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The Global Evolution of Foreign Relations Law

By Kevin L. Cope[*], *Pierre-Hugues Verdier*[**], *and Mila Versteeg*[***]

Abstract

The constitutional rules that govern how states engage with international law have profound implications for foreign affairs, yet we lack comprehensive data on the choices countries make and their motivations. We draw on an original dataset that covers 108 countries over a nearly two-hundred-year period to map countries' foreign relations law choices and trace their evolution. We find that legal origins and colonial legacies continue to account for most foreign relations law choices. A small number of models emerged in the nineteenth and early twentieth century in Western Europe, subsequently spread through colonial channels, and usually survived decolonization. Departures from received models are rare and usually associated with major political shifts. Prominent political science accounts that emphasize how states design their foreign relations law strategically to enhance their international credibility or entrench democracy or human rights appear to have limited explanatory power over the bulk of foreign relations law today.

I. Introduction

The constitutional rules that govern how states engage with international law have profound implications for foreign affairs. For instance, few countries require subnational entities like states or provinces to approve treaties. Yet, because Belgium's constitution does, a veto by its Walloon region nearly blocked the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.[1] In many countries, the national executive enjoys broad unilateral power to withdraw from treaties. But recently, the South African Constitutional Court held that the government could not constitutionally withdraw from the International Criminal Court without parliamentary approval.[2] While some national courts defer to the executive in matters of foreign relations, others have become more interventionist.

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[1] *See Belgium Walloons Block Key EU Ceta Trade Deal with Canada*, BBC News (Oct. 24, 2016), *at* https://www.bbc.com/news/world-europe-37749236.

[2] Democratic Alliance v. Minister of International Relations and Cooperation and Others, 2017 (3) SA 212 (GP) (S. Afr.). The government subsequently revoked its purported withdrawal.

The German Federal Constitutional Court recently blocked Germany's participation in a crucial European monetary program unless the government showed that the program was consistent with the German Constitution.[3]

These and other constitutional arrangements for making and enforcing international law are at the heart of foreign relations law, "the domestic law of each nation that governs how that nation interacts with the rest of the world."[4] They involve a host of design choices that shape a state's ability to engage in international legal transactions and to effectuate them domestically. Should the executive be able to conclude treaties on its own, or should it require legislative approval? If so, should a supermajority be required? Should the same rules apply to withdrawing from existing treaties? Once treaties are concluded, can they be applied directly by courts as part of domestic law? What happens when a treaty conflicts with a statute or another source of domestic law, such as state or provincial legislation? States face similar choices in deciding whether and how to give effect to customary international law (CIL) in their legal system.[5]

In a world of global interdependence where vital areas of policy—security, trade, the environment—require international coordination, these rules reflect fundamental choices states make to balance global governance and sovereignty. Yet, we currently lack comprehensive research on these rules' global patterns and how they evolved.[6] As a result, we lack understanding of basic questions such as whether foreign relations laws reflect countries' unique constitutional traditions or are standardized; whether countries approach foreign relations law choices strategically to improve their international position; and whether these choices reflect domestic political preferences and goals, such as committing to democratic government or human rights.

In this Article, we use an original global dataset to attempt to answer these questions systematically. This dataset captures three important areas of foreign relations law—treaty-making procedures, the status of treaties in domestic law, and national courts' application of CIL—for 108 countries over the period 1815–2013. The data, gathered over multiple years with the participation of dozens of researchers, incorporates information from foreign constitutions, legislation, judicial decisions, and secondary sources to reconstruct these doctrines and how they have evolved. Our data include both quantitative and qualitative information.[7] The dataset consists principally of some four dozen variables that capture states' foreign relations law choices over time. In addition, our data-collection process generated

[3] 2 BvR 859/15 (Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 5, 2020), *at* https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (English translation).

[4] Curtis A. Bradley, *What Is Foreign Relations Law?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 3 (Curtis A. Bradley ed., 2019). Foreign relations law as thus defined also encompasses other areas, such as executive powers, federalism in foreign affairs, regional integration, international immunities, and the use of military force. It is also worth noting that, especially outside the United States, scholars may recognize these issues without conceiving of them as a field or give that field another name. We do not believe these differences are material to our analysis. The issues covered in this Article are regarded as central by scholars who identify foreign relations law as a field, so we need not—and do not—take a view as to the field's precise scope. These issues are also widely recognized and studied across the world's legal systems, whether or not scholars identify foreign relations law as a distinct field.

[5] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1986).

[6] Existing efforts at comparison have consisted primarily of qualitative studies of a small number of well-documented—mostly Western—countries. *See* notes 64–65 *infra* and corresponding text.

[7] We have previously presented analysis of a limited number of variables from an earlier iteration of this dataset. *See* Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation,* 109 AJIL 514, 515–17 (2015).

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extensive qualitative and historical information that allow us to trace the evolution of foreign relations law over time.

We use these data to provide a comprehensive picture of over a century of foreign relations law around the world. We do so, first, by exploring our quantitative data using a statistical data-dimensionality reduction method that allows us to map foreign relations law in two-dimensional space. Using this method, we systematically analyze and map countries' foreign relations law choices, compare them, and track the historical trajectory of foreign relations law globally. We supplement this quantitative analysis with historical qualitative data, providing further insight into the origins of the rules and the circumstances of and motivations for their evolution. We use these methods to investigate what drives states' foreign relations law choices.

We find that, even in the twenty-first century, foreign relations law continues to be shaped primarily by legal origins and colonial legacies, and that few countries appear to deploy their foreign relations laws in pursuit of specific objectives such as international credibility or democratic commitment. Our data show that a small number of models of foreign relations law emerged in the nineteenth and early twentieth century in Western Europe, where they solidified, later spread through colonial channels, and usually survived decolonization. Where countries depart from received models, the changes are usually associated with major political shifts such as post-war reconstruction or revolution, during which countries usually open their systems to international law. But notably, authoritarian backsliding rarely leads to increased doctrinal hostility toward international law. The bulk of foreign relations law remains standardized, reflecting countries' legal origins and colonial heritage.

These findings challenge theories that understand foreign relations law as a tool strategically deployed to further states' domestic and international interests. Prominent scholars working in political science have focused on foreign relations law as a means of making commitments more credible in the eyes of the international community. In this account, design choices such as involving the legislature in treaty-making and empowering courts to enforce international law signal to potential treaty partners that a country will keep its promises.[8] Others have linked foreign relations law choices to democracy and democratization, postulating that democratizing countries seek a larger role for their legislature in treaty-making and make treaties directly applicable by courts to lock in their commitments to human rights and democracy.[9] These leading accounts share functionalist premises: they contend that foreign relations law rules serve specific purposes and, implicitly, that policymakers design them to serve each country's distinctive needs.

Our findings suggest that foreign relations law is usually far less deliberate and strategic than these accounts assume. Our mapping of the data shows no discernible correlation between foreign relations law doctrines and measures of democracy or proxies for the need for international credibility. While functionalist accounts may hold explanatory power in specific cases, our analysis reveals that most of foreign relations law continues to be shaped along colonial lines, even post-independence. [10]

[8] *See* Section II.B *infra*.
[9] *See* Section II.A *infra*.
[10] *See* Section II.C *infra*.

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The remainder of this Article is organized as follows. Part II describes the leading theories articulated for why states choose foreign relations law models. It starts from the well-known distinction between monist and dualist approaches and describes how these approaches are commonly associated with the civil law and common law traditions, respectively. Although conquest and colonization drove initial similarities in foreign relations law within legal families, independent states are free to change their foreign relations law arrangements. While they may continue to be influenced by their received legal tradition, states may also tailor foreign relations law to their unique needs or converge upon a common global model. In fact, leading accounts in political science offer functionalist explanations for foreign relations models that focus on states' desire for international credibility or on democracy and democratization. In these accounts, one would expect states to make similar foreign relations law choices only if they have similar functional needs.

Part III describes our original dataset and the methods we use to analyze it. The most important method is a form of spatial scaling, which uses our quantitative data to plot a point on a two-dimensional graph that represents each state's policy choices for each year. This allows us to map the policy positions of states relative to each other, identify clusters of states that follow similar policies, and track how these policies (and the clusters) shift over time.

Part IV describes the basic findings we derive by mapping contemporary foreign relations law doctrines. It first shows that foreign relations law choices are standardized: countries cluster around a relatively small number of models whose basic features are similar. It further shows that there is little discernible correlation between foreign relations law choices, on one hand, and measures of democracy and of the rule of law (which we treat as a proxy for a state's need for international credibility), on the other. By contrast, countries clearly and strongly cluster together based on their civil-law or common-law origins. This pattern indicates the persistent influence, even post-independence, of legal origins and colonial history across countries, even those that otherwise differ widely in democratic credentials, economic development, and international political alignment.

Part V dives into the worldwide historical development of foreign relations law doctrine. Using a combination of qualitative narrative and spatial maps generated at critical historical junctures, it shows how standardized models of foreign relations law emerged in the nineteenth century. The basic features of these models—broadly associated with Continental Europe, Latin America, and Great Britain—solidified by the beginning of the twentieth century. They then underwent some meaningful changes driven by that century's upheavals, especially the World Wars, and later diffused broadly as decolonization led to the emergence of numerous new states. Despite their anti-colonial stance, new states almost always continued the foreign relations law regimes inherited from colonial powers, modifying them gingerly and gradually, if at all. Part V traces the further evolution of these models through the rise of authoritarian regimes in the 1970s and 1980s and the wave of democratization that followed the end of the Cold War. Only in the latter period does the democratization thesis find stronger support, as Eastern European and Latin American countries consciously enshrined international law as a buttress against authoritarianism and human rights violations. Yet even today, colonial origins remain the primary predictor of foreign relations law choices. Part VI concludes.

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Our investigation makes several important contributions. In its geographical and chronological scope and in the range of sources considered, it surpasses any prior effort to document foreign relations law worldwide. It goes beyond well-documented Western states and familiar English-language sources to encompass dozens of countries in the Global South and sources in multiple languages. It also expands on traditional qualitative approaches by analyzing original quantitative data, including year-by-year measures of treaty-making hurdles and the status of international law across different legal systems. These data will assist researchers across disciplines in studying states' engagement with international law. On the theoretical front, our analysis reveals that colonial ties continue to be influential even decades post-independence, continuing to shape the bulk of foreign relations law. At the same time, our qualitative analysis reveals that functionalist accounts appear to have explanatory power in some countries and periods, contributing to a better understanding of these theories' mechanisms and scope of application. Finally, our analysis might help shape more effective international governance and constitutional design.

II. The Drivers of Foreign Relations Law

A. The Monist-Dualist Divide

International legal scholars traditionally analyze the relationship between domestic law and international law from the perspective of the monist-dualist divide.[11] The canonical formulation of this distinction holds that under the monist approach, which "regards international law and national law as two parts of a single system," international law "automatically passes into the state's national legal system" and "stands 'higher' in the hierarchy of legal norms" than national law.[12] By contrast, the dualist approach "regards international law and national law as separate legal systems," so that international law "does not automatically become a part of the national law"; it does so only "when it has been 'transformed' or 'incorporated' into national law by an act at the national level, such as the enactment of an implementing statute for a treaty."[13]

The monist-dualist distinction's usefulness as an explanatory model is widely debated. Although the theory remains influential, many scholars have observed that the distinction has limited ability to explain the actual foreign relations law arrangements across national legal systems.[14] In fact, no system is strictly monist or dualist: the theories are ideal types that do not exist in the real world.[15] Thus, scholars in this field often warn that researchers

[11] Madelaine Chiam, *Monism and Dualism in International Law*, *in* Oxford Bibliographies in International Law, *at* https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml ("It is conventional practice for international law textbooks and casebooks to include a chapter on the relationship between international and domestic law. Such chapters generally describe monism and dualism . . . and then critique the concepts as unhelpful.").

[12] Lori Fisler Damrosch & Sean D. Murphy, International Law: Cases and Materials 615 (7th ed. 2019).

[13] *Id.*

[14] *See, e.g.*, Dinah Shelton, *Introduction*, *in* International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion 1, 2–5 (Dinah Shelton ed., 2011); The Fluid State: International Law and National Legal Systems (Hilary Charlesworth, Madelaine Chiam, Devika Hovell & George Williams eds., 2005); Francis G. Jacobs, *Introduction*, *in* The Effect of Treaties in Domestic Law xxiv (Francis G. Jacobs & Shelley Roberts eds., 1987); Chiam, *supra* note 11.

[15] *See, e.g.*, Shelton, *supra* note 14, at 3–4; David Sloss, *Treaty Enforcement in Domestic Courts*, *in* The Role of Domestic Courts in Treaty Enforcement 1, 6–7 (David Sloss ed., 2009).

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should focus on specific questions, such as whether treaties are directly applicable in domestic courts and how courts resolve conflicts with statutes, rather than on general characterizations of a national system's approach.[16] Nevertheless, the monist-dualist distinction remains the classical analytical starting point for classifying national approaches toward international law.

The monist-dualist distinction, in turn, is widely seen as connected to the civil and common law legal traditions. In his influential textbook, James Crawford observes that, while there is no single civil law approach to the reception of international law, civil law systems tend to be monist with respect to both treaties and international custom.[17] By contrast, Crawford observes that common law systems tend to be dualist with respect to international treaties and monist with respect to custom.[18] In the United Kingdom, the dualist approach to international treaties is often linked to the country's tradition of parliamentary sovereignty: because parliament is sovereign, international treaties cannot create law directly or override domestic legislation.[19] In civil law systems, monism is often linked to the hierarchy of the sources, an influential doctrine in the civil law tradition.[20] Hans Kelsen, the most famous exponent of this doctrine, argued that every legal order can ultimately be traced back to a basic norm (the "Grundnorm").[21] Because there must be a single source of authority for all law, Kelsen believed that dualism was logically impossible, as it would require there to be more than one basic norm.[22]

The presumed mechanism that drives the correlation between the common law and dualism, on one hand, and the civil law and monism, on the other hand, is conquest and colonization. Comparative law scholarship has long documented that, as British, French, and Spanish colonizers acquired overseas territories, they transplanted large portions of their legal system to their colonies.[23] Former British colonies inherited much of their legal system from the United Kingdom and became common law legal systems, while former French and Spanish colonies inherited their legal systems from France and Spain and became civil law legal systems.[24] A host of studies has shown how "legal origins" continue to shape the substance of many areas of laws around the world, including investor protections and

[16] *See, e.g.*, Eileen Denza, *The Relationship Between International and National Law*, *in* INTERNATIONAL LAW 412 (Malcolm Evans ed., 4th ed. 2014).

[17] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 80–81 (9th ed. 2019).

[18] *Id.* at 59, 63.

[19] *See* Paul Craig, *Engagement and Disengagement with International Institutions: The U.K. Perspective*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 4, at 394; Anthony Aust, *United Kingdom*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT, *supra* note 15, at 476, 477.

[20] *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007).

[21] *See generally* HANS KELSEN, PURE THEORY OF LAW 8 (The Lawbook Exchange 2002 [1967]).

[22] *See* Hans Kelsen, *Sovereignty and International Law,* 48 GEO. L.J. 627, 629 (1960).

[23] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 74 (1974); *see also* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 499 (1995); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 839 (2003); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 442, 443 (Mathius Reimann & Reinhard Zimmermann eds., 2006); *but see* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 120 (1997).

[24] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 20, at 2.

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property rights.[25] Even constitutional law, which is often viewed as a distinct expression of national identity, reflects these influences.[26] Empirical studies of the content of the world's written constitutions find that much of that content is standardized, with countries falling into two primary families that correlate strongly with the civil law and common law traditions.[27] The same mechanisms might explain similarities in foreign relations law.

Of course, legal families are not set in stone.[28] After independence, states generally become free to change their foreign relations law. Of course, that does not mean that doing so is necessarily easy. In some cases, there may be institutional obstacles, as some foreign relations law changes require formal constitutional amendment. There may also be cultural barriers, such as legal elites who prefer the existing system. Even so, there is also reason to believe that such change is possible. In many constitutional systems it is relatively easy to amend or replace the constitution.[29] Even without changes to the constitution's text, courts can modify their interpretations. What is more, much of foreign relations law is sub-constitutional in nature. In many Eastern European countries, for example, organic laws codify the main foreign relations law choices and can be amended through legislation. In most common law countries, much of foreign relations law is judge-made, meaning that judges have some power to change its rules. Thus, while there is no doubt that there may exist important path dependencies, it is reasonable to expect that foreign relations law may change at least somewhat post-independence.

One possibility is that legal norms continue to diffuse inside legal families after independence. As Holger Spamann points out, countries within a legal family often share the same language and elite lawyers receive their legal education in the colonial metropolis, producing shared legal norms and reasoning. The result might be an ongoing diffusion of legal norms within legal families, driven by the professional commitments of judges, legislators, and regulators alike.[30] This type of diffusion can continue to shape foreign relations law even decades post-independence. Constitution-makers might follow the foreign relations law practices that prevail within their legal tradition; and the same might be true for lawmakers and courts. Indeed, our own analysis found numerous instances in which judges simply followed long-established common

[25] *See* Edward L. Glaeser & Andrei Schleifer, *Legal Origins*, 117 Q. J. Econ. 1193, 1193–97 (2002); Anu Bradford, Yun-chien Chang, Adam S. Chilton & Nuno Garoupa, *Do Legal Origins Predict Legal Substance*?, 64 J. L. & Econ. 207 (2021).

[26] *Compare* Gary Jeffrey Jacobsohn, Constitutional Identity 7 (2010), *with* Mila Versteeg, *Unpopular Constitutionalism*, 89 Ind. L.J. 1133, 1160–61 (2014).

[27] *See* Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 Int'l Rev. L. & Econ. 1, 14–16 (2014); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal. L. Rev. 1163, 1164 (2011); *see also* Charles O.H. Parkinson, Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories 19 (2007) (describing how the British Colonial Office drafted the Constitutions of its former colonies); Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000*, 18 Int'l Soc. 71, 74 (2003); Tom Ginsburg, Zachary Elkins & James Melton, *Baghdad, Tokyo, Kabul: Constitution Making in Occupied States*, 49 Wm. & Mary L. Rev. 1139, 1175–76 (2007).

[28] The comparative law literature has long debated whether legal families are exogenous and static or more fluid and subject to change. *See* Nuno Garoupa & Mariana Pargendler, *A Law and Economics Perspective on Legal Families*, 7 Eur. J. Leg. Stud. 36 (2014).

[29] Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 Am. Pol. Sci. Rev. 657, 659 (2016); Zachary Elkins, James Melton & Tom Ginsburg, The Endurance of National Constitutions (2009).

[30] *See* Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. Rev. 1813, 1814 (2009).

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law or civil law practices in landmark foreign relations law cases. To give one example, when the Indian Supreme Court held in 1980 that treaties are not self-executing under Indian law, it relied on British precedent, despite having been independent for thirty-three years.[31]

Another possibility is that countries gradually drift away from colonial models and instead converge on a single global model.[32] A school of thought in sociology—sometimes referred to as the "world polity school"—holds that states adopt law and institutions not because those particular choices rationally further the state's goals but because they are following a common cultural script.[33] Legal scholars have applied these insights to different areas of law, observing that many elements of national legal systems reflect the cultural influence of a global world polity.[34] To illustrate, empirical studies show that states adopt constitutional rights,[35] human rights agreements,[36] and environmental laws,[37] not because they fit their local needs and circumstances, but because these are part and parcel of the global cultural model.[38] Foreign relations law might similarly be shaped by world culture.[39] Indeed, some scholars have drawn attention to the emergence of common values relating to domestic law's relationship toward international law.[40] Thus, countries may converge upon a global model that transcends traditional legal families.

Divergence is also another possibility. Upon independence, states may customize and tailor their foreign relations law choices to their own needs. Specifically, they might strategically deploy foreign relations law to make their treaty commitments more credible or to entrench democratic reforms. We discuss these strategic considerations below.

B. Functionalist Theories

The political science literature offers different strategic accounts for why states might adopt or update their foreign relations law arrangements. These accounts broadly emphasize two

[31] Jolly George Verghese v. Bank of Cochin, (1980) 2 SCR 913, 920 (India).

[32] *See* Anu Bradford, Adam Chilton & Katerina Linos, *Dynamic Diffusion* (manuscript on file with authors, 2021).

[33] *See* John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 Am. J. Soc. 144, 154 (1997).

[34] *See, e.g.*, Ryan Goodman & Derek Jinks, Socializing States: Promoting Human Rights Through International Law 99–110 (2013); Ryan Goodman & Derek Jinks, *Towards an Institutional Theory of Sovereignty*, 55 Stan. L. Rev. 1749, 1760 (2003); Young S. Kim, Yong Suk Jang & Hokyu Hwang, *Structural Expansion and the Costs of Global Isomorphism*, 17 Int'l Soc. 481, 485–87 (2002).

[35] *See, e.g.*, John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870–1970*, *in* Institutional Structure: Constituting State, Society and the Individual, 133, 138 (George M. Thomas, John W. Meyer, Francisco O. Ramirez & John Boli eds., 1987).

[36] Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621, 642–46 (2004).

[37] David John Frank, Ann Hironaka & Evan Schofer, *The Nation-State and the Natural Environment Over the Twentieth Century*, 65 Am. Soc. Rev. 96, 102–03 (2000).

[38] Importantly, states do not necessarily internalize the values embodied in the global cultural models; they adopt the laws and institutions of the global script merely to pay lip service to the international community. *See* Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 Eur. J. Int'l L. 725, 726 (2008).

[39] *See* Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. Ill. L. Rev. 201, 235 (2008).

[40] *See* Philip Allott, *The Emerging Universal Legal System*, *in* New Perspectives on the Divide Between National and International Law 63 (Janne E. Nijmann & André Nollkaemper eds., 2007).

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different strategic considerations: (1) a desire for credibility in the international arena; and (2) democratization and a desire to lock in democracy. The premise behind both of these theories is that countries deploy their foreign relations law strategically, to further specific goals. Importantly, strategic accounts and the legal origins theory are not mutually exclusive: countries that inherited certain models may subsequently engage in reform to further specific interests.

1. Credible Commitments

The idea that foreign relations law can be used to improve a state's international credibility can be traced back to the U.S. founding. Under the Articles of Confederation, the central government found itself powerless to enforce international law obligations. State governments and courts disregarded the nation's treaties and failed to provide remedies for international law violations by individuals, spurring tensions with European powers.[41] The solution was simple and widely agreed upon: treaties would be made part of "the supreme Law of the Land," and federal courts would be empowered to enforce them.[42] John Jay captured this reasoning in the Federalist Papers: "a treaty," he wrote, "is only another name for a bargain, and . . . it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it."[43]

Over two hundred years later, political scientists and legal scholars continue to explore different legal strategies to strategically improve a country's international credibility.[44] The question is not merely academic: policymakers and diplomats know how critical national credibility can be in concluding international agreements on matters such as trade, investment, and national security. Like the early United States, many states today struggle to assure potential treaty partners that their commitments are real.

One way to make international legal commitments credible is to ensure that treaties are enforceable in domestic courts.[45] The U.S. framers did so by making treaties equal in status to federal law. Many constitutions today likewise stipulate that international agreements apply directly, thereby empowering domestic courts to enforce these agreements. Making treaties superior to domestic law might improve international credibility even further. When treaties take priority over domestic statutes, domestic courts are empowered to

[41] *See generally* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 946–79 (2010).

[42] U.S. Const., Art. VI, cl. 2; *see* Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 Persp. Am. Hist. 233, 264 (1984); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1083, 1101–10 (1992); *see also* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 616–19 (2008).

[43] Federalist No. 64, at 415 (John Jay) (Robert Scigliano ed., 2000); *see* Golove & Hulsebosch, *supra* note 41, at 994; *but see* David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 Va. L. Rev. 367, 434–43 (2016) .

[44] *See, e.g.*, Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 97–107 (1984); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int'l Org. 427, 435–41 (1988); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 Int'l Org. 761, 764–68 (2001); Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. Leg. Stud. 189, 207–10 (2007).

[45] *See* Antonio Cassese, *Modern Constitutions and International Law*, 192 Recueil des Cours 331, 352 (1985).

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invalidate inconsistent domestic laws. Although the U.S. framers did not take this approach, many newer constitutions do. When courts can use international law to constrain domestic policy, this sends a signal to potential treaty partners that a state's promises are less likely to be broken, thereby making a formal agreement more appealing to that partner. [46] As a result, a state might be able to conclude more treaties and perhaps to secure more favorable terms.

A different way in which international credibility might be improved is by requiring the executive to seek legislative approval of treaties prior to ratification. Political scientists and legal scholars have proposed various theories to explain how such constraints may increase the credibility of treaty commitments. First, the legislative approval process may generate information that allows potential treaty partners to evaluate the likelihood of future non-compliance or withdrawal.[47] In contrast with executive action alone, a legislative vote demonstrates broader domestic support for the treaty, increasing partners' confidence that compliance will survive changes in the executive. The public debate the vote generates also reveals information on the preferences of important domestic political actors, such as opposition politicians and interest groups, who may influence future compliance.[48] In the case of treaties that require further legislation to become effective, a positive vote also increases confidence that the legislature will adopt the necessary legislation. The availability of this information may thus enhance the credibility of the country's treaty commitments.[49]

In addition to this information-generating function, legislative involvement in treaty-making may also serve a signaling function. Submitting a treaty for legislative approval is politically costly for the executive because she needs to spend political capital to secure its approval. Partners observe that the executive is willing to incur these costs, which suggests to them that the leader sincerely intends to commit to the treaty long enough to reap its cooperative benefits. To illustrate, consider the U.S. Constitution's requirement of treaty approval by two-thirds of the Senate. This process is a costly hurdle for the president. The Senate leadership must be courted to place the treaty on the agenda; individual senators must be lobbied to vote in favor; even a handful can delay or block approval; and failure of a treaty in the Senate has political costs for the president.[50] It would make little sense for

[46] *See, e.g.*, Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241, 252–69 (2008).

[47] *See* Lisa L. Martin, Democratic Commitments: Legislatures and International Cooperation 13, 21–52 (2000).

[48] *See* Daniel A. Farber, *Rights as Signals*, 31 J. Leg. Stud. 83, 86 (2002); Charles Lipson, Reliable Partners: How Democracies Have Made a Separate Peace 106–107 (2003); Curtis A. Bradley, *Article II Treaties and Signaling Theory*, *in* The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law 123, 140 (Paul B. Stephan & Sarah A. Cleveland eds., 2020).

[49] The same logic also applies to withdrawal: requiring legislative permission to withdraw from treaties further heightens the credibility of treaty commitments.

[50] Among U.S. scholars, much of the literature focuses on the president's ability to choose whether to ratify international agreements under Article II of the Constitution (which require a two-thirds vote of the Senate), congressional-executive agreements (which require a majority vote in both houses), or sole executive agreements (which do not require any congressional approval). *See, e.g.*, John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement*, 31 J. Leg. Stud. S5 (2002); Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 Pres. Stud. Q. 440 (2005); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008); John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 Cornell L. Rev. 1 (2011); Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 AJIL 54 (2019). In that context, the signaling rationale described here has been criticized. *See* Bradley, *supra* note 48. In virtually all

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her to devote time and energy to obtaining approval if participation in the regime were not valuable to the administration. Thus, if she chooses to do so, treaty partners may see the commitment as more credible.[51]

Thus, if these credibility theories have explanatory power, we would expect that countries that seek greater international credibility would adopt several policy measures: (1) making treaties directly applicable in their domestic legal systems; (2) elevating their status vis-à-vis domestic law; and (3) requiring more legislative involvement in treaty-making.[52]

2. *Democratization*

There is another strategic objective that states can further through foreign relations law: entrenching their domestic commitment to democracy. Theories that link foreign relations law to democracy were developed primarily in the context of the 1990s democratization wave. They fit within a broader strand of political science research that explores the relationship between democratization and foreign affairs.[53]

Scholars have long observed that democratization often goes hand in hand with growing openness toward international law.[54] Influential accounts observe this relationship for Eastern Europe and Latin America in the 1990s, especially for human rights treaties.[55] Based on 1990s trends in Eastern Europe, Andrew Moravcsik argues that new democracies commit to human rights treaties to delegate enforcement of democratic and liberal values to established external bodies, because their own rights-protecting institutions are nascent or weak.[56] This delegation locks in these values and reforms against the threat that new leadership will threaten or reverse them.

legal systems outside the United States in which legislative approval is required, however, the executive has much less discretion to choose alternative ratification pathways. *See id.* at 126–27, 140 (signaling theories are more relevant in choosing whether to involve the legislature at all in treaty ratification)

[51] There are several potential objections and limitations to the signaling theory, even outside the unique U.S. context. For example, if the short-term benefits of defection are high, the executive may be willing to incur legislative approval costs even if she intends to defect. Even if the executive intends to comply and the signal is accurate, it does not reveal the preferences of her successors. Finally, because sending the signal is costly for the executive, she might refrain from concluding some treaties that would be beneficial for the country but whose private benefits for the executive are insufficient—a form of agency cost. A full examination of these issues is beyond the scope of this Article. For our purposes, it suffices to note that the general prediction that emerges from the literature is that a desire for greater international credibility will be associated with more onerous legislative approval requirements.

[52] It is worth noting that, even if they are not strategically selected, these foreign relations law choices might nevertheless enhance credibility. For example, a country that inherited these features may be able to enter into more treaties or obtain more favorable terms; its treaties may also prove more durable. Because this Article is concerned with the origins rather than the consequences of foreign relations law choices, investigating these effects is beyond its scope.

[53] Studies have shown that democracies are less likely to go to war; that they conclude more trade agreements; and that democratic institutions facilitate international cooperation generally. *See, e.g.*, LIPSON, *supra* note 48, at 12; Edward D. Mansfield, Helen V. Milner & Peter B. Rosendorff, *Why Democracies Cooperate More: Electoral Control and International Trade Agreements*, 56 INT'L ORG. 477, 503–05 (2002).

[54] *See* Cassese, *supra* note 45, at 352.

[55] On Eastern Europe, see Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AJIL 427, 447 (1994). On Latin America, see, e.g., René Ureña, *Domestic Application of International Law in Latin America*, *in* THE OXFORD HANDBOOK OF FOREIGN RELATIONS LAW, *supra* note 4, at 566–67.

[56] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 218 (2000).

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A prominent way of locking in reforms is by giving treaties direct effect in the domestic legal order and elevating their status vis-à-vis domestic law.[57] Under such a system, domestic courts can set aside domestic legislation that conflicts with human rights treaties. Not even the legislature can override the treaty: the government must secure a constitutional amendment to breach it, which is usually more difficult than amending ordinary legislation.[58] Arguably the strongest pre-commitment strategy is to give treaties constitutional rank.[59] Doing so means not only that treaties can be used to set aside ordinary legislation, but that the constitution itself is interpreted in light of international treaties. In effect, states that follow this approach delegate the interpretation of some of their constitutional commitments to international bodies.[60]

Scholars have also linked democratization to higher levels of legislative involvement in treaty-making.[61] As treaties cover a growing number of areas that fall within the traditional realm of domestic legislation—including human rights, the environment, and economic regulation—greater legislative involvement in treaty-making ensures that the executive does not encroach upon the legislature's powers. Without such a requirement, the executive might bypass a recalcitrant legislature and substitute a treaty for domestic legislation.[62] Thus, separation of powers concerns may motivate giving the legislature a larger role in treaty-making.

Thus, if these theories linking foreign relations law to democratization have explanatory power, we would expect that there is a link between democracy and: (1) making treaties directly applicable in their domestic legal system, with either constitutional or statutory rank; and (2) having higher levels of legislative involvement in treaty-making and implementation. We would especially expect that new democracies would adopt these features, to lock in democracy. But because of these processes, we may also observe more generally that democracies are more likely to possess these features.

III. Data and Methods

A. New Global Dataset

How domestic legal systems deal with international law has long interested international lawyers, but our original dataset is the first of its kind. Existing initiatives are less systematic or

[57] *See* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 N.Y.U. J. Int'l L. & Pol. 707, 726–36 (2006); Ginsburg, Chernykh & Elkins, *supra* note 39, at 205.

[58] *See, e.g.*, Donald S. Lutz, *Toward A Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355, 356 (1994); Versteeg & Zackin, *supra* note 29, at 658.

[59] Manuel Eduardo Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a* lus Commune, *in* Transformative Constitutionalism in Latin America 236–238, 240–244 (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan & Ximena Soley eds., 2017).

[60] Ginsburg, Chernykh & Elkins, *supra* note 39, at 219.

[61] *See* Verdier & Versteeg, *supra* note 7, at 518–21.

[62] For evaluations of whether or not this presents a problem, see, e.g., Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 Eur. J. Int'l L. 907, 924–27 (2004); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AJIL 596, 610–617 (1999); *cf.* John H. Jackson, *The Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AJIL 310, 324 (1992) (emphasizing that the act of incorporation into domestic law in dualist systems serves as a democratic check on treaty-making).

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more limited in scope. For instance, both Oona Hathaway[63] and the Comparative Constitutions Project[64] have collected information on the domestic status of international law based on the constitution alone. Yet, many relevant aspects of a domestic legal system's relationship to international law are found not in the text of the constitution, but in legislation, case law, practice, and executive orders. Our dataset goes beyond the text of the constitution and incorporates information from these other sources. In addition to quantitative coding of constitutions, several qualitative surveys offer more in–depth information. However, such surveys cover a small number of countries[65] and issues,[66] and they capture only one period in time. Our dataset traces the development of foreign relations law for 108 countries for the period 1815–2013.

The first step in building our dataset was to identify and define the substantive issues that define a state's relationship with international law. We identified fifty such issues, dealing with, among other things, the procedures for treaty ratification, the status of treaties in domestic law, the status of CIL, and interpretative approaches by courts. Appendix 1.A contains the full survey instrument. For each country, we commissioned a written memorandum that provides a narrative answer to each of the questions, using information from the constitution, court decisions, legislation, and secondary sources. [67] The memoranda also document how the answers have changed over time. For some systems, especially older countries that underwent frequent changes, we commissioned foreign legal experts to write these memoranda; in other cases, they were written by the authors or law students who had received training on how to research foreign relations law. Where multiple interpretations of foreign relations law existed, we relied on the most authoritative source of that system to reconcile them. All reconciliations were made by the authors. We next coded these memoranda, quantifying their information along fifty numerical variables. All coding was conducted by one of the authors.

The resulting data allow us to accomplish several different things. First, the information from the country memoranda and the resulting coding allow us to explore the origins of particular foreign relations law choices and how they spread. That is, we can provide a historical account of where certain choices first emerged and how they subsequently spread globally. Second, we can explore and visualize trends by describing and analyzing our quantitative data. And third, we can use more sophisticated techniques to analyze and explore our data. In what follows, we use a statistical technique called "ideal point estimation," which allows us to represent countries' foreign relations policy choices spatially and track how these choices have evolved over time. The strength of these methods is that they allow us to provide a bird eye's view of foreign relations law. The trade-off is that the approach's focus on breadth comes at the expense of depth; we do not delve into the politics of adoption in specific countries, as process-tracing or other qualitative methods would allow us to do. Moreover, although our

[63] Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1271–74 (2008).

[64] Ginsburg, Chernykh & Elkins, *supra* note 39, at 207–10.

[65] *See, e.g.*, International Law and Domestic Legal Systems, *supra* note 14.

[66] *See, e.g.*, National Treaty Law and Practice (Duncan B. Hollis, Merritt R. Blakeslee, Benjamin Ederington & American Society of International Law eds., 2005); The Role of Domestic Courts in Treaty Enforcement, *supra* note 15; Treaty Making: Expression of Consent by States to Be Bound by a Treaty (Council of Europe and British Institute of International and Comparative Law eds., 2001).

[67] We thank the Comparative Constitutions Project for providing us access to its historical repository of constitutions.

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memoranda and resulting coding capture changes beyond the textual constitution, such as executive orders and judicial interpretations, they include only *formal* legal changes, so not, for example, changes in political attitudes or the relative importance of formal legal rules.

B. Methodological Approach: Spatial Representation of Foreign Relations Law Preferences Through Policy Points

We use ideal-point estimation to identify and describe the principal ways in which states' relationship to international law in their domestic legal order can vary over time—that is, the historical *dimensions* of foreign relations law. An *ideal point* or *policy point* represents the set of policies that an actor thinks is ideal, i.e., which it prefers over all other alternatives. Each state has a policy point along one or more underlying dimensions, which represent the salient issues that divide states in foreign relations law. We can graphically depict these policy points and dimensions, showing how states' policies relate to each other and change over time.[68]

To understand the intuition behind this method, it is useful to consider how it has been used in other contexts. Among other things, ideal-point estimation has been used to study members of the U.S. Congress,[69] justices on the U.S. Supreme Court,[70] member-states of the UN General Assembly,[71] and constitution-drafting processes.[72] The recorded behavior of these actors—be they the *yea* and *nay* votes of lawmakers, the decision making of judges, or the drafting choices of constitution-makers—can be used to determine the most salient issues that unite or divide actors and to estimate their policy points along each of these dimensions. For example, U.S. Supreme Court justices vary mainly along one dimension: how liberal or conservative their judicial ideology is.[73] Each justice's ideal point encompasses all the information from her voting record, and justices vary on this dimension based on their relative liberalism/conservatism. This dimension is "latent," that is, not directly observed. Researchers did not determine the ideal point by asking justices whether they were liberal or conservative; rather their ideal points were inferred from their voting behavior over many cases. Similarly, when analyzing the voting records of states in the UN General Assembly through 1996, one latent dimension explains states' voting: whether a state is associated with the United States and the West, or with the former Soviet bloc and several rising powers.[74]

Political bodies can also divide along multiple dimensions. For example, the U.S. Congress during the 1960s varied along two distinct dimensions: economic-related issues and civil rights-related ones. Each member's ideal point might therefore have two values: one indicating his record on economic bills, and one indicating his record on civil rights issues.[75] The fact

[68] The specific model we use is Item Response Theory (IRT). *See* Joshua Clinton, Simon Jackman & Douglas Rivers, *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355, 356 (2004). Appendix II.B provides more information on our ideal point estimation procedure.

[69] *See, e.g.*, Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 29 AM. J. POL. SCI. 357, 362 (1985).

[70] Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 142 (2002).

[71] Erik Voeten, *Clashes in the Assembly*, 54 INT'L ORG. 185, 198–99 (2000).

[72] Law & Versteeg, *supra* note 27, at 1205–10.

[73] Martin & Quinn, *supra* note 70, at 146.

[74] Voeten, *supra* note 71, at 203–06.

[75] KEITH T. POOLE, SPATIAL MODELS OF PARLIAMENTARY VOTING 14–15 (2005).

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that these are two distinct dimensions implies that knowing a member's record on an issue like taxes would not reveal much about his voting record on issues like voting rights or segregation. In more recent decades, however, the U.S. Congress has converged to one dimension. That means that a member's voting record on taxes should predict her voting record on issues like LGBT or voting rights.[76]

We adapt this widely used method here and, for the first time, apply it to states' foreign relations law choices. To do so, we first code thirty-one attributes of states' foreign relations law, based on the dataset described above. Those thirty-one attributes include issues like whether treaties and international custom apply directly in the domestic legal order, the relative status of treaties in the state's legal hierarchy, the status of CIL in that hierarchy, and which branches of government are empowered to bind the state by ratifying a treaty. Appendix 1.B lists all thirty-one variables.

Next, for each of these thirty-one traits, we identify each state's position on that trait for each year, treating it as a preference or "vote," either for or against the policy for that year. For example, we code whether or not treaties apply directly in the domestic legal order and whether or not they enjoy equal (or greater) status as national legislation. Of course, states do not usually cast annual "votes" per se to determine the different aspects of their foreign relations policies. Nonetheless, we can still conceive of each state's making a decision each year about the rules it prefers, either by retaining the status quo or by adopting a new rule through constitutional amendment, statutory enactment, judicial reinterpretation, or other means. We can therefore treat its expressions of preferred policy as if they were votes and, in turn, use them to estimate states' policy points along one or more dimensions.[77]

Note that, while this method allows us to more clearly observe relationships between state traits (e.g., being in Europe, having a common-law origin, or being a former colony) and state foreign policy choices, it cannot by itself establish that those traits *caused* those policy choices. Nonetheless, we use the method because graphically observing the relationships between traits and policies starts to paint a picture hinting at a possible causal story, which we further explore with the historical account in Part V.

IV. Basic Findings

The data reveal that states' foreign relations legal designs comprise choices that vary principally along two distinct dimensions: (1) the legislature's role in treaty-making; and (2) the status of international law in the domestic legal order. These two dimensions explain roughly 60 percent of the variation in countries' foreign relations legal choices.[78]

A. The Two Dimensions

Figure 1 uses the ideal-point estimation technique described in Section III.B to depict states' policy points along these two dimensions in the year 2010. Figure 1 notes some important or noteworthy states: France, the United Kingdom, China, Russia, India, Belgium, and

[76] *See also* Law & Versteeg, *supra* note 27, at 1233–34.

[77] While we ourselves do not assign different weights to the different issues, the estimation procedure allows different issues to influence the resulting policy points based on a variety of factors.

[78] Appendix II.A provides more details on the dimensionality of the data.

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the United States. One tool to establish the meaning of these two dimensions is to identify the most extreme countries on each dimension based on their policy points and to inspect whether and how their foreign relations choices are unusual, which likely cause at least some of their extreme positions on the dimensions.[79] Figure 1 notes those countries that represent extremes in each of the two dimensions: Australia and Colombia on the first (*x*-axis) dimension, and the Solomon Islands and Montenegro on the second (*y*-axis) dimension.

Consider the first dimension, which we characterize as "the legislature's role in international legal engagement." This dimension captures distribution of power over treaty ratification: whether treaties require legislative approval and whether the requirement includes all treaties or just certain types; whether that legislative approval vote is binding; and whether the executive can conclude executive agreements on her own without legislative consent. This dimension also captures some aspects of the status of treaties: on the left of the plot, we have the dualist countries, which require treaties to be incorporated into domestic law through legislation; on the right, we have countries that not only apply treaties directly without legislative action, but also make them superior to domestic legislation. Countries that apply treaties directly but make them *inferior* or equal to ordinary laws fall somewhere in the middle. These two aspects of the first dimension both relate to the legislatures' role in treaty-making: they capture legislative involvement *ex ante* in the process of committing to a treaty, and *ex post* in passing implementing legislation.

On this first dimension, Australia, along with a cluster of other common law countries including India, sit farthest to the left. These are all countries where the legislature is involved *ex post* but not *ex ante*. That is, the head of government in these countries enjoys substantial authority to bind the state and need not seek the parliament's permission. However, treaties need to be incorporated by statute to have domestic legal effect. Note that the United Kingdom is not part of this cluster. It followed the same approach until it introduced parliamentary approval requirements in 2010, thereby moving it significantly rightward on the plot.[80] The United Kingdom is surrounded by a second cluster of common law countries, including Belize, Zimbabwe, and Papua New Guinea, which likewise have introduced parliamentary approval requirements.

On the far right of the first dimension lie countries like Belgium, Montenegro, and Colombia. These countries have strong monist systems and make treaties superior to domestic legislation, thus allowing no role for the legislature *ex post* and allowing treaties to trump future legislation. However, they do ensure legislative involvement *ex ante* through legislative approval requirements that bind the executive. Indeed, in the countries on the far-right side of this dimension, *all* treaties require legislative approval. (For those in the middle, some but not

[79] Another tool to establish the meaning of the dimensions is to analyze the discrimination parameters produced by the ideal point estimation. Appendix II.B describes in more detail how to do so. The discrimination parameters for all variables that contribute to the policy points are also listed in Appendix II.B.

[80] Constitutional Reform and Governance Act, 2010, c. 25, § 20 (UK). Unlike legislative approval requirements in other jurisdictions, the Act does not require an affirmative vote as a condition for ratification of treaties. Instead, it codifies a preexisting convention known as the Ponsonby Rule, under which governments tabled treaties before Parliament at least twenty-one days before ratification. The Act goes further in a crucial respect: if the House of Commons votes against ratification, the government may not ratify the treaty, although it may resubmit at a subsequent time. Because the Act obligates the government to inform Parliament of pending treaties and makes it illegal to ratify a treaty in the face of a negative vote, we classify the United Kingdom among the countries with a binding parliamentary approval requirement post-2010, although we acknowledge that it is a borderline case.

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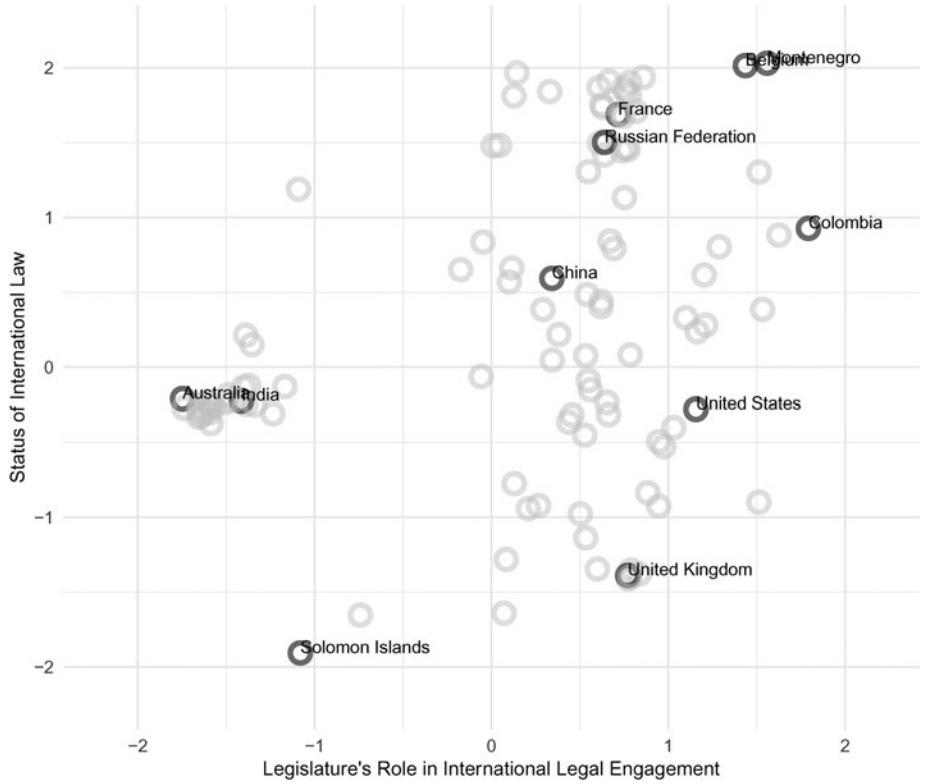

FIGURE 1. Policy Points in Two Dimensions for Key and Extreme States, 2010

all treaties require legislative approval). As can be seen from Figure 1, the United States falls right of the middle on this dimension, reflecting that many (but not all) treaties require congressional approval and that some treaties do apply directly, even though they can be overturned by subsequent legislation.

We characterize the second dimension as "the status of international law in the domestic legal order." Generally speaking, countries that make treaties superior to legislation place high, while countries that make treaties equal or inferior to legislation place near the middle, and countries that require some, most, or all treaties to be incorporated by legislation closer to the bottom. In addition to capturing the domestic status of treaties, this dimension also incorporates information on the status of CIL, which is often different from the status of treaties. Indeed, among the states with the highest scores on this dimension are those that not only make treaties superior to domestic law but do the same for CIL (e.g., Belgium, Montenegro, and Portugal). Conversely, the countries with the lowest score on this dimension are those like the Solomon Islands and Sri Lanka, which do not apply treaties directly and make CIL inferior to statutes or deny it any direct effect.[81] The United States again lies in between, slightly closer to the dualist end (bottom) of the spectrum: so-called "self-executing" treaties

[81] Some countries that apply treaties directly are also positioned near the bottom of this dimension, because these countries do not apply CIL directly.

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apply directly and are equal to ordinary statutes, while CIL applies directly but is inferior to domestic law.[82]

It is worth mentioning that the decision whether or not to apply treaties directly is important on both dimensions.[83] Notably, a policy choice not to make treaties directly applicable means that treaties fall outside the national legal hierarchy, which is central to the second dimension. But it also implies a further role for legislatures, whose intervention is required to make the treaty binding on domestic public or private actors. The fact that the basic choice of what status to give treaties in the domestic legal order bears on both dimensions makes it one of the most distinguishing features of a country's foreign relations law model.

In sum, our analysis reduces more than thirty foreign relations law choices to a two-dimensional plot. Where states made similar policy choices about the legislature's role in treaty-making, they cluster together horizontally (left and right). Where two states made very different choices, they are separated horizontally, with the states giving their legislatures smaller roles lying on the left side of the plot and states giving their legislatures larger roles lying on the right side of the plot. Where states made similar choices about the relative status of international law in their domestic legal orders, those states cluster closely together vertically (top and bottom). States that give international law higher status lie close to the top of the plot, while states that give it lower status lie toward the bottom.

C. Explaining Country Clusters

Where two countries lie close together on the two-dimensional plot, it means that they share similar scores on both the first and second dimensions. In other words, they made similar foreign relations law choices.

Above, we posited several hypotheses about the factors that lead states to adopt similar or different foreign relations laws. Traditional theories from comparative law predict that their foreign relations law choices are mostly explained by a country's colonial heritage.

To explore these prediction, Figure 2 reproduces the same spatial 2010 plot from Figure 1 but highlights all the common law systems in red and the civil law systems in blue.[84] (Countries with socialist, French, German, and Scandinavian legal origins—all considered subgroups of the civil law tradition—are highlighted in different shades of blue: navy, royal, azure, and sky blue, respectively.) The plot reveals a stark divide between common law and civil law countries. In general, the common law countries are clustered in the bottom left of the plot, while the civil law countries are clustered in the top right. Indeed, we can draw a straight, diagonal line on the plot that partitions the universe of states between common and civil law with fairly high accuracy. The only common law countries on the "wrong," i.e., civil

[82] For more than two decades, U.S. scholars have debated whether CIL has the status of federal common law, which would imply superiority over the laws of individual U.S. states. For an overview of this debate, see CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM ch. 5 (3d ed. 2021). The variables on the status of CIL we use in this Article do not code the status of CIL relative to subnational legislation and therefore do not take a position on this question. They reflect what we take to be the most common view among courts and scholars: that CIL is in principle "part of our law" (The Paquete Habana, 175 U.S. 677, 700 (1900)), may in some circumstances be applied directly, and is inferior to the Constitution and federal statutes.

[83] This can be seen from the discrimination parameters listed in Appendix II.B.

[84] We use data from Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 306–09 (2008).

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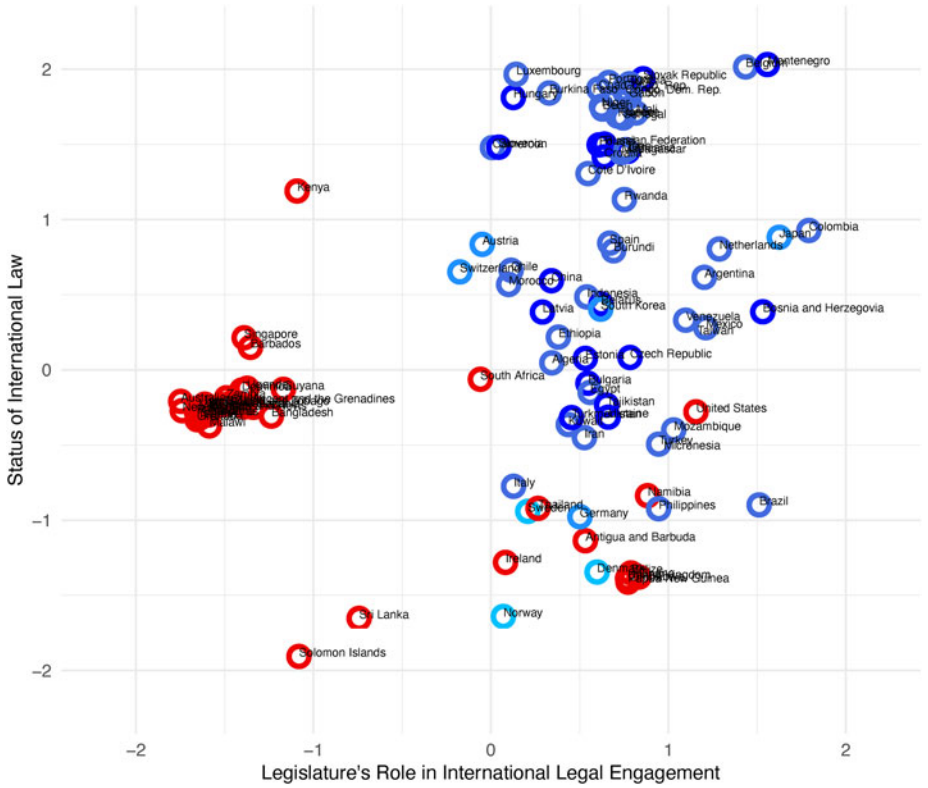

FIGURE 2. Policy Points in Two Dimensions, Color-Coded by Legal Origin, 2010

law, side of the line are the United States, which never followed the traditional common law approach, and Namibia, which adopted parliamentary approval of treaties and a monist system upon independence. Only five civil law countries "erroneously" fall on the common law side of the line: Germany, Italy, and three Scandinavian countries, which are dualist with respect to treaties. Overall, the legal traditions have substantial explanatory power for countries' positions on the plot.

The same method also allows us to explore the extent to which other theories explain foreign relations law choices globally. Theories that link foreign relations law to a desire for credibility in the international arena predict that countries in need of international credibility will adopt legislative approval requirements, apply treaties directly, and give them higher status than ordinary domestic law. If this theory is useful, countries seeking to improve their credibility should cluster at the top right of the plot, indicating both a large role for the legislature and a high openness toward international law.

We can test this prediction by identifying the countries that benefit most from boosting their international credibility. One way to do so is by looking at a measure of states' domestic adherence to the rule of law. For example, a capital-exporting state may worry that a host state with a weak rule of law might expropriate its investors' assets despite any protections it secures in a bilateral investment treaty. In order to conclude such treaties and attract foreign

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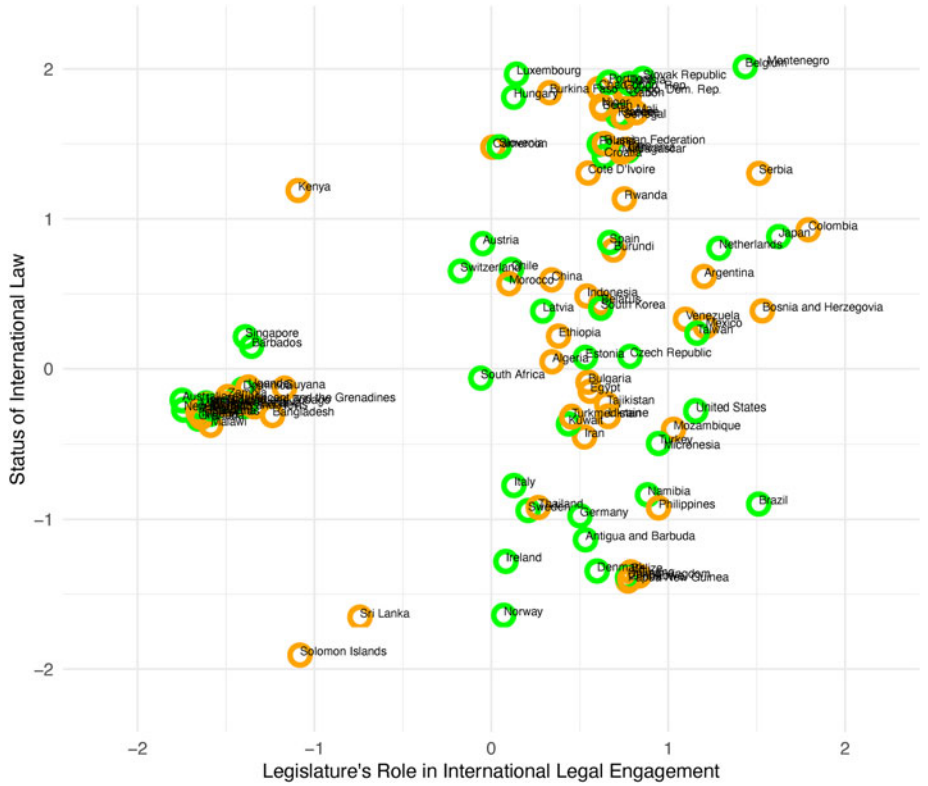

FIGURE 3. Policy Points in Two Dimensions, Color-Coded by Weak (Gold) and Strong (Green) Rule of Law, 2010

investment, the host state may need to take steps to enhance the credibility of its commitments. As discussed in Part II, another way to identify these countries is by their democratic credentials. More specifically, newly democratizing countries, like the early United States, may need to signal that the newly established legislature is committed to the country's treaty obligations. New democracies and states with weak rule of law, therefore, are those that can benefit from deploying foreign relations law strategically and should cluster at the top right corner of the plot.

Figures 3 and 4 identify countries with weak rule-of-law and young democracies, respectively. They show that the predictions from credibility theories do not bear out. Figure 3 depicts a spatial map as of 2010 highlighting countries with strong rule-of-law traditions (in green) and countries with weak rule-of-law traditions (in gold). It does not reveal an obvious relationship between this trait and either of the two dimensions.[85] Figure 4 singles out emerging democracies (in red) versus established democracies and autocracies (in blue) and likewise shows no clear relationship.[86] This does not mean that credibility theories have no

[85] We use 2012 data from the World Justice Project, see http://worldjusticeproject.org (2019).

[86] We use data produced by BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS, App. I (2009).

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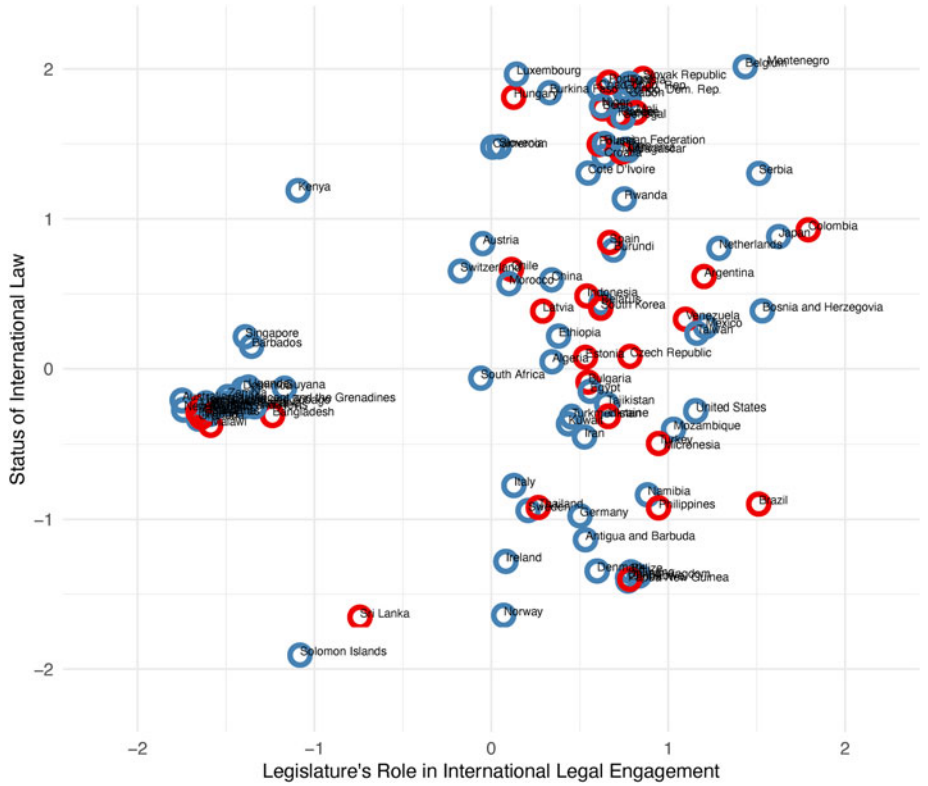

FIGURE 4. Policy Points in Two Dimensions, Color-Coded by New Democracies (Red) and Others (Blue), 2010

predictive value at all—they may still explain particular cases at particular times—but they do not appear to account for global patterns in the data.

Theories that link countries' foreign relations law choices to a desire to lock in democracy postulate that democratization goes hand in hand with a growing openness toward international law in the domestic legal system and with increased legislative involvement in treaty-making.[87] If this is so, we should expect to see countries that seek to pre-commit to democracy cluster in the top right of the spatial map. Figure 4, which highlights new democracies, shows that the data provide little or no support for this theory. Since it is difficult to capture the dynamic process of democratization with a single snapshot of the data, we also separate all democracies from autocracies. Figure 5 shows the same plot with democracies in blue and autocracies in gold.[88] It reveals that predictions that link foreign relations law choices to democracy also do not bear out for the global sample of countries in 2010: both democracies and autocracies are scattered throughout and, if anything, the bottom left of the plot is disproportionately occupied by democracies.

[87] See notes 57–61 *supra* and surrounding text.

[88] We use data from José Antonio Cheibub, Jennifer Gandhi & James Raymond Vreeland, *Democracy and Dictatorship Revisited*, 143 PUBLIC CHOICE 67 (2010).

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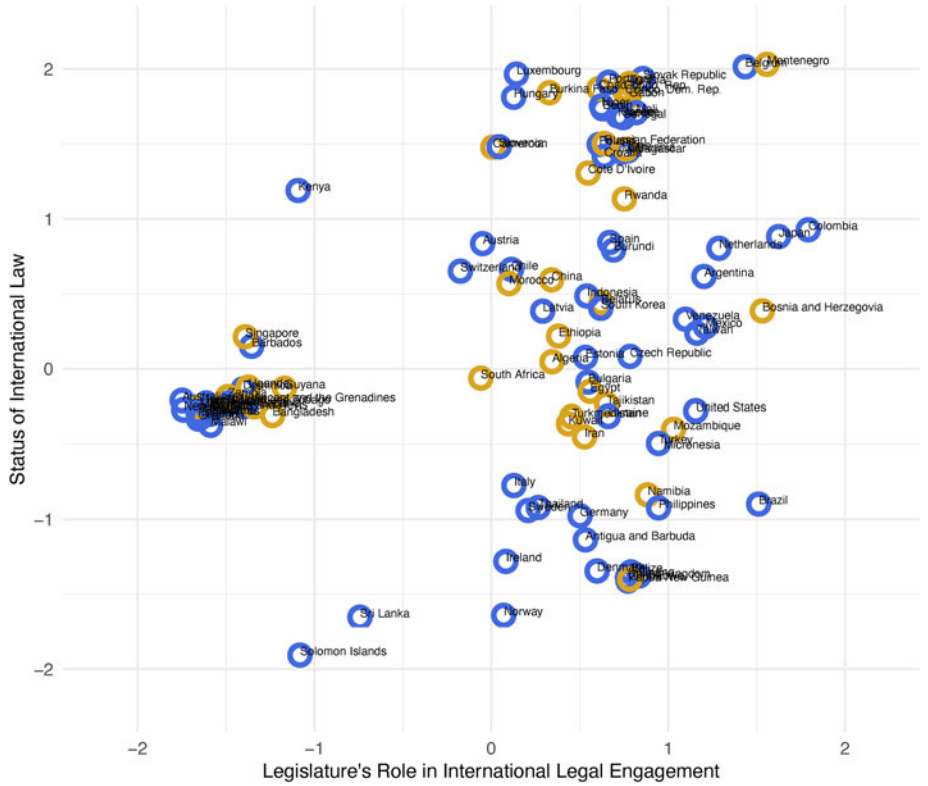

FIGURE 5. Policy Points in Two Dimensions, Color-Coded by Democracy (Blue)/Autocracy (Gold), 2010

Exploring our data through ideal-point estimation thus reveals a number of broad features of foreign relations law globally. First, foreign relations law choices are substantially standardized, but not to the point that states have converged upon a single model. Second, the civil law-common law divide largely explains how countries fall on the plot. While theories of democratization and credibility theories may have explanatory power in individual cases, they do not seem to explain the bulk of foreign relations law choices, either historically or today. By contrast, even today, whether a country has civil law or common law legal origins strongly predicts its foreign relations law choices. Third, the plot reveals that while the civil law-common law divide performs well in explaining where countries fall, the clusters are somewhat dispersed, meaning there are also important differences within these traditions. We will explore these, along with the basic divide, below.

V. MAPPING AND TRACING THE EVOLUTION OF FOREIGN RELATIONS LAW

How did this small set of foreign relations legal models come to prevail around the world? In other words, what factors led countries to adopt these models and, in many cases, modify them over time? In this Part, we use our original data to trace the historical origins of the principal foreign relations legal models and their migration over four periods: the nineteenth century, the early twentieth century, the Cold War, and the post-Cold War period. By

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exploring and explaining how the various country clusters have shifted over time, this Part tracks the long-term evolution of global foreign relations law and provides a more detailed account of the times, places, and circumstances in which each of the three theories described above may explain foreign relations law choices.[89]

A. Origins and Development of the Models (1787–1900)

The predecessors of the models that dominate today first emerged in the nineteenth century in the United States, continental Europe, Great Britain and its colonies, and Latin America. We explore each region in turn.

1. The United States and Continental Europe

The American founders debated extensively how the new nation's foreign relations law ought to be structured. As noted above, the new nation's need to demonstrate its ability to redress wrongs committed by its nationals and to secure the credibility of its treaty commitments largely drove its foreign relations law choices.[90] To accomplish these goals, the new U.S. Constitution contained several novel provisions governing the country's engagement with international law. It assigned an important role to the newly established legislature: the Senate had to approve treaties by a two-thirds majority and Congress was given the power to "define and punish . . . Offenses against the Law of Nations."[91] It also included a Supremacy Clause that made ratified treaties part of "the supreme Law of the Land," thereby allowing treaties to be enforced in federal court.[92] Over the course of the nineteenth century, U.S. courts further refined these choices: they confirmed that treaties applied directly but limited that application through the self-execution doctrine, and they put treaties and federal statutes on equal footing.[93]

In continental Europe, these questions arose first in the late eighteenth and early nineteenth century, with the French Revolution and constitution-making waves that followed. Before then, most continental European countries lacked elected legislative assemblies. Likewise, while courts occasionally applied the law of nations before the nineteenth century, it was not until the rise of positivism[94] in the nineteenth century, and its greater attention to the sources and hierarchy of legal norms, that questions relating to the domestic status of treaties and CIL drew sustained attention. The proliferation of treaties and the development of international law rules in new areas increasingly forced constitution-makers, legislatures, and courts to confront these issues.

[89] The discussion in this Part describes the most salient developments in the foreign relations law choices documented by our data, selected to provide a broad historical account and to evaluate the theories described above. Unlike our quantitative analysis, it cannot cover all aspects of foreign relations law captured by our data for every country in each period; it thus inevitably reflects the authors' judgments as to selection and organization.

[90] *See* notes 42–44 *supra* and accompanying text.

[91] U.S. CONST., Art. I, sec. 8, cl. 10; Art. III, sec. 2, cl. 2.

[92] *Id.* Art. VI, cl. 2.

[93] *See* David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

[94] *See* Jörg Kammerhofer, *International Legal Positivism*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 407, 411–12 (Anne Orford & Florian Hoffman eds., 2016).

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Under the old regime, treaty-making was an exclusive prerogative of the monarch. As absolute monarchy came under attack, separation of powers and legislative oversight of the executive became central battlegrounds. However, treaty-making and the status of international law were hardly at the forefront of reformers' concerns. Influential Enlightenment political theorists, such as Montesquieu and Rousseau, thought of foreign relations as a quintessentially executive function that had little bearing on domestic conditions and which representative assemblies were poorly suited to conduct.[95] The early years of the French Revolution shattered these premises.

Revolutionary France did not face a credibility crisis, as the early United States did, but a political and military one. Following an incident between Spain—France's ally and fellow Bourbon monarchy—and England, King Louis XVI ordered naval vessels armed in preparation for war with England.[96] The prospect of war threatened the Revolution's fragile achievements. In May 1790, a heated debate in the Constituent Assembly opposed proponents of the King's traditional prerogative over foreign relations and reformers who, inspired by Enlightenment ideas, believed that unchecked royal power was the source of all wars and wished to abolish it altogether.[97]

On May 22, the Assembly adopted a decree under which war could be declared only by the legislature on the king's proposal. Whereas the king had exclusive power to conduct external political relations and to sign treaties, "treaties of peace, alliance, and commerce may only be executed upon ratification by the legislative body."[98] The decree thus classified treaties by subject-matter, with certain treaties requiring prior legislative approval while others could be concluded by the king acting alone.[99]

Although this constitutional regime proved short-lived, numerous European constitutions adopted the same approach.[100] Thus, Spain's 1812 liberal Cadiz Constitution required the Cortes' approval for "treaties of offensive alliance, of subsidies, and special treaties of commerce," as well as for any acts that alienated national property, imposed taxes, or admitted foreign troops into the kingdom.[101] Portugal's liberal 1822 constitution contained similar

[95] *See* Boris Mirkine-Guetzévitch, *La Technique parlementaire des relations internationales*, 56 RECUEIL DES COURS 213, 233 n. 1 (1936); Boris Mirkine-Guetzévitch, *Droit international et droit constitutionnel*, 38 RECUEIL DES COURS 307, 357–59 (1931).

[96] *See* Mirkine-Guetzévitch, *Technique parlementaire, supra* note 95, at 232–42.

[97] *See id.* at 235.

[98] *Id.* at 241.

[99] Most of the May 22 decree was incorporated verbatim in the 1791 Constitution. The final provision, however, required legislative approved for all treaties. 1791 CONSTITUTION [CONST.], tit. III, ch. IV, § III, Art. 3 (Fr.). The 1791 Polish constitution also required parliamentary approval for "final ratification of treaties of alliance and trade [and] any diplomatic acts and agreements involving the law of nations." KONSTYTUCJA 3 MAJA [CONSTITUTION OF 3 MAY], Art. VI (1791) (Pol.). Both constitutions were short-lived, and it was the 1790 Decree that proved most influential in nineteenth-century constitutionalism. Mirkine-Guetzévitch, *Technique parlementaire*, *supra* note 95, at 240.

[100] Subsequent French constitutions also made all treaties subject to legislative approval. 1793 CONST., Arts. 55, 70 (Fr.); 1795 CONST., Arts. 331, 333 (Fr.). The Consulate limited legislative approval to peace, alliance, and commercial treaties. 1799 CONST., Art. 50 (Fr.), then eliminated it as it morphed into the Empire. 1801 CONST., Art. 58 (Fr.); 1804 CONST., Art. 41 (Fr). The 1814 Charter gave the king the exclusive power to "make treaties of peace, alliance and commerce." 1814 CONST., Art. 14 (Fr.). Even the reformed 1830 Charter did not grant the assembly a role in treaty-making. Thus, constitutional developments elsewhere in Europe shaped the evolution of treaty-making provisions.

[101] CONSTITUCIÓN POLÍTICA DE LA MONARQUÍA ESPAÑOLA [POLITICAL CONSTITIUTION OF THE SPANISH MONARCHY], Arts. 131(7), 172 (1812) (Spain).

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provisions.[102] The Cadiz Constitution also provided that the king "may not alienate, grant, or exchange any province, city, town, or village, however small, of Spanish territory," implying that any such treaty would require a constitutional amendment.[103] More conservative early constitutions, like the 1815 Dutch constitution and the 1826 Portuguese constitution, left the monarch free to make most treaties but required legislative approval of territorial cessions.[104]

A major turning point came with the 1831 Belgian constitution, which was the first in Europe to explicitly require legislative approval for treaties that modified domestic law.[105] Although there was apparently little debate over this provision, its framers chose to depart from a draft based on the 1815 Dutch constitution, apparently in order to protect Parliament's core prerogatives over law-making and the budget.[106] Many later constitutions followed the Belgian model, often combining similar language with peace treaties, territorial cessions, and other political treaties.[107]

[102] Constituição Política da Monarquia Portuguesa [Political Constitution of the Portuguese Monarchy], Art. 100 (1822) (Port.).

[103] Constitución Política de la Monarquía Española [Political Constitiution of the Spanish Monarchy], Art. 172(4) (1812) (Spain).

[104] Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands], Art. 58 (1815) (Neth.); Carta Constitucional da Monarquia Portuguesa [Constitutional Charter of the Portuguese Monarchy], Art. 75(8) (1826) (Port.).

[105] Specifically, it required parliamentary approval for "treaties . . . that may burden the State, or individually bind the Belgians." 1831 Const., Art. 68 (Belg.).

[106] *See* Ruth D. Masters, International Law in National Courts: A Study of the Enforcement of International Law in German, Swiss, French and Belgian Courts 197–99 (1932).

[107] According to Masters, *supra* note 106, at 128, Belgium's 1831 constitution was "considered to be a model for all constitutional governments." Greece's 1844 constitution, the first to establish an effective constitutional monarchy in that country, adopted a similar provision. Σύνταγμα της Ελλάδας [Constitution of Greece], Art. 25 (1844) (Greece). In 1848, the Dutch constitutional provision on parliamentary approval was expanded to include treaties "that entail . . . any other provision or change pertaining to legal rights." Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands], Art. 57 (1848) (Neth.). Piedmont-Sardinia's 1848 Statuto Albertino, which became the constitution of unified Italy in 1861, required approval of treaties "involving financial obligations or alterations of the territory of the state." Statuto Fondamentale della Monarchia di Savoia (Fundamental Statute of the Monarchy of Savoy), Art. 5 (1848). The 1869 Spanish constitution added "those that may individually obligate Spaniards" (Art. 74(4)), which was also included in the 1876 constitution. Constitución Democrática de la Nación Española (1869), [Democratic Constitution of the Spanish Nation (1869)], Art. 74(4) (Spain). The 1875 fundamental laws of the French Third Republic, which remained in force until World War II, required parliamentary approval of territorial cessions and treaties of peace, commerce, and "those that engage the finances of the State, those that relate to the status of persons and to the property rights of the French abroad." Loi constitutionelle du 16 juillet 1875 [Constitutional Law of 16 July 1875], Art. 8 (Fr.); *see also* Danmarks Riges Grundlov [Constitutional Act of the Realm of Denmark], Art. 23 (1849) (Den.); Constitution du Luxembourg [Constitution of Luxembourg], Art. 37 (1856) (Lux.). This model was adopted even in Central European empires whose regimes strenuously resisted constraints on executive power. Prussia's 1850 constitution provided that treaties required legislative assent "in so far as they are commercial treaties, or impose burdens on the State, or obligations on the individual subjects" (Verfassung für den Preußischen Staat [Constitution for the state of Prussia], Art. 48 (1850)), and the 1871 constitution of the German Empire provided that where treaties relate to matters that "belong in the domain of the Imperial legislation, the concurrence of the Bundesrat is required for their conclusion and the approval of the Reichstag is required for their validity." Verfassung des Deutschen Reiches [Constitution of the German Empire], Art. 11 (1871) (Ger.). Austria-Hungary's 1867 imperial constitutional laws conferred on the Reichsrat power to approve "commercial treaties and . . . those political treaties which place a financial burden upon the empire or any part thereof, which place obligations upon individual citizens, or which have as a consequence a change in the territory of the kingdoms and countries represented in the Reichsrat." Gesetz, wodurch das Grundgesetz über die Reichsvertretung vom 26. Februar 1861 abgeändert wird (Law Altering the Fundamental Law of February 26, 1861, Concerning Imperial Representation), § 11(a) (1867).

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Thus, by the end of the nineteenth century, most Continental European countries—including major colonial powers—had adopted a similar model to regulate the treaty-making power. This model, explicitly enshrined in the constitution, required prior legislative approval for the ratification of a closed list of treaties, which virtually always included peace treaties, territorial cessions, and commercial treaties, and typically included additional items meant to protect the legislature's law-making and budgetary prerogatives.[108]

Although they explicitly addressed treaty-making, nineteenth-century European constitutions did not make provision for the domestic legal status of treaties or CIL. This issue was largely left to courts, which generally considered that ratified treaties were directly applicable. By the end of century, courts in Belgium, France, Germany, Portugal, Spain, and Switzerland had so held.[109] These decisions were rarely explicit regarding their constitutional basis, though they sometimes reasoned that legislative approval implied that treaties should be treated as laws.[110] Few courts squarely addressed the question of the hierarchy of treaties and ordinary laws, but courts generally implied that they would give later inconsistent legislation preference over an earlier treaty, thus effectively giving them equal status.[111]

Courts also regularly applied CIL rules without requiring implementing legislation, as evidenced by multiple cases from Belgium, France, Germany, Greece, Italy, Portugal, Spain, and Switzerland.[112] These cases applied custom on sovereign and diplomatic immunities, but also the law of the sea, jurisdiction, the laws of war, extradition, recognition of states, and even the legality of royal marriage contracts.[113] Again, courts were rarely explicit about the legal basis for applying custom and usually did not discuss its place in the domestic hierarchy of norms. In general, they would not apply a customary norm in the face of a clearly inconsistent statute, regardless of which one was later in time. As a result, most courts effectively treated custom as directly applicable but with a hierarchical status inferior to ordinary domestic laws.[114]

[108] There were a few exceptions. Russia, Sweden, and Norway, for example, imposed no legislative approval requirement, while Portugal and Switzerland adopted provisions that, on their face, required legislative approval of all treaties. *See* ACTO ADICIONAL DE 1852 A CARTA CONSTITUCIONAL DA MONARQUIA [1852 ADDITIONAL ACT TO THE CONSTITUTIONAL CHARTER OF THE MONARCHY], Art. 10 (Port.); CONSTITUTION FÉDÉRALE, Sept. 12, 1848, FF 1 [Cst 1848], Art. 74(5) (Switz.).

[109] *See* MASTERS, *supra* note 106, at 209 (France, Germany, Belgium, Switzerland); Antonio Remiro Brotóns, *The Spanish Constitution and International Law*, 9 SPANISH Y.B. INT'L L. 27, 53 (2003) (Spain); ANDRÉ GONÇALVES PEREIRA, NOVAS CONSIDERAÇÕES SOBRE A RELEVÂNCIA DO DIREITO INTERNACIONAL NA ORDEM INTERNA PORTUGUESA 41–42 (1969) (Portugal).

[110] In some countries such as Belgium, this reasoning meant that only treaties that had received such approval could be treaties as laws, while others were mere royal decrees. *See* MASTERS, *supra* note 106, at 209. Other courts applied ratified treaties directly even where they fell outside the categories that required legislative approval.

[111] *See, e.g.*, *id.* (discussing cases from Belgium, France, Germany, and Switzerland).

[112] *See id.*; *see* Areios Pagos [A.P.] [Supreme Court] 14/1896, (Greece); Natalino Ronzitti, *Application of Customary International Law*, *in* NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 36 (Michael Bothe, Thomas Kurzidem & Peter Macalister-Smith eds., 1990) (Italy); JULIO D. GONZÁLEZ CAMPOS, LUIS L. SÁNCHEZ RODRIGUEZ & MARÍA PAZ ANDRÉS SÁENZ DE SANTA MARÍA, CURSO DE DERECHO INTERNACIONAL PUBLICO 328 (4th ed. 2008) (Spain); GONÇALVES PEREIRA, *supra* note 109 (Portugal).

[113] MASTERS, *supra* note 106, at 214–21 (discussing a famous Belgian case regarding the validity of King Leopold II's marriage contract with the Archduchess of Austria).

[114] There were a few significant exceptions. Italy followed a dualist system under which treaties were not directly applicable absent legislative implementation, although its courts applied CIL directly; Denmark, the Netherlands, and Norway were strictly dualist and considered neither treaties nor CIL directly applicable.

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Thus, by the end of the nineteenth century, most European civil law jurisdictions had converged on a model that combined legislative approval of a closed but expanding list of treaties and direct effect of both treaties and CIL, giving the former status equal to statutes while the latter was considered inferior. This model would later diffuse through colonial lines to many civil law systems outside Europe.

2. *Latin America*

As Latin American countries gained independence in the early nineteenth century, they systematically adopted written republican constitutions. These constitutions, reportedly inspired both by European developments—especially Spain's liberal Cadiz Constitution—and by the U.S. Constitution,[115] almost invariably included provisions requiring legislative approval of treaties. For example, Peru's 1823 constitution provided that one of Congress's exclusive powers was "[t]o approve Treaties of Peace, and Conventions of every description, respecting foreign relations."[116] Despite numerous constitutional changes in the nineteenth and early twentieth centuries, such provisions generally remained in force except in periods of civil war or dictatorship.

[115] *See generally* GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD 1776–1989: A GLOBAL PERSPECTIVE (2009).

[116] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA PERUANA [POLITICAL CONSTITUTION OF THE PERUVIAN REPUBLIC], Art. 60(7) (1823) (Peru). *See also* CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA [CONSTITUTION OF THE REPUBLIC OF COLOMBIA], Art. 55(18) (1821) (Great Colom.). Colombia's 1832 constitution, adopted following Gran Colombia's dissolution, provided that one of Congress's exclusive powers was "[t]o give consent and approval to public treaties and conventions entered into by the Executive." CONSTITUCIÓN POLÍTICA DEL ESTADO DE NUEVA GRANADA [POLITICAL CONSTITUTION OF THE STATE OF NEW GRANADA], Art. 74(14) (1832) (Colom.). Likewise, Venezuela's 1830 constitution granted Congress the authority to "give or withhold its consent and approbation to the Treaties of Peace, Armistice, Amity, offensive and defensive Alliance, Neutrality, and Commerce, which may have been concluded by the Chief of the Republic." *See* CONSTITUCIÓN POLÍTICA DEL ESTADO DE VENEZUELA [POLITICAL CONSTITUTION OF THE STATE OF VENEZUELA], Art. 87(11) (1830) (Venez.). Ecuador's first constitution required legislative approval only of "treaties of peace, partnership, friendship and trade." CONSTITUCIÓN DEL ESTADO DEL ECUADOR [CONSTITUTION OF THE STATE OF ECUADOR], Art. 26(6) (1830) (Ecuador). This was soon replaced by more general language, giving Congress the power "to give its assent and approval to public treaties and agreements concluded by the Executive Power." CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION OF THE REPUBLIC OF ECUADOR], Art. 43(7) (1835) (Ecuador). Mexico's 1824 constitution granted its Congress power to "approve treaties of peace, alliance, friendship, federation and armed neutrality, and whatsoever other which the President of the United States may celebrate with foreign powers." *See* CONSTITUCIÓN FEDERAL DE LOS ESTADOS UNIDOS MEXICANOS [FEDERAL CONSTITUTION OF THE UNITED MEXICAN STATES], Art. 50(13) (1824) (Mex.). Chile's 1833 constitution provided that "Treaties, before ratification, must be presented for the approval of the Congress." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE], Art. 82(19) (1833) (Chile). Argentina's 1853 constitution, adopted after a long period of constitutional instability, granted the National Congress power "[t]o approve or reject the treaties concluded with any foreign nations." CONSTITUCIÓN DE LA CONFEDERACIÓN ARGENTINA [CONSTITUTION OF THE ARGENTINE CONFEDERATION], Art. 64(19) (1853) (Arg.). The short-lived constitutions of 1819 and 1826 also required legislative approval of treaties. The major exception was Brazil, whose emperor had the power to "make treaties of offensive and defensive alliance, of aid and commerce, bringing them subsequently to the attention of the general assembly when the interests and security of the state permit it," except for territorial modifications, which required approval. CONSTITUIÇÃO POLÍTICA DO IMPÉRIO DO BRASIL [POLITICAL CONSTITUTION OF THE EMPIRE OF BRAZIL], Art. 102(8) (1824) (Braz.). Thus, Brazil's imperial constitution followed the European conservative model (although during the 1831–40 regency all treaties were apparently subject to approval.) The 1891 republican constitution brought the country in line with its neighbors, giving Congress power to "[p]ass finally upon treaties and conventions with foreign nations." CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL [CONSTITUTION OF THE UNITED STATES OF BRAZIL], Art. 34(12) (1891) (Braz.).

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Some constitutions, usually those that later adopted federal systems, incorporated provisions inspired by the U.S. Supremacy Clause that explicitly gave ratified treaties domestic legal effect. Argentina's 1853 constitution, still in force today, explicitly made treaties "the supreme law of the Nation"[117] and granted the Supreme Court jurisdiction over cases "involving points to be decided by . . . foreign treaties."[118] Mexico's 1857 constitution provided Federal tribunals with jurisdiction "to take cognizance of . . . civil or criminal cases that may arise under treaties with foreign powers."[119] Colombia's 1858 and 1863 constitutions, as well as Brazil's 1891 constitution, likewise gave their respective Supreme Courts jurisdiction over cases involving treaties.[120] These provisions appear to have been primarily concerned with protecting the federal government's authority over foreign affairs against interference by states or provinces rather than with credibility.

In any event, Latin American courts generally gave direct effect to treaties regardless of whether such explicit provisions were found in the constitution. Thus, while Chile's early constitutions made no mention of the domestic legal status of treaties, courts applied them directly, as they did in Venezuela. Likewise, courts in Argentina, Colombia, Mexico, and Brazil appear to have considered treaties directly applicable even during periods when the constitution contained no such provisions. Although cases and commentary from that period are sparse, courts appear to have followed prevailing thought in civil law systems, including Spain and Portugal, under which treaties had direct effect on an equal footing with statutes. In some cases, the presence of specific clauses may have made a difference: the Brazilian Supreme Court, based on the 1891 constitution, appears to have been the first national court to explicitly hold treaties superior to domestic statutes.[121]

Latin American constitutions did not typically contain any provisions governing the domestic legal status of CIL. Nevertheless, as in the case of treaties, and like courts in Europe, Latin American courts generally recognized that such norms were directly applicable but would yield to an inconsistent statute.[122] Late in the century, a handful of constitutional provisions on custom emerged. Colombia's 1863 constitution expressly provided: "The law of nations is part of the national legislation"—the first instance we found of a national

[117] Constitución de la Confederación Argentina [Constitution of the Argentine Confederation], Art. 31 (1853) (Arg.).

[118] *Id.* Art. 97. The Argentine Supreme Court soon held that while treaties were directly applicable, they were inferior to federal laws and therefore implementing legislation was required if a treaty was inconsistent with legislation. This remained the law until 1963, when it held that they had equal status. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/11/1963, "Martín & Cía. Ltda. S. A. c/ Administración General de Puertos s/ repetición de pago," Fallos de la Corte Suprema de Justicia [Fallos] (1963-257-99).

[119] Constitución Federal de los Estados Unidos Mexicanos [Federal Constitution of the United Mexican States], Art. 97(6) (1857) (Mex.).

[120] Constitución Política para la Confederación Granadina [Political Constitution for the Granadine Confederation], Art. 49(11) (1858) (Colom.); Constitución Política de los Estados Unidos de Colombia [Political Constitution of the United States of Colombia], Art. 71(8) (1863) (Colom.); Constituição da República dos Estados Unidos do Brasil [Constitution of the United States of Brazil], Art. 59(3)(1)(a) (1891) (Braz.).

[121] Until 1977, the Supreme Court continued to hold that treaties were superior to domestic laws. *See* S.T.F., Recurso Extraordinario No. 80,004 SE, Relator: Min. Xavier de Albuquerque, 01.06.1977, 83(3), Revista Trimestral de Jurisprudência [R.T.J.], 809 (Braz.).

[122] Thus, in a 1924 case concerning diplomatic agents, the Colombian Supreme Court stated that "there should be taken into account the public treaties and, in the absence of such treaties, the most accepted rules of International Law." Corte Suprema de Justicia [C.S.J.] [Supreme Court], agosto, 1924, Informe de la Corte Suprema de Justicia al Congreso de la República en sus sesiones de 1924, Gaceta Judicial [G.J.], vol. 31, p. 30 (Colom.).

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constitution's expressly incorporating custom.[123] Venezuela's 1864 constitution contained a virtually identical provision, which reappeared in several subsequent constitutions but was gradually modified to clarify custom's inferior status relative to national laws.[124] These provisions, where they existed, do not appear to have modified, but simply confirmed, the domestic status of CIL.

By the end of the century, Latin American republics had thus converged on a model that combined features adopted from the U.S. Constitution with others similar to those prevailing in the civil law world. This model required legislative approval of treaties. Once ratified, treaties were directly applicable by national courts with a legal status equal to that of regular statutes. Unlike most European constitutions, Latin American constitutions generally required legislative approval of all treaties. CIL rules were considered directly applicable but inferior to domestic statutes.

3. The United Kingdom and Its Former Colonies

Unlike its continental European counterparts, the United Kingdom entered the nineteenth century with an established constitutional monarchy and a well-developed set of doctrines on treaty-making and the domestic status of international law. The sovereign, acting on the cabinet's advice, negotiated and concluded treaties without the need for parliamentary approval. Treaties had no domestic legal effect unless and until implemented by legislation; but there was a presumption that legislation should be interpreted to conform to obligations under ratified treaties. CIL rules were considered to form part of the common law. This approach remained constant throughout the century.

Toward the end of the century, several British settler colonies began to gradually acquire independence to conduct their foreign relations. Although their constitutions generally did not regulate treaty-making and the status of international law, they adopted the basic features of the British approach. For example, the preamble of Canada's 1867 constitution provided that it would be "similar in Principle to that of the United Kingdom."[125] It vested executive power in a governor-general, the monarch's local representative, to be exercised by a government accountable to the Canadian parliament. It did not explicitly allocate the treaty-making power, and initially, foreign relations were conducted at the imperial level. But as that power was gradually transferred to the colony, it was exercised by the local executive as part of the royal prerogative. Australia, New Zealand, and South Africa adopted similar systems.

Likewise, local courts uniformly followed the British system as to the domestic status of treaties and custom. Treaties had no domestic legal effect unless and until implemented by statute. CIL norms, by contrast, were directly applicable as long as they did not conflict with statutes. The seamless adoption of this system sometimes rested on local laws providing that English statutes and common law rules remained in force unless modified. Even without these provisions, local courts routinely cited to English precedent. The Privy Council,

[123] Constitución Política de los Estados Unidos de Colombia [Political Constitution of the United States of Colombia], Art. 91 (1863) (Colom.).

[124] *See* Constitución de los Estados Unidos de Venezuela [Constitution of the United States of Venezuela], Art. 140 (1901) (Venez.); Constitución de los Estados Unidos de Venezuela [Constitution of the United States of Venezuela], Art. 125 (1904) (Venez.); Constitución de los Estados Unidos de Venezuela [Constitution of the United States of Venezuela], Art. 143 (1909) (Venez.).

[125] British North America Act 1867, 30–31 Vict., c. 3., pmbl.

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which heard appeals from local courts even after independence, contributed to uniformity in canonical decisions that remain widely cited across the common law world.[126] Close educational ties with England and a practice of cross-citations may have further supported entrenchment of the British model.[127]

The United States was the major exception to this systematic adoption of the British system by former British colonies that became independent during this period. The framers of the U.S. Constitution charted their own course that departed significantly from the British model. The United States, however, was not immune from British influence: U.S. courts followed English precedent in applying CIL rules directly.[128] Thus, the United States pioneered a hybrid model close to that being developed in continental Europe but with elements of the British tradition.

4. Conclusions

Figure 6 shows the policy point estimates for the countries in our dataset in 1900. It shows a cluster of continental European civil law countries that follow a similar model, with parliamentary approval of most treaties and direct effect of both treaties and CIL. A few countries that lacked parliamentary approval or did not give treaties direct effect appear at the left or below this cluster. Latin American countries tend to cluster to the right of the continental European cluster, reflecting their more comprehensive treaty approval requirements and similar doctrines on the domestic status of international law. Among common law countries, the United Kingdom is far to the left due to its lack of any legislative approval requirement for treaties, while the United States is close to Latin American countries. Portugal and Argentina, despite being monist, rank low on the second (vertical) dimension because, while they gave ratified treaties direct effect, they ranked them inferior to domestic law.

In designing rules on treaty-making, nineteenth-century constitutionalists appear to have been primarily concerned with protecting legislative prerogatives against the executive. In Europe, the United States, and Latin America, they achieved this end by requiring legislative approval of treaties, sometimes covering all treaties, sometimes only those that were most likely to impinge on legislative power. The adoption and expansion of constraints on treaty-making generally coincided with other constitutional reforms that limited executive power, expanded the franchise, and protected individual rights. In this respect, the evolution of foreign relations law is associated with the rise of constitutionalism and democracy in this period. In the United Kingdom and its colonies, democracy also progressed, but the well-established lack of direct effect of treaties mitigated separation of powers concerns.

While few nineteenth century constitutions (other than in federal systems) explicitly provided for the domestic status of treaties, their framers appear to have assumed that treaties would be given direct effect. Indeed, outside the British Empire and a few Northern European countries, this was the practice of most courts. Likewise, they applied

[126] *See, e.g.*, Attorney-General of Canada v. Attorney General of Ontario (Labour Conventions), [1937] A.C. 326 (legislative implementation requirement for treaties) (Can.); Chung Chi Cheung v. R., [1939] A.C. 160 (UK) (direct application of CIL if not inconsistent with statutes).

[127] Spamann, *supra* note 30, at 1818.

[128] *See* Sloss, Ramsey & Dodge, *supra* note 93, at 23–37.

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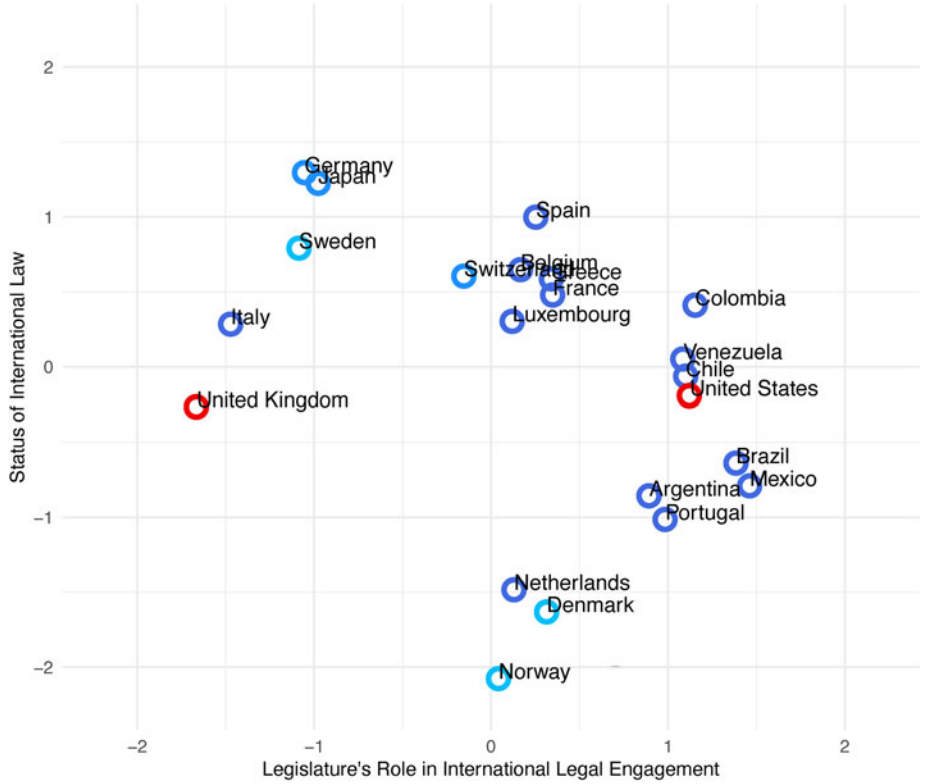

FIGURE 6. Policy Points in Two Dimensions, Color-Coded by Legal Origin, 1900

international custom regardless of the absence of constitutional provisions. It seems likely that direct application of treaties and custom was initially rooted in the natural law tradition, which favored a monistic approach to law and did not insist on clear domestic sources of authority. With the rise of positivism, the status of international law would puzzle courts and scholars, but by then its direct application was well entrenched in practice.

Outside the United States, there is little evidence that credibility concerns influenced the adoption of rules giving direct effect to treaties, although this motivation may have been present in some Latin American countries. Courts, rather than constitution-makers, were the principal actors and appear to have acted based on prevailing legal ideas at the time rather than out of strategic considerations.

B. Wars, Crises, and Constitutional Experimentation (1900–1950)

The aftermath of World War I, the turbulent interwar period, and the post-World War II order brought several important developments. These included the rise of constitutional provisions giving treaties superiority over domestic statutes and providing for constitutional review of treaties. These developments did not fundamentally change pre-existing patterns,

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but rather set the stage for their worldwide diffusion of increasingly well-established models in the decolonization period.

First, the aftermath of World War I and the interwar period saw significant innovations in constitutional reception of CIL in Europe. Germany's Weimar Constitution Article 4 famously provided that "[t]he universally recognized rules of the Law of Nations are binding component parts of the German Imperial Law."[129] Austria's post-war constitution, drafted by the famous legal theorist Hans Kelsen, contained almost identical language.[130] Other new constitutions referred to CIL but left its domestic legal status uncertain. Thus, Spain's 1931 Republican constitution provided that "[t]he Spanish State shall abide by the universal norms of international law, including them in its positive law."[131] These provisions have been hailed as major innovations. Antonio Cassese, discussing Germany's 1919 constitution, enthused: "A new era opened . . . [f]or the first time in history a Constitution proclaimed State observance of customary international law."[132]

The practical impact of these provisions is open to question. CIL was already directly applicable by courts in Germany and Spain, as well as in Latin America.[133] It is unclear whether these provisions were meant to elevate its status and if so, if they succeeded.[134] The German and Austrian provisions triggered endless doctrinal disputes over what it meant for a norm to be "universally accepted."[135] Many courts and scholars settled on the notion that, in order to be directly applicable, a CIL rule had to be accepted specifically by the country in question.[136] Meanwhile, the Spanish provision was read as a mere programmatic commitment.[137]

After World War II, constitutional provisions on CIL reception became more common, appearing notably in the constitutions of Italy, Japan, and France.[138] Like the interwar provisions, these declarations appear to have had primarily symbolic value, as courts in these countries already applied CIL directly and the provisions did not purport to elevate their domestic legal status. The exception is Germany, whose post-war constitution was the first (and remains one of the few) to explicitly grant CIL norms superiority over domestic laws.[139]

[129] WEIMAR CONST., Art. 4 (1919) (Ger.).

[130] BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBL No. 1/1920, Art. 9 (Austria).

[131] CONSTITUCIÓN DE LA REPÚBLICA ESPAÑOLA [CONSTITUTION OF THE SPANISH REPUBLIC], Art. 7 (1931) (Spain). Even more ambiguously, Ireland's 1937 constitution stated that the country "accepts the generally recognised principles of international law as its rule of conduct in its relations with other States." CONSTITUTION OF IRELAND 1937, Art. 29(3) (Irl.).

[132] Cassese, *supra* note 45, at 357.

[133] *See* note 122 *supra*.

[134] Cassese argues that on its face, Germany's 1919 constitution gives CIL the status of federal law and allows impeachment of cabinet members for its violation; but admits that both its drafting history and subsequent practice show that CIL continued to be treated as inferior to domestic law. *See* Cassese, *supra* note 45, at 358–59.

[135] *See* MASTERS, *supra* note 106, at 51–65; Cassese, *supra* note 45, at 359.

[136] It seems that even at the time of its adoption, Hugo Preuss, the constitution's drafter, and the Justice Department believed that this was the proper meaning of Article 4. *See* Cassese, *supra* note 45, at 358–59.

[137] Although Article 5 mentioned custom, it was understood not to directly incorporate it. *See* Paul De Visscher, *Les tendances internationales des constitutions modernes*, 80 RECUEIL DES COURS 512, 521 (1952); *but see* Cassese, *supra* note 45, at 360.

[138] COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION OF THE REPUBLIC OF ITALY], Art. 10(1) (1947) (It.); NIHONKOKU KENPŌ [KENPO] [CONSTITUTION], Art. 98(2) (Japan); 1946 CONST., pmbl. (Fr.).

[139] Grundgesetz [GG] [Basic Law], Art. 25 (Ger.); *see generally* VOLKER RÖBEN, AUSSENVERFASSUNGSRECHT [CONSTITUTIONAL LAW FOR FOREIGN AFFAIRS] (2007).

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Second, treaty approval and reception rules did not change appreciably before World War II. Contrary to its framers' proposal, the Weimar Constitution did not provide for treaty supremacy over domestic law; indeed, it did not expressly provide for treaty reception at all.[140] Neither did the 1920 Austrian constitution. Both appear to have left unchanged the pre-existing practice of giving ratified treaties direct effect, which also continued in other European countries. Spain's 1931 constitution did innovate in several respects, with provisions that appeared not only to confirm the direct effect of treaties but also to give them supralegislative status.[141] Civil war and the demise of Spain's short-lived republican regime, however, meant that these provisions had little practical impact.

By contrast, the post-World War II period saw several significant and lasting innovations. Provisions incorporating treaties in the domestic legal order appeared in constitutions that formerly were silent on the matter, including those of Japan and France.[142] The latter's 1946 constitution specifically granted treaties supralegislative status: "Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification."[143] As discussed below, a similar provision would be incorporated in France's 1958 constitution and prove widely influential. While it would take several years for French courts to give these provisions full effect, they would, unlike Spain's 1931 provision, succeed in generating a consistent and robust domestic judicial practice of applying treaties over domestic legislation.[144]

The 1958 French constitution also established for the first time a specific mechanism for contemporary constitutional review of treaties.[145] Article 54 provided:

> If the Constitutional Council, the matter having been referred to it by the President of the Republic, by the Premier, or by the President of one or the other assembly, shall declare that an international commitment contains a clause contrary to the Constitution, the authorization to ratify or approve this commitment may be given only after amendment of the Constitution.[146]

As a matter of principle, this provision affirmed that although treaties had supralegislative status, they must still yield to the constitution. As a practical level, it provided a mechanism to prevent ratification of unconstitutional treaties. Here too, it would take years for a meaningful practice of treaty review to emerge in France. As will be seen below, however, the

[140] *See* Cassese, *supra* note 45, at 358, 396.

[141] Constitución de la República Española [Constitution of the Spanish Republic], Art. 65 (1931) (Spain). The 1931 constitution also required the government to submit ILO conventions for approval and ratify them if approved; prohibited secret treaties; and prohibited declarations of war inconsistent with the Covenant of the League of Nations.

[142] Nihonkoku Kenpō [Kenpo] [Constitution], Art. 98(2) (Japan). It is noteworthy that Italy's post-war constitution maintained its traditional dualistic approach to treaties and that Germany's did not explicitly give direct effect to treaties; indeed, it was interpreted to establish a dualist regime, contrary to previous German practice.

[143] 1946 Const., Art. 26 (Fr.).

[144] Japan's provision, although less clear on its face, was also read to give treaties supralegislative status.

[145] France was not the first country with a constitutional court, a model pioneered by Kelsen in Austria's 1920 constitution and adopted in others, including by Germany in 1949. However, although many constitutional courts eventually asserted the power to review the constitutionality of treaties, these constitutions did not explicitly grant them that power, nor did they condition ratification on prior constitutional review.

[146] 1958 Const., Art. 54 (Fr.).

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provision was transplanted to numerous former French colonies, sowing the seeds for constitutional treaty review to emerge there.[147]

Another innovation of the post-war era was the appearance of constitutional provisions that explicitly contemplated the formation of international organizations to which powers traditionally exercised at the national level could be delegated. The constitutions of France, Italy, and Germany contained such provisions, paving the way for the European communities.[148]

Besides these largely European developments, the 1900–1950 period also saw the formation of the Soviet Union following Russia's 1917 revolution and the emergence after World War II of several socialist states in Eastern Europe and Asia. Although comparative law scholars debate whether these states followed a distinct legal system, they pioneered a distinctive model in their approach to international law.[149] In its early years, the Soviet Union was highly critical of the existing international legal order and resisted what it saw as the imposition of rules crafted by capitalist and imperialist powers in their own interests.[150] Its 1924 and 1936 constitutions made no mention of the status of treaties and CIL, but Soviet practice was dualist, denying them any domestic legal status.[151] These constitutions also imposed little constraints on the executive's power to ratify treaties. In socialist states that had previously followed a monist tradition, the situation was more complicated. While some scholars argued that monism persisted and courts occasionally suggested as much, practice appears to have been predominantly dualist with respect to treaties, although courts sometimes appeared to apply uncontroversial CIL rules directly.[152]

In sum, by the beginning of the period 1900–1950, the principal models described in the previous section were well-entrenched and significant changes, when they occurred, did so via

[147] The Constitutional Council was a quasi-judicial institution composed of three appointees by each of the president of the Republic, the president of the National Assembly, and the president of the Senate. 1958 CONST., Art. 56 (Fr.). Many countries—including France itself—eventually reformed such councils into constitutional courts. *See* Pierre-Hugues Verdier & Mila Versteeg, *Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 4, at 135, 152–54.

[148] 1946 CONST., pmbl. (Fr.); COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION OF THE REPUBLIC OF ITALY], Art. 11 (1947) (It.); GRUNDGESETZ [GG] [BASIC LAW], Art. 24 (Ger.).

[149] *See* John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 782 (1989).

[150] *See* Cassese, *supra* note 45, at 362–63.

[151] *See* Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AJIL 451, 458 (1994); Lori Fisler Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L.J. 2315, 2320 (1990); *but see* W. E. BUTLER, SOVIET LAW 344 (1983) (reporting that some Soviet scholars described the country's approach as monist but admitting that such classification is debatable).

[152] For example, Poland's 1952 Soviet-style constitution omitted provisions giving direct effect to international law. *See* Zdzislaw Kedzia, *The Place of Human Rights Treaties in the Polish Legal Order*, 2 EUR. J. INT'L L. 133, 133 (1991). This led to heated debate among scholars. *See* Władysław Czapliński, *International Law and Polish Domestic Law*, *in* CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE, 15, 16 (Rein Müllerson, Malgosia Fitzmaurice & Mads Andenas eds., 1998). In general, the practice of incorporating treaties by legislation continued and courts did not apply treaties directly. *Id.*; *see also* Anna Wyrozumska, *Direct Application of the Polish Constitution and International Treaties to Private Conduct*, 25 POLISH Y.B. INT'L L. 5, 17 (2001). Although a handful of court decisions from the 1960s to the 1980s hinted at direct application of treaties, this did not become the norm until after the Cold War. *Id.* Courts, however, occasionally applied immunities without legislative incorporation. China's 1954 constitution entrusted treaty-making to the Standing Committee of the National People's Congress and did not explicitly provide for the domestic legal status of treaties or CIL. Later, direct effect of treaties became the prevailing view. *See* Li Zhaojie, *The Effect of Treaties in the Municipal Law of the People's Republic of China: Practice and Problems*, 4 ASIAN Y.B. INT'L L. 185, 196 (1994). The same appears to be true of CIL. *See* 贾兵兵， 国际公法：理论与实践，第103页 [JIA BINGBING, PUBLIC INTERNATIONAL LAW: THEORY AND PRACTICE 103 (2009)].

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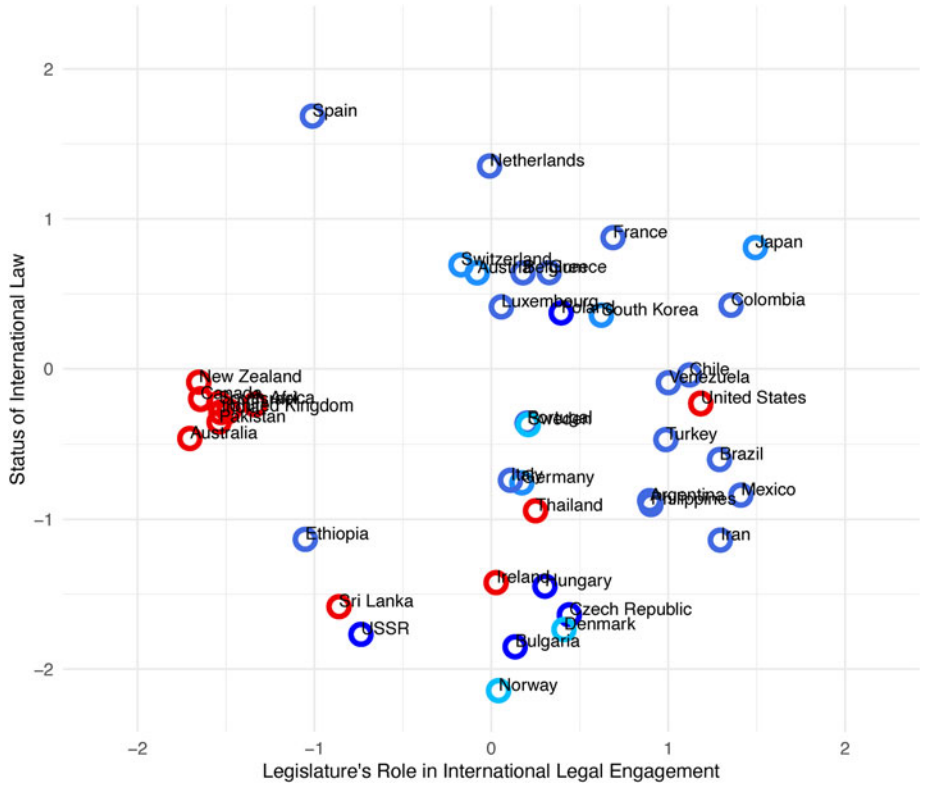

FIGURE 7. Policy Points in Two Dimensions, Color-Coded by Legal Origin, 1950

explicit constitutional reform and usually coincided with broader political shifts. Figure 7 shows policy points in 1950. Some continental European countries continue to form a small cluster, but post-war reforms in France, Japan, and the Netherlands that gave greater status to treaties and CIL are reflected in a higher position on the second dimension. Ireland, upon independence, adopted a system more in line with the continental European model than with its common law peers. Socialist states tend to be relatively low on the second dimension, reflecting largely dualist systems, and distributed along the first dimension according to their different systems for participation by the legislative body in treaty-making (at least on paper).

The most important changes toward greater reception of international law—elevation of treaties to supralegislative status and adoption of explicit provisions incorporating CIL in the domestic legal order—occurred as part of pacification and democratization: in Germany and Austria after defeat in World War I and the fall of imperial governments; in Spain after the demise of Primo de Rivera's dictatorship and abolition of the monarchy; and in Germany, Italy, Japan and France after military defeat and, in the former three, the fall of totalitarian regimes. By contrast, the major new dualist model that emerged was associated with authoritarian socialism.

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Developments during this period generally support the link between democratization and international law reception. This link, however, should not be overstated. In general, episodes of democratic backsliding during this period did not lead to formal downgrading of the status of international law.[153] It must be remembered that, before World War II, international law norms posed little threat to authoritarian regimes. International human rights law, for one, did not exist in its modern form;[154] doctrines that excluded international law from a protected sphere of state sovereignty remained widely accepted; and even in monist countries both treaties and CIL could be displaced by subsequent domestic law. The evidence from this period thus might not show anything more than correlated secular trends toward both democratization and greater reception of international law.

We find little evidence that changes in this period were motivated by a desire to enhance the credibility of international commitments. According to Cassese, Germany after World War I "needed to make a formal pledge to the other members of the international community that she would renounce war and abide by the rules agreed by the majority of States."[155] However, as noted above, that provision did not elevate the pre-existing status of CIL. In addition, other states would likely have been more concerned about Germany's compliance with treaties than CIL, but its post-war constitution did not change their domestic legal status. France's choice to give treaties superior status in its post-war constitution seems unrelated to credibility concerns. Thus, while it is conceivable that credibility considerations may have informed some post-World War I and II reforms, they do not seem to have been a major factor in this period.

Outside countries that underwent war and major political upheavals, the relevant doctrines proved highly persistent. In the United Kingdom and its former colonies, they remained virtually unchanged. In the United States, important shifts such as the rise of executive agreements occurred, but the basic framework also remained intact. Even in Latin America, where many countries underwent frequent regime changes accompanied by new constitutions—what M.C. Mirow has called the "Cadiz effect"—these constitutional changes almost always left doctrines on treaty-making and the status of international law untouched.[156] In sum, developments during this period strongly support the legal origins thesis.

C. Decolonization, the Cold War, and Authoritarianism (1950–1985)

1. Decolonization

The post-World War II period saw a wave of decolonization that more than doubled the number of states in the international system, from 64 in 1945 to 161 in 1985.[157] Many of these new states emerged from the dismemberment of two vast colonial empires, the British and the French, alongside a smaller number of Belgian, Dutch, Italian, and Portuguese

[153] In several countries, dissolution or suspension of the legislature nullified the requirement of legislative approval of treaties, e.g., in Brazil between 1937 and 1946.

[154] *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[155] Cassese, *supra* note 45, at 357.

[156] *See* M.C. MIROW, LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA (2015).

[157] *See State System Membership List, v2016*, CORRELATES OF WAR PROJECT (2017), *at* https://correlatesofwar.org/data-sets/state-system-membership.

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former colonies. From the perspective of foreign relations law, the most striking feature of the new legal systems is that they almost uniformly retained the models of their former colonizers, at least initially. Even where local leaders later chose to adapt or modify these systems, changes were gradual and relatively minor. As a result, colonial models have proved surprisingly durable.

The constitutions of former British colonies, while they often incorporated extensive bills of rights and detailed provisions on the legislative process, generally said little about treaty-making and nothing on the status of international law. In practice, the newly independent states of Africa and Asia uniformly adopted the British model, with no parliamentary approval requirement of treaty ratification and no direct effect of treaties. This was true not only of colonies that attained independence peacefully, but also of those—like India and Pakistan—whose road to independence was marked by struggle and whose new governments sought to break with the colonial past. In virtually all these states, post-independence government practice and judicial decisions clearly establish that the British model remained in force.[158] Former British colonies that attained independence later (e.g., in Africa and the Caribbean) also adopted the same system.

A striking example of the persistence of colonial models is that, even though many former British colonies soon adopted presidential systems, they did not adopt constitutional provisions requiring parliamentary approval of treaties. Thus, Nigeria, despite adopting a presidential system in 1963, continued to follow the British system, as did Kenya, Tanzania, Uganda, Zambia, Malawi, and Botswana.[159] In the rest of the world, presidential systems commonly require parliamentary approval of treaties, an important safeguard of the balance of power between the executive and the legislature. The imbalance created by the lack of such

[158] *See, e.g.*, K. Thakore, *India*, *in* NATIONAL TREATY LAW AND PRACTICE, *supra* note 66, at 354 (India); Bianca Karim & Tirza Theunissen, *Bangladesh*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 98; Singarasa v. Attorney General, 138 ILR 469 (2006) (Sup. Ct.) (Sri Lanka); Simon S.C. Tay, *The Singapore Legal System and International Law: Influence or Interference*, *in* THE SINGAPORE LEGAL SYSTEM (Kevin Y.L. Tan ed., 2d ed. 1999); Government of the State of Kelantan v. Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj, [1963] 1 LNS 145 HC (Malaysia); Indus Automobile v. Central Bd. of Revenue, (1988) 40 PLD (SC) 99 (Pak.); Société Générale de Surveillance SA v. Pakistan, 2002 SCMR 1694 SC (Pak.); Kenneth Good v. Attorney General, [2005] (2) BLR 337 (C.A.) (Botswana); Bojang v. The State, [1994] BLR 146 (H.C.) (Botswana); Charles Fombad, *The Republic of Botswana: Introductory Note*, *in* OXFORD CONSTITUTIONS OF THE WORLD (online) (Botswana).

[159] Babafemi Akinrinade, *Nigeria*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 450, 455; *see also* Okunda v. Republic, 51 ILR 414 (1970) (Kenya); RM and Another v. Attorney General, [2006] eKLR (Kenya); Chacha Bhoke Murungu, *The Place of International Law in Human Rights Litigation in Tanzania*, *in* INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA 57, 59 (Magnus Killander ed., 2010); Tiyanjana Maluwa, *The Role of International Law in the Protection of Human Rights Under the Malawian Constitution of 1995*, 3 AFR. Y.B. INT'L L. 53 (1995); Thomas Trier Hansen, *Implementation of International Human Rights Standards through the National Courts in Malawi*, 46 J. AFR. L. 31 (2002); Chihana v. The Republic, M.S.C.A. Criminal Appeal No. 9 of 1992, *at* https://malawilii.org/mw/judgment/supreme-court-appeal/1993/1 (Malawi); Henry Onoria, *Uganda*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 600; Busingye Kabumba, *The Application of International Law in the Ugandan Judicial System: A Critical Enquiry*, *in* INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA, *id.*, at 84; Michelo Hansungule, *Domestication of International Human Rights Law in Zambia*, *in* INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA, *id.*, at 71. In the early years after attaining independence in 1979, Zimbabwe also combined a presidential system with a British dualist model. *See* ONKEMETSE TSHOSA, NATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: CASES OF BOTSWANA, NAMIBIA AND ZIMBABWE 60 (2001).

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provisions may have contributed to the later "drift" of some of these countries away from the pure British model (described below).[160]

The formal legal systems of former French and Belgian colonies were also profoundly shaped by their colonial past. Unlike former British colonies, their post-independence constitutions were far from silent—virtually all of them contained provisions on treaties modeled closely (often verbatim) on the 1958 French constitution, enshrining a list of subject-matters requiring parliamentary approval, contemporary constitutional review, direct effect, and superiority over statutes. Even in the handful of cases where one of these provisions was omitted, local courts followed French practice.[161] The fact that virtually all senior lawyers were educated in French universities, the authority and prestige of French doctrine and judicial practice, the sparsity of local sources, and extensive political, economic, and cultural ties between France and many of its former colonies, no doubt contributed to the widespread adoption of French practice.

These findings call into question the notion that newly independent states displayed mistrust or hostility toward international law. These states may have challenged existing rules in international fora, but there is little evidence that they systematically denied or diminished international law's place in their domestic legal order. Their treatment of CIL is illustrative. Virtually none of the new constitutions explicitly incorporated custom in domestic law, an omission Cassese interprets as showing that "Third World countries . . . mistrust traditional international standards."[162] But an examination of post-independence *judicial practice* shows

[160] *See* Section V.B.3 *infra*. Another example of post-colonial persistence is the Philippines, whose 1935 constitution (which remained in effect after independence in 1946) provided, like the U.S. constitution, for Senate approval of treaties by a two-thirds majority. Despite the lack of a provision on the legal status of treaties, the Supreme Court held that "a treaty commitment voluntarily assumed by the Philippine Government . . . has the force and effect of law." World Health Organization v. Aquino, 52 ILR 389, 394 (1972) (Sup. Ct.) (Phil.).

[161] Although the Beninese constitutions of 1964 and 1977 omitted the provision giving direct effect and superiority to treaties (which was included in the 1960, 1968, and 1970 constitutions), it appears that Benin continuously followed a French-style monist approach. Horace Adjolohoun, Droits de l'homme et justice constitutionnelle en Afrique: Le modèle béninois 95–96 (2011). Likewise, although Rwanda's constitutions of 1962, 1978, and 1991 did not include any provision on the status of treaties, the country followed the same practice as other French-speaking African countries. Frederic Sebihuranda, *Le droit international conventionnel à travers la constitution Rwandaise*, 9 Revue Juridique du Rwanda 121, 126 (1985). The same was true of the Democratic Republic of Congo before its 1964 constitution incorporated a French-style treaty superiority provision. Vincent de Paul Lunda-Bululu, La conclusion des traités en droit constitutionnel zaïrois 185–86 (1984). Algeria's 1963 constitution did not expressly provide for the domestic status of treaties, but treaties were considered part of the domestic legal order and superior to statutes. Mohamed Abdelwahab Bekhechi, La Constitution Algérienne de 1976 et le droit international 217 (1989). Morocco's constitutions prior to 2011 made no reference to the hierarchy of law with respect to international agreements. Some case law supported the primacy of published treaties, although their precise hierarchical status was debated. *See* Mohammed Amine Benabdallah, *Les Traités en droit marocain*, 94 Revue marocaine d'administration locale et de développement 3 (2010). As part of the 1961 merger of British Cameroon into French Cameroon, a new constitution was adopted that abandoned the French-style provision on the status of treaties. This was the outcome of a compromise under which treaties would be automatically incorporated (as in the French tradition) but would be equal, not superior, to statutes (mimicking the British tradition for implemented treaties.) The scarce judicial decisions from that era suggest that ratified treaties were considered part of the domestic legal order even without a specific constitutional provision. *See* Alain Didier Olinga, *Considérations sur les traités dans l'ordre juridique Camerounais*, 8 Afr. J. Int'l & Comp. L. 283 (1996).

[162] Cassese, *supra* note 45, at 366; *see also* Mohammed Bedjaoui, Towards A New International Economic Order 134 (1979) (noting that "the newly independent States refuse to consider themselves bound by various customary principles when these principles still express relationships of domination, inequality or privilege"); S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 Int'l & Comp. L. Q. 121, 122 (1965) ("With their emphasis on social change rather than on maintenance of

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that virtually all new states continued to regard CIL as directly applicable. Courts in former British colonies followed the maxim that "international law is part of our law," subject to being displaced by inconsistent statutes.[163] Likewise, courts in former French and Belgian colonies followed pre-independence law and gave CIL a similar status.[164] In some cases, such as the Philippines, early post-independence constitutions expressly incorporated CIL.[165] There are few examples of post-independence legal systems explicitly denying CIL direct effect. In a few countries, such as Sri Lanka and Indonesia, courts vacillated in their approach to CIL, sometimes appearing to deny it direct effect.[166] Algeria appears to have deliberately chosen to break with French tradition and deny direct effect to CIL, although this was unclear until the drafters of its 1976 constitution rejected a CIL incorporation provision.[167] While the effectiveness of treaty and CIL implementation varied widely, as a formal

status quo, these States have shown their tendency not to accept the body of customary international law as a whole."). On the attitude of newly independent states to customary international law, see generally George Rodrigo Bandeira Galindo & César Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE J. INT'L L. 251, 253–56 (2017) (reviewing the contemporary literature.)

[163] *See* Babafemi, *supra* note 14, at 461; Chilenye Mwapi, *International Treaties in Nigerian and Canadian Courts*, 17 AFR. J. INT'L & COMP. L. 326, 354 (2011) (Nigeria); Ministry of Defence of the Government of the United Kingdom v. Ndegwa, 103 ILR 235 (1983) (Kenya); *Beysne v. Romania*, [2000] 2 EA 322 (Tanz.); Maluwa, *supra* note 159, at 69 (Malawi); Onoria, *supra* note 159, at 609 (Uganda); TSHOSA, *supra* note 159, at 50 (Zimbabwe); Hansungule, *supra* note 159, at 72 (Zambia); Fombad, *supra* note 158 (Botswana); Gramophone Co. India Ltd. v. Pandey, (1984) 2 SCC 534 (India); USA v. Gammon Layton, 64 ILR 567 (1970) (High Ct.) (West Pak.); Qureshi v. USSR, 64 ILR 585 (1981) (Sup. Ct.) (Pak.); Unimarine v. Panama, (1977) 29 DLR (Sup. Ct.) 252 (Bangl.); C.L. Lim, *Public International Law Before the Singapore and Malaysian Courts*, 8 SING. Y.B. INT'L L. 243, 245–53 (2004) (Singapore); Abdul Ghafur Hamid & Khin Maung Sein, *Judicial Application of International Law in Malaysia, an Analysis*, MALAYSIAN BAR (Mar. 31, 2006), *at* http://www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html (Malaysia).

[164] These cases often concerned state and diplomatic immunities. *See, e.g.*, France v. Banque de l'Afrique de l'Ouest, 65 ILR 439 (1961) (Togo); Cour d'appel [CA] [Regional Court of Appeal] Dakar, July 31,1962, Arrêt No. 70 (Sen.); Amadou v. USAID, Apr. 18, 2002, Arrêt No. 02-90/SOC (Sup. Ct.) (Niger), *reproduced in* Dille Rabo, *Communication de la Cour suprême du Niger*, *in* ACTES DU COLLOQUE INTERNATIONAL SUR « L'APPLICATION DU DROIT INTERNATIONAL DANS L'ORDRE JURIDIQUE INTERNE DES ETATS AFRICAINS FRANCOPHONES » 240 (Association ouest-africaine des hautes juridictions francophones & Agence intergouvernementale de la Francophonie eds., 2003); Abdoulaye Soma, *L'applicabilité des traités internationaux de protection des droits de l'homme dans le système constitutionnel du Burkina Faso*, 16 AFR. Y.B. INT'L L. 313, 328–29 (2008) (Burkina Faso follows a monist approach heavily influenced by French practice); Ramiandrisoa v. The French State, 40 ILR 81 (1965) (Sup. Ct.) (Madag.); Mahe v. Agent Judiciaire du Trésor Français, 40 ILR 80 (1965) (Sup. Ct.) (Madag.); Cour d'appel du Burundi decision of Feb. 11, 1964, 1964 REVUE JURIDIQUE DE DROIT ÉCRIT ET COUTUMIER DU RWANDA ET DU BURUNDI 61 (Burundi); *see also* De Decker v. United States, (1957) 2 Pascirisie Belge 55 (Ct. App. Léopoldville) (Belgian Congo) (pre-independence case affirming application of CIL in Belgian Congo); Ferhat Horchani, *La constitution tunisienne et les traités après la révision du 1er juin 2002*, 50 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 138 (2004) (CIL applies directly in Tunisia).

[165] CONST. (1935), Art. II, § 3 (Phil.). The Supreme Court held that if the principles embodied in a treaty represented "generally accepted principles of international law" those principles would be part of the law of the nation even though the Philippines was not a party to the treaty. Kuroda v. Jalandoni, 83 PHIL. REP. 171, 178 (S.C., Mar. 26, 1949); *see generally* John Trone, *International Law as Domestic Law in the Philippines*, 7 INT'L TRADE & BUS. L. ANN. 265, 270 (2002).

[166] *See, e.g.*, Singarasa v. Attorney General, 138 ILR 469 (2006) (Sup. Ct.) (Sri Lanka), and comment. In Indonesia, courts have been reluctant to apply international law and its status remain unclear, although the Dutch-inherited notion that it has direct effect retains support by leading scholars and has never been explicitly repudiated by courts. *See* Simon Butt, *The Position of International Law within the Indonesian Legal System*, 28 EMORY INT'L L. REV 1 (2014).

[167] *See* Mohammed Bedjaoui, *Aspects internationaux de la Constitution algérienne*, 23 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 75, 84 (1977).

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matter inherited models were clearly the predominant factor in shaping reception of international law in the new states.

Two other aspects of the post-independence legal regimes deserve mention. First, many former colonies adopted procedures for contemporary constitutional review of treaties, often modeled directly on Article 54 of the 1958 French constitution.[168] In some countries, that system appeared largely stillborn. In Gabon, for example, the constitution provided for review of proposed treaties by the Supreme Court only upon referral by the president of the Republic or the president of the National Assembly; by 1986, such review had never been requested.[169] Yet, over time the transplant took root, at least in some countries. After the Cold War many of these constitutional provisions were amended to allow opposition parties or even individuals to initiate the process, opening the door to more frequent review.[170] By contrast, none of the former British colonies adopted contemporary constitutional review of treaties.

Second, post-independence constitutions—especially in Africa—often included provisions regarding international organizations and regional integration. While many of these provisions amounted to little more than statements of support for African unity or international cooperation generally,[171] others were extraordinarily sweeping. Article 2 of Ghana's 1960 constitution read:

> In the confident expectation of an early surrender of sovereignty to a union of African states and territories, the people now confer on Parliament the power to provide for the surrender of the whole or any part of the sovereignty of Ghana.[172]

Other constitutions took a more sober and legalistic, but still ambitious, approach, authorizing membership in "intergovernmental organizations of common management, of coordination and of free cooperation" to serve an enumerated list of purposes, such as "harmonization of monetary, economic and financial policy."[173] The frequent inclusion of such clauses, evidently informed by the early experience of European integration, seems to have helped avert potential constitutional barriers to the establishment and expansion of African institutions.[174]

In sum, post-independence legal systems in Africa and Asia were shaped primarily, indeed overwhelmingly, by principles inherited from France and the United Kingdom. Figure 8 shows very dense clustering of former colonies around their colonizer as of 1965.

[168] For a comprehensive list and further discussion, see Verdier & Versteeg, *supra* note 7.

[169] Guillaume Pambou Tchivounda & Jean-Bernard Moussavou-Moussavou, Éléments de la pratique gabonaise en matière de traités internationaux 43 (1986).

[170] *See* note 252 *infra* and accompanying text.

[171] *See, e.g.*, Constitution de la République du Sénégal du 26 août 1960 [Constitution of the Republic of Senegal of August 26, 1960], pmbl. (Sen.); Constitution du 14 avril 1961 [Constitution of Apr. 14, 1961], pmbl. (Togo); Constitution de la République du Dahomey [Constitution of the Republic of Dahomey], pmbl. (1964) (Benin).

[172] Constitution of the Republic of Ghana, Art. 2 (1960) (Ghana); *see also* Constitution du Mali [Constitution of the Republic of Mali], Art. 48 (1960) (Mali).

[173] Constitution de Côte d'Ivoire du 3 novembre 1960 [Constitution of Côte d'Ivoire of Nov. 3, 1960], Arts. 69–70 (Côte d'Ivoire). *See also* Constitution de la République du Niger [Constitution of the Republic of Niger], Arts. 69–70 (1960) (Niger); Loi Constitutionnelle No. 18-60 du 28 novembre 1960 [Constitutional Law No. 18-60 of Nov. 28, 1960], Arts. 73–74 (Chad).

[174] *See, e.g.*, Conseil Constitutionnel du Sénégal, Decision No. 3/C/93, Dec. 16, 1993 (Senegal) (upholding a treaty aimed at unification of commercial law in Africa that created a new common court, on the ground that it was aimed at advancing African unity)

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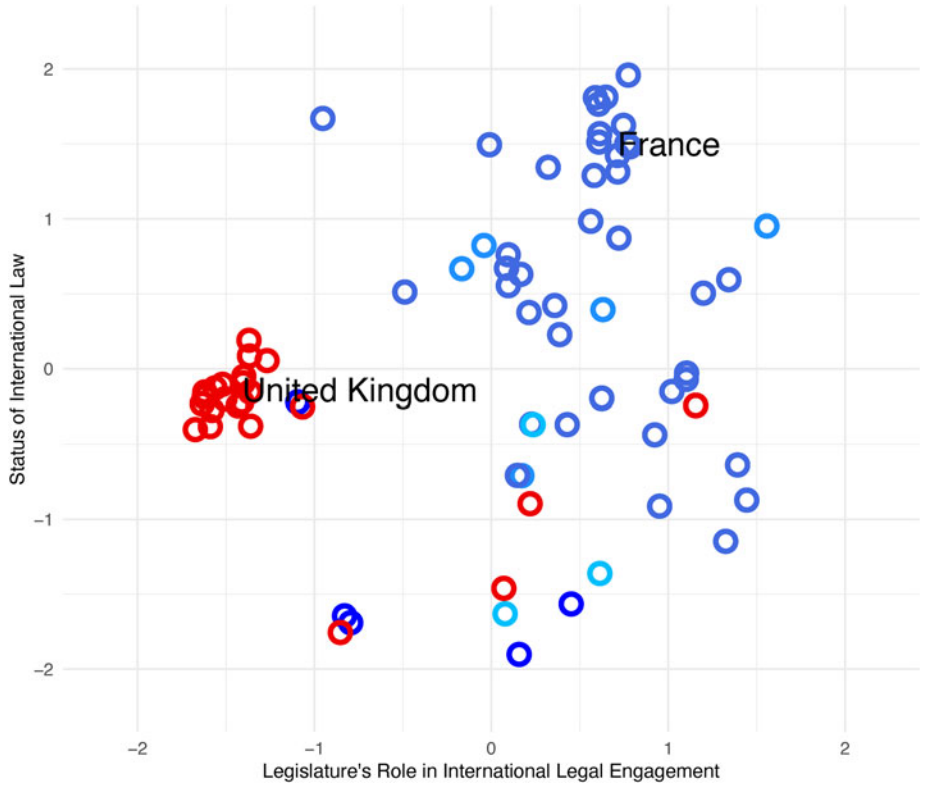

FIGURE 8. Policy Points in Two Dimensions, Color-Coded by Legal Origin, 1965

2. *Authoritarianism and the Cold War*

In the 1960s and 1970s, numerous coups toppled democratic governments, not only in new Asian and African states but also in well-established Latin American constitutional regimes.[175] One might expect that authoritarian regimes would systematically concentrate power in the executive by eliminating legislative review of treaties and weakening the ability of domestic courts to enforce international law. But while elected assemblies were frequently dissolved or sidelined during these periods of authoritarianism, there were surprisingly few formal changes regarding the status of international law in national legal systems, and few of these changes proved durable.

In Africa, many states succumbed to authoritarian rule within a few years of independence.[176] The new regimes often dissolved the legislature or stripped it of many of its powers, usually including treaty approval.[177] Even in countries that did not formally eliminate

[175] *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE 20TH CENTURY 21 (2012).

[176] *See generally* NIC CHEESEMAN, DEMOCRACY IN AFRICA: SUCCESSES, FAILURES, AND THE STRUGGLE FOR POLITICAL REFORM (2015).

[177] The legislative approval requirement was suspended or abrogated in Algeria, Benin, Burkina Faso, Burundi, Chad, the Republic of Congo, the Democratic Republic of Congo, Ethiopia, Ghana (where such a requirement had been adopted in 1969), Madagascar, Mali, Niger, and Togo.

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legislative approval requirements, single-party or personalistic systems made legislative votes empty formalities.[178] Elsewhere in the world, authoritarian regimes followed similar trends. Although Chile's Pinochet government eliminated legislative approval of treaties, that requirement formally remained in force under authoritarian or military-dominated regimes in Greece, Indonesia, South Korea, Taiwan, and Turkey.[179] In some countries, broad exceptions allowed the executive to bypass approval when desired; in others, authoritarian control of the legislature made the requirement an ineffective constraint.[180] In countries like Nigeria and Pakistan that followed the British tradition, the executive already had unchecked power to ratify treaties, so that no formal change was needed. Some authoritarian governments, such as Chile's, eliminated constitutional review of treaties, but most formally left it in place.[181]

By contrast, pre-existing rules giving treaties and CIL direct effect in national legal systems generally remained unchanged. Thus, Chile's Pinochet government seemingly left the formal legal status of international law untouched, as did military governments in Argentina, Greece, and Turkey. The Philippines Supreme Court reaffirmed that treaties had direct effect under Ferdinando Marcos's revised constitution;[182] likewise, important Pakistani decisions confirming the direct effect of CIL were decided during periods of military rule.[183] Although a few authoritarian regimes in Africa modified these doctrines, we know little about their motivations and the changes did not always diminish the status of international law.[184]

[178] For example, even though Gabon's 1961 constitution, which remained in force under Omar Bongo's single-party regime, required legislative approval of several categories of treaties, in practice the parliament's role was marginal. T. Ondo, *Le rôle du parlement gabonais dans les relations internationales*, 83 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 354, 356 (2006).

[179] In some of these countries, the constitution was suspended and/or the legislature dissolved for relatively short periods.

[180] In the Philippines, a new constitution was adopted following Ferdinando Marcos's 1972 coup. The 1973 constitution required a majority of the National Assembly to ratify treaties but allowed the prime minister to bypass this requirement and "enter into international treaties or agreements as the national welfare and interest may require." CONST. (1973), Art. XIV, § 15 (Phil.). The legislature was never convened, and the president entered into and ratified treaties on his own authority. *See* Trone, *supra* note 165, at 270. Soon after consolidating his power and reinstating the Constitution of 1945 in Indonesia, President Sukarno sent a letter to the House of Representatives interpreting the requirement narrowly to cover only "important" agreements related to political matters.

[181] The Philippines' 1973 constitution took an unusual approach, setting a high bar for constitutional review of treaties: "All cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court en banc, and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten Members." CONST. (1973), Art. X, § 2(2) (Phil.).

[182] Under the 1935 constitution, the Supreme Court had held that "a treaty commitment voluntarily assumed by the Philippine Government . . . has the force and effect of law." World Health Organization v. Aquino, 52 ILR 389, 394 (1972) (Sup. Ct.) (Phil.). The 1973 constitution stated that "All treaties, executive agreements, and contracts entered into by the Government, or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations, are hereby recognized as legal, valid, and binding." CONST. (1973), Art. XVII, § 12 (Phil.). Soon thereafter, the Supreme Court held that a treaty concerning employment at U.S. bases was part of domestic law. Guerrero's Transport Services v. Blaylocks, 30 June 1976, G.R. No. L-41518, 71 SCRA 621, 629 (June 30, 1976) (Phil.). In Greece, Taiwan, and South Korea, the formal rule of direct effect of treaties appears to have continued uninterrupted under authoritarian regimes.

[183] *Gammon Layton*, *supra* note 163; *Qureshi*, *supra* note 163.

[184] The 1976 Algerian constitution demoted treaties from superior to equal status, as did Madagascar's 1975 constitution and the Republic of Congo's 1979 constitution, both adopted under authoritarian regimes; but Burundi's 1974 constitution did the opposite, as did Mali's 1974 one-party constitution. As noted, *supra* note 161, Cameroon abandoned treaty superiority in 1961 when it merged with British Cameroon. Nigeria's 1979 constitution codified the British doctrine depriving treaties of direct effect, but this only reaffirmed prior practice. CONSTITUTION OF NIGERIA (1979), § 12(1) (Nigeria).

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During Brazil's military regime, the Federal Supreme Court reversed longstanding case law and held that treaties could be displaced by later statutes, but again there is little indication that this was prompted by authoritarian hostility toward international law.[185] Only in Portugal do we find a clear example of an authoritarian government downgrading the status of CIL.[186]

A striking example of the tenuous connection between authoritarianism and the status of international law comes from Spain. Following Francisco Franco's victory in the Spanish Civil War (1936–39), the country was ruled as a military dictatorship, and even after the regime reestablished an (unelected) legislature in 1942, its approval was not required for treaties.[187] The regime's quasi-constitutional laws did not mention the status of treaties and there was little relevant practice in its early years. By the 1950s, however, administrative and judicial courts were reaffirming Spain's monist tradition and—even more strikingly—granting treaties supralegislative status. In a well-known 1958 decision, the Council of State held that "[t]he provisions contained in an international convention are self-executing" and that "[i]n case of opposition between the provisions of an international convention and those of any domestic law, the former must prevail."[188] The status of CIL was never settled as clearly, but courts appeared to continue to apply CIL rules directly as long as they did not conflict with domestic law.[189] Ethiopia, an absolute monarchy during this period, enshrined treaty direct effect and superiority in its constitution in 1955.

[185] S.T.F., Recurso Extraordinario No. 80,004 SE, Relator: Min. Xavier de Albuquerque, 01.06.1977, 83(3), Revista Trimestral de Jurisprudência [R.T.J.], 809 (Braz.). The case concerned a conflict between the 1930 Geneva Convention of Uniform Law of Bill of Exchanges and Promissory Notes and a later Brazilian statute.

[186] During the early decades of the authoritarian Estado Novo regime, Portugal's courts appear to have adhered to the country's monist tradition. In 1971, a constitutional reform removed a reference to CIL, providing instead that "the norms of international law binding on the Portuguese State shall be carried out in its domestic activities provided that they are laid down in a treaty or other act approved by the National Assembly or by the Government, the text of which has been duly published." *See* CONSTITUIÇÃO POLÍTICA DA REPÚBLICA PORTUGUESA [POLITICAL CONSTITUTION OF THE PORTUGUESE REPUBLIC], Art. 4(1) (amend. 1971) (Port.). The intent appears to have been to exclude direct application of CIL (and its application outside Portugal itself) at a time when the country was involved in bloody conflicts in its overseas colonies.

[187] The preamble to the 1942 Law on the Creation of the Spanish Cortes [Ley de 17 de julio de 1942 de creación de las Cortes Españolas (BOE 1942) (Spain)] stated that "the supreme power of laying down the basic measures of legislation continues to be invested in the Head of State." The Cortes were not elected but comprised members appointed by the head of state and representatives of the government and various organizations. Under Article 14, "[b]efore the ratification of treaties on subjects with which the Cortes are competent to deal . . . its views shall be heard—either in Plenary Session or in Committee," but no vote was required. José Antonio Pastor Ridruejo, *La estipulacion y la eficacia interna de los tratados en el derecho español*, 17 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 39 (1964). The 1967 Organic Law of the State [Ley Orgánica del Estado (BOE 1967, 1) (Spain)] modified Article 14 to require that "[t]he ratification of international treaties or agreements that affect the full sovereignty or the territorial integrity of Spain shall be the object of a law approved by the Cortes in full session."

[188] Re Application of Spanish-Swiss Convention, 28 ILR 461, 462 (1958) (Spain). The Council of State's decisions were not legally binding, but its analysis appears to have been followed by courts. *See* Pastor Ridruejo, *supra* note 187, at 48–53. As late as the early 1970s, occasional court decisions held that treaties were not directly applicable, but that view does not appear to have been widely accepted. *See* JORGE RODRÍGUEZ-ZAPATA, CONSTITUCIÓN, TRATADOS INTERNACIONALES Y SISTEMA DE FUENTES DE DERECHO 270–71 (1976). Supreme Court decisions in the early 1970s confirmed treaty superiority. *See* CAMPOS ET AL., *supra* note 112, at 341. In 1974, Art. 1–5 of the Civil Code was adopted, which confirmed the direct application of treaties.

[189] According to CAMPOS, ET AL., *supra* note 112, at 328, the lack of a provision regarding CIL in the fundamental laws of the state during that period cannot be interpreted as a rejection of the long-established tradition that universal CIL rules are part of domestic law. *See also* RODRÍGUEZ-ZAPATA, *supra* note 188, at 42–52. Supreme Court cases from that era refer to CIL rules, and in at least one case appear to apply CIL directly: S. Tribunal Supremo

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In the Socialist world, the 1970s and 1980s saw limited movement toward giving international law greater status. The USSR's 1977 Constitution mentioned among the principles governing its relations with other states "fulfilment in good faith of obligations arising from the generally recognised principles and rules of international law, and from the international treaties signed by the USSR,"[190] but there was little change in its dualist practice.[191] The same was true of Hungary, Czechoslovakia, and Bulgaria. In Yugoslavia, however, a 1963 constitutional revision expressly provided for direct application of treaties.[192] The most notable move toward reemergence of monism occurred in Poland, whose post-war constitutions had intentionally omitted references to the status of treaties and whose practice had effectively been dualist.[193] In the 1960s, Polish scholars began to argue that treaties should be given direct effect despite the constitution's silence, drawing support from the country's monist tradition.[194] The argument found some traction in the courts, including in a famous 1980 Supreme Court decision that held that employees could register an independent union under International Labour Organization (ILO) Conventions No. 87 and 98.[195] Nevertheless, until the end of the Cold War, Polish courts applied direct effect inconsistently.[196]

Why were authoritarian regimes not more concerned to contain the domestic status of international law? Several explanations appear plausible. During the democratic counterwave of the 1960s and 1970s, international human rights law—the rules most likely to impose constraints on authoritarian regimes—remained relatively marginal. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) would not enter into force until 1976; existing instruments had limited scope and little monitoring and enforcement; and national courts had no experience using international law to oppose human rights violations. Thus, international law posed little substantive threat to authoritarians. When concerns arose, authoritarian regimes could avoid domestic application of treaties, for example by not publishing them—as Pinochet did after ratifying the ICCPR—or through emergency declarations—as happened in India in 1975.[197] Most importantly, authoritarian regimes likely could control or intimidate courts. It thus seems unsurprising that authoritarian regimes did not worry about the potential for domestic application of international law

[T.S.], Jun. 19, 1967 (Repertorio Aranzadi de Jurisprudencia [R.J.], No. 3161) (Spain); see also S.T.S., Jan. 5, 1965 (R.J., No. 2) (Spain).

[190] KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR Constitution], Art. 29.

[191] *See* Danilenko, *supra* note 151; Damrosch, *supra* note 151.

[192] *See* USTAV SFR JUGOSLAVIJE OD 1963 [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA OF 1963], Art. 153; USTAV SFR JUGOSLAVIJE [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA], Art. 210 (1974).

[193] *See* Kedzia, *supra* note 152, at 133 (arguing that the omission was due to the Socialist government's desire to distance itself from international law). According to Wyrozumska, "[f]or many years the treaties were applied almost solely through transposing acts of internal law or owing to express provisions referring to international treaties contained in some statutes." Wyrozumska, *supra* note 152, at 17 (2001); *see also* Czapliński, *supra* note 152, at 17.

[194] *See* Wyrozumska, *supra* note 152, at 17; Czapliński, *supra* note 152, at 16.

[195] *See* Wyrozumska, *supra* note 152, at 17.

[196] *Id.* The Supreme Court reversed its interpretation in a similar case in 1987. SN I PRZ 8/87 of Aug. 25, 1987 of the Supreme Court (Pol.).

[197] The thirty-eighth amendment to the Indian constitution prohibited all judicial review of emergency actions. THE CONSTITUTION (THIRTY-EIGHTH AMENDMENT) ACT, 1975 (Ind.).

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any more than they worried about the long-term consequences of ratifying human rights treaties.[198]

3. *Developments in Western Europe*

Although some post-war European constitutions anticipated international organizations and regional integration, they provided little detail on permissible delegation and the domestic status of supranational norms. In the 1960s and 1970s, the European Court of Justice and national courts transformed the European legal order by adopting the doctrines of direct effect and supremacy.[199] In countries that already recognized the direct effect and superiority of treaties, these doctrines could be accommodated without significant changes. In others, they required adjustments.

In a famous 1971 case, *Le Ski*, Belgium's Supreme Court elevated the status of treaties from equal to superior to statutes—one of the few clear modern instances of a court changing well-established doctrine on the status of international law without a constitutional amendment.[200] In other member states, legislatures and courts devised ways to implement European Community (EC) law supremacy without modifying these general doctrines. In dualist Italy, EC law was incorporated through legislation, to which courts gave superiority over other domestic law via a broad interpretation of Article 11 of the 1947 constitution.[201] German courts went further, interpreting Article 24 of the 1949 Basic Law to give direct effect and supremacy to EC law without the need for implementing legislation.[202] In the United Kingdom, Article 2 of the European Communities Act 1972 subordinated acts of Parliament to EC law, a rule British courts enforced despite tension with the constitutional principle of parliamentary sovereignty.[203]

The supremacy of EC law raised sovereignty and accountability concerns that spurred efforts to impose legal constraints on integration. In countries with constitutional review of treaties, national courts carved out a role in policing new integration agreements. The

[198] *See* SIMMONS, *supra* note 86.

[199] *See* J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2414 (1991). A noteworthy parallel development was the rise of a distinctive body of EU law on treaty-making in areas of EU competence, the principal features of which are now codified in Articles 216–19 of the Treaty on the Functioning of the European Union, 2012 OJ (C 326) 47. *See generally* RAMSES A. WESSEL & JORIS LARIK, EU EXTERNAL RELATIONS LAW: TEXT, CASES AND MATERIALS (2d ed. 2020); PIET EECKHOUT, EU EXTERNAL RELATIONS LAW (2d ed. 2011). The content and evolution of this regime are beyond the scope of this article.

[200] Cour de Cassation [Cass.] [Court of Cassation], May 27, 1971, PAS. 1971, I, 886 (Belg.). The preceding year, a constitutional amendment including treaty superiority had failed for unrelated reasons, perhaps emboldening the court to adopt what one commentator called a "'silent revision' of the constitutional text." *See* Joe Verhoeven, *Belgium*, *in* THE INTEGRATION OF INTERNATIONAL AND EUROPEAN COMMUNITY LAW INTO THE NATIONAL LEGAL ORDER: A STUDY OF THE PRACTICE IN EUROPE 135–36 (Pierre Michel Eisemann ed., 1996) [hereinafter INTEGRATION OF INTERNATIONAL LAW].

[201] Tullio Treves & Marco Frigessi di Rattalma, *Italy*, *in* INTEGRATION OF INTERNATIONAL LAW, *supra* note 200, at 394–97; *see also* Giuseppe Cataldi, *Italy*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 329–30.

[202] *See* Jochen A. Frowein & Karin Oellers-Frahm, *Germany*, *in* INTEGRATION OF INTERNATIONAL LAW, *supra* note 200, at 93–95. A similar solution prevails in Denmark, where pursuant to Article 20 of the Constitution EC law is given direct effect and supremacy over domestic statutes. *See* Frederik Harhoff, *Denmark*, *in* The INTEGRATION OF INTERNATIONAL LAW, *supra* note 200, at 170–73.

[203] *See* Hazel Fox, Piers Gardner & Chanaka Wickremasinghe, *United Kingdom*, *in* INTEGRATION OF INTERNATIONAL LAW, *supra* note 200, at 514–15.

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French Constitutional Council's initial rejection of the 1992 Maastricht Treaty was a critical turning point, after which it went on to decline approval of other important treaties.[204] Some European countries that lacked constitutional treaty review, such as Belgium, adopted it during this period.[205] Other reforms required EU treaties to be approved by legislative supermajorities or by referendum.[206] Some national courts also imposed constraints on EC law by asserting the supremacy of national constitutions.[207] These rulings paved the way for more assertive review of EC actions.[208]

In the 1970s, Southern Europe saw critical transitions to democracy that anticipated the wave of democratization of the late 1980s. Portugal's 1974 Carnation Revolution, the collapse of Greece's military regime the same year, and the 1975 death of Spain's Francisco Franco all led to new democratic constitutions with explicit commitments to human rights and international law. Concrete changes to general doctrines on the status of treaties and custom, however, were less extensive than one might expect. Spain's 1978 constitution enshrined treaty superiority, which was already well-established.[209] It did not explicitly incorporate CIL rules into domestic law, a task that would be left to the courts.[210] Its most notable innovation was to carve out a special place for international human rights, instructing courts to construe constitutional rights "in conformity with the Universal Declaration of Human

[204] *See* Gerald L. Neuman, *The Brakes that Failed: Constitutional Restriction of International Agreements in France*, 45 CORNELL INT'L L.J. 257 (2012).

[205] Belgium adopted constitutional review in 1989. Portugal and Spain did so in new constitutions adopted in 1976 and 1978 with a view toward EC membership.

[206] These restrictions proved to have bite: initial defeats of the Maastricht and Nice treaties in Denmark and Ireland required carve-outs to be negotiated for these countries, and the 2004 EU Constitutional Treaty was abandoned after being defeated in France and the Netherlands. Denmark's constitution requires a referendum for transfer of powers unless a parliamentary majority of five-sixths approves the treaty. The Irish Supreme Court's decision in Crotty v. An Taoiseach, [1987] IESC 4 [1987] IR 713 (Ir.), held that expansion of EC powers required a referendum. EU PARLIAMENT, REFERENDUMS ON TREATY MATTERS 23 (2017). In the United Kingdom, the European Union Act 2011 required referenda for new EU treaties.

[207] *See, e.g.*, BVerfGE, 2 BvR 197/83, Oct. 22, 1986 (Ger.) [Solange II Case]; on similar cases in Italy, see Treves & Frigesi di Rattalma, *supra* note 202, at 395.

[208] See, for example, recent German Constitutional Court cases reviewing the constitutionality of Germany's participation in ECB bond-buying programs. *See* BVerfG, *supra* note 3.

[209] CONSTITUCIÓN ESPAÑOLA [SPANISH CONSTITUTION], Art. 96(1) (1978) (Spain). The new Portuguese constitution provided for direct effect of treaties but did not explicitly give them supralegislative status, an innovation that was left for courts. According to Rui Manuel Moura Raimos, *Portugal*, *in* INTEGRATION OF INTERNATIONAL LAW, *supra* note 200, at 476–77, the majority of authors support the superiority of treaties and both the Supreme Court and Constitutional Court appear to follow that view. *See, e.g.*, Tribunal Constitucional (TC) [Constitutional Court], Precedent No. 266/89 of 23-2-1989, Proceedings No. 290/88, DR 129 Series 2 of 6-6-1989, 5511 (Port.). The new Greek constitution, by contrast, explicitly enshrined the superiority of treaties. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 28(1) (Greece). This was an innovation from prior law under which treaties were equal to statutes. *See* Alkis N. Papacostas, *L'autorité des conventions internationales en Grèce*, 15 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 361, 363–64 (1962).

[210] Courts have continued to treat CIL as part of Spanish law. *See* José Antonio Pastor Ridruejo & Antonio Pastor Palomar, *Public International Law Before Spanish Domestic Courts*, *in* THE LEGAL PRACTICE IN INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW: A SPANISH PERSPECTIVE 524 (Carlos Jiménez Piernas 2007). CIL rules appear to remain hierarchically inferior to domestic laws. In Portugal, the Constituição da República Portuguesa (Constitution of the Portuguese Republic), Article 8.1 of 1976 confirmed the direct effect of CIL rules, but did not address their hierarchical status. According to Ferreira de Almeida "[a]uthors, almost unanimously, ascribe a supra-legal value to general or ordinary international law." Francisco Ferreira de Almeida, *Portugal*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 508. The new Greek constitution confirmed the longstanding direct effect of CIL rules and stated that they prevail over "any contrary provision of the law." 1975 SYN. 28(1) (Greece).

Rights and international treaties and agreements thereon ratified by Spain."[211] The new constitutions also provided for participation in international bodies such as the EC, which the three countries all joined.[212]

4. Conclusions

Figure 9 reflects several of the trends discussed above. First, the continental European and Latin American clusters are more scattered, reflecting some limited migration toward lesser constraints on treaty-making and a lower domestic status for international law among authoritarian regimes. Former British colonies remain tightly clustered, in part because the dualist model required little change to accommodate authoritarian regimes. The changes brought by European integration are, for the most part, not captured by our dataset because they were limited to approval of EC treaties and the status of EC law. Where countries did change the general status of treaties during that period, as Belgium did, the result is a noticeable move up the second dimension.

D. Post-Cold War Trends: Democratization, Human Rights, and Judicialization (1985–2010)

The end of the Cold War brought profound changes to global foreign relations law. Widespread democratization swept the world in the late 1980s and 1990s.[213] Democratization went hand-in-hand with renewed commitments to human rights, reflecting the insight that democracies require liberal constraints to rein in majoritarian excesses.[214] During the same period, many countries opened up and privatized their economies and committed to an international order that sought to protect free markets in addition to individual rights.[215] Because the commitment to liberal democracy, free trade, and human rights was so widespread, some famously described the 1990s as "the end of history."[216] To enforce these new commitments, many countries reformed their constitution and established constitutional courts. These developments brought about an era of "judicialization," whereby judges increasingly became the arbiters of high-stakes political questions.[217] These trends also shaped foreign relations law: many countries opened their legal systems to international law by embracing a monist approach, elevated the status of international human rights law in the domestic legal order, and empowered courts to review the constitutionality of treaties and to enforce them.

[211] Constitución Española [Spanish Constitution], Art. 10(2) (1978) (Spain).

[212] *See* 1975 Syn. 28 (Greece); Constitución Española [Spanish Constitution], Art. 93 (1978) (Spain). The 1976 Portuguese constitution did not expressly authorize conferral of powers on international organizations, but Article 164(j) required parliamentary approval of "treaties for the membership of Portugal in international organizations," which until 1992 was read to authorize such delegations. *See* Constituição da República Portuguesa [Constitution of the Portuguese Republic], Art 164(j) (1976) (Port.).

[213] Huntington, *supra* note 175, at 3–13.

[214] *See* Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad (2003); Louis Henkin, The Age of Rights xvii (1990).

[215] *See, e.g.*, Samuel Moyn, Not Enough: Human Rights in an Unequal World (2018).

[216] Francis Fukuyama, The End of History and the Last Man xi (1992).

[217] *See* The Global Expansion of Judicial Power (Neal Tate & Torbjorn Vallinder eds., 1995); The Judicialization of Politics in Latin America (Alan Angell, Line Schjolden & Rachel Sieder eds., 2005); Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (2000); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 169 (2004).

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FIGURE 9. Policy Points in Two Dimensions, Color-Coded by Legal Origin, 1985

1. *Democratization and Openness to International Law*

Perhaps the most profound transformation brought about by the wave of democratization was growing openness toward international law. By the early 1990s, most countries already had legislative approval requirements.[218] With democratization, these requirements became more meaningful. But the main way in which democratization shaped foreign relations law is through commitment to the international order, as many countries opened up their domestic legal system to international law.

This trend is most pronounced in Eastern Europe. Indeed, developments in this region during this period spurred much of the research on democratization and foreign relations law.[219] Observers have noted that after the Cold War, most countries in the former Soviet sphere of influence moved away from their prior ambivalence, if not outright hostility, to international law, and became decidedly monist with respect to international

[218] For example, the Soviet Union introduced the requirement in 1988. *See* KONSTITUTSIIA SSSR (1988) [KONST. SSSR] [USSR CONSTITUTION], Art. 113(11). As another example, Romania required legislative approval by the General National Assembly as early as 1965. *See* CONSTITUŢIA REPUBLICII SOCIALISTE ROMÂNIA [CONSTITUTION OF THE SOCIALIST REPUBLIC OF ROMANIA], Arts. 43(10), 43(21), 43(24) (1965) (Rom.).

[219] Stein, *supra* note 55, at 429, 447 (documenting an "'opening' toward international law in post-Communist constitution making").

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treaties.[220] Two countries in this region even made treaties equal to the constitution: Montenegro for all treaties and the Czech Republic for human rights treaties only.[221] Notably, all but one country in the region used their newly drafted constitutions to clarify the status of treaties.[222] To illustrate, the 1993 Russian Constitution states that "[i]f an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply."[223]

While Eastern European developments during this period lend some support to theories that link foreign relations law to democratization, the relationship is not as straightforward as it seems. First, the reception of treaties is not limited to the countries that truly democratized, but include countries that never truly became democratic, like Kazakhstan, Georgia, Belarus, and Azerbaijan. This raises the possibility that the renewed importance of international treaties in the domestic legal order reflects a regional trend rather than true democratization. Second, it is noteworthy that some of these countries were previously monist with respect to treaties, and thus merely reverted back to an older tradition.[224] Third, while the new constitutions explicitly addressed the status of treaties, they rarely addressed CIL directly, instead including more ambiguous references to "recognized" or "general" principles of international law.[225] As a result, the status of CIL was left for courts to sort out, with different results in different places.[226]

[220] The following Eastern European countries all became monist in the early 1990s and gave treaties superior status to ordinary legislation: Hungary in 1990; Bulgaria in 1991; Macedonia in 1991; Lithuania in 1992; Estonia in 1992; Russia in 1993; Belarus in 1994; Latvia in 1994; Azerbaijan in 1995; Kazakhstan in 1995; Georgia in 1995; Poland in 1997; and the Czech Republic in 2001.

[221] The lone exception is Romania, which did not make treaties superior but equal to ordinary law in 1991 (although human rights treaties are superior). CONSTITUTIA ROMANIEI [CONSTITUTION OF ROMANIA], Art. 20.2 (1991) (Rom.).

[222] The only exception is Latvia, which stipulates that treaties apply directly and are superior to ordinary law in an organic law.

[223] KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION], Art. 15(4) (Russ.); *see also* AZERBAYCAN RESPUBLIKASININ KONSTITUSIYASI (CONSTITUTION OF THE REPUBLIC OF AZERBAIJAN), Art. 148(II), 151 (1995) (Azer.).

[224] *See, e.g.*, Wyrozumska, *supra* note 152, at 17 (describing pre-1952 Polish practice); *see also* Section V.C.2 *supra*.

[225] *See, e.g.*, KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION], Art. 15(4) (Russ.) ("universally recognized principles and norms of international law" shall be a component part of the legal system of the "Russian Federation"); Конституция Республики Беларусь 1994 Года [CONSTITUTION OF THE REPUBLIC OF BELARUS OF 1994], Art. 8 (Belr.) ("The Republic of Belarus shall recognize the supremacy of the generally recognised principles of international law and shall ensure the compliance of laws therewith.").

[226] For example, it appears that CIL is applied directly by courts in Russia, Belarus, Estonia, Georgia, Hungary, Poland, Latvia and Lithuania. But not all courts have used CIL in the same manner. For example, the Constitutional Court of Hungary has decided that the constitutional provision that refers to "general principles of international law" includes CIL and *jus cogens* norms, and that this means that CIL is superior to ordinary treaties. *See* Nóra Chronowski, Tímea Drinóczi & Ildikó Ernszt, *Hungary*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 262–63. The same is true for the Constitutional Court of Belarus. *See* Danilenko, *supra* note 151, at 59. In Russia, the Constitutional Court has interpreted a similar provision to mean that CIL applies directly but is inferior to ordinary law. *See* B.L. ZIMNENKO, INTERNATIONAL LAW AND THE RUSSIAN LEGAL SYSTEM 303 (William E. Butler trans. 2007). And in Poland, courts treat CIL as equal to domestic law. *See* Anna Wyrozumska, *Poland*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 14, at 486; Z. Brodecki & M. Drobysz, *The Reception of International Law in Poland*, *in* THE RECEPTION OF INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 229, 230 (Erik Franckx & Stefaan Smis eds., 2002). Other courts do not appear to apply CIL at all, such as in Azerbaijan, the Czech Republic, Bulgaria, Kazakhstan, and Romania.

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In Latin America, another region that underwent a democratic transformation during the same period, we see growing openness toward international treaties. Most Latin American countries already applied treaties directly before the 1990s and many, like Colombia, Costa Rica, and Ecuador, had already elevated the status of treaties to make them superior to ordinary legislation. Yet, the 1990s see some further movement toward treaty superiority. Honduras made treaties superior in its 1982 Constitution,[227] while in Argentina and Mexico, it was supreme courts that elevated the status of international treaties.[228] In both cases, these courts reinterpreted a constitutional provision inspired by the U.S. Constitution that makes treaties the "Supreme Law" of the nation to mean that treaties are actually superior to domestic law.[229]

The most notable trend in the region, however, concerned international human rights treaties, which were given equal rank to the constitution in many countries. In some cases, this was done in the constitution itself. To illustrate, Colombia and Venezuela both gave treaties constitutional status in their 1991 constitution;[230] Argentina passed a constitutional amendment that did so in 1994,[231] Brazil did so in 2004, [232] and Mexico did so in 2011.[233] In other cases, courts led the way in elevating the status of international human rights agreement. This was true in Peru,[234] Costa Rica, Ecuador,[235] Honduras,[236] and Uruguay.[237] While the exact interpretative tactics of these courts have varied, they typically held that human rights treaties are part of the "constitutional block," that is, the body of norms and principles that are

[227] Constitución Política [Political Constitution], Art. 18 (1982) (Hond.).

[228] *See* Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo X, Noviembre de 1999, Tesis P. LXXVII/99, Página 46 (Mex.); Corte Suprema de Justicia de la Nación [CSJN] (National Supreme Court of Justice), 7/7/1992, "Ekmekdjian, Miguel Angel c/ Sofovich, Gerardo y otros. s/ Recurso de hecho," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1992-315-II-1492) (Arg.).

[229] *See* Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States], Art. 13 (1917) (Mex.); Constitución de la Nación Argentina [Constitution of the Argentine Nation], Art. 31 (1853) (Arg.)

[230] Constitución Política de Colombia [Political Constitution of Colombia], Art. 93 (1991) (Colom.); Constitución de la República Bolivariana de Venezuela [Constitution of the Bolivarian Republic of Venezuela], Art. 23 (1999) (Venez.).

[231] Constitución de la Nación Argentina [Constitution of the Argentine Nation], Art. 75(22) (amended 1994) (Arg.).

[232] Constituição da República Federativa do Brasil [Constitution of the Federative Republic of Brazil], Art. 5(2) (1988) (Braz.).

[233] Mexico's constitutional provision was less explicit, but the Supreme Court has clarified that it means that human rights treaties have equal standing to the constitution. *See* Pleno de la Suprema Corte de Justicia [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, libro 5, tomo I, Abril de 2014, Tesis P./J. 20/2014 (10a.), Página 202 (Mex.).

[234] Tribunal Constitucional [TC] [Constitutional Court], 15 abril 2006, "Colegio de Abogados de Arequipa y otro," Expediente No. 0025-2005-Pl/TC y 0026-2005-Pl/TC (Peru), partially citing Tribunal Constitucional [TC] [Constitutional Court], 8 Noviembre 2005, "Pedro Andrés Lizana Puelles," Expediente No. 5854-2005-PA/TC (Peru). In Peru, the prior 1979 Constitution made treaties equal to the Constitution; yet the 1993 Constitution was silent on the matter.

[235] Corte Constitucional [C.C.] [Constitutional Court], Agosto 6, 2014, Sentencia No. 004-14-SCN-CC (Ecuador).

[236] *See, e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice], 27 julio 2004, Expediente No. 2187-2003 (Gaceta Judicial, No. 7) (Hond.).

[237] *See* Corte Suprema de Justicia [CSJ] [Supreme Court of Justice], 19/10/2009, "AA. Denuncia. Excepción de Inconstitucionalidad arts. 1, 3 y 4 de la Ley No. 15.848," Sentencia No. 365/2009 (Uru.).

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considered to have constitutional rank.[238] Although the constitutional block doctrine originated in France and Spain, judges in Latin America transformed the doctrine to include international human rights law.[239]

2. *Human Rights and Judicialization*

The growing commitment to human rights agreements was not limited to Latin American countries. Many African countries also incorporated explicit commitments to international human rights law into their constitutions, although they often stopped short of elevating these treaties to constitutional status.[240] And while few of the newly drafted Eastern European constitutions explicitly single out human rights treaties, these countries typically made all treaties superior to domestic law.[241]

As human rights treaties became superior to ordinary law in many jurisdictions, courts gained the power to use international human rights law as a basis for judicial review, striking down inconsistent domestic laws.[242] Examples of courts doing so abound. Notable cases from Eastern Europe include a case in which the Belarussian Constitutional Court cited the ICESCR to declare discriminatory provisions of the labor code unconstitutional;[243] a case in which the Russian Constitutional Court found the City of Moscow's attempt to reintroduce residence permits to violate the ICCPR and other international instruments;[244] and a case in which the Bulgarian Supreme Court of Cassation relied on the ICCPR to declare unconstitutional a provision that mandated pre-trial detention.[245] But perhaps the most dramatic examples come from Latin America. The Colombian Constitutional Court routinely refers to international human rights law when evaluating the constitutionality of domestic law.[246] In 2002, it cited decisions from the Inter-American Commission on Human Rights and the UN Human Rights Committee in striking down a National Security Law

[238] *See, e.g.*, Manuel Eduardo Gongóra-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a* lus Commune, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA, *supra* note 59, at 235.

[239] *Id.*; *see also* Corte Constitucional [C.C.] [Constitutional Court], Mayo 18, 1995, Sentencia C-225/95, Gaceta de la Corte Constitucional [G.C.C.] (vol. 4, p. 39) (Colom.) (per Justice Alejandro Martínez Caballero) (defining the constitutional block).

[240] To illustrate, Benin (1990), Burkina Faso (1990), Burundi (2001), Chad (1889), DRC (1993), Republic of Congo (2002), Cote D'Ivoire (2000), Ethiopia (1995), Gabon (1990), Madagascar (1992), Mali (1992), Mozambique (2004), Niger (2002), Rwanda (2001), Togo (1992), and Uganda (1995) all added specific references to human rights treaties.

[241] But there are some exceptions: Ustava České Republiky [Constitution of the Czech Republic], Article 10 (1992) made human rights treaties equal to the constitution ahead of its general acceptance of all treaties as superior to domestic law (which happened in 2001) and Russia's Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] Articles 46(3) and 55(1) of 1993 does the same thing.

[242] Yonatan Lupu, Pierre-Hugues Verdier & Mila Versteeg, *The Strength of Weak Review: National Courts, Interpretive Canons, and Human Rights Treaties*, 63 INT'L STUD. Q. 507 (2019).

[243] *See* Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT'L L. 51, 64 (1999).

[244] *Id.* at 57.

[245] Prosecutor General, Ruling on a Proposal to Adopt an Interpretative Decision, Case No 1/1997, Ruling No. 1, ILDC 611 (BG 1997) (Bulg.). *See also* Encheva v. Pazardzhik District Investigation Service, Cassation appeal, Judgment No. 719, Civil Case No. 2397/2001, ILDC 613 (BG 2002) (Bulg.).

[246] *See* MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 42 (2017).

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that granted the armed forces special criminal investigation powers.[247] In 2006, it found that a provision that criminalized any type of abortion was unconstitutional because it violated international human rights law.[248] And in 2008, it struck down an entire statute on forest resources for not complying with the right to prior consultation of indigenous peoples set forth in ILO Convention No. 169.[249]

Even as courts became empowered to use human rights law as a basis for judicial review, however, many constitution-makers sought to ensure the ultimate superiority of the national constitution by giving courts the power to review treaties prior to their ratification, following the model first adopted in France. This trend is particularly noteworthy in Eastern Europe. Azerbaijan, Belarus, Belarus, the Czech Republic, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Poland, Romania, and Russia all gave their newly established constitutional courts the power to review treaties *ex ante*, usually by making this explicit in the constitution.[250] In Francophone Africa, many courts already possessed this power, but reforms made it more effective by transforming French-style constitutional councils into constitutional courts and expanding the list of actors who could initiate treaty review.[251] Some granted this power to their courts for the first time: Côte d'Ivoire in 1994, Cameroon in 1996, and Burundi in 1981.

Several courts have used this power to declare proposed treaties unconstitutional. The French Constitutional Council has done so on several occasions, including for the Maastricht Treaty, the Rome Statute of the International Criminal Court, the Treaty establishing a Constitution for Europe, the Second Optional Protocol to the ICCPR, and the Lisbon Treaty.[252] In September 2012, Germany's Federal Constitutional Court held that the government had to enter specific reservations to the Treaty Establishing the European Stability Mechanism to ensure its constitutionality.[253] Although there are few examples outside Europe of constitutional courts actually rejecting proposed treaties, this type of judicial review appears well-established across a diverse range of countries.[254]

Countries that gave their courts the power to review the constitutionality of treaties firmly established that treaties fell below the constitution in their legal hierarchy. Indeed, they gave courts a dual role: on the one hand, they were tasked with enforcing international agreements

[247] Corte Constitucional [C.C.] [Constitutional Court], Abril 11, 2002, Sentencia C-251/02 (Colom.).

[248] Corte Constitucional [C.C.] [Constitutional Court], Mayo 10, 2006, Sentencia C-355/06 (Colom.).

[249] Corte Constitucional [C.C.] [Constitutional Court], Enero 23, 2008, Sentencia C-030/08 (Colom.).

[250] The only countries that did not give their courts such powers are Macedonia, Estonia (which does not have a constitutional court), and Montenegro (where treaties are equal to the constitution).

[251] Prior to the 1990s, Senegal and Chad allowed only the president of the Republic to bring *ex ante* treaty review, while Mali, Niger, Chad, Congo (Republic), Togo, Benin, Burkina Faso, Madagascar, and Rwanda gave this power also to the president of the National Assembly (in addition to the president of the Republic). Senegal started to expand standing requirements beginning 1978; Mali did so in 1992; Niger in 1996; Chad in 1989; and Congo (Republic) in 1992.

[252] For a complete history: PATRICK DAILLIER, MATHIAS FORTEAU & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 172–76 (8th ed. 2009); *but see* Neuman, *supra* note 205 (arguing that judicial review of treaties has played a limited role in restraining the French executive).

[253] BVERFG, 2 BvR 1390/12 (Sept. 12, 2012) (Ger.).

[254] *See, e.g.*, Bernadette Codjovi, *Communication de la Cour Suprême du Bénin*, *in* ACTES DU COLLOQUE INTERNATIONAL SUR « L'APPLICATION DU DROIT INTERNATIONAL DANS L'ORDRE JURIDIQUE INTERNE DES ÉTATS AFRICAINS FRANCOPHONES » 131 (Association Ouest-Africaine des Hautes Juridictions Francophones ed., 2003); Ricardo Abello Galvis, *La Corte Constitucional y el Derecho Internacional. Los tratados y el control previo de constitucionalidad 1992–2007*, 7 REVISTA SOCIO-JURÍDICOS 305 (2005).

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in the domestic legal order; on the other, they had to ensure that these treaties themselves conformed with the constitution.[255] It is therefore unsurprising that this power was not usually given to courts in Latin America, where human rights treaties are usually equal to the constitution.[256] *Ex ante* treaty review remains strongly associated with the civil law tradition; common law countries continue to allocate to their political branches the responsibility to consider the constitutionality of proposed treaties.

3. The Common Law Drift

In recent decades, several countries that inherited the British model have drifted away from it by introducing parliamentary approval requirements for treaties, giving treaties direct effect, setting up mechanisms for prior constitutional review of treaties, or adopting other features historically associated with the civil law model. The result has been the gradual emergence of a separate cluster of common law countries that follow a hybrid model, clearly visible by comparing Figure 8 (1965), Figure 9 (1985), and Figure 2 (2010).

The first category of reforms has consisted of introducing parliamentary review of treaties as a check on executive power. Thus, about a decade after Ghana adopted a presidential system, its 1969 constitution introduced parliamentary approval for any "treaty, agreement or convention . . . which relates to any matter within the legislative competence of National Assembly."[257] Other countries departed from the traditional British model by adopting more modest treaty review procedures, codifying pre-existing British practice of tabling treaties before ratification and adding an opportunity for the legislature to veto it. Papua New Guinea's 1975 constitution adopted such a system, which the United Kingdom itself follows since the adoption of the *Constitutional Reform and Governance Act 2010*.[258] Because none of these countries simultaneously granted direct effect to treaties, their reforms created a hybrid model under which treaties that modify domestic law require both pre-ratification approval and implementing legislation.

In other common law countries, changes have had more far-reaching implications. Upon independence in 1990, Namibia adopted provisions requiring legislative approval of treaties and giving them direct effect, thus embracing central tenets of the civil law model.[259] South Africa's ambitious post-apartheid constitutional reforms carved out an unprecedented place for international law, requiring parliamentary approval of treaties, giving direct effect to their

[255] Doreen Lustig & Joseph Weiler, *Judicial Review in the Contemporary World— Retrospective and Prospective*, 16 INT'L J. CON. L. 315 (2018).

[256] The only Latin American countries that have *ex ante* treaty review are Colombia (1991), Ecuador (1998), and Venezuela (1999) (while Costa Rica has the power for procedural questions only since 1989).

[257] CONSTITUTION OF THE REPUBLIC OF GHANA, Art. 59(2) (1969) (Ghana). A 2001 amendment to Belize's constitution gave its Senate the power of "authorising the ratification . . . of any treaty by the Government of Belize." THE CONSTITUTION OF BELIZE, Art. 61A (amended 2001) (Belize). After 1987, Zimbabwe's constitution incorporated a complex system that required parliamentary approval of some treaties. ZIMBABWE CONSTITUTION ORDER 1979, Art. 111B (1987) (Zim.). In 2013, a new constitution expanded that requirement to cover most treaties. CONSTITUTION OF ZIMBABWE, Art. 327(2) (2013) (Zim.). In 1987, Antigua and Barbuda adopted a parliamentary approval requirement for certain treaties. Ratification of Treaties Act, No. 1 (1987) (Ant. & Barb.).

[258] CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA, Art. 117(3) (Papau N.G.); Constitutional Reform and Governance Act, 2010, c. 25, § 20 (UK). Ireland's constitution has long required proposed treaties to be laid before the legislature but requires its approval only for those that "involv[e] a charge upon public funds." CONSTITUTION OF IRELAND 1937, Art. 29(5)(2) (Irl.).

[259] CONSTITUTION OF THE REPUBLIC OF NAMIBIA, Arts. 63(e), 144 (1990) (Namib.).

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self-executing provisions, enshrining an interpretive presumption of conformity with international law and the direct effect of international custom, and incorporating several references to international human rights.[260] These reforms took these legal systems considerably closer to the traditional civil law model. Kenya's 2010 constitution adopted direct effect of treaties but not a requirement of parliamentary approval, apparently making it one of the only countries in the world where the executive can ratify treaties that change domestic law without any intervention by the legislature.[261]

By contrast, several countries that chose to retain the traditional British model hardened it by enshrining some of its previously unwritten rules. A striking example is Nigeria, whose 1979 constitution—drafted under a military regime—provides: "No treaty . . . shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."[262] Sometimes, such reforms were direct reactions to perceived judicial activism. After Zimbabwe's Supreme Court made several decisions based on the African Charter on Human and Peoples' Rights that constrained the government's policies, the constitution was amended to state that "any convention, treaty or agreement . . . shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament."[263] Likewise, several Commonwealth Caribbean countries eliminated appeals to the Judicial Committee of the Privy Council after it referred to unimplemented international human rights treaties in controversial death penalty cases.[264] Its successor, the Caribbean Court of Justice, repudiated what it saw as the Committee's covert introduction of a monist approach.[265]

Thus, while the overall trajectory of most former British colonies illustrates the strong persistence of inherited models, it also shows how countries may gradually drift over time. The adoption of hybrid models seems correlated with moves toward democratization and liberalization, most vividly illustrated by South Africa's post-apartheid reforms, and with demands for a greater role for legislatures in treaty-making, as in the United Kingdom's 2010 reforms. At the same time, persistence (and occasional hardening) of the traditional British model is hardly the hallmark of authoritarian regimes: it persists in virtually unchanged form in countries such as Canada, Australia, and New Zealand, that rank among the highest on democracy and rule of law indices. Again, there is little evidence that credibility considerations motivated decision makers.

[260] S. AFR. CONST., 1996, Arts. 231–32 (S. Afr.).

[261] CONSTITUTION, Art. 2(6) (2010) (Kenya). The 2010 constitution also enshrines the direct effect of CIL. *Id.* Art. 2(5).

[262] CONSTITUTION OF NIGERIA (1979), § 12(1) (Nigeria); *see also* CONSTITUTION OF THE REPUBLIC OF MALAWI, Art. 211(1) (1994) (Malawi). Ireland's constitution has long codified the same rule: CONSTITUTION OF IRELAND 1937, Art. 29(6) (Irl.).

[263] ZIMBABWE CONSTITUTION ORDER 1979, Art. 111 B(1) (Zim.). *See* TIYANJANA MALUWA, INTERNATIONAL LAW IN POST-COLONIAL AFRICA (1999).

[264] *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

[265] Attorney General v. Joseph, Appeal No. CV 2, CCJ 1 (Nov. 8, 2006) (AJ); *see* Duke E.E. Pollard, *Unincorporated Treaties and Small States*, 33 COMMONWEALTH L. BULL. 389 (2007).

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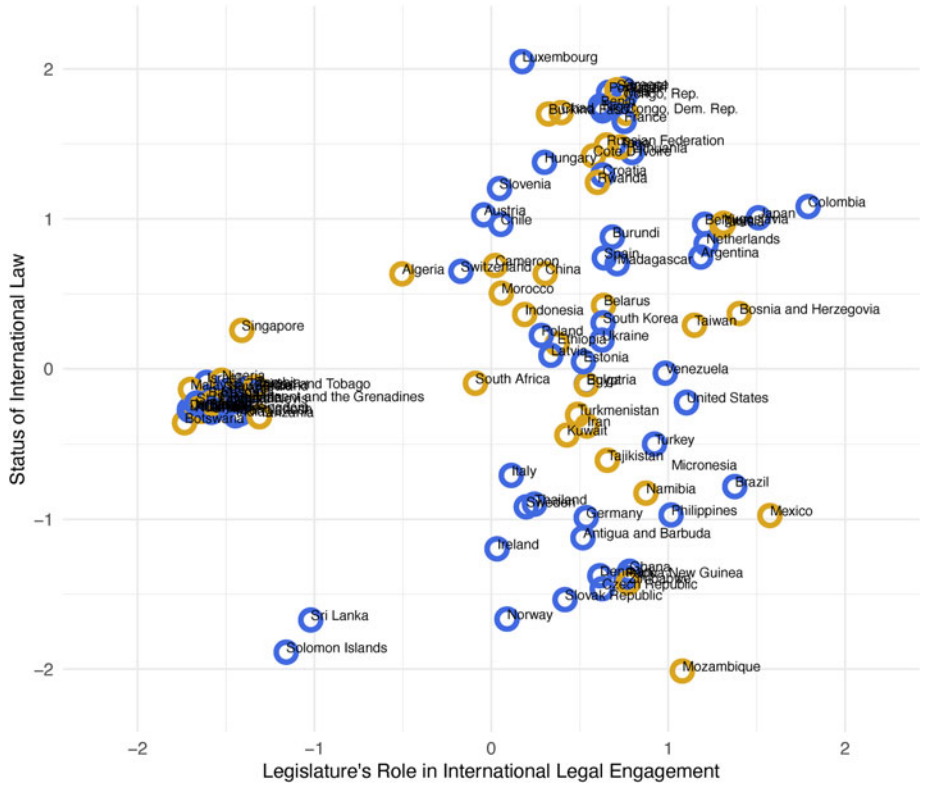

FIGURE 10. Policy Points in Two Dimensions, Color-Coded by Democracy (Blue)/Autocracy (Gold), 1995

4. Conclusions

During the 1990s, we see some important shifts on the spatial map, depicted for 1995 in Figure 10. Eastern European countries move toward the top right of the map, capturing high levels of legislative involvement and high openness to international law, as predicted by democratization theories. We likewise see some Latin American countries shift in the same direction.

But even during this period, the link between democratization and foreign relations law is not straightforward. As noted, even Eastern European countries that never fully democratized open up to international law and move toward the top right of the map. In Latin America, major changes affect only the status of human rights law, not international law in general. Indeed, when we color-code the 1995 spatial map to separate democracies from autocracies, there appears to be no systematic relationship between democracy and foreign relations law; both democratic and autocratic countries cluster at the top right. By contrast, when we show policy points on the same map but color-code countries according to their legal traditions (as Figure 11 shows), it is clear that the civil law-common law divide continues to strongly predict foreign relations law choices.

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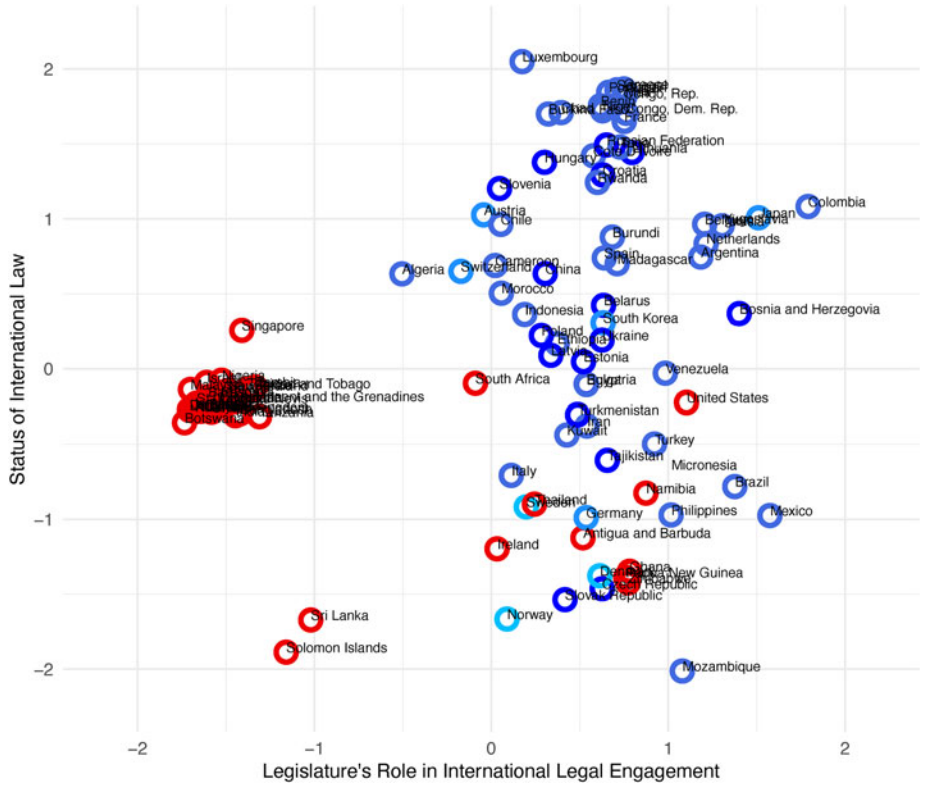

FIGURE 11. Policy Points in Two Dimensions, Color-Coded by Legal Origin, 1995

VI. CONCLUSION

Drawing on the most comprehensive dataset of foreign relations law ever assembled, this Article has shown that countries cluster around standardized models, traced the historical origins and evolution of these models, and investigated how well several prominent theoretical accounts explain the data. It has shown that foreign relations law models are heavily influenced by colonial ties and commonalities in legal origins, thus supporting theoretical accounts that emphasize these factors. By contrast, our data provide limited support for functionalist theories that posit that democratization or states' desire to enhance the credibility of their international commitments drive their choices.

The fact that we observe states hewing closely to the models of their former colonizers and distant-predecessor governments suggests that they may be missing strategic opportunities. The key logic of functionalist theories is that states can better advance their international and domestic objectives by adopting certain foreign relations legal arrangements. Under this view, the optimal arrangements will vary with things like a state's reputation, goals, and geopolitical clout. If these conjectures are correct, young democracies in particular are likely to benefit from making their commitments more credible by involving their legislatures

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in treaty ratification and withdrawal and by giving their courts greater power to enforce international law.[266]

Why many states appear to choose tradition over strategy is beyond the scope of this Article, but we can speculate that both constitutional inertia and domestic politics play roles. The rules governing treaty ratification and the status of international law are often constitutionalized, making them more difficult to amend or replace than other national laws. This means that to bolster the legislative role, some domestic political players, like the executive or minority parties, might need to consent; predictably, many will be reluctant to give up a key element of their foreign relations powers. Similarly, giving courts the power to strike down national or subnational laws that contradict international law might strip lawmakers of some of their power over domestic policy. Thus, while these measures might benefit the state in its foreign affairs, government leaders are engaged in a "two-level game"[267] in which they must weigh the international objectives of the state against their own domestic political goals. Inevitably, the latter often win out.

[266] Determining the extent of these benefits is among the areas that are ripe for further empirical research.
[267] *See* Putnam, *supra* note 44.

SUPPLEMENTARY MATERIAL: To view supplementary material for this article, please visit https://doi.org/10.1017/ajil.2021.58