Duke Law Journal

HOW TO INFLUENCE STATES: SOCIALIZATION AND INTERNATIONAL HUMAN RIGHTS LAW

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ABSTRACT

Regime design choices in international law turn on empirical claims about how states behave and under what conditions their behavior changes. Substantial empirical evidence suggests

three distinct mechanisms whereby states and institutions might influence the behavior of other states: coercion, persuasion, and acculturation. Several structural impediments preclude effective implementation of coercion- and persuasion-based regimes in human rights law—yet these models of social influence inexplicably predominate in international legal studies. In this Article, we first describe in some detail the salient conceptual features of each mechanism of social influence. We then link each of the identified mechanisms to specific regime design characteristics—identifying several ways in which acculturation might occasion a rethinking of fundamental regime design problems in human rights law. Through a systematic evaluation of three design problems—conditional membership, precision of obligations, and enforcement methods—we elaborate an alternative way to conceive of regime design. We maintain that (1) acculturation is a conceptually distinct social process through which state behavior is influenced; and (2) the regime design recommendations issuing from this approach defy conventional wisdom in international human rights scholarship. This exercise not only recommends reexamination of policy debates in human rights law, it also provides a conceptual framework within which the costs and benefits of various design principles might be assessed. Our aim is to improve the understanding of how norms operate in international society with a view to improving the capacity of legal institutions to promote respect for human rights.

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INTRODUCTION

International regime design questions are essentially empirical in nature.[1] Addressing them requires nothing short of understanding the social forces that shape the behavior of states—whether rewards and penalties, reasoned arguments, or concerns about status might influence recalcitrant states (and individuals). In this Article, we identify three specific mechanisms for influencing state practice: coercion, persuasion, and acculturation. We also describe the distinct, and sometimes competing, logic of each mechanism. Optimal regime design, we contend, is impossible without identifying and analytically foregrounding the mechanisms of influence and their discrete characteristics. We consider in detail how these mechanisms of social influence might occasion a rethinking of fundamental regime design issues in international human rights law.

The increasing exchange between international relations scholarship and international legal scholarship illuminates some of the difficulties involved in regime design and offers useful insights to

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1.   Drawing on international relations literature, we use the concept of "regime" to refer to the formal and informal aspects of a regulatory environment. *See* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983) ("Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.").

resolve them.[2] Much current international relations research focuses on theoretical and empirical issues concerning human rights and state practice.[3] This work has inspired legal analyses of international human rights regimes. This groundbreaking "first generation" of empirical international legal studies demonstrates that international law "matters."[4] Nevertheless, the existing literature does not adequately account for the regime design implications of this research. Regime design debates often turn on unexamined or undefended empirical assumptions about foundational matters such as the conditions under which external pressure can influence state behavior, which social or political forces are potentially effective, and the relationship between state preferences and material and ideational structure at the global level. Moreover, prevailing approaches to these problems are predicated on a thin and underspecified conception of the mechanisms for influencing state practice.[5] What is needed is a "second generation" of empirical international legal studies aimed at clarifying the mechanics of law's influence. This second generation, in our view, should generate concrete, empirically falsifiable propositions about the role of law in state preference formation and transformation.

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2. *See, e.g.*, Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2002); Anne-Marie Slaughter, *International Law and International Relations*, 285 RECUEIL DES COURS 9 (2000).

3. *See* Hans Peter Schmitz & Kathryn Sikkink, *International Human Rights*, *in* HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 2, at 517 (offering a survey of the existing literature).

4. *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1939 (2002); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1835 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 337–66 (1997); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599 (1997) (book review). We have previously taken a first generation approach in analyzing aspects of human rights law. *See* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 173–78 (2003).

5. This is a widely recognized deficiency of constructivist scholarship in international relations. *See, e.g.*, Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325 (1998) ("[C]onstructivism, while good at the macrofoundations of behavior and identity (norms, social context), is very weak on the microlevel. It fails to explore systematically how norms connect with agents."); Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487, 488 (2001) (observing that constructivists "have not been very successful in explaining the microprocesses about how precisely actors are exposed to, receive, process, and then act upon the normative arguments that predominate in particular social environments, such as international institutions").

First-generation scholarship in international human rights law provides an indispensable but plainly incomplete framework. Prevailing approaches suggest that law changes human rights practices by either (1) coercing states (and individuals) to comply with regime rules,[6] or (2) persuading states (and individuals) of the validity and legitimacy of human rights law.[7] In our view, the former approach fails to grasp the complexity of the social environment within which states act, and the latter fails to account for many ways in which the diffusion of social and legal norms occurs. Indeed, a robust cluster of empirical studies in interdisciplinary scholarship documents particular processes that

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6. An important strand of international legal scholarship accordingly adheres to the coercion model. *See, e.g.*, Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 970 (2000) (book review); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. S115, S124 (2002) [hereinafter Goldsmith & Posner, *Moral and Legal Rhetoric*]; Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999) [hereinafter Goldsmith & Posner, *Customary International Law*]; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1865–68 (2002); Hathaway, *supra* note 4, at 2020.

7. The persuasion model is also widely endorsed in legal scholarship. *See, e.g.*, THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 8 (1995) [hereinafter FRANCK, FAIRNESS IN INTERNATIONAL LAW]; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 183–94 (1990) [hereinafter FRANCK, LEGITIMACY]; Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 3 (2001); Helfer & Slaughter, *supra* note 4, at 278; Koh, *supra* note 4, at 2603. Dean Anne-Marie Slaughter's influential work on transgovernmental networks also relies principally on notions of persuasion. *See* Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177, 205 (Michael Byers ed., 2000) (describing transgovernmental networks in which "[t]he dominant currency is engagement and persuasion"); *see also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 51 (2002) ("[W]hen networks promote regulatory change, change occurs more through persuasion than command."). Dean Slaughter and Professor Raustiala's work derives, in significant part, from the school of "managerialism" pioneered by Professors Abram and Antonia Chayes. Professors Chayes and Chayes's project understands persuasion as central. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 25 (1995) ("[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public."); *id.* at 26 ("Persuasion and argument are the principal engines of this process . . . ."). Dean Koh's work derives more directly from political science scholarship concerning transnational advocacy networks. *See, e.g.*, Koh, *supra* note 4, at 2645–59. As Professor Rodger Payne's survey of that scholarship explains, "persuasion is considered the centrally important mechanism for constructing and reconstructing social facts." Rodger A. Payne, *Persuasion, Frames, and Norm Construction*, 7 EUR. J. INT'L REL. 37, 38 (2001).

socialize states in the absence of coercion or persuasion. These studies conclude that the power of social influence can be harnessed even if (1) collective action problems and political constraints that inhibit effective coercion are not overcome and (2) the complete internalization sought through persuasion is not achieved.[8] We contend that this scholarship now requires a reexamination of the empirical foundations of human rights regimes.

In this Article, we provide a more complete conceptual framework by identifying a third mechanism by which international law might change state behavior—*acculturation*. By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self. Acculturation encompasses a number of microprocesses including mimicry, identification, and status maximization. The touchstone of this mechanism is that identification with a reference group generates varying degrees of cognitive and social pressures—real or imagined—to conform.[9] We do not suggest that international legal scholarship

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8. *See* Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1753–54 (2003) (outlining a general theoretical model founded on acculturation mechanisms). We should note that some international legal scholars—most notably Koh—advance theories relying in part on mechanisms that resemble what we call acculturation. *See, e.g.*, Koh, *supra* note 4, at 2646 (suggesting that "habitual obedience" is part of the process of norm incorporation). Koh, however, has not identified what role, if any, global-level acculturation processes might play in his theoretical model. In Koh's model, processes that most closely resemble acculturation occur at the final stage of norm implementation; they are governed primarily by bureaucratic and administrative impulses to follow already accepted legal rules. *See, e.g., id.* at 2655 (explaining that "institutional habits lead nations into default patterns of compliance"); *see also* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 651–53 (1998) (describing "bureaucratic compliance procedures" as the cause for habitual compliance). As mentioned above, Koh's discussion of global-level norm diffusion borrows from political science scholarship on transnational advocacy networks, which emphasizes the mechanism of persuasion. *See supra* note 7. That said, we consider our project an extension of Koh's and others' work on transnational norm diffusion. We intend to supplement that larger constructivist agenda by isolating the microprocesses of social influence.

9. This insight is most fully developed in the "new institutionalism" in the social sciences. Foundational works include THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); W. RICHARD SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS: STRUCTURAL COMPLEXITY AND INDIVIDUALISM (1994); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 340 (1977); Lynne G. Zucker, *Institutional Theories of Organization*, 13 ANN. REV. SOC. 443, 443–64 (1987) [hereinafter

has completely failed to identify aspects of this process. Rather, we maintain that the mechanism is underemphasized and poorly understood, and that it is often conflated (or even confused) with other constructivist mechanisms such as persuasion. Differentiating the mechanism of acculturation and specifying the microprocesses through which it operates are profoundly important, however, for addressing questions pertaining to the adoption of international legal norms. Indeed, each of the three mechanisms—coercion, persuasion, and acculturation—is likely to have distinct implications along a number of dimensions, including the durability of norms, the rates and patterns of adoption, and the depth of compliance.

Additionally, we demonstrate how a close analysis of the characteristics and function of each mechanism matters for regime design. We link each of the three mechanisms of social influence to specific regime characteristics—identifying several ways in which identifying acculturation as distinct from the better-understood mechanisms of coercion and persuasion may occasion a rethinking of fundamental design problems in human rights law. In short, we reverse-engineer structural regime design principles from the salient characteristics of underlying social processes. We maintain that (1) acculturation is a conceptually distinct social mechanism that influences state behavior and (2) the regime design recommendations issuing from acknowledging the role of acculturation defy conventional wisdom in international human rights scholarship. We contend that, without this understanding, several characteristics of international society will frustrate regime design models that seek compliance with human rights law solely by coercing and persuading noncomplying states.

Careful readers may argue that the best approach to regime design should incorporate elements of all three mechanisms. This argument reflects the view that the identified mechanisms reinforce each other through a dynamic relationship among them that is sacrificed when a regime emphasizes one mechanism to the exclusion of others. This is an important point, and it is almost certainly correct. However, the kind of analysis contemplated by this line of criticism (i.e., the development of an integrated theory of regime design accounting for each mechanism) first requires, in our view, identification and clear differentiation of these mechanisms. This

Zucker, *Institutional Theories*]; Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOC. REV. 726, 726 (1977) [hereinafter Zucker, *Role of Institutionalization*].

conceptual clarification is a first step, which enables subsequent work aimed at identifying the conditions under which each of the mechanisms would predominate, potentially reinforcing or frustrating the operation of the others. Moreover, we think it useful to link specific mechanisms to concrete regime design problems. Doing so illustrates the design features suggested by each and further clarifies the conceptual commitments of each mechanism. Our analysis of regime design problems yields three models of human rights regimes built on each of the mechanisms. But we do not suggest that any regime does or should exhibit all of the features of a single mechanism.[10]

Before we proceed with our analysis, it is important to note the special characteristics of human rights regimes that bracket our discussion and that make the investigation of socialization processes especially productive in this arena. Most international regimes seek to facilitate cooperation or coordination among states.[11] The global promotion of human rights, however, is importantly different from both types of regimes.[12] For several reasons, the prevalence of human rights violations is not reducible to a simple collective action problem. First, states have substantial capacity to promote and protect human rights within their territory without coordinating their efforts with

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10. In this sense, we offer our application of the mechanisms to regime design issues in the spirit of Max Weber's "ideal types." *See generally* Max Weber, *"Objectivity" in Social Science and Social Policy*, *in* THE METHODOLOGY OF THE SOCIAL SCIENCES 49 (Edward A. Shils & Heary A. Finch eds. & trans., 1949). Ideal types are theoretical constructs that model certain aspects of the social world. These constructs are useful because they serve as the basis for a particular brand of comparative analysis. By comparing an ideal type with a particular historical (observable) case, one can determine the extent to which the elements emphasized in the ideal type occur in reality. In other words, the ideal type is a useful tool that permits an assessment of the extent to which certain attributes or processes exist in a particular case. *Id.*

11. Most international regimes confront pressing collective action problems. *See generally* Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985) (describing the basic structure of various collective action problems).

12. These distinctive features are well understood. *See, e.g.*, Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 217 (2000) ("[I]nternational human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities. In contrast to most international regimes, moreover, human rights regimes are not generally enforced by interstate action."); *see also* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 119–127 (2005) (arguing that modern multilateral human rights treaties exert little influence on how states choose to behave because these treaties are not self-enforcing and lack effective external enforcement).

other states. Without question, states retain some substantial measure of effective autonomy in this area. Second, many states have little clear interest in promoting and protecting human rights abroad. Although "bad actors" impose externalities on other states in extreme cases (for example, when poor human rights conditions trigger massive refugee flows), these externalities arise only sporadically and typically affect only a few (bordering) states. Third, many states have no interest in promoting and protecting human rights domestically. Some states are simply willing to violate human rights when it is convenient to do so, and they have no interest in accepting structural commitments that may alter their current decision processes. Indeed, one of the central regime design problems in human rights law is how best to influence "bad actors" to make fundamental changes. The question whether international law can promote human rights norms may be recast, in an important sense, as how human rights regimes can best harness the mechanisms of social influence.

The task of designing effective human rights regimes is further complicated by several structural characteristics of international society that undercut the potential effectiveness of some strategies. Consider two. First, international human rights norms are not self-enforcing.[13] This point issues from the fact that human rights regimes do not address coordination problems and that states have no clear, direct interest in securing human rights protection in other states. Second, good faith participants in such regimes are generally unwilling or unable to shoulder the enforcement costs necessary to coerce recalcitrant states to comply with human rights norms. This "enforcement deficit"—exacerbated by high enforcement costs and negligible direct returns—is a political reality of the current international order.

The Article proceeds in four parts. In Part I, we introduce the three mechanisms by which actors and institutions influence other actors (and their practices). We emphasize the conceptual core of each mechanism, analyzing in some detail the ways in which each is distinct from the others. This exposition also identifies the schools of thought and research programs that suggest the presence and characteristics of each. We then apply these three mechanisms to three foundational regime design problems in human rights law. In

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13.   GOLDSMITH & POSNER, *supra* note 12, at 109–10.

Part II, we address the problem of membership—how best to define the regime community and articulate regime boundaries. We then consider, in Part III, the ways in which each mechanism would approach the problem of defining the substantive obligations around which a legal community is built. As an important instance of this broad problem, we analyze the value of rule precision in defining prescribed and proscribed conduct. In Part IV, we discuss how each mechanism would approach the problem of compliance and effectiveness—specifically how regimes might directly discourage undesirable behavior and encourage desirable behavior. In short, we assess the implications of each mechanism for common regime design problems in human rights law by analyzing the ways in which design recommendations issue from the underlying theory of social influence. As a means of moving this discussion forward for future research, we conclude briefly, in Part V, with some recommendations for developing an integrated regime design model.

I. THREE MECHANISMS OF SOCIAL INFLUENCE

According to conventional wisdom, there are two ways in which international law and international regimes change state behavior (if at all): coercion and persuasion.[14] These explanations of state behavior are conceptually coherent, empirically supported, and important. However, substantial evidence suggests that the two approaches do not exhaust the ways in which actors and institutions exert influence on the behavior of others.[15] As introduced above, we suggest a third mechanism, acculturation, whereby conformity is elicited through a range of socialization processes. To develop the typology further, we first discuss in more detail the character of the typology itself. We then describe the attributes of each mechanism. In this Part, we seek only to model generally the three mechanisms. In the remainder of the Article, we apply these models to several concrete problems of regime design in human rights law.

Before we proceed, it is useful to make a couple of points about the state of the field in international relations and international law as it pertains to these mechanisms. Extending at least two decades back,

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14.   *See, e.g.*, Moravcsik, *supra* note 12, at 220 ("Existing scholarship seeking to explain why national governments establish and enforce formal international human rights norms focuses on two modes of interstate interaction: coercion and normative persuasion.").

15.   *See infra* Part I.C.

scholars have generally divided into two camps: rationalists and constructivists. The former emphasizes military-economic power and global material structure, whereas the latter emphasizes norms and global ideational structure.[16] Despite the considerable accomplishments of both camps, the microprocesses of social influence are often underspecified, underanalyzed, or, at best, underexplained. Several important questions merit more sustained reflection. For example, how exactly do norms change behavior or attitudes? Do social sanctions impose costs that states weigh against other interests, or do social sanctions function more as cognitive cues? If one mechanism through which norms influence actors is "persuasion," what exactly are the microprocesses by which persuasion works? Our project calls for reorienting the academic discussion toward such issues of microprocess. We discuss how the mechanisms of coercion and persuasion work, in part, by contrasting them with the third mechanism of acculturation.

Initially, note that these mechanisms are essentially theories of how preferences form and the conditions under which preferences change. These theories vary in their claims about whether, and to what degree, international institutions prompt endogenous change in the preferences and identities of actors. This immediately suggests that our project is linked to ontological debates between rationalists and constructivists in international relations theory.[17] The typology that we develop here does not track these debates. Indeed, many constructivist scholars rely on coercion as a lever of change. These scholars suggest that norms and ideas matter in international politics in part because they provide a reservoir of symbolic authority that may, in various ways, be brought to bear on recalcitrant states. For example, socialization processes may exert direct influence over third parties (e.g., donor countries), who in turn use traditional coercive techniques to effect compliance in the target state. In this vein, Professors Margaret Keck and Kathryn Sikkink argue that transnational activist networks utilize international norms to persuade domestic audiences to coerce target governments.[18] Likewise, many rationalist scholars suggest that the social context of

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16.   ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 33–38 (1999).

17.   *See* James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, *in* HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 2, at 52.

18.   MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 16–25 (1998).

international institutions (including the attendant structural opportunities for persuasion and learning) influences the effectiveness of traditional coercive techniques. For example, Professor Lisa Martin argues that threats made within a highly institutionalized environment are more credible because of the greater ''audience costs'' in this social setting.[19] And Professor Leonard Schoppa suggests that coercive tactics are more effective when they accord with widely shared procedural norms governing international bargaining.[20] It is fair to say that rationalists emphasize the coercion mechanism[21] and that constructivists emphasize the persuasion mechanism,[22] but the rationalist-constructivist debate concerns matters that are, for the most part, beyond the scope of this Article. Our typology outlines the microprocesses by which social context influences actors—without building into these models additional assumptions about the character of actors. Conventional approaches de-emphasize, and often ignore, other ways in which institutions and actors exert influence.[23]

One aspect of the prevailing theoretical landscape is that acculturation sometimes appears obliquely in constructivist accounts of human rights law. That is, constructivist scholars, in describing the mechanics of "persuasion," occasionally slip into accounts that rely on various aspects of acculturation.[24] Surveys of constructivist

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19. Lisa L. Martin, *Credibility, Costs, and Institutions: Cooperation on Economic Sanctions*, 45 WORLD POL. 406, 413 (1993).

20. Leonard J. Schoppa, *The Social Context in Coercive International Bargaining*, 53 INT'L ORG. 307, 310 (1999).

21. *See, e.g.*, Daniel W. Drezner, *Introduction: The Interaction of Domestic and International Institutions*, *in* LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS 1, 12–13 (Daniel Drezner ed., 2003) (associating coercion techniques with "the neorealist paradigm"); Johnston, *supra* note 5, at 489–90 (noting that neorealist theories often overlook techniques other than coercion).

22. *See, e.g.*, Johnston, *supra* note 5, at 495 (arguing that a focus on internalization causes constructivists to "focus on persuasion"); Payne, *supra* note 7, at 38 (asserting that constructivists focus on persuasive messages).

23. *See, e.g.*, Drezner, *supra* note 21, at 11; Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 380 (1999).

24. *See, e.g.*, Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. INT'L STUD. 519, 526–28 (2001); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 14 (Thomas Risse et al. eds., 1999) ("In the area of human rights, persuasion and socialization often involve processes such as shaming and denunciations . . . . Persuasion is also not devoid of conflict. It often involves not just reasoning with opponents, but also pressures, arm-twisting, and sanctions.").

scholarship, however, often expressly identify persuasion as the central mechanism of social influence.[25] This failure to differentiate between importantly distinct social processes leaves undone several important tasks, including defining the elements that differentiate persuasion from social sanctions, examining whether social sanctions exhaust the forms of acculturation, and determining when techniques of persuasion and acculturation conflict. In the following discussion, we draw from empirical studies that focus squarely on processes of acculturation to define the distinctiveness and significance of each mechanism.

In this Part, we develop in some detail the meaning of each of the three mechanisms and briefly describe the research suggesting their presence and general features. We do not attempt to prove or disprove the empirical validity of the identified causal mechanisms. In our view, substantial evidence suggests that each of these modes of social influence occurs in global politics and that there are conditions under which each is expected to predominate. An open question is how the international community might employ this burgeoning empirical record to build more effective, more responsive human rights institutions. We consider each mechanism in turn.

A. Coercion

The first, and most obvious, social mechanism is coercion—whereby states and institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through material rewards and punishments.[26] Of course, coercion does not necessarily involve any change in the target actor's underlying preferences. For example, even if state *A* would prefer to continue practice *X*, it may discontinue the practice to avoid the sanctions threatened by states *B*, *C*, and *D*. Note that the coercive gesture of states *B*, *C*, and *D* would prove ineffective if state *A* perceived that the expected benefit of practice *X* exceeded the expected cost of the threatened sanctions. Take a more concrete example. The United States, under the Foreign Assistance Act, denies foreign assistance to states "engag[ing] in a consistent pattern of gross violations of

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25. *See, e.g.*, Johnston, *supra* note 5, at 495 ("The focus on internalization tends to lead constructivists to focus on persuasion."); Payne, *supra* note 7, at 38 (pointing out that "persuasion is considered the centrally important mechanism" for constructivists).

26. *See, e.g.*, Johnston, *supra* note 5, at 489–94 (noting that classic international relations theories focus on "realpolitik pursuits of interest"); *see also* sources cited *supra* note 6.

internationally recognized human rights."[27] Any state denied assistance on this basis is thereby coerced to alter its behavior. Under the logic of coercion, states and institutions change the behavior of other states not by reorienting their preferences but by changing the cost-benefit calculations of the target state. Also, although international institutions do not reconfigure state interests and preferences, they may, under certain conditions, constrain strategic choices by stabilizing mutual expectations about state behavior.[28] Put simply, states change their behavior because they perceive it to be in their material interest to do so.

Theories suggesting the predominance of coercion build on more general theories about the character of international politics. Proponents of this school of thought often contend that the material distribution of power among states essentially determines state behavior.[29] Normative and institutional developments thus reflect the interests of powerful states,[30] and compliance with these norms is largely a function of powerful states' willingness to enforce them.[31] Consistent with this view, international institutions facilitate state cooperation and coordination by reducing transaction costs and overcoming other collective action problems. This perspective is typically, though not exclusively, associated with "rationalist" or rational choice approaches to international relations. As noted above, however, coercion plays an important role in constructivist models of state behavior as well.[32]

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27.   22 U.S.C. § 2151(a) (2000).

28.   Even if international institutions do not further the coercive enterprise directly, they might define more clearly what counts as a cooperative move. *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 51–55 (1984) (summarizing the process of international cooperation and "policy coordination"); Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INT'L ORG. 31, 35–38 (1997).

29.   *See generally* NEOREALISM AND ITS CRITICS (Robert O. Keohane ed., 1986) (elaborating the foundations of this school of thought).

30.   STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (2001); Goldsmith & Posner, *Customary International Law*, *supra* note 6, at 1174–75.

31.   Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 139, 165–67 (Volker Rittberger ed., 1993); A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 101–11 (1999).

32.   *See supra* notes 18–20 and accompanying text.

B. *Persuasion*

The second mechanism of social influence is persuasion—the active, often strategic, inculcation of norms.[33] Persuasion theory suggests that international law influences state behavior through processes of social "learning" and other forms of information conveyance.[34] Persuasion "is not simply a process of manipulating exogenous incentives to elicit desired behavior from the other side," but rather "requires argument and deliberation in an effort to change the minds of others."[35] Persuaded actors "internalize" new norms and rules of appropriate behavior and redefine their interests and identities accordingly.[36] The touchstone of this approach is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice.[37] That is, persuasion occurs when actors actively assess the *content* of a particular message—a norm, practice, or belief—and "change their minds."[38]

Next, consider how persuasion works—a matter explored in depth in a vast, interdisciplinary literature.[39] At the risk of

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33. KECK & SIKKINK, *supra* note 18, at 16; Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 894–909 (1998); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1, 1 (2000). For important legal arguments relying on a persuasion mechanism, see FRANCK, FAIRNESS IN INTERNATIONAL LAW, *supra* note 7, at 40–46, and Helfer & Slaughter, *supra* note 4, at 278.

34. *See, e.g.*, MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 141 (1996) (arguing that even "[n]ormative claims become powerful and prevail by being persuasive").

35. Alastair Iain Johnston, *The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors*, *in* LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS, *supra* note 21, at 145, 153.

36. *See, e.g.*, Jeffrey T. Checkel, *Norms, Institutions, and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 98–99 (1999) (illustrating that the diffusion of ideas led Germany to develop new norms and behaviors with respect to citizenship and national minorities); Koh, *supra* note 4, at 2646 ("[A] transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.").

37. This is a long-held view in social psychology. *See, e.g.*, CARL IVER HOVLAND ET AL., COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE 10–12, 36–38 (1953) (outlining the steps in the persuasion process, including attention, comprehension, and acceptance of message).

38. *See, e.g.*, Johnston, *supra* note 5, at 496 ("[Persuasion] involves changing minds, opinions, and attitudes about causality and affect (identity) in the absence of overtly material or mental coercion.").

39. *See* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE (James Price Dillard & Michael Pfau eds., 2002) [hereinafter PERSUASION HANDBOOK] (surveying literature across disciplines); PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, THE

oversimplifying this rich and varied body of work, we highlight two factors that determine, in substantial part, the persuasiveness of counterattitudinal messages. The first and most important technique of persuasion is "framing." The basic idea is that the persuasive appeal of a counterattitudinal message increases if the issue is strategically framed to resonate with already accepted norms.[40] Many studies of this technique emphasize the role of strategic "norm entrepreneurs," who manipulate frames to resonate with target audiences.[41] One widely studied and highly successful example of such strategic framing is the campaign to ban antipersonnel landmines. The campaign—which culminated in the Ottawa Convention banning the production and use of the weapons—successfully framed the issue in terms of the "indiscriminate nature and effects" of landmines, thereby linking the issue with a universally accepted principle of humanitarian law (and other successful campaigns against weapons of mass destruction).[42]

PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 127–67 (1991) (surveying social psychology literature); Diana Mutz et al., *Political Persuasion: The Birth of a Field of Study*, *in* POLITICAL PERSUASION AND ATTITUDE CHANGE 1, 1–17 (Diana Mutz et al. eds., 1996) (surveying political science research).

40. *See, e.g.*, KECK & SIKKINK, *supra* note 18, at 17–18; David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, *in* FROM STRUCTURE TO ACTION: COMPARING SOCIAL MOVEMENT RESEARCH ACROSS CULTURES 197 (Bert Klandermans et al. eds., 1988); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 467–75 (1986) (discussing types of frame alignment processes and transformations).

41. *See, e.g.*, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (defining "norm entrepreneurs" as individuals who "can alert people to the existence of a shared complaint and can suggest a collective solution. . . . (a) signaling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial"). International lawyers have developed the concept in the context of transnational politics. *See, e.g.*, Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 482 (1990) (defining transnational norm entrepreneurs as international nongovernmental organizations (NGOs) or individuals who (1) "mobilize popular opinion and political support both within their host country and abroad"; (2) "stimulate and assist in the creation of like-minded organizations in other countries"; (3) "play a significant role in elevating their objective beyond its identification with the national interests of their government"; and (4) often direct their efforts "toward persuading foreign audiences, especially foreign elites, that a peculiar . . . regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society"); *see also* Koh, *supra* note 4, at 2612 (arguing that William Wilberforce, Henry Dunant, William Ladd, and Elihu Burritt pioneered norm-generating developments).

42. Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613, 622–30 (1998).

A second technique of persuasion is "cuing" target audiences to "think harder" about the merits of a counterattitudinal message. Cuing is based on the idea that the introduction of new information often prompts actors to "engage in a high intensity process of cognition, reflection, and argument."[43] Substantial empirical evidence suggests that actors often change their beliefs when, faced with new information, they systematically examine and defend their positions.[44] Given its general features, this microprocess works best in iterated, highly institutionalized social environments wherein new information is routinely and systematically linked to broadly shared attitudes.[45] As a practical matter, documentation and study of the extent of human rights abuses (and the conditions under which abuses are likely) might cue states to reexamine current practices and positions— particularly within the framework of international human rights institutions. For example, the extensive documentation of gross human rights abuses in several Latin American military governments in the 1970s and 1980s prompted states to reconsider the scope and character of international human rights regimes.[46] Important changes followed in many intergovernmental organizations at the regional and international levels.[47] This example, however, should not encourage a narrow view of the kind of information likely to produce these cuing effects. Indeed, new information about the preferences of other states might prompt states to reexamine their own views or practices.[48] The new information need not concern matters endogenous to the international institution.

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43.   Johnston, *supra* note 5, at 496.

44.   *See* ZIMBARDO & LEIPPE, *supra* note 39, at 192–97 (summarizing important developments in the field).

45.   *See, e.g.*, James L. Gibson, *A Sober Second Thought: An Experiment in Persuading Russians to Tolerate*, 42 AM. J. POL. SCI. 819, 833–37 (1998).

46.   *See* KECK & SIKKINK, *supra* note 18, at 89–97 (summarizing these developments).

47.   *Id*.

48.   *See, e.g.*, Finnemore & Sikkink, *supra* note 33, at 895–905 (arguing that norm internalization occurs when the number of states accepting a norm reaches a "tipping point" triggering "norm cascades"); *cf.* Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1187 (1997) (noting that group identity and norm enforcement "are especially important to law and, in particular, to the relationship between law and 'norm cascades,'" which produce "large-scale behavioral shifts"); Sunstein, *supra* note 41, at 909 ("Norm bandwagons occur when small shifts lead to large ones, as people join the 'bandwagon'; norm cascades occur when there are rapid shifts in norms.").

Cuing often operates more like "teaching"—depending on the character of the issue and the predisposition of the relevant actors.[49] In some circumstances, actors and institutions might convince target audiences to discard previously held views by conveying authoritative information discrediting those views.[50] This specie of cuing is particularly important in addressing inadvertent or uninformed nonobservance of community standards.[51]

C. *Acculturation*

A burgeoning, interdisciplinary literature suggests another important mechanism of social influence—acculturation. By acculturation, we mean the general process of adopting the beliefs and behavioral patterns of the surrounding culture.[52] This mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self.[53] Acculturation encompasses a number of microprocesses, including orthodoxy, mimicry, identification, and status maximization.[54] Our claim is that individual behavior (and community-level behavioral regularities) is in part a function of social structure—the relations between individual actors and some reference group(s). Acculturation induces behavioral changes not only by changing the target actor's incentive structure or mind but also by changing the actor's social environment. In this Section, we first specify some of

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49. *See, e.g.*, FINNEMORE, *supra* note 34, at 135–39 (discussing the importance of the "interaction between international structures and local agents of change").

50. *See id.* at 34–68 (discussing the example of the United Nations Educational, Scientific, and Cultural Organization (UNESCO)).

51. *See, e.g.*, CHAYES & CHAYES, *supra* note 7, at 17–28; *see also* Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INT'L ORG. 609, 613–14 (2002).

52. *See generally* RUPERT BROWN, GROUP PROCESSES: DYNAMICS WITHIN AND BETWEEN GROUPS 53–64, 123–66 (2d ed. 2000) (describing the dynamics of this process and summarizing empirical research).

53. *See, e.g.*, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 9, at 1–38; SCOTT & MEYER, *supra* note 9, at 100–10 (discussing the institutional conditions that lead to diffusion of ideas and social persuasion); Meyer & Rowan, *supra* note 9, at 348–58; Zucker, *Institutional Theories*, *supra* note 9, at 450–60; Zucker, *Role of Institutionalization*, *supra* note 9, at 730–41.

54. *See, e.g.*, Elvin Hatch, *Theories of Social Honor*, 91 AM. ANTHROPOLOGIST 341 (1989) (summarizing cross-cultural research); Johnston, *supra* note 5, at 499–502 (summarizing research on this point across several disciplines); *see also* ROMANO HARRE, SOCIAL BEING: A THEORY FOR SOCIAL PSYCHOLOGY (1979) (providing a more extended statement of this research agenda in psychology and sociology).

the ways in which acculturation occurs. We then clarify the relationship between this mechanism and the other two previously discussed. Finally, we analyze (at a conceptually abstract level) how institutions might harness acculturation to socialize recalcitrant states.

1. *The Microprocesses of Acculturation.* The touchstone of acculturation is that varying degrees of identification with a reference group generate varying degrees of *cognitive* and *social pressures*—real or imagined—to conform.[55] The operation of this mechanism is best understood by reference to well-documented individual-level phenomena. One of the central insights of social psychology is that individual behavior and cognition reflect substantial social influence.[56] Actors, in an important sense, are influenced by their environment; indeed, this generalized influence is one important way that "culture" is transmitted and reproduced. Although culture is typically understood as "learned behavior," much of what actors absorb from their social environment is not simply "informational social influence."[57] Children, for example, do not simply learn a menu of culturally significant facts. Rather, the acculturation of children involves both the transmission of information and the inculcation of social values and norms. Social influence is a rich process—one that also includes "normative social influence" whereby actors are impelled to adopt appropriate attitudes and behaviors. We explain here the cognitive and social aspects of normative social influence.[58] We also identify evidence suggesting their presence and form. We do not intend to dwell on points that will strike many readers as obviously true. Our objective here is only to identify, with some conceptual precision, the salient general characteristics of the acculturation process.

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55. *See* ELLIOT ARONSON ET AL., SOCIAL PSYCHOLOGY 250–97 (4th ed. 2002) (identifying when people tend to conform to normative social influences).

56. *Id*.

57. *Id.* at 255–63.

58. As a conceptual matter, the cognitive and social processes identified are somewhat imprecise. Without question, some of the processes that we label "cognitive" are importantly "social" and vice versa. In addition, the cognitive and social microprocesses are mutually reinforcing. Although a more formal (and more extended) treatment would clarify the conceptual boundaries (and feedback loops) between these two levels of acculturation, such an analysis is beyond the scope of this Article. For our purposes, we need only identify some of the ways in which acculturation works—and we need only specify these microprocesses with sufficient precision to facilitate a sensible comparison with coercion and persuasion.

First, acculturation is propelled by cognitive pressures. Actors in several respects are *driven* to conform. These internal pressures include (1) social-psychological costs of nonconformity (such as dissonance associated with conduct that is inconsistent with an actor's identity or social roles),[59] and (2) social-psychological benefits of conforming to group norms and expectations (such as the "cognitive comfort" associated with both high social status[60] and membership in a perceived "in-group"[61]). "Cognitive dissonance"—defined broadly as the discomfort caused by holding two or more inconsistent cognitions—is a useful example.[62] This phenomenon is part of a family of cognitive processes related to the basic human need to justify one's actions to oneself and others.[63] Substantial empirical evidence demonstrates that individuals experience discomfort—including anxiety, regret, and guilt—whenever they confront cognitions about some aspect of their behavior inconsistent with their self-concept (including any social roles central to their identity).[64] Individuals are highly motivated to minimize this dissonance by either changing their behavior or finding ways to justify their past behavior.[65] Therefore, there are internal pressures driving actors to act and think in ways consistent with the social roles and expectations internalized by such

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59. *See, e.g.*, JOHN C. TURNER, REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 68–69 (1987); Robert Axelrod, *Promoting Norms: An Evolutionary Approach to Norms*, *in* THE COMPLEXITY OF COOPERATION 44, 55–57 (Robert Axelrod ed., 1997); Christopher Barnum, *A Reformulated Social Identity Theory*, 14 ADVANCES IN GROUP PROCESSES 29 (1997).

60. *See, e.g.*, ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 31–33 (1985) (arguing that high status is a good itself—generating a range of psychological benefits); *see also* ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS 71–95 (1988) (discussing how the "sincere-manner" and "reputation" pathways lead individuals to develop moral sentiments).

61. *See, e.g.*, ROBERT B. CIALDINI, INFLUENCE: THE NEW PSYCHOLOGY OF MODERN PERSUASION 163–99 (1984) (suggesting that individuals are most likely to adhere to certain behavior if other individuals with whom they identify are displaying that behavior).

62. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); *see also generally* Elliot Aronson, *Dissonance, Hypocrisy, and the Self-Concept*, *in* COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 3, 3–19 (Eddie Harmon-Jones & Judson Mills eds., 1999).

63. *See* ARONSON ET AL., *supra* note 55, at 173–212.

64. *See id.* at 174–76.

65. *See, e.g.*, SHELLEY E. TAYLOR, POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTHY MIND 123–33 (1989) (summarizing various methods of dealing with dissonance, such as illusion, repression, and denial); Frederick X. Gibbons et al., *Cognitive Reactions to Smoking Relapse: The Reciprocal Relations Between Dissonance and Self Esteem*, 72 J. PERS. & SOC. PSYCHOL. 184, 192 (1997) (suggesting that people with high self-esteem are more defensive when faced with dissonance).

actors. An implication of this pressure is that, once actors internalize some role (or any other identity formation), they are impelled to act and think in ways consistent with the highly legitimated purposes and attributes of that role.[66] As a consequence, orthodoxy and social legitimacy are internalized as authoritative guides for human action.[67]

Second, acculturation is also propelled by social pressures—real or imagined pressures applied by a group. These pressures—which are no doubt more familiar to many readers—include (1) the imposition of social-psychological costs through shaming or shunning and (2) the conferral of social-psychological benefits through "back-patting" and other displays of public approval.[68] In short, actors hoard social legitimacy and social status, and they minimize social disapproval. Consider, for example, social-psychological studies of conformity. Substantial empirical evidence demonstrates that, in the face of real or perceived social pressure from a reference group, actors often change their behavior to conform to the behavioral patterns of the group.[69] Moreover, actors systematically conform (under the right conditions) even if the group is clearly wrong and even if there are strong incentives to be accurate.[70] Because this variant of acculturation results from external pressure, it often leads

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66. *See, e.g.*, E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, in THE SELF IN SOCIAL PSYCHOLOGY 152–71 (Roy F. Baumeister ed., 1999); E. Tory Higgins, *The "Self Digest": Self-Knowledge Serving Self Regulatory Functions*, 71 J. PERS. & SOC. PSYCHOL. 1062, 1067–72 (1996); E. Tory Higgins & John A. Bargh, *Social Cognition and Social Perception*, 38 ANN. REV. PSYCHOL. 369, 382–87 (1987).

67. One consequence is that actors seek reliable models of appropriate behavior. Therefore, actors "mimic" the behavior of other highly legitimated actors. This effect is well documented in the sociology of organizations literature. *See, e.g.*, W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS 124–28 (1995) (discussing, in the context of collective responses to institutional environments, how states mimic behavior).

68. *See, e.g.*, CIALDINI, *supra* note 61, at 23–27 (describing the many components of what the author terms "weapons of automatic influence"); Richard E. Petty et al., *Attitudes and Attitude Change*, 48 ANN. REV. PSYCH. 609, 612–20 (1997). These microprocesses are well represented in the international law literature—though they are typically embedded in a coercion model of social influence. *See, e.g.*, Risse & Sikkink, *supra* note 24, at 11–35 (outlining a "spiral model" of socialization incorporating elements of coercion, persuasion, and shaming).

69. *See, e.g.*, ARONSON ET AL., *supra* note 55, at 250–97 (discussing the roles of conformity and social pressure).

70. *See, e.g.*, Robert S. Baron et al., *The Forgotten Variable in Conformity Research: Impact of Task Importance on Social Influence*, 71 J. PERS. & SOC. PSYCHOL. 915, 924 (1996) (providing two case studies that found that "heightening incentives for accuracy actually heightened participants' susceptibility to an inaccurate group consensus").

to public compliance with, but not private acceptance of, social norms.[71]

Importantly, actors obviously do not always bow to social pressure. The influential "social impact theory" provides one useful way to condense the empirical record into a small cluster of factors that determine the likelihood of success for social pressure. Social impact theory suggests that the likelihood of conformity turns on the strength, immediacy, and size of the group.[72] Each of these variables is positively correlated with effective social influence: (1) conformity with group norms becomes more likely as the importance of the group to the target actor increases (and as the importance of the issue to the group increases); (2) conformity increases as the target actor's exposure to the group increases; and (3) conformity increases—up to a point—as the size of the reference group increases.[73]

To summarize briefly, actors are amenable to social influence via acculturation processes. These processes—including orthodoxy, mimicry, and status maximization—mobilize internal and external pressures impelling actors, under the right conditions, to adopt socially legitimated attitudes, beliefs, and behaviors. Next we address a few important questions that derive from this foundation: whether this mechanism is importantly different than coercion and persuasion, and whether (and in what manner) states are amenable to this type of social influence.

2. *Acculturation as Incomplete Internalization: Distinguishing Persuasion.* Despite the obvious similarities, acculturation differs from persuasion in important respects. First, persuasion requires acceptance of the validity or legitimacy of a belief, practice, or norm—acculturation requires only that an actor perceive that an important reference group harbors the belief, engages in the practice,

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71. *See, e.g.*, ARONSON ET AL., *supra* note 55, at 264 (collecting citations to other research).

72. *See, e.g.*, Bibb Latané et al., *Measuring Emergent Social Phenomena: Dynamism, Polarization, and Clustering as Order Parameters of Social Systems*, 39 BEHAV. SCI. 1, 1–22 (1994); Bibb Latané, *The Psychology of Social Impact*, 36 AM. PSYCHOLOGIST 343, 343–54 (1981).

73. This last point requires some clarification. The empirical record suggests that group size is positively correlated with social influence/conformity up to a certain point (typically from three to eight or so), but then the effect diminishes rapidly. In other words, going from two to three group members matters far more than going from twenty-two to twenty-three or ninety-two to ninety-three. *See* ARONSON ET AL., *supra* note 55, at 275–77 (discussing the importance of group dynamics).

or subscribes to the norm. Second, persuasion requires active assessment of the merits of a belief.[74] Acculturation processes, in contrast, frequently operate tacitly; it is often the very act of conforming that garners social approval and alleviates cognitive discomfort.[75] Persuasion involves assessment of the *content* of the message (even if only indirectly); acculturation involves assessment of the *social relation* (the degree of identification) between the target audience and some group. Acculturation occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure—the relations between individual actors and some reference group. Acculturation depends less on the properties of the rule than on the properties of the relationship of the actor to the community. Because the acculturation process does not involve actually agreeing with the merits of a group's position, it may result in outward conformity with a social convention without private acceptance or corresponding changes in private practices.

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74. It is also important to note that we include in our conception of acculturation a microprocess identified in the persuasion literature. One well-documented finding is that the *relationship between the persuader and the target audience* may foster (or impede) "persuasion." That is, the "persuasiveness" of a message—controlling for its content—varies according to the relationship between the persuader and persuadee. Although this factor is not central in human rights literature, it is important to mention this dimension of acculturation because of its significance for institutional design in general. Again, the scholarship studying various manifestations of this dynamic is vast, but for our purposes we highlight one important point: substantial evidence suggests that positive affect relationships foster "persuasion." *See* PERSUASION HANDBOOK, *supra* note 39, at 289–328 (summarizing recent developments in this research). The idea here is simple. If the persuadee trusts, "likes," respects, or identifies with the persuader, the persuasiveness of claims advanced by the persuader increases. *See, e.g.*, James H. Kuklinski & Norman L. Hurley, *It's a Matter of Interpretation*, *in* POLITICAL PERSUASION AND ATTITUDE CHANGE, *supra* note 39, at 129–31; Petty et al., *supra* note 68, at 612–29 (reviewing empirical developments on attitudes and persuasion). In the international relations literature specifically, see Risse, *supra* note 33, at 20–21, arguing that "trust in the authenticity of the speaker is a precondition for the persuasiveness of a moral argument." Moreover, a related finding of these studies is that such affect relations are fostered in iterated, highly institutionalized environments. *Id.* Examples of this microprocess abound. Consider Professor Steven Ratner's study of the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe; Professor Ratner demonstrates that such "normative intermediaries," if perceived as impartial and legitimate, persuade states (and other parties to ethnic conflicts) to de-escalate tensions and embrace rule-of-law values in their dealings with each other. Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 678–83 (2000). In this example, the perceived impartiality and legitimacy of the persuader imbued him with normative authority and instilled trust in the target audience. *Id.* at 681–82. Because, in this scenario, the persuadee does not actively assess the content of the message, we classify this affect-driven "persuasion" as "acculturation."

75.   *See* tbl. 1.

These insights are obviously constructivist in that they emphasize the role of social interaction in preference and identity formation. As such, the acculturation mechanism shares many conceptual commitments with the persuasion mechanism. Indeed, it is fair to say that acculturation is, in many respects, part of the broader process of persuasion. That is, acculturation may serve as the cultural predicate for all acts of persuasion. Regardless of whether this claim is accurate, the analytical distinction between the two mechanisms is coherent and meaningful. Moreover, because complete "internalization" is often elusive in international affairs—particularly on many contentious human rights issues—international legal studies should fashion a framework for analyzing socialization that falls short of this standard. We maintain that social forces influence actors in many ways other than internalization and that law and legal institutions might harness these social forces to promote rule-of-law values.

Critics might argue that this distinction between acculturation and persuasion has no difference. There are two variants of this criticism: (1) the conceptual distinction is not amenable to systematic empirical testing because it is not falsifiable and (2) the conceptual distinction is so fine that no important regime design choices turn on it. Both variants miss the mark. First, substantial empirical evidence demonstrates the presence and importance of acculturation as a distinct mode of social influence.[76] The empirical research in psychology, sociology, and political science also strongly suggests the importance of processes of acculturation in shaping state identity, preferences, interests, and behavior.[77] Some of these studies emphasize the significance of group identification and cognitive frames in influencing state action.[78] The studies also predict spurious forms of compliance and peculiar patterns of norm diffusion associated with acculturation.[79] Second, this distinction, though fine, matters for regime design. As we analyze in great detail below, the

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76.   *See, e.g.*, ARONSON ET AL., *supra* note 55, at 173–212; SCOTT, *supra* note 67, at 44–45.

77.   *See generally* Goodman & Jinks, *supra* note 8, at 1753–65 (summarizing this empirical work).

78.   *See, e.g.*, John Boli, *World Polity Sources of Expanding State Authority and Organizations, 1870–1970*, *in* INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL 21 (George Thomas et al. eds., 1987); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 149–57 (1997).

79.   *See, e.g.*, Goodman & Jinks, *supra* note 8, at 1758–61; John W. Meyer et al., *supra* note 78, at 155–58 (describing "decoupling" and "expansive structuration").

unique characteristics of acculturation favor regime design choices that are antithetical to the choices suggested by persuasion.[80]

3. *Acculturation as Social Sanctions and Rewards: Distinguishing Coercion.* The distinction between acculturation and coercion also requires some clarification. Although the distinction is clear at a high level of abstraction, the way in which we define acculturation potentially blurs the distinction between the two at a lower level of abstraction. Recall that, on our view, acculturation processes include social sanctions and rewards, such as shaming and back-patting.[81] Many readers will justifiably think that this definition of acculturation eviscerates the distinction between coercion and acculturation and that, as a consequence, social sanctions and rewards should be part of the coercion category.

The conceptual distinction between coercion and acculturation, however, is straightforward. Coercion encompasses social sanctions that influence actors because those actors conclude that social costs will translate into material costs. Acculturation, on the other hand, includes these coercive elements only to the extent that social costs, in and of themselves, influence thought and action. This dimension of acculturation captures those circumstances in which actors conform to social pressure not because of a second-order calculation of the specific costs and benefits but rather because "conforming" and "belonging" themselves confer substantial affective returns ("cognitive comfort").[82] In addition, actors are engaged in the generalized pursuit of social legitimacy—and this orientation is deeply internalized.[83]

Simple coercion models cannot adequately account for these effects because the costs and benefits associated with specific decision points are too vague and diffuse to guide action in any meaningful sense. Indeed, economists recognize a sharp theoretical distinction between "material preferences" and "social preferences."[84] Moreover, there are good reasons to analyze pure social costs differently.

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80.   *See infra* Parts II–IV.

81.   *See supra* Part I.C.1.

82.   *See, e.g.*, TIM WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).

83.   *See, e.g.*, Johnston, *supra* note 5, at 501.

84.   *See, e.g.*, Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EUR. ECON. REV. 687, 689 (2002) (explaining the distinction).

Consider that these costs are virtually incalculable; indeed, much social science evidence suggests that actors do not attempt to calculate them in any systematic way.[85] In addition, substantial evidence suggests that actors systematically fail to forecast accurately their future affective states (and the impact that certain practices will have on those states).[86] In contrast, the expected influence and effects of material rewards are more amenable to conventional cost-benefit modeling.

4. *Acculturation and the State.* Although substantial evidence demonstrates that acculturation processes occur and, more precisely, how they take place, there is good reason to question whether states as such are amenable to acculturation. After all, much of the research suggesting the presence of this mechanism centers on the cognitive processes of individuals. Do states "identify" with a reference group in any meaningful sense? Do states respond to cognitive frameworks and social pressures? Substantial evidence strongly suggests, on both counts, that they do. As we summarize in an earlier article, there is a rich empirical (and theoretical) literature—so-called "world polity institutionalism"—documenting cultural and associational aspects of international politics that suggest the influence of acculturation on state action.[87] This scholarship has direct roots in the sociology of organizations and, more specifically, in empirical studies that demonstrate how the goals and composition of formal organizations such as corporations, universities, and public hospitals derive in considerable part from their wider social environment.[88] A methodologically simple, yet enormously useful, innovation is to

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85. Recent empirical work on cognitive organization suggests that actors often engage in affect-based decisionmaking rather than reason-based decisionmaking. *See, e.g.*, Melissa L. Finucane et al., *Judgment and Decision Making: The Dance of Affect and Reason*, *in* EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 327 (Sandra L. Schneider & James Shanteau eds., 2003) (describing the "affect heuristic"). Moreover, substantial evidence suggests that actors do not calculate utility systematically (or even reliably). *See, e.g.*, JONATHAN BARON, THINKING AND DECIDING 303–33 (3d ed. 2000) (describing multiple deficiencies in valuation); *id.* at 357–80 (describing common cognitive errors in quantitative assessments).

86. *See, e.g.*, Daniel Gilbert & Tim Wilson, *Affective Forecasting*, *in* 35 ADVANCES IN EXPERIMENTAL PSYCHOLOGY 345, 383 (Mark P. Zanna ed., 2003) (arguing that "affective forecast[ing]" is hindered by "misconstruing the nature of the future event, errors in recall of past emotional experiences, faulty affective theories, failures to correct for unique influences on forecasts, and framing").

87. Goodman & Jinks, *supra* note 8, at 1757–65.

88. SCOTT, *supra* note 67, at 44–45.

study the state as a formal organization—taking the sociology of organizations to the global level.

In organizational sociology, theories of acculturation predict that socialization processes will press organizations toward increasing "isomorphism"—that is, structural similarity across organizations.[89] These theoretical models also predict that increasing homogenization will not reflect the functional task demands of organizations.[90] Rather than correlating with local task demands, structural attributes and goals of an organization will correlate with attributes and goals of other organizations at the time.[91] When institutional conditions are favorable for acculturation, the evidence suggests that the previously identified cognitive and social pressures will encourage compliance with social norms.

Isolating these institutional conditions is more difficult. Nevertheless, the microprocesses of acculturation, particularly "social impact theory," suggests two requirements for the effective functioning of this mechanism: (1) embedding target actors in an institutionalized social setting and (2) institutionalizing at the group level preferred forms of identity.[92] The general directive is clear: change the individual's connection to the wider cultural community or change the content of culturally legitimated practices. The question is whether states, like other organizational forms, respond to and are in significant part reflections of their wider institutional environment.

Numerous empirical studies now suggest that states are significantly shaped and legitimated through their broader organizational environment.[93] States are highly legitimated actors in

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89. Zucker, *Institutional Theories*, *supra* note 9, at 452 (surveying the literature).

90. *See generally* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 9 (explaining the empirical predications of various institutional approaches); *see also generally* Zucker, *Institutional Theories*, *supra* note 9, at 443 (providing a general overview of institutional theories of organization).

91. *See, e.g.*, SCOTT, *supra* note 67, at 115–116.

92. Zucker, *Institutional Theories*, *supra* note 9, at 453.

93. Our approach is "constructivist" in that we emphasize the importance of social interaction. We advance the view that state structure, identity, and preferences are constructed by social forces. Nevertheless, our approach contrasts with conventional constructivist models in two respects: (1) we emphasize *top-down processes*; and (2) we identify *acculturation* (rather than habitualization and persuasion) as the causal mechanism that drives the emergence and diffusion of global scripts. We should emphasize at the outset that our approach avoids two common pitfalls in constructivist research. First, our approach is falsifiable in that it generates a range of concrete empirical predictions that facilitate the assessment of our approach against competing explanations. Second, our approach avoids the circularity problem endemic to some constructivist research. Indeed, constructivist research often fails to distinguish adequately

world society, and their formal structures (e.g., administrative bodies, policy commitments) substantially derive from institutionalized models promulgated at the global level.[94] These studies generally proceed by collecting quantitative data for all available states over several decades and employing analytic techniques—including event history analysis, regression analysis, and process tracing—to test predictions of acculturation. The studies demonstrate that states emulate standardized models of structural organization in areas such as environmental policy,[95] educational curricula,[96] militarization,[97] the laws of war,[98] and human rights.[99] As many commentators point out, the extent of isomorphism across states is remarkable, and it is

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between explanatory and outcome variables. The "new institutionalism" that we embrace distinguishes between "organizations" and "institutions": the concept of "organization" refers to the formal apparatus (and its purposes), whereas the concept of "institution" refers to all regulative and cognitive features of the organizational environment such as rules or shared beliefs. Of course, many "institutions" can also be understood as "organizations" depending on the object of the study. For example, in a study of the organizational features of hospitals, the state (including, perhaps most prominently, regulatory agencies) are part of the institutional environment within which hospitals operate. But, in a study of the organizational features of state regulatory agencies, it is the agencies themselves that are analyzed as "organizations" (and "institutions" in this study would include the salient features of the wider cultural environment in which the agencies are embedded). The important point is that our approach avoids circularity problems by clearly differentiating, as an analytic matter, explanatory variables (institutions) and outcome variables (organizations). *See generally* SCOTT, *supra* note 67; Goodman & Jinks, *supra* note 8.

94. *E.g.*, Meyer et al., *supra* note 78.

95. David John Frank et al., *Environmentalism as a Global Institution*, 65 AM. SOC. REV. 122, 122–26 (2000) [hereinafter Frank et al., *Environmentalism*]; David John Frank et al., *The Nation-State and the Natural Environment over the Twentieth Century*, 65 AM. SOC. REV. 96, 100–03 (2000) [hereinafter Frank et al., *The Nation-State*].

96. John W. Meyer, *Introduction* to JOHN W. MEYER ET AL., SCHOOL KNOWLEDGE FOR THE MASSES: WORLD MODELS AND NATIONAL PRIMARY CURRICULAR CATEGORIES IN THE TWENTIETH CENTURY 1–2 (1992); *see also* John W. Meyer et al., *World Expansion of Mass Education, 1870–1980*, 65 SOC. EDUC. 128, 131–32 (1992) [hereinafter Meyer et al., *World Expansion of Mass Education*].

97. *E.g.*, Dana P. Eyre & Mark C. Suchman, *Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach*, *in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 79, 86–87 (Peter J. Katzenstein ed., 1996).

98. *E.g.*, Martha Finnemore, *Rules of War and Wars of Rules: The International Red Cross and the Restraint of State Violence*, *in* CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875, at 149 (John Boli & George M. Thomas eds., 1999).

99. *See infra* notes 102–08 (discussing norm diffusion with respect to human rights standards).

seemingly inexplicable without reference to acculturation processes.[100] Importantly, the studies do not suggest that this structural convergence reflects actual practices or effects on the ground.[101] On the contrary, the convergence (across states) is accompanied by substantial and persistent "decoupling" (within states): official purposes and formal structure are disconnected from functional demands. Rather than correlating with local task demands, structural attributes and official goals of the state correlate in important ways with attributes and goals of other states in the world.

With respect to human rights, extensive research identifies these patterns of norm diffusion in fundamental areas of governance including welfare and labor policy,[102] civil rights guarantees,[103] and public order maintenance.[104] For example, the number of constitutions that include provisions committed to the state management of childhood and the right to education has increased dramatically.[105] A study of every national constitution in effect during the 1870–1970

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100. Meyer et al., *supra* note 78, at 144–45; *see* David John Frank et al., *What Counts As History: A Cross-National and Longitudinal Study of University Curricula*, 44 COMP. EDUC. REV. 29, 31–32 (2000) (considering "the ways in which world models of 'society' underlie changes in university history curricula"). *See generally* CONSTRUCTING WORLD CULTURE, *supra* note 98 (presenting a series of articles on this topic by various authors). Indeed, "institutionalists would expect roughly contemporaneous global change, regardless of objective technological conditions." Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 338 (1996).

101. Meaningful change, however, becomes possible as the incorporated elements of global culture accumulate. Several of the examples discussed below represent important success stories: women's suffrage, childhood education, and decolonization. *See supra* note 96 and accompanying text; *infra* notes 109–18, 126 and accompanying text. Our point here is only that global diffusion patterns and rates do not correlate with individual state preferences.

102. Andrew Abbott & Stanley DeViney, *The Welfare State as Transnational Event: Evidence from Sequences of Policy Adoption*, 16 SOC. SCI. HIST. 245, 266 (1992); David Strang & Patricia Mei Yin Chang, *The International Labor Organization and the Welfare State: Institutional Effects on National Welfare Spending, 1960–80*, 47 INT'L ORG. 235, 235 (1993); George M. Thomas & Pat Lauderdale, *State Authority and National Welfare Programs in the World System Context*, 3 SOC. FORUM 383, 383 (1988).

103. John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870–1970*, *in* INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL, *supra* note 78, at 72–73; *see also* David John Frank & Elizabeth H. McEneaney, *The Individualization of Society and the Liberalization of State Policies on Same-Sex Sexual Relations, 1984–1995*, 77 SOC. FORCES 911–12 (1999).

104. CONNIE L. MCNEELY, CONSTRUCTING THE NATION-STATE: INTERNATIONAL ORGANIZATION AND PRESCRIPTIVE ACTION 55–57 (1995); Meyer et al., *supra* note 78, at 158.

105. John Boli-Bennett & John W. Meyer, *The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870–1970*, 43 AM. SOC. REV. 797, 804 tbl.1 (1978).

period shows that the adoption of such constitutional provisions over time does not correlate with local forms of social organization (such as urbanization and national wealth) or with technical capacities of the relevant states.[106] Moreover, each group of newly established states shows a significantly higher probability of adopting such constitutional provisions than the preceding group of entrants.[107] The overall findings suggest that "[n]ational constitutions do not simply reflect processes of internal development," but rather "reflect legitimating ideas dominant in the world system at the time of their creation."[108]

Consider, also, state convergence with respect to women's rights. A leading study uses sophisticated analytic techniques to examine state definitions of political citizenship over a hundred-year period.[109] According to the study, once universal suffrage became a legitimating principle associated with the modern nation-state, state enactment of women's suffrage followed a pattern anticipated by theories of acculturation.[110] After an initial stage of early adopters, the number of states providing women the right to vote increased steeply and included most states before the rate of adoption tapered off; the likelihood that a state would adopt women's suffrage correlated with world trend lines; and adoption correlated far less with domestic political conditions once isomorphism took hold.[111] Additionally, an important finding indicates a "contagion" effect: once the norm was institutionalized, a strong predictor for whether an individual state would enact women's suffrage was whether other states in its region had done so in the past five years.[112] The overall findings suggest that, compared with local conditions such as the strength of domestic women's rights groups, "[c]ountries apparently are affected much less strongly by internal factors and much more strongly by shifts in the international logic of political citizenship."[113]

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106. *Id.* at 807–09.

107. *Id.* at 805.

108. *Id*.

109. *See* Francisco O. Ramirez et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990*, 62 AM. SOC. REV. 735, 738–39 (1997) (using event history analysis).

110. *Id.* at 743.

111. *Id.* at 741–42 & tbl.1.

112. *Id.* at 740.

113. *Id.* at 742.

These results are consistent with observations in other areas of women's rights. For example, a separate study of states in the western hemisphere examines how these governments made roughly contemporaneous commitments to eradicate violence against women.[114] Within a relatively short time span, "[n]early all American states . . . created national women's councils that include[d] domestic violence problems among their priorities, . . . approved legal changes that define[d] domestic violence as a crime, . . . launched educational campaigns to combat the problem, and . . . created social services for victims."[115] States also made these advances uniformly; no one state substantially exceeded, or distinguished itself from, the average set of commitments.[116] The extent of this isomorphism despite wide variations in national-level political, cultural, and social conditions is remarkable. Specifically, once the obligation to address domestic violence was institutionalized at the regional level, states joined the bandwagon despite dramatic differences in women's political power or access to economic resources at the national level.[117] Indeed, the study concludes that, at this stage of institutionalization, "international socialization is more important than domestic politics" in getting "nonconformist states to change their policies to meet the standards of new international norms."[118]

In general, the adoption of structural commitments or official policy goals in human rights does not necessarily entail concrete implementation. On the contrary, when states copy an internationally legitimated model that does not fit their local needs, one should expect a continued disjuncture between structural isomorphism (across states) and technical demands and results (within states). For example, the authors of the study of state management of childhood "d[o] not argue that constitutional rules in particular countries are likely to be 'implemented,' but, rather, that prevailing world ideologies are likely to be incorporated both ideologically and

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114.   Darren Hawkins & Melissa Humes, *Human Rights and Domestic Violence*, 117 POL. SCI. Q. 231, 235 (2002).

115.   *Id.* at 234; *see also id.* at 235 (finding that the states "share important similarities in the ways in which they identify national goals, institutionalize guidelines and procedures . . . and outline programs to prevent abuse and to treat victims").

116.   *Id.* at 234; *see also id.* at 234–35 (discussing other comparative studies).

117.   *Id.* at 255–56.

118.   *Id.* at 256.

organizationally."[119] The fact that local social and economic drivers do not explain when states adopt the observed constitutional provisions, and the fact that adoption of such constitutional guarantees does not correlate with technical capacities to implement the provisions, suggest that decoupling might persist. Similarly, the study of domestic violence finds that many of the official commitments remain "woefully underfunded"[120] and that subsequent implementation of these programs "is still unclear."[121] Indeed, as explained above with respect to the sociology of organizations in general, the theory of acculturation predicts cross-national isomorphism irrespective of local circumstances.[122] Because these models have developed universal authority and legitimacy, states follow the global scripts as members of world society despite the ineffectiveness (or even dysfunctionality) of resultant organizational forms.

We maintain that the evidence of structural isomorphism and decoupling discredit theories that explain state behavior solely in terms of global power politics. To clarify why this is so, we consider an important alternative explanation. Specifically, critics might accept that the empirical evidence indicates an external source of state organizational formation but might argue that the external source could be powerful actors compelling states through material penalties or rewards to adopt particular practices. This account, however, is unpersuasive. First, although one would assume that poorer countries are more susceptible to such external coercion, the empirical studies discussed above show that norm adoption does not correlate with the economic wealth or development of countries.[123] Second, this explanation would predict that mimicry (and, hence, isomorphism) would vary depending on the presence, power, and influence of relevant audiences. Substantial evidence, however, shows that isomorphism will frequently occur regardless of whether there is external political pressure to conform. For example, governments follow global scripts concerning the proper orientation of state policy

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119.   John Boli-Bennett & John W. Meyer, *Constitutions as Ideology*, 45 AM. SOC. REV. 525, 526 (1980); *cf.* Boli-Bennett & Meyer, *supra* note 105, at 809 ("[P]olitical ideologies defining the state as responsible for childhood . . . . are worldwide creatures most fully expressed in societies . . . where the general depiction of the state as ultimately responsible for social life and social progress is strongest.").

120.   Hawkins & Humes, *supra* note 114, at 236.

121.   *Id.* at 257.

122.   *See supra* text accompanying notes 89–92.

123.   *See* sources cited *supra* notes 83–100.

toward children—even though powerful states do not exhibit a strong interest in monitoring or forcing others to adopt such an ideology.[124] Third, powerful states are often late adopters in some issue areas, including human rights law.[125] Fourth, counterhegemonic norms exhibit the same pattern of diffusion as prohegemonic norms, suggesting that conventional conceptions of global power politics provide an inadequate descriptive account. One important example is the norm of self-determination (understood as a fundamental human right), which supported decolonization and motivated many indigenous rights campaigns.[126] Finally, the coercion explanation cannot account for persistent decoupling; there is no convincing theory to explain why formal policy convergence without effective implementation on the ground would appease powerful states.[127]

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124. *See, e.g.*, Boli-Bennett & Meyer, *supra* note 105, at 810. Professors Boli-Bennett and Meyer's study discusses the state's differentiation of childhood as a distinct life phase and state management of childhood in spheres such as criminal justice, education, family, and labor between 1870 and 1970. *Id.* at 797–98, 804. Notably, even in the area of child labor, which one might think is a matter of high politics, the institutionalization of global practices occurred before powerful states became seriously involved at the international level. *See*, *e.g.*, Bozena Maria Celek, Note, *The International Response to Child Labor in the Developing World: Why Are We Ineffective?*, 11 GEO. J. ON POVERTY L. & POL'Y 87, 91 (2004) ("States ignored the issue and instead concentrated their discussions on the industrial developments of Europe and North America—nations where child labor hardly was as prevalent as in the developing states. This trend of neglecting child labor issues continued until approximately 1973 . . . .") (citing Hugh Cunningham, *The Rights of the Child and the Wrongs of Child Labor: A Historical Perspective*, *in* 13 CHILD LABOR: POLICY OPTIONS 20, 21 (Kristoffel Lieten & Ben White eds., 2001)).

125. *See, e.g.*, Finnemore & Sikkink, *supra* note 33, at 895–96 (describing global diffusion of women's suffrage and highlighting that global hegemons were late adopters); *see also* Ramirez et al., *supra* note 109, at 737–38.

126. *See* David Strang, *From Dependency to Sovereignty: An Event History Analysis of Decolonization 1870–1987*, 55 AM. SOC. REV. 846, 847–48 (1990) ("By 1960 . . . decolonization itself had delegitimated imperialism, as ex-dependencies . . . proclaimed the right of self-determination . . . ."); David Strang, *Global Patterns of Decolonization, 1500–1987*, 35 INT'L STUD. Q. 429, 442 (1991) (noting that "[p]rior decolonization . . . added to global understandings of the legitimacy and inevitability of decolonization").

127. Another approach might emphasize the rationality of mimicry as a signal to domestic and international audiences—irrespective of whether the global script produces results on the ground. *See, e.g.*, Goldsmith & Posner, *Moral and Legal Rhetoric*, *supra* note 6, at S121 (attempting to reconcile rational choice theory with nations' use of rhetoric and, in particular, to explain why "self-interested nations would use moral and legal rhetoric, even though they are not motivated by a desire to comply with moral or legal obligations"). Although the predictions of this approach track our own in many respects, two points of disagreement bear mentioning. First, the signaling story does not adequately account for isomorphism and decoupling. Assuming that domestic and international audiences learn, the credibility of the mimicry signal will substantially degrade over time in an environment characterized by decoupling. In other words, the signaled audiences should learn that formal mimicry is often decoupled from concrete change on the ground. As a consequence, the value of formal mimicry, without

One remaining question is whether the conditions favorable to acculturation are amenable to manipulation to promote change through institutions. Drawing on institutional theories of the state, we maintain that they are. First, significant empirical evidence shows that increased institutionalization of a model at the global level is followed by its diffusion across states.[128] Second, the empirical research also shows that a state's degree of integration in world society is a strong predictor of whether that state will adopt global cultural scripts.[129] Accordingly, we submit that embedding target actors in social settings organized around highly institutionalized, broadly shared principles could foster the basic elements necessary for acculturation.[130] Under these conditions, states would likely value their status in the group ("identify" with, or mimic, the group)—exploiting the cognitive and social pressures described above.[131]

This evidence demonstrates, at a high level of generality, that states respond to cultural forces. Less clear is how exactly this occurs. The evidence described above does not document a specific causal pathway by which culture influences state action. Although we consider this issue an important one that requires rigorous empirical testing, the claims made in this Article do not rely upon any particular theory about how acculturation occurs. Our claims are not predicated on a tacit theory of domestic political economy. Indeed, the empirical record to date is consistent with a number of possible causal routes: government representatives or high-level policymakers might be directly acculturated;[132] members of special interest groups might be acculturated and they, in turn, might persuade domestic audiences (or

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effective implementation, should erode over time. Second, this approach would predict that mimicry (and, hence, isomorphism) would vary depending on the presence, power, and influence of relevant audiences. Our approach, on the other hand, predicts isomorphism irrespective of whether there is political pressure to conform. *See generally* Goodman & Jinks, *supra* note 8.

128. Frank et al., *The Nation-State*, *supra* note 95, at 110–11.

129. *Id*. at 106; Meyer et al., *World Expansion of Mass Education, 1870–1980*, *supra* note 96, at 146.

130. This is a necessary predicate of acculturation in any meaningful sense. *See, e.g.*, Johnston, *supra* note 5, at 501 (pointing out that the effectiveness of acculturation processes "hinges . . . on an intersubjectively agreed upon notion of what socially valuable behavior looks like").

131. *Id*. at 506.

132. *See, e.g.*, Johnston, *supra* note 35, at 147 (considering the "impact of international institutions on domestic (in this case foreign–policy related) agencies and actors").

political leaders) to adopt socially legitimated practices;[133] or perhaps, in some cases, relevant domestic audiences might be directly acculturated by broader social forces, and these audiences, in turn, might coerce (or persuade) their political leaders to comply with social norms.[134] We are, for the purposes of this Article, agnostic about which of these theories best accounts for the observed behavior of states. Irrespective of the specific causal pathway, we maintain that observed state behavior is, to a nontrivial degree, the product of acculturation. The following Parts also illustrate that fundamental issues of institutional design turn on processes at this level of abstraction.

TABLE 1. THREE MECHANISMS OF SOCIAL INFLUENCE ON STATES

	Coercion	**Persuasion**	**Acculturation**
Basis of Influence	Interest	Congruence with values	Social expectations Cultural identity
Behavioral Logic	Instrumentalism	Active assessment of the validity of a rule	Social role Social status Mimicry
Forms of Influence	Material rewards and punishment	Framing Cuing to think harder Convincing Teaching	Social rewards and punishment (shaming, shunning, back-patting) Cognitive costs and benefits (orthodoxy, dissonance)
Result	Compliance	Acceptance	Conformity

In the balance of the Article, we analyze three regime design problems in human rights law: (1) conditional membership in

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133. *See, e.g.*, Risse & Sikkink, *supra* note 24, at 5 (arguing that networks of domestic and transnational actors "empower and legitimate the claims of domestic opposition groups against norm-violating governments").

134. *See, e.g.*, KECK & SIKKINK, *supra* note 18, at 16–25 (describing this causal pathway in context of human rights networks in Latin America).

organizations, (2) precision of obligations, and (3) monitoring and enforcement mechanisms. Two primary points follow from this analysis. First, regime design principles for each issue vary substantially across the identified behavioral logics. In short, mechanisms matter for regime design. Second, the previously undertheorized acculturation mechanism yields many regime design recommendations that defy conventional wisdom in international law. For example, the deinstitutionalizing effects of many traditional "hard law" devices would, we claim, diminish the compliance-inducing effects of acculturation. Our analysis of these regime design problems is summarized in a table at the end of each Part.

II. CONDITIONAL MEMBERSHIP

An important choice in designing human rights regimes involves deciding between an inclusive or restrictive membership rule in multilateral organizations.[135] Whether membership should be conditioned on compliance with particular human rights standards is the subject of an ongoing debate among governmental actors, practitioners, and scholars. An inclusive approach would allow all comers to join the organization and would place negligible conditions on maintaining membership status. In contrast, a restrictive approach would reject candidate states or expel member states that do not meet particular human rights standards. For example, two supranational organizations—the United Nations (U.N.)[136] and the Council of Europe[137]—have formally adopted a restrictive rule. The goals and

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135. *See* Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 770 (2001) ("Who belongs to the institution? Is membership exclusive and restrictive, like the G-7's limitation to rich countries? Or is it inclusive by design, like the UN? . . . Membership has been one of the most hotly contested issues in recent years.") (emphasis omitted).

136. The U.N. Charter formally allows the organization to function in a restrictive manner, but these powers have remained largely dormant in practice. Specific articles provide for the exclusion of applicant states, *see* U.N. CHARTER art. 4, suspension of membership privileges, *see id.* art. 5, and complete expulsion from the organization, *see id.* art. 6. *Cf.* LEAGUE OF NATIONS COVENANT art. 1, para. 2 (providing for the exclusion of applicant states from the League of Nations); *id.* art. 16, para. 4 (providing for expulsion from the League of Nations).

137. In 1993, the Council adopted a resolution essentially limiting the provision of observer status to democratic states. *See* Observer Status, Eur. Comm. of Ministers, 92d Sess., Stat. Res. (93) 26 (May 14, 1993), *available at* http://conventions.coe.int/treaty/en/treaties/html/Resol9326.htm. In 1994, the Council required applicant states to abolish the death penalty as a precondition for full membership. Abolition of Capital Punishment, Eur. Parl. Ass., 25th Sitting, Res. 1044 (Oct. 4, 1994), *available at* http://assembly.coe.int/Documents/AdoptedText/ta94/ERES1044.htm. In 2001, the Council's Parliamentary Assembly adopted a resolution

activities of these organizations include issues other than human rights. Their membership rules, however, have inspired recent proposals for human rights regimes. It is this debate—whether to condition membership in exclusively human rights regimes on human rights performance—that we consider in depth.

The two principal global human rights forums—international human rights treaties[138] and the U.N. Commission on Human Rights[139]—are currently modeled on an inclusive approach. Both institutions formally allow the equal participation of liberal and illiberal states. However, scholars suggest that the major international human rights treaties should limit admission to states that already comply with particular human rights standards and should expel members that do not comply with terms of the treaty.[140] These

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"call[ing] into question the continuing Observer status of Japan and the United States with the Organisation as a whole, should no significant progress" toward abolition of the death penalty occur. *See* Abolition of the Death Penalty in Council of Europe Observer States, Eur. Parl. Ass., 17th Sitting, Res. 1253 (June 25, 2001), *available at* http://assembly.coe.int/documents/ adoptedtext/ta01/eres1253.htm.

138.   There are six major international human rights treaties. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171; the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195; the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85; and the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

139.   The Commission on Human Rights is a suborgan of the U.N. General Assembly. Its mandate includes developing standards for the elaboration and codification of international human rights law and monitoring and reporting the human rights practices of U.N. member states. Office of the High Commissioner for Human Rights, Commission on Human Rights, *at* www.unhchr.ch/html/menu2/2/chrintro.htm (last visited Dec. 1, 2004) (on file with the *Duke Law Journal*).

140.   *See, e.g.*, Hathaway, *supra* note 4, at 2024 ("Countries might, for example, be required to demonstrate compliance with certain human rights standards before being allowed to join a human rights treaty. . . . Or treaties could include provisions for removing countries that are habitually found in violation of the terms of the treaty from membership in the treaty regime."); *see also* Anne F. Bayefsky, *Making the Human Rights Treaties Work*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 229, 264 (Louis Henkin and John Lawrence Hargrove eds., 1994), *available in* 26 STUD. TRANSNAT'L LEGAL POL'Y 264 (1994) (recommending "[p]utting in place written rules for expelling from the treaty regime those states that do not adhere to a set of minimum requirements drawn from the treaty's implementation provisions"). These restrictive approaches resemble proposals for excluding illiberal states from transnational legal regimes. *See* Anne-Marie Burley [Slaughter], *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1990 (1992) (proposing a new interpretation of the act-of-state doctrine by which "application of the doctrine to bar

proposals have spurred an animated discussion within the academy.[141] They have also begun to gain political momentum within other forums, in particular the Commission on Human Rights. A wide range of actors—including government representatives,[142] policy analysts,[143] activists,[144] and the Office of the U.N. High Commissioner for Human Rights[145]—have recently supported the idea of excluding states with poor human rights records from membership in the Commission.

Importantly, formal membership rules do not exhaust the range of choices confronting regime architects on this issue. States could, as several historical examples illustrate, deploy other strategies when existing organizational rules do not explicitly permit exclusion. As Professor Louis Sohn explains in a leading article on expulsion from multilateral organizations, "[a]ll these measures can be taken by international organizations, whether or not their own constitutions expressly provide for them. In fact, only on a few occasions were the measures taken those actually authorized by explicit constitutional

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adjudication of the validity of [an] act of a certain state would be a judicial declaration that the state in question does not play by liberal rules").

141. *See, e.g.*, Philip Alston, *Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 501, 502 (Philip Alston & James Crawford eds., 2000); Philip Alston, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. ESCOR, 53d Sess., Agenda Item 15, ¶¶ 14–36, U.N. Doc. E/CN.4/1997/74 (1996); Goodman & Jinks, *supra* note 4, at 171–72; Hathaway, *supra* note 4, at 2020–25.

142. *See, e.g.*, U.S. Mission to the European Union, U.S. Deeply Disappointed in Libya's Human Rights Election, *at* http://www.useu.be/Categories/GlobalAffairs/Jan2003UNUSLibya HumanRights.html (Jan. 20, 2003) (on file with the *Duke Law Journal*) ("The United States will continue to make its position clear. . . . We are convinced that the best way for the Commission to ensure the ideals of the Universal Declaration of Human Rights . . . is to have a membership comprised of countries with strong human rights records at home.") (quoting Ambassador Kevin E. Moley, U.S. Permanent Representative to the United Nations in Geneva)).

143. Jeane J. Kirkpatrick, *UN Human Rights Panel Needs Some Entry Standards*, INT'L HERALD TRIBUNE, May 14, 2003.

144. *See, e.g.*, Human Rights Watch, United Nations: Rights Commission Shields Abusers, *at* http://hrw.org/press/2002/04/unhchrfinal.htm (Apr. 26, 2002) (on file with the *Duke Law Journal*) ("[A]ny government whose records the Commission has condemned, who have failed to implement the Commission's resolutions, or who have refused to allow visits by the Commission's investigators and experts, should be excluded from membership on the commission.").

145. Richard Waddington, *Libya Elected to Chair U.N. Human Rights Body*, REUTERS, Jan. 20, 2003 ("U.N. High Commissioner for Human Rights Sergio Vieira de Mello has backed activists' calls for conditions to be agreed for Commission membership. These could include signing and ratifying all human rights treaties and inviting U.N. special rights investigators to visit.").

provisions."[146] Indeed, states have deployed a range of tactics to limit the participation of governments with offensive human rights practices, including denying access to regional and preparatory meetings,[147] rejecting credentials required for participation,[148] limiting voting or speaking rights,[149] and adopting extraordinary resolutions tantamount to expulsion (e.g., "advising" a member state to withdraw).[150] These measures often serve as the functional equivalent of formal conditions on membership. Although we discuss only formal membership rules, our analysis generally applies to these informal measures as well.[151]

Before we proceed to that analysis, it is also important to note that other design features may raise some, though not all, of the same considerations. First, procedural or substantive terms of a treaty may produce significant exclusionary effects. It is well understood that higher standards in a human rights treaty tend to reduce levels of state participation. For instance, in drafting the Rome Statute for the International Criminal Court, negotiators adopted strong procedural and substantive provisions that effectively sacrificed the participation of particular governments.[152] As other

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146.   Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1421 (1964).

147.   *See, e.g.*, CHAYES & CHAYES, *supra* note 7, at 71–72 (discussing measures involving the Food and Agriculture Organization, the International Telecommunication Union, and South Africa).

148.   *See, e.g.*, *id.* at 74 (discussing the World Meteorological Organization's rejection of South Africa's credentials); Sohn, *supra* note 146, at 1401–04 (discussing the exclusion of Spain from several U.N. specialized agencies).

149.   CHAYES & CHAYES, *supra* note 7, at 71–72 (discussing the World Health Organization and South Africa).

150.   *See, e.g.*, *id.* at 80–81 (discussing the Organization of American States and Cuba); *id.* at 71 (discussing the International Labor Organization and South Africa); Sohn, *supra* note 146, at 1409–12 (discussing the Economic and Social Council and Portugal).

151.   Aspects of our discussion also apply to strategies by which individual governments and nongovernmental organizations might encourage illiberal states to join human rights regimes. For example, governments and organizations should consider the institutionalizing effects of universal membership in determining whether to emphasize the strategy of pressuring illiberal states to ratify human rights treaties. Similarly, an understanding of these effects should inform decisions about whether to pressure illiberal states to leave international organizations (e.g., African states' boycotting intergovernmental organizations that allowed South African participation). *See, e.g.*, CHAYES & CHAYES, *supra* note 7, at 71, 73 (discussing several African countries' threats to boycott the United Postal Union.).

152.   *See, e.g.*, Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for the ICC*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 85 (Sarah B. Sewell & Carl Kaysen eds., 2000); *Trigger Mechanisms and Accountability*, 10 INT'L CRIM. CT. MONITOR (NGO Coalition for an Int'l Criminal Court, New York, N.Y.), Nov. 1998,

commentators demonstrate,[153] these design choices may be understood as membership rules.

Second, administrative rules applied in the course of managing a human rights regime may also implicate the scope of membership. Consider, for example, the controversy over the appropriate remedy for invalid treaty reservations.[154] Proposals include severing the reservation and thus keeping the state bound to the treaty, or nullifying the entire act of ratification.[155] Although this debate is complex, the effect of each proposal on treaty membership weighs heavily in any systematic evaluation of these options.[156] Indeed, the very idea that some reservations should be deemed invalid is justified as the best way to promote universal membership without sacrificing the integrity of the underlying treaty norms.[157] Another administrative question concerns the criteria used for accreditation of governmental

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at 5 (discussing the history of the negotiations at the treaty conference), *available at* http://www.iccnow.org/publications/monitor/10/monitor10.199811.pdf.

153. *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 429 (2000) (describing the use of hard law as functionally "an *ex ante* sorting device"); George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465, 500 & n.123 (2000) (analyzing stronger obligations as effectively a restrictive membership approach in environment, trade, and arms control agreements).

154. A reservation is a formal condition that a state makes when ratifying a treaty, whereby the state purports to exclude or modify its obligations under the treaty. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333. Commentators hold a range of opinions on the subject of severing invalid reservations. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) (rejecting severability and challenging the "conventional academic wisdom concerning both the legality and desirability of [reservations, understandings, and declarations] attached to human rights treaties" and arguing that reservations "reflect a sensible accommodation of competing domestic and international considerations"); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 531 (2002) (advocating for the severability of certain treaty reservations, but noting strong opposition to this position by a number of commentators); *cf.* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 509–11 (2002) (discussing the severability of the United States' juvenile death penalty reservation to the International Covenant on Civil and Political Rights); Catherine Redgwell, *US Reservations to Human Rights Treaties: All for One and None for All?*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 392, 399–400 (Michael Byers & Georg Nolte eds., 2003) (discussing possible responses to U.S. reservations to human rights treaties).

155. Goodman, *supra* note 154, at 531; Bradley & Goldsmith, *supra* note 154, at 438.

156. The selected remedy will also affect whether some states are willing to consent to human rights treaties in the first place. *See* Goodman, *supra* note 154, at 535–55.

157. *See* Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (May 28) (noting the traditional rule considering reservations to multilateral treaties invalid unless accepted by all parties).

delegations in international forums—for example, whether to seat a democratically elected government in exile or a nondemocratic government with effective control of a country.[158] Again, this is a thorny problem, but deciding which approach is optimal will turn, in part, on the expected functions of membership rules and the effect desired from exclusion.[159] The important point is that an empirical question inheres in these doctrinal problems: what are the consequences of restrictive membership? The following discussion examines the empirical foundations of membership rules. For the sake of clarity, we focus on rules that directly restrict—either through denial of admission or through expulsion—membership on the basis of human rights performance.

Our analysis of the three mechanisms of social influence is relevant to the debate over conditional membership in several respects. First, the social mechanism that one emphasizes (or tries to harness) might dictate whether and how to condition membership. Second, close attention to social processes clarifies the trade-offs that would accompany specific membership rules. Third, the social mechanism that one emphasizes also implicates various second-order determinations. For example, if one adopted a restrictive approach, each of the mechanisms would suggest unique design principles with respect to the substantive criteria and procedures for selecting, retaining, or ousting members.

A. *Coercion*

Coercion suggests two approaches to the restrictive membership issue. On one view, whether states act within or outside a regime should not substantially affect the ability of stronger states to exert influence over delinquent, weaker states.[160] Another view is that high

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158. Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 605 (1992).

159. Inclusion of the de facto (but illegitimate) government signals acceptance of its authority—and perhaps imbues it with some measure of legitimacy. *See id.* Exclusion, on the other hand, might sacrifice some measure of influence over nondemocratic governments. *Id.* at 605–06 (evaluating the claim that the General Assembly's use of its accreditation power to recognize democratically elected governments would cause it to "lose any leverage it might have to influence the policies of excluded unelected governments").

160*. See, e.g.*, John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994–95, at 5, 7 ("[International] institutions have minimal influence on state behavior . . . ."); *see also* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 486–87 (1988).

levels of regime participation can yield nontrivial benefits: regimes help generate information about the distribution of state preferences, develop reputations for compliance, and lower the transaction costs of cooperation.[161] These effects promote stable cooperative arrangements in part because they facilitate the efficient allocation of rewards and penalties.[162]

The benefits of inclusion, however, must be weighed against the benefits of a restrictive rule. Restrictive membership might yield two advantages for effective coercion. First, conditioning admission on performance has an information-forcing effect. Several leading commentators accordingly hypothesize that rational regime designers are more likely to adopt a restrictive membership rule under conditions of uncertainty about state preferences: "Membership enables states to learn about each others' preferences if the membership mechanism can distinguish cooperators from non-cooperators. . . . Effective membership rules create a separating equilibrium where only those who share certain characteristics will bear the costs necessary to be included in an equilibrium."[163] Assuming that such information is valued, rational regime designers should weigh (1) the information produced by a high admissions bar against (2) the information produced by lowering the bar (i.e.,

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161. KEOHANE, *supra* note 28, at 244–45; Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, INT'L SECURITY, Summer 1995, 39, 46–50. In accordance with this neoinstitutionalist view, a regime should emphasize measures such as reporting requirements and repeat interactions to help develop reputations.

162. We have isolated the different causal mechanisms for theoretical reasons explained above. *See supra* Part I. Note, however, that, if legitimacy is also an empirically meaningful variable, inclusive membership may bolster the effectiveness of coercive power. Specifically, some scholars who argue for the coercion paradigm (for example, some neorealists) accept that legitimacy is a component of power. On this view, the use of sanctions against a state that violates human rights may be more legitimate, and thus more effective, if the target state has formally acceded to the relevant human rights obligations.

163. Koremenos et al., *supra* note 135, at 784; *see also id.* ("When the price of membership is too low, membership is not informative."); Barbara Koremenos et al., *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1056–57 (2001) (discussing results of contributions to the special issue that support this conjecture); *cf.* Abbott & Snidal, *supra* note 153, at 429 ("[S]tates should find hard law of special value when forming 'clubs' of sincerely committed states . . . . Here legalization functions as an *ex ante* sorting device: because hard legal commitments impose greater costs on violators, a willingness to make them identifies one as having a low propensity to defect.").

allowing more states to participate in the intraregime organizational processes that generate information over time).[164]

Second, restricting membership to states with better human rights records might facilitate deep cooperation among regime participants. Professor George Downs et al. define the depth of an agreement as "the extent to which [the agreement] requires states to depart from what they would have done in its absence."[165] These scholars stress the utility of coercive tools in ensuring cooperation among states,[166] and they contend that only states strongly committed to regime principles would ratify treaties requiring deep change.[167] Naturally, they conclude that cooperative international regimes should restrict membership to states that are prepared to undertake substantial obligations.[168] It is unclear, however, whether this reasoning applies to human rights treaties because Professor Downs et. al. developed the theory in the context of environmental regimes. As we describe in the Introduction, human rights regimes do not fit neatly into cooperative models—there is no clear "free rider" problem, and states can, in a nontrivial sense, ensure human rights domestically without the cooperation of other states.[169] As a

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164. After one weighs the benefits of inclusion with the benefits of a restrictive rule, it becomes difficult to see why a rational institutional designer would invariably, or at least usually, favor restrictive membership under conditions of uncertainty.

165. George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 383 (1996); *see also* Guzman, *supra* note 6, at 1854–57.

166. Downs et al., *supra* note 165, at 386, 391.

167. *See, e.g.*, *id.* at 399:

> One possible strategy is to restrict regime membership to states that will not have to defect very often. The idea is that whatever benefit is lost by excluding such states from the regime will be more than made up by permitting those that are included to set and also enforce a deeper level of cooperation . . . .

168. *Cf.* Downs et al., *supra* note 153, at 508:

> [T]he maximum amount of cooperation is likely to be achieved through the creation of a noninclusive regime that contains a majority of the most cooperatively progressive states. Such regimes tend to establish an initial level of cooperation that is relatively deep, whereas a more inclusive regime in which the average state had yet to be affected . . . would do little or nothing.

169. One might incorrectly think that Professor Downs et al.'s analysis equally applies to human rights. Professor Downs et al. do apply their argument to environmental regimes, *see id.*, and, at first blush, the environmental context may appear to raise the same concerns as human rights: the states least willing to control environmental degradation would be omitted from a restrictive regime. However, this is not necessarily the case. In the environmental context, the states more willing to join a restrictive regime ("cooperatively progressive" states) may also be the states with greater environmental problems (or there may be no association between degrading the environment and being a cooperatively progressive state). However, when outsiders are the ones most likely to exhibit the problem (environmental degradation, human

consequence, the types of costs identified by Professor Downs et al. (i.e., increased free riding and the emergence of suboptimal focal points) are negligible in the human rights context.

An additional feature of human rights regimes mitigates the concern that breadth trades off with depth. Because human rights protection does not require a unified institutional framework, there are multiple, overlapping human rights treaty regimes.[170] There are no fewer than four international human rights regimes: the global regime (embodied in the U.N. system and the "International Bill of Rights" treaties)[171] and three regional systems.[172] As a result, states can pursue multiple cooperative strategies simultaneously, and the membership rules of each regime can be tailored to the specific goals of the treaty system in question. Assume, for the sake of argument, that human rights treaties solve some collective action problems—an assumption that makes plausible Professor Down's analysis. Liberal states committed to "deep" cooperation on human rights issues could jointly pursue multiple objectives. To capture the benefits of cooperation, such states could establish a separate treaty regime with (1) robust substantive commitments and (2) restricted membership. To capture the "noncooperative" benefits of constructive engagement, these states could also pursue a global regime with (1) more modest substantive commitments and (2) unrestricted membership.[173]

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rights abuses, etc.), Professor Downs et al.'s argument is less persuasive. *Cf.* Downs et al., *supra* note 165, at 399 ("The idea is that whatever benefit is lost by excluding such states from the regime will be more than made up by permitting those that are included to set and also enforce a deeper level of cooperation . . . .").

170. Overlapping, inconsistent rights regimes can coexist because the regulatory problem that they address is unidirectional. That is, rights regimes seek to maximize the protection of individual rights—subject only to the other necessities of good governance. Rights regimes regulate only underprotection of rights, not their overprotection. Consider a stylized example. Assume that regime *X* protects rights at level ten and regime *Y* protects rights at level five. All states willing to protect rights at level ten could lawfully participate in both regimes.

171. International Covenant on Civil and Political Rights, *supra* note 138, S. EXEC. DOC. E, 95-2, at 1, 999 U.N.T.S. at 331; International Covenant on Economic, Social and Cultural Rights, *supra* note 138, 993 U.N.T.S. at 3; *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

172. African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

173. This is an important point because it goes a long way toward dispelling one potential problem with our model. As we note in the Introduction, one purpose of international human rights regimes is to improve the practices of illiberal states. There are, however, other important

If a restrictive approach were adopted, the coercion mechanism would suggest particular procedures for applying the membership rule. Specifically, it would make sense to design the admission process to yield particular types of information. The regime might, for example, target information otherwise difficult to detect. Candidate states could be required to provide information on death in custody or statistics on racially disparate social conditions.[174] The important point is that the analysis of mechanisms informs not only the decision of whether to adopt a restrictive rule but also the determination of the most effective means of administering the selected rule.

B. *Persuasion*

Properly considered, persuasion—like coercion—can and does occur outside international organizations.[175] Treaty regimes do accord, however, some structural opportunities for persuasion. Moreover, international human rights regimes help liberal states coordinate their efforts at persuasive diplomacy. Typically, commentators who emphasize the value of persuasion also suggest that membership

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objectives of human rights regimes. For example, international rights regimes might empower national governments to "lock in" elevated levels of rights protection—allowing national leaders to consolidate gains in liberalization and democratization. *See* Moravcsik, *supra* note 12, at 220 (stating that "governments turn to international enforcement when an international commitment effectively enforces the policy preferences of a particular government at a particular point in time against future domestic political alternatives"). As the discussion in the text suggests, these goals can be pursued within the context of a regional regime—or a regime organized around some other salient state characteristic. Indeed, Professor Moravcsik's important study documents how some national governments utilized the European human rights regime for this purpose. *See id.* at 243 (stating that the origins of the European Convention for the Protection of Human Rights and Fundamental Freedoms "lie in self-interested efforts by newly established (or reestablished) democracies").

174. U.N. monitoring bodies have had difficulty acquiring this type of information. *See, e.g.*, Michael Banton, *The Causes of, and Remedies for, Racial Discrimination*, U.N. ESCOR Comm. on Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/1999/WG.1/BP.6 (1999) (explaining difficulties in obtaining data from governments on dimensions of racial discrimination), *available at* http: www.unhchr.ch/Huridocda/Huridoca.nsf/0/a0a298536f43dc 51802567a5005a1d09?Opendocument.

175. Some commentators may overestimate the importance of treaty regimes for persuasion. *See* Downs et al., *supra* note 153, at 495–97 (criticizing scholars for trumpeting processes of persuasion within international organizations without considering alternative opportunities for persuasion in the wider context). *But cf.* KECK & SIKKINK, *supra* note 18, at 1–38 (describing transnational processes of persuasion, including but not limited to formal organizations); Koh, *supra* note 4, at 2656–58 (describing multiple forums and processes apart from international organizations); Raustiala, *supra* note 7, at 10–16 (analyzing the importance of networks outside formal organizations and treaties).

should be inclusive.[176] Broad treaty membership, on this view, would lower transaction costs and facilitate opportunities for collective deliberation and dialogue. The primary advantage of unrestricted membership is that it enmeshes illiberal states in regularized communicative processes.[177] In addition, the interdisciplinary "communicative action" literature suggests that open debate and constructive dialogue would push states toward a progressive realization of human rights.[178] Under this approach, restrictive membership rules risk deinstitutionalization by foregrounding disagreements without providing a constructive institutional setting in which these disagreements could be debated.[179] These commentators often perceive restrictive rules as crude punitive measures. Professors Chayes and Chayes, for example, classify restrictive membership rules exclusively within the rubric of "sanctions."[180] Similarly, Professor Rodger Payne contends that measures implying "participant rank" introduce a wholly undesirable "warping factor" into persuasive settings.[181] The argument for inclusiveness in this literature, however, is often based on the theory that broad-based membership will exert stronger and more authoritative "community pressure" on recalcitrant states.[182] Such a proposition describes (within the four corners of our model) the mechanism of acculturation, which involves a different set of assumptions and implications.

On the other hand, the mechanics of persuasion suggest some nontrivial advantages of restricted membership. For example, exclusion of illiberal states from human rights regimes can promote issue salience in those states. This increased salience empowers

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176. *See* PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (2d ed. 2002); Downs et al., *supra* note 153, at 477–78 (describing the literature); *see also* CHAYES & CHAYES, *supra* note 7, at 68–69.

177. Of course, the nature of the forum would need to foster these types of interactions.

178. Risse, *supra* note 33, at 2; *cf.* Reus-Smit, *supra* note 24, at 526.

179. *See* CHAYES & CHAYES, *supra* note 7, at 69 ("[D]isputes about membership necessarily imposed costs in terms of regime performance . . . ."); *id.* at 85 ("The very effort to impose sanctions [through membership status], even when it is successful, turns into a major issue, disrupts the work of the organization and generates dissatisfaction and resentment among supporters as well as opponents of the action."); *cf.* Payne, *supra* note 7, at 41–42 (borrowing from Jürgen Habermas in discussing the noxious effects of using coercive tools with ongoing processes of persuasion).

180. CHAYES & CHAYES, *supra* note 7, at 68–87.

181. Payne, *supra* note 7, at 47.

182. *See, e.g.*, BIRNIE & BOYLE, *supra* note 176, at 175 ("These are institutions in which community pressure is arguably at its strongest because of their broadly drawn membership . . . .").

human rights advocacy networks to shape the local political agenda by alerting local actors to these issues and exposing inconsistencies in national priorities.[183] The important point is that "negative" events—such as exclusion or expulsion from a human rights regime—can inspire the mobilization of social movements.[184]

If a restrictive approach were adopted, the mechanics of persuasion would also suggest how best to make membership determinations. The process initiated by such a membership regime would provide multiple opportunities for framing human rights issues. For example, membership criteria (and the negotiations that they trigger) might target issues, such as indigenous rights or the legality of extraterritorial human rights violations, that might not have received adequate attention on the international stage. The important comparative point is that this negotiating process—which the coercion approach simply dismisses as transaction costs[185]—is, in the persuasion approach, an advantage in that it provides structural opportunities for productive exchange and teaching.

C. Acculturation

Unlike the other two approaches, the acculturation mechanism suggests that membership rules are of high importance in regime design. According to this view, broad membership would amplify social pressure and help substantiate the claim that the principled commitments of the regime are, indeed, universal. Moreover, one of the principal empirical insights of acculturation studies is that the degree to which states are embedded in international organizations is strongly associated with the state's conformity to global models of appropriate behavior.[186] Participation in international institutions thus

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183. KECK & SIKKINK, *supra* note 18, at 24–27.

184. William A. Gamson & David S. Meyer, *Framing Political Opportunity*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 275 (Doug McAdam et al. eds., 1996). For example, the European Union's denial of Turkey's application for admission might assist domestic human rights movements in promoting long-term reforms.

185. Our point here is simply that coercion does not value highly the negotiating process itself.

186. Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 328–30 (1996); *see* Meyer et al., *supra* note 78, at 173 ("[W]orld-society models shape nation-state identities, structures, and behavior via worldwide cultural and associational processes."); *see also supra* notes 128–31 and accompanying text (discussing the correlation between states' international involvement and their adoption of global norms).

plays a significant role in promoting standardized, socially legitimated models of appropriate state behavior.[187] Importantly, institutions with broad membership advance the social processes by which states adopt norms identified with being a "modern state."[188] Accordingly, the mechanism of acculturation—unlike coercion and persuasion—operates much more effectively, and sometimes necessarily, through international organizations.

Acculturation suggests several additional benefits of inclusive membership worth mentioning. First, inclusive membership encourages illiberal states to define and justify their resistance to global norms in terms of the treaty. To guard against retrenchment, for example, disputes over rights protection should occur within the terms of global models of legitimate state objectives. In practice, human rights treaties often contain provisions that delineate acceptable governmental restrictions on particular rights, such as derogation and limitation clauses.[189] The inclusion of illiberal states within these frameworks should facilitate the institutionalization of globally legitimated restrictions. Exclusion, on the other hand, may encourage parochial or idiosyncratic modes of resistance to human rights norms. Escape clauses (such as derogation and limitation clauses) both encourage state participation in human rights regimes and increase the acceptability of various institutionalized forms of state reporting and third-party evaluation. Moreover, states can—through the use of these devices—meaningfully participate in a treaty

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187.   FINNEMORE, *supra* note 34, at 3; Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 712–15 (1999).

188.   *See, e.g.*, Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565, 566, 583–87 (1993) (concluding that the efforts of UNESCO prompted the creation of national science bureaucracies in many countries).

189.   *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 138, art. 4(1), 999 U.N.T.S. at 174 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation . . . ."); American Convention on Human Rights, *supra* note 172, art. 15, 1144 U.N.T.S. at 149:

   No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

regime because many state interests (even if idiosyncratic or highly controversial) can be expressed within the terms of the treaty.[190]

Second, the logic of acculturation, in contrast to the logic of the other mechanisms,[191] highlights the importance of discouraging certain relationships that can arise between organizational insiders and outsiders. As a model of culture, acculturation predicts the institutionalization of deviance within subcultures that can form among outsiders who have been denied access to the dominant group.[192] Indeed, acculturation studies explain variation among states by showing that adherence to dominant norms is associated with levels of participation in international organizations.[193] Thus, states with fewer connections to international bodies (e.g., Burma and North Korea) should be more prone to adopt aberrant official policies and forms of governance. Furthermore, the forces of social pressure and orthodoxy that occur within global institutions can also occur within smaller communities—e.g., Asia-Pacific states with low participation in international human rights forums—thus propelling local standards partly defined in contradistinction to global conventions.

The acculturation approach differs from the other approaches in how it evaluates "defections" by states inside the organization. First, an acculturation approach predicts certain patterns of defection not envisioned by the other approaches, and it thus evaluates the cost of defection for regime maintenance very differently. The coercion approach, for example, raises the concern that including states with lower commitments to regime objectives will prove unworkable due

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190. This suggests an important, and potentially problematic, difference between the mechanics of acculturation and persuasion. The acculturation approach is agnostic about the "truth-finding" capacities of social interaction. Under the persuasion approach, on the other hand, "communicative action" theory suggests (either expressly or impliedly) that greater rights protections will emerge from well-structured discourse among states. *See* Downs et al., *supra* note 153, at 474 (explaining that this area of scholarship appears to consider a set of prescribed processes "relentlessly progressive"). The acculturation model instead emphasizes cultural and associational factors that shape the definition and mediate the transmission of socially accepted behavior.

191. Recall that, under the coercion and persuasion approaches, gains to insiders are largely absolute and localized; these approaches do not impose costs on outsiders. The organizational benefits to insiders do not affect the relationships between insiders and outsiders or the impact of exclusion on outsiders' attitudes or behavior.

192. *See generally* HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963) (describing the processes of subculture formation among outsiders).

193. *See supra* notes 128–31 and accompanying text (discussing the correlation between states' international involvement and their adoption of global norms).

to frequent defection within the forum.[194] The persuasion approach predicts that few meaningful defections will occur and considers defection in unequivocally unfavorable terms.[195] An acculturation approach, in contrast, predicts that defections will occur and may be somewhat salutary. Specifically, it predicts that pressure to conform will produce a particular form of defection: decoupling, in which structural adherence to globally institutionalized models does not correspond to actual state practices on the ground.[196] As we argue elsewhere, this disconnect between local circumstances and universal models is not an impediment to the diffusion of global norms, as other theories would suggest.[197] Rather, this form of decoupling, in important respects, makes possible the diffusion of global models and the resultant convergence of policies and organizational structures. The important points here are that the acculturation mechanism predicts a peculiar form of defection and that this form of defection assists the diffusion of norms.

The mechanics of acculturation also suggest potential advantages to a restrictive rule. First, membership itself can serve as a device for affirmation or censure. That is, inclusion can provide a form of back-patting, whereas exclusion can shame and shun. In a related context, Dean Anne-Marie Slaughter advocates calibrating the application of doctrines of judicial deference to different forms of government. She proposes that national courts exercise jurisdiction over the acts of liberal foreign states but abstain from reviewing the acts of illiberal ones.[198] Dean Slaughter contends that shielding illiberal states from judicial scrutiny entails "salving their sovereign sensitivities, but at the price of . . . moral ostracism from the liberal community."[199] Indeed, her proposal is designed to confer a "badge of alienage" on illiberal

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194. *See* Downs et al., *supra* note 165, at 398–99 (discussing "why many deeply cooperative regimes have a limited number of members and why regimes with a large number of members tend to engage in only shallow cooperation").

195. *See* Raustiala & Slaughter, *supra* note 2, at 543 (discussing the theory that states develop a "sense of obligation" and that "[w]hile instances of non-compliance clearly occur . . . they are generally inadvertent"); *cf.* Downs et al., *supra* note 165, at 379–80 (criticizing this prediction of compliance).

196. *See supra* Part I.C.4.

197. Goodman & Jinks, *supra* note 8, at 1761.

198. *See* Burley, *supra* note 140, at 1916–23 (contending that domestic courts' divergent treatment of liberal and illiberal foreign states would create a "zone of law" in relation to liberal states and a "zone of politics" in relation to illiberal states).

199. *Id.* at 1991.

states and a "badge of legitimacy" on liberal states.[200] Although substantial empirical evidence now suggests that these categories are socially meaningful, Dean Slaughter does not consider countervailing effects within the terms of the same social logic. That is, the same body of empirical work provides strong reasons for bringing recalcitrant states into the fold. Specifically, as discussed above, processes of assimilation suggest that illiberal states will begin to imitate the group in which they are included.[201] This "identification" with a group—not banishment from the group—is perhaps more likely to propel the legal and political systems of illiberal states toward conformity with prevailing norms.[202]

Second, the acculturation approach suggests that restrictive membership might foster greater affinity among insiders—thus accelerating processes of norm diffusion within a group. The social meaning of exclusivity—created by the restriction itself—should intensify forms of identification. And, if the substantive criteria for membership include human rights performance, identification is likely to develop along the axis of that defining criterion. However, such dynamics improve the situation only for states willing and able to join an organization. Although we discussed a similar difficulty with the coercion approach (in which gains only accrue to insiders),[203] this result is especially problematic in the context of acculturation. Widening disparities between insiders and outsiders might culminate in standards that are unrealistically high for illiberal states, diminishing substantially the probability that these states will identify with insiders.

Finally, substantial evidence from social psychology suggests that small groups often facilitate processes of acculturation. The literature often describes this effect as "persuasion," but the mechanics of this social process mirror what we call "acculturation."[204] In discussing international institutions, for example, Professor Iain Johnston notes that "ideal persuasion is likely to be the most prevalent and powerful

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200.   *Id.* at 1990–92.

201.   *See supra* Part I.C.1.

202.   As we note above, Dean Slaughter's project on transgovernmentalism relies centrally on notions of persuasion. *See supra* note 7.

203.   *See supra* text accompanying notes 165–73 (explaining that, under the coercion approach, restrictive membership facilitates deeper cooperation among insiders only).

204.   This is yet another important example of the literature's conceptual slippage along the persuasion/acculturation divide. *See supra* text accompanying notes 24–25 (describing this conceptual slippage at an abstract level).

socialization process when membership is small (social liking and in-group identity effects on the persuasiveness of counterattitudinal messages are strongest)."[205] Notwithstanding the persuasion label, this view clearly suggests that small group size promotes acculturation because small groups are more likely to foster intimate, high-affect exchanges.[206] Regimes with restricted membership, therefore, should facilitate the convergence of practices.[207] The degree to which this insight is applicable to human rights treaty regimes, however, is questionable. The identified advantages issue only from the size of the group. As such, the social psychology literature is nonspecific and offers no guidance on any other defining characteristic of membership regimes. For example, the "small-group" effect does not necessarily support the view that regime members should be selected on the basis of human rights performance; in fact, if it did, acculturation would prove most effective when needed least—in the case of high performance states. In addition, persuasive encounters—such as bilateral or trilateral diplomatic exchanges—may occur in small-group settings irrespective of the size of the treaty regime writ large.

On balance, the features of acculturation support inclusive membership. However, if a restrictive rule were adopted, the principles of acculturation would favor particular criteria in applying the rule. First, the acculturation approach would suggest requiring only a *de minimis* demonstration of human rights performance. Second, qualifying criteria for new entrants might be used to encourage candidate states to establish institutional arrangements fostering subsequent structural opportunities for the diffusion of global norms. The acculturation literature suggests that particular

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205.   Johnston, *supra* note 5, at 509.

206.   In other words, this design feature—small groups—induces social conformity through affiliation and identification with other participants, not through deliberation on the content of the exchange. Just as it is possible that such affiliation and identification could set the stage for more effective persuasion, so might the tools of coercion set the stage for more effective persuasion. The important point is not to commit the conceptual error of confusing the tools that set the stage from activities that then take place on the stage.

207.   Professor Johnston risks the same framing error that we discuss with respect to the coercion paradigm. *See supra* notes 165–73 and accompanying text. That is, focusing on institutional effectiveness in this manner displaces the wider regime and has implications for excluded states. An exclusionary organization may enhance the social environment for insiders. But, especially with respect to human rights, one should weigh the advantages of significantly enhanced effectiveness for member states against the advantages of lowering the bar and allowing more states to benefit from—overall less effective—participation.

domestic arrangements can (unintentionally) accelerate diffusion by providing "domestic receptor sites" for international norms.[208] For example, Professor David John Frank et al. show that domestic natural science associations and environmental institutes facilitate the local transmission of global models of environmentalism.[209] In the context of international human rights, national human rights commissions are a close analogue.[210] Hence, admission to the intergovernmental organization might be conditioned on (or highly favor) establishing such national institutions. In a similar vein, an intergovernmental organization could require or encourage candidate states to establish a human rights ombudsman or a human rights unit in the foreign ministry to interface with the international organization. The basic idea would be to promote institutional arrangements that, according to the behavioral logic of acculturation, should produce a multiplier effect in the transmission and diffusion of human rights norms.

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208. Frank et al., *The Nation-State*, *supra* note 95, at 96 n.1 ("Receptor sites are social structures (e.g., scientific institutes) with the capacity to receive, decode, and transmit signals from the world society to national actors."); *see also* Frank et al., *Environmentalism*, *supra* note 95, at 123–24 (discussing the diffusion of international environmental norms through "scientific receptor sites").

209. Frank et al., *The Nation-State*, *supra* note 95, at 105–09.

210. *See generally* HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD (Kamal Hossain et al. eds., 2000).

TABLE 2: CONDITIONAL MEMBERSHIP [211]

	Inclusive	Restrictive
Coercion	1. Repeat interactions increase information 2. Repeat interactions decrease cheating (by fostering future gains and developing reputations for compliance) 3. The institutional setting decreases the transaction costs of gaining information and making agreements 4. The process of reviewing membership involves transaction costs *Note*: A reason for inclusiveness exists if the size of membership increases the amount of rewards and penalties for members[212]	1. Membership rules are information-forcing devices that reveal states' willingness and capacity to join an organization[213] 2. Smaller membership involves lower transaction costs in the management of an organization (but benefits accrue only to liberal states inside the organization)
Persuasion	1. Inclusion promotes opportunities for discussion, argument, and debate 2. Inclusion lowers the transaction costs of collective communication and exchange 3. The process of applying membership rules undermines a deliberative atmosphere	Exclusion increases issue salience (e.g., with domestic audiences)
Acculturation	1. Inclusion produces strong social effects on insiders (i.e., embeddedness in regimes promotes conformity) 2. Inclusion regulates forms of resistance 3. Inclusion avoids creating a subculture of outsiders 4. Inclusion promotes a message of universality in norm enunciation 5. Larger membership maximizes social pressure (cumulative effect for back-patting and shaming) *Risk*: A high prevalence of violations among insiders risks institutionalizing undesirable behavior	1. Membership itself is a device for conferring legitimacy and ostracizing outsiders affinity among insiders 2. Membership rule strengthens affinity among members. 3. The process of reviewing membership has institutionalizing benefits

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211. These conclusions rely on two assumptions: (1) that the regime has sufficiently high human rights standards and (2) that one of the participants' principal concerns is to change the behavior of governments engaged in frequent and severe human rights violations.

212. Also, issue linkage within a regime (linking human rights compliance with material rewards or penalties) would provide a stronger reason for a more inclusive rule.

213. If issue linkage includes rewards for mere membership, a stronger reason exists for a restrictive rule.

III. PRECISION OF OBLIGATIONS

Another important choice in human rights regime design concerns the level of precision[214] with which obligations are defined. Scholars consider "precision and elaboration . . . especially significant hallmarks of legalization at the international level."[215] The issue of precision has accordingly become a prominent topic in the study of international institutions.[216] Like the debate over legal formalism in domestic law,[217] these debates in international law persist without an adequate understanding of the connection between prescriptive claims and empirical assumptions. Commentators argue for—or against—precision without due regard for the manner in which their ostensibly normative claims are tethered to undefended or unexamined empirical propositions.

Consider, for example, the debates about whether treaties or customary international law provides a better vehicle for regulating state practice. As Professor David Kennedy remarks in a more critical voice, "Are international norms best built by custom or treaty? International lawyers have worried about this for at least a century, one or the other mode coming in and out of fashion at various points."[218] Professor Kennedy suggests that these debates repeat themselves across generations of international legal scholars without moving matters forward. One reason for this repetition without progression may be the failure to specify and trace the significance of relevant behavioral logics. For example, according to some

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214.   We use a standard definition of precision: "*Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe." Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000); *see also id.* at 412 ("A precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation.").

215.   *Id*. at 414.

216.   For example, in 2000, *International Organization*—the leading international relations journal—devoted a special issue to the topic of legalization. The authors of the volume identity "precision" as one of three characteristics for evaluating the concept of legalization across international institutions. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 387 (2000). Issues of "determinacy" figure prominently in Professor Thomas Franck's influential study of international legal compliance. *See* FRANCK, LEGITIMACY, *supra* note 7, at 50–90.

217.   Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 650–69 (1999) (discussing the empirical dimensions of disputes regarding domestic legal formalism).

218.   David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 352 (2000).

commentators, treaties are better devices for regulating state behavior because they generally provide a level of specification that is difficult to obtain through custom.[219] However, without empirical support, that assessment is largely conjecture. To test the assessment, it would be necessary to know whether, how, and under what conditions normative and legal precision actually influences state behavior. And it would be important to identify gaps in empirical information that must be filled to assess adequately the social effects of precision. It would also be important to discover whether states are likely under certain conditions to try to obfuscate their human rights obligations, to evaluate obligations deliberatively, or to mimic obligations.

The language used to define obligations in human rights treaties is notoriously vague compared with the language used in other legal domains.[220] A common view is that human rights treaties should aspire to greater levels of precision to foster compliance and enforcement.[221] Other commentators caution, however, that ambiguity can help build consensus in the treaty-drafting process.[222] The issue of precision should thus be evaluated along two dimensions: ex ante effects on legislative processes and ex post effects on compliance. The following discussion analyzes the issue along those lines.

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219. *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 66 (1991) ("It is easy to see the advantages of that process. . . . In place of the uncertain and slow process of custom, . . . [t]he text brings clarity and precision where there had been obscurity and doubt."); *id.* at 71 (theorizing a "bureaucratic factor" that encourages the application of treaties because "[t]he law is declared in a concise and definitive form that is highly convenient for lawyers and officials"); Guzman, *supra* note 6, at 1876 ("Because CIL's [customary international law's] content is uncertain, states can often claim to have complied even when they have ignored the content of CIL. In other words, the commitment to CIL is more easily avoided than the commitment to a treaty."); *id.* at 1877 ("Problems of clarity and a lack of explicit commitment on the part of states make CIL weaker than treaties.").

220. Louise Doswald-Beck & Sylvian Vité, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94, 106 (1993) ("[T]he major difficulty of applying human rights law as enunciated in the treaties is the very general nature of the treaty language.").

221. *See, e.g.*, Panel Discussion, *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371, 378 (1988) (remarks of Bruno Simma):

> What I have just said will be feasible, however, only if and to the degree that human rights treaty provisions are actually susceptible to violations in the sense that infringements of treaty provisions can be determined clearly. . . . Indeed, international human rights treaties are not notorious for the precision of their wording; they contain many vague and ambiguous provisions . . . . It will not be easy to localize clear-cut violations of such provisions . . . .

222. *See* CHAYES & CHAYES, *supra* note 7, at 11; FRANCK, LEGITIMACY, *supra* note 7, at 52–53; Abbott & Snidal, *supra* note 153, at 434, 444–45.

A. Coercion

According to the coercion approach, precision offers a number of advantages. A general assumption of the approach is that states act to maximize their own material well-being. Precision is therefore a valuable device for constraining "self-serving auto-interpretation"[223]—thereby discouraging free riding and clearly defining what counts as cooperative behavior. The precise delineation of proscribed behavior can also help maximize the reputational effects of compliance and noncompliance. That is, reducing potential interpretive disputes over whether a state has fulfilled its obligations makes more certain the reputational costs of human rights violations (which may in turn translate into material costs).[224] Moreover, if "reputational effects of a violation can be generalized to all agreements subject to international law"[225]—that is, if violations of a human rights treaty can damage a state's overall reputation as a treaty partner—then human rights regimes can piggyback on issue areas in which states value their reputations more highly.[226] Finally, because precision raises the costs of defection, it enhances the ability of regime participants to gauge the credibility of commitments; the act of ratifying a treaty with high

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223. Abbott & Snidal, *supra* note 153, at 427.

224. *See* Abbott & Guzman, *supra* note 6, at 1863:

> The clarity of both the international obligation and its violation are important because a failure to live up to an international obligation triggers a reputational loss. The reputational consequences are most severe when the obligation is clear and the violation is unambiguous. As the uncertainty of an obligation increases, the reputational cost from a violation decreases.

Recall that the coercion model incorporates reputation effects only insofar as they implicate directly some material cost or benefit. *See supra* Part I.C.3 (distinguishing acculturation and coercion in regard to social sanctions and rewards).

225. Abbott & Snidal, *supra* note 153, at 427; *see id.* ("When a commitment is cast as hard law, the reputational effects of a violation can be generalized to all agreements subject to international law, that is, to most international agreements."); KEOHANE, *supra* note 28, at 106:

> For reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to. . . . They might often decide, in light of this cost-benefit calculation, to conform to the rules.

But see George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S95–S96 (2002) (disputing the influence of the reputational effects of noncompliance across regimes); Weisburd, *supra* note 31, at 104 ("[A] state's breaches of human rights treaties may be seen as not indicating the likelihood of the state's breaching other types of agreements and may not impact on the state's reputation for reliability regarding such agreements.").

226. *See* Guzman, *supra* note 6, at 1879–81 (discussing a state's impact of reputational loss on capacity to extract concessions in negotiating future agreements).

levels of precision signals a willingness and capacity to make the grade.[227]

Under the coercion approach, the most important cost of precision is its effect on treaty negotiations. Commentators suggest that ambiguity facilitates agreement in the drafting stage. Indeed, Professors Abbott and Snidal contend that ambiguity can be a "major advantage"[228] in lowering contracting costs and that, in some circumstances, insisting on precision "may prevent agreement altogether."[229] The important point is that states will find it easier to build consensus at a higher level of abstraction.

B. *Persuasion*

The persuasion approach generally favors greater precision in the definition of legal obligations. Commentators relying on this mechanism often acknowledge, however, that imprecision may be necessary in the drafting and ratification processes.[230] Nevertheless, these commentators argue that regime participants should endeavor to "concretize" treaty terms over time on the view that specificity facilitates persuasive interactions and norm internalization.[231] These calls for evolutionary precision are typically tethered to recommendations concerning how best to design dispute resolution mechanisms—and, at times, are directed not to treaty makers but to actors and institutions created by the treaty (such as the independent experts serving on so-called treaty bodies).[232] Because these proposals are so closely integrated with implementation strategies, we analyze them more fully in our discussion of enforcement in Part IV.

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227. *See* Abbott & Snidal, *supra* note 153, at 427 (stating that "[p]recision of individual commitments" is one way to enhance credibility and "increase[ ] the costs of reneging" on such commitments).

228. *Id.* at 434; *id.* at 436 ("In general, we hypothesize that softer forms of legalization will be more attractive to states as contracting costs increase.").

229. *Id.* at 445.

230. *See, e.g.*, *id.* ("Rather than hold up the overall agreement, states can incorporate hortatory or imprecise provisions to deal with the difficult issues, allowing them to proceed with the rest of the bargain.").

231. *Cf. id.* ("Over time, if the soft arrangements are successful and without adverse consequences, the initially reluctant states may accept harder legalization.").

232. *See, e.g.*, Helfer & Slaughter, *supra* note 4, at 314–18 (observing that supranational courts such as the European Court of Justice and the European Court of Human Rights have incrementally expanded the application of the treaties under which they were created).

The important point for now is that persuasion-centered approaches emphasize the value of precision. For example, Professors Chayes and Chayes argue that extensive noncompliance stems from imprecision in how obligations are framed: "[A]mbiguity and indeterminacy of treaty language," they contend, "lie at the root of much of the behavior that may seem to violate treaty requirements."[233] Under the persuasion approach, rules are most useful if they sharply reduce uncertainty about the content of obligations. In general, precise rules help clarify points of agreement and disagreement. This clarification facilitates targeted debates in which preexisting, even if thin, agreement on clearly defined obligations provides a normative framework within which the parties might move toward further agreement on more controversial matters. Recall that the touchstone of persuasion is that states internalize human rights norms following an active assessment of the justifications for these norms.[234] On this view, it is the *content* of the rule that is assessed and, ideally, internalized. In this sense, the precision of legal obligations is central to the project of persuasion. In comparison, the acculturation approach tolerates greater disparity between acceptance of rules and actual practice. Under certain conditions states will accede to obligations to avoid social ostracism or to conform to orthodoxy—states might accept and (under some conditions) apply even imprecisely framed treaty obligations.

More specifically, framing strategies analogize controversial practices to one or more clearly prohibited practices. This reasoning by analogy carries persuasive force only if the "frame" itself is well defined. Similarly, the strategy of cuing actors to think harder about controversial practices relies upon the precision of some underlying obligations. Recall that this tactic works because the persuadee is forced to confront and reconcile inconsistencies in stated positions.[235] This strategy is unlikely to prompt the persuadee to reevaluate controversial practices if inconsistencies are easily resolved because the underlying norms are highly malleable and easily subject to reinterpretation.

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233. CHAYES & CHAYES, *supra* note 7, at 10; *id.* at 126–27 (explaining that "parties can more readily adapt their conduct" to the substantive norms of an international organization when those norms are made more precise); *cf.* Raustiala, *supra* note 7, at 78 ("Managerialism . . . argues that the primary drivers of non-compliance are actually rule ambiguity and, especially, lack of domestic regulatory capacity.").

234.   *See supra* notes 36–38 and accompanying text.

235.   *See supra* notes 43–51 and accompanying text.

It is useful at this point to elaborate on the intraregime contexts in which persuasive encounters might take place. First, the very exercise of drafting a legal instrument (such as a treaty, resolution, or declaration) provides an important opportunity for persuasive encounters. In the course of drafting text, debates over the specific definition of legal obligations are productive. Many commentators underscore the importance of these occasions as opportunities to enunciate norms: "They [substantive norms] are elaborated and given more concrete and specific form so that parties can more readily adapt their conduct."[236] In short, as with the membership procedures discussed in Part II, a seemingly arduous negotiation process—understood in the coercion model in terms of transaction costs—is understood as a benefit in the persuasion model. The process affords valuable opportunities for discourse and exchange.[237]

Second, persuasive encounters occur in the course of applying rules to specific practices once a regime is established. The existence of many structural opportunities for such encounters suggests that ex ante precision is less important than one might otherwise suppose. That is, states can draft imprecise rules and defer the process of specification to subsequent, intraregime encounters. This deferral typically involves delegation of interpretive authority to a dispute resolution or supervisory body established by the relevant treaty. Professors Abbott and Snidal explain that "[d]elegation is often the best way to deal with incomplete contracting problems," because states can "utilize administrative . . . institutions to interpret and extend broad legal principles."[238] The mechanics of persuasion suggest some nontrivial virtues of deferral. Most importantly, deferral can provide structural opportunities for reflection, application, justification, and argument. "The discursive elaboration and application of treaty norms is the heart of the compliance process . . . . In the course of . . . debate, the performance required of a party in a particular case is progressively defined and specified."[239] That is, broad standards can furnish a general template against which "seemingly endless discussion of the scope and meaning of norms"

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236. CHAYES & CHAYES, *supra* note 7, at 126.

237. *See id.* at 123 ("The participants seek, almost in Socratic fashion, to persuade each other of the validity of the successive steps in the dialectic.").

238. Abbott & Snidal, *supra* note 153, at 433.

239. CHAYES & CHAYES, *supra* note 7, at 123.

can take place—an important, even if counterintuitive, benefit.[240] Perhaps most significantly, enmeshing rights-violating states in active interpretation and justification should facilitate the effectiveness of persuasion.[241]

C. Acculturation

The acculturation model departs significantly from canonical approaches to the "level of precision" problem. International instruments are often "remarkably precise and dense, presumably because proponents believe that these characteristics enhance their normative and political value."[242] The other two behavioral models are consistent with this line of thinking. Under the coercion and persuasion approaches, obtaining precision is generally considered essential to the long-term effectiveness of the regime. For these approaches, the major cost of precision is that it complicates ex ante negotiations by making it more difficult to obtain initial commitments from illiberal (or weakly liberal) states.[243] In short, precision (1) increases the difficulty of reaching agreement ex ante but also (2) promotes compliance ex post. Under the acculturation approach, however, these effects are potentially reversed: precision that outstrips existing preferences might propel agreement, and imprecision will sometimes help to produce behavioral conformity. In other words, precision is potentially beneficial ex ante and costly ex post.

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240. *Id.* at 126; *see id.* ("[T]he seemingly endless discussion of the scope and meaning of norms in the formal proceedings of the organization enhances their authoritative[ness] . . . . [T]he content of the substantive norms becomes more transparent.").

241. *See id.* ("It becomes harder for a party to reject the normative command after treating it seriously and at length in debate within the organization."); Risse, *supra* note 33, at 16 (suggesting that governments first become entangled in arguments and then become persuaded by the logic of those arguments); *cf.* STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 102–03, 113 (2001) (documenting that states employ shifting strategy of silence, denial, and partial acknowledgement when accused of violating accepted rules).

242. Abbott et al., *supra* note 214, at 414; *see also* FRANCK, FAIRNESS IN INTERNATIONAL LAW, *supra* note 7, at 30–31 ("Rules which have a readily accessible meaning and which say what they expect of those who are addressed are more likely to have a real impact on conduct.").

243. The effects of complicating negotiations might also yield important benefits such as fostering deliberation or conveying information. Nevertheless, the inability to reach agreement in negotiations, or to bring illiberal states on board, is part of the cost of obtaining those benefits.

We should say more about both the ex ante and the ex post effects. First, the acculturation approach suggests that precision will have less dramatic ex ante effects on treaty negotiations than either coercion or persuasion suggest. One might assume that establishing precise yet meaningful human rights obligations would require widely shared normative and political preferences across states. The existence of diverse cultures, national histories, and material resources may be thought to confound efforts to fashion global agreement in defining obligations. Indeed, some commentators even contend that cross-national diversity renders customary international law chimerical: "With over 180 nations representing an even larger number of cultures, international society lacks a reservoir of shared values or a common ideology from which to derive and perceive norms. Shared values and perceptions are essential to the formation of customary norms . . . ."[244] As an empirical matter, however, remarkable levels of homogeneity exist across all states. Transnational convergence is apparent in wide-ranging areas such as education policy, science bureaucracies, development agendas, and environmental regulation.[245] As we argue elsewhere, the patterns of policy convergence suggest the existence of a global culture (or "world polity").[246] This global cultural system indicates that some measure of precision is achievable, especially in areas related to globally shared norms. These convergent tendencies in policy and structure also indicate that treaty negotiators and nongovernmental organizations can efficiently demand greater levels of precision than persistent cross-national variations might suggest possible. Indeed, laggard states can be expected to accept particular policy or structural commitments earlier than their existing set of preferences might predict. Hence, demanding greater levels of precision in the legislative process could create opportunities for accelerating agreement.

The second point—that imprecision promotes behavioral conformity ex post—requires an important qualification. Here, it is necessary to distinguish the two types of acculturation discussed

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244. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 465 (2000).

245. *See* Goodman & Jinks, *supra* note 8, at 1759–61 (suggesting global institutionalization of policies in a wide variety of areas); *supra* Part I.C.4. (proffering that studies demonstrate that states emulate standardized models of structural organization and public policy goals).

246. *See* Goodman & Jinks, *supra* note 8, at 1757, 1767 (inferring the existence of global culture from "high levels of organizational isomorphism").

earlier: conformity resulting from cognitive cues and conformity resulting from social sanctions.[247] Both types of acculturation predict some measure of conformity (and other group-regarding behavior). As discussed previously, behavioral regularities do not issue from the content of the relevant rule or norm; rather, they are a function of the relations between individual actors and some reference group(s).[248] Conformity depends less on the properties of the rule than on the properties of the actor's relationship to the community. Because the convention or norm is associated in general terms with the identity of the group, rules best foster conformity by "establish[ing] broad hortatory goals with few specific proscribed or prescribed activities."[249] This effect suggests that imprecision mobilizes "cognitive pressures" to adopt social norms (the first type of acculturation). Precision, on the other hand, is more likely to emphasize disagreements—triggering cognitive cues that the would-be reference group is importantly dissimilar from the target actor.[250] There are, nevertheless, good reasons to suspect that precision might facilitate social rewards and sanctions—one of the two types of acculturation that we identify. One problem is that constructivist scholarship on the subject does not carefully distinguish the two types of acculturation. Therefore, the utility of precision has been obscured.

Professor Thomas Franck's discussion of "determinacy"[251] helps explain both the distinction between the two types of acculturation and the potential benefits to precision. Franck discusses how precise rules promote compliance—emphasizing the social value of precision. His analysis of precision, however, generally suggests only one type of acculturation—the distribution of social sanctions. According to Franck, precision strengthens the perceived fairness (and legitimacy) of a rule because "it is thought fairer to impose rights and duties which can be understood and anticipated by those to whom they are addressed than to impose rights and duties which leave the reader

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247. *See supra* Part I.C.1. (arguing that acculturation occurs through cognitive and social pressures).

248. *See supra* Part I.C.2.

249. Ronald B. Mitchell, *International Control of Nuclear Proliferation: Beyond Carrots and Sticks*, NONPROLIFERATION REV., Fall 1997, at 40, 46; *see also* David Strang & John W. Meyer, *Institutional Conditions for Diffusion*, 22 THEORY & SOC'Y 487, 493–94 (1993) (describing the importance of promulgating general conceptions of state obligations).

250. The literature here is substantial. *See, e.g.*, Zucker, *Institutional Theories*, *supra* note 9.

251. *See* FRANCK, LEGITIMACY, *supra* note 7, at 52 (arguing that precise rules are more likely to affect conduct).

unable to anticipate the vagaries of . . . interpretation."[252] Target states are accordingly more likely to accept the social sanction as legitimate, and other states are more likely to sponsor sanctions. In addition, Franck suggests that the determinacy of a rule will narrow the range of permissible interpretations and thus facilitate the regulatory effects of social sanctions. He contends that states, in trying to avoid the wrath of the community, will attempt to evade the application of a rule "by interpreting the rule permissively" and "using clever sophistry."[253] Precision limits that possibility.

We agree that precision may strengthen social pressure by enhancing the legitimacy of a sanction. In that respect, an acculturation approach would value precision. Professor Franck's analysis, however, is unsatisfactory because he undervalues (or fails to consider) the microprocesses of acculturation. Effective social sanctions (and rewards) require that target actors value the judgment of some reference group. Indeed, it is the approval of, or status in, this reference group that the target actor seeks. If precision outstrips the institutionalized preferences and expectations of target actors, then it disserves acculturation. As described above, too much precision risks deinstitutionalization.[254]

Moreover, Professor Franck's concern with self-serving and evasive interpretations does not easily fit the conceptual apparatus of acculturation through cognitive processes. Indeed, cognitive pressures suggest that states may be more inclined to conform their behavior to community expectations—and that they are unlikely to sustain, over the long term, an idiosyncratic interpretation of any norm that the international community considers central. The motivation to mimic the reference group is also self-directed. Indeed, states will even adopt legitimated practices under conditions of little or no surveillance by the international community.[255] On this view, it is

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252.   FRANCK, FAIRNESS IN INTERNATIONAL LAW, *supra* note 7, at 33.

253.   *See id.* at 31, 33 (arguing that the vagueness of a rule and noncompliance with it vary proportionately); *see also* FRANCK, LEGITIMACY, *supra* note 7, at 79–80 (positing that "sophist" rules are more likely to be ignored because their lack of precision renders them difficult to apply).

254.   *See, e.g.*, Zucker, *Institutional Theories*, *supra* note 9.

255.   *See, e.g.*, Aaron Benavot et al., *Knowledge for the Masses: World Models and National Curricula, 1920–1986*, 56 AM. SOC. REV. 85, 86, 90–91 (1991) (proposing that similarities among primary school curricula are linked to the rise of standardized models of society and noting that the same core subjects have appeared in most official curricula); Finnemore, *supra* note 188, at 575–76, 581–82, 585–87 (arguing that states created science policy organizations in response to norms promoted by UNESCO (which redefined science as a state concern), but not because of

inaccurate to suggest that states embedded in international organizations will invariably engage in "unilateral, self-serving exculpatory interpretations of . . . rules."[256] Furthermore, Professor Franck's analysis of this issue emphasizes the penalties side of social pressures, rather than social rewards or cognitive impulses to conform. In that respect, Professor Franck's analysis indicates that precision may be a less valuable tool under conditions in which social sanctions are underutilized, infeasible, or expensive.

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coercion exerted by the organization); Frank et al., *supra* note 100, at 31–32 (emphasizing that global models of society—not local or national definitions of society—determine what is included in universities' curricula).

   256. FRANCK, LEGITIMACY, *supra* note 7, at 79; *see id.* (noting that the elasticity of "sophist" rules may undermine the legitimacy resulting from such rules).

IV. IMPLEMENTATION: MONITORING AND ENFORCEMENT

The final design issue that we examine is how best to monitor and enforce compliance with substantive regime rules. Admittedly, other design choices also bear on questions of compliance and effectiveness. But the devices for monitoring and enforcement probably have the most direct consequences for the observance of regime rules. Existing options range from "soft" to "hard" techniques. We discuss the following points along that spectrum:

1. *Publishing Best Practices*

Examples include the International Coordinating Committee for National Human Rights Institutions,[257] U.N. Sub-Commission on the Promotion and Protection of Human Rights;[258]

2. *Monitoring and Reporting*

Examples include the Special Mechanisms under the U.N. Commission on Human Rights,[259] Inter-American Commission of

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257. The International Coordinating Committee is an umbrella organization representing national-level human rights institutions (e.g., commissions and ombudsmen). Along with the High Commissioner for Human Rights, the Committee has developed best practices for national human rights institutions. Documents relating to best practices for the implementation of human rights regimes and programs are available at http://www.nhri.net; *see also* Commonwealth Secretariat, National Human Rights Institutions: Best Practice (2001) www.thecommonwealth.org/shared_asp_files/uploadedfiles/ %7BBF05153F-7565-4A2F-8F2A-F002F05594EC%7D_HumanRightsBestPractice.pdf.

258. The Sub-Commission on the Promotion and Protection of Human Rights is the main subsidiary body of the U.N. Commission on Human Rights. The Sub-Commission is comprised of twenty-six independent experts who meet annually to undertake studies and make recommendations on thematic agenda items. The Sub-Commission has assisted in the development of best practices in areas such as affirmative action. *E.g.*, *The Concept of Affirmative Action*, U.N. ESCOR Comm'n on Hum. Rts., 52nd Sess., Provisional Agenda Item 3, U.N. Doc. E/CN.4/Sub.2/2000/11 (2000).

259. The U.N. Commission on Human Rights appoints independent individuals (special rapporteurs) or a group of individuals (a working group) to address specific country situations (e.g., Burma/Myanmar) or thematic issues (e.g., torture). These individuals and groups examine, monitor, advise, and publicly report on human rights situations in specific states and on types of human rights violations across different states. Links to studies and reports of special rapporteurs and working groups on these topics can be found at the Commission's website at http://www.unhchr.ch/html/menu2/2/ liststudrepts.htm.

Human Rights,[260] periodic state reports to international human rights treaty bodies;[261]

3. *Criticizing Bad Actors*

Examples include the country resolutions by the U.N. Commission on Human Rights,[262] concluding observations by international human rights treaty bodies on state periodic reports;[263]

4. *Binding Decisions and Material Sanctions*

Examples include the European Court of Human Rights,[264] International Criminal Court.[265]

Scholars also offer variations on existing structures. Professor Laurence Helfer and Dean Anne-Marie Slaughter, for example, propose institutional changes to make treaty bodies appear and act

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260. The Inter-American Commission on Human Rights is a permanent organ of the Organization of American States. The mandate of the Commission includes conducting on-site visits to investigate specific situations and publishing special reports regarding human rights conditions in particular states. For individual country reports, see the Commission's website at http://www.cidh.oas.org/publi.eng.htm.

261. The six principal human rights treaties each require state parties to submit a period report to a supervisory organ, called a "treaty body," which reviews the state's compliance with the treaty obligations. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 138, art. 40, 999 U.N.T.S. at 181–82 ("The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . . ."); *see also supra* note 138 (listing the six treaties).

262. *See supra* note 139 (describing the Commission on Human Rights). The Commission on Human Rights is empowered to adopt resolutions criticizing a U.N. member state in "situations which reveal a consistent pattern of violations of human rights." E.S.C. Res. 1235, U.N. ESCOR, 42d Sess., Supp. No. 1, 1479th plen. mtg. at 17, U.N. Doc E/4393 (1967).

263. The concluding observations of a treaty body provide a collective assessment of a state's periodic report. Concluding observations commonly include a declaration of factors impeding the application of the treaty and criticism of specific practices. For example, concluding observations from reports by the Committee against Torture are available at http://www.unhchr.ch/html/ menu2/6/cat/cats.htm. For additional background information on and links to treaty monitoring bodies, reports, and reporting requirements, see Amnesty International's website at http://web.amnesty.org/ pages/treaty-periodic-reports-eng.

264. Judgments of the European Court of Human Rights are binding. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe. *See* European Convention for the Protection of Human Rights and Freedoms, *supra* note 172, art. 46 (requiring states parties to abide by judgments of the European Court of Human Rights and empowering the Committee of Ministers to enforce such judgments).

265. Rome Statute of the International Criminal Court, art. 77, July 17, 1998, 2187 U.N.T.S. 3, 135 (entered into force July 1, 2002).

more like courts.[266] Dean Harold Koh emphasizes the importance of increasing transnational adjudication.[267] Professors Jack Goldsmith and Stephen Krasner both stress that economic and military force would best promote human rights,[268] and they question whether new institutions (the International Criminal Court) and new doctrines (humanitarian intervention) support or undermine the maximum use of that power.[269] Notably, these projects share the sense that the monitoring and enforcement options listed above reflect a continuum of effectiveness. Such proposals reflect the view that compliance is best induced by the exercise of coercive authority—such as military intervention or binding decisions of third-party monitoring institutions. This view, we maintain, is called into question by the acculturation approach. Indeed, we posit that, under certain conditions, "soft law" mechanisms will be more effective in establishing durable norms.

In examining this set of design issues, it is important to isolate the effects suggested by each of the three mechanisms of social influence. One might mistakenly suppose that exploiting a range of tactics—without having to delve into finer details of mechanisms and behavioral logics—is a pragmatically sound approach. This response, however, is riddled with problems. First, and perhaps most obviously, effective regime design often requires setting priorities and making tough choices with limited resources. Accordingly, enforcement decisions should be based on a comparison of the expected utility of each option, as measured by the probability of achieving behavioral

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266. *See* Helfer & Slaughter, *supra* note 4, at 366 (suggesting that the U.N. Human Rights Committee take additional steps to reinforce those characteristics that tend to make it more like a tribunal).

267. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); *see also* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203 (1996) (suggesting that interaction between states and the transnational legal process encourages compliance with international law).

268. Goldsmith, *supra* note 6, at 970–72 (summarizing Professor Krasner's argument that "power" and self-interest account for states' adherence to international norms); Krasner, *supra* note 31, at 139–40, 166–67 (suggesting and then concluding that "realism"—via the use of military power—is necessary, though not necessarily sufficient, to ensure enforcement of human rights regimes).

269. *See* Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003) (asserting that the "ICC depends on U.S. . . . military . . . and economic support for its success"); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 47, 56–57 (arguing that the ICC cannot fulfill its goals without U.S. military support and that the ICC may in fact increase impunity for human rights violations by decreasing the likelihood of such military support to punish noncompliance).

change.[270] Second, the features of the three mechanisms reveal potential incompatibilities among strategies. For example, as we discuss below, some forms of coercion would undercut strategies for fostering acculturation; that is, coercive tactics can have a deinstitutionalizing effect. Some of these conflicts can be managed, whereas others are more fundamental. Third, the central practical concerns of specific strategic options vary by social logic. For example, the persuasion approach is most concerned about "overlegalization" by third-party monitoring institutions.[271] Other concerns that vary by behavioral logic include the informational politics employed by various strategies—such as the type and timing of disclosures.[272] In short, sensible regime design must carefully consider the three social mechanisms when fashioning implementation strategies.[273]

A. *Coercion*

Under the coercion approach, traditional notions of power—military and economic—provide the principal machinery for changing state practices. Treaty regimes discourage undesirable behavior by increasing its costs (or, alternatively, encourage desirable behavior by

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270. Studying mechanisms of social influence may also help assess the likelihood that states will resort to one strategy or another. For example, Professors Chayes and Chayes reject several coercive strategies not because the respective approach would be ineffective if deployed but because they conclude that the prospects of states using such an approach are dim. *See* CHAYES & CHAYES, *supra* note 7, at 63–66 (criticizing international economic sanctions for being ineffective because consensus is difficult to assemble and maintain, sanctions are slow to operate, and enforcement decisions are essentially made on a national level).

271. *Cf.* Helfer, *supra* note 4, at 1855–58 (suggesting that overlegalization by way of highly effective enforcement mechanisms may lead to a backlash against human rights treaties, including withdrawal).

272. *See* Mitchell, *supra* note 249, at 48–49 (summarizing the transparency requirements of various nonproliferation strategies).

273. Understanding the impact of the different logics can also help identify important, incidental social effects of a design choice. For example, coercive devices—such as binding decisions by supranational institutions—may most effectively produce social change through their noncoercive effects (such as helping to frame issues). Evaluating their utility should thus take into account predicted outcomes—not simply express objectives such as deterrence and raising costs of proscribed behavior. This lens reveals how NGO strategies that may appear naive—such as constructing tribunals to deter tyrants or advocating that regime principles apply equally to powerful liberal states—could reflect more sophisticated understandings of symbolic politics than critics recognize. *See* Goldsmith, *supra* note 269, at 90, 95 (criticizing NGO's stated goal in creating the ICC and arguing that the ICC will reduce human rights protections); Goldsmith & Krasner, *supra* note 269, at 53 (criticizing the political platforms of human rights NGOs with respect to constructing international criminal tribunals).

rewarding its practice). On this view, the best prospects for orchestrating change include establishing "agreements with teeth" (e.g., the International Criminal Court via criminal sanctions[274] or the U.N. Charter via Security Council enforcement measures[275]) and arrangements that link human rights performance to financial and military interests (e.g., conditional U.S. security assistance[276] or good governance requirements for World Bank loans[277]).

The coercion approach does not value highly soft strategies such as publishing best practices or monitoring and reporting human rights abuses—except insofar as these strategies are integrated into some coercive apparatus. Publishing best practices, for example, might serve to establish standards of conduct around which coercive measures can be organized—in other words, these focal points might help regime participants identify good and bad actors. However, utilizing best practices in this manner probably contradicts the informal character of their promulgation[278] and ignores the fact that they represent a prospective ideal.[279] Indeed, tying best practices to coercive strategies would frustrate the relaxed political process through which organizations generally draft, endorse, and promote such standards. Monitoring and reporting are also considered

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274. *See* Rome Statute of the International Criminal Court, *supra* note 265, arts. 103–111, 2187 U.N.T.S. at 150–53 (detailing enforcement mechanisms for criminal sentences, specifically the relationship between the ICC and the states parties to enforce such sentences).

275. U.N. CHARTER arts. 39–51 (detailing enforcement actions that the Security Council can take to maintain peace and security or to respond to acts of aggression).

276. *See, e.g.*, Foreign Assistance Act of 1961, 22 U.S.C. § 2304(a)(2) (2000) (prohibiting security assistance for any country whose government consistently violates internationally recognized human rights).

277. *See* World Bank Group, Governance & Anti-Corruption: About Governance, *at* http://www.worldbank.org/wbi/governance/about.html (last visited Oct. 19, 2004) (on file with the *Duke Law Journal*) (providing general information about the World Bank's strategy and approach to promoting good governance in client countries).

278. The Office of the High Commissioner for Human Rights has sometimes assumed responsibility for compiling and publishing best practices in the human rights field. The Office of the U.N. Secretary-General has undertaken similar initiatives, as has the Sub-Commission on the Protection and Promotion of Human Rights. Each of these bodies is comprised of U.N. administrative officials or independent experts, not states. These institutions accordingly lend themselves to informal, less politicized processes. *See, e.g.*, *supra* notes 257–58 (providing links to best practices information).

279. *Cf.* Christopher McCrudden, *Human Rights Codes for Transnational Corporations: The Sullivan and MacBride Principles*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 418, 422 (Dinah Shelton ed., 2000) (suggesting that political principles can only operate effectively if the legal system provides them with "breathing room" in which to operate, and implying that excessive determinacy and enforcement would likely backfire).

valuable—if connected to coercive tools. They might generate information according to which rewards and penalties could be directed. Linking information about state practices to coercive tactics, however, can also force information underground.[280] Indeed, coercive strategies might provide states with incentives to conceal the very types of information most useful to the persuasion or acculturation approach.

The coercion approach also considers official criticism to be largely unimportant. As a direct coercive technique, criticism constitutes a nominal sanction. It is, indeed, difficult to conceive of the net benefit of criticism alone once transaction costs are taken into account. Nevertheless, depending on the nature of the institutions responsible for levying criticism, the practice may help to delineate proscribed behavior. For example, Professors Abbott and Snidal explain that states may promulgate relatively general directives in response to ex ante contracting costs and thus may designate institutions to elaborate more specific rules.[281] The creation of a formal body to criticize state performance—and thereby apply legal obligations to practice—can serve this process of elaboration. Additionally, graduated criticism might convey useful information to a targeted state to facilitate reorientation of its practices. Specifically, graduated criticism might signal the existence of a political commitment to employ coercive power.[282] Of course, this suggests that official criticism should be used judiciously to maintain the credibility of threats over time. This understanding of official criticism is inconsistent with tactics of persuasion and acculturation, which rely on more liberal or sweeping use of criticism (for example, to bring attention to events or to facilitate the process of institutionalizing norms).

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280. Mitchell, *supra* note 249, at 41–42.

281. *See* Abbott & Snidal, *supra* note 153, at 433–34 ("Delegation is often the best way to deal with incomplete contracting problems.").

282. As an illustration, the U.N. Security Council has adopted a routine of using deliberately graduated language in a series of resolutions, before activating its more powerful enforcement authority.

B. *Persuasion*

Under the persuasion approach, "managerialism"[283] is the central medium for promoting regime objectives. Managerialism suggests that human rights regimes can encourage desirable behavior in two ways: (1) by systematically engaging governments in discussion about controversial practices and (2) by fostering structural opportunities for transnational networks to engage governments (or other relevant audiences).[284] On this view, states can be convinced to embrace regime norms (1) through organizational arrangements that facilitate meaningful communicative exchanges among stakeholders (e.g., the International Labor Organization[285]) and (2) through the exercise of "good offices" by high-level officials (e.g., the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe[286]).

Furthermore, according to the persuasion approach, monitoring and reporting can induce change if conducted in a sensitive manner. Some persuasion scholars recommend these strategies as means of generating useful information and cooperative solutions. Professors Chayes and Chayes, for example, discuss the usefulness of directing states' attention to potential defections to facilitate management of

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283.   *See* Raustiala & Slaughter, *supra* note 2, at 542 ("The theory was 'managerial' in that it rejected sanctions and other 'hard' forms of enforcement in favor of collective management of (non)performance."); *id.* at 542–43 (describing principles of managerialism).

284.   *See, e.g.*, CHAYES & CHAYES, *supra* note 7, at 126–27 (stating that "endless discussion of . . . norms . . . enhances their authoritative character"); Raustiala & Slaughter, *supra* note 2, at 543 (discussing prescriptive strategies for managing noncompliance in accordance with this theoretical approach).

285.   The International Labor Organisation (ILO) is structured on a tripartite system; each country is represented by delegations from government, labor, and business. The members meet regularly to devise policy recommendations, develop standards, and discuss implementation. ILO, Structure of the ILO, *at* http://www.ilo.org/public/English/depts./fact.htm (last updated Sept. 26, 2000) (on file with the *Duke Law Journal*).

286.   Ratner, *supra* note 74, at 595 (arguing that the High Commissioner on National Minorities exemplifies "an innovative instrument for persuading relevant domestic decision-makers to comply through a set of distinct . . . strategies," and stating that "[t]hese . . .aspects of the European experience represent a direct challenge to existing theories on compliance with international law"); *id.* at 695 ("The work of the High Commissioner shows the salience of softer forms of law not merely as pieces of paper, but as tools of persuasion."); *see also* Harold Hongju Koh, *A Job Description for The U.N. High Commissioner for Human Rights*, 35 COLUM. HUM. RTS. L. REV. 493, 500–01 (2004) (arguing "that the Commissioner is best able to draw attention to economic, social, and cultural rights" when these rights are denied to minorities).

such defections.[287] The significance of periodic state reports can help states and other interested actors to assess actual practices under the terms of the treaty. The open exchange of ideas and experiences assists "the winnowing out of reasonably justifiable or unintended failures to fulfill commitments . . . and the identification and isolation of the few cases of egregious and willful violation."[288] Monitoring and reporting can also serve an important function in cuing states to think harder about human rights violations—another valuable ingredient in the persuasion process.[289] Accordingly, international organizations could create institutional environments in which new information (e.g., about the type or prevalence of human rights violations) would be routinely and systematically linked to broadly established values. In contrast, a second variant of the persuasion scholarship suggests that regimes do not have to emphasize exposing state practices. External surveillance is considered less important because the dominant social influence is based on sincere acceptance of the content of the rules.[290] Nevertheless, disclosures that reveal new types and patterns of violations are independently important in that they change minds about the significance and prevalence of human rights violations.[291] These views, in turn, help mobilize (and organize) responses at a systemic level. And finally, as we discussed above, some of this scholarship recommends strategies not clearly linked to the persuasion-centered causal account—indeed, they seem to rely on coercion or acculturation processes. For example, some commentators suggest that social sanctions will gradually compel states to narrow the gap between position-taking and actual practice.[292]

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287. *See, e.g.*, CHAYES & CHAYES, *supra* note 7, at 126–27 (asserting that the process of evaluating alleged noncompliance clarifies norms and defines the performance required to bring a state party into compliance).

288. *Id.* at 28.

289. *See supra* notes 43–51 and accompanying text (discussing cuing as a persuasion technique).

290. In discussing this regulatory strategy in the nuclear proliferation context, Professor Ronald Mitchell explains: "Monitoring potential proliferant behavior becomes unnecessary since actors serve as 'their own ubiquitous inspectors.'" Mitchell, *supra* note 249, at 45 (quoting EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 248 (1982)).

291. *See, e.g.*, KECK & SIKKINK, *supra* note 18, at 16 (describing transnational networks' strategy of using information to shame state actors and to raise awareness of human rights violations).

292. *See* CHAYES & CHAYES, *supra* note 7, at 123 ("The participants seek . . . to persuade each other . . . . Since the party has participated in *each stage of the argument, the pressures to*

Less clear in the persuasion model is the effectiveness of criticism and sanctions. The literature is ambivalent on this issue. One school of thought maintains that criticism and more severe penalties can complement efforts at persuasion. Indeed, the (implicit or explicit) threat of sanctions may bring states to the table in the first place.[293] Moreover, some scholarship stresses the importance of persuasion but finds its greatest impact in encouraging transnational political movements and foreign states to leverage concessions from recalcitrant states.[294] In sharp contrast, other scholarship argues that criticism and more severe penalties have a deleterious effect on the communicative atmosphere required for collective deliberation to thrive.[295] Criticism may, therefore, also discourage states from systematically reviewing new types and patterns of human rights violations.[296]

C. Acculturation

Under the acculturation approach, power is understood as productive, cultural, and diffuse—not merely prohibitory, material, and centralized. Treaty regimes can induce desirable behavior through processes that institutionalize models of legitimate state practice and that link states and their citizenry to forums that

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conform to the final judgment are great." (emphasis added)); *see also id.* at 119 ("Failure to behave in ways for which one can construct acceptable accounts leads to varying degrees of censure . . . . It is . . . crucial that international relations are conducted in large part through diplomatic conversation—explanation and justification, persuasion and dissuasion, approval and condemnation.").

293. *See id.* at 26, 28 (suggesting that "justificatory discourse" and "[t]he need to be a member in good standing" of the international community exert strong pressure on states to comply with human rights obligations).

294. *See* KECK & SIKKINK, *supra* note 18, at 12, 16, 117; *see also supra* text accompanying notes 18–22 (citing scholarship suggesting that activist networks use human rights norms to convince audiences to encourage their governments to persuade nonconforming states to comply with such norms). In terms of framing effects in particular (and thus within the strict terms of the persuasion model), criticism of a state's behavior can also increase the salience of an issue.

295. Notably, scholars who derive their models of communicative action from Jürgen Habermas stress the purity of discourse free of coercive techniques. *See, e.g.*, Payne, *supra* note 7, at 41–42 (agreeing with the argument that exacting concessions through material exchanges (bribes) is not free of distortion and that such bribes prevent the development of shared normative values).

296. *Cf.* Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26, 44 (1997) (arguing that international environmental agreements can hasten progressive implementation of norms by avoiding the use of words such as "dispute" or "compliance").

elaborate and apply such standards. Furthermore, the theory of acculturation suggests that regimes should carry out a number of activities: allocate available resources to assist states in reporting on their own human rights practices (e.g., under Article 40 of the International Covenant on Civil and Political Rights[297]), facilitate transnational experts in human rights consultancy (e.g., the technical and advisory services of the Office of the High Commissioner for Human Rights[298]), and create local "receptor sites" for transmitting global norms (e.g., by establishing and strengthening national human rights commissions).[299]

Acculturation values the publication of best practices more highly than does either of the other mechanisms. Admittedly, the general approach would not suggest relying heavily on this method. Nevertheless, publishing best practices can contribute to the process of standardization. States may be more willing to adopt such models, at faster rates and more durably, than the other approaches suggest. The emulation of best practices will not require persuading relevant actors. State policies that "mimic" best practices should also be more durable than policy shifts caused by coercion—the policies should generally persist even when material pressure is no longer applied or available.

Monitoring and reporting can also perform valuable functions in a regime that takes acculturation seriously. However, these devices should be used differently depending on the form of acculturation being harnessed.[300] With respect to conformity through social rewards and sanctions, it is vital to expose wrongdoing (and to tie exposure to external praise and criticism). Accordingly, external surveillance and reporting—especially by third-party states and organizations—should be significant parts of the monitoring and reporting apparatus.[301]

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297.   International Covenant on Civil and Political Rights, *supra* note 138, art. 40.

298.   *See* U.N. OFFICE OF HIGH COMM'R FOR HUMAN RIGHTS., FACT SHEET NO. 3, ADVISORY SERVICES AND TECHNICAL COOPERATION IN THE FIELD OF HUMAN RIGHTS (1996) (describing the history, current status, and scope of providing advisory services to states parties and NGOs to help member countries implement human rights treaties and other related obligations), *available at* http://www.unhchr.ch/html/menu6/2/fs3.htm.

299.   *See supra* text accompanying notes 208–10 and accompanying text (citing acculturation scholarship suggesting that national human rights commissions serve to accelerate diffusion of norms).

300.   *See supra* Part I.C.1 (describing the two microprocesses of acculturation: social pressure and cognitive pressure).

301.   *Cf.* ROBERT F. DRINAN, THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS 85–86 (2002) (describing the effectiveness of U.S. State Department reports on human

With respect to acculturation through cognitive pressure, monitoring and reporting serve different functions. States will formally adopt particular conventions even under conditions of nonsurveillance. That is, they will accede to particular norms in the process of identity formation and mimicry of globally promulgated models. External monitoring and reporting are thus not necessarily required (a fact that human rights regimes should take into account when considering how to expend limited resources). Nevertheless, visibility might perform a regulatory function. Indeed, the leading social theorist on discursive practices, Michel Foucault, emphasizes the power of visibility in regulating social behavior.[302] A regime attempting to exploit these attributes might stress reporting by a state's own organs, not simply reporting by third parties. Indeed, the very process of identifying, describing, and controlling human rights practices helps the diffusion of the human rights discourse through global and local levels. This general approach, however, would require care not to institutionalize noncompliance. As suggested by recent studies of domestic order maintenance,[303] international regimes should be concerned that emphasizing the prevalence of violations might promote disorder and further violations.[304]

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rights practices of other countries); KECK & SIKKINK, *supra* note 18, at 23 ("Moral leverage involves what some commentators have called the 'mobilization of shame,' where the behavior of target actors is held up to the light of international scrutiny . . . . on the assumption that governments value the good opinion of others . . . .").

302.   *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200 (Alan Sheridan trans., Vintage Books 1979) (1978); MICHEL FOUCAULT, *Questions on Geography*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 63, 72 (Colin Gordon ed., Colin Gordon et al. trans., 1980) (emphasizing that surveillance is one way that states and individuals can monitor each other); James F. Keeley, *Toward a Foucauldian Analysis of International Regimes*, 44 INT'L ORG. 83, 92 (1990) (briefly explaining how "actors are defined and become visible as targets of observation and control"); *cf.* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 687–89 (2001) (explaining Foucault's analysis of visibility—i.e., exposure via surveillance—in constructing norms and inducing behavioral regularity).

303.   *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 19 (1996) (citing the "Broken Windows" study, which indicates a correlation between publicly visible disorder and more serious crimes); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 366, 369–70 (1997) (supporting the "Broken Windows" theory that public disorder lowers the "price" of serious crime).

304.   More theoretical work could examine how these concerns might relate to Foucault's notion of "incitement to discourse"—a social process in which classification and prohibition help produce perversions. *See generally* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 17–35 (Robert Hurley trans., Vintage Books 1990) (1978).

Under certain conditions, binding third-party decisions and material sanctions may weaken the effectiveness of acculturation. Cognitive dissonance studies suggest that the simultaneous presence of instrumental threats and promises can undermine subtle forms of socialization.[305] Actors are more willing to embrace a practice or idea if they consider the decision to comply an act of personal choice (intrinsic motivation), rather than one compelled by external force (extrinsic motivation). However, the applicability of this theory to states (either at the macrolevel of states or the microlevel of diplomats, elites, or domestic publics) is questionable. Additionally, once norms are internalized, more intrusive (and perhaps coercive) measures might then be legitimated (e.g., the European Court of Human Rights[306]).

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305. *See, e.g.*, Sheena S. Iyengar & Mark R. Lepper, *Rethinking the Value of Choice: A Cultural Perspective on Intrinsic Motivation*, 76 J. PERSONALITY & SOC. PSYCH. 349, 364 (1999) (reporting results of studies indicating that theories and paradigms of motivation reflect the cultures in which they are developed); *cf.* Mark R. Lepper, *Social-Control Processes and the Internalization of Social Values: An Attributional Perspective*, *in* SOCIAL COGNITION AND SOCIAL DEVELOPMENT 294, 318 (E. Tory Higgins et al. eds., 1983) (suggesting that systems of rewards and punishments will be used in different contexts).

306. Helfer & Slaughter, *supra* note 4, at 314–17 (discussing the importance of incrementalism in the evolution of European Community law and European human rights law).

TABLE 4: MECHANISMS OF IMPLEMENTATION

	Publishing Best Practices	Monitoring and Reporting	Criticizing Bad Actors	Binding Decisions and Sanctions
Coercion	Negligible	Effective (in providing information) if tied to coercion	Negligible	Highly effective and essential
Persuasion	Moderately effective	*One View*: Highly effective: Monitoring and reporting devices generate issue salience (e.g., they change minds regarding the gravity of a problem) *Another View*: Moderately important if the states already agree on a rule	Potentially effective: Criticism generates issue salience Potentially counterproductive: Criticism has a deleterious impact on the communicative atmosphere	Potentially counter-productive: Sanctions create incentives not to reveal information *Risk*: "Overlegalization" (third-party adjudicator exceeds states' acceptance of obligation)
Acculturation	Effective	Highly effective and important *Risk*: Emphasizing prevalence risks institutionalizing noncompliance	Highly effective and important: Criticism mobilizes shame	Potentially counter-productive: Sanctions create incentives not to reveal information Potentially productive if there are high levels of institutionalization *Risk*: Sanctions can undermine institutionalization (i.e., when cognitive dissonance exists, coercive force can actually undermine acceptance) *Risk*: Coercion administered inequitably (e.g., by imposing double standards or by shielding some states from sanctions) undercuts social influence

V. TOWARD AN INTEGRATED MODEL

In this Article, our principal objectives are to analyze the characteristics of each mechanism of social influence and to demonstrate their significance for institutional design, in the hope of assisting future research agendas in international legal scholarship—empirical, conceptual, and doctrinal. Having now analyzed the microprocesses that comprise each mechanism, we offer some provisional comments about the prospects for developing an empirically grounded approach that would integrate all three mechanisms in fashioning a human rights regime. Such an approach—which would appreciate the distinct qualities of, and interactions among, the processes of coercion, persuasion, and acculturation—is in our view essential to building an effective human rights regime. In this Part, we identify some general features that such a model should include.

First, an integrated model should take seriously the processes of acculturation. Indeed, acculturation has been systematically undervalued (and, at times, misunderstood) in debates about human rights regimes. As discussed above,[307] commentators rarely invoke acculturation; when they do, it is often either (1) conflated with persuasion or (2) unexplained. Yet, the acculturation approach is potentially quite useful in the context of human rights law. As we mention in the Introduction, there are several reasons to suspect that the other mechanisms will prove ineffective in this arena. States generally lack sufficient interest or political will to sustain an effective strategy of coercion. Persuasion approaches require internalization of the values of human rights regimes—and there is little evidence to suggest that this is a reliable method of socializing bad actors. Indeed, theories of persuasion do not provide a useful way to think about partial or incomplete internalization. In short, the prevailing approaches will prove ineffective. Furthermore, as the analysis of membership rules demonstrates, acculturation strategies greatly value the social effects generated by intergovernmental organizations. In contrast, both coercion and persuasion operate quite effectively outside formal organizational settings.

Second, an integrated model should account for negative interactions among the three mechanisms. Simply put, deploying one

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307. *See supra* Part I (reviewing mechanisms of social influence, including acculturation).

mechanism might undermine the ability to deploy another. For example, overt coercion can interfere with persuasion strategies by polarizing group deliberations. Coercion may also undercut acculturation by suggesting that the target behavior is not self-evidently appropriate—the "deinstitutionalization" effect that we describe above.[308] Persuasion and acculturation may similarly countermand one another if the former focuses attention on resolving particular substantive disagreements among states when the latter stresses abstract commonalities. Persuasion and acculturation strategies may also conflict when the former highlights the prevalence of human rights violations as a framing device and the latter, to avoid the institutionalization of undesirable behavior, casts such violations as aberrant.

Third, an integrated model should endeavor to identify the conditions under which the various mechanisms operate successfully. For example, the effectiveness of all three mechanisms will likely vary according to the socioeconomic and sociopolitical conditions of the relevant states. In particular, it is important to assess the structural capacities of states to monitor human rights practices and sanction human rights violations. The likelihood, feasibility, and costs of these measures will often determine which strategy (or strategies) should predominate. Another important variable is the character of the extant structural relations at the global or regional level. For example, the effectiveness of various mechanisms should turn on considerations such as the density of international interactions, the axes along which relevant states share important cultural characteristics (including religion, ethnicity, and language), and the distribution of military and economic power.

Finally, an integrated model should consider various "sequencing" effects. That is, an integrated model might emphasize different mechanisms at different stages of the institutionalization of a norm. For example, there may be reason to coerce states into formal organizations in which they are later subject to measures that rely on persuasion or acculturation. If acculturation can alter state preferences over time, intergovernmental organizations might incorporate more flexible administrative devices such as

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308. *See supra* text accompanying note 305 (arguing that cognitive dissonance studies suggest that institutional regimes combining threats and rewards can undermine subtle socialization techniques); *see also* Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589, 596–606 (2001) (summarizing this growing literature).

renegotiation clauses—essentially devices that recognize that the preferences of states may be systematically influenced by their very participation in an organization. These insights suggest that a human rights regime might also enhance its effectiveness by demanding modest initial commitments and ratcheting up obligations over time. More specifically, strategies could include allowing supervisory organs to expand their authority incrementally and creating opportunities for optional protocols only after an organization has existed for a particular time period. Under certain conditions, a regime might concentrate on exploiting the effects of acculturation before investing heavily in persuasive techniques to define obligations more precisely. Also, human rights regimes can potentially employ coercive techniques most effectively once robust levels of internalization have occurred. This strategy of delayed onset coercion reflects, in many respects, the evolutionary path of the European Convention on Human Rights.

These reflections on the general contours of an integrated model are, we recognize, provisional. The full elaboration of an integrated model will require further empirical and conceptual work. Nevertheless, we contend that a few basic points should guide this work. First, the project of building an effective international human rights regime will be stymied if the microprocesses of social influence are not taken into account. And, second, considerable attention must be given to the force of acculturation.

CONCLUSION

Regime design choices turn on empirical claims about how states behave and under what conditions their behavior changes. We suggest that a central problem for human rights regimes is how best to socialize "bad actors" to incorporate globally legitimated models of state behavior and how to get "good actors" to perform better. Substantial empirical evidence suggests three distinct mechanisms whereby states and institutions might influence the behavior of other states: coercion, persuasion, and acculturation. Several structural impediments preclude full institutionalization of coercion- and persuasion-based regimes in human rights law. Yet, inexplicably, these models of behavioral modification predominate in international legal studies. In this Article, we first unpack the components of each mechanism. We then link each of the identified mechanisms of social influence to specific regime design characteristics—identifying several

ways in which acculturation might occasion a rethinking of fundamental regime design problems in human rights law. Through a systematic evaluation of three design problems—conditional membership, precision of obligations, and enforcement methods—we identify and elaborate acculturation as a third way to conceive of regime design problems. We maintain that (1) acculturation is a conceptually distinct social process through which state behavior is influenced and (2) the regime design recommendations issuing from this approach defy conventional wisdom in international human rights scholarship. This exercise not only recommends reexamination of policy debates in human rights law, but also provides a conceptual framework within which the costs and benefits of various design principles and political strategies might be assessed. Our aim is to improve the understanding of how norms operate in international society with a view to improving the capacity of global and domestic institutions to harness the processes through which human rights cultures are built. Regime design in human rights law must then seek to incorporate what is known about global culture, the diffusion of practices within and across societies, and the processes of social influence more generally. This Article is, we hope, a step in that direction.