

# Congress's International Legal Discourse<sup>1</sup>

## O Discurso Jurídico Internacional do Congresso Estadunidense

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**Abstract:** Using an original dataset comprising thirty years of legislative histories of U.S. federal statutes, I show that, in debates over bills whose enactment might trigger international law violations, members of Congress urge international law compliance relatively often. The arguments are overwhelmingly supportive of international law and often phrased in legalistic terms. These findings imply that members of Congress are incentivized to take public pro-international law positions by international law-minded executive officials. The executive appears to use congressional international law discourse to boost the country's international credibility and strengthen the president's hand in making and enforcing future commitments.

**Keywords:** International Law. Congress. International Relations. Foreign Policy. Legislation. Constitutional Law.

**Resumo:** Lançando mão de um acervo de dados original que compreende 30 anos de históricos legislativos de estatutos federais estadunidenses, o autor demonstra que, em debates sobre leis cuja aprovação poderia levar a violações de direito internacional, membros do Congresso invocam observância a este com relativa frequência. Os argumentos são amplamente favoráveis ao direito internacional e frequentemente fraseados em termos legalistas. Essas conclusões demonstram que membros do Congresso são incentivados a tomar posições públicas pró-direito internacional por oficiais executivos com tendências internacionalistas. O executivo parece utilizar do discurso congressista de direito internacional para reforçar a credibilidade internacional do país e fortalecer a posição do presidente para realizar e implementar obrigações futuras.

**Palavras-chave:** Direito Internacional. Congresso. Relações Internacionais. Política Estrangeira. Legislação. Direito Constitucional.

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## 1 Introduction

The role of international law in both international relations and state<sup>2</sup> domestic affairs has grown markedly over the past several decades<sup>3</sup>. In the United States, international conventions now cover numerous topics that were once the sole domain of federal or U.S. state law<sup>4</sup>. As of 2012, the United States was a party to at least 8,400 bilateral and multilateral treaties, covering issues from chemical weapons to racial discrimination<sup>5</sup>. Over roughly the same period, American jurists have gradually converged on a “modern view” of customary international law (“CIL”), which holds that CIL is a form of federal law enforceable in federal courts<sup>6</sup>. Together, these trends have increased the political and practical relevance of these

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<sup>2</sup> Unless otherwise specified, this Article uses the term “state” as it is used in international law parlance, to denote a sovereign country.

<sup>3</sup> See Restatement (Third) of the Foreign Relations Law of the United States pt. VII, introductory note, at 144-145 (1987) (“[H]ow a state treats individual human beings, including its own citizens, in respect of their human rights . . . is a matter of international concern and a proper subject for regulation by international law.”); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1291 (2000) (“[W]ith globalization, the matters appropriate for treaties have expanded and will continue to do so.”).

<sup>4</sup> See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 480 (1998) (“The number of federal and state cases that raise international law issues has been growing rapidly. And the international law invoked in these cases purports to regulate many matters traditionally within domestic control.”).

<sup>5</sup> U.S. Dep’t of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013* (2013), available at <http://state.gov/documents//.pdf>.

<sup>6</sup> See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 111 n.3 (“Customary international law is considered to be like common law in the United States, but it is federal law.”); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1555–61 (1984); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393, 418–25 (1997); Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 Notre Dame L. Rev. 1495, 1515–38 (2011).

two forms of international law in the U.S. domestic system<sup>7</sup>. Perhaps as a partial result, interest in topics at the nexus of international law and domestic decision making has surged among legal scholars<sup>8</sup>.

That attention, however, has focused almost exclusively on the courts<sup>9</sup> and the president<sup>10</sup>. With the exception of Congress's role in approving and implementing international agreements, the impact of international law in congressional lawmaking has been mostly ignored by scholars<sup>11</sup>. This is true despite the fact that under the U.S. system of

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<sup>7</sup> See David A. Koplow, *Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?*, 37 Fletcher F. World Aff. 53, 69–71 (2013) (noting several mechanisms that lead the United States to violate treaty commitments and the consequences thereof).

<sup>8</sup> See, e.g., Curtis A. Bradley, *International Law in the U.S. Legal System* xi (2013) (“The intersection between [...] international law and the U.S. legal system has become increasingly important. . . . U.S. courts . . . have seen a surge of cases in recent years raising issues of international law.”); International Law in the U.S. Supreme Court: Continuity and Change 1 (David L. Sloss et al. eds., 2011) [hereinafter *Continuity and Change*] (“The twenty-first century’s first decade was an extraordinarily active one for international law in the [U.S.] Supreme Court...”).

<sup>9</sup> See generally *Continuity and Change*, *supra* note 7; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599 (2008) (arguing that a default rule of treaty self-execution is most appropriate); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 Colum. L. Rev. 628 (2007) (noting that many critics conflate U.S. courts’ use of foreign law and international law).

<sup>10</sup> See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 551 (2004) (challenging the so-called executive “Vesting Clause Thesis,” which holds that the constitutional text vests broad executive powers in the president); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 236 (2001) (“[T]he Constitution’s text supplies a sound, comprehensive framework of foreign affairs powers without appeal to amorphous and disputed extratextual sources.”); Bruce Fein, *Attacking Syria: A War of Aggression?*, Huffington Post (Nov. 7, 2013, 2:47 PM), [http://huffingtonpost.com/fein/attacking-syriaa-war-of-a\\_b\\_4233682.html](http://huffingtonpost.com/fein/attacking-syriaa-war-of-a_b_4233682.html) (challenging a former State Department legal advisor’s view that the President has authority under constitutional and international law to attack Syria).

<sup>11</sup> See Harlan Grant Cohen, *Historical American Perspectives on International Law*, 15 ILSA J. Int’l & Comp. L. 485, 487 (2009) (describing how the great majority of legal-history scholarship on the United States and international law focuses either on how

international law, federal statutes can uphold or breach international law on the domestic plane, meaning that Congress plays a key role in how the United States treats its ever-growing international commitments<sup>12</sup>.

The cause of this neglect is unclear. It could be a by-product of the legal academy's general "court-centric" focus<sup>13</sup>. Alternatively, it could stem from an assumption that studying international law in Congress would be mostly fruitless: that Congress is mostly indifferent to international law, and time spent searching for international law consideration by Congress would be time wasted. That notion, however, would appear to rest mainly on conjecture and anecdote. To date, no study has examined systematically to what extent international law norms are part of the congressional lawmaking process<sup>14</sup>.

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foreign affairs-oriented constitutional law has historically been interpreted to conform with international law or on how American leaders have treated international law in conducting foreign affairs).

<sup>12</sup> Liberalist international relations scholars, in contrast, have devoted significant attention to the role of legislatures in international relations. For instance, some have observed that states with representative legislatures behave differently than nondemocratic states, particularly as to how they resolve international conflicts. *See, e.g.*, Charles Lipson, *Reliable Partners: How Democracies Have Made a Separate Peace* (2003) (arguing that the transparency of democratic processes facilitates the democratic peace); Lisa L. Martin, *Democratic Commitments: Legislatures and International Cooperation* (2000) (arguing that institutional struggles between domestic branches legitimize state commitments and strengthen international cooperation); Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993) (exploring how conflict resolution mechanisms facilitate the democratic peace); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *Phil. & Pub. Aff.* 205 (1983) (examining aspects of the liberal peace); Michael R. Tomz & Jessica L. P. Weeks, *Public Opinion and the Democratic Peace*, 107 *Am. Pol. Sci. Rev.* 849 (2013) (finding evidence that the reason democracies generally do not fight democracies is that people believe that doing so is relatively immoral and that democracies are less threatening).

<sup>13</sup> *See* Elizabeth Garrett, *Teaching Law and Politics*, 7 *N.Y.U. J. Legis. & Pub. Pol'y* 11, 11 (2003) (observing a "court-centric" bias in law schools); *accord* Michael E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, 89 *B.U. L. Rev.* 863, 870 (2009).

<sup>14</sup> Interestingly, the exact phrase, "international law in Congress," has never appeared in the text of either an electronically available law review article or U.S. judicial opinion as determined by a Westlaw search on February 11, 2015.

This Article attempts to buck that trend. Because the nexus of international law and Congress is too broad for one study, this Article first sets forth a typology of ways in which Congress interacts with international law, and it examines one of those types, what I call *elective* consideration of international law,<sup>15</sup> in detail. The Article then takes up the question of how international law informs legislative decision making and, specifically, how Congress purports to use international law in its public discourse about bills that violate it.

To do so, the Article develops three hypotheses. Each assumes that members of Congress are self-interested, utility-maximizing actors, but each is based on different sets of assumptions about attitudes toward international law, the specific political incentives facing members of Congress, and the relationships between states.

First, the apparent conventional wisdom is captured in an *Indifference Hypothesis*. It holds that because international law is poorly understood and less valued than domestic sources of law, electorally minded members of Congress will generally avoid or show indifference toward much of international law in their legislative statements.

The two alternative hypotheses challenge this view. The *Constituent Audience Hypothesis* relies on two assumptions: that the conventional wisdom about Americans' opinion of international law is exaggerated or wrong, and that members of Congress know this and respond accordingly out of political interest. In other words, members of Congress might take international law-supportive symbolic positions often and without compunction because, if done right, domestic constituents might actually reward it. Moreover, legislators will frame their international law arguments in either legalistic or pragmatic terms to broaden their appeal to constituents.

Third and finally, the *Foreign Audience Hypothesis* also posits that international law considerations have a vibrant role during the creation

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<sup>15</sup> I define "elective" consideration of international law as that which arises when Congress considers ordinary, domestic legislation that is facially unrelated to international law but that implicates an international law norm. Section I.C.3 below includes a more thorough discussion of the term.

of domestic statutes, but it assumes an altogether different audience for this discourse. It proposes that when considering legislation lacking any obvious connection to international law, but which would potentially violate some international law norm, members of Congress routinely invoke international law. Such consistent legislative backing for adherence to international law is intended to yield long-term credibility dividends, which, in turn, strengthen the country's position in future foreign policy negotiations. Under this hypothesis, the relatively internationally oriented executive may be wholly or partly driving this form of discourse. Empirically, the hypothesis predicts that members of Congress will phrase their arguments in more legalistic terms, stressing the importance of international law compliance for the sake of compliance.

To test these hypotheses, I assemble an original dataset comprising 620 argument observations from the legislative histories of roughly two dozen selected statutes. I compare the deliberations leading to the international law statutes with those of a control group comprising comparable statutes containing constitutionally problematic elements. I code and analyze numerous aspects of each argument, including the speaker's attitude toward the international or constitutional law, the speaker's attitude toward the legislative proposal, and several characteristics of the legislative proposal and the speaker herself. I also code the speaker's rhetorical framing device, that is, whether the argument is styled as legalistic, pragmatic, or as concern for threat of formal sanction.

The data strongly refute the Indifference Hypothesis. They show that international law occupies a similar amount of Congress's attention as constitutional law does under comparable circumstances. Indeed, Congress elects to consider many types of international law norms in domestic lawmaking most of the time it is relevant, that is, whenever there is tension between international law and the proposed bill. In subjects including use of force, intellectual property, the status of enemy combatants, criminal law, and others, members of Congress consistently express concern about breaching the country's international law obligations, and they urge their colleagues to amend or defeat the bills to avoid doing so. They do so even though the bills raise no facial

international law issues and although it would be lawful under U.S. law to ignore international law altogether. Notably, these international law arguments rely heavily on both legalistic and pragmatic arguments, much like the control set of constitutional arguments, which are also often framed in legalistic and pragmatic terms, but include many formal sanction-oriented arguments as well.

This evidence more closely matches the two alternative hypotheses. It demonstrates that many members of Congress prefer to state support for abiding by many forms of international law, a finding that could be explained by either the Constituent Audience Hypothesis or the Foreign Audience Hypothesis. Other qualitative evidence, including anecdotes about congressional-executive relations, supports the Foreign Audience Hypothesis.

Specifically, that evidence suggests that Congress's power to override international law commitments incentivizes interbranch bargaining, in which international law compliance-minded executive officials bargain with members of Congress to support legislative policies that uphold international law, especially with regard to treaties. As part of this bargain, the executive enlists members of Congress – who are not particularly concerned with an electorate that is largely unresponsive to foreign policy issues – to use their legislative platform to proclaim international law fidelity. This process bolsters the nation's international credibility and, therefore, its ability to make and receive international commitments.

It is easy to anticipate at least two objections to this Article's approach. First, it is admittedly impossible to infer substantive impact on a statute's content from certain norms' appearance in legislative history. As explained in Part II, this study is concerned with what motivates legislators *to invoke* international law in their deliberations, and the related question of why Congress might value international law as a device for framing legislative arguments. Without additional evidence linking the two, I decline to draw definitive conclusions about how the discussions affect the fate or substance of the bills, or to what extent members of Congress truly believe that international law norms

should constrain lawmaking and shape domestic legislation. In short, I believe that the choice to use the rhetorical weapon of international law is significant, regardless of how readily that rhetoric translates into policy.

Second, the universe of legislation considered is limited to *enacted* statutes, excluding defeated bills. As such, the dataset – which focuses on arguments pointing to tension with international law – comprises many “losing arguments”: those that failed to prevent the bill’s passage and enactment. Given the methodology for identifying the analyzed statutes, adding failed bills would present significant additional challenges. It is possible that consideration of failed legislation would yield further or different insights, and I hope that future studies will do so.

Despite these limitations, this Article has much to say about the forces that push Congress to voluntarily consider international norms. These observations underscore the role of domestic lawmaking institutions in international law and politics, and I hope that they will spur a wider conversation about legislatures’ relationships with international law.

The rest of this Article proceeds as follows. Part I reviews the formal relationship between Congress, the courts, and international law, and compares that relationship with the relationship between Congress, the courts, and constitutional law. Part II explores what congressional discourse, including international law rhetoric, can reveal about congressional norms. Part III sets forth the three hypotheses for whether and why members of Congress might frame their arguments about domestic statutes in international law terms. Part IV reviews and analyzes the empirical data and examines their implications for the hypotheses discussed above. Part V draws on additional evidence to flesh out one of the supported hypotheses. The Conclusion suggests how this Article’s findings may contribute to the fields of international law, international relations, and foreign relations, and suggests further research.



## I. International Law As “Higher-Order” Law And As Ordinary Federal Law

### A. *Foreign Relations, International Law, and Congress*

Which government branches are responsible for the various aspects of U.S. foreign policy is a longstanding subject of descriptive and normative controversy. Operating primarily from textual, historical, or functional standpoints, legal scholars since before the founding have clashed over the proper distribution of foreign affairs power<sup>16</sup>. For social scientists, the question has not been who should control foreign relations, but, as a descriptive matter, who actually does control it. They traditionally see U.S. foreign policy as almost entirely dominated by the executive, with Congress serving a mere subordinate, “secondary,” or “reactive” role<sup>17</sup>. These executive-centric views of foreign policy rest partly on scholars’ observation that, while Congress had imposed some constraints on the president, it was the executive who conducted almost every formal “act” of foreign relations<sup>18</sup>. But starting in the 1990s, research increasingly appreciated how Congress used informal mechanisms to shape foreign policy<sup>19</sup>.

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<sup>16</sup> See, e.g., Prakash & Ramsey, *supra* note 9, at 236–52 (“[T]he Constitution’s text supplies a sound, comprehensive framework of foreign affairs powers without appeal to amorphous and disputed extratextual sources.”).

<sup>17</sup> Martin, *supra* note 11, at 6; see also James A. Nathan & James K. Oliver, *Foreign Policy Making and the American Political System* 238–39 (3d ed. 1994) (arguing that although Congress took a more active role in U.S. foreign policy beginning in the 1970s, it “remained essentially a reactive participant”); Paul E. Peterson, *The President’s Dominance in Foreign Policy Making*, 109 *Pol. Sci. Q.* 215, 217 (1994) (“For all of Capitol Hill’s increased involvement [in foreign policy in the 1970s and 1980s], it still remained a secondary political player.”).

<sup>18</sup> Martin, *supra* note 11, at 7 (“Arguments that Congress has little influence on foreign policy often start by noting that the president and his appointees actually *do* foreign policy: they negotiate, sign agreements, send troops abroad, spend money, and so on.”).

<sup>19</sup> See, e.g., Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (1997); James M. Lindsay, *Congress and Foreign Policy: Why the Hill Matters*, 107 *Pol. Sci. Q.* 607, 608–09 (1992) (“Even a subordinate Congress may influence foreign policy in important ways. . . . Congress influences policy through

It is often underappreciated how Congress can use *formal* mechanisms to influence foreign policy as well, namely, the management of international law. As explored in Section I.B below, Congress has a constitutionally defined function in incorporating international law into U.S. federal law<sup>20</sup>. It does so in large part by helping to create treaty law<sup>21</sup> and by domesticating existing international law commitments<sup>22</sup>.

Though Congress has a crucial role in domestic administration of the international law that binds the United States, the rules governing how international law operates in Congress are far from straightforward. The relationship between international law and U.S. domestic law generally is a complex field which has long challenged scholars and policymakers<sup>23</sup>. This relationship is central to the question of how and why Congress might engage in international law discourse. It is therefore appropriate to first briefly review pertinent aspects of international law in the U.S. legal system and to set out a typology of congressional interactions with international law.

To do so, it is helpful to conceptualize international law in the United States as dualistic<sup>24</sup>. In one sense, it is “higher-order” law; in another sense, it is akin to ordinary federal legislation. As explored below, its rank vis-à-vis a federal statute depends on which legal lens –

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several indirect means: anticipated reactions, changes in the decision-making process in the executive branch, and political grandstanding.”).

<sup>20</sup> See U.S. Const. art. I, § 8, cl. 10 (“The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations . . .”).

<sup>21</sup> See *id.* art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

<sup>22</sup> See *id.* art. I, § 8, cl. 10, 18 (“The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution [that power].”).

<sup>23</sup> John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int’l L. 310, 310–11 (1992) (“The degree to which . . . treaty norms are treated directly as norms of domestic law . . . without a further ‘act of transformation,’ has been debated in an extensive literature for more than a century.” (footnote omitted)).

<sup>24</sup> This use of “dualistic” should not be confused with the related term, “dualist,” which denotes a domestic legal system in which international and domestic law operate in separate domains.

international or domestic-constitutional – one uses. Comparing these international and domestic perspectives allows us to understand how the interaction between international and domestic law might constrain and enable Congress’s consideration of international law.

*B. International Law as “Higher-Order” Law*

International law is one of only two legal regimes in the U.S. legal system that are not unambiguously inferior to federal statutes. The other, of course, is constitutional law<sup>25</sup>. Every other source of law – e.g., U.S. state constitutional and statutory law, federal regulations, and federal common law – is either on equal footing with federal statutes or inferior to them. In those cases, enacting a valid federal statute effectively eliminates the conflicting law completely. The two forms of higher norms – international and constitutional law – do not give way so readily.

While constitutional law’s heightened status derives from the Constitution’s Supremacy Clause,<sup>26</sup> international law’s domestic status is less straightforward. It originally comes from CIL, which has long held that a state’s inconsistent domestic law is not a valid defense to an international law violation. As to treaty obligations, the norm is now reflected in the Vienna Convention on the Law of Treaties,<sup>27</sup> to which the United States is a signatory but not a party<sup>28</sup>. In what might be described as the “Supremacy Clause of treaty law,” the Vienna Convention states, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” effectively asserting treaties’ superiority over domestic law<sup>29</sup>.

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<sup>25</sup> *E.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–28 (2012) (“[W]hen an Act of Congress is alleged to conflict with the Constitution, [i]t is emphatically the province and duty of the judicial department to say what the law is.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

<sup>26</sup> U.S. Const. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>27</sup> Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>28</sup> *Id.* at 332 n.1, 493.

<sup>29</sup> *Id.* at 339.

Therefore, when members of Congress vote for a bill that conflicts with either an international or an existing constitutional norm, they know that the legislation will not completely replace the contrary rule<sup>30</sup>. They are aware that in a conflict between constitutional law and an ordinary act of Congress, every U.S. domestic court must enforce the former over the latter; the constitutional norm will endure and will be given preference over the act of Congress<sup>31</sup>.

Under international law, the same is true of domestic legislation that conflicts with treaties and CIL. On this international plane, the relationship is straightforward: domestic law is almost categorically inferior to pertinent international law<sup>32</sup>. From that perspective, where treaty obligations or CIL norms bind a state, they do so despite any contrary domestic provision<sup>33</sup>. As a result, before the International Court of Justice (“ICJ”), for instance, if a country’s statutory code calls for it to do “X” and a treaty to which it is a party requires it to do “not X,” it must do “not X” to avoid a judgment against it. The presence of the contrary domestic statute does not nullify the force of the treaty’s international law obligation. If the state opts to follow its domestic requirements, it must be prepared to accept any international consequences, either informal ones in

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<sup>30</sup> See *Zivotofsky*, 132 S. Ct. at 1427–28.

<sup>31</sup> U.S. Const. art. VI, cl. 2.

<sup>32</sup> See VCLT, *supra* note 26, art. 27, 1155 U.N.T.S. at 339; Restatement (Second) of the Foreign Relations Law of the United States § 3(2) (1965) (“The domestic law of a state is not a defense to a violation by the state of international law.”). I say “almost” because some treaties permit states to interpret their requirements to adhere to domestic procedures, so long as those procedures do not undermine the purpose of the treaty provision. See VCLT, *supra* note 26, art. 46, 1155 U.N.T.S. at 343; *Breard v. Greene*, 523 U.S. 371, 376 (1998) (*per curiam*) (discussing the impact of domestic procedure on provisions of the Vienna Convention on Consular Relations).

<sup>33</sup> *But cf.* VCLT, *supra* note 26, art. 46(1), 1155 U.N.T.S. at 343 (“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent *unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*” (emphasis added)).

its foreign relationships or formal ones through legal and other sanctions before an international judicial, treaty, or arbitral body<sup>34</sup>.

C. *The Domestic Relationship Between Congress, the Courts, and International Law*

Under U.S. constitutional law, domestic and international law have a more complicated relationship. Whereas constitutional law itself is categorically superior to acts of Congress, international law norms are either on equal footing with or inferior to statutes<sup>35</sup>. This distinction depends on, among other things, the nature of the international norm (treaty or customary law) and the timing of the respective laws' creation<sup>36</sup>. Regardless, because international law does not categorically trump legislation on the domestic plane, Congress has the authority under domestic law to breach international law by enacting ordinary legislation. Effectively, Congress may elect to consider (or not consider) international law and then either uphold or violate it. If Congress chooses the latter, the violation will not invalidate the law under the Constitution. These nuances are further explored below.

I. *Pertinent Doctrine Governing International Law in the U.S. Domestic System: Treaties, Customary Law, and the Charming Betsy Canon*

International law comes principally from two sources: treaties and CIL<sup>37</sup>. As to treaties,<sup>38</sup> the Founders saw a meaningful role for them in the

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<sup>34</sup> This observation is not intended as a comment on whether international law meaningfully constrains state action, or on why states comply with international law. See *infra* notes 115–117 and accompanying text.

<sup>35</sup> See *infra* note 43 and accompanying text.

<sup>36</sup> See *infra* note 44 and accompanying text.

<sup>37</sup> See Statute of the International Court of Justice art. 38(1), available at <http://www.icj-cij.org//.php?p1=4&p2=2&p3=0> (“The [International] Court [of Justice], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law . . .”).

<sup>38</sup> Unless otherwise noted, this Article uses the term “treaty” to denote the broad meaning of treaty contained in the Vienna Convention on the Law of Treaties. VCLT, *supra*

U.S. system; the Constitution mentions them four times,<sup>39</sup> and historical evidence suggests that ensuring treaty compliance was a primary goal of the Founders' constitutional design<sup>40</sup>. One of those references describes the role of the Senate and the president in making treaties<sup>41</sup>. The Supremacy Clause also mentions treaties, stating that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"<sup>42</sup>. Both treaties and federal statutes are part of this supreme law and therefore stand on equal footing<sup>43</sup>. As a result, as with two inconsistent statutes, where a statute and a treaty are inconsistent, the one enacted later prevails<sup>44</sup>. This rule means that Congress has the domestic power to break a treaty commitment, self-executing or non-self-executing, by enacting inconsistent ordinary

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note 26, art. 2(1)(a), 1155 U.N.T.S. at 333 (" 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . . "). In the U.S. legal system, this definition encompasses both Article II treaties and executive agreements (including both congressional-executive and sole executive agreements).

<sup>39</sup> U.S. Const. art. I, § 10, cl. 1; *id.* art. II, § 2, cl. 2; *id.* art. III, § 2, cl. 1; *id.* art. VI, cl. 2.

<sup>40</sup> David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 936 (2010) ("The framers believed that the republic could not expect equal membership unless it . . . could, or would, comply with its international duties. The framers therefore embedded a set of interrelated and innovative mechanisms into the text of the Constitution to ensure that the new republic would comply with its obligations under treaties and the law of nations.").

<sup>41</sup> U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

<sup>42</sup> *Id.* art. VI, cl. 2; *accord* *Ware ex rel. Jones v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (confirming supremacy of treaties over state law).

<sup>43</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("Both [statutes and treaties] are declared by [the Constitution] to be the supreme law of the land, and no superior efficacy is given to either over the other.").

<sup>44</sup> *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) ("[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (internal quotation marks omitted))); *Whitney*, 124 U.S. at 194 (holding that in the event of a conflict between a statute and a treaty, the more recent one will control).

legislation<sup>45</sup>. The power of Congress to legislate contrary to its earlier higher-order international commitments is important to the question presented here because it represents the chief structural distinction between the roles of international law and constitutional law in Congress.

CIL, historically known as “the law of nations,” has been considered part of federal law since at least the turn of the twentieth century, when it was commonly thought to be general common law<sup>46</sup>. After *Erie Railroad Co. v. Tompkins* did away with “federal general common law” in 1938,<sup>47</sup> the Supreme Court resurrected federal common law for certain specific areas “uniquely federal in nature”<sup>48</sup> or authorized by federal statute. When the Third Restatement of Foreign Relations Law was published in 1987, it characterized CIL as “like federal common law”<sup>49</sup>. It further stated that “the modern view is that

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<sup>45</sup> Since the early nineteenth century, it has been generally understood that, while all treaties are part of the “supreme Law of the Land,” not all provisions of all treaties are enforceable in U.S. courts. *See, e.g.*, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). *But cf.* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”*, 99 Colum. L. Rev. 2095, 2099 (1999) (reviewing non-self-execution rule and arguing that historical evidence shows that the framers intended all treaties to be self-executing). A self-executing treaty has automatic domestic effect upon ratification (and deposit or exchange of instruments), without the need for further action by Congress or anyone else. Non-self-executing treaties bind the United States but do not have domestic effect unless and until Congress enacts separate legislation implementing their provisions. *See, e.g.*, John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum. L. Rev. 2218, 2254–55 (1999).

<sup>46</sup> *See generally* Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789–1914*, at 1–24 (2004) (reviewing English and early American history of the meaning of the term “law of nations”); Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 470 (1997) (“For most of the nation’s history, [customary international law] . . . was indisputably part of the general common law.”).

<sup>47</sup> 304 U.S. 64, 78 (1938) (emphasis added) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

<sup>48</sup> *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964) (concluding that the act of state doctrine is part of federal, not state, law).

<sup>49</sup> Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. d (emphasis added) (“Customary international law is considered to be like common law in

customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts”<sup>50</sup>.

While courts generally now treat CIL like other federal common law, courts treat CIL and treaties differently in some ways. For instance, courts have held that a later-developing CIL norm (unlike a self-executing treaty) is inferior to a previous inconsistent federal statute,<sup>51</sup> as other federal common law is<sup>52</sup>. Nonetheless, from a domestic perspective, Congress has the power to ignore or – defy – existing CIL by enacting ordinary legislation. This point is relevant to the theories and observations set out in the next Sections because it raises the question of why Congress might “elect” to claim to constrain itself with CIL.

Although U.S. domestic law empowers Congress to violate both treaties and CIL, the Supreme Court’s jurisprudence has long reflected a norm against doing so: where possible, the United States conforms its

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the United States, but it is federal law.”).

<sup>50</sup> *Id.* § 111 n.3.

<sup>51</sup> *See, e.g.,* Guaylupo-Moya v. Gonzales, 423 F.3d 121, 124–25 (2d Cir. 2005); United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003). The Third Restatement and several commentators argue that CIL should trump inconsistent state law (as statutes and self-executing treaties do). Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. d (“[C]ustomary international law, while not mentioned explicitly in the Supremacy Clause, [is] also federal law and as such [is] supreme over State law.”); *see also* Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998) (concluding that international law is and should be federal law and thus trumps state law under the Supremacy Clause). Nonetheless, no court has expressly endorsed this view. Bradley, *supra* note 7, at 153 & n.74 (stating that a 1969 New York Court of Appeals case, *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969), is the only U.S. judicial decision implying that CIL may trump state law).

<sup>52</sup> *See, e.g.,* City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (“Our ‘commitment to the separation of powers is too fundamental’ to continue to rely on federal common law ‘by judicially decreeing what accords with common sense and the public weal’ when Congress has addressed the problem.” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978))).



domestic lawmaking to international law<sup>53</sup>. The *Charming Betsy*<sup>54</sup> canon of statutory construction is an important manifestation of that rule<sup>55</sup>. In that sense, the canon is the international law version of the canon governing the implied repeal of statutes<sup>56</sup>; *Charming Betsy* tells courts to assume that Congress did not intend to violate an existing international law norm and to therefore interpret a statute as violating international

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<sup>53</sup> See, e.g., *Murray v. Schooner Charming Betsy (Charming Betsy)*, 6 U.S. (2 Cranch) 64 (1804) (announcing the principle that courts should assume that, in resolving statutory ambiguities, Congress did not intend to violate international law norms); see also Bradley, *supra* note 3, at 494–95 (suggesting that one possible explanation for the *Charming Betsy* canon’s adoption was the negative consequences of violating international law and its perceived connection to natural law); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1113, 1197 (1990) (arguing that the *Charming Betsy* canon represents the complexity of applying international law and eventually concluding that the canon is supported, in part, by a desire to respect international law norms); Jonathan Turley, *Dualistic Values in an Age of International Legisprudence*, 44 Hastings L.J. 185, 211–17 (1993) (charting history of the *Charming Betsy* doctrine).

<sup>54</sup> 6 U.S. (2 Cranch) at 64.

<sup>55</sup> A related canon, the presumption against extraterritoriality, holds that unless Congress clearly states otherwise, courts should assume that Congress does not intend its laws to apply outside U.S. borders. E.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that presumption against extraterritorial application applies to Alien Tort Statute). Although this presumption is not required by international law (because customary international law recognizes other bases besides territoriality on which a state can regulate, see Restatement (Third) of the Foreign Relations Law of the United States § 402), it exists partly to guard against judicial interpretations that cause conflict with other countries’ laws without Congress’s clear intent to do so. See *Kiobel*, 133 S. Ct. at 1664 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

<sup>56</sup> See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (“It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.” (quoting *United States v. United Cont’l Tuna Corp.*, 425 U.S. 164, 168 (1976))); Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 Emory L.J. 677, 703 (2002) (citing *Radzanower*, 426 U.S. at 155) (“[I]f two statutes are capable of coexisting, the courts must harmonize the statutes, absent a clear expression of Congress to repeal.”).

law only where the statute does so unambiguously<sup>57</sup>. The canon has been interpreted to encompass both treaties and CIL<sup>58</sup>;

Though the purpose of *Charming Betsy* is to prevent international law violations and to limit the latitude of the courts' statutory interpretation, the canon can also be conceived as a form of "soft" judicial review, in that courts can use it to nullify a statute at odds with international law. Statutes that are inconsistent with international law are not stricken per se, but to the extent a statute "rubs up" against them, the *Charming Betsy* canon can allow the reviewing court to distort the statute's intended but not clearly expressed meaning. In this way, as with constitutional judicial review, courts can alter a statute's effect to the extent its provisions are inconsistent with the higher-order law.

## 2. *Three "Easy" Cases of Congressional-International Law Interaction*

Congress interacts with international law (and potential international law) in at least four important ways. For the first three ways, consideration of international law is a necessary part of the legislative process, so in those contexts, congressional consideration of international law is predictable, even inevitable. That is, it is relatively easy, both logistically and politically, for Congress to invoke international law. This Article instead focuses on a fourth way, Congress's unpredictable considerations – what I call "elective" international law. To illustrate the unique features of elective international law, I first describe the other three "easy" types.

First, Congress sometimes *incorporates* international law norms, both preexisting customary and treaty law, into statutes designed for purposes other than international law compliance. These international

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<sup>57</sup> *Charming Betsy*, 6 U.S. (2 Cranch) 64; see also *supra* note 52 (reviewing selected modern *Charming Betsy* literature).

<sup>58</sup> See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (recognizing that a federal statute prohibiting Defense Department discrimination against U.S. citizens should be interpreted in light of treaties addressing overseas U.S. military bases' preferential hiring of local nationals).

norms serve to define or interpret certain aspects of the statutes' meaning. By one count, in 2013 there were 115 federal statutes in effect that expressly incorporated "the law of nations" or "international law"<sup>59</sup>. A well-known example of international law incorporation is the Alien Tort Statute, which confers federal jurisdiction over an action for a tort committed "in violation of the law of nations or a treaty of the United States"<sup>60</sup>. Many other international law incorporations are pursuant to Congress executing its constitutionally delegated responsibility to "define and punish [...] Offences against the Law of Nations"<sup>61</sup>. By their very nature, incorporating statutes are consistent with the international law they incorporate. This incorporation phenomenon constitutes an important nexus between domestic legislation and international law, and it cuts against the popular notion that Congress eschews international law. In most cases, however, such legislation is probably intended from the outset to involve international law, making it predictable that the legislative history will mention international law prominently<sup>62</sup>. Therefore, while an investigation into how Congress uses international law in this way would no doubt be insightful, it is outside the scope of this study.

The second interaction occurs when Congress *creates* international law by approving treaties, including Article II treaties and congressional-

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<sup>59</sup> Michael Van Alstine, List of Statutory Incorporations of the "Law of Nations" or "International Law" (2013) (unpublished research data) (on file with author).

<sup>60</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1350 (2012)). It is possible that the drafters perceived some international obligation to provide a civil remedy for torts committed in the United States, but this obligation probably derived from comity or foreign policy considerations rather than from customary international law. See William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 *Hastings Int'l & Comp. L. Rev.* 221, 236–37 (1996) (reviewing history of the Alien Tort Statute and arguing that "Congress preferred to assure other nations that 'individuals who have been injured . . . have a remedy by a *civil* suit in the courts of the United States.'" (quoting 1 Op. Att'y Gen. 57, 59 (1795))).

<sup>61</sup> U.S. Const. art. I, § 8, cl. 10.

<sup>62</sup> *E.g.*, 16 U.S.C. § 742a(2) (2012) (stating that for the U.S. fishing industry to fulfill its national function, the law must protect its ability "to fish on the high seas in accordance with international law").

executive agreements (either *ex ante* or *ex post*)<sup>63</sup>. Of the thousands of such examples, two prominent ones include the New START Treaty<sup>64</sup> (an Article II treaty) and the North American Free Trade Agreement (“NAFTA”)<sup>65</sup> (an *ex post* congressional-executive agreement). It is likely that Congress often considers other relevant international law in its deliberations over such agreements. For example, NAFTA was designed to replace the United States-Canada Free Trade Agreement,<sup>66</sup> so congressional deliberations over NAFTA necessarily involved consideration of how it would supersede the existing treaty.

Third, Congress *domesticates* international law when it implements a non-self-executing treaty or customary law obligation or updates or better harmonizes existing federal law with such an obligation<sup>67</sup>. In this case, the domestication process itself forces Congress to consider what international law requires; the existence of international law is analytically prior to its consideration by Congress<sup>68</sup>. In other words, were it not for the relevant international norm, the bill could not exist, so consideration of international law is a logistical necessity to consideration of the bill. Because the terms of the domestic statute are dictated by the underlying treaty or CIL norm, Congress has little opportunity to weigh domestic objectives against international law. For instance, Congress could not conceivably have enacted the Foreign Affairs Reform and Restructuring

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<sup>63</sup> Those groups include those which Congress approves by a simple majority in both houses *prior to* presidential signature and those which it likewise approves *after* such signature, respectively.

<sup>64</sup> Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., art. XIV, para. 1, Apr. 8, 2010, S. Treaty Doc. No. 111-5.

<sup>65</sup> North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

<sup>66</sup> *Id.* § 107.

<sup>67</sup> In the case of self-executing treaties, international law creation and domestication merge into one process.

<sup>68</sup> See Kevin L. Cope & Hooman Movassagh, *Comparative International Law in National Legislatures*, in *Comparative International Law* (Anthea Roberts et al. eds., forthcoming 2015) (noting how and why domestically implemented norms can sometimes differ from their international counterparts).

Act of 1998<sup>69</sup> (which implements the United States' obligations under the Convention Against Torture<sup>70</sup>) without considering international law; the Act's very purpose was to implement the international law. Because consideration of specific international law is necessary to the process, the legislative history would not reveal much about the relative value that members of Congress purportedly attach to international law compliance generally. Those considerations occurred, if at all, during the Senate's advice and consent process for the convention itself.

These three cases – incorporation, creation, and domestication – thus constitute the “easy” cases of congressional consideration of international law. Because they stem from the objective of creation or compliance with international law, an empirical study of those cases' legislative history would show ubiquitous international law arguments almost by definition<sup>71</sup>.

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<sup>69</sup> Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. § 1242.

<sup>70</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *done* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

<sup>71</sup> Consider, for example, the congressional deliberations over the Chemical Weapons Convention Implementation Act of 1998, *Chemical Weapons Implementing Legislation: Hearing on S. 610 Before the S. Comm. on the Judiciary*, 105th Cong. (1997), the law implementing the United States' obligations under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC), *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 In a key hearing before the Senate Committee on the Judiciary, preliminary discussions principally revolved around how to fully implement the treaty requirements without violating constitutional rights, including the Fourth Amendment. Kevin L. Cope, *Lost in Translation: The Accidental Origins of Bond v. United States*, 112 Mich. L. Rev. First Impressions 133, 136–38 (2014). Because the treaty requires inspection of certain private facilities to ensure compliance, members of Congress and witnesses devoted considerable time to ensuring that domestic procedures would comply with the requirements of the convention. For instance, some on the committee were concerned with a provision allowing private parties subject to inspection to obtain a special injunction against the search. *E.g.*, *Chemical Weapons Implementing Legislation: Hearing on S. 610 Before the S. Comm. on the Judiciary*, 105th Cong. 29 (1997) (statement of Professor Ronald D. Rotunda). One witness confirmed that such a procedure could put the United States at risk of violating the convention. *Id.* (statement of Professor Barry Kellman) (“What motivates the concern is the possibility that a magistrate or judge somewhere might misinterpret the

### 3. The “Hard” Case: Elective Consideration of International Law

This Article focuses instead on a fourth type of interaction: the “hard,” but fairly common, cases of congressional interaction with international law. Congress has the opportunity to interact with international law whenever it considers ordinary, domestic-oriented legislation that causes tension with an international law norm, but which (though it may expressly concern U.S. foreign relations) is facially unrelated to international law. For instance, Congress could pass a U.S. copyright protection law to protect U.S. authors and encourage innovation without acknowledging international norms regarding “moral rights” as set forth in the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is a party<sup>72</sup>. Similarly, Congress could enact criminal drug-trafficking laws that have extraterritorial effect without considering the customary international law norms concerning jurisdiction to prescribe public law extraterritorially. In both of these cases, if members of Congress invoke international law arguments in the course of their deliberations – that is, engage in *international law discourse* – they are making an affirmative, perhaps politically motivated decision to do so. Here, Congress is not obligated by either process or domestic law to engage in international law discourse, but does so voluntarily, i.e., *electively*. Though U.S. treaties and most CIL norms are binding on the international plane,<sup>73</sup> Congress can enact laws that violate them, perhaps without even knowing it is doing so.<sup>74</sup>

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Convention or might misinterpret this legislation, and thereby cause the United States to be in a situation of potential noncompliance.”).

<sup>72</sup> See Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* 37 (2010).

<sup>73</sup> The United States would be excluded only from those customary international law norms to which it is a “persistent objector.” See generally David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 Wash. L. Rev. 957 (1986) (arguing that required degree of persistence should depend on context).

<sup>74</sup> See, e.g., Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 Harv. J. L. & Pub. Pol’y 65, 65 (2006) (“One suspects that . . . members of Congress . . . do not really even know what customary international law is. . . . [And] [o]bviusly, if politicians are generally unaware of customary international law, it cannot greatly limit their decision making.”).

Or, Congress could know of the pertinent international law norms, but deprioritize or disregard them in favor of domestic priorities. Indeed, an analogous process exists for the other higher norm, constitutional law, in which legislators identify and weigh a constitutional rule against some conflicting, but otherwise attractive, legislative proposal.

For international law, this fourth scenario arguably provides the best insight into the extent to which international law is on legislators' minds and how much they purport to value it. Investigating those reasons reveals something meaningful either about members of Congress's nominal attitude toward international law's role in domestic law development or about their view of how invoking international law will be politically advantageous<sup>75</sup>. For members of Congress to consider international law in such cases, they must first recognize that there is some international law norm to consider, a nontrivial task. Then they must decide how international law invocation will resonate with various audiences. This process, together with the inherent tension between international law and domestic objectives, arguably makes this fourth form of interaction the most interesting, and most revealing. The purpose of this Article is to examine how members of Congress address these cases and why.

#### *D. Comparison to Constitutional Higher-Order Law*

To put the quantity and nature of elective international law deliberations in perspective, this Article compares arguments about international law norms with arguments about constitutional norms. It is worthwhile, then, to underscore how the structural relationship between constitutional law, Congress, and the courts, on one hand, compares with the relationship between international law, Congress, and the courts, on the other hand.

Two differences stand out. Most obvious, the *Charming Betsy* "soft" judicial review notwithstanding, there is no robust judicial review of statutes for violations of international law. Second, Congress has a significant role in shaping international law, but not in shaping

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<sup>75</sup> See *infra* Part II (exploring how congressional discourse, including international law discourse, relates to the values and objectives of members of Congress).

constitutional law. The Senate must consent to Article II treaties, and both houses must agree to congressional-executive agreements (which comprise the great majority of international agreements<sup>76</sup>)<sup>77</sup>. Conversely, the vast majority of constitutional developments occur in the courts,<sup>78</sup> in part because the U.S. Constitution is so difficult to amend<sup>79</sup>. Therefore, despite its formal role in approving constitutional amendments, Congress has very little impact on the development of most constitutional law. With these principles in mind, I explore the forces that prompt Congress to consider international law during its domestic lawmaking.

## II. What Congressional Discourse Says About Congressional Norms

Understanding whether, how, and why members of Congress might use international law discourse in domestic lawmaking requires considering the relevance of symbolic congressional discourse: what it is, why legislators engage in it, and what it accomplishes. In other words, what, if anything, can legislative statements – and especially international law statements – reveal about the values and priorities of members of Congress?

In explaining how members of Congress use international law rhetoric, this Article makes the unremarkable assumption that politicians

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<sup>76</sup> Loch K. Johnson, *The Making of International Agreements: Congress Confronts the Executive* 12–13 (1984) (determining that nearly 87 percent of international agreements between 1946 and 1972 were congressional-executive agreements); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *Yale L.J.* 140, 149 (2009) (observing that ex ante congressional-executive agreements “make up the vast majority of international agreements in force for the United States today”).

<sup>77</sup> Bradley, *supra* note 7, at 74–75 (describing procedural differences between Article II treaties and congressional-executive agreements).

<sup>78</sup> See Mark Tushnet, *Taking the Constitution Away from the Courts* (1999) (arguing for a more democratic and populist version of constitutional law and a diminished role for the judiciary).

<sup>79</sup> See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* 21 (2008) (“[T]he U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.”). Indeed, formal amendments occur infrequently, barely more than once every twelve years on average since 1789. See U.S. Const. amends. I–XXVII.



are utility-maximizing actors<sup>80</sup>. Generally speaking, political scientists treat legislators' behavior largely as a function of pursuing three broad goals: obtaining reelection, increasing influence within the legislature, and making "good" public policy<sup>81</sup>. Of these three, it is commonly understood that the first, reelection, explains much of legislators' behavior<sup>82</sup>. Historically, most congressional behavior studies have been limited to how reelection concerns drive formal voting, or "roll-call" behavior<sup>83</sup>. More recently, though, scholars have explored how similar motivations drive symbolic – i.e., "non-roll-call" – behavior<sup>84</sup>.

This non-roll-call communication is worth studying, in part, because it carries advantages over voting as a legislative signaling device. First, voting is essentially mandatory, and, particularly on a large or

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<sup>80</sup> This approach could be considered an application of *public choice theory*, an approach that applies certain economic assumptions to political behavior. See Gordon Tullock, *Public Choice*, in *The New Palgrave Dictionary of Economics* (Steven N. Durlauf & Laurence E. Blume eds., 2d ed. 2008), available at [http://dictionaryofeconomics.com/?id=pde2008\\_P000240](http://dictionaryofeconomics.com/?id=pde2008_P000240). See generally Duncan Black, *The Theory of Committee and Elections* (Iain McLean et al. eds., rev. 2d ed. 1998) (describing the median voter theorem, based in mathematics and economics, to explain political decisionmaking based on the preferences of voters); Anthony Downs, *An Economic Theory of Democracy* (1957) (explaining the actions of political parties and voters using economic theory); *Research Handbook on Public Choice and Public Law* (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (examining the foundations of public choice theory and the critical role it plays in public law).

<sup>81</sup> See Richard F. Fenno, Jr., *Congressmen in Committees 1–14* (1973); Michael S. Rocca & Stacy B. Gordon, *The Position-Taking Value of Bill Sponsorship in Congress*, 63 *Pol. Res. Q.* 387, 387 (2010) (citing Fenno, *supra*).

<sup>82</sup> See Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 *J. Pol. Econ.* 135 (1957) (outlining a theory of democratic governance which treats political action as rationally motivated). See generally Roger D. Congleton, *The Median Voter Model*, in *The Encyclopedia of Public Choice* 382 (Charles K. Rowley & Friedrich Schneider eds., 2004) (explaining the median voter theory of legislative motivation).

<sup>83</sup> Rocca & Gordon, *supra* note 80, at 388 (“[A] large literature has developed to understand the nature of the connection between legislators’ roll call votes and the opinions and preferences of their constituencies. Left largely unstudied has been position taking outside the domain of roll call voting.” (footnote omitted)).

<sup>84</sup> *E.g.*, *id.* (empirically examining the political impact of non-roll-call position taking in Congress).

substantively diverse bill, a “yea” or “nay” vote usually sends a vague signal that constituents can inadvertently misinterpret and political competitors can deliberately distort. In contrast, symbolic speech is optional, giving legislators the flexibility of choosing when and to whom they wish to speak<sup>85</sup>. On a tricky political issue, it may be prudent simply to say nothing. Equally important, non-roll-call speech allows the legislator to carefully craft and tailor her message to its intended audience.

Non-roll-call messaging can take several forms, including bill sponsorship/cosponsorship,<sup>86</sup> nonlegislative statements (such as talk show appearances, press conferences, advertisements on the Internet or other media, and public speeches),<sup>87</sup> and legislative discourse (statements made in the course of official congressional business). This Article is concerned with legislative discourse. Legislative discourse is readily available to legislators on a relatively equal basis, and it enjoys some distinct advantages over other types of non-roll-call signaling, making it a preferred communication method for many legislators. For instance,

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<sup>85</sup> *Id.* at 388 (“[M]embers have greater discretion about whether they take positions on particular issues because there are no formal requirements to do so.”).

<sup>86</sup> See David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts 191–99* (1999) (discussing the role of bill sponsorship and cosponsorship in the context of race and representation); Michele L. Swers, *The Difference Women Make: The Policy Impact of Women in Congress 32–72* (2002) (explaining how female legislators utilize bill sponsorship and cosponsorship to communicate support and facilitate position taking on issues); James E. Campbell, *Cosponsoring Legislation in the U.S. Congress*, 7 *Legis. Stud. Q.* 415 (1982) (studying motivations for bill cosponsorship); Daniel Kessler & Keith Krehbiel, *Dynamics of Cosponsorship*, 90 *Am. Pol. Sci. Rev.* 555 (1996) (arguing that bill cosponsorship is a key intracongressional signaling mechanism); Gregory Koger, *Position Taking and Cosponsorship in the U.S. House*, 28 *Legis. Stud. Q.* 225 (2003) (arguing that a key function of bill cosponsorship is to communicate position taking to agenda setters and constituents); Michael S. Rocca & Gabriel R. Sanchez, *The Effect of Race and Ethnicity on Bill Sponsorship and Cosponsorship in Congress*, 36 *Am. Pol. Res.* 130, 132–33 (2008) (describing bill sponsorship and cosponsorship as instruments of credit claiming and position taking); Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 *Am. J. Pol. Sci.* 186 (1995) (examining factors motivating bill sponsorship and cosponsorship).

<sup>87</sup> Benjamin Highton & Michael S. Rocca, *Beyond the Roll-Call Arena: The Determinants of Position Taking in Congress*, 58 *Pol. Res. Q.* 303 (2005).

compared with paid advertisements, legislative discourse entails fewer organizational costs because the office itself provides the forum for the communication (i.e., reserved time in a committee hearing or floor debate broadcast on C-SPAN). Legislative discourse also entails less preparation time than bill sponsorship and, therefore, fewer resources.<sup>88</sup>

Most legislators surely have various motives for their legislative discourse, including influencing “good” policymaking and building intra-institutional influence<sup>89</sup>. But as with roll-call signaling, studies on non-roll-call signaling – including legislative discourse – have found that the drive to bolster reelection odds largely explains the behavior<sup>90</sup>. And there are multiple ways in which legislative discourse can produce electoral dividends: by persuading other legislators or officials, by communicating a position on an issue to constituents or interest groups (known in the political science literature as position taking<sup>91</sup>), by bolstering name recognition and publicity, or by spurring campaign contributions.

Just as numerous methods of communication are aimed at producing electoral advantage, multiple actors are positioned to bestow those benefits. Legislative discourse can therefore be directed toward

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<sup>88</sup> There are also disadvantages to legislative discourse. For instance, it may reach a smaller audience than advertisements, talk shows, and news program interviews.

<sup>89</sup> See generally Robert G. Lehnen, *Behavior on the Senate Floor: An Analysis of Debate in the U.S. Senate*, 11 *Midwest J. Pol. Sci.* 505 (1967).

<sup>90</sup> E.g., Richard L. Hall, *Participation in Congress* (1996); David R. Mayhew, *Congress: The Electoral Connection* (2d ed. 2004); Highton & Rocca, *supra* note 86; Kim Quaille Hill & Patricia A. Hurley, *Symbolic Speeches in the U.S. Senate and Their Representational Implications*, 64 *J. Pol.* 219, 220 (2002) (“Virtually all students of symbolic activity contend that it is electorally motivated: that is, it is intended to sustain positive relationships between legislator and constituent, and some of those relationships have representational consequences.”); Jonathan B. Slapin & Sven-Oliver Proksch, *Look Who’s Talking: Parliamentary Debate in the European Union*, 11 *Eur. Union Pol.* 333, 335 (2010) (“Members of the US Congress will often stand up before an empty House to deliver an address, knowing that their fellow members of Congress will never hear what they have to say . . . [but] hop[ing] the media will pick up on their speech and report their policy positions back to their constituents. . . . Like voting, speech is a tool politicians can use to demonstrate to their constituents that they are standing up for them in Washington.”).

<sup>91</sup> E.g., Mayhew, *supra* note 89, at 61–73 (discussing the phenomenon of position taking).

one or more of those actors. The primary audience is often constituents, but it can also be interest groups (which may endorse the legislator or contribute funds to her reelection);<sup>92</sup> other members of Congress (with whom the legislator has agreed to a political horse trade);<sup>93</sup> the courts (which may use the legislative history to interpret the statute consistently with the legislator's preference);<sup>94</sup> the president (who can serve as a valuable political ally);<sup>95</sup> a particular executive agency;<sup>96</sup> or some combination of these.

Whoever the audience, legislative discourse can also prove politically costly<sup>97</sup>. There are opportunity costs to framing a legislative argument in a particular form. There are countless ways to frame support for, or objection to, proposed legislation. After all, particularly in the House of Representatives, a legislator's "scarcest and most precious

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<sup>92</sup> See Rocca & Gordon, *supra* note 80, at 389 ("Among the most common targets of congressional signals within the attentive public are . . . interest groups.").

<sup>93</sup> See, e.g., Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information and Legislative Rules with a Heterogeneous Committee*, 33 Am. J. Pol. Sci. 459 (1989).

<sup>94</sup> See, e.g., Lee Epstein & Jack Knight, *The Choices Justices Make* 138–45 (1998) (discussing the way in which Supreme Court justices strategically consider the legislative preferences of Congress in order to maximize their own policy preferences in their judicial decisionmaking); Brian R. Sala & James F. Spriggs, II, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 Pol. Res. Q. 197, 197 (2004) ("Justices who care about policy outcomes therefore have an incentive to take the preferences of other governmental actors into account in their own deliberations.").

<sup>95</sup> Cf. William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* 3–32 (2007) (arguing that Congress plays an important role in shaping the domestic politics that precede military action and in influencing the willingness of presidents to embark on new ventures abroad); Lindsay, *supra* note 18 (exploring the dynamics of congressional influence over the president with regard to foreign policy).

<sup>96</sup> See, e.g., John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. Econ. & Org. 1 (1990) (considering the impact of certain congressional actions on agency behavior); Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. Pub. Pol. 287, 292–303 (1989) (exploring how Congress, and individual legislators, use the legislative process to send signals to executive agencies and other actors).

<sup>97</sup> See, e.g., Hill & Hurley, *supra* note 89 at 221 n.2 ("Some might see such speeches as 'cheap talk' that entails no costs, but the theoretical work on symbolic activity suggests it is strategically motivated.").

political resource” is time;<sup>98</sup> members of Congress writing committee reports, questioning hearing witnesses, or debating on the chambers floor generally have limited time and space to convey their messages<sup>99</sup>. If those members choose a given approach (such as international law compliance) as their rhetorical frame, they have forgone some other, potentially more promising approach. Equally important, just as well-planned legislative discourse can bring electoral advantage, poorly chosen discourse can bring electoral woe. If a legislator chooses an unpersuasive or objectionable approach, the decision can alienate his constituents, contributors, and would-be allies, and of course, undermine his immediate legislative goals<sup>100</sup>. As a result, because a primary purpose

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<sup>98</sup> Richard F. Fenno, Jr., *Home Style: House Members in Their Districts* 34 (1978); see Slapin & Proksch, *supra* note 89, at 343–44. Members of the House of Representatives enjoy less speaking time than senators do, as House chambers rules and the sheer number of members severely limit time on the House floor; but, even in the Senate, speaking time is effectively limited, especially during committee hearings. See Walter J. Oleszek, *Congressional Procedures and the Policy Process* 24 (7th ed. 2007) (“Size explains much about why the two chambers differ. Because it is larger, the 435-member House is a more structured body than the 100-member Senate. Indeed, the restraints imposed on representatives by rules and precedents are far more severe than those affecting senators.”).

<sup>99</sup> See Oleszek, *supra* note 97, at 5–11.

<sup>100</sup> Cf. Schiller, *supra* note 85, at 189 (discussing potential political costs of bill sponsorship). To illustrate, the international lawfulness of the U.S. decision to violate Afghanistan’s territorial sovereignty after 9/11 was controversial among lawyers. See, e.g., Rabia Khan, *Was the NATO Invasion of Afghanistan Legal?* E-Int’l Rel. (Nov. 6, 2013), <http://e-ir.info/the-nato-invasion-of-afghanistan-legal> (arguing that the invasion of Afghanistan violated international law). Yet, members of Congress publicly raised few or no concerns about it during the discussion of the Authorization for Use of Military Force bill, which would serve as the domestic authority for President Bush to initiate Operation Enduring Freedom. See 147 Cong. Rec. 17,040–45 (2001) (debating the Authorization for Use of Military Force and passing the bill by a vote of 98 to 0). Indeed, it was unclear at the time of the bill’s passage what or where the military target would be. E.g., *id.* Comparably, in discussions of a bill that created a national sex offender registry and a federal postincarceration civil commitment process, few raised due process objections to postsentence incarceration for certain sex offenders. See, e.g., 152 Cong. Rec. 15,325–45 (2006) (discussing the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587). Objections phrased in those terms have been made by (usually unelected) legislative participants; indeed, they would seem obvious questions to raise. See generally Emily Eschenbach Barker, *The Adam Walsh Act: Un-Civil Commitment*, 37

of legislative statements is to signal ideological solidarity to the like-minded,<sup>101</sup> prudent legislators will frame their statements in terms their audiences find agreeable. Even if few citizens watch floor debates or read legislative transcripts, statements that conflict with public opinion will be amplified in opponents' campaign sound bites, on television talk shows, and through web-based media. As the *Economist* magazine reported in 2014, “[m]ore or less every word a [political] candidate says now lives online somewhere”<sup>102</sup>. Political groups can search for contradictory or other unfavorable statements from their opponents and “alert reporters, or sympathetic activists who can then create ads or web campaigns exploiting the discovery.”<sup>103</sup> And in the age of the Internet and social media, the damaging statement could haunt the legislator in perpetuity. In essence, members of Congress are well-advised to choose their words carefully.

Legislative discourse is therefore not categorically “cheap talk”<sup>104</sup>. Notably, analogous statements made in other branches are rarely considered meaningless. Numerous empirical and theoretical studies have examined statements by domestic, foreign, and international courts<sup>105</sup>.

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Hastings Const. L.Q. 141, 162–63 (2009) (arguing that the clear and convincing evidence standard for civil commitment is unconstitutional). But members of Congress generally do not raise them, probably at least in part because they perceive a political cost to doing so.

<sup>101</sup> Hill & Hurley, *supra* note 89, at 221 (“[I]n their constituency identification speeches senators identify personally and positively with some individual or group in the constituency, thus indicating ‘I am one of you’ . . . [and in] constituency empathy speeches senators symbolically indicate to one or more constituency groups . . . ‘I understand your situation and care about it.’”); Rocca & Gordon, *supra* note 80, at 387 (“Representatives . . . use non-roll call forums to signal attentive groups that they are ‘on their side.’”).

<sup>102</sup> *Digging Dirt Digitally: How to Ensure That Dumb Things Politicians Say Get a Wide Audience*, *Economist*, Jul. 15, 2014, at 27, available at <http://economist.com/states/21606854-how-ensure-dumb-things-politicians-say-get-wide-audience-digging-dirt-digitally>.

<sup>103</sup> . . . *Id.*

<sup>104</sup> . See, e.g., Hill & Hurley, *supra* note 89, at 221 n.2.

<sup>105</sup> See, e.g., Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 Am. Pol. Sci. Rev. 178, 178 (1985) (attempting “to uncover patterns of citation between the several state supreme courts and to evaluate alternative

That research usually makes little attempt to draw definite links between statements, on one hand, and genuine motivations or policy outcomes, on the other<sup>106</sup>. Yet failure to make these connections has not deterred scholars from investigating and drawing useful conclusions about the motives, forms, and predictors of judicial arguments about foreign or international norms<sup>107</sup>.

Legislative arguments about international law are no less worthy of attention. As Professor Caldeira has observed, “flows of political information, such as [...] cue-receiving and cue-sending inside the legislature, can and often do have quite dramatic consequences for public policy”<sup>108</sup>. But even though it is difficult to draw clear causal relationships between international law arguments and international law-influenced lawmaking, revealing the presence of international law in congressional deliberations has value in itself. If it turns out that members of Congress spend time, energy, and staff resources using international law to ostensibly impact domestic lawmaking, it suggests they believe that international law bestows some comparative advantage over other

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explanations for these patterns”); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131, 136 (2006) (“Our goal here is to set out a framework for assessing the question of whether courts should consult the practices of other states, either domestically or nationally.”); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int’l L.J. 191, 193 (2003) (“Constitutional courts are citing each other’s precedents on issues ranging from free speech to privacy rights to the death penalty.”).

<sup>106</sup> Indeed, some judicial realists argue that even judges’ written opinions do not reliably convey the “true” reasons for their decisions. See generally Richard A. Posner, *How Judges Think* (2008) (discussing various motivations for judges’ decisions and to what extent published opinions divulge those motivations).

<sup>107</sup> Slaughter, *supra* note 104, at 202 (“The practice of citing foreign decisions reflects a spirit of genuine transjudicial deliberation within a newly self-conscious transnational community.”).

<sup>108</sup> Caldeira, *supra* note 104, at 179; accord John W. Kingdon, *Congressmen’s Voting Decisions* 72–145 (Univ. Mich. Press 1989) (observing effect on mass behavior in legislatures); Donald R. Matthews & James A. Stimson, *Yeas and Nays: Normal Decision-Making in the U.S. House of Representatives* 41–77 (1975) (same); cf. Heinz Eulau, *The Columbia Studies of Personal Influence*, 4 Soc. Sci. Hist. 207 (1980) (observing effects on mass behavior).

forms of argument. It is worthwhile to ask what that advantage might be, and why it is advantageous.

### III. Toward a Theory of Congressional International Law Discourse

With this model of legislative discourse as a backdrop, I turn to the Article's central question: whether, how, and why Congress might invoke international law when making domestic law that does not by its nature require international law consideration. A key development in international relations theory over the past few decades is the view that explaining interstate relations requires considering the intrastate interactions among countries' domestic institutions and interest groups<sup>109</sup>. This view is often described as the *liberalist* approach to international relations<sup>110</sup>. The liberal perspective underlies theories such as the so-called democratic peace, which attempts to explain the role of domestic institutions in promoting the "empirical law"<sup>111</sup> that democracies do not fight wars with each other<sup>112</sup>.

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<sup>109</sup> See, e.g., Martin, *supra* note 11 (arguing that institutional struggles involving legislatures can legitimize state commitments and strengthen international cooperation); Milner, *supra* note 18 (positing a rational-choice theory to explain how interactions between domestic actors impact interstate interactions).

<sup>110</sup> Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513, 519–20 (1997) ("[Under the liberal view, states] . . . pursue particular interpretations and combinations of security, welfare, and sovereignty preferred by powerful domestic groups enfranchised by representative institutions and practices."); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 Am. Soc'y Int'l L. Proc. 240, 241 (2000) (stating that in Liberal International Relations theory "states bear no resemblance to billiard balls, but rather to atoms of varying composition, whose relations with one another, either cooperative or conflictual, depend on their internal structure").

<sup>111</sup> Tomz & Weeks, *supra* note 11, at 849 ("To some, the absence of military conflict among democracies is so consistent that it approaches the status of an 'empirical law.' " (citing Jack S. Levy, *Domestic Politics and War*, 18 J. Interdisc. Hist. 653, 661–62 (1988))).

<sup>112</sup> E.g., Lipson, *supra* note 11, at 53–55 (arguing that, inter alia, the transparency of democratic processes facilitates the democratic peace); Russett, *supra* note 11, at 31–33 (suggesting that conflict-resolution mechanisms facilitate the democratic peace); Doyle, *supra* note 11, at 225 (examining aspects of the liberal peace); Tomz & Weeks, *supra* note 11, at 850 (finding evidence that the reason democracies generally do not fight democracies



The issue of international law discourse in Congress raises numerous such intrastate-focused questions, such as: Are there aspects of the constitutional place of international law in the domestic order that predict certain types of empirical findings? What factors explain any differences in how members of Congress use constitutional law discourse in similar contexts? And what, if anything, might these statements say about how the U.S. government values international law, or conversely, how international law shapes domestic policy?

To explain how and why Congress might voluntarily discuss international law in its domestic lawmaking, I draw on the relevant international law, international relations, and domestic political science literature to offer three alternative explanations. All three fall within the liberal tradition of international law, as they emphasize “complex interactions between political players at the domestic level” in explaining state behavior on the international plane (here, respect for international law)<sup>113</sup>. In this case, those political players are members of Congress, the executive branch, domestic constituents, and the courts. Each explanation, however, is based on a different set of assumptions about attitudes toward international law, the political incentives facing members of Congress, and the relationships between states. I call the three hypotheses the *Indifference Hypothesis*, the *Constituent Audience Hypothesis*, and the *Foreign Audience Hypothesis*.

A. *The Indifference Hypothesis: Congressional Indifference Toward, or Ignorance of, International Law*

The *Indifference Hypothesis* holds that, because international law is poorly understood and less valued than domestic sources of law, electorally minded members of Congress will generally eschew

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is that people believe that doing so is relatively immoral and that democracies are less threatening).

<sup>113</sup> See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. Chi. L. Rev. 469, 484 (2005) (“[I]nstitutional liberalism . . . opens the black box of domestic politics that is largely unexamined by other interest-based scholars, and looks to the political institutions, interest groups, and state actors that shape state preferences to explain state behavior in the international arena.”).

it, including in their public debates and deliberations. In both literature and popular perception, Americans are often associated with hostility to foreign and international legal constraints<sup>114</sup>. Particularly in contrast with citizens of Europe, Americans are thought to be “constitutionalists,” valuing national sovereignty above more universal values like international law<sup>115</sup>. If these characterizations are accurate, electorally minded members of Congress might be wise to avoid international law-supportive positions altogether.

From a global and theoretical perspective, Professors Posner and Goldsmith argue that unless it would boost a nation’s welfare, government officials *should not be expected* to consider international law in their policymaking. They assert that “[t]he dominant purpose of any state is to create a community of mutual benefit for citizens and other members, and more generally to preserve and enhance the welfare of compatriots”<sup>116</sup>. Posner and Goldsmith’s analysis reflects a “realist” strain of international relations hypothesis, which generally holds that states comply with international law only when it would otherwise suit their interests<sup>117</sup>.

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<sup>114</sup> Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* 3 (2003) (“It is time to stop pretending that Europeans and Americans share a common view of the world . . . . [T]he United States remains mired in . . . an anarchic Hobbesian world where international laws and rules are unreliable . . . .”); Cohen, *supra* note 10, at 494 (“[A] caricature describes the United States as a holdout from international law and institutions, a state only willing to abide by international law to the extent it suits its interests.”). See generally *American Exceptionalism and Human Rights* (Michael Ignatieff ed., 2005) (describing how the U.S. approach to international human rights law is exceptional).

<sup>115</sup> Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971 (2004) (arguing that, unlike universalist-oriented Europeans, Americans are constitutionalists, placing national sovereignty above international or universal values).

<sup>116</sup> Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 211 (2005) (“The U.S. Constitution[’s] . . . foreign relations mechanisms were crafted to enhance U.S. welfare.”).

<sup>117</sup> See Beth Simmons, *International Law and International Relations*, in *The Oxford Handbook of Law and Politics* 187, 191 (Keith E. Whittington et al. eds., 2008) (“[Realism holds that i]nternational law reflects the power and the interests of the states that take part in its generation, but it does little to tame the use of power in the name of interests (prescriptively: nor should it).”).

If legislators have adopted this mindset – or if they believe that constituents or donors have – they would invoke international law norms to shape domestic law only for instrumental or pragmatic reasons, that is, where international law compliance clearly benefits state or constituent interests and where the legislator can make a convincing case for that link. This pragmatic criterion would seem to significantly reduce the number of instances in which invoking international law makes sense.

Indeed, many federal officials, students of U.S. politics, and laypersons apparently find it implausible that members of Congress would publicly admit that international norms impact their domestic policymaking<sup>118</sup>. At a 1998 American Society of International Law (“ASIL”) panel discussion titled *Does International Law Matter to Congress?*, the associate director of the University of Virginia’s Center for National Security Law appeared to answer the question in the negative. It was “sad,” he said, that in general, Congress neither “underst[ood]” international law nor recognized that “upholding the United States’ international commitments . . . [is] very much in the national self-interest”<sup>119</sup>. In a publication produced from the same ASIL annual meeting, a senior fellow at the Council on Foreign Relations described the conventional wisdom of the then-Congress: “Congress is . . . contemptuous of the very idea that international law should serve as a restraint on the exercise of unilateral American power”<sup>120</sup>. And as one commentator more recently put it, “[American] legal culture has . . . evolved in a strikingly parochial direction . . . U.S. policymakers

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<sup>118</sup> See Sarah E. Mendelson, *Dusk or Dawn for the Human Rights Movement?*, Wash. Q., Apr. 2009, at 103, 108; Robert F. Turner, *Does International Law Matter to Congress?*, 92 Am. Soc’y Int’l L. Proc. 321, 321 (1998) (“[I]t is *uncommon* to find a member [of Congress] who will take the floor, endorse a proposal in principle, and then say: ‘Nevertheless, I urge my colleagues to vote against this amendment because it is contrary to international law.’”); cf. Prakash, *supra* note 73, at 66 (“[I]t is doubtful that customary international law limits the war on terror in any meaningful way. . . . [M]ost politicians will not resist the urge to shove customary international law out of the way.”).

<sup>119</sup> Turner, *supra* note 117, at 321.

<sup>120</sup> Allan Gerson, *Congress and International Law: The Case of UN Funding – Are We Deadbeats?*, 92 Am. Soc’y Int’l L. Proc. 328, 329 (1998) (disagreeing with that characterization, stating, “[t]he truth, I will suggest, is more complex”).

and the public increasingly embrace 'legal isolationism,' characterized by a lack of understanding of international law and little demand for compliance"<sup>121</sup>.

This cynicism is not surprising. In comparison with the other higher norm, constitutional law, international law is certainly less enshrined in lawmakers' political consciousness. While the Constitution is perhaps a "civil religion" subject to "rhetorical veneration" by citizens and policymakers,<sup>122</sup> international norms are probably not well understood and certainly not venerated<sup>123</sup>. Indeed, some believe that even if members of Congress wanted to invoke it, their sheer ignorance would prevent them from doing so. Professor Turner argues, "as a group, Congress does not understand international law any better than most Americans do" (which, he says, is poorly)<sup>124</sup>. Professor Prakash speculates that "[o]ne suspects that . . . members of Congress . . . do not really even know what customary international law is"<sup>125</sup>. And Allan Gerson notes that "[a]ny member of Congress can quickly introduce any bill he or she wishes without checking for conformity with international law," and that "[I]n legislative counsel on Capitol Hill rarely addresses this [international law conformity] issue" as it does with domestic law<sup>126</sup>. If international law is so absent from lawmakers' minds, it would be surprising to find their regularly touting its relevance to lawmaking<sup>127</sup>.

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<sup>121</sup> Mendelson, *supra* note 117, at 108.

<sup>122</sup> See Levinson, *supra* note 78, at 13, 16–24 (analyzing historical and modern veneration of the Constitution in the United States).

<sup>123</sup> See Mendelson, *supra* note 117, at 108; Lindsey Raub, *Book Annotation*, 40 N.Y.U. J. Int'l L. & Pol. 923, 924, 927 (2008) (reviewing Daniel Terris et al., *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007)) ("[I]n the United States . . . the work of international judges is poorly understood and often subject to misinformed criticism.").

<sup>124</sup> Turner, *supra* note 117, at 321.

<sup>125</sup> Prakash, *supra* note 73, at 65.

<sup>126</sup> Gerson, *supra* note 119, at 331.

<sup>127</sup> Of course, it is the job of officials within the State Department, Office of Legal Counsel, National Security Council, and other offices to know about international law and, often, to inform Congress about international norms relevant to its lawmaking. See, e.g., Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law*

Finally, there is little reason to fear that most internationally unlawful statutes will face legal enforcement<sup>128</sup>. One of the realities that continues to challenge international lawyers is the continuing existence of “vast domains” in which international law enforcement is “nonexistent or, at best, sporadic”<sup>129</sup>. The absence of a centralized world judicial body with compulsory jurisdiction over states or of effective regional systems (outside Europe), means that many state violations of international law go unpunished. As a result, the international perspective on compliance is sometimes as theoretical as it is practical<sup>130</sup>. Indeed, some such violations may not even be noticed, let alone punished. This is especially true of

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*and International Human Rights*, 51 Emory L.J. 983, 996 (2002) (“The State Department and nongovernmental organizations both inform Congress about international law when immigration legislation is pending.”); John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 102 Am. J. Int’l L. 860, 882 (2008). Of course, it is unclear just how closely Congress responds to that advice. *See, e.g.*, Gerson, *supra* note 119, at 331 (“[I]nstitutionalizing an international law proponent such as the Legal Advisor’s Office at State hardly assures that international law will in fact be advocated. Take the Legal Advisor’s involvement in . . . the Antiterrorism Act of 1996. Terrorist states were defined strictly by political, not legal, criteria.”).

<sup>128</sup> Hathaway, *supra* note 112, at 491 (“[T]here remain vast domains in which enforcement of international law is nonexistent or, at best, sporadic. . . . This lies in contrast with law in a functioning domestic legal system.”); *see* Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 Ga. J. Int’l & Comp. L. 463, 467 (2006) (“[I]nternational law does not pull states toward compliance contrary to their interests. International law emerges from states pursuing their interests to achieve mutually beneficial outcomes.”).

<sup>129</sup> Hathaway, *supra* note 112, at 491.

<sup>130</sup> The structural relationship between international law and domestic law might still suggest little international law invocation. As discussed in Part I, because a domestic court cannot wholly invalidate a federal statute based on its conflict with international law, legislation that contradicts preexisting international commitments remains valid domestically. So concern for invalidation provides little incentive to discuss international law during the legislative process. The only exceptions are the fairly rare cases of vague or uncertain conflict with international law, like the Antiterrorism Act and its potential tension with the UN Headquarters Agreement. *See* discussion *supra* Section I.C.1. In those instances, legislators may wish to record their intent for the courts, who, using the *Charming Betsy* principle, will interpret the act as consistently with international law as possible.

violations of CIL, where (unlike with bilateral or plurilateral<sup>131</sup> treaties) the violation has no obvious victim. As such, the United States is unlikely to incur reputational costs from being named and shamed by other states. In these cases, the legal and political costs of an international law violation should be lowest, meaning that the relative temptation to commit the violation should be greatest. For these norms especially, the result is that Congress can exercise its power to breach an international law obligation without significant fear of formal or informal consequences.

In sum, much conventional wisdom suggests that we should not expect to find meaningful voluntary invocation of international law in Congress. If the Indifference Hypothesis has explanatory power, the legislative histories of internationally problematic statutes would either include very few international law arguments, or they would include many statements dismissing its importance. Moreover, if the public did not care much for international law per se, any pro-international law arguments that were made would likely be brief or would be clothed in some practical argument for compliance. The arguments would thus take an almost entirely pragmatic form, grounding justifications for international law compliance in implications for U.S. security, liberty, or economic interests, for example. Any talk of adapting domestic interests to international norms without an accompanying functional justification would be taboo.

*B. The Constituent Audience Hypothesis: Meaningful International Law Discourse Motivated by Electoral Support for International Law*

The *Constituent Audience Hypothesis* posits, contrary to the conventional wisdom, that well-framed international law arguments could actually resonate with an American electorate that tends to value the rule of law generally. As a result, voter sentiment would drive at least some members of Congress to proclaim fidelity to international law at opportune

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<sup>131</sup> A plurilateral treaty is one in which “it appears from the *limited number of the negotiating States* and the object and purpose . . . that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound.” VCLT, *supra* note 26, art. 20(2), 1155 U.N.T.S. at 337 (emphasis added).

times, leading to significant international law arguments during domestic lawmaking. This hypothesis therefore relies on two assumptions: that the conventional wisdom about Americans' low opinion of international law is exaggerated or altogether wrong, and that members of Congress know this and respond accordingly. In this way, the democratic nature of the organ holding the power to uphold or violate international law means that, in theory, public support for international law compliance should translate into at least nominal respect for compliance.

As discussed above, Americans are often caricatured as unusually hostile to foreign or international norms<sup>132</sup>. Yet there is reason to think that this anti-international law caricature is just that: in principle, Americans generally want their government to adhere to international law<sup>133</sup>. Providing a theoretical basis, Professor Buchanan challenges Posner and Goldsmith's normative view that governments, including the U.S. government, owe no duty to abide by international law for noninstrumentalist reasons: "[W]e cannot simply *assume* that as a matter of principle democracies are only legitimately concerned with realizing their own citizens' preferences or maximizing their interests"<sup>134</sup>. Therefore, he argues, we cannot conclude "as a matter of principle" that "democracy is in tension with cosmopolitan state action"<sup>135</sup>.

This theoretical view has some empirical support. Noting that the United States "played a leading role in the creation and development of modern international law and international institutions," Professor Powell argues that "internationalism is sometimes misunderstood as un-American"<sup>136</sup>. More concretely, evidence exists that a majority of

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<sup>132</sup> Cohen, *supra* note 10, at 494.

<sup>133</sup> *But cf.* Turner, *supra* note 117, at 324 (observing in the wake of the United States' withdrawal from the ICJ's compulsory jurisdiction that the critics of U.S. policy in Nicaragua likely felt that renegeing on our word to the ICJ would not anger many Americans).

<sup>134</sup> Allen Buchanan, *Democracy and the Commitment to International Law*, 34 Ga. J. Int'l & Comp. L. 305, 329 (2006).

<sup>135</sup> *Id.*

<sup>136</sup> Catherine Powell, *Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. Int'l L. &

Americans prefer the United States to uphold international commitments, even at the expense of some domestic priorities<sup>137</sup>. In a 2009 poll by the University of Maryland's Program on International Policy Attitudes, 69 percent of Americans indicated that they agreed more with the statement, "It is wrong to violate international laws, just as it is wrong to violate laws within a country," than they did the statement, "If our government thinks it is not in our nation's interest, it should not feel obliged to abide by international laws"<sup>138</sup>. In fact, Americans' level of support for abiding by international law was the third highest among the twenty countries surveyed, with only China (74 percent) and Germany (70 percent) scoring higher<sup>139</sup>. Granted, given that the poll does not present the difficult policy choices of real-life policymaking, its generalizability is dubious. That said, it is hard to dismiss the survey's finding of Americans' *relative* respect for international law.

Other recent empirical research, though not directly on point, also undermines the anti-international law American caricature. One study showed that Americans defer their views on domestic issues to the views of the largest international organization. Americans were asked about domestic policy issues<sup>140</sup> such as their views on the statement, "The United States should increase taxes in order to provide mothers of newborn children with paid leave from work"<sup>141</sup>. Baseline support for this proposal was low, with roughly 20 percent agreeing<sup>142</sup>. When the question was prefaced with the statement, "American family policy experts recommend that the United States should provide mothers of newborn children with paid leave from work," agreement jumped to approximately

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Pol. 723, 734 (2008).

<sup>137</sup> *Public Opinion on Global Issues: Chapter 9: U.S. Opinion on General Principles of World Order*, World Order: United States 2011–2012 Updated Chapter, Council on Foreign Relations 2 (Dec. 16, 2011), [http://.cfr.org/thinktank/\(citing Program on International Policy Attitudes Survey\)](http://.cfr.org/thinktank/(citing Program on International Policy Attitudes Survey)).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Katerina Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries* 41 (2013).

<sup>141</sup> *Id.* at 42.

<sup>142</sup> *See id.*



42 percent<sup>143</sup>. But when “American family policy experts recommend that the United States should” was substituted with, “The *United Nations* recommends that *all countries* should,” the level of agreement was nearly 50 percent<sup>144</sup>. Similar effects were observed for another domestic policy question related to health care<sup>145</sup>. Other recent studies have found that international law can exert a normative pull on Americans’ views toward U.S. foreign policy on human rights-related issues<sup>146</sup>.

These attitudes are consistent with the United States’ historical role in developing and promoting international organizations and institutions. They are also consistent with the conventional wisdom that Americans are generally hostile to *foreign* legal norms for constitutional interpretation. There may be truth to the notion that Americans are comparatively unreceptive to foreign law, and by extension, that they expect their representatives to be so as well<sup>147</sup>. But international law is not foreign law,

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<sup>143</sup> *See id.*

<sup>144</sup> *See id.* (emphasis added).

<sup>145</sup> *Id.* at 41–52.

<sup>146</sup> Adam S. Chilton, *The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study*, 15 Chi. J. Int’l L. 110 (2014) (finding evidence that while appeals to general human rights norms do not generally sway opinions, knowledge of existing U.S. human rights treaty commitments makes U.S. respondents more likely to oppose policies prohibited by those treaties); Tonya L. Putnam & Jacob N. Shapiro, *International Law and Voter Preferences: The Case of Foreign Human Rights Violations* 17 (July 8, 2013) (unpublished manuscript), *available at* [http://princeton.edu/~jns//\\_Shapiro\\_2013\\_IL.pdf](http://princeton.edu/~jns//_Shapiro_2013_IL.pdf) (finding empirical evidence that “international law has an identifiable, albeit conditional, effect on public support for human rights enforcement” among U.S. respondents).

<sup>147</sup> In the wake of two Supreme Court cases citing international sources and/practices in the context of sodomy laws, *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003), and the death penalty, *Roper v. Simmons*, 543 U.S. 551, 567, 575–77 (2005), some lawmakers called for legislation requiring the impeachment of any judge who does likewise. *See* Constitution Restoration Act of 2005, S. 520, 109th Cong. § 302 (2005), *available at* <http://thomas.loc.gov/bin//?c109:S.520> (“To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, as the case may be, by reason of section 1260 or 1370 of title 28, United States Code, as added by this Act, engaging in that activity shall be deemed to constitute the commission of . . . an offense for which the judge may be removed upon impeachment and conviction . . .”).

though they are often lumped together, even by lawmakers and jurists<sup>148</sup>. This conflation is problematic because judicial reliance on international law and judicial reliance on foreign law raise very different theoretical issues requiring very different responses<sup>149</sup>.

The difference between foreign and international law is also important with respect to congressional deliberations. It is conceivable that Americans recoil at, say, allowing German notions of cruel and unusual punishment to sway American law, even while they support fulfilling treaty-based promises to allies and trade partners or adhering to UN commitments<sup>150</sup>. The question of whether Congress should use French, Indian, or South African law in shaping U.S. policy may prompt a wholly different response – from poll respondents and from congressional constituents – from that triggered by the notion of the United States' upholding its international commitments<sup>151</sup>. The former suggests subjugating American principles to foreign ones. The latter suggests principles akin to personal responsibility or law-abiding citizenship, values commonly identified as traditionally American<sup>152</sup>. If members of

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<sup>148</sup> See Waters, *supra* note 8, at 630 (“Opponents of the trend condemn the use of so-called ‘foreign authority’ in constitutional analysis, while proponents describe with approval ‘the emergence of a transnational law . . . that merges the national and the international.’” (quoting Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43, 53 (2004) (footnote omitted))); *id.* at 630 n. 2 (citing *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 11–15 (2005) (statement of M. Edward Whelan, President, Ethics and Public Policy Center)) (referencing the assertion of a witness before Congress that the Supreme Court’s citation of international treaties in *Roper* was evidence that “misuse of foreign law is real and growing”).

<sup>149</sup> *Id.* at 631 (“[T]he wide lens . . . approach misses important parts of the overall picture.”).

<sup>150</sup> See *supra* text accompanying notes 131–148.

<sup>151</sup> See *supra* text accompanying notes 131–148.

<sup>152</sup> The 2006 World Values Survey reports that, in response to a question about “requirements for citizenship,” the world mean of the percentage responding that “abiding by my country’s laws” was “Very Important” was 72.8 percent, while the U.S. figure was 80.9 percent. In response to the question of “whether the government or people should take more responsibility” (on a 1–10 scale, with 10 meaning people should take more responsibility), the world mean was 4.8, and the U.S. figure was 5.9. World Values Survey

Congress believe that Americans support upholding international law, even as they reject reliance on foreign law, then those members may be incentivized to discuss, question witnesses, and publish committee reports stressing international law compliance.

The Constituent Audience Hypothesis posits that Congress uses non-roll-call signaling to express support for compliance with international law in hopes of gaining electoral advantage. Very few members of Congress would flatly dismiss international law per se; if a conflict between international law and a domestic priority arose, a legislator would instead attempt to explain why the particular international law norm was not pertinent. The Constituent Audience Hypothesis would also predict that international law-framed arguments would be rather in depth. More specifically, it would predict both legalistic and pragmatic forms of discourse: legalistic discourse would appeal to constituents who value compliance with international law for its own sake, while pragmatic arguments would likely resonate with the largest number of constituents. It would appeal both to those who value international law compliance per se and to those more concerned with international or domestic fallout from failing to do so.

C. *The Foreign Audience Hypothesis: A Robust International Law Discourse Directed Abroad*

Third and finally, the *Foreign Audience Hypothesis* takes account of diverse sets of interests inside the government and outside the country. It posits that whether or not proclaiming the importance of international law compliance serves the interests of individual legislators, doing so is very much in the national interest. By extension, it also serves the interests of the president, whom Chief Justice Marshall famously characterized as “the sole organ of the nation in its external relations, and its sole

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Association, Study No. 906-WVS2005, World Values Survey Wave 5 (2005–2009), 195–96, 376 (version v.2014.04.28 2014), available at <http://.worldvaluessurvey.org/.jsp>; see also Edward C. Stewart & Milton J. Bennett, *American Cultural Patterns: A Cross-Cultural Perspective* 66 (rev. ed. 1991).

representative with foreign nations.”<sup>153</sup> Though members of Congress engage in limited forms of direct foreign diplomacy,<sup>154</sup> the president is the country’s chief executive and diplomat, and she is incentivized to maximize the credibility of her country’s international commitments in order to strengthen her diplomatic hand.<sup>155</sup> With its power to override most international law commitments, Congress can frustrate this goal. As such, international law-minded executive officials engage in interbranch bargaining. As part of this bargaining, they negotiate with members of Congress to voice support for legislative policies that uphold international law, particularly Article II treaties and executive agreements, in exchange for political support from the president on issues they value more.

Despite the academic focus on legislative signaling that is directed at the electorate, another line of research suggests that certain types of non-roll-call signaling are more intended for nonconstituent audiences. This is particularly the case where the electorate is disengaged from the relevant issue. Though lawmakers generally make legislative statements primarily to curry electoral advantage,<sup>156</sup> scholars have also suggested that this relationship varies by substantive policy issue. Popular views on domestic issues such as taxes, education, and crime – on which constituents feel relatively well-informed and perceive a direct impact – strongly drive legislators’ behavior<sup>157</sup>. But for foreign policy, some literature suggests a “disconnect” between constituent opinions and

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<sup>153</sup> 10 Annals of Cong. 613 (1800), *cited with approval* in *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

<sup>154</sup> See Ryan M. Scoville, *Legislative Diplomacy*, 112 Mich. L. Rev. 331, 333 (2013) (“[I]nternational diplomacy by Congress is longstanding, frequent, and widespread.”); *id.* at 394 (“Although the president still dominates, legislative diplomacy suggests that the narrative of overwhelming dominance is overstated.”).

<sup>155</sup> See, e.g., Lindsay, *supra* note 18; Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int’l Org. 427 (1988).

<sup>156</sup> See *supra* text accompanying notes 85–107.

<sup>157</sup> See John R. Zaller, *The Nature and Origins of Mass Opinion* 216–19 (1992) (discussing the well-settled proposition that well-informed voters are much less likely to be persuaded to change their mind by campaigns).

government policy choices<sup>158</sup>. In essence, it seems that Americans tend to take their cues on foreign policy issues from the statements and stances of political elites, not vice versa<sup>159</sup>. However the American public truly feels about the importance of complying with international law, therefore, there is reason to believe that their views on any given international law issue do not meaningfully drive their representative's behavior.

Part of this disconnect stems from voters' lack of knowledge about specific foreign policy issues, including those concerning international law. Professor Holsti notes the "overwhelming evidence . . . [that] the American public is generally poorly informed about international affairs"<sup>160</sup>. Likewise, Professor Saunders observes that political realists have long seen "public opinion as irrelevant [to the making of American foreign policy] . . . because the public's views are fickle and strongly susceptible to elite leadership"<sup>161</sup>. She argues that because foreign policy is "rarely important [to voters] in an absolute sense,"<sup>162</sup> the public statements of decision making elites generally drive voter opinions on

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<sup>158</sup> Benjamin I. Page with Marshall M. Bouton, *The Foreign Policy Disconnect: What Americans Want from Our Leaders but Don't Get* (2006); Elizabeth N. Saunders, *The Political Origins of Elite Support for War: How Democratic Leaders Manage Public Opinion* 44–45 (Feb. 2015) (unpublished manuscript) (on file with author) ("[A classical realist] sees public opinion as irrelevant or even dangerous because the public's views are fickle and strongly susceptible to elite leadership."); *see also* Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 161 (Kenneth W. Thompson & W. David Clinton eds., 7th ed. 2006) ("[C]onflict between the requirements of good foreign policy and the preferences of public opinion is . . . unavoidable . . .").

<sup>159</sup> Saunders, *supra* note 157, at 1; *see also* Interview with Former Cong. Aide, in D.C. (July 25, 2014) [hereinafter Cong. Aide Interview] ("The notion that constituent views strongly drive foreign relations and international law positions is refuted by senators like Luger, Hamilton, Graham, McCain; they're internationalist, they've become leaders in facilitating international agreements, but they come from jurisdictions where there's hostility to treaties. If it's only something to placate constituent interests, why would anyone be in foreign affairs?").

<sup>160</sup> Ole R. Holsti, *Public Opinion and American Foreign Policy* 55 (2004).

<sup>161</sup> Saunders, *supra* note 157, at 5.

<sup>162</sup> *Id.* at 10.

foreign policy,<sup>163</sup> rather than voter opinion driving policy decisions.<sup>164</sup> And as noted international relations theorist Hans Morgenthau puts it, the government “is the leader and not the slave of public opinion” on foreign policy matters<sup>165</sup>. In other words, politicians’ foreign policy views and stances have little impact on their electoral fortunes, and politicians seem to know it<sup>166</sup>.

Some key congressional foreign affairs leaders hail from jurisdictions that are among the most averse to international law, further supporting the notion of a foreign affairs electoral disconnect. Over the past few decades, senators like John McCain and Lindsey Graham have emerged as leaders in facilitating treaties and other international agreements<sup>167</sup>. Recently, relative newcomers James Risch and John Barrasso have been among the Senate’s most engaged on foreign affairs and international law matters. The constituents of these four (who hail from Arizona, South Carolina, Idaho, and Wyoming, respectively) are among the least supportive of foreign entanglements, foreign aid spending, and international organizations<sup>168</sup>. If constituent preferences were a significant driver of legislator behavior on foreign affairs and international arrangements, these senators would likely be less internationally oriented.

Assuming legislators are in fact disconnected from constituent views on international law, it begs the question: If constituents generally neither reward nor punish legislators for their expressed stances on international law, what motivates legislators to voluntarily choose the rhetorical device of international law?

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<sup>163</sup> *See id.* at 13–14.

<sup>164</sup> *See generally id.*

<sup>165</sup> Morgenthau, *supra* note 157, at 161 (“[P]ublic opinion [on foreign policy] . . . is a dynamic, ever-changing entity to be continuously created and re-created by informed and responsible leadership . . .”).

<sup>166</sup> *See supra* text accompanying notes 156–164.

<sup>167</sup> Cong. Aide Interview, *supra* note 158.

<sup>168</sup> *Id.*

One possibility is that the audience is the courts. With statutes implicating constitutional law, it is often useful for legislators to clarify their intent in the legislative record. Doing so serves a number of functions, such as increasing the chance of a judicial interpretation that is close to the legislator's preferred interpretation and possibly establishing that the government has a "rational basis"<sup>169</sup> for, or an important governmental interest in,<sup>170</sup> the legislation's objectives<sup>171</sup>. These types of statements would increase the odds that the legislator's bill, in which she may have a vested electoral interest, will survive judicial review<sup>172</sup>. Of course, as discussed in Part I above, there is no judicial review of statutes for compliance with international law, though the *Charming Betsy* canon comes closest<sup>173</sup>. Legislators may want to signal to the courts that Congress does not intend to violate international law, thereby increasing the odds that the courts will interpret the statute consistently with that wish. Or perhaps some members of Congress *do* want to violate international law and by expressing that for the record, they hope to overcome *Charming Betsy's* presumption against international law violation by affirming that Congress acted intentionally. At any rate, it seems unlikely that this sort of signaling to the judiciary occurs regularly; most statutes that violate international law are probably not susceptible to any other interpretation<sup>174</sup>.

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<sup>169</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

<sup>170</sup> See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."); *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny).

<sup>171</sup> See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 376–77 (2012) (explaining that members of Congress frequently give floor speeches and create other forms of legislative history in order to influence the courts); Tushnet, *supra* note 77, at 57–65.

<sup>172</sup> James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative–Judicial Interaction*, 45 *Am. J. Pol. Sci.* 84, 87 (2001).

<sup>173</sup> See *supra* text accompanying notes 52–57.

<sup>174</sup> *But cf.* *United States v. Howard-Arias*, 679 F.2d 363, 369–72 (4th Cir. 1982) (reviewing legislative history to determine that Congress understood international law to give it

If the intended audience of discourse affirming the importance of international law compliance is not typically constituents or the courts, then to which audience might any international law discourse be directed? The Foreign Audience Hypothesis proposes that the ultimate intended audiences are the governments of foreign countries, especially those of current and future treaty partners. Scholars have given considerable attention to how intrastate dynamics impact treaty making. For some time, the conventional wisdom has held that requiring legislative approval to join binding international agreements hampers the executive's ability to negotiate and conclude such agreements<sup>175</sup>. Democratic wrangling between diverse interest groups, the assumption goes, hamstring the executive by interfering with her power to make promises on behalf of the state<sup>176</sup>. More recently, however, political scientists like James Fearon, Lisa Martin, and Kenneth Schultz have challenged this view, arguing that democratic institutions can actually facilitate and improve international cooperation by increasing the credibility of a state's commitments<sup>177</sup>. The credibility phenomenon has focused on the formal actions of legislatures in *approving* international law commitments (that is, formal approval of bilateral treaties and multilateral conventions), and how those powers influence international cooperation. But the logic of the phenomenon might easily extend to legislatures' powers to respect or repudiate international law well after the obligation arises. Specifically, legislatures with the formal power to implement domestic legislation that violates international law (such as the U.S. Congress) may be able to ensure more credible future commitments *after* the commitment has been

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jurisdiction over stateless vessels and, if it was wrong, Congress intended to violate international law by giving federal courts jurisdiction over such vessels).

<sup>175</sup> See, e.g., Martin, *supra* note 11, at 36–43 (describing traditional wisdom).

<sup>176</sup> See, e.g., *id.*

<sup>177</sup> *Id.* at 13; James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 Am. Pol. Sci. Rev. 577, 577–78 (1994) (“[S]tronger domestic audiences may make democracies better able to signal intentions and credibly to commit to courses of action in foreign policy than nondemocracies . . . .”); see also Kenneth A. Schultz, *Democracy and Coercive Diplomacy* 9, 95–96, 114, 243 (2001) (arguing that domestic competition from opposition parties makes a government's threats to other states stronger and more credible).



made. By taking positions that reaffirm commitment to international law obligations, perhaps legislatures can strengthen the executive's hand in future negotiations.

Ideally, these positions would take the form of legislative action (or inaction) that formally upholds international law. Indeed, international credibility theories generally focus on such official, constitutionally recognized duties of whole legislative bodies<sup>178</sup>. But these theories should apply with comparable force to informal and symbolic legislator action. Legislator non-roll-call signaling – whether through bill sponsorship, popular media, or official legislative debate – can seek to push Congress toward compliance, or, if that fails, to mitigate international credibility losses from noncompliance. Legislators can signal to external audiences that the government values international law commitments. And they can use those statements to push legislation that potentially violates international law toward better harmony with international law commitments. But even if these efforts fail and a bill with negative international law implications is enacted, legislator rhetoric proclaiming fidelity to international law could reduce the ill effect of possible noncompliance. This informal action would signal to treaty partners that the United States still values international law commitments and that its seeming disregard for the law is really just good faith disagreement over its proper interpretation.

Indeed, history shows that international audiences are sensitive to the statements and other symbolic actions of domestic legislatures, including the U.S. Congress<sup>179</sup>. Professor Lindsay notes that legislators “often want to send signals to [foreign] friends and foes,” and he cites several instances where the informal actions of members of Congress have helped to alter the course of an international dispute<sup>180</sup>. For instance, after it surfaced that the Japanese electronics company Toshiba was selling sensitive technology to the Soviet Union in 1987, and the Japanese

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<sup>178</sup> See, e.g., Martin, *supra* note 11, at 53–56 (describing the U.S. Senate's constitutional duty to provide advice and consent – i.e. to ratify or decline to ratify – international agreements).

<sup>179</sup> See Lindsay, *supra* note 18, at 625.

<sup>180</sup> *Id.*

government was slow to respond, members of Congress destroyed a Toshiba radio with a sledgehammer on the Capitol steps<sup>181</sup>. The images were played repeatedly in Japanese media, the top Toshiba executives resigned, and the company formally apologized; within a month, the Japanese government began taking steps to form a long-term technology-development agreement with the United States<sup>182</sup>. Today, the Internet and twenty-four-hour news networks mean that legislators need not resort to such theatrics to broadcast their messages internationally.

If the Foreign Audience Hypothesis has explanatory power, congressional statements in the studied statutes would likely contain significant amounts of international law-supportive rhetoric. Those arguments would not generally be throwaway references to international law, but full-throated arguments emphasizing compliance. Many of the arguments would take a legalist form, stressing the value of international law compliance for compliance's sake. Commitments framed in that way would best assure international audiences that commitments will be upheld, whether or not they are politically expedient or otherwise practical. In contrast, too much reliance on pragmatic-framed arguments could be counterproductive in that respect; if the practical reason for international law compliance were to fall away at some point later, the commitments might too.

#### *D. Empirical Predictions*

The three hypotheses of international law discourse predict different empirical results. The Indifference Hypothesis predicts that the legislative history of internationally problematic statutes would include very few international law arguments (relative to those connected with the comparable constitutional law statutes), that any existing arguments would be largely dismissive of international law as a binding norm, and that those arguments would take a mainly pragmatic form, citing justifications such as security, liberty, or economic interests. The

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (quoting Greg Treverton & Anna Warrock, *Taking Toshiba Public* 11–12 (Harvard Univ. John F. Kennedy Sch. of Gov't, Case C15-88-858.0, 1988)).

Constituent Audience Hypothesis, in contrast, predicts a large number of in-depth arguments, largely supportive of international law compliance, framed as both pragmatic and legalist arguments. Finally, the Foreign Audience Hypothesis predicts that congressional discussions of the studied statutes would contain a large number of in-depth arguments. They would also largely support international law compliance, and they would use a significant amount of legalist-styled rhetoric intended to stress the government's principled commitment to international law.

As a point of comparison, consider the empirical findings for the constitutionally problematic group of statutes. First, as a body of law subject to "rhetorical veneration,"<sup>183</sup> we would expect many intensive arguments about relevant constitutional law principles. We would also anticipate nearly all references to the bills' relevance to constitutional law to support constitutional compliance, either explicitly or implicitly; it would be surprising to see members of Congress expressing open disregard for, or indifference toward, the Constitution. In addition, Americans generally believe that violating the Constitution is wrong per se (even if they often disagree about precisely what constitutes a violation)<sup>184</sup>. Thus, an argument that a certain law would violate the Constitution should tend to resonate with Americans even without pragmatic explanation of the practical evils that would result. And as Professor Tushnet and others have noted, Congress tends to fixate on the Supreme Court's potential view of a bill when debating its constitutionality, accepting the Court's judgment as authoritative.<sup>185</sup> As a result, in debates over whether a particular provision meets constitutional muster we would also expect to see considerable discussion of what the Supreme Court and other federal courts have said on this issue.

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<sup>183</sup> Levinson, *supra* note 78, at 16–24.

<sup>184</sup> *See id.* at 19–20 (arguing that many post–World War II Americans have come to believe that the U.S. Constitution is essentially perfect).

<sup>185</sup> *See* Tushnet, *supra* note 77, at 57–65.

#### **IV. Evidence of International Legal Discourse in Congress**

This Article thus presents three conjectures for whether and why Congress purports to value international law in the course of its domestic lawmaking. As mentioned above, these accounts in turn generate somewhat different predictions regarding the quantity, quality, attitudes, and rhetorical form of Congress's international legal discourse; the rest of this Article tests these predictions and examines the results.

##### *A. Defining the Database and Data Collection*

To test the hypotheses, I developed an original dataset comprising international law arguments in the legislative history of key statutes enacted between 1980 and 2010, inclusive. For this group of statutes, the study includes only arguments about binding international *law* – specifically, treaty or customary international law. That is, it is concerned only with norms that impose formal legal constraints on the United States. That definition excludes, for instance, foreign law or norms or international policy considerations that do not impose any formal legal requirements. With these standards in mind, I developed a set of specific criteria for selecting statutes for this internationally problematic group. Bills were included if and only if they met all four criteria: they (1) were enacted; (2) between 1980 and 2010;<sup>186</sup> (3) lacked a necessary nexus with international law; and (4) created some facially demonstrable conflict with an international law norm binding on the United States<sup>187</sup>. The first two criteria are straightforward. The third criterion, i.e., lacking a necessary nexus with international law, operated to exclude two of the three types of congressional international law interactions (creation and domestication) described in Section I.C.2 above. As to the fourth criterion, those statutes were excluded if the tension between the two

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<sup>186</sup> This date was chosen because it would both assure a sufficient number of statutes and minimize variation in congressional procedure and structure.

<sup>187</sup> Some internationally problematic statutes give considerable enforcement discretion to the executive. That means that while they *authorize* the United States to breach an international law norm, their enactment does not force violation – nor does it constitute a breach per se. It is therefore possible that executive agency enforcement of such statutes would not run afoul of any international law rule.

sources of law was not facial, that is, where the conflict was dependent on an unusual or unforeseeable application of the statute.

Of course, applying this criterion necessarily involved some degree of judgment. My research relied primarily on three methods of identifying pertinent statutes. First, I identified case law where the court discussed an apparent tension between a federal statute and international law, often in the context of a *Charming Betsy* analysis. Second, I sent surveys to dozens of legal scholars across a range of legal fields asking them to identify, based on postenactment reaction from jurists and scholars, federal statutes that arguably conflicted with international law. Third, I searched for law review articles arguing that a particular federal statute violated international law.

Though I attempted to identify the entire universe of such statutes, certain other statutes arguably might have been included<sup>188</sup>. Nonetheless, the statutes cover a wide range of time and subject matters, suggesting a highly representative sample. Twelve statutes with international law implications were identified (see Table 1). They include the following: Marijuana on the High Seas Act,<sup>189</sup> Tax Reform Act of 1986,<sup>190</sup> Anti-

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<sup>188</sup> For example, the World Trade Organization determined that the Extraterritorial Income Exclusion Act, Pub. L. No. 106-519, 114 Stat. 2423 (2000), constituted a prohibited export subsidy under the General Agreement on Tariffs and Trade, *see* Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations”*, WT// (Jan. 14, 2002). Its predecessor legislation, I.R.C. §§ 921–27, was also held to violate the United States’ WTO obligations. *See* Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations,”* WT// (Feb. 24, 2000).

<sup>189</sup> Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified as amended at 46 U.S.C. §§ 70501–07 (2012)) (broadening the extraterritorial authority of federal law enforcement officials to board stateless vessels in search of Americans transporting illegal drugs); *see also* *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982) (“[T]here need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction. Jurisdiction exists solely as a consequence of the vessel’s status as stateless.”).

<sup>190</sup> Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of I.R.C.) (conditioning tax relief on compliance with U.S. statutory residency requirements, thereby trumping conflicting international law residency definitions).

Terrorism Act of 1987,<sup>191</sup> Iran and Libya Sanctions Act of 1996,<sup>192</sup> Illegal Immigration Reform and Immigrant Responsibility Act,<sup>193</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms–Burton Act),<sup>194</sup> Fairness in Music Licensing Act of 1998,<sup>195</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002,<sup>196</sup> REAL ID Act of 2005,<sup>197</sup> Detainee Treatment Act of 2005 (Graham-Levin Amendment),<sup>198</sup> Merchant Marine Laws Codification (Maritime Drug Law Enforcement Act),<sup>199</sup> and Military Commissions Act of 2006<sup>200</sup>.

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<sup>191</sup> Pub. L. No. 100-204, tit. X, 101 Stat. 1331, 1406 (1987) (codified at 22 U.S.C. §§ 5201–03 (2012)) (prohibiting a named terrorist organization and its constituent groups from maintaining offices in the United States).

<sup>192</sup> Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified as amended at 50 U.S.C. § 1701 note (2012)) (imposing economic sanctions on firms that do business with Iran and Libya, including non-U.S. companies).

<sup>193</sup> Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009–546 (1996) (codified as amended in scattered sections of 8 U.S.C. and other titles of the U.S. Code) (denying withholding of removal for certain aliens convicted of crimes, even where their deportation might be prohibited under the Convention Against Torture).

<sup>194</sup> Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified as amended at 22 U.S.C. §§ 1643, 6021–24, 6031–46, 6061–67, 6081–85, 6091 (2012)) (extending sanctions to non-U.S. entities doing business with Cuba).

<sup>195</sup> Pub. L. No. 105-298, tit. II, 112 Stat. 2827, 2830–34 (1998) (current version at 17 U.S.C. § 512 (2012)) (easing permit restrictions for playing recorded copyrighted music).

<sup>196</sup> Pub. L. No. 107-243, 116 Stat. 1498, 1501 (2002) (“The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq . . .”).

<sup>197</sup> Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–11 (2005) (current version at 8 U.S.C. § 1778 (2012)) (tightening various asylum-related provisions aimed at preventing terrorist immigration).

<sup>198</sup> Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739–44 (2005) (codified as amended at 42 U.S.C. §§ 2000dd, 2000dd–1 (2012)) (establishing standards for the interrogation and treatment of military detainees).

<sup>199</sup> Pub. L. No. 109-304, ch. 705, 120 Stat. 1485, 1685–1689 (2006) (codified as amended at 46 U.S.C. §§ 70501–07 (2012)) (regulating the transport of narcotics in international waters).

<sup>200</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10 U.S.C. (2012)) (authorizing trial by military commission for certain offenses related to war).

To put the international law argument observations in context, I sought to compare them with a control group implicating another norm that shares some attributes with international law. Because constitutional law is the only other higher norm, constitutionally suspect statutes served as the most fitting comparison. To identify the set of constitutionally problematic statutes, I identified laws that posed constitutional problems, but which Congress had enacted nonetheless. I started by identifying every act of Congress enacted during the selected period that had been declared unconstitutional, in whole or in part, by the Supreme Court. From that group, I chose those acts that followed most closely in public-law number to the existing set of international law statutes (see Table 2). In this way, I sought to “match” the international law statutes with constitutional ones as closely as possible, thereby minimizing confounding factors such as changes in Congress’s composition and institutional changes in structure or procedure<sup>201</sup>. Tables 1 and 2 illustrate the two subsets, respectively: one group of twelve statutes that were later thought to create tension with an international law norm; and one control group of eleven statutes<sup>202</sup> (two of which are also in the first group) that were later determined to be unconstitutional<sup>203</sup>. Each of the studied statutes thus falls into one or both of two groups: “internationally problematic” or “constitutionally problematic”.

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<sup>201</sup> The absolute difference between the enactment dates of the internationally problematic statutes and those of their matching constitutionally problematic statutes ranges from zero to three years; the mean of the absolute differences is 0.67 years. See *infra* Tables 1 and 2.

<sup>202</sup> Two internationally problematic acts, the Maritime Drug Law Enforcement Act and the Military Commissions Act of 2006, matched the constitutionally problematic Military Commissions Act of 2006 (“MCA”), which the Supreme Court partially invalidated, *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that MCA unconstitutionally suspended Guantanamo Bay prisoners’ right to habeas corpus), thereby meeting the criteria for a constitutionally problematic statute. As a result, there are only eleven instead of twelve matching constitutionally problematic statutes.

<sup>203</sup> In comparing statutes that are suspect from an international standpoint with those that are constitutionally suspect, slightly different criteria were used to select the two groups of statutes, and it is possible, though unlikely, that those differences could be confounding the observed similarities and differences.

Table 1: international law legislative histories analyzed

Act Name	Pub. L. #	Year	International Norm Implicated
Marijuana on the High Seas Act	96-350	1980	Extraterritoriality
Tax Reform Act of 1986	99-514	1986	U.S.-Canada Tax Treaty
Anti-Terrorism Act	100-204	1987	UN Headquarters Agreement
Iran and Libya Sanctions Act of 1996	104-172	1996	Extraterritoriality
Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act)	104-114	1996	Extraterritoriality
Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)	104-208	1997	CAT, ICCPR, etc.
1998 Fairness in Music Licensing Act	105-298	1998	BERN Convention
Authorization For Use of Military Force Against Iraq Resolution of 2002	107-243	2002	Use of Force
REAL ID Act of 2005	109-13	2005	CAT
Detainee Treatment Act of 2005	109-148	2005	Torture CIL, CAT
Maritime Drug Law Enforcement Act	100-304	2006	Extraterritoriality
Military Commissions Act of 2006	109-366	2006	Geneva Conventions

Source: Prepared by the author of this article

Table 2: Constitutional Law Legislative Histories Analyzed

Act Name	Pub. L. #	Year	Constitutional Norm Implicated
Indian Land Consolidation Act	97-459	1983	Taking w/o Just Comp.
Metropolitan Washington Airports Act of 1986	99-591	1986	Separation of Powers
Child Protection and Obscenity Enforcement Act	100-297	1988	Freedom of Speech
Defense of Marriage Act	104-199	1996	Equal Protection
Child Pornography Prevention Act of 1996	104-208	1996	Freedom of Speech
Line Item Veto Act	104-130	1996	Separation of Powers
Animal Cruelty Depiction	106-152	1999	Freedom of Speech
Sarbanes-Oxley Act	107-204	2002	Separation of Powers
Sentencing Reform Act	108-21	2003	Substantive Due Process
Detainee Treatment Act of 2005	109-148	2005	Due Process
Military Commissions Act of 2006	109-366	2006	Due Process

Source: Prepared by the author of this article



Having identified the set of pertinent statutes, I reviewed the legislative history of each statute, which I obtained from ProQuest Legislative Insight's near-comprehensive database of published recent congressional legislative history<sup>204</sup>. The goal of this review was to identify international law and constitutional law *arguments*, which, for these purposes, means clusters of statements by a member of Congress (sometimes, as part of a dialogue with one or more other members or witnesses), that make some point about the relevance of a given international or constitutional law norm to the bill under consideration<sup>205</sup>.

For each statute, the legislative history studied entails all available published texts of three sets of proceedings: the congressional record (comprising transcripts of floor debates), committee reports, and committee hearing transcripts. Importantly, the first two sets of documents, congressional record and committee reports, contain statements exclusively by members of Congress, speaking individually or as part of a committee majority or minority<sup>206</sup>. Though committee hearing transcripts contain statements by both members of Congress and hearing witnesses,<sup>207</sup> only statements from members of Congress were included in the analysis. The complete set of records comprises nearly 700 documents, averaging approximately 150 pages in length, for a total of over 100,000 pages of legislative history. To identify relevant

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<sup>204</sup> *Legislative Insight*, ProQuest, <http://proquest.com/> (last visited Feb. 11, 2015).

<sup>205</sup> For international law-related terms, an argument was of interest to the study if and only if it is used to express how the international law obligations of the United States (in whatever form): (1) affect either the prudence of passing the proposed bill or its international validity; or (2) are pertinent to the ramifications of passing it, not passing it, or amending it. For constitutional law-related terms, an argument was of interest to the study if and only if it is used to express how U.S. constitutional law (including, as interpreted by courts): (1) affects either the prudence of passing the proposed bill or its constitutional validity; or (2) is pertinent to the ramifications of passing it, not passing it, or amending it.

<sup>206</sup> See *About Congressional Record*, U.S. Gov't Printing Off., [http://gpo.gov/html/about\\_congressional\\_record.htm](http://gpo.gov/html/about_congressional_record.htm) (last visited Feb. 11, 2015); *About Congressional Reports*, U.S. Gov't Printing Off., [http://gpo.gov/html/about\\_congressional\\_reports.htm](http://gpo.gov/html/about_congressional_reports.htm) (last visited Feb. 11, 2015).

<sup>207</sup> See *About Congressional Hearings*, U.S. Gov't Printing Off., [http://gpo.gov/html/about\\_congressional\\_hearings.htm](http://gpo.gov/html/about_congressional_hearings.htm) (last visited Feb. 11, 2015). Notably, not all hearings are included in this database.

arguments, a combination of electronic and manual techniques was used to search each legislative history document, identifying any mention of the potentially conflicting higher norm, as well as other terms and phrases suggesting a concern with higher norms<sup>208</sup>.

### *B. Analytical Methods*

After identifying pertinent arguments about international or constitutional law, numerous aspects of every argument were analyzed and coded. All argument data were aggregated by statute, allowing for characterizations about the nature of Congress's consideration of international or constitutional law for each statute. The references were also coded and aggregated by category of higher norm, allowing for broad comparisons between international law rhetoric and constitutional rhetoric.

In total, fifty-one attributes of each argument were recorded and analyzed. Those references include the following information: the name, title, and party of the speaker(s); the legislative context (committee hearing, floor debate, committee report); the length and depth of the argument; and the form of argument. Most notably, each reference was coded for its attitude toward international or constitutional law and toward

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<sup>208</sup> For the international law group, the search terms included: "International law," "International laws," "International norm," "International norms," "International custom," "International customs," "International commitment," "International commitments," "International responsibility," "International responsibilities," "International obligation," "International obligations," "International duty," "International duties," "International agreement," "International agreements," "International legal," "International treaty," "International treaties," "International convention," "International conventions," "International and United States," "International and U.S.," "International and domestic," "International and constitutional," "International and moral," "International and ethical," "Customary law," "Treaty law," "Treaty commitment," "Treaty commitments," "Treaty responsibility," "Treaty responsibilities," "Treaty obligation," "Treaty obligations," "Treaty duty," "Treaty duties," "Under treaty," "Under treaties," and "Law of nations," as well as variations on the particular international law norm pertinent to the statute. For the constitutional law group, the search terms included: "Constitution," "Constitutional," "Constitutionality," "Unconstitutional," "Bill of Rights," "Civil Right," and "Civil Rights," as well as variations on the particular constitutional law norm pertinent to the statute.

For each statute, after all documents that contain the search terms were identified, that set of documents was reviewed manually to reduce false hits and maximize accuracy.

the bill (or amendment to the bill) under consideration. That is, arguments were characterized as either supportive of international/constitutional law or adverse to/neutral toward it. They were also classified as either “pro-bill” or “anti-bill.” All arguments were also classified as one of three forms of argument: *legalism*, *pragmatism*, and *formal sanction* concerns. In other words, speakers argued that the statute should be defeated or modified to avoid violating international or constitutional law due to: (a) legalism, or law abidance for law abidance’s sake; (b) pragmatic reasons such as: threats to the safety, security, liberty, or economic interests of Americans or allies; the possibility of triggering reciprocal violations; or concerns about undermining relationships with U.S. partners and allies; and (c) the threat of a judicial or other institution nullifying the law or sanctioning the government. Some arguments fell into more than one argument form category. These categories and the prevalence of each are shown in Table 3 and illustrated in Figures 1–3 in Section IV.C below.

It may be helpful to provide some examples of arguments within each argument form category. First, congressional speakers sometimes cite the higher-order principle itself as a basis for rejecting a bill without specifying any pragmatic or concrete policy, political, or other justification. For example, in the 1996 debates over the Helms-Burton Act (which extended sanctions to non-U.S. entities doing business with Cuba), some speakers cited the customary international law norm that forbids states, except in certain limited circumstances, from regulating conduct by nonnationals outside their own territories<sup>209</sup>. On the House floor, Republican Congressman Campbell argued against the Act as presented based on CIL. A central theme of the argument is legalist. “[W]hat we have is a direct affront to rules of international law on jurisdiction. . . . [T]here is no precedent for extending American law to investments made in another country pursuant to laws of that country”<sup>210</sup>.

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<sup>209</sup> See, e.g., 142 Cong. Rec. 3792 (1996) (statement of Rep. Thomas Campbell).

<sup>210</sup> *Id.* Not everyone agreed with Campbell’s reliance on CIL principles. The bill was partially buoyed by an incident in which the Cuban air force had shot down two planes piloted by U.S.-nationalized exiled Cuban opposition leaders. See Jerry Gray, *President Agrees to Tough New Set of Curbs on Cuba*, N.Y. Times, Feb. 29, 1996, at A1, available at [http://nytimes.com/\\*\\*\\*\\*/president-agrees-to-tough-new-set-of-curbs-on-cuba.html](http://nytimes.com/****/president-agrees-to-tough-new-set-of-curbs-on-cuba.html); see also *infra* notes 222–224 and accompanying text.

Appeals to legalism could also occur in constitutional arguments, sometimes balanced against notions of fundamental rights or natural law. For instance, an excerpt from the dissenting opinion of the House committee report for the Animal Cruelty Depiction Act stated,

[a]lthough it is clear that governmental interests in protecting human rights may be sufficiently compelling to overcome fundamental rights[,] . . . the question posed by the bill is whether protecting animal rights counterbalances a human's fundamental rights. [I]t would seem . . . that the answer is "no"<sup>211</sup>.

As to the second argument form, members of Congress might cite higher-order law for a number of pragmatic reasons, such as: threats to the safety, security, liberty, or bodily integrity of Americans or allies; the possibility of triggering violations by other entities or other lawlessness; and (and in the case of international law) concerns about undermining relationships with U.S. partners and allies. As an example of an argument invoking danger to the safety of the nation or its allies, Senator McCain introduced an amendment during deliberations over the Detainee Treatment Act of 2005 that would further regulate detainee interrogation techniques. Democratic Congressman Markey noted that the McCain amendment would "prevent the use of inhuman interrogation practices" and that the Markey amendment would "prevent the use of funds in contravention of the UN Convention Against Torture"<sup>212</sup>. "If we do not approve both the McCain and Markey amendments," Markey predicted, "we will set a precedent that torture is okay for all and open up our own troops to face torture at the hands of our enemies"<sup>213</sup>. Markey concluded, "Our troops already face enough risks. Shouldn't we protect them any way we can?"<sup>214</sup>. Markey's argument, and many others that urge adherence to international law, cite perceived perils that will befall American interests if the country breaches international law.

Another pragmatic argument approach is to cite international law out of nominal concern for unilateral reciprocal violations by other states. For

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<sup>211</sup> H.R. Rep. No. 106-397, at 11 (1999) (dissenting views).

<sup>212</sup> 101 Cong. Rec. H11582 (daily ed. Dec. 14, 2005) (statement of Rep. Edward Markey).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

example, Congressman Ortiz argued against the Military Commissions Act of 2006 as presented: “Are we prepared for other nations’ leaders, such as Iran, Syria, and others, to selectively interpret the Conventions’ article 3 in a way that we are comfortable with?” Ortiz asked rhetorically<sup>215</sup>. Ortiz believed that what he viewed as a liberal, perhaps improper, interpretation of international law by Congress would give other countries license to likewise deviate from the conventions as traditionally understood<sup>216</sup>. “The Navy Judge Advocate General [...] reminded us recently that Geneva exists to protect American soldiers,” Ortiz said. “Our protections are only as strong as the protections of the Geneva Conventions”<sup>217</sup>.

Congressional speakers might also cite concerns for the views of allies or trade partners as a pragmatic reason to comply with international law. For example, in discussing the proposed Iran and Libya Sanctions Act of 1996, which would regulate foreign companies’ business with those countries, Republican Congressman Bereuter urged international law compliance based on concern for U.S. foreign policy, specifically, relations with a major U.S. trade partner. He implied that a breach could hamper future trade agreements.<sup>218</sup> Bereuter did not focus on the importance of following the norm for the sake of legality nor did he rely on the threat of reciprocal breaches or formal sanctions<sup>219</sup>.

Third and finally, members of Congress might urge compliance with higher-order law because of threats of litigation or formal sanctions in domestic or international courts or commissions<sup>220</sup>. Admittedly, this form contains elements of both legalism and pragmatism, depending on how it is phrased. In one sense, it can be legalistic, especially for constitutional arguments, which focus on what the Court’s existing doctrine permits. In another sense, concern for sanctions is also pragmatic, as the

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<sup>215</sup> 152 Cong. Rec. H7536 (daily ed. Sept. 27, 2006) (statement of Rep. Solomon Ortiz).

<sup>216</sup> *Id.* at H7536–37.

<sup>217</sup> *Id.* at H7537.

<sup>218</sup> *Markup on H.R. 3107 Before the H. Comm. on Int’l Relations*, 104th Cong. 9–10 (1996) (statement of Rep. Doug Bereuter), available at <https://www.govinfo.gov/app/details/HR104/markupbefo00unit>.

<sup>219</sup> *Id.*

<sup>220</sup> *See supra* Section III.A (discussing the current lack of compliance with higher-order international law relative to compliance with higher-order domestic law due to lack of international law enforcement).

argument might stress the financial or other material consequences of the formal sanction. In that it looks outward to another governmental or quasi-governmental body with primary concern for having the law sustained, this category is also distinct from either of the others. In the case of international problematic statutes, the risk, as discussed in Section III.A, is not nullification by an international or domestic institution, but formal sanction by a foreign or international body. Predictably, in light of the existing state of the international legal-enforcement regime,<sup>221</sup> that risk would seem remote.

To illustrate how these categories might interact in one argument, consider a congressional argument opposing expanding the country's criminal jurisdiction. The argument maintains that to do so would violate international norms on jurisdiction to prescribe extraterritorially, and it focuses on concerns for reciprocal law violations by other countries. That argument would be classified as pro-international law (higher-norm attitude), anti-bill (bill attitude), and pragmatic (argument form).

### *C. Results*

The data refute the conventional wisdom of the Indifference Hypothesis and instead provide support for the Constituent Audience Hypothesis and/or the Foreign Audience Hypothesis. In total, 620 arguments were observed: 299 international law arguments and 321 constitutional law arguments. The majority of the statutes, in both the internationally problematic group and the constitutionally problematic control group, contained robust arguments about higher norms. Table 3 summarizes the results, grouped by statute and by higher norm.

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<sup>221</sup> *Supra* Section III.A; Hathaway, *supra* note 112, at 489 (“International law often lacks enforcement.”). A few examples do exist in the studied legislative history, however. For instance, in the debates over the Fairness in Musical Licensing Act of 1998, Marybeth Peters of the Register of Copyrights testified before the House Subcommittee on Courts and Intellectual Property that “[t]he Copyright Office believes that several of the expanded exemptions . . . would lead to claims by other countries that the United States was in violation of its obligations under the Berne Convention for the Protection of Literary and Artistic Works, incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”).” *Fairness in Musical Licensing Act of 1997: Hearing on H.R. 789 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Marybeth Peters, Register of Copyrights), available at <http://copyright.gov/html>.

Table 3: Summary Statistics<sup>222</sup>

Statute	Higher Norm	For Pro-IL/CL Arguments										
		Argument Volume			Bill & Higher-Norm Attitude			Argument Form			Party	
		Total Arguments	Mean Arg. Length (words)	Total Arg. Length (words)	%Pro-Bill & Pro-IL/CL	%Anti-Bill & Pro-IL/CL	%IL/CL Adverse/Neutral	%Legislative	%Pragmatic	%Formal Sanction	%Republican	%Democratic
<b>Aggregate International Law</b>		299	148	44229	35	49	16	43	58	4	40	60
Marijuana High Seas Act	Extraterritoriality	1	159	159	0	100	0	0	100	0	100	0
Tax Reform Act of 1986	U.S.-Can. Tax Tr.	0	0	0	0	0	0	0	0	0	0	0
Anti-Terrorism Act	UN HQ Agree.	5	239	1196	100	0	0	100	0	20	60	20
Iran & Libya Sanct. Act	Extraterritoriality	18	100	1801	61	17	22	29	79	0	67	33
Helms-Burton Act	Extraterritoriality	15	110	1657	60	40	0	40	57	0	53	47
IRIRA	CAT, ICCPR	51	159	8118	18	69	14	55	48	7	38	62
Fairness in Music Lic. Act	BERN Convention	35	216	7570	51	46	3	38	62	6	73	27
AUMF Iraq Res. of 2002	Use of Force	49	118	5796	20	65	14	45	55	0	17	81
REAL ID Act of 2005	CAT	13	145	1886	0	92	8	8	83	26	0	100
Detainee Treatment Act	Torture CIL, CAT	22	166	3659	82	5	14	42	65	0	37	63
Mar. Drug Enforce. Act	Extraterritoriality	0	0	0	0	0	0	0	0	0	0	0
Military Comm. Act	Geneva Convs.	90	253	22739	27	46	28	43	58	0	38	63
<b>Aggregate Constitutional Law</b>		321	193	62012	33	55	12	51	45	30	31	69
Indian Land Consol. Act	Taking w/o Comp.	0	0	0	0	0	0	0	0	0	0	0
Metro. Wash. Air. Act	Sep. of Powers	0	0	0	0	0	0	0	0	0	0	0
Child Prot. & Ob. Enf. Act	Freed. of Speech	58	102	5893	43	41	16	45	33	37	48	52
Defense of Marriage Act	Equal Protection	64	176	11289	33	64	3	27	95	18	35	65
Child Porn. Prev. Act	Freed. of Speech	4	95	380	100	0	0	37	58	11	0	100

Source: Prepared by the author of this article

<sup>222</sup> Some clarifications are in order regarding Table 3. Under Argument Form, because some arguments take multiple forms, the three forms within each category often add to greater than 100 percent. The title “% Pro-Bill & Pro-IL/CL” means the bill should pass at least in part because it complies with international law. The title “% Anti-Bill & Pro-IL/CL” means the bill should be defeated at least in part because it violates international law. The title “% IL/CL Adverse/Neutral” means regardless of whether the bill should pass, whether it complies with international law is irrelevant or unimportant.

The variation between the two groups' forms of discourse was surprisingly small, with constitutional law arguments taking the form of legalistic, pragmatic, and formal sanction justifications, and international law arguments primarily taking the form of legalistic and pragmatic arguments. Below I discuss and analyze the results by (1) number and depth, (2) higher norm and bill attitude typologies, and (3) argument form, giving numerous examples.

### *1. Number and Depth*

Because the alternative hypotheses predict different levels of international law arguments over the examined statutes, I first examine the observed variation between statutes and higher norms in the number and depth of the arguments. Both international and constitutional statutes included dozens of arguments, with international statutes averaging twenty-five arguments and constitutional law statutes averaging twenty-nine arguments. By word count, international statutes contained 3,686 words of international law arguments on average, while constitutional statutes contained 5,637 words of constitutional law arguments on average. And in general, members of Congress discussed international law in less depth, that is, in a somewhat more cursory way than constitutional law. The typical international law argument involved between several sentences to a few paragraphs, but usually less than a page. The median constitutional law argument was longer, typically involving several paragraphs but less than a page.

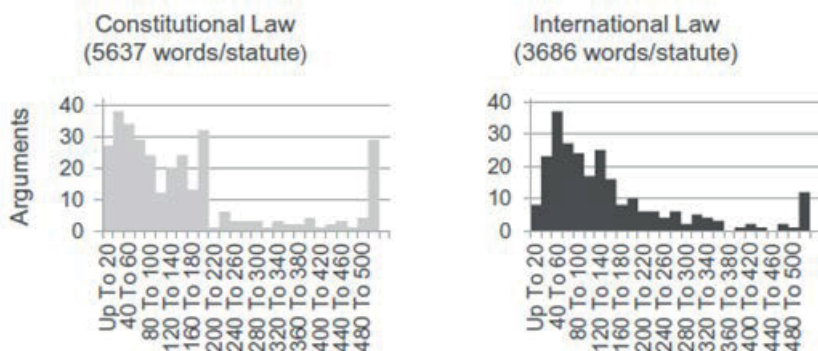


Figure 1: Distribution of Argument Lengths by Higher Norm  
 Source: Prepared by the author of this article



Figure 1 is a pair of histograms illustrating the distribution of argument lengths broken down by type of higher norm. The international law histogram is noticeably skewed to the right, showing how shorter arguments were more prevalent for international law than for constitutional law. Though there are longer arguments for both sorts of norms, those arguments occurred relatively more frequently in the context of constitutional law. In sum, though constitutional arguments occurred somewhat more frequently and contained slightly more depth, the incidence of international law arguments well exceeded the modest expectations of the Indifference Hypothesis described above.

## 2. Higher Norm and Bill Attitude Typologies

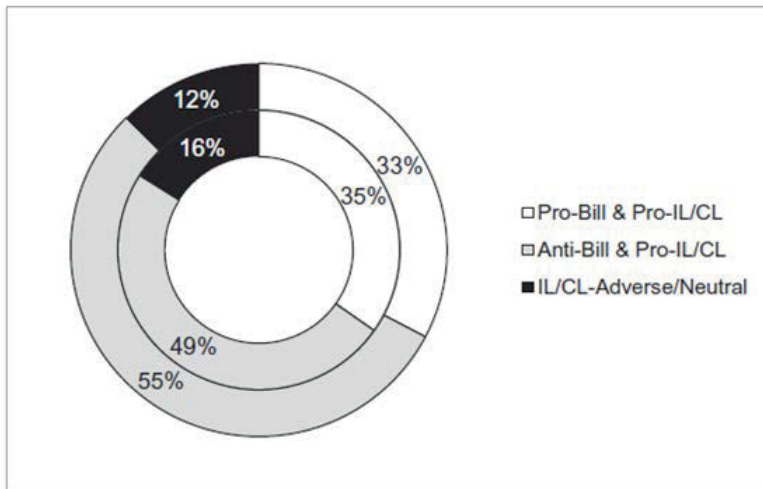


Figure 2: Distribution of Higher Norm and Bill Attitudes (outer ring – Constitutional Law; Inner ring – International Law)

Source: Prepared by the author of this article

The different hypotheses predict that legislators will convey different attitudes toward the normative value of international law in crafting legislation. Therefore, I next analyze the observed variation in the legislators' attitudes toward the higher norms and toward the legislative proposal being considered. Congressional discussants were overwhelmingly supportive of international law and constitutional

law. There were essentially no arguments contending that violating international or constitutional law was desirable per se, and relatively few conveyed true apathy toward either set of law. One of the very few such instances was Democratic Congressman Torricelli's House floor response to the debates over the Helms-Burton Act, which extended sanctions to non-U.S. entities doing business with Cuba<sup>223</sup>. The bill was partially buoyed by an incident in which the Cuban air force had shot down two planes piloted by U.S.-nationalized exiled Cuban opposition leaders<sup>224</sup>. After another representative finished a speech expressing concern over the bill's implications for customary norms on extraterritoriality, Torricelli responded in part, "I never thought, . . . Mr. Speaker, that I would hear a day when Members of Congress would come to the floor while the bodies of four Americans are still lost in the Straits of Florida, having been murdered by Fidel Castro, talking about consideration for . . . extraterritoriality"<sup>225</sup>.

Within this deference to the higher norms, arguments were divided between those that argued the higher norm supported or condoned the proposed bill or amendment, on one hand, and those that argued that the higher norm counseled for defeat of the bill or amendment, on the other. Figure 2 is a donut graph illustrating the data from Table 3: the breakdown of arguments by their attitude toward the two higher norms, and toward the bill or amendment in questions. As the graph shows, attitudes were distributed similarly within the two norms.

### 3. *Argument Form*

Finally, the three hypotheses are each associated with legislators framing their international law arguments in different ways. Therefore, the arguments that implied deference to or support for international or constitutional law, whether pro- or anti-bill were further broken down into the argument's form, or its rhetorical frame.

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<sup>223</sup> See *supra* Section III.A.

<sup>224</sup> See Gray, *supra* note 209.

<sup>225</sup> 142 Cong. Rec. 3794 (1996) (statement of Rep. Robert Torricelli).

As Table 3 above and Figure below show, the relative levels of legalism and pragmatic arguments were fairly similar for the two types of statutes. Not surprisingly, formal sanction concerns were also a major part of the constitutional arguments. Examples of each of these bases and their incidence in the legislative history are discussed below.

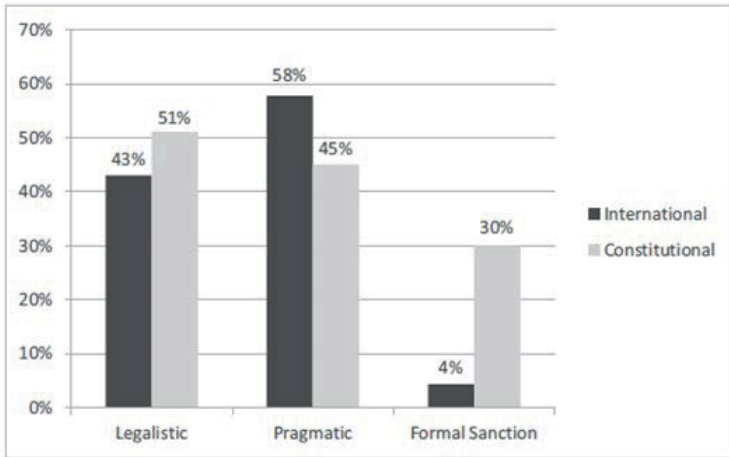


Figure 3: Incidence of Pro-Higher-Order Norm Arguments by Form of Argument<sup>226</sup>

Source: Prepared by the author of this article

### A. *Legalism*

Appeals to law mainly for law's sake are common in both constitutional and international arguments. Overall, of the arguments implying that the proposal was problematic due to some tension with international law, 43 percent were based on legalism. Those figures are approximately the same as the incidence of appeals to legalism contained in the constitutional law arguments. For constitutional law arguments, 51 percent of those claiming constitutional tension were based on legalistic justifications. Thus, it appears that members of Congress believed that arguments framed in legalistic terms would be advantageous in advocating both constitutional and international law compliance. This

<sup>226</sup> Because some arguments take multiple forms, the three forms within each category sum to greater than 100 percent.

finding is unsurprising for constitutional arguments. As stated, given constitutional law's "civil religion" status in the United States,<sup>227</sup> the value of constitutional compliance is probably self-evident to most lawmakers and laypersons alike.

The prevalence of legalistic arguments supporting international law, on the other hand, is counterintuitive to the conventional wisdom of the Indifference Hypothesis, but consistent with the Constituent Audience Hypothesis or the Foreign Audience Hypothesis. International law's murkier domestic status coupled with its relative obscurity might suggest that international law-based arguments would require additional justification beyond the innate value of compliance. Yet members of Congress were often content to let the merits of international law compliance speak largely for themselves.

*b. Pragmatism*

Reliance on the practical ramifications of compliance with international law was extremely common: 58 percent of statements expressing tension with international law mentioned these pragmatic concerns. Pragmatism was somewhat less common in constitutional arguments, with 45 percent of such arguments including it. Nonetheless, it appears that like international law, members of Congress often feel it worthwhile to emphasize that constitutional law violations can have pragmatic consequences. Indeed, one of the justifications for free speech protections is to provide a safety valve for dissent, lessening the likelihood of violent or sudden upheaval.<sup>228</sup> Another theoretical basis is to bolster the "marketplace of ideas," increasing the odds that best policies will prevail<sup>229</sup>. Likewise, an important basis for constitutional criminal process protections

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<sup>227</sup> Levinson, *supra* note 78, at 11–24 (criticizing that status).

<sup>228</sup> See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 884 (1963) ("The principle of open discussion is a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.").

<sup>229</sup> See *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas."). See *generally* John Stuart Mill, *On Liberty* 53–54

is ensuring that the innocent are not punished (and, by extension, the guilty are prevented from reoffending). These sorts of justifications are important animating rationales for constitutional principles, and they are used just slightly less frequently than legalistic arguments.

Congress's reliance on pragmatic international law arguments is consistent with the Indifference Hypothesis or the Constituent Audience Hypothesis. Under some realist approaches to international law as discussed above,<sup>230</sup> states comply with international law only for instrumental reasons.<sup>231</sup> At any rate, the threat of informal sanctions, reciprocal violations, or threats to national interests are a common and predictable consequence of violations of many kinds of international law. It is therefore unsurprising that lawmakers often invoke these kinds of bases as a primary justification for international law compliance.

*c. Formal Sanctions*

Arguments focusing on the possibility of formal sanction or nullification occur far more frequently in constitutional debates. This disparity is hardly surprising, given the relatively weak mechanisms for formal enforcement of most international law.<sup>232</sup> Overall, of the arguments suggesting that the proposal was problematic due to tension with international law, just 4 percent were based on the possibility of judicial or other formal sanction. Those rates are much lower than the incidence of appeals to legalism contained in the constitutional law arguments. For constitutional law arguments, 30 percent of those claiming constitutional tension were based on threat of judicial condemnation.

Notably, constitutional law-violation concerns are often framed in terms of judicially created principles, or in terms of the likelihood of surviving judicial review. By and large, objections parrot the concerns of courts rather than reflecting original constitutional thinking. This

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(Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) (articulating an early version of the economic exchange theory of free expression).

<sup>230</sup> See Simmons, *supra* note 116, at 191–93.

<sup>231</sup> See, e.g., Goldsmith & Posner, *supra* note 127, at 467.

<sup>232</sup> See Hathaway, *supra* note 112, at 489.

finding is consistent with Tushnet's observations, which suggest that the "judicial overhang" of constitutional review causes Congress to mimic the language of the courts in framing constitutional arguments<sup>233</sup>.

## V. Further Questions

As stated, the data largely reject the Indifference Hypothesis and instead provide support for the Constituent Audience Hypothesis and the Foreign Audience Hypothesis. Congress discusses international law often, nearly as often as it discusses constitutional law in comparable circumstances. Those arguments contain not just passing mentions of international law, but well-developed arguments for compliance. The arguments comprise both pragmatic and legalistic justifications for compliance, meaning that the legislators are touting international law compliance for practical reasons as well as for law's sake.

These results suggest a need for future research into why members of Congress use international legal discourse so frequently. This evidence suggests that they are addressing either domestic constituents or foreign governments. The Constituent Audience Hypothesis explains how direct electoral dividends motivate members of Congress to address international law. If, however, the Foreign Audience Hypothesis also partly explains this discourse – that is, if we accept that legislative discourse might often be directed externally to bolster U.S. international credibility – the question remains open why legislators would bother to do so. In other words, what would incentivize members of Congress to devote their precious committee and floor time to international law rhetoric in the service of national foreign relations objectives if doing so would produce little positive (or even negative) direct political impact?

There is evidence in the literature on intergovernment dynamics that the executive branch might provide much of that incentive.<sup>234</sup> Given the relationship between international and U.S. domestic law, internationally-

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<sup>233</sup> See Tushnet, *supra* note 77, at 63.

<sup>234</sup> Cf. generally Ashley Deeks, *Statutory International Law* (working paper) (on file with author) (arguing that the executive plays a critical role in shaping uses of international law in domestic statutes).

minded executive officials might push legislators to take actions that respect international law. In this way, the executive department uses Congress as an unofficial mouthpiece for international law compliance and communicates a national attitude toward international law that the executive would like to project.

Indeed, Lindsay notes that the executive administration sometimes “encourages grandstanding” by Congress in order to “strengthen [...] its own hand in foreign negotiations”<sup>235</sup>. In this way, interbranch bargaining allows members of Congress to use international law rhetoric as a tool that both builds political capital with the president and strengthens international commitments and credibility. Thus, freed by the electoral-foreign policy disconnect from the bonds of popular opinion on international law compliance, legislators can kill two birds with one stone; they can mitigate the effect of possible international law noncompliance by professing fidelity to international law, thereby signaling to treaty partners that the United States values international law commitments even when its actions might say otherwise. In turn, they build political capital with the president, which they can use to shape related policies about which they care, or for purely electoral purposes. All of this can be accomplished to some extent regardless of whether Congress’s formal legislative actions ultimately uphold international law.

Saunders argues that, because the public “delegate[s] the running of foreign policy to elites,” government elites play an “elite coalition game,” such that,

[i]f leaders are able to earn and retain the support of other key elites, then they can inoculate themselves against electoral consequences. But in the process, the chief executive may have to bargain with or accommodate other elites in order to keep them on board with his policies, lest they publicly dissent. This success may require concessions to other elite preferences that affect the substance of policy even if the public is not clamoring for a policy shift in the same direction or if the details remain largely out of public view<sup>236</sup>.

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<sup>235</sup> Lindsay, *supra* note 18, at 625.

<sup>236</sup> Saunders, *supra* note 157, at 2–3.

Indeed, to those involved in foreign affairs issues in Congress and the executive branch, it is well known that executive agencies, usually led by the State Department, often lobby members of Congress to take positions that uphold existing international law commitments<sup>237</sup>. Specifically, the State Department's Bureau of Legislative Affairs (commonly known simply as "H"), is charged with serving as an intermediary between the State Department and Congress<sup>238</sup>. It is the executive's first contact on foreign relations issues developing in Congress. The bureau continuously monitors legislative developments in Congress, and it maintains constant contact with Congress on foreign relations and international law issues of interest to the executive branch. In this way, the bureau "exerts subtle pressure" on individual members of Congress<sup>239</sup>. It conducts informal discussions, sends letters, and arranges meetings between State Department officials and members of Congress<sup>240</sup>. If a bill that the State Department views as undermining U.S. interests in upholding international law passes out of a congressional committee, the bureau may work with White House officials to arrange a presidential statement, and/or to signal a veto threat<sup>241</sup>. The bureau also works with the Office of Legal Counsel, an entity within the Justice Department charged with advising the White House on general legal matters<sup>242</sup>. Where members of Congress remain committed to foreign relations and international law positions adverse to the executive's priorities, the bureau has the authority to negotiate with those members to attempt to find alternative ways to achieve their goals<sup>243</sup>.

Other offices within the State Department are also involved in pushing international law compliance. Perhaps the greatest influence on executive international law views historically has come from the

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<sup>237</sup> Cong. Aide Interview, *supra* note 158.

<sup>238</sup> *Bureau of Legislative Affairs*, U.S. Dep't St., <http://.state.gov/>(last visited Feb. 11, 2015).

<sup>239</sup> Cong. Aide Interview, *supra* note 158.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*



State Department Office of the Legal Adviser,<sup>244</sup> which has traditionally promoted strong fidelity to international law<sup>245</sup>.

The president uses this process of interbranch bargaining because presidents tend to value international law compliance more than other political actors, whose loyalties and/or electoral fortunes lie more with their states and districts.<sup>246</sup> As the country's chief executive and commander-in-chief, it is the president, not members of Congress, whom the public and history associates with the country's foreign policy

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<sup>244</sup> Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 Am. J. Int'l L. 633, 633 (1962) (“[T]he office of the Legal Adviser exerts a major influence on the views and policies of the United States Government concerning matters of international law.”); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It”*, 96 Minn. L. Rev. 194, 230–37 (2011). Professor Rao has shown how intragovernmental ideological differences and political maneuvering – even within a branch commonly considered to be unitary – can impact how a country conducts foreign affairs and applies international law. See generally *id.*

<sup>245</sup> See Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser 201–15* (2010) (summarizing the views of ten former State Department legal advisers and concluding that they commonly perceived international law as real law that is binding even if ambiguous); Bilder, *supra* note 243, at 679 (“Experience in the Office [of the State Department Legal Adviser] tends . . . to impress one deeply with the logic in terms of national interest of a policy of compliance with international law.”); Gary E. Davidson, *Congressional Extraterritorial Investigative Powers: Real or Illusory?*, 8 Emory Int'l L. Rev. 99, 103 (1994) (“The State Department is . . . sensitive to international concerns regarding attempts by the United States to assert its legal reach extraterritorially in an intrusive fashion.”); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 680–81 (1998) (“Nations obey [international law] because of people like us – lawyers and citizens who care about international law, who choose not to leave the law at the water’s edge, who do their utmost to ‘bring international law home.’ ”); Rao, *supra* note 243, at 230 (“The specific culture of the [State Department] legal adviser’s office values international law and considers it a positive good for the promotion of human rights and as a solution to problems of international scope.”).

<sup>246</sup> Cong. Aide Interview, *supra* note 158. Executive views on international law issues are strongly shaped by a variety of agencies and officials, including lawyers with the State Department Office of the Legal Adviser, Department of Justice Office of Legal Counsel, the White House Counsel, the National Security Council, and the Department of Defense, among others. Rao, *supra* note 243, at 230–51.

successes and failures. The president thus has the single largest stake in building and maintaining the country's international credibility.

## **2 Conclusion**

This Article has found, perhaps counterintuitively, that international law discourse is relatively prevalent in congressional arguments over bills whose enactment arguably triggers international law violations. In fact, these arguments occur at rates and levels not much lower than those in debates over comparable constitutionally problematic bills. The arguments are overwhelmingly supportive of international law, and discussants commonly argue that the bill or amendment should fail because there is tension between international law and the proposed bill or amendment. The arguments are often phrased in both pragmatic and legalistic terms. This suggests that legislators sometimes assume that their audiences will take as a given the value of an international law norm. Sometimes, however, legislators may anticipate that their audiences want some practical justification for bending domestic objectives to international law. These findings suggest that congressional discourse is generally not hostile to or unsympathetic toward international law. Rather, members of Congress use the rhetorical device of international law to address international law-minded constituents and/or foreign governments, perhaps with a nudge from the more internationally oriented executive branch. The two are largely observationally equivalent, and it is plausible that both play a role.

Some external evidence supports the conjecture that foreign governments are an important intended audience for international legal discourse: pro-international law positions are at least partly the product of lobbying by internationally oriented executive officials, for whom international law compliance is an important means of bolstering the country's international credibility. Legislators may or may not reap direct electoral benefits from taking such positions, but they certainly anticipate that appeasing the president will yield political capital. In this way, the executive's self-interested behavior of respecting certain international

law obligations may trickle down to Congress by prompting its members to take symbolic positions affirming the importance of international law compliance. Further research comprising interviews with current and former members of Congress and executive officials would provide insight into this mechanism.

Of course, neither of the supported models perfectly explains the congressional relationship with international law. Congress is hardly a monolith, and it certainly does not embrace or reject a given norm as one body. Predictably, the data show that some members of Congress are relatively international law-oriented and others are not. No doubt, some of this variation results from factors not captured in the data, such as their personal backgrounds or policy interests. Likewise, not all international law is received the same way by Congress; some norms are invoked frequently, while others are invoked rarely or ignored. As with most human decisionmaking, members of Congress have multiple reasons for choosing whether to take a particular stance. In essence, a nuanced summary of these results would hold that *some* members of Congress *sometimes* take positions supportive of *some* international law, though as a body, Congress does so far more than many would have expected. Regardless, the data provide useful insight into some of the broad forces behind how and why the federal legislature considers international law.

The findings also have at least two key ramifications: one practical and one theoretical. Both ramifications merit further study. First, perhaps legislators trumpeting the importance of upholding international law boosts public respect for it. Congress's emphasis on respect for international law reaches not just foreign leaders, but the American electorate. Some studies observe a similar phenomenon in Supreme Court decisions' effect on public opinion<sup>247</sup>. For example, evidence suggests that

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<sup>247</sup> E.g., James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 Pol. Res. Q. 419, 419 (2006) ("We argue that the ability of Court decisions to influence public opinion is a function of the salience of the issue, the political context, and case specific factors at the aggregate level."); Michael A. Unger, *After the Supreme Word: The Effect of McCreary County v. ACLU (2005) and Van Orden v. Perry (2005) on Support for Public Displays of the*

the Supreme Court's decision in *McCreary County v. ACLU of Kentucky*<sup>248</sup> (which held that a Ten Commandments display at a county courthouse violated the Establishment Clause), made those who heard of the decision more likely to oppose publicly sponsored Ten Commandments displays<sup>249</sup>. No studies have considered whether a similar effect might be at work for congressional arguments, but the principles underlying the Court's effect on public opinion suggest that it could. Given that many congressional statements are now broadcast widely via the Internet and cable news – and are amplified by various television and electronic social media and in campaign advertisements<sup>250</sup> – such congressional statements are likely reaching at least some segments of the public. And it is already suspected that public opinion on foreign policy, and by extension, international law issues, is “fickle and strongly susceptible to elite leadership.”<sup>251</sup> For these reasons, when members of Congress take public positions on these issues, it should move public opinion more than it would for domestic issues.

Hearing these views from elite officials may buttress public support for international law, which, in turn, creates a circular effect, further incentivizing legislators' nominal commitment to international law. If so, the constitutional choice to award the legislature the power to break international law sets off a chain of events that could ultimately affect rates of international law adherence. In essence, public opinion toward international law might both reflect and mutually reinforce the nominal value Congress gives to those norms.

Second, this Article's findings may also contribute to theories of how structural arrangements among domestic political actors can affect state management of international law. The U.S. constitutional order makes Congress the de facto enforcer of many international law commitments. By awarding Congress the power to breach international

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*Ten Commandments*, 36 Am. Pol. Res. 750 (2008) (finding that understanding the cases increases likelihood of attitude change about public display of the Ten Commandments).

<sup>248</sup> 545 U.S. 844 (2005).

<sup>249</sup> Unger, *supra* note 246, at 766.

<sup>250</sup> See *supra* text accompanying notes 101–102.

<sup>251</sup> Saunders, *supra* note 157, at 5.

law obligations entered into by the president, the Constitution indirectly incentivizes interbranch bargaining to facilitate foreign relations goals. The president may be induced to enlist Congress to help him reassure the sincerity of the United States' commitments to current and potential treaty partners.

International relations liberals have argued that studies of how states relate are incomplete unless they consider the effect of intragovernmental relationships<sup>252</sup>. By showing how government structure and intragovernment politics can impact a state's international law compliance, these findings buttress the liberalist idea that explanations of state behavior benefit from attention to domestic politics. These findings also show how the converse can be true. Some government actors derive benefits from their state's status as a law-abiding world citizen. It makes sense that those actors would bargain with other policymakers to facilitate that good citizenship. And that internationally driven bargaining, may, in turn, foster a more internationally oriented domestic policy.

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<sup>252</sup> See, e.g., Milner, *supra* note 18, at 3–4.

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