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# Judicial Power in Domestic and International Politics

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**Abstract** Although scholars have made considerable progress on a number of important research questions by relaxing assumptions commonly used to divide political science into subfields, rigid boundaries remain in some contexts. In this essay, we suggest that the assumption that international politics is characterized by anarchy whereas domestic politics is characterized by hierarchy continues to divide research on the conditions under which governments are constrained by courts, international or domestic. We contend that we will learn more about the process by which courts constrain governments, and do so more quickly, if we relax the assumption and recognize the substantial similarities between domestic and international research on this topic. We review four recent books that highlight contemporary theories of the extent to which domestic and international law binds states, and discuss whether a rigid boundary between international and domestic scholarship can be sustained on either theoretical or empirical grounds.

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## Books Discussed in This Review Essay

- Alter, Karen J. 2009. *The European Court's Political Power: Selected Essays*. New York: Oxford University Press.
- Guzman, Andrew T. 2008. *How International Law Works: A Rational Choice Theory*. New York: Oxford University Press.
- Helmke, Gretchen. 2005. *Courts Under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge: Cambridge University Press.
- Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press.

For some time now, scholars have been arguing that common analytical distinctions drawn between the study of domestic and international politics are mis-

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placed. Indeed, Milner<sup>1</sup> begins a recent essay in *International Organization* by quoting Hanrieder who, writing in 1968, colorfully describes the self-imposed conceptual prisons in which comparative politics and international relations (IR) scholars had confined themselves, rendering each deaf and mute to the work of the other.<sup>2</sup> Thirty-seven years later Milner declares the locks shattered and the inmates liberated, at least among a relatively large group of scholars working in each field.<sup>3</sup>

The liberation, such as it was, resulted from the willingness of scholars to consider alternatives to three assumptions on which the separation between the two fields rested: (1) that states are unitary actors, (2) that states are the most (and often the only) important actors in the international system, and (3) that anarchy describes international politics while hierarchy describes domestic politics. Relaxing the first two assumptions presented a clear path toward analyzing how intrastate and nonstate differences might influence the outcomes of international political phenomena, and in that way, invited work at the boundary of international and domestic politics. Yet, the rigid subfield division did not turn critically on the unitary actor and state-centric assumptions. Even if states are best understood as collections of interests, and say, nongovernmental organizations do matter, if international politics are carried out under anarchy while domestic politics are carried out under hierarchy, then we are still talking about very different subjects of inquiry. For that reason, the series of conceptual challenges to the anarchy/hierarchy distinction, notably reflected in work by Milner and Lake, raises even more significant questions about the usefulness of maintaining our traditional subfield boundaries.<sup>4</sup> Lake argues that the conceptualization of anarchy/hierarchy as two values in a binary concept is harmful to inquiry in both domestic and international politics. If problems of anarchy have to be resolved at the domestic level, in largely the same way as in the international system, then it is unclear whether the division between the fields has anything more to do with the proper names of the actors. And if this is correct, then the lack of cross-fertilization can be particularly harmful. We have learned a great deal about important questions by relaxing the assumptions Hanrieder, Lake, and Milner have questioned. The most prominent example of blurred distinctions between domestic and international politics involves models built on the assumption that politicians want to retain office. This assumption is widely adopted in

1. Milner 1998.

2. Hanrieder 1968.

3. Indeed, Lake most recently echoed this position in his 2010 Presidential Address to the International Studies Association. Lake 2010.

4. Milner's essay "probe[s] the sharp dichotomy between domestic and international politics that is associated" with the assumption that anarchy is a fundamental feature of international politics (Milner 1991, 68). She argues that the assumption is "degenerative, posing anomalies and inhibiting new insights by separating international politics too radically from other politics" (ibid.). Lake has more recently made a very similar point. First in the context of the mini-renaissance of sovereignty, 2003a, 303–7, second in the context of theories of conflict, Lake 2003b, 84–85, and third in IR generally, Lake 2010.

the study of interstate conflict,<sup>5</sup> as well as the study of civil conflict.<sup>6</sup> The successful use of bargaining models of strategic interaction provide an even better illustration.<sup>7</sup> And, as Milner observes, the focus on institutions (whether democracy versus autocracy or mechanisms such as audience costs) has led scholars of both domestic and international policy to reference profitably one another's work.<sup>8</sup>

Despite this progress, it is not clear that Hanrieder's inmates have been fully liberated. There are several pockets of research, some quite extensive, in which one or more of the old assumptions continue to guide scholarship.<sup>9</sup> In this essay, we discuss research on the conditions under which courts come to meaningfully constrain governments from violating their international and domestic legal obligations. Specifically, we address whether, and if so why, courts endowed with formal powers to review the actions of states come to constitute binding constraints on governments. We refer to this work as research on *judicial power*. In this context, the hierarchy/anarchy assumption suggests that international and domestic courts confront fundamentally different problems in the construction of their authority. Because we contend that they do not, scholarship in this area can benefit considerably from bringing our subfields into a more direct dialogue.

Four recent books published by influential scholars tell us much about what we know—and more importantly, what we do not yet know—about how governments can be bound to their legal commitments by courts. Alter's *The European Court's Political Power* collects a series of essays that extend and consolidate her theory of how the domestic social and political contexts of European countries have influenced the power of the European Court of Justice (ECJ).<sup>10</sup> Alter's primary idea is that the ECJ successfully leveraged the power of domestic judiciaries to increase its own authority. Guzman's *How International Law Works* focuses on international law and describes how simple mechanisms of reputation, reciprocity, and retaliation carried out by states against states render international obligations enforceable. States' varying interests in maintaining a reputation in the international system account for the conditions under which international law will bind them.<sup>11</sup> By extension, the power of international courts is limited to the boundaries defined by interstate enforcement.

The other two books center on domestic courts. Helmke's *Courts Under Constraints* seeks to understand why judges hand-picked by powerful executives aiming to eliminate constraints on their authority sometimes challenge their appointers—often over salient political controversies.<sup>12</sup> Helmke argues that gov-

5. See Smith 1996; Bueno de Mesquita et al. 2003; and Clark 2003.

6. See Mukherjee 2006; and Tarar 2006.

7. See Fearon 1995; Austen-Smith and Banks 1988; and Groseclose and McCarty 2001.

8. See, for example, the discussion in Rogowski 1999.

9. For a discussion of several such pockets, see Lake 2010.

10. Alter 2009.

11. Guzman 2008.

12. Helmke 2005.

ernment or regime instability can induce judges to defect from their appointers in an effort to keep their posts after a transition. Vanberg's *The Politics of Constitutional Review in Germany* considers how political battles between the judiciary and the executive can be mediated by the public. In Vanberg's argument, the power of courts depends on the transparency of the conflicts they resolve, which makes it possible for public pressure for compliance to bear on potentially recalcitrant politicians.<sup>13</sup>

Together these books raise questions about the value of imposing a strict divide between research on judicial power in international and domestic politics. They also highlight the insularity of our subfields with respect to understanding judicial power. A standard approach of domestic judicial scholarship is to ignore work on power in IR. For example, Helmke's book contains no discussion of the problems of power confronted by international courts, how the solution to those problems might inform her question, or how the argument around which her book turns might apply in the international context.<sup>14</sup> Vanberg's book contains two paragraphs in the conclusion on the debate over the ECJ's power, but it would be a stretch to claim that the international scholarship he discusses informs the book's central argument.<sup>15</sup> Insofar as comparative politics make use of the IR literature, it is largely as a means of investigating how international law may be used to resolve domestic legal problems.<sup>16</sup> Research on international law and courts frequently takes the opposite approach, addressing how domestic judiciaries can be used by international courts to advance their goals. This is, in fact, the central theme of Alter's research.<sup>17</sup> Yet an even more familiar approach in IR is to draw distinctions between the fundamental problems that international and domestic courts confront, and on those grounds, assume away the possibility that international courts are, or can become, more powerful than originally intended. This is the approach taken by Guzman in his book.<sup>18</sup> In none of these ways do the lessons of power construction in one context inform or condition meaningfully our understanding of power in another. In each of these ways, scholars are uncritically, if sometimes only implicitly, accepting the anarchy/hierarchy assumption. We believe that there are good reasons to proceed differently.

Failing to recognize essential similarities between the problems international and domestic courts face as they attempt to constrain governments retards our progress in understanding judicial power. Empirically, it unnecessarily limits the

13. Vanberg 2005.

14. Helmke 2005. Quite obviously it would have been impossible for Helmke (or Vanberg for that matter) to cite the Alter and Guzman books we have selected. However, these books reflect recent work in a long line of scholarship, which predated the Helmke volume.

15. Vanberg 2005, 171–72.

16. Maveety and Grosskopf 2004, 465.

17. Alter 2009. Also see the discussion in Burley and Mattli 1993, 62–65.

18. Guzman 2008.

set of courts on which scholars think to test their claims. Theoretically, it obscures critical research questions. Most obviously, if legal hierarchy is constructed domestically, then it is reasonable to ask whether it can be constructed internationally. Yet if international legal hierarchy depends on its construction domestically, as much of the international judicial literature suggests, then understanding the processes by which domestic courts come to constrain governments is essential. Assuming that international courts will be powerful when domestic courts are powerful is an incomplete explanation. Relaxing the hierarchy/anarchy assumption also identifies puzzles in the literature on international judicial power, which require a revision to either our understanding of international law, domestic law, or both.

Put most directly, we argue that scholars writing about judicial power at the domestic and international levels are, and should be, writing in one coherent literature. We can learn more from engaging each other's work seriously than from making use of untested assumptions about essential differences across levels. This can mean testing the predictions of theories developed in either literature on data typically reserved for the other, but it can also mean—and here we think lies the real advantage—building more general, internally consistent models, which could be applied to courts in the international or domestic systems. Recent scholarship suggests that the literature may be moving in this direction. Indeed, Voeten's analysis of decision making on the European Court of Human Rights (ECHR) provides a lucid example of the first approach,<sup>19</sup> whereas Carrubba's analysis of federal and international courts suggests how the latter approach might proceed.<sup>20</sup> This essay documents the theoretical and empirical justifications for continuing to move our literatures in this direction.

To support our argument, we first address whether international courts and domestic courts confront fundamentally different enforcement challenges. We then consider whether the theories scholars have proposed as explanations of judicial power are distinct across the international and domestic levels. If they are, then even if the courts on which we focus confront the same enforcement challenges, the domestic-international subfield division can be rationalized by suggesting that power in these courts is constructed and maintained via different processes, and so cordoning off one class of courts from another risks little in the way of empirical or theoretical innovation. Finally, we consider whether the empirical propositions emerging from our theories receive different support across the international and domestic levels. If they do, perhaps we can sustain a rigid separation on empirical grounds alone.

The remainder of the essay is divided into six sections. The first defines key concepts. The next three sections develop our argument, in the order we have just described. We then consider the implications of our argument for future scholarship.

19. Voeten 2008.

20. Carrubba 2009.

## Concepts: Courts and Judicial Power

The courts we have in mind at the domestic level are states' highest appellate courts with constitutional jurisdiction, or constitutional courts in the states that create them.<sup>21</sup> Internationally, we limit ourselves to what Romano calls international judicial bodies.<sup>22</sup> These are permanent tribunals, created by an international legal instrument, which resort to international law for the resolution of cases, use pre-existing rules of procedure that cannot be altered by the parties, and issue legally binding decisions. Romano divides them into five categories: general; international criminal law/humanitarian law; human rights; trade, commerce, and investments; and regional economic and political integration.<sup>23</sup> Because of our focus on courts that have the authority to review states' contemporary actions we exclude the criminal tribunals established to prosecute abuses in the former Yugoslavia and Rwanda, but the other bodies in the Project on International Courts and Tribunals' Synoptic Chart fall within the scope of our discussion.<sup>24</sup> These bodies include, for example, the International Court of Justice, the ECHR, the Inter-American Court of Human Rights (IACHR), the International Criminal Court, the World Trade Organization (WTO), and the Court of Justice of the African Union.

Of course, both international judicial bodies and domestic high courts with constitutional jurisdiction engage in a variety of activities, some of which have nothing to do with evaluating the behavior of states with respect to limits on their power. The scope of our claims are limited to constitutional review. We follow Stone Sweet<sup>25</sup> who considers a constitution to be "a body of metanorms, [or] rules that specify how legal norms are to be produced, applied and interpreted." Insofar as international judicial bodies evaluate the actions of governments subject to international metanorms, which limit governmental power, they are engaged in constitutional review. It is in this sense that Alter refers to the ECJ as "a constitutional court for Europe in all but name."<sup>26</sup>

Judicial power as a concept is similar to, but distinguishable from, several similar concepts often discussed in the literature: "judicial autonomy," "judicial effectiveness," and "judicial independence." The four books that motivate our essay exhibit a broad array of conceptual usage, ranging from a lack of interest in precise definitions,<sup>27</sup> to varied positions on the importance of studying effective-

21. Ginsburg 2003.

22. Romano 1999, 713–14.

23. See the Project on International Courts and Tribunals' Synoptic Chart for a listing of the bodies that meet this definition (Romano 2004).

24. *Ibid.*

25. Stone Sweet 1994, 444.

26. Alter 2009, 6. The same interpretation, for a wider set of international judicial bodies is given by Stone Sweet 2009, 631.

27. Helmke 2005.

ness,<sup>28</sup> respectively, through use of all of the terms as effective synonyms.<sup>29</sup> Nevertheless, useful analytic distinctions can be drawn among these terms.

Although judicial independence has no consensus definition,<sup>30</sup> most definitions can be divided into one of two groups: those that emphasize “judicial autonomy” and those that focus on “judicial effectiveness.”<sup>31</sup>

Autonomy’ refers to judges’ ability to develop opinions independent of the preferences of other political actors. As Kornhauser suggests, judges ought to be the “authors of their own decisions.”<sup>32</sup> The more a court’s decisions reflect that court’s sincere evaluation of the legal questions presented to it, irrespective of external pressures, the more autonomous it is. Following Helfer and Slaughter, effectiveness refers to the extent to which courts can compel the state to comply with adverse decisions.<sup>33</sup> The greater a court’s ability to compel parties to implement judicial decisions with which they do not agree the more effective it is.<sup>34</sup>

Judicial power is thus a two-dimensional concept that is greater the greater the level of autonomy and effectiveness that a court possesses. That is, we define a court as “powerful” if it is both autonomous and effective. An autonomous court that is not effective borders on being irrelevant to political outcomes: it makes sincere decisions that are then ignored. Similarly, in the extreme, a court that is not autonomous may appear effective, but is in fact either a lackey doing others’ bidding or engaging in strategic prudence to the same effect. To exercise power a court must both be able to rule free from outside influence and have that ruling obeyed by the state, regardless of whether the state approves or disapproves of the decision.

## The Domestic Enforcement Problem

The primary rationale for maintaining a strict division between research on international and domestic judicial power is that international and domestic politics are themselves fundamentally distinct. As Waltz suggests, international politics are anarchic, while domestic politics are hierarchical.<sup>35</sup> This distinction hinges on the existence of governments in domestic polities and the absence of a government in

28. See Guzman 2008; and Vanberg 2005, respectively.

29. Alter 2009.

30. For a review of concepts, see Burbank and Friedman 2002.

31. We focus on *de facto* concepts of judicial independence. Posner and Yoo 2005, 7 invoke a *de jure* concept, where judicial independence is a set of legal institutions, which are assumed to influence particular kinds of behavior. We discuss some of these well-known institutions (for example, appointment and removal rules) in the section on theories of judicial power.

32. Kornhauser 2002, 48.

33. Helfer and Slaughter 1997.

34. Effectiveness in this sense is closer to the way in which Raustiala and Slaughter 2002, 539, define compliance, though the critical distinction is that a court may only be considered effective if it is capable of compelling compliance when a party would rather defy a resolution.

35. Waltz 1979, 88.

the international system. As Wagner puts it, “under government there is someone to enforce contracts and property rights and in anarchy there is not.”<sup>36</sup>

In the context of judicial research, the anarchy/hierarchy assumption supports the belief that international and domestic courts confront fundamentally different problems of enforcement. Guzman offers a representative statement.

The critical difference between domestic and international courts is that the former are backed by the state and a system of coercive enforcement. . . . A party who refused to comply with her obligations can be forced to do so or to pay damages. . . . International tribunals lack this ability to summon coercive enforcement. . . .<sup>37</sup>

In her work on the ECJ, Alter expresses similar confidence in the ability of domestic courts to enforce their rulings:

While national governments appeared to be willing to ignore ECJ jurisprudence, ignoring their own courts was a different matter entirely. Citizens might trust their government when it says that an international tribunal’s ruling is unsound, and they may actually prefer having national interests take precedence over an international obligation. But few governments want to claim a right to ignore their own courts, and few citizens want their governments to have such a right.<sup>38</sup>

By both accounts, the difference between international and domestic politics is stark. International courts confront serious challenges to their effectiveness, whereas domestic courts do not.

In our view, this distinction is highly appropriate if scholars mean to contrast (1) the absence of a third party to enforce contracts in international politics with (2) the presence of a third party to enforce individual-to-individual contracts in domestic politics. With respect to citizens violating their obligations to one another the hierarchy metaphor is apt and captures nicely the binding constraints that individuals confront when they contract under the shadow of the state, at least relative to the constraints states face at the international level.

But the distinction breaks down when we turn our attention to the enforceability of state commitments themselves at the domestic level. Indeed, as *Publius* suggests in *Federalist* No. 51 and as Weingast reminds us in the modern era, a fundamental dilemma of institutional design concerns precisely what is assumed under the Waltzian distinction: constructing a state that is powerful enough to

36. Wagner 2007, 123.

37. Guzman 2008, 49. Similarly, Mitchell and Powell 2009, 100, argue that “International courts do have not the same types of enforcement mechanisms as domestic courts. . . .”

38. Alter 2001, 219–20. It is worth stressing that Alter does express a position in other work that it will be inappropriate to assume that domestic courts will influence meaningfully political behavior in all contexts (see, for example, Alter 2009, 134). Nevertheless, even when limiting her account of international judicial power to domestic contexts characterized by the rule of law, Alter does not evaluate explicitly how rule of law characteristics, like judicial power, are constructed.



enforce private obligations risks constructing a state that cannot be bound to its own promises.<sup>39</sup> Although we may grant without much harm that domestic, private contracting is carried out under the shadow of the state, carrying the assumption to the enforceability of state promises is problematic. In the domestic context the state does not contract under the shadow of anything. For this reason, theorists that wrestle with the domestic problems associated with the enforceability of state obligations find themselves on precisely the same conceptual footing as theorists who tackle problems that emerge out of anarchy in the international system.

Perhaps there is a way back to the Waltzian distinction in our context precisely through the institutional argument North and Weingast develop. As is well known, the North and Weingast solution to the fundamental dilemma requires government to make a credible commitment to respect rights, which requires that government has incentives to follow through with its promises and that these incentives are common knowledge.<sup>40</sup> Commitments are credible when they are self-enforcing. As North and Weingast suggest, one way by which commitments are rendered credible is through the development of an autonomous and effective system of courts.<sup>41</sup> Such courts induce credible commitments because they constitute genuine constraints on government behavior. If we can assume that a state has a powerful judiciary, then perhaps the Waltzian distinction can be saved. In this sense, governments contract in the shadow of their judiciaries.

But here *Federalist* No. 78 injects another theoretical challenge. Lacking financial and violent means of coercion, judiciaries are uncommonly weak institutions that depend on outside political actors to implement their decisions.<sup>42</sup> This is a fundamental problem of judicial policymaking. When the actor whose behavior is under review is the same actor responsible for implementation (that is, the government), the problem is most acute. For this reason, it is not clear how courts come to constrain governments or even if they ever really do.

In a variety of ways, this issue is at the center of the separation of powers (SoP) literature in law and social science, within which Helmke and Vanberg write.<sup>43</sup> Though we will have more to say about particulars, it is enough here to note that identifying the ways in which domestic judiciaries might come to constrain the state is the central contribution of each book. Domestic legal hierarchy, in their accounts, is constructed in both Argentina and Germany. Of course, we might be tempted to dismiss Helmke's analysis of the Argentine Supreme Court as being driven by her selection of an authoritarian, or at best a transitioning, state. However, Vanberg's analysis of the German Constitutional Court cannot be rejected on those grounds. Moreover, the essential point of the larger SoP literature, much of

39. See Hamilton, Madison, and Jay 2009; and Weingast 1995.

40. Strictly speaking North and Weingast focus on property rights, but their point is easily generalized to rights generally.

41. North and Weingast 1989, 813. See, also, the critique in Stasavage 2002.

42. Hamilton, Madison, and Jay 2009.

43. See Helmke 2005; and Vanberg 2005.

which is conducted on the U.S. Supreme Court, is that courts should be able to influence public policy outcomes only under certain, politically constructed conditions.<sup>44</sup> This scholarship strongly suggests that the Waltzian distinction is inappropriate. The key implication is really quite simple: the essential problem that animates the literature on interstate relations, that a state's legal obligations are not obviously enforceable, is the same problem that animates the literature on intrastate relations.

The construction of judicial power, or otherwise put, the construction of hierarchy, is a generic problem for all courts empowered to review state actions. From a theoretical perspective if we assume that domestic courts are powerful due to hierarchy and that international courts have little power due to anarchy we assume an answer to key questions. Why do governments delegate formal powers to courts? Why do governments only sometimes comply with their obligations to respect decisions of the courts to which they have delegated power? Why does the power of some courts seem to expand over time, while the power of other courts contracts? Variation in judicial power across courts should be an important object of inquiry, not something about which we assume an answer. The domestic SoP literature represented by Helmke and Vanberg embraces this view, but proceeds largely without incorporating the lessons of international courts.<sup>45</sup> Guzman explicitly invokes the assumption we are challenging. And Alter appears to be moving from the Guzman position toward that represented in Helmke and Vanberg, but as we shall see, Alter stops far short of a serious engagement with existing theory of domestic power.<sup>46</sup>

## **Explanations of Judicial Power in International and Domestic Judicial Politics**

To put to rest a concern that the two fields are too conceptually distinct to support meaningful cross-fertilization, we discuss three major theoretical accounts of judicial power, each of which is represented in the four books featured here, and demonstrate that scholars studying both domestic and international courts are asking the same types of questions and proposing theories that highlight similar causal mechanisms.

### *Delegation-Centered Arguments*

Scholars of both domestic and international courts have isolated the process by which states delegate judicial review as important to understanding whether those

44. See Martin 2006 for the basic SoP logic and citations to related scholarship.

45. See Helmke 2005; and Vanberg 2005.

46. See Guzman 2008; and Alter 2001 and 2009.

courts are, or become, autonomous from, and effective vis-à-vis the states that delegate that authority. That is, judicial power is essentially constructed by institutional design.

In the domestic literature, for example, Landes and Posner suggest that legislators construct independent judiciaries in order to more credibly signal to interest groups that current legislative deals will stick in the future.<sup>47</sup> The influential North and Weingast tradition suggests that powerful judiciaries credibly commit states to respect property rights, and by so doing ensure the financial stability of the state and drive economic growth.<sup>48</sup> Moustafa has even argued that authoritarian states permit courts to exercise a significant measure of control over human rights issues in order to communicate to foreign and domestic investors a commitment to property rights.<sup>49</sup>

A very similar argument in IR suggests that states adopt international obligations, and presumably delegate authority to judicial bodies empowered to enforce these agreements, in order to signal commitments to particular policies or to the international order itself.<sup>50</sup> Just as Landes and Posner or North and Weingast or Moustafa have argued that the delegation of power to domestic courts induces credible domestic commitments, Alter suggests that the delegation of power to international courts, like the ECJ induce the credibility of state promises to their international obligations.<sup>51</sup> In these arguments, the central logic of delegation that induces powerful courts is one of ensuring that promises will be perceived as credible.

In contrast to the credible commitment logic of delegation, other scholars have argued that powerful courts are constructed during periods of political uncertainty to insulate current political majorities, or their policies, from being undermined by current minorities in the event of a government transition. Both Ginsburg and Finkel argue that domestic actors delegate or expand constitutional review authority to courts in order to provide insurance against possible future losses of power, essentially locking in their current policy initiatives.<sup>52</sup> This “lock-in” logic is familiar to students of IR, where scholars have argued that legal regimes are developed to insulate current, newly won domestic democratic norms during periods of political uncertainty.<sup>53</sup> On these accounts, judicial power emerges by design yet is aimed at insulating the interests of current political coalitions from the vagaries of democratic turnover.

A final delegation logic centers on information. IR scholars have argued in various ways that international courts should be conceptualized as “agents” of contracting states in the international system, and that their primary role is to help

47. Landes and Posner 1975.

48. North and Weingast 1989.

49. Moustafa 2007.

50. See Alter 2009; Simmons 2000; and Mansfield and Pevehouse 2006.

51. Alter 2009, 242.

52. See Ginsburg 2003; and Finkel 2008.

53. See Moravcsik 2000; and Reinhardt 2003.

uncover hidden information about whether states are behaving consistently with their obligations.<sup>54</sup> Guzman, in fact, envisions two, not necessarily mutually exclusive, informational roles for international courts. The first is to clarify the meaning of international obligations. The second, as we have just suggested, is to identify violations.<sup>55</sup> Guzman argues that international law is enforced endogenously via state-to-state relations and operates most effectively via the mechanism of reputation. States comply with their obligations so that they will be able to credibly communicate the likelihood of good behavior in future negotiations. International courts, when operating autonomously, can play a highly important role in maintaining the system of reputation, but courts exercise power only insofar as their creators allow it.

Domestic scholars have similarly suggested that constitutional review can provide an important information-gathering function, essentially allowing governments to engage in more creative policymaking: powerful courts can set aside policies that turn out to be ineffective or ill-suited to the problems of the day, but which could not be reformed through the legislative process, because of how veto structures privilege the status quo.<sup>56</sup> Although the precise mechanism is less about monitoring than reducing uncertainty about unknowable states of the world, a court's information provision role is central. Governments give up power to take advantage of the information judges can provide via *ex post* review.

In three kinds of ways, across both international and domestic levels, scholars suggest that judicial power is created by institutional design. That is not to say that the various arguments of this sort are wholly simpatico. Scholars of comparative politics continue to debate whether judicial reform is primarily about insulating parties from power transfer or about inducing credible commitments. And of course a debate has emerged among IR scholars regarding whether delegation-centered accounts should be constructed within the principal-agency framework of neo-institutional economics, as in Garrett and Weingast or Posner and Yoo,<sup>57</sup> or within what Alter calls the "trustee" model.<sup>58</sup> Alter contends that we should conceive of international courts as "trustees" to whom states delegate enforcement authority as a means of rendering credible various promises to fulfill their international obligations, not as the constrained agents of contracting parties. International courts, in their role as trustees, can behave autonomously and can compel compliance, precisely because overt political influence on judicial decision making or refusal to implement legally binding orders undermines the credibility of the promise, which was the entire reason for creating the court in the first place.

It is not our aim to resolve these important debates. The take-away point is this: regardless of one's position on them, delegation-centered research on courts ought

54. See Garrett and Weingast 1993; Carrubba 2005; and Posner and Yoo 2005.

55. Guzman 2008, 51–54.

56. Rogers 2001.

57. See Garrett and Weingast 1993; and Posner and Yoo 2005.

58. Alter 2009, 237–62.

to be viewed as part of a larger theoretical literature than it is presently considered. It can be usefully understood as a debate about how courts at any level construct judicial power. By doing so we expand the population of courts we ought to be studying empirically, and in principle, we set ourselves up to learn fundamental, less contextually restricted, lessons about law and politics.

### *External Political Arguments*

Not all accounts of judicial power are centered on institutional design at the moment of delegation. Indeed, many scholars have suggested that political conditions subsequent to institutional design condition the power that international and domestic courts exercise. These conditions are “external” in the sense that they are best conceptualized as exogenous to the choices that judges make—though judges may be influenced by them, they cannot, strictly speaking, control them.

The primary argument of this sort suggests that judicial power is politically determined—that power is a function of political context. In other words, judicial power turns on the choices political coalitions (or leaders) make during the appointment process or in response to particular decisions. For example, Helfer and Slaughter draw on Steinberg to develop a “constrained independence” model for international courts.<sup>59</sup> They suggest that international court autonomy and effectiveness is affected by what they call *ex ante* and *ex post* tools of influence. Obvious *ex ante* tools include formal appointment institutions and procedural rules that limit jurisdiction. At the international level, there is evidence that governments make appointments designed to advance their political interests. Voeten finds that left-leaning governments and governments that aspire to European Union membership are more likely to appoint “activist” judges to the ECHR.<sup>60</sup> *Ex post* constraints include removal institutions and control over the judicial budget. Further, simple noncompliance can be conceptualized as an *ex post* tool, as can global norms regarding the appropriate behavior of international judges.<sup>61</sup> In Helfer and Slaughter’s version, these factors influence the size of the so-called judicial strategic-space, which we take to define the boundaries of the court’s power.<sup>62</sup>

59. See Posner and Yoo 2005; Helfer and Slaughter 2005; and Steinberg 2004.

60. Voeten 2007, 692–94.

61. See Terris, Romano, and Swigart 2007; and Mitchell and Powell 2009.

62. Additional *ex ante* tools might include procedural or substantive rules that increase access to the judiciary or caseloads. Insofar as judges care about having cases to resolve, such tools might be quite effective (Helfer and Slaughter 1997, 301). Although there are differences across levels, it is unclear how fundamental the differences are. For example, international judicial bodies such as the International Court of Justice or the WTO limit standing to states, whereas individuals typically have access to their own constitutional courts. This is not true universally, though. Indeed, until a major reform in 2008, individuals did not have direct access to the French Constitutional Council. See the discussion of French Constitutional Council in Stone Sweet 2000. More broadly, particular legal actions in the domestic context are often restricted to entities of the state. See the discussion in Navia and Rios-Figueroa 2005.

Cavallaro and Brewer develop a model, in which the ability of international courts to effectively compel compliance depends on media attention of and domestic public support for their decisions.<sup>63</sup> In the absence of support for the policies international court decisions imply, it is unlikely that international courts will meaningfully influence state behavior. But even if public support existed, if the media does not cover resolutions, it will be difficult to mobilize public opinion in support of the decision.

Domestic scholars have developed nearly identical theoretical arguments, yet there has been little cross-fertilization. The oldest argument focuses on institutions that should insulate judges from external pressure (for example, life tenure, supermajoritarian removal institutions, or independent budget authority) and can thus induce autonomous judicial behavior.<sup>64</sup> Empirical tests of this argument have produced mixed results.<sup>65</sup>

Scholars writing in the literature on the SoP in domestic legal systems offer a second, related argument: the combination of multiple veto points and fragmented politics induces judicial autonomy by making it difficult for political authorities to coordinate on an appropriate response to unfavorable judicial decisions.<sup>66</sup> Despite the explanatory power of the SoP framework, it is nevertheless true that courts have challenged powerful political officials over salient issues even when the conditions that should have induced judicial constraint were met. Helmke notes that the Supreme Court of Argentina challenged the military junta even in habeas corpus cases in the early 1980s.<sup>67</sup> She argues that in the context of regime or government instability judges may begin ruling against sitting governments in a bid to save their positions after the pending transfer of power. Thus, even though current conditions suggest that courts should be deferential, the dynamics of regime transition can induce greater autonomy, precisely because removal institutions create incentives for judges to take risks.

Finally, other students of domestic judiciaries have argued that public support for constitutional courts, which can derive from beliefs in procedural fairness and other norms of appropriate judicial behavior exercised by these courts,<sup>68</sup> or from beliefs that judges are more faithful agents of the public,<sup>69</sup> can serve to induce judicial power by creating government incentives to accept unfavorable deci-

63. Cavallaro and Brewer 2008.

64. The intellectual basis for this argument can be found in Hamilton, Madison, and Jay 2009; Montesquieu 1873; and Locke 1965.

65. See, for example, Cross 1999; Herron and Randazzo 2003; Keith 2002; Keith, Tate, and Poe 2009; and Smithey and Ishiyama 2002.

66. See Ferejohn and Shipan 1990; Spiller and Gely 1992; and Ríos-Figueroa 2007. Importantly, Cox and McCubbins 2001; and Stasavage 2002 have argued that the presence of multiple veto points is not sufficient to induce the credibility government may be seeking. In particular, if the holders of these points share government preferences, then although there may be a separation of powers, there will be no "separation of purpose."

67. Helmke 2005.

68. Gibson, Caldeira, and Baird 1998.

69. See Carrubba 2009; and Stephenson 2004.

sions.<sup>70</sup> The logic of this idea is that if sufficient numbers of voters are unwilling to accept noncompliance and they are able to coordinate on a response, governments confront incentives to respect the rule of law even in response to a decision that is unpopular to the public on policy grounds. As Vanberg notes, however, this public support mechanism can work only if the cases that courts resolve are sufficiently transparent.<sup>71</sup> As Cavallaro and Brewer argue in the international context, without transparency, it is not possible to monitor noncompliance.<sup>72</sup> Consistent with these arguments, Staton argues that judges attempt to influence the transparency of their resolutions through public relations strategies. Where the underlying political conditions should induce autonomy, judges have incentives to maximize transparency. He argues, on the other hand, that where political conditions undermine autonomy, greater transparency can threaten judicial power, and so judges might prefer obscurity.<sup>73</sup>

As with the delegation-centered literature, there are considerable similarities among the arguments advanced by students of domestic and international courts. Scholars have emphasized the impact of divided governments on judicial power, and though the argument is more strongly developed among students of domestic courts, Cavallaro and Brewer's recent study of the IACHR also emphasizes the importance of the mobilization of public support to pressure governments to respect courts' decisions.<sup>74</sup> What divides our literatures is less about the general problems that domestic and international courts confront, and more about the very particular ways in which we theorize about judicial power.

### *Judge-Centered Arguments*

A third type of argument about judicial power calls attention to judges and considers how they might influence the parameters that external theories of judicial power believe matter so dearly. Again, we see similar mechanisms being emphasized in the literatures on international and domestic courts. In IR two arguments take prominence: strategic partnering with powerful domestic courts,<sup>75</sup> and courting legal activists.<sup>76</sup> A venerable literature on public interest law laid the foundation for the latter of these two arguments,<sup>77</sup> and a more recent literature on domestic courts emphasizes judges who build power over time via strategic prudence.<sup>78</sup> The

70. See Weingast 1997; and Vanberg 2005. A more recent take on this account considers how politicians manipulate their superior information about public preferences in order to reduce judicial constraints on their power (Clark 2011).

71. Vanberg 2005, 19–60.

72. Cavallaro and Brewer 2008.

73. Staton 2010.

74. Cavallaro and Brewer 2008.

75. As again we know to be the case in Alter 2009, chap. 5.

76. See Harlow and Rawlings 1992; and Simmons 2009.

77. See Vose 1957 and 1958; and Caldeira and Wright 1988 and 1990.

78. See Ginsburg 2003; and Carrubba 2009.

argument about strategic judges has been echoed recently by Terris, Romano, and Swigart as well as Cavallaro and Brewer's recent study.<sup>79</sup> Yet, the cross-fertilization is less than would be the case if these scholars thought of themselves as working in the same literature.<sup>80</sup>

Again, consider Alter, who develops further Burley and Mattli's argument that the ECJ was able to build what we call power by forming partnerships with domestic courts throughout the region.<sup>81</sup> Reflecting existing arguments, Alter suggests that the ECJ invited domestic courts to become active enforcers of European law by ruling that, in certain circumstances, the Treaty of Rome created individual legal rights for European citizens and that European law was supreme even to domestic law changed after ratification.<sup>82</sup> Of course, such doctrines would be meaningful only if domestic courts were willing to make use of them and if domestic political actors were willing to accept the corresponding change in the nature of the community. Addressing the first concern, Alter suggests that competition among domestic courts provided an incentive for lower court judges to make use of ECJ jurisprudence inviting them to refer directly questions of European law to the ECJ. The gradual process of requesting ECJ opinions on matters of European law as they arose in ordinary law suits eventually resulted in the ECJ interpretation of community commitments becoming supreme. The core theoretical problem, of course, is, why would domestic political actors allow this to happen? Here, Alter argues that European politicians acceded largely because judges have longer time horizons than politicians: the former focused on decisions that would provide autonomy and effectiveness in the long run while not threatening the latter's short-run electoral interests.

The ECJ accomplished this second task via a clever, and yet ultimately familiar domestic doctrinal strategy. As Hartley writes, "A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established."<sup>83</sup> The idea, as Alter suggests, is to "build doctrinal precedent without arousing political concerns."<sup>84</sup> Of course, domestic scholars also have proposed that judges have some measure of control over their power. Ginsburg offers a representative argu-

79. See Terris, Romano, and Swigart 2007, chaps. 4 and 5; and Cavallaro and Brewer 2008.

80. As an example, Terris, Romano, and Swigart 2007, 103 argue that the "International judges . . . face somewhat different problems from their national peers. Unlike national judges, international judges do not inherit courts of law; they need to build them." While some of their point involves administrative capacity, they are also referring to what we are calling judicial power. We doubt that justices in contemporary Pakistan, Venezuela, or Zimbabwe (or many other countries) would agree that they inherited powerful courts.

81. Alter 2009, 92–136.

82. Together, these are known as the doctrines of direct effect and supremacy.

83. Hartley quoted in Alter 2009, 119.

84. *Ibid.*



ment. He suggests that nascent courts frequently follow John Marshall's template in *Marbury v. Madison* and attempt to build power by establishing legal principles, which can lead to a significant expansion in power over the long run, but which do not impose short-run costs on ruling coalitions, thus producing a stream of compliant choices from the political branches.<sup>85</sup> Over time, the argument goes, this sequence of compliance becomes convention. In this way, old legal principles become binding constraints. Carrubba suggests that the reason such a stream of results can evolve into a norm of general compliance is that courts challenge governments only when the implementation of their decision would be net beneficial for the public generally.<sup>86</sup> For this reason, over time, people can begin to believe that systematic judicial control over fundamental legal principles is preferable to allowing their representatives to ignore certain kinds of decisions.

The second thrust within this literature argues that judges are able to construct power by anticipating the impact of their decisions on networks of interest groups and potential litigants. In the European context, this kind of argument has been advanced most clearly by Cichowski.<sup>87</sup> The domestic public interest law literature emphasizes the impact of litigants who use courts to empower groups rather than individuals or corporations. The United States, with its *amicus* briefs and class action suits, is the quintessential case, and much of this literature developed to explain the impact of U.S. groups such as the American Civil Liberties Union and the National Association for the Advancement of Colored People.<sup>88</sup> Shapiro, and especially Harlow and Rawlings, document how judges in domestic courts outside of the United States also consider how their rulings can empower groups, and that interest groups recognize this and forum shop among courts and legislatures in their effort to change public policy.<sup>89</sup> Indeed, Epp has argued that courts have little impact on social change without an active, well-organized network of legal activists ready to take advantage of expansive doctrine.<sup>90</sup>

In addition to documenting the considerable history of public interest law in the United Kingdom, Harlow and Rawlings also dedicate a chapter to European judges' strategic public interest decision making in international law.<sup>91</sup> Terris, Ramano, and Swigart and Cavallaro and Brewer make similar arguments.<sup>92</sup> The latter, in particular, emphasize the care that IACHR justices have taken to determine which cases to hear. That issue is surely an understudied area: these arguments suggest that whether courts have control of their docket would strongly and positively co-vary with their power. Courts that have to hear the cases assigned to them have

85. Ginsburg 2003.

86. Carrubba 2009.

87. Cichowski 2007.

88. See Vose 1957 and 1958; and Caldeira and Wright 1988.

89. See Shapiro 1981; and Harlow and Rawlings 1992.

90. Epp 1998.

91. Harlow and Rawlings 1992, chap. 6.

92. See Terris, Romano, and Swigart 2007, chaps. 4 and 5; and Cavallaro and Brewer 2008.

considerably less discretion to act strategically, as these arguments recommend, than those that have considerably more cases than they could possibly hear, and thus select which cases come before them. This would appear to be a ripe area for empirical work studying domestic and international courts using a single theoretical framework.

### *Summary*

International and domestic arguments for judicial power reflect each other in critical ways. Both literatures develop delegation-centered models. Both identify similar exogenous, postdelegation factors that should influence powers. And both consider how courts might develop their own power. Having said that, the similarities we have highlighted operate at the level of general classes of models, and it would be unfair to suggest that there are no unique arguments in each subfield. For example, we are not aware of any argument developed at the domestic level that operates precisely as Alter's account of the expansion of ECJ authority. Stone Sweet has suggested that the Italian Constitutional Court relies on the cooperation of other elements of the judiciary to ensure the implementation of its resolutions, but the account is not identical in all respects to the explicit coalition-building argument Alter constructs.<sup>93</sup> Similarly, we are not aware of an argument in IR that mirrors exactly Helmke's strategic defection account.

Nevertheless, we think it would be possible to apply these accounts to either level, if a scholar were so inclined. Moving Alter's story to the domestic level would be particularly straightforward in the context of a federal state, in which jurisdiction is divided across national and subnational judicial units. Applying Helmke's argument would require some conceptual changes. In particular, it is not clear why we would want to imagine that an international judge contemplates the simultaneous failure of all governments whose states are parties to the treaties she is charged to interpret—the conceptual analog of Helmke's domestic judges who contemplate government or regime failure. That said, if international judges face pressures from their home governments,<sup>94</sup> then it seems very plausible that an international judge might contemplate the failure of that government while ignoring the fates of the rest.

It is possible to continue identifying particular aspects of each argument we have reviewed here, and by so doing characterize the uniqueness of each model. Yet this is possible in every theoretical literature, as scholars borrow from and build on the work of their colleagues. Insofar as they sit within general classes of arguments applied to both levels, we are confident that there is enough theoretical overlap between the "unique" arguments to promote meaningful cross-fertilization. For this reason, if we are going to sustain the rigid subfield boundary it must be

93. See Stone Sweet 2009, 635, and 2000.

94. See discussion in Voeten 2008.

because international and domestic courts operate in fundamentally different empirical environments, such that our general models' predictions will apply at either the international or domestic levels, but not both.

### **Empirical Differences Across Contexts?**

Even if international and domestic courts confront the same enforcement challenges, and even if the same theoretical models explain power at both levels, perhaps a rigid subfield division can be sustained on empirical grounds. Perhaps the empirical implications of our models receive different support in the international and domestic contexts. We address this issue in two ways. First, we discuss why fundamental data limitations undermine our current efforts to say anything definitive about potential differences across the levels. Second, we consider two highly salient empirical distinctions that deal with the *ex post* and *ex ante* mechanisms of influence on judicial behavior that Helfer and Slaughter identify.<sup>95</sup> Whereas the concepts of *ex post* and *ex ante* tools are surely useful, it is unhelpful to assume that the effects of these tools vary systematically across levels. Since none of the four books address these issues directly we look to other works within the field for examples with which to build and illustrate our case.

#### *The General State of Affairs*

Consider the following hypothesis associated with multiple public enforcement models of constitutional review. A court (international or domestic) is more likely to declare that a policy of a sovereign state violates a higher law commitment when the public of that state endows the court with considerable legitimacy than when the public endows the court with little. To support a rigid subfield division, we want to ask a number of questions about this hypothesis. For example, is the effect of legitimacy stronger among domestic courts? Is it stronger among international courts? Is it very small for both types of courts or otherwise equal at both levels? And of course, assuming that we observe effects, are they consistent with theoretical predictions?

What is remarkable is that we are unaware of a study that systematically estimates these effects in a way that would allow for even the most casual comparison across levels. What is more, scholars do not even possess systematic data around the world, which would allow for some basic descriptive inferences. Although there are cross-national estimates of judicial autonomy, they are derived from expert summaries, not actual judicial behavior. Further, though scholars write about compliance patterns, we are far from being able to conclude anything specific about the frequency of compliance across the domestic and international levels. While

95. See Helfer and Slaughter 1997 and 2005.

we can marshal examples suggesting that decisions of international legal bodies are easily ignored sometimes,<sup>96</sup> we can just as easily marshal examples of domestic defiance.<sup>97</sup> To be sure, some exciting new projects are beginning to shed some light on the matter, at least at the international level,<sup>98</sup> but our present state of knowledge about these basic facts is best described as one of belief drawn from assumption or anecdotal observation rather than information based on systematic observation.

It is generally understood that inferring power merely from compliance is fallacious. But ignoring compliance in our estimates of power is equally problematic, precisely because an autonomous court can be quite ineffective. Getting a good estimate of judicial power, which will allow for careful cross-national comparison, represents a significant empirical challenge that has yet to be solved in any way necessary to sustain a claim that international (domestic) courts are more (less) powerful than their domestic counterparts. In summary, we do not have systematic evidence about the extent to which states are bound more or less by domestic or international courts to their legal obligations; without that evidence, it is unclear why we would assume an answer.

### *Empirical Differences?*

Although we do not yet possess the kind of data that would allow us to systematically evaluate our theories across theoretical contexts, we can nevertheless consider the possibility. Two empirical claims in the literature suggest that there is something fundamentally different about the domestic and international levels with respect to the tools of governmental influence.

*Ex ante* controls. Even IR scholars who fall on opposing sides of key debates on international courts seem to agree that there are important differences between the international and domestic levels with respect to the controls that political authorities can exercise on judicial behavior through *ex ante* tools, the appointment process being the most obvious example. But what is more intriguing is that they come to different conclusions about the nature of the differences.

Consider an exchange between Alter and Posner and Yoo. Alter suggests that domestic appointers are relatively unconstrained in their ability to shape the output of their courts through the appointment process. Posner and Yoo contend the opposite. For example, Alter argues that since the appointment process at the international court level cannot be controlled by one state, “international judges are

96. The open U.S. defiance of an International Court of Justice decision prohibiting the mining of Nicaraguan harbors is a common example (Alter 2009, 252–54).

97. Bavarian public schools apparently responded to a German Constitutional Court order banning crucifixes in classrooms by adding them to classrooms from which they had previously been absent (Vanberg 2005).

98. See Cavallaro and Brewer 2008; and Hawkins and Jacoby 2010.

institutionally less subject to appointment politics than their domestic counterparts.”<sup>99</sup> In direct contrast, Posner and Yoo write “A distinctive feature of domestic courts . . . is their separation from politics. While not completely immune to political influence, such courts are less prone to manipulation by elected officials than are ordinary government institutions.”<sup>100</sup> By “appointment politics” and “political manipulation,” we understand a process of naming judges in which the appointer fills vacancies such that the court’s output will reflect the interests of the appointer perfectly or arbitrarily so.

As a first step toward resolving this debate, we might consider the domestic literature on appointments. Critically, Moraski and Shipan have shown that one cannot make unconditional statements about actors’ ability to constrain courts through the appointment process; and further, the list of conditions is long.<sup>101</sup> Specifically, they demonstrate that the institutional rules governing appointments, the number of appointments available, and the distribution of preferences across the political branches involved in the process influence how constrained an appointer is likely to be. Even without a veto constraint the appointer is powerfully constrained by the distribution of preferences among the remaining judges. In short, the best that the appointer can do is alter the court’s output within a limited range.<sup>102</sup>

The critical upshot of Moraski and Shipan’s work is that it is reasonable to question the claims that Alter and Posner and Yoo make. Insofar as we cannot draw any general conclusions about the *ex ante* constraints appointment places on domestic courts, it is unclear that we wish to assume that a generic international court is more or less influenced by appointment politics than a generic domestic court.

This is not to say that we could never say anything specific about the effects of the appointment process, but we want to be careful when we do so. Consider one simple example: an international court in which judges are filled basically by state-by-state selections. In other words there is no significant interstate voting process required for appointments (for example, the ECJ or ECHR). This would seem like the least likely process through which the court as a whole will be subject to significant appointment dynamics largely because with  $n$  appointers for  $n$  judges it is unclear that any appointer can exercise any meaningful control over the ideological (or legal philosophical) structure of the court. But what if a majority of states

99. Alter 2008, 46.

100. Posner and Yoo 2005, 12.

101. Moraski and Shipan 1999.

102. Given limited space we do not detail the model here, however, the essential characteristics are as follows. Moraski and Shipan build their argument around a model of collegial judicial policymaking, where they take the position of the median judge to reflect the policy output (or average policy output if you like) to be expected from the court in session. Their appointment process follows the U.S. rules for Supreme Court appointments (though the rules can obviously be relaxed) and is modeled as a one-vacancy appointment via a take-it-or-leave-it bargaining game, played between the president and the Senate. In light of a vacancy, the goal of the appointer, the president, is to move the median of the court as close as possible to the president’s ideal policy, reflected in this context as a point on a line. Sensibly, the president’s ability to do this is influenced by the preferences of the Senate relative to the president’s own and the existing structure of the court.

have correlated preferences over a salient dimension (for example, limitations on religious practice as understood say via the appropriateness of wearing religiously meaningful garments in public workplaces)? If this is true, then absent a veto structure for appointments, it would seem very likely that this majority will exercise complete control, via the appointment process, of future court decisions. Of course, to know whether this claim holds, we would need a carefully specified theoretical model, which could then be used to compare outcomes across different institutional structures—some of which will reflect common domestic processes and some of which will reflect common international processes. It is this sort of model we envision being developed when scholars start thinking about our literatures as inherently similar.

*Ex post* controls. The most obvious supposed difference between *ex post* tools across the domestic and international courts is that noncompliance is easier for governments faced with international court decisions than with domestic court decisions. As Posner and Yoo suggest, states really can ignore these decisions.<sup>103</sup> In Alter's view, however, we might expect the opposite.<sup>104</sup> If courts are trustees, noncompliance undermines the commitment strategy, and so we might expect that noncompliance is highly costly for states that establish what we might call a trustee court. Still, such a claim seems to imply that international courts might enjoy higher levels of compliance than domestic courts (unless they, too, are trustee courts). It seems reasonable to imagine that it is more difficult for a German government to ignore an ECJ decision than it would be for the current Venezuelan president to ignore the Venezuela Supreme Court. Yet, given the fragmented nature of national Mexican politics since the late 1990s, it seems quite likely that the Mexican president is far more constrained by the Mexican Supreme Court than, say, the Guatemalan president is constrained by the IACHR.<sup>105</sup> The point is that the field lacks the evidence we would need to establish that *ex post* constraints on judicial power are stronger at either level.

Of course, there are other mechanisms of *ex post* control. Political officials can remove judges from the bench, they can refuse to (re-)appoint, and they can influence budgets, jurisdiction and other institutions we might imagine that judges care about. On a number of domestic accounts, whether these potential constraints are likely to influence judicial autonomy, depends on how reasonable it is to assume that they can be effected in particular circumstances. Importantly, Voeten has recently provided evidence consistent with a theory of ECHR judicial behavior in which judges are more partial to their appointing states as the differential between their current income and what could be expected at home if they are removed

103. Posner and Yoo 2005, 14.

104. Alter 2009, chap. 11.

105. See discussions of Mexican judicial effectiveness in Finkel 2008; and the effectiveness of the IACHR in Cavallaro and Brewer 2008.

increases.<sup>106</sup> Similarly, the discussion in Terris, Romano, and Swigart indicates that a number of international judges are sensitive to the need to consider the response to their rulings of governments with reappointment responsibilities.<sup>107</sup> Thus, there is evidence that some international judges behave as if removal authority functions as an influence on their behavior.

Another tool of *ex post* control involves the political override of judicial decisions, which scholars argue might serve to undermine judicial autonomy.<sup>108</sup> The domestic logic of political fragmentation is crucial in this regard.<sup>109</sup> If judges care about being overridden, then if the political branches are unable to coordinate on a response to an unfavorable judicial decision, judicial autonomy expands. Empirically, supermajority voting rules or increasing veto points make coordinating on a response more difficult. Thus, we should expect greater autonomy when courts are protected by favorable veto structures.<sup>110</sup> Of course, this is precisely the logic at the international level for why it might be difficult to discipline a court for overstepping its bounds.<sup>111</sup> Importantly, Carrubba, Gabel, and Hankla provide evidence suggesting that the ECJ is more likely to defer to states as the likelihood of an override increases.<sup>112</sup>

We would not claim that we have evidence that the ECJ is actually as constrained by *ex post* controls as, say, the average domestic supreme court, but it is unclear why we want to assume that it is not. More broadly, it is not clear why we would want to assume that international court autonomy, in general, is more or less constrained by *ex post* tools than domestic courts.

## Implications

We have suggested that the common rationales for treating work on judicial power in international and domestic politics as separate analytical endeavors are not convincing. Existing theoretical models are similar enough to support meaningful dialogue and the empirical record does not support the inference that domestic and international courts resolve their power concerns differently. However, the critical claim is that our understanding of the impact of law upon politics will be considerably enhanced if we no longer assume, if only implicitly, that international politics takes place in a context of anarchy whereas domestic politics takes place under hierarchy.

What remains is a consideration of whether anything meaningful is likely to be gained by discarding the assumption. In other words, what opportunities do we

106. Voeten 2008.

107. Terris, Romano, and Swigart 2007, chaps. 4 and 5.

108. Garrett and Weingast 1993.

109. Chavez 2004.

110. Rios-Figueroa 2007.

111. Scharpf 1998.

112. Carrubba, Gabel, and Hankla 2008.

miss by making the hierarchy/anarchy assumption? What misconceptions does it support? Even if we are right that we will understand judicial power better by discarding the assumption, we must ask what this better understanding would imply for the core questions in comparative politics and international relations. Insofar as courts are central pieces of the formal enforcement mechanism for legal regimes, understanding better the process by which courts can successfully constrain governments is directly related to questions about why governments respect their legal limits. That is, understanding judicial power better is not only about understanding why governments accept unfavorable judicial rulings. It is also about compliance with law and more.

The key for recognizing the broad implications of our argument hinges on accepting that actors' expectations about the likelihood of a state's compliance with its legal obligations, both international and domestic, influence a broad swath of politically relevant behavior. If this much is assumed, then courts are not just important for compliance but for the choices of governments to bind themselves to legal limits, and to a variety of human welfare outcomes, which depend on constraining opportunistic government behavior.

### *Implications for Judicial Power*

The primary implication of relaxing the hierarchy/anarchy assumption is that it would allow us to work together and more efficiently on open theoretical and empirical questions. It strikes us as noncontroversial to observe that our theoretical models have outpaced our empirical tests. Some models are even in tension with each other, such that we are in great need of reconciliation.<sup>113</sup> Just as important, perhaps more so, is that relaxing the assumption would eliminate a key misconception about the nature of domestic judicial power, one that influences the questions we ask and the answers we give in IR.

To consider the second point in more detail, let us return to Guzman.<sup>114</sup> His key distinction, that international courts cannot compel compliance whereas domestic courts can, depends on restricting our attention to citizen-to-citizen contracts. Yet once we consider the extent to which the state can be bound to its own promises, we will need an explanation of enforcement domestically, not an assumption. There is no reason to look for a special explanation for why international law ever binds states. Of course, to be fair to Guzman, his argument about how international law

113. Consider the argument that courts with judicial review powers are constructed as a form of insurance against losses of political power. A delegation of this sort is most likely when politicians envision losing a veto over future legislation. To insure themselves against such a scenario, they establish judicial review—a new veto point. Yet, if the SoP argument concerning fragmentation is correct, then politicians delegating new judicial power per the insurance argument should expect their veto to be weakest precisely when they need it most. What is more, if the politician under the insurance model anticipated having the political strength in the future necessary to ensure that the new court was empowered in practice, the court would not be necessary to constrain the opposing politician.

114. Guzman 2008.



works implies only that the enforcement mechanism will involve state-on-state pressure via the mechanisms of reputation, retaliation, and reciprocity. For that reason, the nature of the international constraints that international courts can place on governments could never grow beyond the kinds of constraints possible in the absence of such courts. It must be for this reason that Guzman largely ignores courts.

By relaxing the hierarchy/anarchy assumption, we uncover a primary way through which research on domestic courts ought to influence research on international law and thereby enrich Guzman's account: it reminds us that some domestic courts have gained the capacity to constrain governments to their legal obligations in settings in which there is no other government to assist in enforcement. This is not to argue that domestic courts are ever completely free from constraint. Yet it would appear that a number of domestic courts have expanded their power beyond what was intended initially.<sup>115</sup> If domestic judicial power can grow in the absence of the mechanisms Guzman proposes, then *a fortiori*, it seems possible for international courts to develop power beyond what was initially intended, where the Guzman mechanisms and others are possible. So, in this sense, Alter's work, which turns on answering how international courts might expand their authority beyond what was originally intended is a critical question to answer, reinforced by our understanding of domestic judicial power.<sup>116</sup>

Having said that, Alter's explanation for the power expansion of the ECJ itself relies on a version of the hierarchy/anarchy assumption, which if relaxed further sharpens the questions we should be asking. To review, Alter argues that the ECJ gained power by leveraging the capacity of domestic courts to constrain their own governments. Insofar as this is correct, then an explanation of international judicial power depends critically on our understanding of domestic judicial power. Of course, Alter recognizes this concern: "[T]he critical role of national courts as enforcers of ECJ decisions also implies that in countries where national courts are less legitimate, less vigilant, and a rule of law ideology is not a significant domestic political factor, politics would be more likely to use extralegal means to circumvent ECJ jurisprudence."<sup>117</sup> Yet noting the extent to which the argument is conditioned by domestic judicial politics is not quite the same thing as explicitly modeling that process. And it does not appear fruitful to invoke Alter's own "time horizons" logic in this context. If politicians are always guided by longer time horizons than judges, then all domestic judges should be able to take advantage of the differential in order to advance their power. This has just not been the case. If Alter is right about the nature of international judicial power, then a complete understanding requires unlocking the puzzles of domestic judicial power.

What is more, if Vanberg and other SoP models are essentially correct, then the ECJ case raises an important puzzle of its own. If the German Constitutional Court

115. Ginsburg 2003.

116. Alter 2009.

117. *Ibid.*, 134.

is constrained by domestic political conditions, how is it that the ECJ built its power on the back of the German Constitutional Court? How can the ECJ generally escape the German government when the German Constitutional Court can only do so given strategic calculation of political and technical contexts? Instead of limiting the power of the ECJ (or international courts more generally) to states characterized by the “rule of law,” the more precise limitations will be to the conditions (for example, transparency, fractionalized government, inclusive appointment procedures, etc.) that explain how domestic courts construct and maintain judicial power. Alter’s account itself suggests that the ECJ may be limited in this way. Since the German Constitutional Court considers itself the final arbiter over the limits of European law in Germany,<sup>118</sup> though European law may be supreme, it will be a domestic court that ultimately interprets the boundaries. If this is correct, then we sharpen a final point of inquiry. Scholars looking for international limits on international courts, as say via the coordination of states on override votes, are likely looking for constraint in the wrong place.

Put plainly, if states can constrain international courts via the pressures they place on their own courts to interpret international law favorably, then whether it is possible to construct a unanimous coalition of states in an international community for the purposes of overriding particular decisions may be irrelevant to the ability of states to insulate themselves from international law with which they disagree. The relevant political battles will be domestic.

### *Broader Implications: Compliance, Cooperation and Human Welfare*

Understanding judicial power better, especially with respect to IR, requires a broader sense of compliance than that with which we have been concerned so far. In this essay, we have limited our discussion of compliance to “compliance with judicial rulings,” largely because this kind is an essential component of judicial power. Yet, a ruling is a very special element of international law, and when IR scholars consider compliance with international law, they have in mind something far broader. Characteristically, Raustiala and Slaughter define compliance as “a state of conformity or identity between an actor’s behavior and a specified rule.”<sup>119</sup> Typically, when this definition is invoked, we are not so much interested in the reaction of governments to judicial decisions, but rather whether governments comply with their legal obligations whether or not a court is involved. The question is what the construction of judicial power, and its focus on effectiveness, has to do with compliance with international law more generally.

118. Alter 2001, 98–123.

119. Raustiala and Slaughter 2002, 539.

In explaining the limits of a reputational mechanism for the enforcement of international obligations, Guzman reminds us that we should expect noncompliance on occasion. He writes:

[T]here are situations in which compliance is not to be expected. It follows that reputational sanctions will be quite modest in those circumstances . . . [I]magine the position of a state negotiating an environmental agreement. Compliance with the agreement will impose a cost on the signatories, but all parties prefer mutual compliance to mutual noncompliance. The signatories expect compliance in many states of the world, but not in every such state. For instance, assume that every signatory recognizes that a country will abandon its obligation if it goes to war because the environmental obligations are too costly to accept during wartime . . . As long as all parties expect breach in the event of a war, there is no reason that past conduct consistent with this expectation would affect the negotiation.<sup>120</sup>

The point is that there will be contexts (for example, when states are at war), in which compliance will be too costly for a signatory. As long as these contexts are clear, that is, as long as signatories can tell whether noncompliance is expected, the parties can enforce agreements efficiently, as Guzman anticipates. The war example would seem the most obvious scenario in which the relevant context is readily observable. But if there is uncertainty about whether a state is truly prohibited from complying because of some particular state of affairs, the compliance problem is significant. The problem is that State A may be unable to tell whether State B is failing to comply in good faith, which should not trigger a retaliatory response, or doing so opportunistically, which should. Without complete information about the context, the best signatories can do is punish all forms of noncompliance, but since some noncompliance makes reciprocation or retaliation will be insufficient to motivate compliance, ineffective punishment ensues.

Carrubba has suggested that courts can help address this problem by providing a monitoring function, which offers parties an independent evaluation of the extent to which another has violated both explicit and implicit terms of a legal agreement.<sup>121</sup> This informational mechanism allows signatories to concentrate punishment (retaliation or reciprocation in Guzman's sense) only on states that violate terms opportunistically.

By solving the parties' information problem, Carrubba's court decreases the costliness of sustaining cooperation by ensuring that state-to-state retaliation will be targeted on contexts in which retaliation can be effective, that is, when a legal term's violation is set to occur in a context where the parties would have expected compliance. This does not mean that states will never violate formal terms of agreements in the context of a powerful court—only that violations will be limited to contexts that the parties understand implicitly to be outside the bound-

120. Guzman 2008, 79.

121. Carrubba 2005.

aries of the agreement. In this sense, courts should reduce opportunistic forms of noncompliance.

Theories of judicial power also put flesh on core models of international cooperation. If powerful courts are part of the enforcement architecture for international political agreements, they may alter the dynamics of international negotiation. Indeed, in Carrubba's view, because powerful courts lower the costs of enforcement, they also expand the conditions under which states will wish to bind themselves to a cooperative legal agreement in the first place. In this sense, powerful courts might induce more international cooperation.

Yet there is another possibility. Although they are likely to reduce the costs of enforcement, they simultaneously raise the costs of compliance for particular parties in particular circumstances. And as Fearon has suggested,<sup>122</sup> by increasing the stakes of the agreement, powerful courts can complicate bargaining over the substance of these agreements. Abbott and Snidal made this observation about all international treaties, and Hathaway as well as Powell and Staton report evidence consistent with it when studying human rights treaties.<sup>123</sup> Put plainly, once they exist and have become powerful, courts make *ex post* compliance more likely. But for this reason, they stress the process by which parties come to agreements in the first place.

Thus, from the perspective of understanding the total effect of a powerful court on the incentive to engage in political compromise in the international setting, we are left with a tradeoff. Powerful courts lower the expected costs of enforcing a deal; however, by making it more difficult to violate obligations, they also raise the stakes of international agreements, and thus may make compromise more difficult. Knowing the total effect of judicial power on international cooperation will require theoretical work evaluating how this tradeoff ought to be evaluated in particular contexts, so we will need to develop empirical strategies designed to be sensitive to how powerful courts pull states in different directions.

Beyond the context of international compliance and cooperation, there are a number of reasons why understanding judicial power should matter beyond the community of scholars for whom the issue is a professional concern. A considerable body of research has suggested that courts that can constrain states from violating fundamental limits on their powers establish conditions for growth and development,<sup>124</sup> promote the expansion and protection of individual liberty,<sup>125</sup> and ensure political order itself.<sup>126</sup> And on normative grounds, of course, courts that can independently resolve conflicts are key elements of the rule of law, which can be understood as a virtue in and of itself.<sup>127</sup> Thus, whether we care about the

122. Fearon 1998.

123. See Abbott and Snidal 2000; Hathaway 2005; and Powell and Staton 2009.

124. Barro 1997.

125. Epp 1998.

126. North, Summerhill, and Weingast 2000.

127. Raz 1977.

capacity of courts to constrain governments because constraint is an unalloyed normative good or because we believe that constraint is a means of advancing critical elements of human welfare, understanding judicial power is essential.

We hope that the primary implication of relaxing our subfield boundaries is that we learn more, and more efficiently, about the conditions under which powerful political authorities come to be bound by the courts empowered to enforce their legal commitments. In addition to being valuable in their own right, the books by Alter, Guzman, Helmke, and Vanberg provide a useful lens through which to focus our attention on how these subfield distinctions have limited the cross-fertilization we believe is both possible and desirable.<sup>128</sup> More specifically, if leading international theories of judicial power, which stress the role of domestic judiciaries, are correct, then international scholars themselves have good reason to turn their attention to understanding domestic judicial power. But this is a two-way street. If international courts confront problems of enforcement similar to those confronted by domestic courts, then domestic scholars have an incentive to study this phenomenon at the international level, both theoretically and empirically. Even if one does not care particularly about judicial politics itself, by understanding judicial power, we might open ourselves to richer understandings of international cooperation and ultimately compliance.

## Conclusion

Scholars of international and domestic courts have been writing in a single, if not entirely coherent, literature on judicial power. The lack of coherence derives from our subfields' (implicit) choice to view the separation of judicial power research in international relations and comparative politics as appropriate. We argue here that there are good reasons to discard the primary assumption around which the divide is constructed: that domestic politics are carried out under hierarchy, whereas international politics are carried out under anarchy. Beyond that, we see no solid theoretical justification to proceed separately. In truth, we have been developing nearly identical arguments in each subfield. What is more, we do not have the data necessary to sustain an empirical rationale for dividing the international from the domestic.

Although we might easily become enmeshed in the important theoretical and empirical challenges that remain, our efforts would be profitably aimed at learning about institutional design in the real world. In this context, it is worth considering a final potential objection to our argument: whether the project we advocate is immediately guilty of an inappropriate "domestic analogy," in Suganami's sense.<sup>129</sup> That is, have we mistakenly inferred an understanding of the world of

128. See Alter 2009; Guzman 2008; Helmke 2005; and Vanberg 2005.

129. Suganami 1989, 170–73.

states from our understanding of the world of individuals? Concerning the design of international institutions, Suganami has famously argued against creating international judicial bodies with compulsory jurisdiction. He advances three reasons: (1) there are some international obligations which no state will ever respect under the right conditions, (2) the lack of enforcement mechanisms for international judicial decisions renders compulsory jurisdiction meaningless, and (3) compulsory jurisdiction might exacerbate political conflicts by giving aggrieved parties an additional complaint in the event that a state fails to comply with a decision.

Our proposal addresses the Suganami position in two ways, by addressing directly the three concerns with granting international courts compulsory jurisdiction, but also more broadly by addressing the domestic analogy process. Relaxing the hierarchy/anarchy assumption immediately undermines the first two rationales. If the lack of an enforcement mechanism is reason enough to counsel against compulsory international jurisdiction, then at least as jurisdiction regards state obligations to its citizens, the reason counsels against compulsory jurisdiction at the domestic level, as well. Likewise, we can surely recognize that there are some scenarios in which states cannot be constrained to their legal obligations, international or domestic. Yet it is not clear why this implies that courts should be denied compulsory jurisdiction. In short, Suganami's first two rationales argue too much. His third implication, that compulsory jurisdiction will increase political conflict is an empirical question, which can be evaluated validly domestically and internationally under the project we advocate. The issue of empirics leads us to the final point.

Although we certainly believe that research on domestic judicial power is relevant for research on international judicial power, what we are advocating, a more coherent literature on judicial politics, is most certainly not a "domestic analogy" because a domestic analogy involves the role of inference—the process of learning about facts we do not know from facts that we do. To be guilty of invoking the analogy one must engage in presumptive reasoning: the assumption that because the domestic and international contexts are similar in some regards, they will be similar (or identical) in some new regard, for which we have no evidence. The core problem with this kind of reasoning is that it not grounded in empirical evidence. On this dimension, we could not agree more with the reasonable concerns Suganami raises.

Indeed, were one to propose a set of specific international institutions based on our current understanding of both domestic and international judicial power we would expect such an effort to necessarily involve a great deal of error. Our theoretical models are in need of refinement, reconciliation, and more systematic testing. As we have discussed, the empirical record does not support any clear inference over whether the international and domestic courts really do confront their political problems differently. Evaluating whether they do ought to be a goal of future research.

What we envision, what we hope for at least, is a more robust, theoretically guided empirical research program in judicial politics that does not make strict

divisions between work on international or domestic courts. If and when that program provides the kind of empirical evidence we would need to conclude that international and domestic courts confront identical problems of power, we might be in a position to advocate for institutional reforms that would be interchangeable across levels. We doubt that this will be the ultimate conclusion. Nevertheless, we believe that our institutional prescriptions will be all the better for our decision to leave behind the hierarchy/anarchy assumption in this context.

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