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# Alternatives to “Legalization”: Richer Views of Law and Politics

Martha Finnemore and Stephen J. Toope

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The authors of “Legalization and World Politics” (special issue of *IO*, summer 2000) have done an excellent job connecting one branch of thinking about international law (rooted in the legal theory of H. L. A. Hart) to one branch of thinking about international politics (neoliberal institutionalism).<sup>1</sup> However, the connections between the two disciplines are broader and deeper than the volume indicates. International legal scholars have long understood that international law is more than the formal, treaty-based law on which the volume’s authors focus their work. Law is a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies.<sup>2</sup> Customary international law displays this richer understanding of law’s operation as does the increasingly large body of what has been termed “interstitial law,” that is, the implicit rules operating in and around explicit normative frameworks.<sup>3</sup> Similarly, legal pluralist analysis of domestic and international legal systems focuses on the interaction of overlapping state and nonstate normative systems.<sup>4</sup>

We show how a fuller appreciation of what international law is and how it influences behavior allows room for a wealth of intellectual connections between international legal scholarship and research in international relations—connections that are not evident from the framing of the “legalization” phenomenon in the *IO* volume we discuss here. We argue that a narrow conception of law and legalization hinders rather than helps these authors’ empirical research. Narrow and stylized frameworks like this one may be useful if they provide conceptual clarity and facilitate operationalization of concepts. However, the empirical applications of

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1. *International Organization* 54, 3, Summer 2000.
2. Glenn 2000.
3. Lowe 2000.
4. See Walzer 1983; and Macdonald 1998.

*International Organization* 55, 3, Summer 2001, pp. 743–758

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legalization in the volume suggest the opposite: the articles reveal that the concept of legalization as defined in the volume is peripheral, in need of revision, or generates hypotheses that are wrong. A fuller consideration of law and its role in politics might produce concepts that are more robust intellectually and more helpful for empirical research.

### A Richer View of International Law

The framers of the volume are careful in defining their terms. *Legalization* refers to a specific set of characteristics that institutions may (or may not) possess: obligation, precision, and delegation.<sup>5</sup> Each of these characterizations may be present in varying degrees along a continuum, and each can vary independently of the others. This attention to definitions is helpful and lends coherence to the volume, but appropriating the general term *legalization* for only a few features of the law is misleading. It suggests that law *is* and can only be this limited collection of formalized and institutionalized features. The phenomenon the authors investigate might more accurately be termed *legal bureaucratization*, since it seems to involve the structural manifestations of law in public bureaucracies. We fully agree that the connections between law and public bureaucracy are important in world politics, but this connection does not exhaust law's role.<sup>6</sup> Under a broader view of law, the legalization of politics encompasses more than just the largely technical and formal criteria of obligation, precision, and delegation. It encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice.<sup>7</sup> It attends to the purposive construction of law within inherited traditions, the way participating in law's construction contributes to legitimacy and obligation, and to the continuum of legality from informal to more formal norms.<sup>8</sup> Indeed, without this broader view of law that causes us to pay attention to legal procedures, methodologies, institutions, and processes generating legitimacy, the authors' three components of legalization lack theoretical coherence and raise more questions than they answer, as we show.

Obviously, any analytic endeavor of this kind requires focus, and the authors are explicit about the issues they "bracket," but nowhere in the volume is there any cautionary discussion to situate the authors' very particular understanding of law's role in a larger context of the possible roles law might play.<sup>9</sup> Consequently, there is also no assessment of how important this specific legalization phenomenon might be among law's many influences in politics or of how this formalized legalization

5. Abbott et al. 2000, 401.

6. Barnett and Finnemore 1999.

7. Postema 1994.

8. Brunnée and Toope 2000.

9. Lutz and Sikkink display a broader sensitivity to these issues than the other articles, but they do not provide an explicit discussion of their broader view or its theoretical implications. Lutz and Sikkink 2000.

might interact with other work law does in the world. In such an extensive effort, these omissions seem surprising. Given that most *IO* readers are not lawyers, we believe that situating and more precisely specifying the authors' notion of legalization will be helpful.

The view of law presented in the volume, though important, is limited. In it, law is constructed primarily through cases and courts, or through formal treaty negotiation. The processes of law are viewed overwhelmingly as processes of dispute resolution, mostly within formal institutionalized contexts. The "international legal actions" chosen in the volume's introduction to epitomize the phenomenon of legalization are mainly examples of tribunal decisions. The secondary evidence of legalization is drawn exclusively from explicit obligations imposed by treaties.<sup>10</sup> Law in this view is constraint only; it has no creative or generative powers in social life. Yet law working in the world constitutes relationships as much as it delimits acceptable behavior. The very idea of state sovereignty, both a legal and a political construction, creates the context that allows for the formal articulation of treaty rules.<sup>11</sup> Similarly, property rights, over which political actors battle in many of the volume's articles, are themselves dynamic constructions generated by law. Oddly, given this group of authors, even the role of formal law in creating and shaping the life of institutions like the IMF, GATT, and WTO, explicitly addressed in the volume, is neglected. Theirs is an overwhelmingly liberal and positivist view of law. It is also limited to the bureaucratic formalism described by Weber and so is very "Western" in a narrow sense.<sup>12</sup> We are not implying that Western law, positivism, and liberalism are uninteresting theoretical frameworks, but an analysis of the role of law in world politics that is entirely constrained by these three optics, attending primarily to formal institutions, is at best partial.<sup>13</sup>

Despite the efforts of the framers of the volume to define terms and to expressly bracket issues, at the end of the day it is difficult to decide exactly what the authors have set out to demonstrate and what analytic work their concept of legalization is supposed to accomplish. Is legalization a dependent variable or an independent one? The framing chapters are not clear on this basic point, and the articles offer diverse, even contradictory, treatments. This diversity also begs obvious questions. If legalization is a phenomenon to be explained, what other factors might explain it, and how important are they? If legalization explains aspects of state behavior, what other independent variables should be considered in assessing legalization's role,

10. Goldstein et al. 2000, 385–86.

11. Biersteker and Weber 1996.

12. Glenn 2000.

13. For a helpful categorization of various legal theories as they relate to the question of compliance, see Kingsbury 1998. Among the competing theories of international law (and particularly of international obligation) that are not included within the volume's concept of legalization are the "world constitutive process" model of the Yale School (Lasswell and McDougal 1971; Reisman 1992), natural law approaches (Verdross and Koeck 1983), the "transnational legal process" model of Harold Koh (Koh 1997), the "interactional" framework of Brunnée and Toope (Brunnée and Toope 2000), and the rigorously rationalistic law and economics approach of Goldsmith and Posner (Goldsmith and Posner 1999).

and how might these interact with legalization?<sup>14</sup> Equally important for the authors, do the three defining features of legalization all have the same causes, or cause the same effects, and how would we know if they did (or did not)? In the last section of this article, we examine three applications of their concept of legalization and show that confusion about these basic issues limits the utility of their conceptualization of legalization.

### *Three Lacunae*

Political scientists have understood for decades that formal institutions do not capture many of the most important features of politics. Indeed, the authors of this volume have a fairly broad, and by now standard, political science definition of institutions, one that focuses attention beyond their formal attributes. Institutions are “rules, norms, and decision-making procedures” that shape expectations, interests, and behavior.<sup>15</sup> Marrying such a broad understanding of institutions to a narrow and formal understanding of law seems both unfortunate and unnecessary. A fuller understanding of law would complement our more nuanced understanding of institutions and produce a richer joint research agenda. To illustrate, we discuss three interrelated features of international law neglected in the volume; these features are central to understanding its effects on world politics and, further, are crucial to a theoretically defensible understanding of the very specific legalization phenomenon the volume’s authors employ.

**Custom.** The most obvious casualty of the volume’s narrow framing of legalization is customary international law, with which it almost completely fails to engage. Any assessment of law’s persuasive influence that neglects to treat seriously the customary law elements of such topics as state responsibility, legal personality, territory, human rights, and the use of force is bound to produce a skewed perspective. For example, customary law on the use of force stands alongside, complements, and even modifies treaty-based norms.<sup>16</sup> Although the UN Charter and humanitarian law treaties establish an explicit framework of norms circumscribing the use of force in international relations, no one analyzing this issue-area can afford to ignore the customary law of self-defense or the impact of the concept of *jus cogens* (peremptory norms) on the attitudes of states toward the legitimate use of force.<sup>17</sup> It is not surprising that the volume contains but the briefest discussion of security issues, for they simply cannot fit within a narrow judicial and treaty-based

14. See Abbott and Snidal 2000; see also Abbott et al. 2000.

15. Goldstein et al. 2000, 387.

16. *Nicaragua v. United States (Merits)* [1986] ICJ Rep. 14.

17. See Bowett 1958; and Ragazzi 1997.

perspective on law's influence in world affairs.<sup>18</sup> Similarly, in the area of human rights, the broadening of customary law obligations has altered the content of interstate diplomatic rhetoric and affected bilateral political relationships. Canada and Norway now engage in a trilateral "human rights dialogue" with China, for example, an engagement that could not take place in the absence of customary norms, for China has yet to ratify key human rights treaties.<sup>19</sup> Again, it is not surprising that the one article on human rights concludes that the legalization framework does not explain behavior particularly well.

**Defining characteristics of law.** A second, related, issue concerns the selection of obligation, precision, and delegation as the defining characteristics of legalization. While the volume's framers offer careful discussion of these terms, their meanings, and characteristics, they say little about why, among the universe of legal features, these three are more important than others. These three features certainly do not define law or distinguish it from other types of normativity, nor are they the source of law's power (or, if they are, that case is not made in the volume).

Precision and delegation are particularly problematic. In a number of well-established areas of international law with strong records of influence and compliance, norms are relatively imprecise. Examples include the delimitation of maritime boundaries (often accomplished on the basis of "equity"), the bases of state criminal jurisdiction (where overlapping rules are the norm), and state responsibility (including a very broad duty not to knowingly allow one's territory to be used in a manner harmful to another state). Similarly, there are wide swaths of functioning international law that do not depend in any way on extensive "delegation" of decision-making authority. Outside of the European context, the entire law of human rights operates and affects world politics without any mechanisms of compulsory adjudication. The treaty-monitoring bodies only gain jurisdiction to deal with individual cases with the consent of states, a consent only sporadically granted. For example, Human Rights Committee decisions are not enforceable. It is also rare for domestic courts to implement international human rights commitments directly within national law. A comparable pattern of influence in the absence of delegation is found in international environmental law. Many international environmental commitments continue to function on the basis of information-sharing and voluntary compliance. Where modern treaties create mechanisms to promote implementation, they are often premised on the need for positive reinforcement of obligations rather than on adjudication and sanctions for noncompliance. There is no extensive delegation of decision-making authority. Why delegation and precision should be defining fea-

18. The exception is a brief foray into ASEAN's security relationships in Kahler 2000a. The *Nicaragua Case* (1986) is discussed in Keohane, Moravcsik, and Slaughter 2000, though for purposes unrelated to an analysis of the customary law on the use of force.

19. For example, although China recently ratified the International Covenant on Economic, Social, and Cultural Rights, it has yet to ratify the International Covenant on Civil and Political Rights.

tures of legalization and what they add to the analytic power of this concept is simply not clear.

Further, the relationship among these three characteristics is unexplored, a significant lacuna since these features could contribute to contradictory developments in many circumstances. Increased precision could lead to less obligation, when prospective members of legal regimes are driven away by fears of detailed rules that are inflexible (a point actually supported by the description of the WTO offered by Judith Goldstein and Lisa Martin).<sup>20</sup> Delegation of decision making can also lead to less precision in rules rather than to greater clarity, as presumed by the proponents of legalization. If one considers the decisions of the International Court of Justice in boundary delimitation cases, for example, the results are clearly legal, influential, and effective in promoting compliance, but they are highly imprecise.<sup>21</sup> What we gain by combining, rather than disaggregating, concepts with such complex and tense interrelationships is not well explained.

Most problematic, however, is the volume's conceptualization of obligation, arguably the central preoccupation both of lawyers and of political scientists interested in how norms affect state behavior. Obligation is central to the volume's framework of legalization, yet the authors articulate no theory of obligation and seem remarkably uncurious about how a sense of obligation might be generated. In the volume's lead article, legal obligation is defined in an entirely circular fashion, with reference to its products: "Legal obligations bring into play the established norms, procedures, and forms of discourse of the international legal system."<sup>22</sup> We know obligation by what it achieves, but this approach does not explain how obligation creates these products. To the extent that the bases of obligation are treated at all in the framing article, the conceptualization is very thin, formal, and contractual. Obligation is created when parties enter into treaties or other express agreements. The mechanism for generating obligation is thus choice—presumably choice by utility-maximizing actors.<sup>23</sup> Yet both legal scholars and international

20. Goldstein and Martin 2000.

21. In the *North Sea Continental Shelf Cases* [1969] ICJ Rep. 3, the court articulated a "rule" of law that the continental shelf should be divided on the basis of "equitable delimitation taking into consideration all of the circumstances." This rule has shaped all subsequent continental shelf negotiations as well as judicial and arbitral decisions.

22. Abbott et al. 2000, 409.

23. In Abbott and Snidal's discussion of "soft law," that quintessentially fluid concept is treated as a preexisting form of institution to be chosen by states for strategic reasons. Abbott and Snidal 2000. This approach misses much of what we know from many legal analyses about how soft law works; see Chinkin 1989; Hillgenberg 1999; and Finnemore 2000. First, soft law is not simply "out there" waiting to be chosen. Part of what is "soft" about this form of law is precisely that it is in flux, in the process of becoming. How states treat it is not exogenous to soft law; it determines and shapes soft law; it is constitutive of it. Equally important, the notion that states "choose" soft law formulations is misleading. Soft law, like customary law, is not always "chosen" in a meaningful strategic sense. For example, the evolution of the "precautionary principle" or "intergenerational equity" in international environmental law is a study in normative entrepreneurship and subtle instantiation as much as in strategic choice. See Brunnée 1993; and Brunnée and Toope 1997.

relations (IR) scholars understand very well that contractual obligations alone are often insufficient to determine behavior.

More careful theorizing of these defining characteristics might have led the framers to explore some alternative features of law and develop more robust concepts. For example, one concept that is notably absent from the various analyses of obligation is legitimacy, yet legal scholars have long focused on legitimacy as an essential source of obligation and "compliance pull" in law.<sup>24</sup> Legitimacy in law has been argued to have a number of interrelated sources. Legitimacy is generated in part through attention to internal legal values that we seem to take for granted in the liberal democratic West but that students of repression will recognize as essential. Law is legitimate only to the extent that it produces rules that are generally applicable, exhibit clarity or determinacy, are coherent with other rules, are publicized (so that people know what they are), seek to avoid retroactivity, are relatively constant over time, are possible to perform, and are congruent with official action.<sup>25</sup> Law that adheres to these values is more likely to generate a sense of obligation, and corresponding behavior change, than law that ignores these values. Legal legitimacy also depends on agents in the system understanding why rules are necessary.<sup>26</sup> Participating in constructing law enhances agents' understanding of its necessity. Finally, adherence to specific legal rationality that all participants understand and accept helps to legitimate the collective construction of the law. Legal claims are legitimate and persuasive only if they are rooted in reasoned argument that creates analogies to past practice, demonstrate congruence with the overall systemic logic of existing law, and attend to contemporary social aspirations and the larger moral fabric of society.<sup>27</sup> Law that exhibits this kind of rationality—that is viewed as necessary, involves in its construction those it binds, and adheres to internal legal values—is more likely to be viewed as legitimate than law that does not have these features.

Legitimate law generates obligation, not just in a formal sense but also in a felt sense. Legitimacy thus connects obligation to behavior in important ways.<sup>28</sup> This is a major strain of argument in international law scholarship, one that IR scholars do read, yet the authors of the *IO* volume do not address legitimacy as part of the legalization phenomenon. They never investigate legitimacy's relationship to obligation, precision, and delegation, nor do they explore alternative hypotheses

24. See Lauterpacht 1947; Lasswell and McDougal 1971 (where legitimacy is not discussed directly but is implicit in the posited relationship between "authority" and "control"); Franck 1990; and Byers 1999.

25. See Fuller 1969; Franck 1990; and Postema 1994. These legitimating characteristics are much broader than the volume authors' concept of "precision," as indicated by Fuller's term for these values—"internal morality of law." Fuller 1969.

26. See Fuller 1969; and Postema 1994.

27. See Fuller 1969; Franck 1990; and Brunnée and Toope 2000.

28. Franck 1990.

concerning legitimacy.<sup>29</sup> We suspect that legitimacy is a prior variable, generating a felt sense of obligation and empowering those who delegate to do so. Variations in legitimacy almost certainly relate to variations in legalization. The spread of formal legal institutions investigated in the volume is likely to depend on the legitimacy of these formal legal processes generally and on the legitimacy of the particular configurations of these processes (the kind of delegation, the nature and content of the obligation) that these institutions embody.

**Law as process.** A third fundamental issue to consider is the nature of legalization itself. The authors of this volume treat law as an artifact—something created by state choice—and equate legalization with three features of the *form* of this artifact (obligation, delegation, precision). Politics thus becomes “legalized,” in their view, as it displays these three features. When one thinks about what legitimates law, however, another possibility emerges. Law, and by implication legalization, may be much more about process than about form or product. Much of what legitimates law and distinguishes it from other forms of normativity are the processes by which it is created and applied—adherence to legal process values, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning. A view of legalization that focused on legal relationships and processes rather than forms would be more dynamic and better suited to explaining change—which many of us, the volume’s authors included, are interested in. Unlike Thomas M. Franck, we would not argue that process is the only thing that legitimates law.<sup>30</sup> Values suffice legal argument and they underlie legal processes generally, so it is not sufficient to seek the power of law solely in the details of its processes of elaboration and application.<sup>31</sup> But it is equally suspect to craft a framework for the empirical study of legalization that ignores process in favor of an essentially structural, and product-focused, analysis.

As framed in the volume, the world’s “move to law” is a move to a very particular kind of law, and not one that resonates with international lawyers who are unaccustomed to the narrow view of obligation espoused by the authors and who would doubt that precision or delegation are the hallmarks of growing normativity in international relations. A broader understanding of law would open up research connections among scholars who would not find the authors’ formulation of legalization particularly engaging. Most obviously, a more culturally and sociologically attuned formulation of the role of law speaks to constructivist concerns and builds bridges between that group of IR scholars and like-minded thinkers in law. Situating law in its broader social context allows room for cultural explanations of

29. Abbott and Snidal recognize that legitimacy exists, but they do not theorize or investigate its independent causal effects on strategic choice. Abbott and Snidal 2000, 428–29. Lutz and Sikkink do explore legitimacy issues and find, as we suggest, that these are causally prior to legalization. Lutz and Sikkink 2000, 654–59.

30. Franck 1990.

31. See Hurrell 2000; and Toope 2000.

behavior and identity formation in ways that these scholars will find helpful. It also promises to reveal connections between IR theory and approaches to comparative law that address issues of identity and normative change within legal traditions.<sup>32</sup> Focusing on law as a set of relationships, processes, and institutions embedded in social context has the further advantage of reformulating the lively legal debate over how "soft" law "hardens" and connecting it with the rich and growing body of work on transnational norm dynamics that has occupied constructivists in recent years. Exploring the causes, nature, and effects of legal legitimacy, a task that cuts across almost all these concerns, is already receiving extensive attention in both of these disciplines.

### **What Difference Does Law Make?**

A fuller understanding of law is not simply a pleasing accessory to the framework proposed in this volume, however. It is a necessity. The purpose of the legalization concept is presumably to facilitate empirical research. If a narrowly drawn and simplified concept generates new insights for researchers and helps them explain empirical puzzles, it may still be valuable. To assess whether legalization does this, we examine the three articles that apply the concept of legalization to different issue-areas. Our examination suggests that the concept provides little help to these researchers, not only because it contains such a narrow notion of law but also because it is inadequately theorized.

Beth Simmons, applying the concept of legalization to monetary affairs, asks why states voluntarily declare themselves bound by Article VIII rules concerning current account restrictions and unified exchange rates. She frames this as a credible commitments problem. The policy dilemma for states is to make their commitments to Article VIII rules credible to markets, thus producing desired investment flows. Law's role is to provide a "hook" or signal that makes commitments credible.<sup>33</sup>

The legalization concept does little work here. Simmons certainly does not need it to carry out her analysis. The only aspect of the concept Simmons treats is obligation, recasting it as "credible commitment"; precision and delegation are apparently not relevant. Conceptual equipment for credible commitment and signaling analyses have been around for a long time. Simmons could have completed essentially the same analysis without "legalization"; it is not clear how the concept helps her.

Adopting a richer view of law, as we suggest, might open this analysis to some important questions and make law more than peripheral in our understanding of these events. A focus on law's role, for example, might prompt us to ask whether or why legal commitments are credible signals to markets for all states. After all,

32. See Postema 1991; Kennedy 1997; and Glenn 2000.

33. Simmons 2000, 601.

some of the developing countries most successful at attracting investment, such as China and Indonesia, have extremely weak conceptions and applications of the rule of law. If accepting legal obligations is such an important signal to investors, as assumed here, why do investors pour so much money into countries where law is so weak?<sup>34</sup> If Simmons believes that domestic and international rule of law are unconnected, so that investors assume that even countries without effective rule of law domestically will be bound unproblematically in the international realm, this would certainly require some elaboration, since it cuts against prominent past work by other authors in the volume.<sup>35</sup>

More generally, equating law with obligation and obligation with credible commitments ignores much of what law does in monetary affairs that might be relevant to Simmons' analysis. The notion that law is merely promise-keeping ignores both the authoritative and the transformative character of law. States are not making the Article VIII decisions in a legal vacuum. The Articles of Agreement (of which Article VIII is a part) created an entire structure of law on monetary affairs, including a Weberian rational-legal bureaucracy (the International Monetary Fund) to make policy on monetary matters. Law thus created a new source of authority in monetary matters, the IMF, which generated new rules for states but also new knowledge about technical matters in economic policy that changed expectations for behavior. Throughout the period examined by Simmons, states are making their decisions about Article VIII commitments in a dynamic environment of law, rules, and economic knowledge about monetary policy, and much of this changing environment is actively promoted by the IMF. One odd feature of Simmons' analysis is that the IMF is all but absent, implying that its actions are unconnected to Article VIII decisions, even in states that have been under its tutelage. The fact that the IMF, through its technical assistance programs, is deeply involved in shaping the laws and central institutions (including central banks) of monetary politics in member states underscores this problem. Treating law's role as simply a "hook" or signal to markets ignores the fact that law, and the rational-legal bureaucracies it creates, has transformed monetary politics both internationally and domestically, enabling states to entertain this kind of commitment as a policy choice and generating the conceptual and policy equipment to make credible commitments to Article VIII desirable and possible, particularly in the developing world.

Goldstein and Martin's analysis of trade politics addresses the volume's legalization concept much more directly. They examine the effects of increasing obligation, precision, and delegation in formal trade agreements on international cooperation and compliance. They find that "more is not necessarily better" because more precision and "bindingness" in rules can mobilize protectionist groups who can now better calculate the costs of freer trade.

34. Wang's analysis of exactly this question in the case of China points squarely to the need for a broader view of how law works. Wang 2000.

35. For example, Slaughter 1995.

What work does the legalization concept do here? As in Simmons' article, Goldstein and Martin create a link between legalization and another well-known concept in political analysis, in this case, information. "Increased transparency" (better information) is added to the definition of legalization without comment in this article.<sup>36</sup> Information then becomes the centerpiece of the analysis. "Legalization entails a process of increasing rule precision, [ergo] a more legalized trade regime will provide more and better information about the distributional implications of commercial agreements."<sup>37</sup> Once we understand what legalization does to information, information does most of the heavy analytic lifting in this article, not law.

One obvious question to ask is whether increased legalization really translates into increased information and decreased uncertainty in the way the authors assume, or whether, indeed, change among the three elements of legalization correlates positively at all. This is an instance where some disaggregation of the concept might be helpful. Goldstein and Martin make a strong case that an inverse relationship exists between precision and any sense of felt obligation, since more precision tends to promote greater use of escape clauses and mobilizes interest groups for noncompliance. The inverse relationship they identify in trade can be found in other areas as well. International Court of Justice decisions on questions as diverse as formal requirements for the creation of custom or unilateral treaty commitments, the existence of regional customary law, the concept of nationality, and the legality of nuclear weapons have all been crafted to promote greater bindingness by offering less precision.

Unfortunately, however, Goldstein and Martin's findings seem not to have prompted much rethinking of the content of legalization by the volume's framers or by Miles Kahler in the conclusion.<sup>38</sup> Such an overall examination might have revealed additional problematic relationships among their three elements of legalization, even in the Goldstein and Martin article. For example, it is not clear that increased precision in law always increases certainty about distributional effects, as Goldstein and Martin assume. If increased precision involves delegation, uncertainty may remain high or even increase because delegation, by its nature, creates uncertainty in principal-agent relationships. Thus, members of the WTO may have more precise rules about resolving disputes than they did under the GATT, but the workings of the dispute settlement body may be sufficiently opaque or unpredictable that distributional consequences remain uncertain in many areas. Conversely, increased delegation does not guarantee more precise rules for the same principal-agent reasons, so there is no reason to think those co-vary. The overall effect of Goldstein and Martin's interesting finding about the effects of information is thus to suggest a wide array of possible relationships among legalization's core features. This, in turn, suggests that the legalization concept is itself less analytically useful

36. Goldstein and Martin 2000, 604.

37. *Ibid.*, 604.

38. Kahler 2000b.

than its component parts, which, as we noted earlier, are not necessarily or uniquely legal.

More attention to law might lead these authors to ask some substantive questions that would bear on their findings. These authors are commendably enthusiastic about including domestic politics in their analysis yet remarkably inattentive to variations in those politics created by widely varying structures of domestic law. Law governing ratification of trade agreements, central to this analysis, differs hugely across even the democratic, industrialized countries on which these authors focus. These differences profoundly change the “logic of [domestic interest group] mobilization” in different countries, around which the analysis revolves. For example, the authors assert that it is the need for treaty ratification, with attendant public processes of debate, that gives rise to the possibility of effective protectionist backlash. Yet in Canada, the United States’ largest trading partner, the treaty-making power is held by the functional equivalent of the executive branch (in practice the prime minister and cabinet), and there is no constitutional requirement for ratification by Parliament. The entire NAFTA treaty could have been concluded by the executive branch, benefiting from the legitimacy granted by an overwhelming parliamentary majority, without any opportunity for formal political debate. The limited public debate that did take place revolved around the need to involve the Canadian provinces in negotiations, for it is provincial legislatures that must transform many trade treaty obligations into domestic law. However, that debate related primarily to jurisdictional conflicts between federal and provincial authorities and did not provide significant opportunities for the protectionist concerns of particular industries or trade unions to mobilize public opposition.

These differences in legal structure are more than simply differences in the constraints or political opportunity structure surrounding strategic actors. Domestic structures of law are, themselves, mobilizing factors for a wide variety of groups involved in trade politics. Domestic law is what constitutes, empowers, and mobilizes a host of interest groups, from trade unions, to professional organizations, to business groups, to environmentalists and human rights activists. Unions have different forms and powers in different national legal contexts, as do business groups and nongovernmental organizations. Law’s role in mobilizing different groups is much more profound than mere provision of information.

Attention to this broader set of legal influences might also lead the authors away from their curiously dichotomous picture of trade politics as an interaction between free-trade and protectionist interest groups. Groups may oppose trade agreements for many reasons; they may oppose some types of free trade but not others. Groups opposed to free trade can actually find inspiration for their work in specific policies and pieces of legislation passed by the same governments that now promote a free-trade agenda. Again, to take a Canadian example, anti-free-trade coalitions are mobilized by nongovernmental organizations active in the protection and promotion of indigenous culture. These coalitions are empowered by existing laws that promote Canadian content on radio and television, and in print. Such cultural and identity-oriented legal frameworks, and the legitimacy they provide for expanding

anti-free-trade arguments, cannot be reduced to "economic protectionism." One can find comparable examples in French legislation and French nongovernmental organizations, especially concerning U.S. domination of the domestic market for films.

Goldstein and Martin are certainly correct that domestic politics are important in trade politics, but significant variation in domestic legal systems should provoke some caution in claiming generalized effects of domestic ratification on interest group politics. If generalizing their analysis to Canada is problematic, we suspect that generalizing to Europe and Asia, and certainly the developing world, would be even more so. More careful thought about the varied possibilities for law to shape public debates on trade—by providing information but also by constituting, empowering, and constraining different kinds of actors in different states—might yield a more defensible set of propositions.

Ellen Lutz and Kathryn Sikkink apply the legalization concept to human rights to test their hypothesis that increased legalization increases compliance with human rights law.<sup>39</sup> They examine three areas of human rights law—torture, disappearance, and democratic governance—and find the least compliance in the most "legalized" area, torture, and the most compliance in the least "legalized" area, democratic governance. They find stronger explanatory power for compliance in broader social variables and in the "norm cascade" that swept through Latin America in the 1970s and 1980s.

Oddly, the legalization concept seems to be most useful to these researchers who find its effects so limited. Unlike Simmons, or Goldstein and Martin, Lutz and Sikkink take us through an examination of the concept, as defined in the framing chapter, and discuss its application to their issue-area. Lutz and Sikkink do not turn legalization into some other analytic concept (like information or credible commitment) to carry out the analysis. In particular, they engage explicitly with the concept of obligation, suggesting briefly that human rights norms are often rooted in customary law. They also stress that any existing "right" to democratization can only be a social norm or a customary norm. Their findings support the understanding of obligation that we traced out earlier, an approach rooted in social processes of interaction. To be effective, obligation needs to be felt, and not simply imposed through a hierarchy of sources of law. Precision and delegation play absolutely no role in the promotion of compliance, at least with these human rights norms. Once Lutz and Sikkink find the legalization hypothesis wanting, they move into familiar conceptual turf (for Sikkink), employing the "norm cascade" concept elaborated elsewhere to explain the pattern of compliance they see.<sup>40</sup>

That Lutz and Sikkink focus so strongly on legalization's contribution to compliance brings us back to an important problem. As noted earlier, the framing article is not clear about analytic objectives. If the volume's purpose is primarily to

39. Lutz and Sikkink 2000.

40. Finnemore and Sikkink 1998.

describe legalization, then Lutz and Sikkink's article is beside the point. After all, the framing article does not claim that legalization will lead to greater compliance with law. Consequently, the fact that a more highly legalized area engenders less compliance than a less legalized area is neither here nor there for the framers of the volume. Yet the idea that this finding is somehow beside the point and gives no pause to the framers, as revealed by Kahler's dismissive treatment of Lutz and Sikkink's article in the conclusion, is surprising, since elsewhere the volume's authors claim to investigate the consequences of legalization that, presumably, would involve compliance.<sup>41</sup> More generally, if the purpose of the legalization concept is to generate hypotheses that guide research, one would expect disconfirming evidence of the type Lutz and Sikkink present to result in a rethinking of the basic concept. If the concept of legalization is both narrow theoretically, containing no theory of obligation, and weak when applied to empirical studies, parasitizing other concepts and uninterested in compliance with norms in concrete settings, then we are forced back to our central question: how much does the legalization framework deliver?

## Conclusion

No analysis can do everything, but analysts must justify their choice of focus in the light of other obvious possibilities. The framers of the legalization concept are not explicit, however, about their limited view of law or about alternative views of law (or IR theory) that might yield different understandings of their cases. Further, they have not adequately theorized their definition of legalization so as to provide clear help to the empirical researchers seeking to apply the concept. We have called attention to some alternative views of law and suggested ways they can help us to address gaps in the authors' own framework that might lead researchers to examine important questions neglected in this volume. Our hope is the same as the authors'—that international law and IR scholars will begin to read each other's work more carefully and use each other's insights in analysis. Our suspicion, however, is that this process will not yield a long trail of scholarship on the concept of legalization as defined in the volume discussed here. Rather, as IR scholars read more broadly in international law, they will find rich connections between the two fields and will be able to create joint research agendas that are diverse and fruitful.

## References

- Abbott, Kenneth W., and Duncan Snidal. 2000. Hard and Soft Law in International Governance. *International Organization* 54 (3):421–56.

41. Goldstein et al. 2000, 386.

- Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. 2000. The Concept of Legalization. *International Organization* 54 (3):401–19.
- Barnett, Michael, and Martha Finnemore. 1999. The Politics, Power, and Pathologies of International Organizations. *International Organization* 53 (4):699–732.
- Biersteker, Thomas J., and Cynthia Weber, eds. 1996. *State Sovereignty as Social Construct*. Cambridge: Cambridge University Press.
- Bowett, Derek W. 1958. *Self Defence in International Law*. Manchester: Manchester University Press.
- Brunnée, Jutta. 1993. Toward Effective International Environmental Law: Trends and Developments. In *Law and Process in Environmental Management*, edited by Steven A. Kennett, 217–36. Calgary, Alberta: Canadian Institute of Resources Law.
- Brunnée, Jutta, and Stephen J. Toope. 1997. Environmental Security and Freshwater Resources: Ecosystem Regime Building. *American Journal of International Law* 91:26–59.
- . 2000. International Law and Constructivism: Elements of an Interactional Theory of International Law. *Columbia Journal of Transnational Law* 39:19–74.
- Byers, Michael. 1999. *Custom, Power, and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press.
- Chinkin, Christine M. 1989. The Challenge of Soft-Law: Development and Change in International Law. *International and Comparative Law Quarterly* 38:850–66.
- Finnemore, Martha. 2000. Are Legal Norms Distinctive? *NYU Journal of International Law and Politics* 32 (3):699–705.
- Finnemore, Martha, and Kathryn Sikkink. 1998. International Norm Dynamics and Political Change. *International Organization* 52 (4):887–917.
- Franck, Thomas M. 1990. *The Power of Legitimacy Among Nations*. New York: Oxford University Press.
- Fuller, Lon L. 1969. *The Morality of Law*. Rev. ed. New Haven, Conn.: Yale University Press.
- Glenn, H. Patrick. 2000. *Legal Traditions of the World*. Oxford: Oxford University Press.
- Goldsmith, J. L., and E. A. Posner. 1999. A Theory of Customary International Law. *University of Chicago Law Review* 66:1113–77.
- Goldstein, Judith, and Lisa L. Martin. 2000. Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note. *International Organization* 54 (3):603–32.
- Hillgenberg, H. 1999. A Fresh Look at Soft Law. *European Journal of International Law* 10:499–515.
- Hurrell, Andrew. 2000. Conclusion: International Law and the Changing Constitution of International Society. In *The Role of Law in International Politics: Essays in International Relations and International Law*, edited by Michael Byers, 327–46. Oxford: Oxford University Press.
- Kahler, Miles. 2000a. Legalization as Strategy: The Asia-Pacific Case. *International Organization* 54 (3):549–71.
- . 2000b. Conclusion: The Causes and Consequences of Legalization. *International Organization* 54 (3):661–83.
- Kennedy, David. 1997. New Approaches to Comparative Law: Comparativism and International Governance. *Utah Law Review* 2:545–637.
- Keohane, Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution: Interstate and Transnational. *International Organization* 54 (3):457–88.
- Kingsbury, Benedict. 1998. The Concept of Compliance as a Function of Competing Conceptions of International Law. *Michigan Journal of International Law* 19:345.
- Koh, Harold. 1997. Why Do Nations Obey International Law? *Yale Law Journal* 106:2599–2659.
- Lasswell, Harold D., and Myres S. McDougal. 1971. Criteria for a Theory About Law. *Southern California Law Review* 44:362.
- Lauterpacht, Hersch. 1947. *Recognition in International Law*. London: Cambridge University Press.
- Lowe, Vaughan. 2000. The Politics of Law-Making: Are the Method and Character of Norm Creation Changing? In *The Role of Law in International Politics: Essays in International Relations and International Law*, edited by Michael Byers, 207–26. Oxford: Oxford University Press.
- Lutz, Ellen L., and Kathryn Sikkink. 2000. International Human Rights Law and Practice in Latin America. *International Organization* 54 (3):633–59.

- Macdonald, Roderick A. 1998. Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism. *Arizona Journal of Comparative and International Law* 15:69–91.
- Postema, Gerald J. 1991. On the Moral Presence of Our Past. *McGill Law Journal* 36:1153.
- . 1994. Implicit Law. *Law and Philosophy* 13:361.
- Ragazzi, M. 1997. *The Concept of International Obligations Erga Omnes*. Oxford: Oxford University Press.
- Reisman, Michael. 1992. The View from the New Haven School of International Law. *Proceedings of the American Society of International Law* 86:118.
- Simmons, Beth A. 2000. The Legalization of International Monetary Affairs. *International Organization* 54 (3):573–602.
- Slaughter, Anne-Marie. 1995. International Law in a World of Liberal States. *European Journal of International Law* 6:503–38.
- Toope, Stephen J. 2000. Emerging Patterns of Governance and International Law. In *The Role of Law in International Politics: Essays in International Relations and International Law*, edited by Michael Byers, 91–108. Oxford: Oxford University Press.
- Verdross, Alfred, and Heribert Franz Koeck. 1983. Natural Law: The Tradition of Universal Reason and Authority. In *The Structure and Process of International Law*, edited by R. Macdonald and D. M. Johnston, 17–50. The Hague: Martinus Nijhoff.
- Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.
- Wang, Hongying. 2000. *Weak States, Strong Networks: The Institutional Dynamics of Foreign Direct Investment in China*. New York: Oxford University Press.