of the Grotian tradition is contested and no IO escapes critical scrutiny.

The value of universal participation has been tainted, on the one hand, by the participation of undemocratic states (as in the UN Human Rights Commission) and, on the other hand, by the extent to which universal participation, when paired with certain forms of voting by consensus, may exacerbate rule by the powerful. n114 The proliferation of legal actors and subjects [*344] in the age of IOs is no longer regarded as an unalloyed good, at least not by those who see the "decentralization" of the state as undemocratic or unaccountable, n115 or those who contend that IO-based legalization and democratization at the national level do not always go hand in hand. n116 The possibility that IOs may mobilize internal interest groups within liberal states or at the international level has a darker edge--for those who suggest that IO processes have empowered primarily Western-based NGOs and multinational corporations or, alternatively, for those who argue that IO processes have increased the power of national interest groups (such as trade protectionists) to the detriment of global welfare. n117 The Grotians' faith in technocratic expertise has been shaken by a public-choice literature that emphasizes the risks of delegating authority to the "unaccountable" agents of IOs--from their designated experts to their civil servants--and especially the likely damage to national or global welfare of capture, rent seeking, and log rolling. n118 Trust in international civil servants has been further undermined by contemporary revelations (e.g., from the UN oil-for-food scandal to widely publicized rapes attributed to UN peacekeepers), as well as by Weberian insights into the pathologies of bureaucracies, international and national. n119 Adjudicative lawmaking has been criticized either because international dispute settlers are considered too similar to "unaccountable" judges in otherwise democratic states or because they are deemed too distinct in their features to share the legitimacy of national judges who
are made accountable to the electorates of democratic states through a variety of mechanisms. n120 The development agenda of IOs has been criticized as a continuation--albeit accompanied by more politically correct rhetoric--of the colonialist enterprise or, more moderately, for failing to recognize the need for a more nuanced application of the "Washington consensus." n121 Faith in functionalism as the engine for institutionalized cooperation has been shaken by the premise that the problems attendant on globalization do not consist only of "market failures" requiring ever-rising forms of international regulation, but also emerge from self-inflicted "government failures" produced by mistaken reliance on global legal elites who have undertaken ineffectual or counterproductive codification efforts. n122 Confidence in permanent venues for international discourse has been undermined by critical takes on the identity of the participants in that discourse and its prospects for success. n123 Constructivists' and managerialists' hopes for greater levels of compliance through "socialization" or IO-induced changes in state interests have been shaken by empirical scholarship that questions the level of compliance within IO regimes, n124 as well as contentions that to the extent that IOs are indeed remaking states, they are changing them "in ways that favor the interests of transnational capital" and not always that favor the interests of the most affected populations. n125

Much of the contemporary hostility toward IOs reflects a growing recognition that the benefits of the values advanced by IOs--centralization and independence--are not distributed equally among states. n126 There is a growing awareness, particularly as IOs centralize their own power as well as concentrate the power of their most powerful members, that institutionalization may not have truly "leveled the playing field" as advertised, even though the relative powers of rich and poor or West and "other" are undeniably "more equal" than before, when the bulk of today's states were deemed entirely outside the domain of "civilized" law. Some of the skepticism about the value of IOs as "neutral" venues for regulation or discourse stems from postmodern doubts about the law's neutrality. Even that supposed great leveler of power within some organizations, institutionalized dispute settlement, has come under challenge because of asymmetric material resources in setting out the rules and procedures, the power dynamics that determine which treaty-contract issues will be "completed" by the adjudicative process, the unequal power of states to operate in the shadow of dispute settlement, and states' unequal abilities to access dispute settlement or to avoid its constraints. n127 Such doubts feed skepticism about the value of "constitutionalization" (as with respect to the WTO) and the merits of promoting legalization by granting private parties access to international dispute resolution. n128 Even the once-innocuous idea that IOs serve as disseminators of innovative ideas is no longer regarded with equanimity--not by those who contend that IO notions of good governance, including ideas about the proper separation of powers, the central role of courts, the proper sphere for regulating business, and technical standards, are unduly and unwisely influenced by the United States. n129

As this criticism suggests, recognition that state power continues to matter within IOs (and that its exercise generates predictable resistance) has undermined the progress narrative that characterized the turn to IOs. The manifold examples of the purported exercise of power through IOs--that is, the exercise of state power through forum shifting, recourse to private arbitration (as under the auspices of the International Centre for Settlement of Investment Disputes), the imposition of multilateral forms of conditionality (as by the IMF), expressive but selective condemnations of "rogue" states (as by the IAEA and the Security Council), and the absence of equal, effective access to institutionalized dispute settlement (as in the WTO)--raise considerable doubts about whether the new conception of sovereignty as "status" and the new ways states are being made to "behave" really constitute progress. n130 Enthusiasm for institutionalization has waned as more states find that the "progress" that IOs bring increasingly makes them unwilling rule takers rather than avid participants in a "pooling of sovereignty" for the benefit of all. n131

Second thoughts about the value of institutionalization, by those who were not "present at the creation" and have a less vested interest in IOs' success, account for contemporary reform proposals that are strikingly un-Grotian. Some of these suggest a twenty-first-century move away from institutions nearly as intense as the post--World War II move toward them.

Doubts about the "bureaucratic sclerosis" that characterizes most IOs may explain why the pace of institutionalization appears to be slowing down (at least by some measures) or why some regions of the world, such as Asia, have not shared the general post--World War II enthusiasm for them. n132 It may also explain the appeal of less institutionalized alternatives (such as transnational networks of government regulators or models of governance like environmental treaties' COPs and MOPs) or hybrid, not-quite-international models for international adjudication (such as the Special Court for Sierra Leone). Some suggested reforms start from the non-Grotian premise that multilateral rules produced by the representatives of the "international community" will not necessarily be morally superior to or more effi-
acious than, say, unilateral assertions of extraterritorial jurisdiction, bilateral treaties, or recourse to regional institutions or regional adjudication. n133 Various proposals attack IOs’ increasing legislative, regulatory, or adjudicative prowess by urging restraints on the principle of implied powers, the permissible scope of delegated authority, or the interpretive gap-filling power of international adjudicators. n134 Others propose greater or more creative recourse to concepts that are deferential to or more protective of sovereignty (such as through doctrines permitting dismissal on procedural grounds, reliance on forms of subsidiarity, the principle of non liquet, and even a return to the Lotus presumption), particularly by adjudicators who are in a position to expand the regulatory effects of IO legal products. n135 Some have suggested that IOs simply learn the lessons of "government failures" elsewhere and engage in less lawmaking by turning to the market or deregulation—as many states have done. n136

The present state of IO studies (and of IOs) lies in the eye of the beholder. For some, the glass is more than half empty. Deepening skepticism about the value of international institutionalization across the political spectrum in the United States and among many in Europe and the global South can easily be portrayed as part and parcel of contemporary public international lawyers’ "existential crisis" n137—a loss of the turn-of-the-century idealism that gave rise to IOs in the first place. For others, perhaps the majority for whom the "heroic" n138 period of international law and institutions has not yet ended, the plethora of current proposals for institutional reform and alternatives to IO forms of governance suggest not buyers’ remorse but healthy, if belated, recognition that the study of IOs should never be confused with their celebration. n139

Legal Topics:
For related research and practice materials, see the following legal topics:
International LawAuthority to RegulateGeneral OverviewInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational LawSovereign States & IndividualsHuman RightsGenocide

FOOTNOTES:
n1 See, e.g., A. E. R. Boak, Greek Interstate Associations and the League of Nations, 15 AJIL375 (1921); see also Josiah Ober, Classical Greek Times, in THE LAW OF WAR (Michael Howard et al. eds., 1994) (discussing, among other things, the Amphictyonic League, an organization of Greek peoples that regulated the affairs of Delphi); Steve Sheppard, The Laws of War in the Pre-Dawn Light: Institutions and Obligations in Thucydides’ Peloponnesian War, 43 COLUM. J. TRANSNAT’L L. 905 (2005) (semble). But Boak, who points out that the Greek leagues “were only created and held together under the leadership of one state more powerful than the rest,” concludes his article with a prescient query: he wonders whether the nascent League of Nations would fail for lack of a comparably powerful state or group of states capable of coercive enforcement. Boak, supra, at 383.
n3 Kennedy, supra note 2, at 848, 859.
n4 Id. at 858; see also D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 1-9 (4th ed. 1982).
n5 Kennedy, supra note 2, at 849, 866. Despite the U.S. decision not to participate, the Journal closely followed subsequent League developments. See, e.g., Charles Noble Gregory, The First Assembly of the League of Nations, 15 AJIL 240 (1921).
n6 See Current Note, The League of Nations, 13 AJIL 570, 572-75 (1919). President Wilson’s address was particularly prescient given current concerns over the “democratic deficits” of IOs, see infra at notes 99-107 and
corresponding text. He noted that since it is "impossible to conceive a method or an assembly so large and various as to be really representative of the great body of the peoples of the world," the best alternative was to have each government be represented by two or three representatives, though only a single vote, so that a number of voices would speak from time to time for each government. Id. at 572.

n7 For a backward-looking view of the UN Charter as correcting the perceived flaws of the League of Nations Covenant, see BOWETT, supra note 4, at 17-22. For discussion of the turn to institutions in the international economic area, see, for example, the centennial essays by John H. Jackson, International Economic Law—A Growing, Powerful Sub-Subject of International Law, 100 AJIL, and Detlev F. Vagts, International Economic Law and the American Society of International Law, 100 AJIL (both forthcoming July 2006).

n8 Kennedy, supra note 2, at 984-85.

n9 For descriptions of existing IOs, see HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (4th rev. ed. 2003); PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS (5th ed. 2001). Note that a substantial proportion of new IOs are today created not by governments but by other IOs and that traditional IOs created by treaty declined from 394 in 1982 to 339 in 1992, while "emanations" from other IOs increased from 669 to 808. Eric Stein, International Integration and Democracy: No Love at First Sight, 95 AJIL 489, 489-90 n.2 (2001). For a listing of international dispute settlers, see Project on International Courts and Tribunals, Synoptic Chart: The International Judiciary in Context (Nov. 2004), at <http://www.pict-pcti.org>.

n10 For one attempt to measure the "degree" of legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, The Concept of Legalization, 54 INT'L ORG. 401 (2000) (measuring legalization in accordance with three variables: obligation, precision, and delegation).


n13 Id. at 19-51.


n15 Dinah Shelton, Normative Hierarchy in International Law, 100 AJIL 291 (2006).


n17 See generally ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 176-77 (1986) (describing the evolution of the rules in the Vienna Convention). The term "package deal" may mean either provisions of a treaty negotiated, on the basis of consensus, that appeal to different groups of states, or treaty provisions subject to an express limitation on reservations or severability designed to prevent the dismantling of the "package" at the time of ratification. See Hugo Caminos & Michael R. Molitor, Progressive Devel-
opment of International Law and the Package Deal, 79 AJIL 871 (1985). According to Cassese’s description of the negotiating dynamics of the Vienna Convention, the insertion of *jus cogens* appears to fit both descriptions of a "package deal," at least to some degree, since the concept was favored by developing countries especially and its inclusion seems to have played a role in securing their acceptance of a package that did not include some of their other preferred "progressive" changes. In addition, although the Vienna Convention on the Law of Treaties does not prohibit reservations, the terms of Article 53 (barring any derogation from a "peremptory norm") attempt to achieve the second purpose of some "package deals," at least with respect to *jus cogens*.

n18 Compare Bruno Simma, Consent: Strains in the Treaty System, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 487, 494 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983) (contending that when IO forums produce a treaty, the "lowest common denominator" provisions deemed necessary to facilitate its conclusion in global venues, or to encourage the widespread ratification that is often regarded as the indicator of success, may devalue the entire exercise).

n19 Shelton, supra note 15, at 301 n.63 (citing commentary at 1986 UN conference).


n21 See Fundamental ILO Conventions, at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm> (last modified Oct. 20, 2000). This is not the ILO’s sole attempt to suggest a hierarchy within international labor law. The ILO’s Constitution has also been read to imply members’ commitment to certain "core" obligations, such as the right to form labor unions, and to include a *sub silentio* commitment to respond to complaints alleging the violation of such rights. See FREDERIC L. KIRGIS JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 413-25 (2d ed. 1993). As Shelton suggests, other IOs have done the same. Shelton, supra note 15, at 314-15 (discussing hierarchically superior norms, as found by the Human Rights Committee under the International Covenant on Civil and Political Rights).


n24 For a discussion of how the interpretation of IO charters has been "constitutionalized" through teleological interpretation, see ALVAREZ, supra note 14, at 65-108. See, e.g., Hannes L. Schloemann & Stefan Ohl-hoff, "Constitutionalization "and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AJIL 424, 424 (1999) ("Constitutional structures are developing much faster in international trade law than in any other area of international law . . ."). For a thoughtful review and critique of such views with respect to the


n26 Christine Chinkin has enumerated six definitions of "soft" law; namely, norms that (1) have been articulated in nonbinding form; (2) contain vague or imprecise terms; (3) emanate from bodies lacking international lawmaking authority; (4) are directed at nonstate actors whose practice cannot constitute custom; (5) lack any corresponding theory of responsibility; and (6) are based solely upon voluntary adherence. Christine Chinkin, Normative Development in the International Legal System, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 30 (Dinah Shelton ed., 2000).

n27 See generally ALVAREZ, supra note 14, at 458-520, 545-66.

n28 See, e.g., CASSESE, supra note 17, at 185 (contending that the "duty to cooperate" emerges naturally from the universal participation of states in modern lawmaking settings since it makes negotiations between diverse and often conflicting groups of states possible); Pierre-Marie Dupuy, The Place and Role of Unilateralism in Contemporary International Law, 11 EUR. J. INT'L L. 19, 22-25 (2000) (arguing that the "law of coexistence" brought about by the UN system is the "basis for the whole post-war international legal order" and requires states to "choose the path of compromise and negotiated settlement").

n29 See, e.g., Bruno Simma & Andreas L. Paulus, The 'International Community': Facing the Challenge of Globalization, 9 EUR. J. INT'L L. 266, 266 (1998) (claiming that the Lotus principle "is giving way to a more communitarian, more highly institutionalized international law, in which states 'channel' the pursuit of most of their individual interests through multilateral institutions").

n30 See FREDERIC L. KIRGIS JR., PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE (1983); Christopher D. Stone, Common but Differentiated Responsibilities in International Law, 98 AJIL 276 (2004).


n32 International organizations' deployment of their implied powers and reliance on the principle of effectiveness have contributed to postmodern doubts about relying on state consent as the basis for all international obligations. See generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 270-91 (1989).


n34 See generally Roy S. Lee, Multilateral Treaty-making and Negotiation Techniques: An Appraisal, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORGI.


n36 See Helfer, supra note 35.


n41 The Paquete Habana, 175 U.S. 677 (1900).

n42 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Thus, even the generally conservative U.S. Restatement of Foreign Relations Law recognized the possibility that some General Assembly resolutions could have an impact on customary law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 reporters’ note 2 (1987).


n45 See, e.g., Kingsbury, Krisch, & Stewart, supra note 44.

n47 See generally DAVID M. LEIVE, INTERNATIONAL REGULATORY REGIMES: CASE STUDIES IN HEALTH, METEOREOLOGY, AND FOOD (1976); Naomi Roht-Arriaza, 'Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization, in COMMITMENT AND COMPLIANCE, supra note 26, at 263. Note that even some instruments not produced within IOs, such as the international standards of the International Organization for Standardization (ISO) and soft codes produced by some IOs, may come to be "hardened" (or enforced) through the actions of other IOs. See David A. Wirth, Commentary, in id. at 330, 338-41 (describing the use of ISO standards under the WTO's Agreement on Technical Barriers to Trade); see also ALVAREZ, supra note 14, at 217-35.

n48 See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ REP. 174 (Apr. 11) (finding that the attributes of the United Nations as an international legal person can be derived from a "principle of effectiveness" that implies the existence of certain powers even when these are not otherwise stated in its charter [such as the power to conclude treaties, nowhere mentioned in the UN Charter, or to bring an international claim for injuries], if these are necessary to enable that organization to fulfill its purposes).

n49 But see Steve Charnovitz, The Relevance of Non-State Actors to International Law, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 543, 544-48 (Rudiger Wolfram & Volker Roben eds., 2005) (arguing that the UN Security Council, NATO, the Financial Action Task Force, and the WTO "are not themselves actors, but rather are arenas for utilizing persuasion and applying power"; id. at 546).

n50 See generally Kingsbury, Krisch, & Stewart, supra note 44. For a description of the evolving powers of the Security Council, see THE UN SECURITY COUNCIL, supra note 22.


n52 Barnett & Finnmore, supra note 2, at 169-75.

n53 Id. at 174-81 (citing as examples the IMF's coercion of states to get on the "right track," IO "shaming" techniques, establishment of "best practices," strategic use of information, agenda-setting activities, and other "constitutive" activities; the latter relate, for example, to defining what constitutes "development" or even a legitimate state (as in determining the proper scope of peacekeepers regarding the maintenance of a free market, a working democracy, and the "rule of law"). For a survey of UN contributions to development thinking and practice, see, for example, RICHARD JOLLY, LOUIS EMMERIJ, & THOMAS G. WEISS, THE POWER OF UN IDEAS: LESSONS FROM THE FIRST 60 YEARS (2005).

n54 Thus, some scholars and policymakers have proposed creating new interstate organizations to handle environmental issues, refugees, counterterrorism, or international investment. For examples of the continuing proliferation of subentities within existing IOs, see Paul C. Szasz, The Complexification of the United Nations System, 1999 MAX PLANCK Y.B. UN L. 3.

n55 See, e.g., id. To date, the Security Council has created at least three distinct sub-bodies in connection with its efforts since the events of September 11, 2001, to combat terrorism. See generally Eric Rosand, Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism, 97 AJIL 333
n56 Compare SANDS & KLEIN, supra note 9, at 16-19 (defining IOs and the "nature of international institutional law"), 115-19 (describing "other autonomous organizations," including environmental COPs/MOPs and commodity agreements).


n58 ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 27 (1995); see also Kal Raustiala, Rethinking the Sovereignty Debate in International Economic Law, 6 J. INT'L ECON. L. 841, 853, 860-61 (2003) (arguing that IOs are sovereignty-enhancing instruments if "sovereignty" is redefined to mean something other than the ability to take autonomous action). For an argument that sovereignty under the UN Charter is being redefined to mean "conditional" sovereignty such that the right of a state to have its sovereignty respected is now dependent on its fulfilling its Charter obligations, see Anne-Marie Slaughter, Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform, 99 AJIL 619, 627-30 (2005).


n61 For instances of the impact of IOs on the internal structures of states, see, for example, MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 34-66 (1996) (discussing UNESCO's impact on national science policies). Note that IOs' impact on national laws and institutions is not dependent on whether their rules are "self-executing" as a matter of national law. Thus, WTO decisions have had an impact on the practices of both the executive and the legislative branches in the United States notwithstanding that WTO law is not "self-executing." See, e.g., United States--Sections 301-310 of the Trade Act of 1974, Doc. WT/DS152/R (adopted Jan. 27, 2000) (holding the United States to its word that it would not unilaterally enforce trade remedies inconsistently with its WTO obligations).

n62 See, e.g., David A. Wirth, Trade Union Rights in the Workers' State: Poland and the ILO, 13 DENV. J. INT'L L. & POL'Y 269 (1984) (describing how the ILO both legitimated Solidarity within Poland and discredited that country's nonindependently licensed labor union).


n64 See, e.g., Wirth, supra note 62. See generally SLAUGHTER, supra note 63.

n65 Bederman, supra note 2, at 21. For a survey of how IOs have influenced, and in some cases may have inspired, the methods of international law surveyed in this Journal's Symposium on Method, 93 AJIL 291 (1999), see Jose E. Alvarez, International Legal Perspectives, in THOMAS G. WEISS & SAM DAWES, THE OXFORD HANDBOOK ON THE UNITED NATIONS (forthcoming 2006).


n68 LLOYD GRUBER, RULING THE WORLD (2000); see also POWER IN GLOBAL GOVERNANCE, supra note 2; notes 127-30 infra and corresponding text.

n69 CHAYES & CHAYES, supra note 58.

n70 ROBERT O. KEOHANE, AFTER HEGEMONY (1984); Abbott & Snidal, supra note 33.


n72 Id. As the debate over the legality of Operation Iraqi Freedom suggests, even within the United States the public debate is not limited to determining whether the U.S. Congress authorized that operation but extends to whether the UN Security Council implicitly did so. See, e.g., William H. Taft IV & Todd F. Buchwald, Pre-emption, Iraq, and International Law, 97 AJIL 557 (2003). As this debate also implies, the participation of a state in IOs changes the dynamics between its branches of government (executive, judicial, and legislative) and, if it is a federal state, may also alter the dynamics between the federal and state levels. See generally ALVAREZ, supra note 14, at 617-20.

n73 Jeffrey L. Dunoff & Joel P. Trachtman, Economic Analysis of International Law, 24 YALE J. INT'L L. 1, 37, 49-53 (1999) (adapting Coase). The authors contend that, for example, the "best" organization is "the one that maximizes the positive sum of transaction gains, transaction losses, and transaction costs." Id. at 39.

n74 Id. at 41. For these authors, an "asset specific investment" is one that can realize its full value only in the context of continued relations with another party or that requires binding another person over time.


n76 See generally SLAUGHTER, supra note 63. At the same time, Slaughter apparently no longer claims that transnational networks are displacing IOs; her more recent work acknowledges that these networks often work alongside and in tandem with IOs. Compare Anne-Marie Slaughter, The Real New World Order, FOREIGN AFF., Sept./Oct. 1997, at 183, with SLAUGHTER, supra.

n77 See, e.g., Cassese, supra note 63 (discussing the impact of the WTO both on subunits within governments and in changing government's perceived interests).


n79 Id. at 277.

n80 See, e.g., Brunnee & Toope, supra note 78; Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621 (2004).

n81 Compare Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 MINN. L. REV. 342 (2004) (describing "bottom-up" approaches for implementing or enforcing national law), with Brunnee & Toope, supra note 78 (describing international mechanisms for inducing compliance), and Janet Koven Levit, A Bottom-up Approach to International Lawmaking: The Tale of Three

n82 Brunnee & Toope, supra note 78, at 276.

n83 See, e.g., id. at 292 ("interactional law generates self-bindingness and adherence to norms, even in the absence of material incentives or sanctioning mechanisms").


n85 JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 254 (4th ed. 2002); see also Jackson, supra note 7; cf. Kennedy, supra note 2, at 982 (noting how the League of Nations proponents sought to decontextualize wars by turning them into "disputes").


n87 Michael Barnett & Raymond Duvall, Power in Global Governance, in POWER IN GLOBAL GOVERNANCE, supra note 2, at 1, 1.

n88 There is a clear and unmistakable connection between today’s self-identified "progressive" developers of international law and early advocates of international organization in this Journal. See, e.g., Albert Kocourek, Some Reflections on the Problem of a Society of Nations, 12 AJIL 508 (1918); John Bassett Moore, International Law: Its Present and Future, 1 AJIL 12 (1907); Paul S. Reinsch, International Unions and Their Administration, 1 AJIL 604.

n89 Barnett & Duvall, supra note 87, at 1.

n90 See, e.g., Hurd, supra note 60; Johnstone, supra note 60.


n93 Barnett & Duvall, supra note 87, at 5 (citing Doyle, Zacher & Matthews, Keohane, and Deudney & Ikenberry). For a recent rearticulation of such views, see, for example, Slaughter, supra note 58. See generally Lauterpacht, supra note 12, at 19-53.

n94 See, e.g., Petersmann, supra note 86.

n95 See, e.g., SLAUGHTER, supra note 63.

As Laurence Helfer has noted, today's scholars attempt to resolve the potential conflicts brought about by the proliferation of IOs (as through proposals for normative and institutional hierarchies between institutionalized regimes), seek to improve compliance with IO-generated norms, attempt to deter states' attempts to enter and exit institutionalized regimes, and generally try to buttress the legitimacy of IOs. Laurence R. Helfer, Constitutional Analogies in the International Legal System, 37 LOY. L.A. L. REV. 193 (2003).


For an overview of these challenges, see, for example, ALFRED C. AMAN JR., THE DEMOCRACY DEFICIT (2004); Paul B. Stephan, International Governance and American Democracy, 1 CHI. J. INT'L L. 237 (2000); Stein, supra note 9; Grainne de Burca, Democratizing Transnational Governance: Lessons from the EU Experience (Columbia Law School Young Scholars Workshop, 2004-05), at <http://www.law.columbia.edu/faculty/fac_resources/faculty_lunch/>. U.S. scholars tend to focus on the "representational" failings of IOs, see, e.g., Rubenfeld, supra note 99, whereas European scholars tend to focus on the failures of IOs to respect the international legal rights of individuals and of states, see, e.g., ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

This is not a new concern. See, e.g., Denys P. Myers, Representation in Public International Unions, 8 AJIL 81 (1914) (discussing, among other things, the tendency of powerful nations to use the votes of their nonsovereign colonies to enhance their voting prowess, to the detriment of sovereign equality, in administrative unions).


See, e.g., Kingsbury, supra note 44. For an entirely different defense of sovereignty that is nonetheless grounded in perceived threats posed by IOs, see JEREMY A. RABKIN, THE CASE FOR SOVEREIGNTY (2004).

See Stein, supra note 9.

These ideological concerns range from the mildly critical, see, e.g., Benedict Kingsbury, First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society, 3 CHI. J. INT'L L. 183 (2002) (suggesting the narrowing effects of conceptions of "First Amendment" rights in the United States and Western states), to the all-embracing, see, e.g., Mattei, supra note 102, at 383 (criticizing the turn to "imperial" law through the vehicle of "predatory economic globalization"). Notably, today's critiques have gone beyond the international financial institutions. See, e.g., Kristen Boon, Legislative Reform in Postconflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-making Powers, 50 MCGILL L.J. 285 (2005) (discussing attempts at market reform in the guise of UN peacekeeping). See generally SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY (2003).

See, e.g., Jose E. Alvarez, Hegemonic International Law Revisited, 97 AJIL 873 (2003); Lloyd Gruber, Power Politics and the Institutionalization of International Relations, in POWER IN GLOBAL
GOVERNANCE, supra note 2, at 125; Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 EUR. J. INT’L L. 369 (2005); Mattei, supra note 102; see also HUMANIZING OUR GLOBAL ORDER: ESSAYS IN HONOUR OF IVAN HEAD (Obiora Chinedu Okafor & Obijiofor Aginam eds., 2003).

n107 See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW 171-200 (2000); Robert Howse, From Politics to Technocracy–and Back Again: The Fate of the Multilateral Trading Regime, 96 AJIL 94 (2002); see also ALVAREZ, supra note 14, at 640-45.

n108 For discussion of these reform proposals, see, for example, Accountability of International Organisations, in INTERNATIONAL LAW ASSOCIATION, BERLIN CONFERENCE (Final Report of Comm. on Accountability of International Organizations, 2004), available at <http://www ila-hq.org/pdf/Accountability/Final%20Report%202004. pdf>; Stein, supra note 9, at 531–34. See also the ongoing discussions within the International Law Commission in connection with the topic of responsibility of international organizations, for example, in Giorgio Gaja, Second Report on Responsibility of International Organizations, UN Doc. A/CN.4/541 (2004). But others have denied that a "democratic deficit" truly exists at the international level, defending the legitimacy of IOs either on the basis that they are technocratic or regulatory organizations already subject to parliamentary and executive approval or on the premise that IOs are subject to a diverse set of unique accountability mechanisms. See, e.g., Grainne de Búrca, supra note 100; Ruth W. Grant & Robert O. Keohane, Accountability and Abuses of Power in World Politics, 99 AM. POL. SCI. REV. 29 (2005). For contrasting views on the viability of establishing an international parliamentary assembly as a remedy for the UN democratic deficit, compare Richard Falk & Andrew Strauss, Toward Global Parliament, FOREIGN AFF., Jan./Feb. 2001, at 21 (advocating an elected world assembly), with Robert A. Dahl, Can International Organizations Be Democratic? A Skeptic's View, in DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999) (arguing that such an assembly is infeasible).

n109 See Kingsbury, Krisch, & Stewart, supra note 44 (identifying a need for "global administrative space" characterized by enhanced procedural participation, adherence to substantive standards, reliance on reasoned decisions, and forms of review).

n110 See Koskenniemi, supra note 99, at 231.

n111 See, e.g., DE WET, supra note 100; AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000); Chesterman, supra note 98.


n114 For an example of the former critique, see Kenneth Anderson, Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks, 118 HARV. L. REV. 1255, 1296 n.67 (2005) (book review) (contending that the United Nations is "almost by definition a corrupt network because its doors are open to the wicked as well as the good"). For an example of the latter, see Andrew Hurrell, Power, Institutions, and the Production of Inequality, in POWER IN GLOBAL GOVERNANCE, supra note 2, at 33, 51 (suggesting that the stability of hegemonic power "depends on consensus as well as coercion and on the capacity to engender collaboration").

n115 See, e.g., Anderson, supra note 114.

choices); Stephan, supra note 100 (arguing that IOs are undemocratic to the extent that they strengthen the powers of the executive branch, enhance the power of certain interest groups over others, or bolster the power of IO bureaucrats).

n117 See, e.g., Kenneth Anderson, The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society, 11 EUR. J. INT'L L. 91 (2000). For a critique of the WTO on the basis of which interests it empowers within the North, see, for example, Gregory Shaffer, Power, Governance, and the WTO: A Comparative Institutional Approach, in POWER IN GLOBAL GOVERNANCE, supra note 2, at 130, 135 (contending that while powerful constituencies within the United States and the European Union, such as large multinationals and trade associations, harness state power in the WTO to promote their interests, business and NGOs in smaller countries cannot). Even with respect to the United States, the WTO's impact on democratic processes and domestic interest groups has divided commentators. Compare John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 HARV. L. REV. 511 (2000) (praising the WTO for "correcting" the flaws in the U.S. democratic process that give rise to trade protectionism), with Judith Goldstein & Lisa L. Martin, Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note, 17 NW. J. INT'L L. & BUS. 681, 713 (1996-97) (suggesting that what passes for WTO-induced trade liberalization "may turn out to be special interest legislation"). For a critique of the WTO on constructivist grounds, that is, for helping to create and sustain a "club" atmosphere for a narrow-minded epistemic community of free traders, see Howse, supra note 107.

n118 For a critical view of the "rent seeking" by nonstate interest groups that are given access to IO law-making processes, see, for example, Stephan, supra note 117. (Rent seeking has been defined as efforts to obtain quota rents, or the using up of real resources in an effort to secure rights to economic rents arising from government policies.) See also Jonathan R. Macey, Regulatory Globalization as a Response to Regulatory Competition, 52 EMORY L.J. 1353 (2003) (explaining the impetus for international regulation as stemming from the perceived self-interests of the regulators themselves); Enrico Colombatto & Jonathan R. Macey, A Public Choice Model of International Economic Cooperation and the Decline of the Nation State, 18 CARDOZO L. REV. 925 (1996) (seemle).


n120 See generally Stephan, supra note 117. For a critique of the assumptions that international lawyers make about the desirability of judicial "independence" at the international level, see Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 CAL. L. REV. 1 (2005).


n122 Stephan, supra note 100.


n124 See, e.g., Hathaway, supra note 11; see also Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 CAL. L. REV. 1823, 1885 (2002) (concluding that, given the ineffectiveness of certain inter-
national regimes, international lawyers should devote their efforts to economic regulation rather than concern themselves with war, arms control, territorial limits, neutrality, or human rights).

n125 Mark Laffey & Jutta Weldes, Policing and Global Governance, in POWER IN GLOBAL GOVERNANCE, supra note 2, at 59, 65; see also Hurrell, supra note 114, at 52 (describing those who believe "socialization" "derives either from great power imposition or from the competing dynamics of the state system"); Krisch, supra note 106, at 375 (discussing the prospects for "hegemonic" socialization); Nico Krisch, Imperial International Law 58 (Global Law Working Paper 01/04), at <http://www.nyulawglobal.org/workingpapers/detail/documents/KrischFinal0904.pdf> [hereinafter Krisch, Imperial IL] (criticizing some IOs' reliance on the market as a tool for hegemonic compliance--as through use of Standard and Poor's or Moody's ratings for countries).

n126 Cf. Abbott & Snidal, supra note 33 (describing the benefits of IO-based forms of centralization and independence).

n127 See, e.g., Andrew T. Guzman & Beth A. Simmons, Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes, 34 J. LEGAL STUD. 557 (2005) (empirical study concluding that the lack of financial, human, and institutional capital explains LDCs' continuing inability to participate fully in international dispute settlement); Shaffer, supra note 117 (describing the embedded inequities of WTO dispute settlement with respect to poorer states); see also Gruber, supra note 106.

n128 Compare Alec Stone Sweet, Judicialization and the Construction of Governance, 32 COMP. POL. STUD. 147 (1999) (describing how granting private parties access to international dispute settlement contributes to legalization), with Robert Howse & Kalypso Nicolaidis, Enhancing WTO Legitimacy: Constitutional or Global Subsidiarity? 16 GOVERNANCE 73 (2003) (questioning the value of proposals to grant private causes of action in order to constitutionalize the WTO). For a synthesis of anticonstitutional views within the WTO literature, see CASS, supra note 24, at 207-37.

n129 See, e.g., Krisch, Imperial IL, supra note 125, at 55; see also B. S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 EUR. J. INT'L L. 1 (2004).

n130 See, e.g., Hurrell, supra note 114, at 57-58 (agreeing that "conditional sovereignty" exists but suggesting that it is mostly conditional for the weak).

n131 See, e.g., Barnett & Finnemore, supra note 2, at 182.

n132 On "bureaucratic sclerosis," see id. For the suggestion that we are now in a "post-institutionalist" period dominated by continued proliferation of NGOs but a more restrained stance toward establishing new IOs, see CHARLOTTE KU, GLOBAL GOVERNANCE AND THE CHANGING FACE OF INTERNATIONAL LAW 26-34 (ACUNS Rep. & Papers No. 2, 2001), available at <http://www.acuns.org/public/research_library/>. For an account of the resistance to certain forms of "legalization" in Asia and the Pacific, see Miles Kahler, Legalization as Strategy: The Asia-Pacific Case, 54 INT'L ORG. 549 (2000).

n133 See generally Stephan, supra note 117. At the extreme, some democratic sovereigntists question whether IOs are truly necessary, while reviving old doubts about the binding force of international law. See, e.g., John R. Bolton, Is There Really "Law" in International Affairs? 10 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2000) (arguing that treaties are "politically" but not "legally" binding); John R. Bolton, Should We Take Global Governance Seriously? 1 CHI. J. INT'L L. 205 (2000). Even some of those who presumably disagree with Bolton as to the legal nature of treaties contend that some forms of IO lawmaking are useless or pernicious. See, e.g., Stephan, supra.

n134 See, e.g., Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 STAN. L. REV. 1557 (2003); Jan Klabbers, The Changing Image of International Organizations,


n136 See, e.g., Klabbers, supra note 134, at 238.

n137 Koskenniemi, supra note 99, at 230.

n138 KOSKENNIEMI, supra note 2, at 511.