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Understanding Change in International Organizations: Globalization and Innovation in the ILO

Laurence R. Helfer

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Understanding Change in International Organizations: Globalization and Innovation in the ILO

*Laurence R. Helfer**

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I. INTRODUCTION

In the growing cacophony of voices heralding or contesting the many facets of globalization, international organizations (“IOs”) are playing an increasingly prominent role. Government officials, advocacy groups, and scholars are heatedly contesting the merits and demerits of using IOs to promote interstate cooperation and to resolve the many transborder collective action problems that globalization has fostered. These controversies raise important questions about how IOs are designed and how they respond to the uncertainties and changing circumstances that are endemic to international affairs.

In the debates over globalization and institutional change, one IO—the International Labor Organization (“ILO”)—has been given surprisingly short shrift.¹ Founded in 1919 and headquartered in Geneva, Switzerland, the ILO is one of the world’s oldest IOs. It has survived a world war and a cold war, a major global depression and a slew of recessions, a quadrupling in the number of its member states, and the rise of global capitalism.²

The ILO has a unique tripartite governance structure. Representatives of governments, organized labor, and employers from each of the organization’s 178 member states participate in the work of the ILO in a ratio of 2-1-1, respectively. Worker and employer delegates attend the annual ILO Conference, the organization’s principal lawmaking body, and meetings of its executive arm, the Governing Body, in their independent capacities. They form separate caucuses and often vote with their respective groups rather than with their governments.³ With only minor modifications, this “corporatist” tripartite structure has survived intact as the ILO’s membership has

1. In this Article, I use the Americanized spelling of the ILO’s name, but retain the original Anglicized spelling where it appears in official ILO documents and secondary sources.

2. See generally ANTONY ALCOCK, *HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION* (1971); DAVID A. MORSE, *1 THE ORIGIN AND EVOLUTION OF THE I.L.O. AND ITS ROLE IN THE WORLD COMMUNITY* (1969); *THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION* (James T. Shotwell ed., 1934).

3. The ILO Constitution directs each member state to appoint two government delegates, one worker delegate, and one employer delegate. Constitution of the International Labour Organization art. 389.1, June 28, 1919, 49 Stat. 2712, 225 C.T.I.A. 373 [hereinafter 1919 ILO Constitution]. The constitution directs governments to appoint worker and employer delegates “in agreement with the industrial organizations . . . which are most representative of employers or workpeople, as the case may be, in their respective countries.” *Id.* art. 389.3. For discussions of the ILO’s structure and the importance of tripartism to the organization’s work, see N. VALTICOS & G. VON POTOBOSKY, *INTERNATIONAL LABOUR LAW* 40–42 (1995); C. Wilfred Jenks, *The Significance for International Law of the Tripartite Character of the International Labour Organisation*, in 22 *TRANSACTIONS OF THE GROTIUS SOCIETY* 45, 45–58 (1936); David Strang & Patricia Mei Yin Chang, *The International Labor Organization and the Welfare State: Institutional Effects on National Welfare Spending 1960-80*, 47 *INT’L ORG.* 235, 241 (1993).

grown from a small club of Western European states to include members with radically different approaches to managing labor relations, including the United States, socialist nations, and a large contingent of countries from the developing world.⁴

Given this tenacious capacity for survival and the central importance of labor rules to both economic development and trade, the ILO should occupy a pivotal, even preeminent, place in the debates over the role of IOs in globalization. Remarkably, this is not the case. According to one recent study, “most reasonably informed people have little idea what the letters I-L-O stand for,” and even trade specialists and labor economists have failed to pay much attention to the organization and the lessons its survival may offer.⁵ This is a far cry from the widespread attention given to other IOs—such as the World Trade Organization (“WTO”) and the World Bank—which stand at the center of globalization’s maelstrom and which have prompted both street protests and reams of academic commentary.

A principal reason for the ILO’s inconspicuous profile is a widely held perception that the organization is powerless to combat the workplace abuses that globalization can engender, abuses that include “child labor, punishingly long work days, harsh discipline, hazardous working conditions, sexual predation, and suppression of the freedom to associate and organize.”⁶ Numerous studies deride the ILO as a “90-pound weakling of UN agencies,” a “toothless tiger,”⁷ whose only tools of influence are the sunshine of public scrutiny and the shame of public censure,⁸ and whose feeble enforcement mechanisms render all but nugatory its efforts to improve global labor conditions.⁹

4. Robert W. Cox, *Labor and Hegemony*, 31 INT’L ORG. 385, 386–88, 409–10 (1977) [hereinafter Cox, *Labor and Hegemony*]. See generally Lucio Baccaro, *What Is Dead and What Is Alive in the Theory of Corporatism* (Decent Work Research Programme Discussion Paper No. DP/143/2002, Int’l Inst. Lab. Stud., 2002) (describing the different meanings of corporatism), available at <http://www.ilo.org/public/english/bureau/inst/download/dp14302.pdf>.

5. KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 93 (2003).

6. Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, at 4 (May 2, 2000), available at <http://www.archonfung.net/papers/RLS21.pdf>.

7. ELLIOTT & FREEMAN, *supra* note 5, at 95, 102.

8. See Edward Weisband, *Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime*, 44 INT’L STUD. Q. 643, 648 (2000); see also Michael J. Trebilcock & Rob Howse, *Trade Policy and Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 274 (2005) (“[C]ompliance with ILO norms depends on a combination of public identification, embarrassment and shaming (a mild stick), and technical assistance to promote compliance (a mild carrot).”).

9. See, e.g., Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL’Y J. 365, 399 (1999) (stating that the

These critiques of the ILO's efficacy cannot be attributed to institutional inertia. Over the course of its long history, the ILO has adopted no fewer than 185 conventions and a similar number of recommendations. These instruments range from basic human rights charters to detailed regulatory codes for specific industries. Unlike domestic lawmaking bodies, whose rules apply automatically once adopted, the legislative output of the ILO—like that of all other IOs—is subject to an additional political filter. Each member state must separately ratify each convention adopted by the ILO before that treaty can legally bind that state.

This political filter has led the ILO to adopt many treaties that are sparsely ratified. The gap between treaty adoption and treaty ratification has increased over time. In fact, with the exception of a few “core labor standards” agreements, ratification rates have actually declined.¹⁰ Recent econometric studies challenge the ILO's efficacy at a deeper level. They contest the organization's claim that ratified treaties influence domestic labor practices, arguing instead that countries only sign on to conventions whose obligations are already reflected in their national laws.¹¹

The ILO was not always held in such low esteem. The organization received the Nobel Peace Prize in 1969 for its “lasting influence on the legislation of all countries.”¹² Within the academy, the ILO was an object of attention and lavish praise by international legal scholars and political scientists alike. Commentators penned detailed and laudatory analyses of the ILO's treaty-making and treaty-monitoring functions, the influence of ILO officials, its

ILO is “[v]iewed by many as a ‘slow, cumbersome and low-profile institution’ . . . [that] has not made the impact it should in the new political economy” (internal citation omitted); William A. Douglas et al., *An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions, and NGOs*, 26 HUM. RTS. Q. 273, 276 (2004) (noting “frequent allegations that the ILO ‘has no teeth,’ and that its work consequently makes little difference in the labor practices of governments”) (citation omitted); Trebilcock & Howse, *supra* note 8, at 274 (“The ILO has been widely criticized by proponents of a trade/labor linkage for ineffective enforcement of its norms . . .”).

10. See Int'l Lab. Office, Committee on Legal Issues and International Labour Standards, *Possible Improvements in the Standard-Setting Activities of the ILO: Addendum: Statistics on the Ratification of Conventions*, GB.277/LILS/2(Add.1), 277th Sess. (Geneva Mar. 2000), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/lils-2a1.pdf> [hereinafter ILO, *Statistics on Ratification*]; Bernhard Boockmann, *The Ratification of ILO Conventions: A Hazard Rate Analysis*, 13 ECON. & POL. 281, 294 (2001).

11. See Robert J. Flanagan, *Labor Standards and International Competitive Advantage*, in INTERNATIONAL LABOR STANDARDS 15, 20, 29 (Robert J. Flanagan & William B. Gould IV eds., 2003).

12. Steve Charnovitz, *Promoting Higher Labor Standards*, 18 WASH. Q., Summer 1995, at 167, 173 (1995).

tripartite structure, and its capacity to adapt to changes in its political, economic, and legal environment.¹³

How, then, did the ILO fall so far from grace? In part, because of the unintended consequences of decisions made by the individuals running the organization, in particular its Directors General and its permanent Secretariat—known as the ILO Office.¹⁴ Shortly after the organization's founding at the end of the First World War, the first Director General, Albert Thomas, skillfully exploited ambiguities in the ILO Constitution and forged connections to national trade unions to increase the power and influence of ILO officials. The Director General expanded the Office's information gathering, standard setting, and treaty monitoring functions, enhancing its authority and effectiveness. These innovations enabled the ILO to survive the Second World War and to forge a relationship with the newly created United Nations.

The ILO's evolution during the post-war period was very different, however. Seeking to place the organization at the forefront of social and economic regulation, the ILO expanded its mandate to encompass new subject areas and modified preexisting lawmaking and monitoring procedures to match these new tasks. These adaptations responded to both external pressures (including changes in the economic and political landscape and demands from a larger and more diverse membership) and internal initiatives (from the Directors General and ILO officials) to push the organization in new directions.¹⁵ For reasons I explain in greater detail below, these adaptive efforts were mostly unsuccessful, leading to a period of institutional stagnation during which the ILO became increasingly dysfunctional and ineffective.

13. For the most influential political science accounts, see Special Issue, *The International Labor Organization*, 166 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1933) [hereinafter ANNALS ILO ISSUE]; Robert W. Cox, *ILO: Limited Monarchy*, in THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION 102 (Robert W. Cox & Harold K. Jacobson eds., 1974) [hereinafter Cox, *Limited Monarchy*]; ERNST B. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964); E. A. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE (1966) [hereinafter LANDY, THIRTY YEARS]. For influential *supra* accounts by international legal scholars, some of them former ILO officials, see ALCOCK, *supra* note 2; C. WILFRED JENKS, SOCIAL JUSTICE IN THE LAW OF NATIONS: THE ILO IMPACT AFTER FIFTY YEARS (1970) [hereinafter JENKS, ILO IMPACT]; MORSE, *supra* note 2.

14. The International Labor Office is the ILO's permanent secretariat. The Office is headed by the Director General, who is appointed by the Governing Body, the ILO's executive arm. See VALTICOS & VON POTOBOSKY, *supra* note 3, at 42.

15. For a discussion of the distinction between exogenous and endogenous sources of change within IOs, see *infra* note 43.

Over the last decade, however, the ILO has entered a new phase of innovation, one that has involved narrowing its mandate to emphasize universal compliance with a core group of fundamental labor rights. This restructuring began with a period of self-critical analysis in which the organization, again led by the Director General and the Office, sought to learn from other IOs and from its own past mistakes. The ILO has since adopted novel approaches to treaty-making and treaty monitoring that are intended to streamline its activities, enhance its effectiveness, and reach out to new constituencies beyond the organized labor groups that have traditionally been its supporters.

In this Article, I trace the ILO's past and its present with two broad objectives in mind. First, I offer a corrective to the prevailing view among international lawyers and legal scholars that the ILO is a weak and ineffective institution, one that has "been around forever, but... also has done nothing forever, so... is not terribly interesting."¹⁶ Even a cursory review of the organization's activities reveals the fallacy of this statement. The ILO has not, however, been equally active or equally effective in influencing state behavior throughout its history. A study of law-related innovation in the ILO thus offers important insights for legal scholars and government officials who seek to enhance the efficacy of other IOs.

Second, this Article's process-tracing history of the ILO serves an important theoretical purpose—to analyze the under-studied issue of how IOs change. As world events have revealed the central role that IOs play in promoting interstate cooperation, scholars of international affairs have developed competing theories to explain why states create IOs and why IOs appear in different forms.¹⁷ But how IOs evolve after their founding is an under-theorized issue that commentators are only now beginning to consider.¹⁸ This omission is all the more consequential given disparities in IO longevity. As a

16. *The Challenge of Non-State Actors*, 92 AM. SOC'Y INT'L L. PROC. 20, 35 (1998) (reprinting the statement of Jessica Tuchman Mathews, President of the Carnegie Endowment for International Peace).

17. See, e.g., JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 17–45 (2005); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 7–10 (2005); THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS (Koremenos et al. eds., 2004); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (4th ed. 2004); Beth A. Simmons & Lisa L. Martin, *International Organizations and Institutions*, in HANDBOOK OF INTERNATIONAL RELATIONS 192 (Walter Carlsnaes et al. eds., 2002). For earlier influential contributions, see Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 8 (1998); Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987).

18. For a discussion of the few commentators that have addressed these issues, see *infra* Part II.

recent empirical study concludes, IOs “do have a mortality rate, and it can be surprisingly high.”¹⁹ But the evidence also reveals a strong survivor bias: the more years that have elapsed since an IO was founded, the longer it is likely to exist.²⁰ This makes the ILO—at nearly ninety, one of the world’s oldest IOs—a particularly fruitful venue in which to analyze theories of institutional change.

Three social science theories attempt to explain the mechanics of change in IOs: (1) rational choice; (2) neofunctionalism; and (3) historical institutionalism.²¹ Each theory offers a different prediction as to the actors that establish IOs, the goals of those actors, and the mechanisms they adopt to achieve their goals. More intriguingly, each theory predicts that IOs will follow a different evolutionary path whose trajectory is marked by changes in their external environments, by shifts in state preferences, by the independent efforts of private parties and IO officials, or by a combination of these factors.

A historical study of the ILO provides two opportunities to evaluate these competing theoretical frameworks and, in addition, to consider the under-examined role of IO officials in promoting institutional change. First, the four major phases of the ILO’s existence—its founding, the interwar years, the decades following World War II, and post-Cold War globalization—offer discrete domains within which to assess the theories’ comparative explanatory power. As I discuss below, no single theory explains the changes that occurred in each episode of the ILO’s life cycle.²² The influence of the ILO’s past on the organization’s current reforms provides a second opportunity for theoretical assessment. As this Article will show, none of the theories would have expected ILO officials to revitalize the organization, seventy-five years after its birth, by contracting its authority rather than expanding it.

Before proceeding with these arguments, a cautionary note is in order. This Article does not seek to analyze every aspect of the ILO.²³ Rather, I limit my focus to the creation of international labor standards and how the organization determines whether member

19. Cheryl Shanks et al., *Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992*, 50 INT’L ORG. 593, 594 (1996).

20. *Id.* at 621–22.

21. See *infra* Part II (analyzing these theories and their variants in greater depth).

22. Cf. Peter J. Katzenstein & Nobuo Okawara, *Japan, Asian-Pacific Security, and the Case of Analytical Eclecticism*, 26 INT’L SECURITY 153, 154 (2001) (arguing “against the privileging of parsimony that has become the hallmark of paradigmatic debates” and in favor of “drawing selectively on different [theoretical] paradigms”).

23. ILO activities not analyzed in this Article include technical assistance, educational activities, and the gathering and dissemination of cross-national labor statistics. See Strang & Chang, *supra* note 3, at 241.

states are adhering to those standards. I refer to these two activities as, respectively, ILO “lawmaking” and ILO “monitoring.”²⁴ Lawmaking and monitoring are among the most important tasks that an IO performs.²⁵ I analyze how the ILO’s founders envisioned that these activities would occur, and then consider how the two tasks evolved in response to changes in the organization’s external environment, to the varying composition and shifting demands of governments, workers, and employers, and, perhaps most surprisingly, to the independent efforts of the ILO Directors General and the ILO Office.

The remainder of this Article proceeds as follows. Part II reviews three social science theories of IOs and analyzes the important but understudied issue of IO change. Part III begins by developing a rational choice framework for international labor standards and evaluating the degree to which that framework is embodied in the ILO Constitution. Part III then reviews the history of the ILO, dividing the analysis into discrete time periods that conform to distinct phases of the organization’s evolution. Part IV analyzes the lawmaking and monitoring innovations that the ILO has adopted over the past decade, demonstrating the ways in which the organization has learned from other IOs and from its own past mistakes. Part V concludes with a review of the ILO’s legal innovations and a counterfactual analysis of the three theories of IO change in light of the evidence presented.

II. THEORIES OF CHANGE IN INTERNATIONAL ORGANIZATIONS

Nation states frequently turn to IOs to address the myriad collective action problems that transcend national borders.²⁶ For more than two decades, political scientists have sought to understand why

24. “Lawmaking” includes the procedures by which an IO creates and revises legally binding treaty commitments and nonbinding recommendations. “Monitoring” focuses on implementation and compliance. It includes procedures for determining whether an IO’s member nations are adhering to the organization’s rules and norms and how the IO responds to the compliance information that it discovers. See Abbott & Snidal, *supra* note 17, at 22–23, 26–27.

25. See generally ALVAREZ, *supra* note 17, at 273–584 (reviewing multilateral treaty-making and dispute settlement by IOs). This assumes, of course, that the IO founders have delegated lawmaking and monitoring responsibilities to the organization. Not all IOs possess such delegated powers.

26. See Charlotte Ku, *Global Governance and the Changing Face of International Law*, 2 ACUNS REP. & PAPERS 5, 24 (2001) (“A census of international institutions tells us that at the end of the 20th century there are more than 250 conventional international governmental organizations . . . [.] more than 1500 other international bodies[,] and roughly 3700 other institutions of special types, making a total of almost 5500.”) (internal citations omitted); see also ALVAREZ, *supra* note 17, at 4–17 (reviewing different definitions of IOs).

states create IOs and why they select particular design features from the rich matrix of available alternatives.²⁷ Scholars have advanced three major theories to answer these questions: (1) rational choice; (2) neofunctionalism; and (3) historical institutionalism.²⁸ These three theories are partly grounded in different strands of international relations scholarship.²⁹ But they are also central to theoretical approaches in social science (including sociological, resource dependence, and organization theories) that analyze the workings of domestic institutions or that study why similarly situated countries choose different institutions to address analogous problems.³⁰

These social science theories of institutions have made significant progress in explaining why nation states turn to IOs to help them establish and maintain cooperative relationships. As Michael Barnett and Liv Coleman have recently written: "We know a lot about the conditions under which states establish IOs, why states will design them the way they do, and some of the conditions under which states will grant autonomy to IOs."³¹ But for most scholars, the story of IOs ends where it ought to begin—with their founding. What these institutions do once they have been created remains under-examined and under-theorized.

27. Serious study of cooperation via IOs and international regimes is generally traced to the publication of works by Robert Keohane and Stephen Krasner. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, reprinted in *INTERNATIONAL REGIMES I* (Stephen D. Krasner ed., 1983).

28. I include within historical institutionalism a family of related theories that includes sociological institutionalism and constructivist institutionalism and organization theory. (A fourth variant, rational choice institutionalism, is more easily subsumed under a discussion of rational choice theory.) These variants of historical institutionalism share a basic premise—that political action is shaped and constrained by historically constructed institutions that exhibit surprising durability notwithstanding changes in their economic or political environment or shifts in the preferences of actors. For a more detailed discussion of the different variants of historical institutionalism, see Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three Institutionalisms*, 44 *POL. STUD.* 936 (1996).

29. For an analysis of the intersection between constructivism, rational choice, and historical institutionalism, see Thomas Risse, *Constructivism and International Institutions: Toward Conversations Across Paradigms*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 597, 604–07 (Ira Katznelson & Helen V. Milner eds., 2002) [hereinafter *STATE OF THE DISCIPLINE*].

30. See, e.g., *COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES* (James Mahoney & Dietrich Rueschemeyer eds., 2003); *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991); JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1983); J.T. Hage, *Organizational Innovation and Organizational Change*, 25 *ANN. REV. SOC.* 597 (1999); Paul Pierson & Theda Skocpol, *Historical Institutionalism in Contemporary Political Science*, in *STATE OF THE DISCIPLINE*, *supra* note 29, at 693.

31. Michael Barnett & Liv Coleman, *Designing Police: Interpol and the Study of Change in International Organizations*, 49 *INT'L STUD. Q.* 593, 593–94 (2005).

This omission is a significant and consequential gap in our understanding of international institutions. Most IOs possess at least a modicum of autonomy; many are given substantial independence as a deliberate strategy to hold states fast to their cooperative commitments or to confer greater legitimacy upon the subsequent actions states take through them. Yet this autonomy, whether great or small, creates opportunities for IOs (or, to be more precise, for the autonomous actors operating within them) to develop preferences and goals that diverge from those of their founders. As IO autonomy increases, so too do opportunities to change an IO's structures, mandates, and norms.

If little is known about how IOs behave after they have been created, the causes of change in IOs are even less well understood. The issues to be addressed include such foundational questions as

who or what catalyzes such formal or informal change off/in IOs and how is a consensus on the direction of change attained (if at all)? Is this fundamentally driven by principals in a response to changes in rational interests or shifting domestic/global norms? Or do IOs, as bureaucratic actors, strategically initiate specific reforms in anticipation of challenges in their external environments? . . . [W]hat enables or constrains principals and/or IOs themselves from changing the formal and/or informal rules that drive organizational actions?³²

These questions reveal the wide expanse of theoretical and empirical terrain yet to be traversed. However, by looking beyond the specific topic of IOs to social science literature on institutional change more generally, it is possible to identify hypotheses about IO change that build upon the foundations of different theoretical traditions.

In the next sections, I undertake this analysis for rational choice, neofunctionalism, and historical institutionalism. I identify the actors who found IOs, the goals of those actors, the mechanisms used to achieve those goals, the nature of change each theory predicts after an IO's founding, the responses to those changes, and the expected outcomes. A table at the end of these sections summarizes the key points of this analysis and the strengths and weaknesses of each theoretical framework.

32. Michael Tierney & Catherine Weaver, *Principles and Principals? The Possibilities for Theoretical Synthesis and Scientific Progress in the Study of International Organizations* 12–13 (2005) (unpublished manuscript, on file with author) (citations omitted); see also Barnett & Coleman, *supra* note 31, at 594 (“[W]e know relatively little about how, why, and when change will occur.”).

A. Rational Choice and Exogenous Institutional Change

Rational choice provides a compelling explanation of why IOs exist and why they appear in particular forms. For rational choice scholars, IOs are creatures of nation states. States call IOs into being; states select their design features; states control their funding and other forms of support; and states revise their mandates or even abolish them when national interests change.³³

Self-interested, strategic behavior provides rational choice's driving force. States establish IOs to overcome the limitations of their anarchic environment and to create joint gains that they could not achieve acting on their own.³⁴ These gains include increasing the quality and quantity of information, reducing the costs of negotiating agreements and of linking discrete issue areas, resolving disputes over the meaning of rules and norms, monitoring behavior, and imposing sanctions for noncompliance.³⁵

Different strands of rational choice theory offer different answers to how, if at all, institutions evolve in response to changes in state preferences. The most straightforward (and the most simplistic) approach imputes preferences to states from the "strategic situations"³⁶ or collective action problems that they face. Rather than examining an IO's history or the goals of its founders, scholars adopting this approach take an analytical shortcut. They use the functions that an institution now performs (or rationally should perform) to infer current state preferences.³⁷ This assumes that preferences are well-defined and that there is a close if not perfect match between preferences and institutional design features.

This approach also predicts that states tightly control the autonomy they delegate to IOs. When organizations veer from their prescribed mandates, states quickly respond with corrective action.³⁸

33. See ALVAREZ, *supra* note 17, at 25; GOLDSMITH & POSNER, *supra* note 17, at 4–5; see also Kenneth W. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 1 n.3 (1993) ("[R]ationalist theory often assumes that states act as unitary entities.").

34. See KEOHANE, *supra* note 27, at 85–109 (developing a functional theory of international regimes).

35. *Id.* at 85–109; Abbott & Snidal, *supra* note 17, at 8.

36. See Abbott, *supra* note 33, at 1–2 n.4 (defining a "strategic situation" as "involving a relationship of interdependence among a relatively small number of actors. When states . . . are involved in a strategic interaction, each state's actions affect the fortunes of others as well its own, and the best course of action depends on what others may do.").

37. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 108 (2004).

38. See Darren Hawkins et al., *States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 1, 27–37 (Darren

Perhaps most importantly, this rationalist vision of IOs sees both state preferences and institutions as essentially static. Because change is inconsistent with the theory's premises, it is simply assumed away.³⁹

Not all rational choice theories adopt such a denatured, time-insensitive analysis. Some accounts anticipate changes in the distribution of power or resources among states or in the geostrategic context in which they interact.⁴⁰ Others consider the behavior of government agencies and non-state actors.⁴¹ And still others pay attention to the messiness and complexity of institutional origins and to the costs of creating new institutions or modifying old ones.⁴² Considering any of these factors opens up opportunities for analyzing how institutions change.

The change that these more capacious rational choice approaches predict has very specific characteristics, however. Most fundamentally, change is exogenous to the institution and occurs as a result of shifts in state preferences.⁴³ Such preference shifts often

Hawkins et al. eds., forthcoming 2006), available at <http://weber.ucsd.edu/~dlake/Delegation%20volume.htm>.

39. See Ira Katznelson & Barry R. Weingast, *Intersections Between Historical and Rational Choice Institutionalism*, in PREFERENCES AND SITUATIONS: POINTS OF INTERSECTION BETWEEN HISTORICAL AND RATIONAL CHOICE INSTITUTIONALISM 1, 7 (Ira Katznelson & Barry R. Weingast eds., 2005).

40. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 359–60 (2002).

41. See Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. INT'L L.J. 1, 12–30 (2005).

42. Katznelson & Weingast, *supra* note 39, at 5–8 (discussing rational choice variant of historical institutionalism).

43. Distinguishing between exogenous and endogenous sources of change in the study of institutions is a difficult and unsettled issue. See Duncan Snidal, *The Politics of Scope: Endogenous Actors, Heterogeneity and Institutions*, 6 J. THEORETICAL POL. 449, 456 (1994) (“The normal distinction between exogenous and endogenous variables is . . . awkward for institutional analysis.”); Avner Greif & David D. Laitin, *A Theory of Endogenous Institutional Change*, 98 AM. POL. SCI. REV. 633, 633 (2004) (“Endogenous institutional change appears . . . to be a contradiction in terms.”). This is particularly true for an intergovernmental organization such as the ILO, whose membership is composed not only of governments but also of autonomous groups of workers and employers. However, most scholars analyzing IO change appear to agree—albeit using different labels at times—that change emanating from IO officials and staff is properly labeled as “endogenous,” whereas that change resulting from shifts in state preferences or from alterations to the economic, political, or social environment is appropriately described as “exogenous.” See Barnett & Coleman, *supra* note 31, at 594 (“The dominant view is that external forces in general and states in particular are responsible for its timing, direction, and content. . . . Yet if IOs can take on a life of their own, then they can be agents of change.”); see also Tierney & Weaver, *supra* note 32, at 10 (“[S]cholars of IO are waking up to [the] reality . . . that IOs . . . exhibit varying degrees of autonomy and consequently possess their own preferences and bureaucratic cultures that are distinct from those of their member states.”). I adopt these definitions of exogenous and endogenous here, but recognize that alternative labels are possible and that a more extended treatment of these issues is warranted. See Simon Hug, *Endogenous*

follow large and sudden transformations in the external environment. These shocks, disasters, and crises upset settled habits, alter the calculus of sunk costs and anticipated benefits, and enable institutional reforms unobtainable in more settled times.⁴⁴ In the comparative politics literature, rational choice scholars account for such discontinuous institutional changes by searching for “critical junctures”—key events that usher in distinctively new conditions.⁴⁵ The result is a model of “punctuated equilibrium,” in which scholars predict that only rare, sudden, and intense exogenous forces will herald path-altering institutional change. Outside of these infrequent and precarious periods, however, institutions are stable or even static.⁴⁶

Consistent with its focus on state preferences, this more nuanced version of rational choice theory predicts specific types of responses by an IO’s membership. If the cost of closing the gap between current preferences and preexisting IO structures is too high, states may abandon an old institution and establish another to supplant it.⁴⁷ Or they may stick with an existing IO but consciously redesign it to fit the new environment.⁴⁸ As IOs respond to these new institutional structures, a self-reinforcing equilibrium is achieved, leading to a fresh period of institutional quiescence in which state preferences are aligned with IO functions.

The rational choice framework sketched above provides useful insights for analyzing the forms and functions of IOs and for predicting states’ responses to exogenous shocks. However, its explanation of institutional change is incomplete in at least three important respects.

Preferences and Delegation in the European Union, 36 COMP. POL. STUD. 41 (2003) (discussing preference divergences between European Union member states and the supranational actors they appoint to the European Commission).

44. See Devesh Kapur, *Processes of Change in International Organizations* 8 (Harvard U. Weatherhead Ctr., Working Paper No. 00-02, 2000), available at http://www.wcfia.harvard.edu/papers/164_Helsinki3.wcfia.pdf; Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 766–67 (2001).

45. PIERSON, *supra* note 37, at 51. As I explain below, historical institutionalism also considers that critical junctures can be important precursors of institutional change. See *infra* Part II.C.

46. Wolfgang Streeck & Kathleen Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 1, 7.

47. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1583 (2005) (describing an instance in which states withdrew from a treaty establishing an IO and established a rival organization).

48. See Koremenos et al., *supra* note 44, at 766–67 (arguing that “conscious design” is “the overriding mechanism guiding the development of international institutions” and institutional change).

First, rational choice fails to consider that the birth of IOs often involves political compromises among coalitions of founders with multiple and often conflicting objectives for establishing a new institution.⁴⁹ Second, it gives insufficient attention to government officials and private parties, whose interests are often distinct from states or their leaders and who can use IOs to help further those interests, especially if they possess a formal voice in the organization. Third and most significantly, the theory fails to adequately consider the role of IO officials as independent strategic actors who have the autonomy (if not always the outright authority) to set agendas and select tasks that chart a course away from an institution's original goals.⁵⁰

Each of these omissions underplays the possibility that change can occur endogenously, that is, that change can emanate from within an organization.⁵¹ The failure to account for internally-driven modifications to an organization's structure, activities, or norms has recently been noted by rational choice scholars of domestic institutions.⁵² One response to this omission—one that is fully consistent with the theory's rationalist premise—is to recognize IO independence as a conscious design feature of certain institutions.⁵³ More autonomy for IO officials and staff brings an increased likelihood that "IOs can potentially use that autonomy in ways that are not dictated or delegated by states."⁵⁴

This approach resonates with recent principal-agent theories of IO behavior.⁵⁵ But it allows only limited conceptual space for IO independence and for the endogenous changes that such autonomy can engender. Rather than analyzing these issues, rational choice scholars emphasize why sovereign states delegate autonomy to IOs in

49. PIERSON, *supra* note 37, at 108–12.

50. MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 22 (2004) ("IOs *must* be autonomous actors in some ways simply to fulfill their delegated tasks.") (emphasis in original).

51. See *supra* note 43 (discussing the distinction between endogenous and exogenous sources of IO change).

52. Barry R. Weingast, *Rational-Choice Institutionalism*, in STATE OF THE DISCIPLINE, *supra* note 29, at 660, 692 (characterizing issues of "endogenous emergence, choice and survival of institutions" as "frontier issues" for rational choice scholars).

53. Tierney & Weaver, *supra* note 32, at 10. For a debate over the benefits of independence in international tribunals, compare Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005), with Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

54. Barnett & Coleman, *supra* note 31, at 595.

55. See Hawkins et al., *supra* note 38.

the first instance and how they correct for "agency slack."⁵⁶ Such scholars pay far less attention to the subsequent activities of IOs and to how states interact with them.⁵⁷

B. Neofunctionalism and Endogenous Institutional Change

There is, however, an older theoretical tradition—neofunctionalism—that identifies endogenous actors as the main engine of IO change. Neofunctionalism was first advanced by political scientists to explain the sharp increase in the number of global and regional IOs after the Second World War. According to the theory's adherents, IOs arise from the need to address technical and apolitical transborder issues, such as disease prevention, trade barriers, and finance.⁵⁸ States assign IOs the autonomy needed to promote cooperation in these technocratic, functionally-defined issue areas.

Neofunctionalism shares with rational choice the premise that actors are self-interested and utility-maximizing. But its disassembly of states into their constituent parts allows neofunctionalists to model separately the interests of sub-state actors and IO officials and to identify how these two groups work in concert to expand the scope of international cooperation.⁵⁹

The process of change begins as domestic interest groups recognize that by working within IOs they can achieve results they could not obtain in national politics. IO officials, in turn, realize the benefits of alliances with these groups and actively cultivate their support. As demands from these sub-state actors increase, officials promote modest expansions of IO authority that are logical, functional add-ons to existing tasks and that serve both their own interests and those of their sub-state clients.⁶⁰

56. *See id.* at 7.

57. *See* Barnett & Coleman, *supra* note 31, at 595. *But see* Helfer & Slaughter, *supra* note 53, at 942–55 (analyzing both exogenous state controls and endogenous cultures of professionalism that together create a zone of "constrained independence" for international courts and tribunals).

58. Ernst Haas was the principal proponent of neofunctionalism for both global and regional organizations. *See* HAAS, *supra* note 13; ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950–57* (1958); Ernst Haas, *International Integration: The European and the Universal Process*, 15 INT'L ORG. 366 (1961). Haas's theory of neofunctionalism was a modification of earlier, functionalist theories of international integration through IOs. *See* DAVID MITRANY, *A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION* (1944).

59. *See* Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 53–57 (1993).

60. *See* HAAS, *supra* note 13, at 47–50.

The institutional change that results from these interactions is the inverse of that predicted by rational choice models. It is endogenous, incremental, and continuous, producing small effects at each individual step but cumulatively resulting in ever deeper levels of cooperation.⁶¹ As support from sub-state actors grows, cooperation takes on a self-reinforcing dynamic. It spills over from technical, function issues with low political salience to high-politics issues such as peace and security, arms control, and human rights.⁶²

The challenge for IO officials is how to promote cooperation as activities shift into areas of greater political contestation. For neofunctionalists, the prescription is not to avoid politics but to manage it. Cooperation deepens when officials strategically identify and select tasks that enhance the organization's authority and that garner additional support from domestic interest groups and other sub-state actors, while persuading states that such tasks further their interests as well. Leadership and skill in agenda setting are, in this view, important precursors for successful IO expansions.⁶³ The end result of these efforts, neofunctionalists predict, is slow but inexorable progress toward integration.⁶⁴

Although neofunctionalism is strong on issues of endogenous change where rational choice is weak, it suffers from its own serious deficiencies. Its most striking failure was to predict that the expansion of international cooperation would eventually shift political loyalties from nation states to IOs. Even in the world's most integrated international polity—the European Community—no such transfer of loyalties has occurred, leading the theory's proponents to renounce its more far-reaching claims.⁶⁵ In addition to its overly

61. Neofunctionalists recognize that IOs change in response to changes in their environment, but these exogenous forces are not the focus of their analysis. See HAAS, *supra* note 13, at 129–31.

62. See Tim Büthe & Gabriel T. Swank, *The Politics of Antitrust and Merger Review in the European Union: Institutional Change and Decisions from Messina to 2004* at 6–12 (Dec. 2005) (unpublished manuscript, on file with author) (summarizing history of neofunctionalism and reviewing writings of scholars who have endorsed it); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 313–16 (1998) (same).

63. See HAAS, *supra* note 13, at 119–25; R.W. Cox, *Towards a General Theory of International Organization*, 19 INDUS. & LAB. REL. REV. 99, 101 (1965) (reviewing ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964)) [hereinafter Cox, *General Theory of IO*].

64. Zaring, *supra* note 62, at 314.

65. See Ernst B. Haas, *The Obsolescence of Regional Integration Theory*, in 25 INSTITUTE OF INTERNATIONAL STUDIES: RESEARCH SERIES (1975). Recently, however, scholars have begun to revisit the insights of neofunctionalist theory, in particular as it relates to legal issues. See, e.g., Gráinne de Búrca, *Rethinking Law in Neofunctionalist Theory*, 12 J. EUROPEAN PUB. POL. 310

sanguine empirical predictions, neofunctionalism's privileging of cooperation over conflict makes no allowance for dysfunctional organizational changes (such as expansions of autonomy that benefit IO bureaucrats but not domestic actors) or for "the plethora of outcomes . . . that fall between success and failure."⁶⁶

C. Historical Institutionalism and Multiple Sources of Institutional Change

If neofunctionalism overemphasizes the likelihood of IO cooperation, and rational choice overstates the ability of nation states to use institutions to serve rational ends, historical institutionalism offers a third approach to explain how IOs change over time. Unlike rational actor models that are based on generic cooperation problems, historical institutionalism considers the particular historical and social contexts in which IOs are born and in which they must survive.⁶⁷ It recognizes that institutions are established by multiple actors with divergent and often conflicting preferences. Tensions within this founding coalition mean that no one group of actors predominates in specifying an institution's structures and functions.⁶⁸ The result is an unavoidable gap between the founders' goals and the design features they select to achieve them.⁶⁹

This gap between goals and institutional structures implies that even the most homogenous founding coalition will have difficulty dictating an IO's functions as it matures. At best, such a coalition can select design features to achieve functional goals in the short term. As time horizons lengthen, however, the institution inevitably evolves in ways that its founders neither anticipated nor intended. Initial design choices produce unintended consequences that shape and constrain the future behavior of actors whose identity and composition may have changed since the time of the organization's founding.⁷⁰

Historical institutionalists anticipate that change will occur. But they do not prejudge its direction, pace, scope, or source. Change

(2005); Philippe C. Schmitter, *Ernst B. Haas and the Legacy of Neofunctionalism*, 12 J. EUROPEAN PUB. POL. 255 (2005).

66. Michael G. Huelshoff, *Domestic Politics and Dynamic Issue Linkage: A Reformulation of Integration Theory*, 38 INT'L STUD. Q. 255, 258 (1994).

67. Katznelson & Weingast, *supra* note 39, at 4–5.

68. See PIERSON, *supra* note 37, at 110 (arguing that multiple actors, multiple purposes, and multiple effects are more pronounced "in the construction of constitutions"). The constitutions of IOs manifest similar features. See *infra* Part III.B.

69. Streeck & Thelen, *supra* note 46, at 11, 19.

70. See PIERSON, *supra* note 37, at 14–15; Paul Pierson, *The Path to European Integration: A Historical Institutional Analysis*, 29 COMP. POL. STUD. 123, 147 (1996).

can be either positive or negative, abrupt or slow. Change can be path dependent, its direction marked out by the increasing returns and positive feedback that result from first-generation decisions.⁷¹ Or it can be more fluid and adaptive, evolving incrementally but producing “transformative results.”⁷² It can result in modifications to formal institutional structures or to informal practices and working methods.⁷³ Perhaps most importantly, change can emanate from within the organization, from outside it, or from a mix of endogenous and exogenous sources.

Of the three theories of change discussed in this Article, historical institutionalism is the most recent. Most of the literature focuses on domestic political institutions and compares their geographic differences and temporal development. Scholars analyzing these issues have created different typologies and frameworks to categorize change processes within domestic institutions. These include Streek and Thelen’s five categories of gradual institutional transformation (displacement, layering, drift, conversion, and exhaustion);⁷⁴ Pierson’s analysis of long-term processes of institutional change (such as positive feedback, path dependence, and sequencing);⁷⁵ and Katznelson and Weingast’s effort to bridge historical institutionalism and rational choice theories.⁷⁶

Historical institutionalist treatments of IOs are less well developed, both theoretically and empirically. The most extensive analysis has been done by Barnett and Finnemore, who work in the constructivist school of international relations theory. Barnett and Finnemore view IOs as “active agents in their own change” with a “propensity toward dysfunctional, even pathological, behavior.”⁷⁷ They recognize both external and internal sources of change that emanate from conflicts over material resources or divergent interpretations of organizational culture.⁷⁸ Although the causes of change are diverse, they all point to a common outcome: an expansion in the size of IOs and the functions they perform.⁷⁹ Most recently, Barnett and Coleman have considered IOs as strategic actors that

71. See PIERSON, *supra* note 37, at 20–30.

72. Streek & Thelen, *supra* note 46, at 9 (emphasis omitted).

73. *Id.* at 19.

74. *Id.* at 18–31.

75. See PIERSON, *supra* note 37, at 17–53.

76. Katznelson & Weingast, *supra* note 39, at 7–21.

77. BARNETT & FINNEMORE, *supra* note 50, at 3, 158.

78. *Id.* at 42–43.

79. *Id.* at 43 (“IOs tend to define both problems and solutions in ways that favor or even require expanded action for IOs.”).

seek to “further their mandate, . . . protect their autonomy, and minimize organizational insecurity.”⁸⁰ The authors develop a typology of strategies (acquiescence, compromise, avoidance, defiance, manipulation, and strategic social construction) that IOs deploy in response to different levels of organizational security and different degrees of incongruity between internal organizational culture and the external environment.⁸¹

As these diverse approaches illustrate, historical institutionalism considers multiple sources of change and the interactions among those sources to explain how institutions adapt, innovate, or stagnate over time. This capaciousness is one of the paradigm’s strengths. But it also presents one of its greatest challenges. For example, historical institutionalism characterizes some IOs as entrenched and resistant to reform; others as proactive and seeking to take on new tasks.⁸² These contrasting characterizations are possible because of the theory’s emphasis on context-specific factors and historical contingencies. But this focus also limits the theory’s predictive power, making it difficult to isolate the causal contribution of any single explanatory variable and limiting the policy prescriptions the theory offers for other organizations.⁸³

To address these concerns, empirical studies of IO evolution that emphasize historical particularities should also strive to identify common patterns upon which to build working hypotheses that then can be falsified or refined by other scholars.⁸⁴ I take up this challenge in the concluding section of this Article.

80. Barnett & Coleman, *supra* note 31, at 595.

81. *Id.* at 600–02.

82. See BARNETT & FINNEMORE, *supra* note 50, at 2.

83. See Katznelson & Weingast, *supra* note 39, at 6; see also Tierney & Weaver, *supra* note 32, at 13 (emphasizing that the processes of how IOs change raise “extremely difficult questions”).

84. See BARNETT & FINNEMORE, *supra* note 50, at 164 (asserting, based on historical and empirical study of three IOs, that “IOs appear to be steadily expanding their mandates in a convergent direction: all are increasingly involved in the domestic affairs of states, and, specifically, all are trying to create durable, modern nation-states that are organized around democracy and markets”).

D. Summary

The table below summarizes the mechanisms of institutional change predicted by each of the three theories reviewed above. It identifies the principal actors who establish IOs, the goals of those actors, the design features they select to achieve their goals, the nature of the changes that each theory predicts will occur after the IO's founding, how actors respond to those changes, and the expected outcomes. The table also summarizes the strengths and weaknesses of each theory.

Table 1: Theories of Change in International Organizations

	Rational choice	NeoFunctionalism	Historical Institutionalism
IO Founders and their Basic Characteristics	<ul style="list-style-type: none"> ◆States (usually unitary actors) ◆Rational, self-interested and utility-maximizing 	<ul style="list-style-type: none"> ◆Government officials and private parties ◆Self-interested and utility-maximizing ◆Domestic actors seek to expand cooperation 	<ul style="list-style-type: none"> ◆States, government officials, and private parties ◆Actors' interests and preferences shaped by historical and social contexts
Goals of IO Founders	<ul style="list-style-type: none"> ◆General—Efficiency ◆Specific—Joint gains from inter-state cooperation, e.g. reduced transaction costs, information, monitoring, etc. 	<ul style="list-style-type: none"> ◆General—Cooperation ◆Specific—Mutually beneficial rules to manage technical/apolitical issues 	<ul style="list-style-type: none"> ◆No predetermined substantive goals ◆Coalitions of actors with multiple and often inconsistent goals
Mechanisms Used to Achieve Goals at Founding of IO	<ul style="list-style-type: none"> ◆Rational selection of IO design features to solve a specific cooperation problem ◆Goal clarity ◆Assumption of perfect or close match between goals and selected design features ◆Limited IO autonomy 	<ul style="list-style-type: none"> ◆Functional selection of IO design features to promote cooperation in areas of "low politics" ◆IO autonomy sufficient to achieve functional goals 	<ul style="list-style-type: none"> ◆Tensions among goals and coalitions of IO founders ◆Tensions create gaps between goals and chosen design features ◆Rational or functional design unlikely or effective only in short term ◆Variable IO autonomy
Nature of Change Predicted After Founding of IO	<ul style="list-style-type: none"> ◆Change frequently ignored ◆Any change that occurs results from shifts in state preferences ◆Change viewed as: <ul style="list-style-type: none"> ▪Exogenous ▪Infrequent ▪Sudden and discontinuous ▪Producing large effects ▪Producing punctuated equilibria 	<ul style="list-style-type: none"> ◆Anticipates existence and nature of change ◆Formation of beneficial alliances between IOs and domestic interest groups ◆Change viewed as: <ul style="list-style-type: none"> ▪Endogenous ▪Incremental ▪Producing small effects ▪Teleological 	<ul style="list-style-type: none"> ◆Fact of change anticipated, but not its nature or direction ◆IOs develop interests independent of states ◆Change viewed as: <ul style="list-style-type: none"> ▪Endogenous, exogenous, or both ▪Path dependent ▪Result of unanticipated consequences

	Rational choice	NeoFunctionalism	Historical Institutionalism
Expected Outcomes	<ul style="list-style-type: none"> ◆ IOs are (more or less) faithful agents and respond to controls by States principals ◆ Desired goals achieved and self-reinforcing equilibrium established (or) ◆ States abandon IO and establish a rival institution 	<ul style="list-style-type: none"> ◆ Expansion of IO autonomy ◆ Cooperation expands from “low politics” to “high politics” issues ◆ Loyalties shift from States to IOs ◆ Eventual integration 	<ul style="list-style-type: none"> ◆ Outcomes highly variable: ◆ Expansion of IO functions and responsibilities ◆ Pathological and inefficient self-preservation of IOs ◆ Significant IO redesign possible
Major Strengths and Weaknesses of Each Theoretical Framework	<p><u>Major Strengths:</u></p> <ul style="list-style-type: none"> ◆ Simplicity and predictability ◆ Strategic analysis explains why states create IOs and the design features they select <p><u>Major Weaknesses:</u></p> <ul style="list-style-type: none"> ◆ Difficulty addressing multiple actors with competing goals ◆ Change under-theorized and limited to exogenous sources 	<p><u>Major Strengths:</u></p> <ul style="list-style-type: none"> ◆ Models endogenous change ◆ Models expansion of IOs via incremental change <p><u>Major Weaknesses:</u></p> <ul style="list-style-type: none"> ◆ No explanation for failures of cooperation ◆ Shift of loyalties to IOs disproven empirically 	<p><u>Major Strengths:</u></p> <ul style="list-style-type: none"> ◆ Models interests of multiple state and non-state actors ◆ Includes multiple sources of change and both positive and negative outcomes <p><u>Major Weaknesses:</u></p> <ul style="list-style-type: none"> ◆ Relationship among sources of change difficult to specify ◆ Less predictive power

III. DESIGN, EVOLUTION, INNOVATION, AND STAGNATION IN THE ILO

Social science theories of institutional change provide a useful framework for studying the ILO's long history of evolution, innovation, and stagnation. The ILO has survived numerous external and internal changes since its creation at the end of the First World War. It would be impossible in the pages of a single book—let alone a single journal article—to portray the organization's complex and rich history in detail.

This Part therefore paints the ILO's historical portrait with broader brushstrokes, focusing on two of the organization's most

important functions—lawmaking and monitoring.⁸⁵ I emphasize three goals that the ILO's founders sought to achieve with respect to these functions: (1) universal membership in the organization and widespread ratification of the treaties it generated ("universality"); (2) international labor standards durable enough to improve domestic labor practices but flexible enough to apply to rapidly changing workplace conditions in countries at different stages of economic development ("flexibility"); and (3) centralized monitoring mechanisms to determine whether states were in fact adhering to the standards they had pledged to follow ("centralization").

I begin with rational choice. I analyze the different collective action problems that international labor standards present and identify the institutional design choices that an abstract analysis of these problems implies. I then show how these design choices are only partially and imperfectly embodied in the ILO Constitution,⁸⁶ reflecting the conflicting political and functional motivations of its drafters.

After reviewing the ILO's constitutional architecture from a rational choice perspective and situating the organization's birth in a wider political and historical context, I examine the evolution of ILO lawmaking and monitoring during the organization's first two decades of life. The ILO's development during this period closely tracks the endogenous changes predicted by neofunctionalist theory. In particular, the first Director General and the ILO Office furthered the founders' goals of universality, flexibility, and centralization by forging alliances with national labor unions in ways that also expanded the authority of ILO officials and staff.

The historical narrative resumes toward the end of the Second World War. I document the ILO's second wave of expansion into new subject areas and trace this enlargement to changes in the economic and political environment and to disputes among the ILO's increasingly large, diverse, and fractious membership. These exogenous changes precipitated a broadening of the ILO's mandate into politically contested areas. When added onto the innovations adopted during the pre-war period, these post-war expansions generated perverse incentives to adopt treaties that were not widely ratified, that were normatively incoherent, and that were inadequately monitored. Taken together, these problems—which

85. See *supra* text accompanying note 24 (defining ILO lawmaking and ILO monitoring).

86. The ILO Constitution appears as Part XIII of the Treaty of Versailles. As explained below in Part III.D, the constitution was amended after World War II. See generally EBERE OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANISATION (1985) (providing a detailed analysis of the ILO Constitution and general practices of the ILO).

track the predictions of some historical institutionalist accounts of organizational change—hampered the ILO’s effectiveness and contributed to its current reputation as a weak and ineffectual IO.

A. *The Rational Design of International Labor Standards*

The protection of international labor standards raises four interrelated issues that together comprise the “strategic situation”⁸⁷ facing the ILO: (1) the number of nation states to be governed by those standards; (2) the type of collective action problem that the standards attempt to resolve; (3) the uncertainties of regulating workplace conditions in different countries and in response to changing industrial practices and improvements in technology; and (4) the ability of states to deviate from prior commitments as a result of international law’s weak enforcement mechanisms.⁸⁸ As I explain below, the ILO’s founders responded to this strategic situation by designing an institution with aspirations to (1) universal membership and widespread treaty ratifications; (2) appropriately flexible substantive rules; and (3) centralized mechanisms for monitoring state behavior.⁸⁹

1. Universality

A rationally designed IO includes all actors that can influence cooperation in a particular issue area.⁹⁰ For an IO charged with creating and monitoring international labor standards, universality is the optimal membership rule. The ILO’s founders recognized this point expressly, stating in the preamble to the ILO Constitution that “the failure of *any nation* to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”⁹¹ This statement succinctly

87. See Abbott, *supra* note 33, at 1 n.4 (defining a strategic situation).

88. See Koremenos et al., *supra* note 44, at 773 (listing enforcement, number, and uncertainty, inter alia, as independent variables that states face when seeking resolve collective action problems).

89. See *id.* at 769 (listing membership, flexibility, and centralization, inter alia, as dependent variables that states manipulate when designing IOs to particular strategic situations).

90. See SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 195–220 (2003) (analyzing the importance of membership rules in promoting international cooperation); George W. Downs et al, *Managing the Evolution of Multilateralism*, 52 INT’L ORG. 397, 398 (1998) (same).

91. 1919 ILO Constitution, *supra* note 3, pmb. (emphasis added); see also INT’L LAB. OFFICE, INTERNATIONAL LABOUR ORGANISATION: THE FIRST DECADE 35 (1931) [hereinafter ILO,

captures the proverbial race-to-the-bottom, a race in which each country lowers its labor standards in a bid to attract foreign investment or to give its domestic industries competitive advantages over foreign exporters. The result is a classic Prisoners' Dilemma. All states reduce their labor standards to suboptimal levels but, in the end, retain their preexisting share of trade or investment after the race has run its course.⁹²

The ILO attempts to prevent this race to the bottom by establishing a common baseline of global labor standards that deters states from entering the race in the first instance.⁹³ If, however, even one nation remains outside of the organization and the legal standards it promulgates, it can avoid that common baseline and exploit its competitive position to the detriment of member nations. The size of the negative externalities generated by outsider states depends upon their level of economic development, the size of their labor markets, and their share of world trade. But the risk of free riding is present so long as any state remains outside of the organization or fails to ratify the treaties that articulate global ground rules for protecting workers and regulating workplace conditions.

The content and function of those global rules, however, depends upon the type of collective action problem the organization's members confront. The ILO's founders feared a race to the bottom because they believed that regulating labor and workplace conditions made nations less competitive, raising the cost of exports and deterring foreign investment.⁹⁴ At the same time, and somewhat paradoxically, they also viewed "the well-being, physical, moral and intellectual, of industrial wage-earners" as having an intrinsic value akin to fundamental human rights.⁹⁵ This alternative vision suggests

THE FIRST DECADE] (stating that "the universality at which the [ILO] must logically aim is three times emphasised in the Preamble").

92. See Brian A. Langille, *Re-Reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights*, 42 COLUM. J. TRANSNAT'L L. 87, 91 (2003) [hereinafter Langille, *Re-Reading the ILO Preamble*]; Trebilcock & Howse, *supra* note 8, at 270–71.

93. 1919 ILO Constitution, *supra* note 3, art. 405 (describing procedures for adoption of international labor standards).

94. See ILO, THE FIRST DECADE, *supra* note 91, at 273–74 (noting difficulties in getting rival states to ratify ILO conventions); Trebilcock & Howse, *supra* note 8, at 261–62 ("Many of these early efforts were motivated by the concern that in the absence of international labor standards, international competition in an environment of increasingly freer trade would precipitate a race to the bottom."). *But see infra* note 110 (citing recent empirical studies indicating that compliance with core labor standards neither increases the cost of exports nor deters foreign investment, undermining the race-to-the-bottom rationale for international labor standards).

95. See 1919 ILO Constitution, *supra* note 3, art. 427; ILO, THE FIRST DECADE, *supra* note 91, at 28 (stating that the "social justice" element of international labor standards has "moral value" and is "an end in itself"); Langille, *Re-Reading the ILO Preamble*, *supra* note 92, at 98

that there is in fact no race to enter because nations share a humanitarian commitment to protect a core group of global labor rights. As I explain below, these competing conceptions of international labor standards have persisted throughout the ILO's history, serving as an important tool for changing the structure and substantive focus of ILO lawmaking and ILO monitoring.

2. Flexibility

A second concern of an IO's founders is how to adjust the organization's rules to reflect the pervasive uncertainties of international affairs. Because states cooperate under conditions of incomplete information, they cannot fully predict the behavior and preferences of other nations, the future application of international rules, or the state of the world and how it may change over time.⁹⁶ The founders can mitigate these unknowns by increasing the flexibility of institutional structures and the treaties and recommendations that the organization adopts.

Flexibility has numerous advantages. It allows IOs with universal membership to adjust rules to account for material differences among member states, it facilitates the revision of rules if predictions about the future turn out to be inaccurate, and it prevents IOs and treaties from becoming moribund. Flexibility provisions that are too generous, however, can reduce the credibility of member states' commitment to cooperate or do little to change preexisting behaviors. As a result, "one of the greatest challenges in institutional design is to find the optimal trade-off between stickiness and flexibility."⁹⁷

In the ILO, flexibility concerns cluster around three issues. The first is whether international labor standards should be protected in legally binding conventions or nonbinding recommendations. The ILO's founders provided for both approaches, recognizing the advantages of both hard and soft law for regulating workplace

(describing a more empirically accurate view of international labor standards "as part of the package of interactive economic, social, and political freedoms, which are both the destination and the way to successful economies and societies"). Commentators disagree, however, over precisely which labor standards rise to the level of human rights. See Trebilcock & Howse, *supra* note 8, at 273.

96. See Koremenos et al., *supra* note 44, at 778-79 (analyzing the independent variable of uncertainty); B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829, 832-35 (2001) (discussing escape clauses and political uncertainty).

97. Barbara Koremenos et al., *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1076 (2001).

conditions.⁹⁸ A second flexibility issue concerns how to tailor labor standards to states at different levels of economic development. The states that founded the ILO understood the value of accommodating national differences, particularly for countries with less advanced economies and labor markets.⁹⁹ The third dimension of ILO flexibility is temporal rather than geographic. Labor markets and workplace conditions can shift rapidly in response to economic, industrial, or technological changes, rendering existing labor standards outdated or obsolete. The ILO's founders were aware of these exogenous changes, and ILO officials developed detailed lawmaking procedures to revise and update international labor standards in response to them.¹⁰⁰

This trio of issues reveals that calibrating the optimal tradeoff between durability and flexibility was a pervasive challenge for the states that supported the ILO's creation.

3. Centralization

Third and finally, the designers of an IO must consider whether to create centralized monitoring and enforcement mechanisms to disseminate information, reduce bargaining and transaction costs, and review state behavior.¹⁰¹ International law lacks the built-in enforcement tools found in national legal systems. As a result, states may deviate from their prior commitments if doing so generates larger individual gains than those offered by cooperation. To address this pervasive risk of noncompliance, rational choice theorists argue either that treaties must be compatible with state incentives such that adhering to them serves state interests, or that IOs must include strong monitoring and enforcement mechanisms to deter states from cheating.¹⁰²

98. 1919 ILO Constitution, *supra* note 3, art. 405, ¶ 1 (authorizing the ILO to adopt both conventions and recommendations).

99. *Id.* art. 405, ¶ 3 (directing ILO members to consider modifying treaties and recommendations to accommodate countries with different climatic conditions, less advanced economies or labor markets, and other special circumstances); *id.* art. 427 (noting the difficulty of obtaining "strict uniformity in the conditions of labour").

100. See ILO, *THE FIRST DECADE*, *supra* note 91, at 33 (describing views of founders emphasizing "the impossibility of drafting immediately a code which could apply permanently over a long period and of foreseeing all the future developments . . . which might be aimed at later"). However, as explained below, *infra* Part III.C.1, the Constitution itself did not expressly address the ILO's power to revise conventions. See C. Wilfred Jenks, *The Revision of International Labour Conventions*, 14 BRIT. Y.B. INT'L L. 43, 48 (1933) [hereinafter Jenks, *Revision*].

101. Koremenos et al., *supra* note 44, at 771-72 (describing centralization options).

102. See George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996) (describing need for strong enforcement mechanisms to

From a rational choice perspective, the extent of the ILO's monitoring and enforcement challenge depends upon the strategic issues that international labor standards address. If such standards seek to forestall a race to the bottom, states will have a strong incentive to defect. Counteracting that incentive requires a robust and highly centralized monitoring and enforcement system.¹⁰³ The tripartite structure adopted by the ILO's founders—in which independent workers' and employers' groups have direct membership rights and can file complaints against countries that fail to comply with international labor standards—goes a long way toward creating just such a centralized system.¹⁰⁴ If their complaints are substantiated, the constitution authorizes other governments to impose economic sanctions against the defaulting state.¹⁰⁵

Less centralization is required if labor standards (or at least a core subset of them) are viewed as universal human rights. Nations that share a normative commitment to these rights should protect them without the need for strong monitoring or enforcement.¹⁰⁶ The ILO's detailed system of state reporting on international labor standards suggests that its founders endorsed this view, at least in part. Reports provide an opportunity for workers, employers, and governments to scrutinize each state's compliance record.¹⁰⁷ And they

encourage compliance with international law); Koremenos et al., *supra* note 44, at 768 (describing need for “incentive-compatible” rules).

103. See Robert W. Staiger, *The International Organization and Enforcement of Labor Standards 24* (May 2001) (unpublished manuscript, on file with author) (“[E]ffective prevention of race-to-the-bottom/regulatory-chill problems in the context of labor standards requires that enforcement measures be put in place and potentially utilized.”); see also Trebilcock & Howse, *supra* note 8, at 270 (noting that proponents of the race-to-the-bottom rationale for labor standards argue that the race “can only be pre-empted by international agreement on and enforcement of minimum labor standards”).

104. 1919 ILO Constitution, *supra* note 3, art. 409; ILO, *THE FIRST DECADE*, *supra* note 91, at 71.

105. 1919 ILO Constitution, *supra* note 3, art. 419 (authorizing “measures of an economic character” for failure to follow recommendations of Commission of Enquiry or Permanent Court of International Justice). As I discuss more fully below, the ILO amended its constitution after the Second World War to remove this express reference to economic sanctions. In addition, the organization has never actually imposed economic sanctions, although it is on the verge of doing so against Myanmar for its widespread use of forced labor. See *infra* Part IV.B.3.

106. Note, however, that recent works by rational choice scholars question whether states do in fact view human rights in this way. See GOLDSMITH & POSNER, *supra* note 17, at 110–19 (describing an instrumentalist logic for compliance human rights agreements). Moreover, some empirical evidence suggests that noncompliance with human rights treaties is often widespread. *Id.* at 122–24 (citing several supporting studies).

107. 1919 ILO Constitution, *supra* note 3, art. 408 (requiring ILO member states to file annual reports “on the measures which it has taken to give effect to the provisions of conventions to which it is a party” and authorizing the Director General to publicize summaries of the reports to the entire ILO membership).

create a risk of public embarrassment and censure if that record discloses significant gaps between a state's behavior and its prior commitments. Seen from this perspective, ILO reporting procedures provide a sufficient incentive for states to adhere to core labor standards even in the absence of strong, centralized enforcement mechanisms.¹⁰⁸

A third possibility is that international labor standards produce instrumental benefits for all countries, even less developed nations whose comparative advantage derives from low labor costs.¹⁰⁹ A growing number of recent empirical studies conclude that the race to the bottom has no empirical foundation because “[i]nvestment is attracted, not repelled, by adherence to core labor standards.”¹¹⁰ Noncompliance is not—as the race to the bottom scenario fears—a deliberate if ultimately futile attempt to capture unilateral gains, but rather the result of misguided policies, inadequate information, or a lack of capacity. If this third conception of international labor standards is accurate, the appropriate institutional response is a softer “managerial” approach to centralization that emphasizes information sharing and technical assistance to help ILO member states “develop policies which are individually and collectively rational.”¹¹¹

108. See Weisband, *supra* note 8, at 648 (describing shaming as the motivating force behind the ILO's monitoring regime).

109. Drusilla K. Brown, *Labor Standards: Where Do They Belong on the International Trade Agenda?*, 15 J. ECON. PERSP. 89, 102 (2001) (analyzing the “incentives for both high- and low-income countries to choose high labor standards”).

110. Langille, *Re-Reading the ILO Preamble*, *supra* note 92, at 93; see also EMPLOYMENT, LABOUR & SOC. AFFAIRS COMM. & TRADE COMM., ORG. FOR ECON. CO-OPERATION & DEV., TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS RIGHTS AND INTERNATIONAL TRADE (1996), available at <http://213.253.134.29/oecd/pdfs/browseit/2296031E.PDF> (demonstrating how adherence to core labor standards increases productivity and cost-effectiveness, thereby attracting investment); Drusilla K. Brown, *International Trade and Core Labour Standards: A Survey of the Recent Literature* 45, ¶ 262 (Org. for Econ. Co-operation & Dev., Lab. Mkt. & Soc. Pol'y Occasional Papers, Paper no. 43, 2000), available at <http://puck.sourceoecd.org/vl=1167854/cl=14/nw=1/rpsv/cgi-bin/wppdf?file=5lgsjhvj7rwd.pdf> (“Furthermore, empirical evidence suggests that firms are more likely to invest in countries with some labor protections than in countries with poor labor practices, particularly with regard to working children.”); David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the “Conventional Wisdom”* (Int'l Labour Org., Int'l Inst. for Labour Studies, Decent Work Research Programme, Discussion Paper No. DP/130/2001, 2001), available at <http://www.ilo.org/public/english/bureau/inst/download/dp13001.pdf> (rebutting the “conventional wisdom about low-standard countries being a haven for foreign investors”); Flanagan, *supra* note 11, at 46 (stating that available “data show no reliable evidence that high labor standards reduce a country's share of” foreign direct investment).

111. Langille, *Re-Reading the ILO Preamble*, *supra* note 92, at 96; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22–28 (1995) (advocating a “managerial approach” to promote compliance with international law).

B. The Birth of the ILO: Balancing Functional and Political Goals

As the foregoing discussion reveals, the founders of the ILO were motivated by three broad functional objectives. They believed that all nations should be members of the organization and should accept the conventions and recommendations that it adopted. They wanted ILO lawmaking to be sufficiently flexible to account for geographic and economic differences among its member states and changes in workplace conditions around the world. And they sought to centralize the monitoring of international labor standards by creating a system of complaints, state reports, and information sharing that responded to the different (and somewhat conflicting) collective action problems that the organization faced. This multiplicity of institutional goals belies the claim of some rational choice scholars that IOs are established to serve a single functional purpose.¹¹²

The rational choice aspects of the ILO's birth should not be overstated, however. The founders of the organization were motivated by political as well as functional goals, and the design features they selected to promote universality, flexibility, and centralization were only imperfectly reflected in the ILO Constitution.¹¹³ True, the ILO's distinctive tripartite structure gave actors closest to the industrial workplace a direct and independent voice in creating and monitoring international labor standards. But in addition to these functional benefits of tripartism, short-term political anxieties provided an equally pressing motivation for the ILO's founders to grant membership to non-state actors.

Industrialized governments in Europe feared that the Russian Revolution of 1917 would spread communism westward, fomenting violent regime change elsewhere on the continent. Better that workers should channel their reformist energies in an institutional setting than for those energies to remain pent up and eventually be unleashed in political unrest. As one scholar pithily encapsulated these fears, "[t]he ILO was Versailles' answer to Bolshevism."¹¹⁴ For that answer to serve as an attractive alternative to revolution, however, states would need to create an IO with at least a modicum of independent authority and provide workers with a voice in shaping the exercise of that authority to create and enforce global labor standards.

112. See *supra* Part II.A.

113. Cf. HAAS, *supra* note 13, at 141–42 (referring to “constitutional weaknesses built into the ILO Constitution”).

114. Cox, *Limited Monarchy*, *supra* note 13, at 102.

Even acknowledging these fears of labor unrest, states were wary of delegating substantial autonomy to the nascent organization. They categorically rejected worker proposals to make labor conventions automatically binding in domestic legal systems.¹¹⁵ This ensured that whatever international labor standards the ILO adopted, governments would have the final say in deciding whether those standards would apply in their respective national labor markets. In addition, the power of the purse and the authority to impose economic sanctions remained with the ILO's parent organization, the League of Nations.¹¹⁶ By retaining an institutional umbilical cord to the League—an IO in which only states were members—founding governments believed they could retain significant control over the ILO and prevent it from taking actions contrary to their interests.¹¹⁷

The ILO's cabined authority is also reflected in the constitutional provisions describing the functions of the Director General and the ILO Office. The ILO Governing Body, the executive organ of the ILO, appoints the Director General, who in turn appoints the ILO staff and manages the ILO Office "subject to the instructions of the Governing Body."¹¹⁸ The constitution specifies the Office's functions, which include collecting and distributing information, examining issues for future treaty-making, and preparing the agenda for the annual meeting of the International Labor Conference.¹¹⁹ More consequential authority, such as the power to review state reports, to interpret treaties, and to review complaints remained with the ILO's political bodies or with the member states themselves.¹²⁰

Taken together, these constitutional provisions and the historical and social context in which they were fashioned reflect the ILO's uneasy mix of functional and political goals and its founders' equivocal endorsement of an IO tasked with creating and enforcing global labor standards. Given this ambiguous constitutional blueprint, the ILO's founding governments could reasonably expect the organization to diffuse the potential for post-war labor unrest by adopting treaties and recommendations to address the most pressing

115. See ILO, *THE FIRST DECADE*, *supra* note 91, at 32.

116. 1919 ILO Constitution, *supra* note 3, arts. 399 & 420.

117. See HAAS, *supra* note 13, at 143 (explaining how the "final power of action continued to rest with governments" in the League of Nations) (emphasis omitted); see generally Cox, *Limited Monarchy*, *supra* note 13, at 102-03 (describing the origins and development of the ILO in the context of the League of Nations).

118. 1919 ILO Constitution, *supra* note 3, art. 394, ¶ 1.

119. *Id.* art. 396, ¶¶ 2-3, and 402. The Office's agenda-setting function is subject to the right of any government to object to the inclusion of any item in the agenda.

120. See *id.* arts 408-20 (allocating these powers to the member states or to ILO political bodies).

safety, health, and social problems of the early twentieth-century workplace. But they would not have anticipated that the ILO would venture much beyond this mandate.¹²¹

C. Early Innovations

It was the first ILO Director General, Albert Thomas, and the staff of the ILO Office who, in the organization's first two decades from 1919 to 1939, expanded the organization's authority well beyond this restricted role.¹²² The Director General and the Office exploited constitutional ambiguities and adopted working methods to enhance the ILO's functional goals notwithstanding the founders' limited delegation of authority.

These expansions of authority were facilitated by the successful efforts of ILO officials to cultivate support from workers' groups. These officials sought to bolster organized labor—both trade unions participating in the ILO's tripartite membership and those active in national labor markets—to foster industrial democracies in which workers would be equal partners with employers and governments.¹²³ The Director General and his staff expended considerable effort to strengthen domestic trade unions and encourage their participation in the organization. Their aim was “to promote social justice through international labor standards” and to turn the ILO into the agent for “transforming the world into a system of pluralistic welfare societies closely integrated internationally.”¹²⁴

121. See 1919 ILO Constitution, *supra* note 3, pmb1. (identifying workplace conditions requiring international attention); HAAS, *supra* note 13, at 144 (stating that governments did not “feed [new] demands into the ILO because they had not expected the need for any policy” beyond those specified in the constitution).

122. See HAAS, *supra* note 13, at 144, 143 (recounting the “self-consciously dynamic polic[ies]” adopted by the first ILO Director General Albert Thomas and describing the pre-war evolution of the ILO as an “unintended consequence of the very immediate and expedient governmental concern” of its founders); E.J. PHELAN, YES AND ALBERT THOMAS 245–57 (1936) (reviewing competence-expanding activities of ILO's first Director General and his support of worker delegates); Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in THE UNITED NATIONS AND HUMAN RIGHTS 580, 613 (Philip Alston ed., 1992) (“The Office plays a leadership role in promoting the objectives of the ILO . . . ILO officials have been initiators in the work of the Organisation, considering themselves not as simple executors of the desires of member States, but rather as collaborators in the pursuit of social justice.”).

123. See HAAS, *supra* note 13, at 145 (describing the ILO as a “coordinator and unifier of national trade groups”); PHELAN, *supra* note 122, at 240–47 (explaining Director General Thomas's vision of the ILO as a collaboration of national trade unions).

124. Cox, *Limited Monarchy*, *supra* note 13, at 122; see also C. WILFRED JENKS, THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM 519, 522 (1957) (arguing that support of worker organizations was essential to development of additional authority by ILO Office).

As I document below, ILO officials sought to achieve these ambitious and lofty goals in three ways: (1) by encouraging more nations to join the organization and to ratify worker-protection treaties; (2) by developing innovative lawmaking procedures to balance the competing demands of stability and flexibility; and (3) by enhancing centralized monitoring procedures to promote compliance with a rapidly growing body of international labor standards. Many of these legal innovations have long been forgotten. For observers in the inter-war period, however, the ILO was viewed as a highly effective organization and a model for other IOs to follow.¹²⁵

1. Promoting Widespread Membership and Treaty Ratifications

"[O]ne of the chief preoccupations" of the first generation of ILO officials was to "increase the number of ILO Members as much as possible."¹²⁶ The ILO's status as an offspring of the League of Nations presented an obstacle to expanding the organization's geographic and demographic scope. According to the constitution, all members of the League were automatically members of the ILO.¹²⁷ But what of those countries—including powerful or populous nations such as the United States, Germany, and the Soviet Union—which refused to join the League or which were ineligible to become League members?

The constitution did not address this question. But throughout the 1920s, non-League members applied for and received admission to the organization. Universality arguments invoking fears of a race to the bottom carried the day, with the existing membership accepting the Office's contention that "inhuman [labor] conditions in even a single country may, through international competition, arrest or compromise social progress in every other country."¹²⁸

125. See MARK F. IMBER, *THE USA, ILO, UNESCO, AND IAEA: POLITICIZATION AND WITHDRAWAL IN THE SPECIALIZED AGENCIES* 43 (1989) (noting the praise and respect the ILO received from other IOs during the inter-war period); C. Wilfred Jenks, *The Need for an International Legislative Drafting Bureau*, 39 AMER. J. INT'L L. 163, 172-73 (1945) [hereinafter Jenks, *Legislative Drafting Bureau*] (detailing the careful and effective methods of treaty-making in the ILO's first two decades); Charles W. Pipkin, *Relations with the League of Nations*, in ANNALS ILO ISSUE, *supra* note 13, at 124, 128 (describing the successful leadership of the ILO during the inter-war years).

126. ILO, *THE FIRST DECADE*, *supra* note 91, at 35; see also Josef Sulkowski, *The Problem of Universal Membership in the International Labor Organisation* 5 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 70, 70-72 (1952-53) (describing the ILO's goal of universal membership).

127. 1919 ILO Constitution, *supra* note 3, art. 387.

128. ILO, *THE FIRST DECADE*, *supra* note 91, at 35; see also *id.* at 36-41 (discussing legal and political issues regarding admission of new members to the ILO).

The ILO Office quickly went to work encouraging non-members to join the organization. The absence of the United States prior to 1934 was especially troubling, and the Office did "all in its power to induce the United States to take part in" the work of the organization, establishing relationships with "official and private bodies" to encourage American participation and ultimately ratification.¹²⁹ The Office also provided non-members, including the Soviet Union, with studies of their domestic labor problems and tried to persuade states to join with promises of additional information and technical assistance.¹³⁰ In part as a result of these efforts, the ILO membership expanded from forty-five states at its inception in 1919 to sixty-two states by the mid-1930s.

The drive to promote ratification of labor treaties evolved somewhat differently. The ILO Constitution obligated member states to submit all conventions and recommendations to their respective political branches to encourage adoption of the instruments.¹³¹ But it soon became clear that this mandatory submission procedure would not ensure widespread ratification of the treaties.

At the Office's urging, the ILO adopted several procedural innovations to encourage states to ratify. First, the Office developed an "exceptionally thorough and detailed" process for drafting treaties to ensure that each of their provisions had "been subjected to intensive scrutiny and discussion prior to adoption."¹³² To further encourage the membership's support, the ILO Conference gave two separate reviews to all draft conventions.¹³³ And to make treaties more politically palatable, it gave governments alone the right to submit amendments prior to the draft's second reading.¹³⁴

A second deterrent to ratification stemmed from ambiguous provisions in certain conventions. Beginning in the early 1920s, governments asked the Office to clarify these ambiguities. ILO officials responded cautiously to these requests, inasmuch as the constitution entrusted all interpretive functions to the Permanent Court of International Justice.¹³⁵ States were unwilling, however, to invoke this formal adjudicatory process, and the Office responded to the demand for its services by providing unofficial interpretations of

129. *Id.* at 43.

130. *Id.* at 42–46, 328–31; ALCOCK, *supra* note 2, at 118–33.

131. 1919 ILO Constitution, *supra* note 3, art. 405, ¶ 5.

132. J.F. McMahon, *The Legislative Techniques of the International Labour Organization*, 41 BRIT. Y.B. INT'L L. 1, 93 (1965–66).

133. OSIEKE, *supra* note 86, at 148–51, 167.

134. *Id.*

135. 1919 ILO Constitution, *supra* note 3, art. 423.

conventions and publishing them for the benefit of the entire membership.¹³⁶ In undertaking this new task, the Office stressed the technical and specialized knowledge it had acquired in drafting the conventions and in promoting their implementation.¹³⁷ No state ever challenged its authority, with the result that “[t]he ILO secretariat, without explicit constitutional warrant, [became] the principal organ for rendering these effectively conclusive but formally advisory interpretations.”¹³⁸ An important consequence of these new powers was the Office’s ability to reassure states that had expressed concerns about textual ambiguities and thereby “remove[] obstacles inhibiting ratification” of the treaties.¹³⁹

A third procedural innovation by which ILO officials encouraged treaty ratifications while simultaneously expanding their own authority was the Office’s practice of collecting and publishing information on compliance with recommendations and unratified conventions.¹⁴⁰ The effects of this practice were threefold. First, in the case of recommendations, the information helped to pave the way for the later adoption of a convention on the same subject. Second, in the case of treaties, it created a fund of practical experience concerning domestic labor laws and practices upon which the Office could draw to ease the concerns of non-ratifying states. And third, collecting information on both ratified and unratified conventions blurred the distinction between the two categories of instruments, reducing the consequences of ratification.¹⁴¹

In practice, however, these three procedural innovations produced only modest results. The total number of ratifications of all ILO treaties grew at a steady rate, from 27 in 1921 to 408 in 1930 to 873 in 1939.¹⁴² But these figures amounted to only about 25% of the

136. See C. Wilfred Jenks, *The Interpretation of International Labour Conventions by the International Labour Office, in Notes*, 20 BRIT. Y.B. INT’L L. 132, 132–41 (1939) (detailing the frequency with which the Office gives unofficial interpretations); ILO, *THE FIRST DECADE*, *supra* note 91, at 276 (discussing the member states’ preference for such interpretations).

137. McMahon, *supra* note 132, at 91–96 (noting the Office’s “exceptional and special knowledge” in reviewing practices of ILO member states and preparing drafts of conventions).

138. ALVAREZ, *supra* note 17, at 226 (internal punctuation omitted).

139. McMahon, *supra* note 132, at 100.

140. See ILO, *THE FIRST DECADE*, *supra* note 91, at 267–76, 310–12, 317–20 (discussing efforts by Office to overcome obstacles to ratification and to gather information on the implementation of recommendations).

141. In recent years, the Office has continued to stress the influence of unratified conventions and recommendations on the domestic laws and practices of member states. See INT’L LAB. OFFICE, *THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS* 11–26 (1976) [hereinafter INT’L LAB. OFFICE, *IMPACT OF CONVENTIONS*].

142. ILO, *THE FIRST DECADE*, *supra* note 91, at 277; ILO, *Statistics on Ratification*, *supra* note 10, graph 1.

total possible ratifications by all member states. As I explain in the next section, the ILO Office took great pains to explain why universal ratification was neither realistic nor, in some cases, desirable,¹⁴³ even as it continued to press for additional ratifications by member states with widely different industrial and economic conditions.

2. Creating and Revising Flexible International Labor Standards

The drafters of the ILO Constitution recognized that international labor standards could not be applied uniformly in all countries and would need to be updated in response to changing workplace conditions and technological advances. Yet they provided surprisingly little guidance on how to achieve these goals or on how to reconcile them with the organization's competing aspirations to universal membership. Again, it was the ILO Office that responded to these challenges.

The Office promoted, and the ILO membership adopted, a systematic approach to make labor conventions and recommendations relevant to the diverse and changing conditions of the early 20th century workplace. It distributed questionnaires to solicit information from governments, conducted studies of national laws and labor practices, and provided numerous opportunities for review and comment by all three branches of the ILO's tripartite membership. The Office played an agenda setting role in each of these areas, drafting questionnaires, studies, and the texts of treaties and recommendations for the consideration of ILO delegates.¹⁴⁴

Several features of this standard setting process are particularly noteworthy. First, the ILO promulgated in rapid succession a series of conventions and recommendations that extended international labor standards to an increasingly broad array of workers and workplace issues.¹⁴⁵ The brisk pace of lawmaking began with the very first ILO Conference in 1919, where the membership approved six treaties. Over the next two decades, the ILO adopted

143. See *id.* at 278 (stating that it would be "unreasonable" to expect ratification of maritime conventions by non-maritime states). But see *infra* notes 217–218 and accompanying text (describing the practice of "empty ratifications" of maritime conventions by some landlocked states).

144. See McMahon, *supra* note 132, at 62–65 (describing the drafting procedure); Jenks, *Legislative Drafting Bureau*, *supra* note 125, at 172–73 (explaining the need for a uniform drafting technique).

145. See Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 85, 91 (Philip Alston ed., 2005) [hereinafter Maupain, *Reflections on Myanmar*] (discussing the expansion of the ILO's mandate by the Permanent Court of International Justice, which held that the organization's jurisdiction covered all workers).

sixty-one additional conventions and sixty-six separate recommendations.¹⁴⁶

Second, ILO officials attempted to strike a balance between standards that established a minimum baseline for all members and more lenient standards for countries with less advanced economies and labor markets.¹⁴⁷ The Office developed a dual strategy to achieve these competing goals. First, it successfully resisted attempts by member states to file reservations to the treaties after they had been adopted. It justified this position—one without precedent in international law—on the ground that reservations were inconsistent with the ILO's tripartite structure and with its objective of establishing "a network of mutual obligations" that would prevent states from entering a race to the bottom in their scramble for a greater share of global trade and investment.¹⁴⁸

In the place of these unilateral exclusions, the ILO Office promoted a diverse array of flexibility devices to customize treaties to fit different economic, social, and geographic conditions. Some conventions identified specific countries (usually developing nations) and the differential (usually lower) standards that applied to them. Others contained only general principles, with more detailed rules relegated to accompanying recommendations on the same topic. Still other treaties permitted ratification in parts or allowed states to exclude the treaty's application to designated industries or categories of workers.¹⁴⁹ These diverse textual approaches helped to make the treaties more relevant and more politically palatable to a broad cross-section of ILO member states.

A third flexibility issue the organization confronted concerned the revision of treaties. The ILO's founders recognized that workplace conditions and workers' needs would change rapidly over time. But they failed to provide any procedures for amending outdated conventions.¹⁵⁰ As a result of this missing joist in the constitutional architecture, the ILO could not revise or abrogate a treaty after it had

146. Nicolas Valticos, *Fifty Years of Standard-Setting Activities by the International Labour Organisation*, 135 INT'L LAB. REV. 393, 399 (1996).

147. See *id.* at 402.

148. McMahon, *supra* note 132, at 80; see also *id.* at 77–85 (discussing history of and rationales for ban on reservations).

149. See J.M. Servais, *Flexibility and Rigidity in International Labour Standards*, 125 INT'L LAB. REV. 193 (1986) (detailing the flexibility devices used in ILO conventions); VALTICOS & VON POTOBSKY, *supra* note 3, at 55–61 (same).

150. See ILO, *THE FIRST DECADE*, *supra* note 91, at 33 (describing the founders' awareness that ILO would need to address new labor issues in the future); *id.* at 86 (stating that the problem of revision of conventions "is not mentioned" in the Constitution of 1919 but "it was bound to arise sooner or later").

entered into force. The only permissible alternative was to adopt a second convention on the same subject. A state wishing to adopt the newer standard would then ratify the “revising convention” and formally denounce the earlier treaty.¹⁵¹ Yet the earlier treaties continued to remain in force for countries that wished to retain the older standards.¹⁵² This was a cumbersome solution to the problem of treaty revision, since it created new treaties without eliminating old ones.¹⁵³ But it enabled the ILO Office to close the gap in the constitution and provided—at least temporarily—a mechanism to update international labor rules.¹⁵⁴

3. Enhancing Centralized Monitoring

With a growing membership and an expanding corpus of labor standards, the ILO Office naturally turned its attention to issues of monitoring and compliance. As described above, the ILO Constitution provided two ways to review state behavior—annual reports on ratified conventions and complaints by workers, employers, or governments.¹⁵⁵ But the constitution failed to address numerous procedural details, leaving ample room for ILO officials to propose functional solutions that resulted in a marked expansion of the organization’s monitoring powers.¹⁵⁶

The earliest and most important innovation involved the creation of a permanent body of independent experts to review reports filed by member states on ratified treaties. The constitution entrusted

151. Jenks, *Revision*, *supra* note 100, at 49–52.

152. *E.g.*, Marking of Weight (Packages Transported by Vessels) Convention, art. 7, ¶¶ 2–3, June 21, 1929, ILOLEX No. C27, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (providing that, on the date that a revising convention entered into force, the original convention would be closed to future ratifications but would remain in force for those states that had previously ratified it).

153. Maritime labor treaties provide an apt illustration. The ILO Conference adopted the first Wages, Hours of Work and Manning (Sea) Convention in 1946. June 29, 1946, ILOLEX No. C76, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>. The treaty was followed three years later, however, by the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949, and nine years after that by a second revising convention, Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958. June 18, 1949, ILOLEX No. C93, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>; May 14, 1958, ILOLEX No. C109, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

154. As I explain in the next section, this approach to treaty revision later created problems for the organization. See *infra* Part III.E.2.

155. For detailed discussions, see OSIEKE, *supra* note 86, at 171–83, 210–34; T.K. Samson, *The Changing Pattern of ILO Supervision*, 118 INT’L LAB. REV. 569, 569–80 (1979).

156. See HAAS, *supra* note 13, at 251 (describing expanding reporting obligations for member states); *id.* at 348–50 (comparing constitutionally mandated procedures with those that have been developed ad hoc by the ILO); JENKS, ILO IMPACT, *supra* note 13, at 42 (explaining changes in supervisory procedures).

the review of these reports to the Director General, but it soon became clear that he could not process the vast quantity of information that states provided. In the mid-1920s, a few governments proposed a standing committee to consider state reports. Mollified by assurances from the Office that the committee would be limited to the technical issue of comparing national laws to treaty texts, the remaining member states agreed to the proposal.¹⁵⁷

Once created, however, the "Committee of Experts on the Application of Conventions and Recommendations" quickly enlarged its authority. With the support of information from worker delegates, the Committee sought out additional information from governments, and it asked for an evaluation of the problems that they had encountered in giving domestic effect to the treaties. Armed with this knowledge, the Committee could engage in pointed exchanges with state representatives and offer specific recommendations for remedial action.¹⁵⁸ By the end of the interwar period, the Committee of Experts had become a "mainstay of ILO supervision."¹⁵⁹

Procedures for convening a Commission of Inquiry to review allegations of noncompliance followed a different evolutionary pathway. No state invoked these procedures during the ILO's first two decades.¹⁶⁰ But the ILO Office helped to establish an important precedent that expanded the pool of potential complainants when it confirmed that an ambiguous provision in the constitution allowed workers and employers to request a Commission of Inquiry.¹⁶¹ The Office thus transformed a procedure that many governments would have preferred to be restricted to interstate complaints—a form of

157. See HAAS, *supra* note 13, at 252; OSIEKE, *supra* note 86, at 173.

158. An early observer noted that the Committee of Experts "presents critical observations, acknowledges responses of governments, discusses them, refutes them, formulates commentaries on the interpretations presented, and advances suggestions." HAAS, *supra* note 13, at 253 (translating and quoting JEAN ZARRAS, *LE CONTROLE DE L'APPLICATION DES CONVENTIONS INTERNATIONALES DU TRAVAIL* 173 (1937)). Committee members were careful, however, to couch their conclusions in the form of "observations" rather than "criticisms." *Id.*

159. Samson, *supra* note 155, at 569.

160. See ALCOCK, *supra* note 2, at 280 (describing first Commission of Inquiry, convened in 1961 to respond to a complaint by Ghana against Portugal); HAAS, *supra* note 13, at 362 (same).

161. See OSIEKE, *supra* note 86, at 223 & n.124 (noting legal dispute over whether workers and employers could submit complaints that could trigger the creation of a Commission of Inquiry).

treaty monitoring that is often underutilized¹⁶²—into one in which workers and employers could raise compliance challenges directly.¹⁶³

4. Theoretical Assessment

From a theoretical perspective, the expansion of lawmaking and monitoring during the ILO's first two decades closely tracks the predictions of neofunctionalism. The Director General and the ILO Office acted as autonomous agents with interests distinct from those of the states that created their positions. Officials brought about change endogenously and incrementally, seeking support from worker delegates at the ILO, building connections to national trade unions, and using their expertise in information gathering, analysis, and agenda setting to shape the demands and expectations of member states.

These events also provide an opportunity to assess rational choice and historical institutionalist accounts of change in IOs. Most obviously, the historical narrative reveals that the behavior of IOs cannot be explained, as some rational choice theories claim, by examining state interests alone or by an analysis that is frozen at a specific moment in time. Rational choice analysis is, however, useful for identifying the functional objectives of an IO's founders and the design features they select to achieve them. It is these goals and design choices, in turn, that shape the strategies for change deployed by first-generation IO officials and staff.

Notably, the Director General and the Office did not expand lawmaking and monitoring authority by means of a raw power grab. Such an attempt surely would have provoked a backlash from member states. Instead, officials made common cause with organized labor while stressing the universality, flexibility, and centralization goals that had animated the organization since its inception. They justified each modest expansion on functional grounds, taking small individual steps that ultimately produced a substantial expansion of the organization's powers from within. This process echoes some historical institutionalist accounts of how domestic institutions evolve, a process characterized by "incremental change with transformative results."¹⁶⁴

162. See David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 779 (1994) (describing limitations of interstate dispute settlement procedures).

163. Recent Commissions of Inquiry have been overwhelmingly requested by non-state actors. See VALTICOS & VON POTOBSKY, *supra* note 3, at 290–93.

164. Streeck & Thelen, *supra* note 46, at 9.

The endogenous changes that occurred during the ILO's first twenty years did not, however, insulate the ILO from exogenous shocks. The Great Depression of the 1930s presented a serious challenge to the organization, generating acrimonious divisions among workers, employers, and governments that resulted in a slow-down of treaty ratifications and the rejection of half a dozen draft conventions intended to mitigate the depression's labor-related hardships.¹⁶⁵ But ILO officials made limited progress even on these contentious topics, for example by successfully advocating for the adoption of a new convention regulating the length of the work week.¹⁶⁶ Far more importantly, they preserved their expanded authority over ILO lawmaking and monitoring—no small feat in the face of a sharp downturn in the global economy and the soon-to-be fatal political challenges to its parent organization, the League of Nations.

D. Post-War Transitions and Subject Matter Expansions

The innovations described in the previous section enabled the ILO to create international labor standards that responded to changing workplace conditions and to the evolving demands of its tripartite membership. But these adaptive efforts also helped the organization to weather the cataclysmic changes that occurred during and after the Second World War. During the hostilities, the ILO decamped from its headquarters in Geneva, Switzerland to Montreal, Canada.¹⁶⁷ Lawmaking, treaty ratifications, and monitoring slowed to a crawl and the organization's membership shrank with the withdrawal of the Axis Powers and countries in their orbit.¹⁶⁸

As the war neared its end, attention shifted to the ILO's future. Aware that the League would not survive the conflict, ILO officials and worker organizations sought to position the organization to take the preeminent role in social and economic aspects of the post-war geopolitical order.¹⁶⁹ The Declaration of Philadelphia, adopted in May

165. See ALCOCK, *supra* note 2, at 99 (describing decline in ratifications); *id.* at 110–12 (outlining failure to adopt conventions concerning unemployment and social security).

166. See *id.* at 110 (discussing the Forty-Hour Week Convention, June 4, 1935, ILOLEX No. C47, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>); see also Cox, *General Theory of IO*, *supra* note 63, at 102 (stating that at “critical moments in [the ILO’s] history, its leadership has put forward bold programs” and citing the “anti-depression program” of Director General Harold Butler).

167. ALCOCK, *supra* note 2, at 160–61.

168. *Id.* at 151–70, 171 n.1 (discussing the ILO's activities during World War II); VALTICOS & VON POTOBSKY, *supra* note 3, at 33 (stating that ILO membership fell from sixty-two states in the 1930s to forty-eight states in the early 1940s).

169. See Edward Phelan, Acting Dir., Int'l Lab. Office, Address at the International Labour Conference (May 10, 1944), in INT'L LAB. OFFICE, “A NEW ERA”: THE PHILADELPHIA CONFERENCE

1944, provided the blueprint for a redefinition of the ILO's goals. In addition to lofty aspirational statements endorsing individual freedom, economic security, and poverty eradication, the Declaration set out an ambitious agenda of social and economic policy reforms.¹⁷⁰ The Declaration's drafters intended these statements to broaden the organization's mandate, and, in so doing, "to define the part the ILO should play in the new order of economic co-operation to be established by the United Nations."¹⁷¹

Securing a place in the new political order was no easy task. The ILO was "an embarrassing reminder of the League,"¹⁷² and the Soviet Union believed that its interests would be better served in other forums.¹⁷³ In the end, the ILO settled for autonomy rather than primacy. It entered into an agreement with the United Nations designating it as a specialized agency of that multilateral body, but not before overhauling the Constitution of 1919 to enshrine its expanded social and economic mandate. The new Constitution of 1946¹⁷⁴ incorporated the Declaration of Philadelphia as an Annex. But it also recognized the ILO's autonomy over its budget and membership (both problematic aspects of its relationship to the now defunct League) and augmented its lawmaking and monitoring functions.¹⁷⁵ With respect to the latter issue, the most significant change required states to report on the extent of their compliance with unratified ILO conventions and to indicate the impediments that prevented or delayed such treaties' future ratification.¹⁷⁶

AND THE FUTURE OF THE I.L.O. 132-45 (1944) (discussing the post-war future of the ILO); see also HAAS, *supra* note 13, at 152 (noting that, in response to "the very real challenge of a drastically changed international environment," the ILO Office increasingly "assumed the role of the leader and executive, the initiator and promoter of policy").

170. Int'l Lab. Org., Declaration Concerning the Aims and Purposes of the International Labour Organization (adopted May 10, 1944 in Philadelphia), *available at* <http://www.ilo.org/public/english/about/iloconst.htm#annex>. The specific policy goals included promoting full employment, raising living standards, recognizing the right of collective bargaining, protecting life and health in all occupations, and protecting equality of educational and vocational opportunity. *Id.*

171. ALCOCK, *supra* note 2, at 184.

172. *Id.* at 171.

173. Cox, *Limited Monarchy*, *supra* note 13, at 104 (describing the Soviet Union's preference "that labor interests be expressed directly through the new United Nations machinery"); VICTOR-YVES GHEBALI, THE INTERNATIONAL LABOUR ORGANIZATION: A CASE STUDY ON THE EVOLUTION OF U.N. SPECIALISED AGENCIES 104-07 (1989) (detailing Soviet hostility to the ILO).

174. Constitution of the International Labour Organization, as amended Oct. 9, 1946, 62 Stat. 3485, 15 U.N.T.S. 35 [hereinafter 1946 ILO Constitution].

175. HAAS, *supra* note 13, at 161-66; see also VALTICOS & VON POTOBOSKY, *supra* note 3, at 19, 46-47 (arguing that the Declaration of Philadelphia expanded the ILO's regulatory authority).

176. 1946 ILO Constitution, *supra* note 174, art. 19.5(e).

Taken together, the Declaration and the new constitution appeared to presage an influential role for the ILO. The organization quickly returned to a rapid pace of treaty-making, using the procedures that ILO officials had developed in the 1920s and 1930s.¹⁷⁷ But this lawmaking activity, and the monitoring functions that inevitably accompanied it, occurred in an environment that had changed radically from the one in which the ILO operated before the war. Three factors in particular shaped the ILO's activities during the post-war period: (1) an expanded and increasingly diverse group of member states and worker and employer representatives; (2) competition with other IOs; and (3) a prolonged period of economic prosperity. As I explain below, these three changes acted as catalysts that vastly expanded the ILO's subject matter mandate.

First, the number of ILO member states increased rapidly in the 1950s and 1960s, initially when the Soviet Union and other socialist nations joined or rejoined the organization and later as former colonies in Africa and Asia gained independence. With the admission of these new members, the ILO became a site of trenchant Cold War clashes between East and West (which took the form of challenges to the independence of worker delegations from socialist nations and reciprocal claims that those countries were violating forced labor standards) and decolonization battles between North and South (which were reflected in politically-motivated challenges to labor practices in South Africa, in former colonial powers, and in Israel).¹⁷⁸ As before the war, the Director General and the ILO Office continued to press for new initiatives in particular subject areas.¹⁷⁹ But these independent efforts by ILO officials now competed with new demands of governments and workers from developing countries, leading to "greater heterogeneity of ideologies and objectives among

177. See GERARD J. MANGONE, A SHORT HISTORY OF INTERNATIONAL ORGANIZATION 226 (1954) (describing post-war efforts to draft additional labor conventions).

178. See Cox, *Limited Monarchy*, *supra* note 13, at 105; GHEBALI, *supra* note 173, at 104-07. These politically motivated events were the catalyst of the temporary withdrawal of the United States from the ILO between 1977 and 1980. See IMBER, *supra* note 125, at 58 (analyzing Secretary of State Henry Kissinger's argument that the United States' withdrawal was precipitated by, *inter alia*, the ILO's "disregard for due process and increasing politicization").

179. See MORSE, *supra* note 2, at 45-76 (describing initiatives promoted by Director General between 1948 and 1968).

the membership.”¹⁸⁰ The result was a vast “proliferation of program demands.”¹⁸¹

Second, the ILO experienced new forms of competition from other international bodies, in particular from the human rights activities of the United Nations Economic and Social Council.¹⁸² In the late 1940s and 1950s, the ILO vied for policy dominance with this new rival by adopting human rights treaties on forced labor, freedom of association, and equality in employment.¹⁸³ The ILO Office also sought to influence human rights treaties drafted in the United Nations by providing expert analysis of their labor rights provisions.¹⁸⁴ Finally, the ILO created—contrary to the wishes of some UN human rights officials—a specialized monitoring body to protect the rights of trade unions.¹⁸⁵ This new Committee on Freedom of Association soon developed into a “major innovation” in ILO monitoring, reviewing numerous workers’ complaints against countries regardless of whether they had ratified ILO treaties protecting freedom of association.¹⁸⁶ As these examples illustrate, competition with other IOs spurred a marked expansion of ILO activities relating to human rights.

Third and finally, favorable economic circumstances helped to foment an expansion of the ILO’s competence. “[T]hirty glorious years” of post-war prosperity and growth in industrialized countries “encouraged governments and enterprises to show generosity” in

180. Cox, *Limited Monarchy*, *supra* note 13, at 105; *see also* Efrén Córdova, *Some Reflections on the Overproduction of International Labor Standards*, 14 COMP. LAB. L.J. 138, 144 (1993) (describing how worker groups “press for inclusion of standards specific to their sector in the International Labor Code”); HAAS, *supra* note 13, at 167, 242 (discussing demand for new labor standards in former colonial territories).

181. HAAS, *supra* note 13, at 171.

182. *See* Leary, *supra* note 122, at 587–88.

183. *See* HAAS, *supra* note 13, at 166–68; *see also* Fundamental ILO Conventions, available at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/> (listing dates of adoption of ILO human rights treaties).

184. *See* Philip Alston, *The United Nations’ Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT’L L. 79, 94 (1979); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462, 480–81 (2004).

185. *See* JOHN P. HUMPHREY, HUMAN RIGHTS & THE UNITED NATIONS 83–84 (1984) (discussing the UN’s desire for a joint UN-ILO commission to protect trade union rights); Leary, *supra* note 122, at 602–03 (discussing UN opposition to ILO Freedom of Association Committee).

186. Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457, 481 (2004). The authority to review the conduct of non-ratifying states derived from the ILO Constitution, which protects freedom of association. “[It] has therefore been held that this principle should be observed by all [member states] by virtue of their membership [in] the Organization alone.” VALTICOS & VON POTOBKY, *supra* note 3, at 295.

response to worker demands.¹⁸⁷ This generosity enabled the organization to make good on the promises of the Declaration of Philadelphia by extending ILO treaty-making into "broad subjects of employment and social policies."¹⁸⁸ During this period, the organization adopted conventions and recommendations on subjects as diverse as welfare, workers' education and training, rural development, colonial working conditions, and workers' health and medical benefits.¹⁸⁹

E. Institutional Stagnation

The previous section reviewed three factors—a larger, more diverse and more assertive membership, competition with the newly-created United Nations, and a prolonged period of global economic prosperity—that acted as catalysts for expanding the ILO's activities. As before the war, the organization continued to draft detailed regulations for specific industries and workplace problems. But it also broadened its subject matter focus to include new initiatives in human rights, social policy, and economic development.

At first, ILO officials successfully managed the more wide-ranging lawmaking and monitoring activities that these changes precipitated. Over time, however, the expansion of the ILO's functions exposed deeper institutional problems. In particular, it revealed that the innovations relating to universality, flexibility, and centralization that ILO officials had introduced during the organization's first two decades were ill-suited to a more diverse and more politicized membership and to ambitious forays into controversial subjects at the core of national sovereignty. To the contrary, these pre-war innovations—when applied in a markedly changed post-war environment—created dysfunctional incentives and pathological behaviors that impeded the organization's effectiveness.

The changing composition and interests of workers' organizations was an important factor in precipitating these negative changes. As described above, national trade unions provided strong support for the social justice mission espoused by the first generation of ILO officials.¹⁹⁰ As a member of the ILO and of domestic interests groups, organized labor provided a key link between the organization and the domestic politics of its member states. Trade unions lobbied

187. Maupain, *Reflections on Myanmar*, *supra* note 145, at 93 n.25.

188. Córdova, *supra* note 180, at 143.

189. *Id.* at 142–43.

190. See *supra* notes 123–124 and accompanying text (discussing support of worker groups for ILO Office during the organization's first two decades).

governments to ratify ILO conventions, to implement labor protections in national laws and collective bargaining agreements, and to support (or at least acquiesce in) the expansion of ILO officials' authority. "To be effective instruments of pressure within countries," however, "trade unions would have to be strong and independent of state control or domination."¹⁹¹

Maintaining the independence of organized labor presented little problem when the ILO's members were nearly all from industrialized democracies. But it became increasingly difficult to maintain with the inclusion of labor delegates from socialist and developing countries. Challenges to the accreditation of "pseudo-delegates" of worker organizations from the Soviet Union and Eastern Europe have been well documented,¹⁹² as have ILO officials' efforts to strengthen nascent trade unions in newly independent (and democratically shaky) countries in Africa, Asia, and Latin America.¹⁹³ Yet as national labor groups diversified, the workers' representatives at the ILO remained in "the hands of trade union functionaries who head[ed] old, entrenched organizations representing, overwhelmingly, democratic and industrialized national settings."¹⁹⁴ The result was a disconnect between labor groups operating internationally and those active in domestic politics, a divide that constricted a crucial pipeline of support that ILO officials had cultivated during the organization's earlier decades.

1. Perverse Lawmaking Incentives

Beginning in the late 1940s, the ILO churned out a steady stream of new conventions using the lawmaking procedures it had adopted before the war.¹⁹⁵ As the organization's legislative output increased, however, ILO officials noticed a disturbing and increasingly common trend: many of these new treaties were sparsely ratified.¹⁹⁶

191. Cox, *Limited Monarchy*, *supra* note 13, at 122.

192. Maupain, *Reflections on Myanmar*, *supra* note 145, at 90.

193. HAAS, *supra* note 13, at 192.

194. *Id.* at 201; *see also id.* at 199–202 (discussing the dominance that the International Confederation of Free Trade Unions exercised over other trade union groups in the ILO during the 1950s and 1960s).

195. *See* Valticos, *supra* note 146, at 401 (stating that ILO adopted sixty-three conventions and sixty-eight recommendations between 1944 and 1969).

196. *See* Boockmann, *supra* note 10, at 292; Cooney, *supra* note 9, at 376. A 2000 ILO study found that ratification rates for different categories of conventions—such as labor administration, working conditions, social security, and safety and health—ranged between approximately 15% and 35% of ILO member states. Only "fundamental conventions," including human rights treaties, had significantly higher ratification rates—around 68% of member states. ILO, *Statistics on Ratification*, *supra* note 10, graph 7.

The ILO's tripartite structure might predictably produce this result where the membership adopted a treaty with strong backing from employers and workers, but only limited support from governments.¹⁹⁷ But the ILO adopted nearly all post-war conventions unanimously or with supermajority governmental support.¹⁹⁸ In addition, the Constitution of 1946 obligated member states to convey newly-adopted treaties to their respective parliaments for approval and to provide compliance information for treaties that domestic lawmakers ultimately chose to reject.¹⁹⁹ These new obligations should have increased the pressure on ILO members to ratify the treaties.

A rational choice framework that examines the conduct of nation states alone cannot account for this paucity of treaty ratifications. But by disaggregating states into their governmental components, and by considering the independent interests of IO officials, the perverse incentives for ILO treaty-making without treaty implementation are revealed.

The different identity of representatives voting for treaties in the ILO and those voting to make those treaties binding in domestic law provides a partial explanation for the sparse number of ratifications. In the ILO, workers and employers have direct participation rights; in national legislatures, they have only indirect influence and must compete with other interest groups for legislators' attentions. This distinction was especially prevalent in socialist and developing countries during the 1960s and 1970s, many of which were run by centralized governments that tightly controlled both domestic labor groups and the treaty ratification process. Seen from this perspective, the ILO Office's desire to expand the number of member states exacerbated the incentive for the ILO to adopt treaties that garnered only meager ratifications.

The different identities of international and domestic lawmakers cannot, however, explain why government delegates supported treaties that they could readily anticipate would be rejected at home. It was the structure of ILO lawmaking that permitted these delegates to engage in a reverse two-level game,²⁰⁰ voting in favor of

197. Recall that each state nominates two government delegates, one employer delegate, and one worker delegate to the ILO Conference, and that a two-thirds vote is required to adopt a treaty. See *supra* note 3.

198. See TORSTEN LANDELIUS, *WORKERS, EMPLOYERS AND GOVERNMENTS: A COMPARATIVE STUDY OF DELEGATIONS AND GROUPS AT THE INTERNATIONAL LABOUR CONFERENCE, 1919-1964*, at 66-91 (1965).

199. 1946 ILO Constitution, *supra* note 174, arts. 19.5-6.

200. Cf. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988) (arguing that international politics shapes how national governments pursue state interests and how those interests are in turn defined through domestic politics).

treaties that their national parliaments were likely to reject (a rejection made more likely by the ILO's practice of barring unilateral reservations).²⁰¹ Aware that the decision to bind their respective countries would take place at a later date and in a different forum, government delegates could support the demands of other delegates who favored the adoption of new conventions. In one version of this game, government delegates traded their current votes in exchange for promises of support for future initiatives they themselves favored. In another, "logics of appropriateness" rather than "logics of consequences"²⁰² diminished resistance to new treaty-making and allowed delegates "to lend their ears to arguments based solely on principles, rationality and social justice."²⁰³

A little-known provision of the amended ILO Constitution also provided an incentive for ILO officials to encourage the adoption of treaties that had little hope of widespread adherence. This provision required member states to disclose the extent to which they had complied with unratified conventions and recommendations and to identify the obstacles to future ratification.²⁰⁴ Anecdotal evidence—widely cited and praised in ILO studies of the period—indicated that these reports had led many governments to modify their national laws even when they had not ratified the treaties nor endorsed the corresponding recommendations.²⁰⁵ As a result, the adoption of conventions with only dim prospects of ratification would nevertheless enhance the authority of the ILO Office by providing an additional mechanism for ILO officials to influence state behavior.²⁰⁶

201. See *supra* Part III.C.2.

202. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 5–6 (1999).

203. Córdova, *supra* note 180, at 161.

204. 1946 ILO Constitution, *supra* note 174, art. 19.5(e). Other scholars, employing public choice theory, have argued that international bureaucrats seek to expand their authority and discretion through the creation or interpretation of international rules. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 706, 718–19 (1996–97). As noted in the text, however, the ILO Constitution contains unique features that exacerbate these public choice concerns.

205. E.A. Landy, *The Influence of International Labour Standards: Possibilities and Performance*, 101 INT'L LAB. REV. 555, 563–64 (1970) [hereinafter Landy, *Influence of Standards*]; see INT'L LAB. OFFICE, IMPACT OF CONVENTIONS, *supra* note 141, at 25–26 n.5 (citing Landy article with approval).

206. See Córdova, *supra* note 180, at 161–62; Ignacio A. Donoso Rubio, *Economic Limits on International Regulation: A Case Study of ILO Standard-Setting*, 24 QUEENS L.J. 189, 235 (1998); see also INT'L LAB. OFFICE, IMPACT OF CONVENTIONS, *supra* note 141, at 25–26 (stating that reports on unratified conventions "have a dynamic effect in occasioning a re-examination by governments, employers, and workers of the adequacy of national law and practice and consideration by the ILO of the need for reinforcing its own activities") (emphasis added).

2. Normative Incoherence

Putting to one side the perverse incentives that favored the adoption of treaties that were unlikely to be widely ratified, post-war ILO lawmaking became increasingly convoluted and normatively incoherent.

The treaties that comprised the rapidly expanding body of international labor law were formally equal in status but highly variable in content. A handful of treaties protected fundamental rights, but most concerned narrow, technical subjects.²⁰⁷ Yet all conventions were subject to identical monitoring requirements. This absence of hierarchy created an uncoordinated “cafeteria approach” in which states were free to “pick and choose” which treaties to ratify without regard to their normative value.²⁰⁸ Grouping treaties together in this haphazard way also cheapened the value of those few treaties that ILO officials viewed as fundamental. As one commentator pointedly remarked, “Such well-known and highly praised instruments as those dealing with hours of work, abolition of forced labor, freedom of association, and equality of opportunity and treatment lose prominence when they are lumped in the same category with those dealing with the certification of ships’ cooks or paid educational leave.”²⁰⁹

A second coherence problem arose from the cumbersome rules for revising treaties. As described above, the absence of amendment procedures in the ILO Constitution required states to adopt “revising conventions” to update international labor rules.²¹⁰ These new conventions supplemented, but did not replace, older treaties addressing the same subject. Over time, families of closely related treaties on the same topic came to occupy an increasingly large component of international labor law.²¹¹ Many of the original conventions in these families were outdated; some treaties even conflicted with each other. But because the ILO had no power to abrogate the earlier treaties, they remained in force for some member

207. See HAAS, *supra* note 13, at 247 (distinguishing between general and specific conventions).

208. Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 EUR. J. INT’L L. 439, 444 (2005) [hereinafter Maupain, *Revitalization Not Retreat*].

209. Córdova, *supra* note 180, at 151 (references to individual treaty numbers omitted).

210. See *supra* Part III.C.2.

211. Nicolas Valticos, *The Future Prospects for International Labour Standards*, 118 INT’L LAB. REV. 679, 685 (1979) (stating that, as of 1979, 40 of 150 ILO conventions were revisions of earlier conventions); Valticos, *supra* note 146, at 404 (stating that, as of 1969, 25 of 130 ILO conventions were revisions of earlier conventions).

states. This increased reporting and monitoring burdens for states and ILO officials and freighted the corpus of international labor rules with a sizable number of treaties that were nothing more than dead weight.

A third and final coherence difficulty concerned the degree to which conventions accommodated national differences through flexibility clauses. Some governments and commentators argued that pre-war and early post-war treaties were overly rigid and detailed, making them relevant only to industrialized countries.²¹² The ILO Office responded to these criticisms by including more flexibility provisions in many (but not all) new conventions. The result was that more recent treaties were often weaker than their predecessors.²¹³ Yet many of the states that had argued most vociferously for greater flexibility rarely invoked these clauses when ratifying the new treaties.²¹⁴ This raised the question of just how seriously these governments were taking their treaty commitments, an issue I discuss in the next section.

3. Inadequate Monitoring Standards

Notwithstanding the perverse incentives and incoherence problems described above, many ILO member states ratified at least a few of the post-war conventions.²¹⁵ For these treaties, detailed empirical studies conducted during the 1960s concluded that the ILO had a compliance record “of which any international agency can be intensely proud.”²¹⁶ These statements suggest that the monitoring mechanisms developed by the first generation of ILO officials were highly effective at influencing state behavior.

A more detailed analysis belies these sanguine views, however. In particular, the standards that ILO officials used to assess member states’ actions were incomplete or inaccurate in several important respects. In addition, the findings generated in response to these

212. See Cooney, *supra* note 9, at 373 (commenting that ILO conventions and recommendations set targets “that only the richest countries could realistically achieve”); Rubio, *supra* note 206, at 211 (discussing inflexibility of ILO conventions).

213. See HAAS, *supra* note 13, at 246 (“Conventions found to be too demanding are often revised downward by later conferences; upward revisions occur less often.”).

214. Servais, *supra* note 149, at 196–97.

215. Although ratification rates remained low for many treaties, the total number of ratifications rose during the half-century following World War II. ILO, *Statistics on Ratification*, *supra* note 10, at 2 & graph 1 (total ratifications of all ILO conventions increased from 908 in 1944, to 3527 in 1969, to 6255 in 1994).

216. HAAS, *supra* note 13, at 258; see also LANDY, THIRTY YEARS, *supra* note 13, at 198 (reaching a similar conclusion).

assessments appeared in a highly stylized form that was difficult for those outside the ILO to comprehend and that limited their ability to influence state behavior.

The most simplistic evaluation measure was a simple head count of treaty ratifications. This metric, however, ignored the fact that some ratifications were “empty” or “bogus,” acts in which a country “accept[ed] standards for which there was little or no basis in national law and practice.”²¹⁷ The ratification of maritime labor conventions by landlocked and navy-less Luxembourg was a widely cited—and widely derided—example.²¹⁸ Empty ratifications of this sort were useless, but they had few negative consequences. Far more serious were cases in which “ratification was undertaken lightly without seriously considering the implications for the economy.” Governments in this situation sometimes “def[ied] the authority of the Organization” by failing to submit reports or by refraining from enacting the legislation necessary to implement the treaties.²¹⁹

Confusion over how to evaluate state behavior made it difficult for ILO officials to determine the extent of this recalcitrance. The post-war growth in the number of treaties, of member states, and of reporting obligations increased the burdens on the Committee of Experts—the entity charged with reviewing state reports on ratified labor conventions.²²⁰ One response to these increased pressures was to analyze only the implementation of conventions (whether states had adopted formal legislation to give effect to the treaties) rather than examining the more challenging and time-consuming issues of compliance (whether governments actually enforced that legislation or otherwise adhered to the treaty) or effectiveness (whether the treaty

217. LANDY, THIRTY YEARS, *supra* note 13, at 83–84; *see also* Córdova, *supra* note 180, at 155–56 (discussing rise of “hasty and spurious forms of ratification”).

218. *See* LANDY, THIRTY YEARS, *supra* note 13, at 84–86; *see also* Córdova, *supra* note 180, at 156 (listing Luxembourg’s ratification of maritime conventions as an example of a bogus ratification); Strang & Chang, *supra* note 3, at 243 & n.36 (characterizing as “implausible” Luxembourg’s ability to implement maritime conventions).

219. HAAS, *supra* note 13, at 268.

220. *See supra* note 158 and accompanying text. The continuous output of conventions and recommendations vastly enlarged the Committee’s workload. *See* HAAS, *supra* note 13, at 253 (discussing Committee’s roles and functions); *see also id.* at 257 (stating that Committee of Experts reviewed government reports concerning more than 3,200 ratifications between 1927 and 1963). To address the backlog, the ILO increased the interval between the submission of reports from annually to once every two years, and then once every four years for most conventions. *See* Samson, *supra* note 155, at 570. In another time- and cost-saving measure, the Committee began to publish only its most important “observations;” its remaining comments were simply forwarded to governments for their review. *See id.*

actually altered the behavior of governments and provided greater legal protections for workers).²²¹

The focus on implementation, however, provided an incomplete picture of member state behavior. For example, a comprehensive empirical study conducted in the early 1960s found that nearly 75% of ILO conventions were fully implemented at the time states ratified them.²²² This statistic is impressive, but should not be confused with a finding that the conventions actually improved domestic labor standards. In some instances, treaty standards were so vague that ratifying states could easily enact a “law that conformed fully to the criteria set forth in the convention but that was at the same time operationally meaningless.”²²³ Conventions of this sort had high implementation rates but produced little improvement in national labor practices. In other instances, governments ratified only conventions whose standards “their domestic politics and policies ha[d] already met.”²²⁴ For these treaties, compliance was perfect, but effectiveness was negligible, since the treaties merely “reflect[ed] previously attained labor conditions.”²²⁵

ILO officials eventually recognized the need to review compliance and effectiveness as well as implementation.²²⁶ Yet even as the organization attempted to improve its assessment measures, preexisting modes of ILO monitoring made it difficult to evaluate state behavior accurately and objectively.

As noted above, ILO member states had been wary of creating a Committee of Experts in the 1920s to review their compliance

221. See Cooney, *supra* note 9, at 377 (“[W]here a convention is . . . ratified, the [ILO] monitoring system considers whether or not a country’s legal system complies with that convention, and essentially stops there.”); WALTER GALENSON, *THE INTERNATIONAL LABOR ORGANIZATION: AN AMERICAN VIEW* 214–15 (1981) (noting resistance of ILO officials to “prob[ing] more deeply into the actual implementation of legislation and its effect on social and economic conditions” in ratifying states); LANDY, *THIRTY YEARS*, *supra* note 13, at 57 (noting that the “primary emphasis” of supervision is on “the achievement of legislative conformity” with ILO conventions).

222. Strang & Chang, *supra* note 3, at 242 (reporting that Landy’s study of ILO monitoring between 1927 and 1963 found 73% full implementation); see LANDY, *THIRTY YEARS*, *supra* note 13, at 66 (reporting that, in 72% of ratifications during this period, the Committee of Experts made no “observations” on states’ failure to comply).

223. GALENSON, *supra* note 221, at 210 (applying this example to the ILO convention requiring the establishment of minimum wages “for all wage earners whose terms of employment are such that coverage would be appropriate”) (internal quotations omitted).

224. Flanagan, *supra* note 11, at 35.

225. *Id.* at 29. This argument assumes that states did not improve their national labor practices in anticipation of subsequently ratifying the ILO conventions.

226. Cf. Maupain, *Revitalization Not Retreat*, *supra* note 208, at 442 (arguing that ILO initiatives should be measured by whether “they make a verifiable contribution to the advancement of the Organization’s objectives in the real world”).

records. To reduce potential resistance, the Committee couched its comments to governments in the form of “observations” rather than “criticisms.”²²⁷ Over time, the observations evolved into a highly stylized and understated language. Thus, for example, when the Committee identified a state’s behavior “‘with concern’ or ‘with regret’, those phrases [were] meant to be understood as a serious criticism of a government’s failure to implement a convention.”²²⁸

The Committee’s circumspect approach was appropriate for an early twentieth century international monitoring body seeking to overcome resistance from governments. But it was a highly inefficient way for a more mature IO to monitor treaty compliance.²²⁹ The Committee’s exquisitely enigmatic condemnations of states may have been intelligible to old ILO hands, but they were hardly comprehensible to those outside the organization.²³⁰

The different compositions of worker representatives in the ILO and in domestic labor markets exacerbated this lack of transparency.²³¹ The disconnect between these two groups—especially in socialist and developing countries—limited the ability of ILO officials to cultivate a constituency that could translate the Committee’s opaque criticisms into politically salient language and use them to pressure governments to improve their domestic labor practices.²³² The result was that the ILO’s monitoring system, although older and more developed than those of most United Nations

227. HAAS, *supra* note 13, at 253.

228. Leary, *supra* note 122, at 598; *see also* Oliver Liang, Informational Dimensions of the ILO’s Committee of Experts 3 (2004) (unpublished manuscript, on file with author) (describing the “esoteric codex of linguistic signifiers” used by the Committee of Experts to indicate degrees “of approval or disapproval”). The Committee diffused states’ criticism in another way: by segregating the sections of its reports containing comments to governments from those describing treaty ratifications and “cases of progress” (the Committee’s verbal notation for improvements in response to its past criticisms). Weisband, *supra* note 8, at 651. This separation made it extremely difficult to compare domestic labor standards between member states and within a single state over time. *See* Liang, *supra*, at 5 (stating that the reports of the Committee of Experts contain “informational limits” that make them “a difficult source for quantitative indicators of facts on the ground”).

229. *See* Weisband, *supra* note 8, at 651 (noting that the working methods of the Committee of Experts had the paradoxical effect of undermining the “logic of the ILO monitoring regime”).

230. Liang, *supra* note 228, at 3 (“The ILO publishes a maximum of 8,000 printed copies of the [Committee of Expert’s] report, circulated mostly in a closed community of cognoscenti who [are] familiar with the Committee’s purpose and language.”).

231. *See supra* text accompanying notes 190–194 (describing these differences).

232. Conversely, ILO conventions had their greatest impact in “pluralist democracies where labor [was] politically organized but not politically dominant.” Strang & Chang, *supra* note 3, at 254. These were countries in which the interests of domestic labor groups were aligned with the interests of organized labor unions that held the reins of influence in the ILO. *See* HAAS, *supra* note 13, at 448–49.

treaty systems, attracted little interest from the “most dynamic social movements, such as human rights and consumer organizations.”²³³

4. Theoretical Assessment

The post-war period provides additional evidence to evaluate which theory of IO change best explains the ILO's evolution. ILO officials responded to the shock of the Second World War by successfully pressing for a marked expansion of their pre-war mandate. Although the Office failed in its bid to achieve preeminence for the ILO in social and economic affairs, it succeeded in expanding the organization's autonomy and subject matter mandate and in locking in those expansions by amending the ILO Constitution.

This outcome accords with the predictions of some rational choice scholars, who assert that IO change is best explained by a punctuated equilibrium model in which institutional evolution occurs in response to infrequent but intense exogenous forces.²³⁴ It even more closely tracks the claims of Barnett and Finnemore, who share rational choice's focus on exogenous shocks but who also argue (contrary to rational choice scholars) that IO officials capitalize on these “moments of rapid global change” to “facilitate their own expansion and intervention in the affairs of states and nonstate actors.”²³⁵ Conversely, these events cast doubt on neofunctionalism's prediction that the most consequential IO change is incremental, continuous, and endogenously driven.

Having successfully managed the post-war transition, however, ILO officials faced a different challenge: how to apply existing lawmaking and monitoring functions to an expanded policy space, one in which their core constituency—workers' organizations—were no longer as independent or as influential in domestic politics. The improvements in lawmaking and monitoring that ILO officials had achieved before the war—when the membership was small and homogeneous and the ILO was viewed as a paragon for other IOs—were ill suited to an organization whose members were more numerous and diverse and which was forced to compete for predominance with other IOs.

233. Virginia A. Leary, “Form Follows Function”: *Formulations of International Labor Standards—Treaties, Codes, Soft Law, Trade Agreements*, in INTERNATIONAL LABOR STANDARDS, *supra* note 11, at 179, 187.

234. See Koremenos et al., *supra* note 44, at 766–67 (discussing how to account for evolution of institutions within a rational design framework); see also Streeck & Thelen, *supra* note 46, at 7–8 (reviewing literature).

235. BARNETT & FINNEMORE, *supra* note 50, at 33, 162.

In this new environment, the ILO Office's campaign for universality, flexibility, and centralization generated inefficient and dysfunctional behaviors. A larger policy domain made it more difficult to agree on prioritizing the problems to be regulated, resulting in normative incoherence, inconsistent use of flexibility provisions, and incentives for states to adopt treaties but not ratify them. And with more members, more treaties, and more diverse standards, centralized monitoring of state behavior became increasingly difficult.

These problematic outcomes resonate with historical institutionalist accounts of organizational change that emphasize path dependence. As the use of particular working methods to realize specific goals becomes a habit, it is increasingly difficult to change either the goals or the methods used to achieve them. Instead of responding to new challenges with fresh approaches, IOs follow preexisting rules that channel responses in familiar, time-worn directions, ultimately producing dysfunctional outcomes.²³⁶ In addition, competition with other organizations does not necessarily improve performance, a point that historical institutionalist scholars also emphasize.²³⁷ To the contrary, competition can lead organizations to engage in behaviors that are inefficient or undesirable from a functional perspective.²³⁸

IV. GLOBALIZATION AND THE RETURN OF INNOVATION TO THE ILO

The history of the ILO analyzed in the preceding sections of this Article helps to explain why many scholars and commentators perceive the ILO to be ineffective and weak. But this historical study also reveals the now-forgotten period of innovation by the first generation of ILO officials, who worked independently of states to improve the effectiveness of the organization's lawmaking and monitoring functions. From a theoretical perspective, the ILO's history reveals that both exogenous forces (such as shifting state demands and environmental changes) and endogenous forces (such as the autonomous interests and working methods of officials and staff) are important variables for explaining how IOs change during different time periods. Theories of institutional change that consider only one sort of change or another would not have predicted the evolution of the world's oldest extant multilateral organization.

236. See PIERSON, *supra* note 37, at 34–44.

237. *Id.* at 126–30.

238. See BARNETT & FINNEMORE, *supra* note 50, at 37.

This focus on multiple sources of change raises an important and unresolved question: can IOs learn from past mistakes?²³⁹ Stated another way, if the combined effect of exogenous and endogenous forces produces inefficient procedures or policy failures, can IOs reverse course and correct these errors? If so, when and how do they diverge from path-dependent practices to redefine their goals and improve their performance?

I address these questions in the sections that follow. I analyze the current wave of innovation at the ILO—a period of institutional evolution and learning from past errors that began in 1994 following nearly half a century of stagnation. I begin by identifying the catalysts for institutional change and then analyze the major reforms to ILO lawmaking and monitoring. I conclude with a discussion of how ILO officials are cultivating support from non-governmental organizations (“NGOs”) beyond the organization’s core constituency of organized labor groups and national trade unions.

A. *The Exogenous Catalysts for Change*

By the mid-1990s, the ILO’s geopolitical and economic environment had undergone another major transformation. The end of the Cold War reduced East-West divisions within the ILO, and the triumph of market-based economies that followed led both states and business interests to emphasize policies that promoted deregulation, competition, and free trade.²⁴⁰

Linked to these developments was a marked decline in the influence of organized labor. As described above, the ILO Constitution and the Declaration of Philadelphia adopted a corporatist model of social regulation, one in which workers and employers established formal associations to negotiate with each other and with governments. For the first half-century after its founding, the ILO’s tripartite membership rules mirrored the corporatist structure found in most of its member states, in particular in industrialized countries.²⁴¹ During this “heyday of corporatism,” ILO worker and employer delegates could “legitimately claim to speak for a substantial

239. Scholars who analyze domestic and international institutions disagree on the extent to which learning is a factor in producing change. Compare PIERSON, *supra* note 37, at 38 (stating that, in politics, “learning is very difficult [and] cannot be assumed to occur”), with BARNETT & FINNEMORE, *supra* note 50, at 160–61 (positing that “learning from failure” results in expansions of IO activities).

240. See HECTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* 60–61 (1996); Alston, *supra* note 186, at 463–64.

241. Cox, *Labor and Hegemony*, *supra* note 4, at 409–10.

portion of the 'workforce' or for 'employers,' as those terms were then understood."²⁴²

By the early 1990s, however, corporatism was in serious decline. Industrial workplaces structured around unionized, full-time, salaried employees with benefits and pensions were no longer the norm, even in industrialized democracies.²⁴³ Informal, non-unionized, part-time, and self-employed workers (an increasing percentage of them women) were far more prevalent. And the eroding divisions between home and work and between formerly segmented national labor markets were engendering a global workforce that was both less organized and more vulnerable.²⁴⁴

These shifts raised fundamental questions about the ILO's mission and the purpose of the labor standards it produces. With respect to membership, the breakdown of corporatism challenged the legitimacy of the ILO's tripartite structure and the ability of "delegates drawn from trade union federations [to] give an effective institutional voice to the majority of the [non-unionized] workforce in most countries."²⁴⁵ The post-Cold War emphasis on deregulation and competition also created the risk that member states would view worker protections as a hindrance to economic development, triggering anew the race to the bottom that the ILO's founders had feared.²⁴⁶

Following in the agenda-setting footsteps of his predecessors, Director General Michel Hansenne used the occasion of the ILO's seventy-fifth anniversary in 1994 to emphasize the paradigm-shifting nature of these events and the need to reshape the organization's future. In a report titled *Defending Values, Promoting Change: Social Justice in a Global Economy*,²⁴⁷ the Director General considered how to maintain the ILO's relevance in the face of these "enormous" and "unprecedented" challenges.²⁴⁸ In striking contrast to earlier shifts in the organization's environment, however, the Director General did not

242. Cooney, *supra* note 9, at 370.

243. *See id.* at 370–71. Indeed, as early as the 1970s, official ILO reports indicated that workers covered by collective bargaining agreements comprised less than a tenth of the world's work force. *See Cox, Labor and Hegemony, supra* note 4, at 411.

244. *See Cooney, supra* note 9, at 365–66; Christine Haight Farley, *Men May Work from Sun to Sun, But Women's Work is Never Done: International Law and the Regulation of Women's Work at Night*, 4 CIRCLES: BUFF. WOMEN'S J.L. & SOC. POL'Y 44, 46–48 (1996).

245. Cooney, *supra* note 9, at 371.

246. *See supra* Part III.A (discussing the rational design of international labor standards).

247. INT'L LAB. OFFICE, REPORT OF THE DIRECTOR GENERAL TO THE 81ST SESSION OF THE INTERNATIONAL LABOUR CONFERENCE, DEFENDING VALUES, PROMOTING CHANGE: SOCIAL JUSTICE IN A GLOBAL ECONOMY—AN AGENDA FOR THE ILO (1994).

248. *Id.* at 29.

seek to expand the ILO's subject matter mandate. To the contrary, he stressed the dangers of "trying to do too much, setting ourselves a course of action out of all proportion with the resources and skills at our disposal."²⁴⁹

In addition to defining the new challenges facing the organization, the report candidly admitted that the ILO's past problems were threatening the universality, flexibility, and centralization goals that had animated the organization since its founding. It highlighted the declining ratification rate for ILO treaties and the "growing discrepancy between the attitude of certain governments at the time a [treaty] is adopted . . . and the stance they take when the same instrument comes up for ratification."²⁵⁰ The report also indicated that a larger and more diverse membership had made the balance between universal and flexible labor standards exceptionally difficult to achieve. And it pointedly stated that the ILO had misdirected its past lawmaking efforts, producing a surfeit of disjointed conventions and recommendations that were unduly stringent or largely irrelevant to the problems of the late 20th century workplace.²⁵¹

B. Revising the Structure and Function of International Labor Standards

Defending Values, Promoting Change set out a range of proposals to address these deficiencies.²⁵² These suggestions set the tone for discussions among governments, workers, and employers over how to restructure ILO lawmaking and monitoring. The membership, assisted by the ILO Office, quickly adopted a series of major reforms that included: (1) a campaign to ratify a core group of labor rights treaties; (2) a declaration on fundamental labor rights applicable to all member nations; (3) an unprecedented use of the ILO's sanctioning authority; (4) the discarding of outdated labor standards; and (5) measures to reduce the pace and improve the quality of ILO lawmaking. I analyze each of these reforms below, emphasizing how ILO officials learned both from their past mistakes and from the successful practices of other IOs to remedy the perverse incentives,

249. *Id.* at 26.

250. *Id.* at 43–44.

251. *Id.* at 44–45.

252. See Alston, *supra* note 186, at 464–65 (reviewing Director General's proposals).

normative incoherence, and inadequate monitoring problems of earlier years by narrowing and refocusing the organization's authority.²⁵³

1. The Ratification Campaign for Fundamental Labor Conventions

One of the ILO membership's first tasks was to create a hierarchy of international labor standards with a small number of conventions at its apex. Building on the references to human rights in the Director General's report, attention quickly coalesced around eight labor rights treaties. These conventions were labeled as "fundamental" to denote their privileged place in the new normative order.²⁵⁴ In 1995, the Director General launched an aggressive campaign to promote universal ratification of these treaties by all ILO members. In each subsequent year, the Director General has published a report on the progress made toward this goal and has urged states that have not ratified all of the fundamental conventions to do so or to identify specific obstacles to doing so.²⁵⁵

The ILO Office has judged the ratification campaign to be "singularly successful."²⁵⁶ As of November 2005, the campaign had generated 468 new ratifications. Of the ILO's 178 member states, 116 have now ratified all eight fundamental conventions. All together, the Office has received 88% of the total possible ratifications for these

253. For a comprehensive review of all of the lawmaking and monitoring reforms adopted during the last decade, see Int'l Lab. Office, Comm. on Legal Issues and Int'l Lab. Standards, *Improvements in the Standards-Related Activities of the ILO: A Progress Report*, GB.292/LILS/7 at 1 (Mar. 2005), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/lils-7.pdf> [hereinafter Int'l Lab. Office, *2005 Progress Report*].

254. The eight fundamental conventions are: the Freedom of Association and Protection of the Right to Organize Convention, 1948, July 9, 1948, ILOLEX No. C87, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>; Right to Organize and Collective Bargaining Convention, 1949, July 1, 1949, ILOLEX No. C98, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>; the Forced Labour Convention, 1930, June 28, 1930, ILOLEX No. C29, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>; the Abolition of Forced Labour Convention, 1957, June 25, 1957, ILOLEX No. C105, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105>; the Equal Remuneration Convention, 1951, June 29, 1951, ILOLEX No. C100, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100>; the Discrimination (Employment and Occupation) Convention, 1958, June 25, 1958, ILOLEX No. C111, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>; the Minimum Age Convention, 1973, June 26, 1973, ILOLEX No. C138, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>; and the Worst Forms of Child Labour Convention, 1999, June 17, 1999, ILOLEX No. C182, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

255. Int'l Lab. Office, Comm. on Legal Issues and Int'l Lab. Standards, *Ratification and Promotion of Fundamental ILO Conventions*, GB.294/LILS/5 at 1 (Nov. 2005), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/lils-5.pdf> [hereinafter Int'l Lab. Office, *Promotion of Fundamental Conventions*].

256. Int'l Lab. Office, *2005 Progress Report*, *supra* note 253, at 1.

eight treaties.²⁵⁷ These statistics reveal that the ratification campaign has made substantial progress toward achieving the ILO's long-held objective of universality. But it has done so by narrowing the organization's focus to a core group of treaties that have the most compelling normative claim to adherence by the entire ILO membership.

2. The Declaration on Fundamental Principles and Rights at Work

The ratification campaign seeks to achieve the ILO's goal of universality by accelerating the traditional international law practice of voluntary treaty ratifications. Yet even as the campaign gathered steam in the mid-1990s, ILO officials and workers' representatives recognized the need for a more ambitious approach—a mechanism to apply fundamental labor standards to all ILO member states regardless of whether they had ratified the treaties protecting those standards.

To achieve this result, the ILO took a page from the book of the newly created World Trade Organization (“WTO”). The agreement establishing the WTO was a “single undertaking,” a grand bargain that all states were required to accept as a condition of membership.²⁵⁸ Recognizing the advantages of this global package deal and the threat of trade sanctions that held it together, governments, scholars, and activists began to debate whether to incorporate new subjects into the WTO, including labor rights.²⁵⁹

The issue came to a head at a 1996 WTO ministerial meeting. The trade ministers acknowledged the relationship between free trade and labor, but they rejected calls to enforce labor standards with WTO sanctions. Instead, the ministers “propel[led] the issue back into the ILO's court by reasserting . . . the importance of the core rights dimension of globalization and the leading role of the ILO in managing that issue.”²⁶⁰ This acted as a catalyst for the organization to return to first constitutional principles and adopt a new approach—

257. See Int'l Lab. Office, *Promotion of Fundamental Conventions*, *supra* note 255, at 1–2.

258. See Steinberg, *supra* note 40, at 359–67.

259. See Alston, *supra* note 186, at 466, 471, 480; Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 134–35 (1999).

260. Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 421 (2005) [hereinafter Langille, *Core Labour Rights*].

the 1998 Declaration on Fundamental Principles and Rights at Work.²⁶¹

The Declaration is a succinct restatement of the four core labor rights—freedom of association, the elimination of forced labor, the abolition of child labor, and non-discrimination in employment—protected in the eight fundamental conventions. It requires member states “to respect, to promote and to realize, in good faith[,]” the “principles concerning the[se] fundamental rights.”²⁶² Significantly, these obligations emanate from the ILO Constitution itself, in particular the clause that requires states to report on unratified conventions.²⁶³ The Declaration thus applies to all ILO members without regard to the treaties they have adopted or their level of economic development. By anchoring the Declaration in “the very fact of membership in the Organization,”²⁶⁴ ILO officials had found an ingenious way to mimic the WTO’s single undertaking approach using the ILO’s existing constitutional structure.

In addition to its normative commitments, the Declaration creates a new monitoring procedure to review government and private sector conduct. The ILO has given this “follow-up mechanism” a high degree of institutional support and funding.²⁶⁵ The mechanism features an annual performance review of states which have not yet ratified all of the fundamental conventions and an annual “Global Report” that addresses one of the rights in depth. “The aim of each Global Report is to provide an overall picture of the trends and evolution with respect to the right concerned both in countries which have ratified the relevant conventions, and in those which have not.”²⁶⁶

The creation of membership-wide obligations and monitoring mechanisms has a partial precursor in the Committee on Freedom of Association formed in the 1950s to review workers’ complaints alleging violations of trade union rights.²⁶⁷ But the fanfare that accompanied the Declaration’s adoption in 1998 suggests something considerably more momentous, with many observers heralding the recognition of universal principles for all members states as “nothing

261. Int’l Lab. Org., Declaration on Fundamental Principles and Rights at Work (June 1998), <http://www.ilo.org/public/english/standards/decl/declaration/text/tindex.htm> (follow “text of the declaration” hyperlink) [hereinafter Int’l Lab. Org., Declaration].

262. *Id.*

263. 1946 ILO Constitution, *supra* note 174, art. 19.5(e).

264. Int’l Lab. Org., Declaration, *supra* note 261.

265. Maupain, *Revitalization Not Retreat*, *supra* note 208, at 444–45.

266. *Id.* at 445.

267. See Alston, *supra* note 186, at 479–80; see also *supra* text accompanying note 186.

short of a revolution in legal terms”²⁶⁸ and a “constitutional moment” in the life of the ILO.”²⁶⁹

Whether the Declaration is achieving these lofty goals is a subject of lively debate. Early praise for the Declaration was effusive, but more recent assessments are less sanguine. Participants have criticized the follow-up mechanism as “limited by the ILO’s failure to develop a politically potent process to debate and prioritize” violations,²⁷⁰ and prominent scholars have challenged the Declaration’s normative ambiguities, its potential to be co-opted by powerful nations for unilateral ends, and its diversion of resources and attention from traditional standard setting activities.²⁷¹ Other scholars and former ILO officials have responded with aggressive defenses of the Declaration.²⁷² Yet both sides in this debate appear to agree that the Declaration’s efficacy will ultimately be judged by its real-world effects, and on that score, it must be evaluated together with other recent changes in ILO lawmaking and monitoring.

3. The Threat and Use of Sanctions Against Myanmar

The goal of both the ratification campaign and the Declaration was to create, on paper at least, a common core of legal standards applicable to the entire ILO membership. Promoting compliance with these commitments presented a far more difficult task. The ink on the Declaration’s pages was barely dry when the ILO faced its first major compliance challenge—stopping the widespread use of forced labor in Myanmar.

The Myanmar situation presented the ILO with a paradigmatic case for sanctions. A 1998 Commission of Inquiry had documented the use of forced labor in the country on a widespread scale, in clear and flagrant violation of a fundamental labor rights treaty (the 1930 Forced Labor Convention, which Myanmar had ratified), as well as the Declaration’s parallel ban on forced labor. Confronted with the

268. Francis Maupain, *The Liberalization of International Trade and the Universal Recognition of Workers’ Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up*, in SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS AND HUMAN RIGHTS 35, 44 (Maria Gavouneli & L.A. Sicilianos, eds. 2001).

269. Alston, *supra* note 186, at 459 (noting but not endorsing this viewpoint).

270. Andrew J. Samet, *Doha and Global Labor Standards: The Agenda Item That Wasn’t*, 37 INT’L LAW. 753, 755 (2003). Samet is a former Deputy Under-Secretary of Labor for International Affairs and U.S. representative to the ILO. *Id.* at 753.

271. See Alston, *supra* note 186, at 476–513 (outlining problems with the core labor standards approach).

272. See Langille, *Core Labour Rights*, *supra* note 260, at 412–37; Maupain, *Revitalization Not Retreat*, *supra* note 208, at 440–63.

Commission's findings, Myanmar's military government was recalcitrant and unrepentant. Its hostile response ruled out the softer managerial approaches and shaming strategies that are the bread and butter of ILO monitoring, leaving sanctions as the only remaining option.²⁷³

Yet the imposition of sanctions raised delicate and unsettled issues. The Constitution of 1919 expressly authorized "measures of an economic character" in response to a state's failure to implement a Commission's findings.²⁷⁴ But the organization never exercised its power to impose trade sanctions, and the 1946 revision of the constitution removed this language and substituted a more ambiguous mandate for the ILO Conference to take "such action as it may deem wise and expedient to secure compliance."²⁷⁵ In practice, therefore, trade sanctions had remained politically and legally out of bounds since the ILO's founding. The uncertain legality of sanctions under the WTO's free trade rules created an additional deterrent. Any WTO member that imposed trade sanctions in response to a request from the ILO might be forced to defend its actions before the WTO dispute settlement system and could itself be subjected to trade penalties if the sanctions were found to be WTO-incompatible.²⁷⁶

Notwithstanding these uncertainties, to remain idle in the face of Myanmar's open defiance risked landing "a fatal blow" to the ILO monitoring system.²⁷⁷ In 2000, the organization responded to this threat by adopting a resolution that invoked the constitution's compliance clause for the first time in the ILO's history.²⁷⁸ The resolution asked governments and other IOs to review their relations with Myanmar and to assist in implementing the Commission's recommendations.²⁷⁹

This cautious, incremental approach was hardly surprising given the unsettled political and legal terrain that the ILO was traversing. But even this guarded first step produced measurable results. Myanmar officials agreed to site visits from high level officials and to a more permanent ILO presence in the country. They

273. See Maupain, *Reflections on Myanmar*, *supra* note 145, at 95–97.

274. 1919 ILO Constitution, *supra* note 3, art. 419.

275. 1946 ILO Constitution, *supra* note 174, art. 33.

276. See Maupain, *Reflections on Myanmar*, *supra* note 145, at 107–14 (discussing the legal uncertainty of ILO-authorized trade sanctions against Myanmar).

277. *Id.* at 96.

278. Int'l Lab. Org., *Resolution Concerning the Measures Recommended by the Governing Body Under Article 33 of the ILO Constitution on the Subject of Myanmar*, ILO Conf. 88th Sess. (June 14, 2000), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I>.

279. *Id.* ¶ 1(b).

also began to consider specific domestic labor reforms.²⁸⁰ Far more significantly, the 2000 compliance resolution facilitated the imposition of trade sanctions by ILO member states. In the United States, for example, the Burmese Freedom and Democracy Act of 2003²⁸¹ specifically references the ILO resolution as a justification for a blanket ban on imports from Myanmar²⁸² until such time as the President determines, after consultation with the ILO Director General (and other entities), that the military government in Myanmar “no longer systematically violates workers rights, including the use of forced and child labor, and conscription of child-soldiers.”²⁸³

Unfortunately, the violation of labor rights in Myanmar increased sharply in 2003, and by the end of 2005, the situation had reached a critical stage. Myanmar has threatened to withdraw from the ILO (although it has not filed a formal notice of withdrawal), and ILO officials are making a final effort to resolve the situation before considering whether to impose additional compliance measures, including trade sanctions, at the summer 2006 meeting of the ILO Conference.²⁸⁴ These events highlight the limited and imperfect tools available to pressure rogue states to comply with international law. But they also reveal that the ILO membership is now willing to use those tools against such states in the pursuit of the organization’s fundamental values.²⁸⁵

4. Pruning International Labor Law

The ratification campaign and the 1998 Declaration privileged a small set of fundamental labor rights and sought to apply them to all member states—including global pariahs such as Myanmar. But the ILO also faced the opposite problem: how to weed out and discard conventions and recommendations that had become moribund.

280. See Maupain, *Reflections on Myanmar*, *supra* note 145, at 99–105.

281. Burmese Freedom and Democracy Act of 2003, 50 U.S.C. § 1701, Pub. L. 108–61, §§ 1 to 9 (2006).

282. *Id.* § 2(10).

283. *Id.* § 3(a)(3)(A). For a discussion of the sanctions adopted by the European Union, see External Relations, Eur. Union, *The EU’s Relations with Burma/Myanmar* (Nov. 2005), http://www.europa.eu.int/comm/external_relations/myanmar/intro/index.htm.

284. See Int’l Lab. Office, Conclusions Concerning Myanmar, GB.294/6/1 & GB.294/6/2 (Nov. 2005), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/myanmar-conc.pdf>; Int’l Lab. Office, Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB.294/6/2 (Nov. 2005), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/gb-6-1.pdf>.

285. See Maupain, *Reflections on Myanmar*, *supra* note 145, at 118 (characterizing the use of sanctions against Myanmar as “a significant innovation” and a reflection of the ILO’s defense of “international public (moral) order”).

Although studies of outdated labor standards had been undertaken in the past, the organization had taken little concrete action to implement their recommendations. In the changed economic and political landscape of the mid-1990s, however, the ILO membership gave fresh attention to pruning international labor law's dead wood.²⁸⁶

The process proceeded in stages. First, a new working group analyzed and classified all ILO instruments.²⁸⁷ Second, the ILO Office began to actively promote the ratification of treaties that the working group had identified as up-to-date. Third, it advocated the removal of outdated treaties from the ILO monitoring system. To achieve this result, the Office urged states to denounce outmoded treaties and to ratify their corresponding revising conventions. It also proposed an amendment to the constitution²⁸⁸ authorizing the ILO Conference to "abrogate" outmoded treaties still in force.²⁸⁹ Pending the amendment's adoption, the Conference would "withdraw" treaties no longer in force and "shelve" moribund treaties that were operative in name only.²⁹⁰

Taken together, these efforts have produced a major overhaul of international labor standards. The working group identified 73 up-to-date conventions and 76 up-to-date recommendations out of 185 conventions and 195 recommendations—a statistic revealing that

286. See Int'l Lab. Office, *2005 Progress Report*, *supra* note 253, at 2 (describing the process for updating the ILO's standards).

287. See, e.g., Working Party on PoLy Regarding the Revision of Standards, Int'l Lab. Office, *Follow-Up to the Recommendations of the Working Party: Information Note on the Progress of Work and Decisions Taken Regarding the Revision of Standards*, GB.283/LILS/WP/PRS/1/2, at 1 (Mar. 2002), <http://www.ilo.org/public/english/standards/reIm/gb/docs/gb283/pdf/prs-1-2.pdf> [hereinafter Int'l Lab. Office, *Information Note*].

288. Int'l Lab. Office, *Instrument for the Amendment of the Constitution of the International Labour Organisation, 1997, Questions and Answers* (2005), <http://www.ilo.org/public/english/bureau/leg/download/campaign2005.pdf> (analyzing proposed amendment to ILO Constitution that, if adopted, will authorize the ILO Conference, by a two-thirds vote, to abrogate a convention "which appears . . . to have lost its purpose or that . . . no longer makes a useful contribution to attaining the objectives" of the ILO); see also Int'l Lab. Office, *Information Note*, *supra* note 287, at 14–15 & n.38 (describing powers conferred by the amendment and the number of ratifications required before it can take effect).

289. "Abrogation" terminates "all the legal effects of a ratified Convention, meaning reporting obligations as well as the obligation to implement the Convention." Tim De Meyer, *The Ratification of International Labour Conventions in the Asian-Pacific Region: Up to the Standard?* 42 n.49 (Centre for ASEAN Studies Discussion Paper No. 16, 1998), available at <http://143.129.203.3/cas/PDF/CAS16.pdf>.

290. "Withdrawal" has the same legal effect as abrogation, but is applied to ILO treaties that are not in force because of a lack of ratifications or subsequent denunciations. "Shelving" renders a treaty dormant and subjects it to only minimal review by the ILO's monitoring mechanisms. Int'l Lab. Office, *Information Note*, *supra* note 287, at 14, 15.

more than 60% of ILO legal instruments were outdated.²⁹¹ The ILO Conference has since shelved or withdrawn twenty-nine obsolete conventions and thirty-six recommendations and identified other treaties as candidates for abrogation after the constitutional amendment takes effect.²⁹² To speed that result, in 2005 the Office launched a campaign to encourage ratification of the amendment.²⁹³

Member states have also increased their unilateral denunciation of moribund treaties. The ILO Office received more than 250 denunciations between 1996 and the middle of 2005, the large majority of which occurred automatically upon the ratification of an up-to-date revising convention.²⁹⁴ To further promote these treaties, the Office has asked non-ratifying states to describe any impediments that prevent or delay their ratification.²⁹⁵

5. Reducing the Pace and Improving the Quality of Lawmaking

Since the Director General's 1994 report, the ILO membership has also become more deliberative in its adoption of new treaties. The Office now reviews all suggestions for conventions to determine whether the proposed standards are relevant, coherent, and have widespread support.²⁹⁶ This more rigorous screening process has slowed the pace of lawmaking dramatically. "In the post-war 'golden era' the average rate of standard production was 3.15 conventions and 2.94 recommendations per year. For the last 10 years this yearly average has dropped to 1.1 and 1.3 respectively."²⁹⁷

291. Comm. on Legal Issues & Int'l Lab. Standards, Int'l Lab. Office, *Improvements in the Standards-Related Activities of the ILO: Outlines of a Future Strategic Orientation for Standards and for Implementing Standards-Related Policies and Procedures*, at 3, GB.294/LILS/4 (Nov. 2005), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/lils-4.pdf> [hereinafter Int'l Lab. Office, *2005 Improvements in Standards*].

292. Int'l Lab. Office, *Information Note*, *supra* note 287, at 13; Int'l Lab. Office, *2005 Progress Report*, *supra* note 253, at 4.

293. Int'l Lab. Office, *2005 Improvements in Standards*, *supra* note 291, at 2. Eighty member states had ratified the amendment seven years after its adoption in 1997. Ratifications from 118 states are required for the amendment to enter into force. Int'l Lab. Office, *2005 Progress Report*, *supra* note 253, at 4 n.22.

294. A search performed using the advanced search web page of ILOLEX, in the category of "ratifications by member states," using the word "denounced," for the years 1996 to 2005 inclusive, yielded 263 denunciations. ILOLEX advanced query form, <http://www.ilo.org/ilolex/english/iloquery.htm>. For a more detailed analysis of why states have denounced ILO conventions, see Helfer, *Exiting Treaties*, *supra* note 47, at 1596-99.

295. Int'l Lab. Office, *Information Note*, *supra* note 287, at 11.

296. Int'l Lab. Office, *2005 Progress Report*, *supra* note 253, at 5.

297. Langille, *Core Labour Rights*, *supra* note 260, at 425 (citing Breen Creighton, *The Future of Labour Law: Is There A Role for International Labour Standards?*, in *THE FUTURE OF LABOUR LAW* 253, 258 (C. Bernard et al. eds., 2004)).

As the quantity of treaties has decreased, their quality has increased. The ILO Office now emphasizes the need for consensus building before beginning to draft any treaty texts. These deliberations have produced some important successes. One recently-adopted treaty—the 1999 Convention on the Worst Forms of Child Labor—is the most rapidly ratified agreement in ILO history.²⁹⁸

The Consolidated Maritime Labor Convention (“CMLC”), adopted in early 2006, provides an even more striking example.²⁹⁹ The CMLC creates an incentive for all actors in the maritime shipping industry—flag states, port states, labor-supplying states, ship owners, and seafarers—to comply with its provisions. It achieves this result by adapting an integrated certificate and inspection system found in widely-ratified maritime treaties adopted by another IO—the International Maritime Organization.³⁰⁰ The CMLC also includes a flexible blend of hard and soft law and an expedited amendment procedure to facilitate changes to the treaty’s technical rules. Finally, and perhaps most remarkably, ship owners and seafarers are both strong supporters of the treaty.³⁰¹ Their joint agreement has made it possible for delegates to negotiate the CMLC in less than five years—a rapid pace for a mega-treaty that will replace sixty-eight maritime labor conventions and recommendations.³⁰²

298. Int’l Lab. Office, *2005 Progress Report*, *supra* note 253, at 6 (noting that convention received 150 ratifications in six years). Other recently adopted treaties have been far less widely adopted, although none of them is a fundamental convention. See ILOLEX: Database of International Labour Standards, <http://www.ilo.org/ilolex/english/newratframeE.htm> (indicating that four of the most recently adopted treaties have received between four and eighteen ratifications as of July 2005).

299. Int’l Lab. Office, *Proposed Consolidated Maritime Labour Convention* (Int’l Lab. Conf., 94th (Maritime) Sess., Report I(1B), 2006), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1b.pdf>. A former ILO official has described the CMLC as an “extremely ambitious” and “revolutionary project.” Maupain, *Revitalization Not Retreat*, *supra* note 208, at 441.

300. See Int’l Lab. Office, *Adoption of an Instrument to Consolidate Maritime Labour Standards* 6–8 (Int’l Lab. Conf., 94th (Maritime) Sess., Report I(1A), 2006), <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1a.pdf>; Int’l Lab. Office, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft* 2, 5, 11–12 (Preparatory Technical Maritime Conference, Sept. 13–24, Report No. PTMC/04/2, 2004), <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/ptmc/pdf/cmlc-comment.pdf> [hereinafter Int’l Lab. Office, *CMLC Commentary*].

301. Int’l Lab. Office, *CMLC Commentary*, *supra* note 300, at 33 (reviewing elements that all negotiating groups believed should be included in the CMLC); see High-Level Tripartite Working Group on Maritime Labour Standards, Int’l Lab. Office, *Final Report*, at 16–17, 23–24 (TWGMLS/2001/10, Jan. 2001), available at <http://www.ilo.org/public/english/dialogue/sector/techmeet/twgmls01/twgmls-fr.pdf>.

302. See Joint Maritime Commission, Int’l Lab. Office, *Final Report*, App. 2 (JMC/29/2001/14, Jan. 2001), available at <http://www.ilo.org/public/english/dialogue/sector/techmeet/jmc01/jmcrf.pdf>. The Maritime Session of the International Labor Conference approved the final text of the CMLC on February 23, 2006. See Dep’t of Communication, ILO, *ILO Adopts*

A final change to ILO lawmaking is a recognition that new treaties may not be an optimal way to achieve the organization's regulatory goals. The "plan of action for migrant workers," adopted in 2004, exemplifies this view.³⁰³ This plan of action eschews treaty-making in favor of an "integrated approach" that includes the promotion of existing conventions and recommendations, information gathering, technical assistance, capacity building, and cooperation with other IOs.³⁰⁴ The plan of action thus tackles the contentious subject of transborder migration of workers as a whole and with greater emphasis on monitoring than was possible under a system of sparsely ratified treaties.³⁰⁵

C. Cultivating Partnerships with NGOs to Address New Workplace Realities

The institutional reforms described in the previous sections go a long way toward remedying the problems that plagued lawmaking and monitoring during the ILO's period of institutional stagnation. They do not, however, address the declining importance of organized labor groups that have long been the ILO's core constituency. ILO officials have recognized the limitations of the corporatist model to address the changing realities of the 21st century workplace. As a result, they have cultivated support from NGOs and advocacy groups to extend the ILO's regulatory reach to workers outside of formal labor markets who are not represented by trade unions or industrial organizations.

A 1999 report by the Director General, entitled *Decent Work*, signaled this redefinition of the organization's mission.³⁰⁶ The report reemphasized the ILO's commitment to core values, including the

Sweeping New Charter for Maritime Sector: New Convention Will Guarantee "Quality Shipping" Worldwide (Feb. 23, 2006), <http://www.ilo.org/public/english/bureau/inf/pr/2006/7.htm>.

303. Comm. on Migrant Workers, Int'l Lab. Conf., *Report of the Committee on Migrant Workers*, at 60 (June 2004), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/pr-22.pdf>.

304. Int'l Lab. Office, *Date, Place and Agenda of the 92nd Session (2004) of the International Labour Conference*, at 31–32 (GB.283/2/1, Mar. 2002), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/gb-2-1.pdf>.

305. See Comm. on Migrant Workers, *Plan of Action*, *supra* note 303, at 60–64. Prior to the adoption of the plan of action, one commentator lamented that "the ILO instruments concerning migrant workers seem to have been generally ignored by the international community" and that ILO activity on migrant worker issues was "effectively dormant." RYSZARD CHOLEWINSKI, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 135–36 (1997).

306. Int'l Lab. Office, *Report of the Director General to the 87th Session of the Int'l Labor Conference: Decent Work* (June 1999), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

workers' rights in the 1998 Declaration and the eight fundamental conventions. But it also marked a clear break with the past. The reference to "work" rather than "labor" was deliberate. It reflected the Director General's desire for the ILO to regulate all types of work-related activities, including those not involving employment contracts, fixed wages, or unions. As the report explained:

Because of its origins, the ILO has paid most attention to the needs of wage workers—the majority of them men—in formal enterprises. But this is only part of its mandate, and only part of the world of work. Almost everyone works, but not everyone is employed. . . . The ILO must be concerned with workers beyond the formal labor market—with unregulated wage workers, the self-employed, and homeworkers.³⁰⁷

Reaching these informal workers presented a challenge for the organization. The ILO's tripartite structure privileges access by organized labor and employer associations over other advocacy groups. These associations have little incentive to represent the interests of other types of workers.³⁰⁸ A key goal of the *Decent Work* agenda, therefore, has been to identify how NGOs "other than trade unions and employer associations can make a positive contribution to the design and implementation of decent work policies."³⁰⁹

As with other recent innovations, ILO officials learned from the experiences of other IOs in reaching out to these NGOs. Following the lead of "organizations like the World Bank, the OECD, and the European Union," the officials asked "what so-called 'civil society' [can] do for decent work policies."³¹⁰ The provisional answer appears to be that NGOs can make significant contributions to ILO lawmaking and monitoring.

Perhaps the most successful venture illustrating the ILO's new linkages with civil society has been the campaign against child labor in Pakistan's sporting goods industry. The campaign, launched in 1996 during a high-profile European soccer championship, dramatized the plight of 7,000 children who hand-stitched soccer balls in the Sialkot region of Pakistan.³¹¹ After the International Confederation of Free Trade Unions (an ILO member) publicized the use of child labor in the region, all of the relevant parties—the Sialkot Chamber of

307. *Id.* Informal work is especially prevalent in developing countries, accounting for nearly 60% of total employment in Latin America and 90% of new urban jobs in Africa. *Id.*

308. See Cooney, *supra* note 9, at 371 (stating that ILO worker delegates "do not share the experiences of non-organized workers, and are faced with conflicts of interest" in representing them).

309. Lucio Baccaro, *Civil Society, NGOs, and Decent Work Policies: Sorting Out the Issues* 1 (Decent Work Research Programme Discussion Paper No. DP/127/2001, Int'l Inst. Lab. Stud., 2001), available at <http://www.ilo.org/public/english/bureau/inst/download/dp12701.pdf>.

310. *Id.*

311. *Id.* at 23.

Commerce and Industry, the ILO, UNICEF, Pakistani NGOs, the Government of Pakistan, Save the Children, and the World Federation of the Sporting Goods Industry—entered into an agreement to eliminate child labor from soccer ball manufacturing in Sialkot.³¹²

The agreement weaned the industry away from its past practices by encouraging the voluntary transfer of production facilities from villages and homes to registered stitching centers. ILO field monitors randomly inspected the centers to check for compliance with the agreement. In addition, the agreement funded new education centers for children who no longer worked in the soccer industry.³¹³ According to a 2001 assessment, the Sialkot program has been remarkably successful. Although it has yet to eradicate child labor in the region, more than 3,000 children no longer work in the soccer industry and 6,400 children are attending over 200 education centers set up by the agreement.³¹⁴

The ILO is also incorporating NGOs into other facets of its lawmaking and monitoring activities. Its International Program on the Elimination of Child Labor is collaborating with international and local civil society groups to reduce the number of children working in agricultural industries in Africa and in the garment industry in Bangladesh.³¹⁵ NGOs representing workers in the informal economy have become more active in lobbying at the ILO, influencing debates among workers' delegates and shaping the substantive policies they advanced during a 2002 discussion of "Decent Work and the Informal Economy."³¹⁶ Finally, in 2004, NGOs seeking greater legal protections for migrant workers participated in ILO meetings in Geneva for the first time.³¹⁷ NGOs still lack the mechanisms of institutional voice that employer and worker representatives enjoy as members of the ILO.³¹⁸ But their increasing participation reveals the benefits of

312. Bureau for Workers' Activities, ILO, ILO Partnership to Eliminate Child Labour in the Soccer Ball Industry in Pakistan (Feb. 14, 1997), <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/ilosoc.htm>.

313. Baccaro, *supra* note 309, at 24.

314. *Id.*

315. See Int'l Prog. on Elimination of Child Lab., *IPEC Reflections on Current Strengths and Weaknesses in the West Africa Cocoa/Commercial Agriculture Program to Combat Hazardous and Exploitative Child Labour (WACAP)* 4 (June 27, 2005), http://www.ilo.org/public/english/standards/ipece/download/2005_07_wacap_en.pdf; Int'l Lab. Office & UNICEF, *Addressing Child Labour in the Bangladesh Garment Industry* 7, 10, 16 (2004), http://www.ilo.org/public/english/standards/ipece/publ/download/2001_syn_bgmea_en.pdf.

316. See Leah Vosko, "Decent Work": *The Shifting Role of the ILO and the Struggle for Global Social Justice*, 2 GLOBAL SOC. POLY 19, 24–25, 39–40 (2002).

317. Migrants Rights International, *Migrant Workers and Advocates Address the ILO Tripartite Committee* (2004), http://www.choike.org/nuevo_eng/informes/2078.html.

318. See Cooney, *supra* note 9, at 389–90.

expanding the corporatist model to include a broader array of civil society groups in efforts to promote the fundamental rights of workers.

V. CONCLUSION: THE ILO'S RELEVANCE TO INTERNATIONAL LAW AND POLITICS

The ILO is a creature of the fragile and temporary peace treaty that ended World War I. It is the tangible embodiment of a gesture that the victorious Allies made to organized labor groups in industrializing democracies to stave off the greater evils of communism. Born into the brief but heady period of interstate cooperation which followed that first global military conflict, and structured around a corporatist model of social relations that divided societies into governments, trade unions and employers' associations, the ILO should not have outlived the demise of the League of Nations. It survived through the skillful efforts of the Directors General, the ILO Office, and the trade unions that supported them, weathering financial and economic crises, another world war, polarizing East-West conflicts, the struggles of decolonization, and the challenges of a globalizing economy.

Not surprisingly, the ILO's effectiveness in creating and monitoring international labor standards has fluctuated over its nearly ninety-year existence. The organization's early decades were among its most successful. The hazards of the industrial workplace were plain for all to see, and a small and homogeneous membership enabled the Directors General and their staffs to expand the ILO's lawmaking and monitoring authority without triggering a backlash from states. The decades following World War II were a different matter. The ILO adopted a capacious mandate for social and economic change, extending its reach into uncharted and politically contested terrain. ILO officials continued to follow the lawmaking and monitoring procedures of the pre-war years. But when applied in a vastly altered geostrategic environment—one characterized by a larger and more diverse membership and national trade unions with limited independence and waning political influence—these procedures created dysfunctional incentives that impeded the ILO's efficacy.

In the last decade, however, the organization has shifted ground yet again. ILO officials have ushered in a period of innovation and reform, narrowing the organization's mandate to emphasize a core group of fundamental labor rights. These rights, which bind all states by virtue of their membership in the ILO, now serve as the organization's normative polestar. But they also perform a secondary

function. They enable ILO officials to reorient the organization away from its past focus on preventing a race to the bottom—a strategic framing that views labor protections as detrimental to free trade and foreign investment—and to emphasize instead the instrumental benefits to all states of adhering to fundamental labor standards.³¹⁹

As I explain below, this history of ILO lawmaking and monitoring contains insights for international legal scholars and for social scientists.

A. *The ILO and Legal Innovation*

For lawyers and legal scholars, this Article rediscovers the ILO's forgotten past and explains how the organization survived and prospered when other IOs of the inter-war period failed. It reveals how the first generation of ILO officials cultivated support from national labor unions and exploited ambiguities in the ILO Constitution to improve the efficacy of the organization's lawmaking and monitoring procedures in aid of the founders' universality, centralization, and flexibility goals.

The Article also explores the transformations of the ILO's present, in which a blend of treaties, soft law instruments, and monitoring mechanisms are carefully vetted, hierarchically organized, widely supported, and structured to promote real-world change. These legal innovations are the result of ILO officials learning from the lawmaking and monitoring experiences of other IOs and from the mistakes of the ILO's own past—most notably an overly ambitious social justice agenda that produced a jumble of under-adopted and normatively incoherent conventions and recommendations.

Taken together, this review of ILO lawmaking and monitoring belies the conventional wisdom that the ILO is a feeble and ineffectual IO whose activities merit little attention from legal scholars or policymakers. As other IOs struggle to make international rules relevant to real-world problems and to address increasing demands for participation by NGOs and advocacy groups, the ILO's many years of experience in adapting to shifts in its political and economic environment and in managing the competing demands of states and non-state actors will provide invaluable insight and guidance.

319. See Int'l Lab. Office, *2005 Improvements in Standards*, *supra* note 291, at 3–4 (emphasizing these instrumental benefits).

B. The ILO and Assessing Theories of Change in International Organizations

For social scientists—and in particular for international relations scholars who examine how IOs change—a process-tracing case study of the ILO provides an opportunity to assess the three theories of institutional change analyzed in this Article. This assessment can best be made by using a counterfactual analysis that reviews the hypotheses of rational choice, neofunctionalism, and historical institutionalism and then compares those predictions to the history of the ILO as it actually unfolded.³²⁰

Rational choice fares poorly under this counterfactual analysis.³²¹ Recall that the simplest rational choice models claim that state preferences determine the forms and functions of international cooperation at any given moment in time.³²² Proceeding from this premise, rational choice scholars would assert that the ILO's changes throughout its history accurately reflect the shifting preferences of its member states. Yet it is highly unlikely that states would have created a multilateral labor standards organization that includes workers and employers as full fledged members at any period *other* than immediately following World War I.

The reasons for this are twofold. First, the inclusion of independent worker and employer associations as equal partners in the ILO was a revolutionary break with the state-centric international order of the early twentieth century. This unique tripartite membership structure reflected the founders' endorsement of a corporatist model of social relations and their desire to provide workers with a meaningful alternative to revolution. Once these social forces subsided, however, there was little reason for states to confer IO membership upon non-state actors. Indeed, it would take

320. Comparing real-world events to hypothesized alternatives is a widely accepted method of testing hypotheses in the social sciences. See, e.g., COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS: LOGICAL, METHODOLOGICAL, AND PSYCHOLOGICAL PERSPECTIVES (Philip E. Tetlock & Aaron Belkin eds., 1996); James D. Fearon, *Counterfactuals and Hypothesis Testing in Political Science*, 43 *WORLD POL.* 169 (1991). This is so even if "an element of speculation and uncertainty is inevitable in entering the counterfactual realm." Mark W. Zacher, *Multilateral Organizations and the Institution of Multilateralism: The Development of Regimes for Nonterrestrial Spaces*, in *MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM* 399, 401 (John G. Ruggie ed., 1993).

321. Rational choice has more traction in explaining the structures and functions of the 1919 ILO Constitution. See *supra* Part III.A. Because this theory does not take into account the founders' political concerns as well as their functional goals, however, it fails to explain why the founders' functional design choices are only partially and imperfectly embodied in the constitution. See *supra* Part III.B.

322. See *supra* Part II.A.

another half a century before states would again seriously consider allowing civil society groups to participate in IOs, to say nothing of granting them equal membership rights.

A second historical fact casting doubt on the predictions of rational choice is the persistence of a freestanding, subject-specific labor organization. As this Article has shown, labor standards are closely related to trade and investment, economic development, and human rights. This affinity creates powerful logical and functional arguments for linking some or all of these issues together in the same IO. If, for example, states had first regulated international labor standards at the end of World War II, they would have almost certainly included those standards in the newly-created United Nations Economic and Social Council. (Even with the ILO in existence, states invested the Council with a limited mandate to address labor rights.) Similarly, if the ILO had not existed at the end of the 20th century, states could logically have paired labor issues with free trade, incorporating core labor rights into the WTO's single undertaking. Or they might have eschewed labor multilateralism altogether, leaving powerful countries like the United States to include labor standards in their bilateral trade and investment agreements with developing countries.

Many variations are plausible. The essential point is that the allocation of interrelated subjects among different institutions and treaties is contingent on politics and history. If politics and history change but the initial allocation of subjects does not, an explanation other than rational choice is needed to account for its persistence.

The foregoing analysis strongly suggests that the ILO has survived not because it has faithfully reflected state interests or a rational distribution of labor-related subjects, but rather that it has persisted notwithstanding changes in those interests and subjects. To be sure, this conclusion does not disprove more sophisticated versions of rational choice theory, which predict that change in IOs occurs in response to infrequent, intense shifts in their external environment which lead states to redesign the organization or to shift cooperation to a rival IO. However, a closer examination of the ILO's history refutes these hypotheses as well.

Major exogenous events such as the Great Depression, World War II, the Cold War, and a globalizing economy triggered reactions within the organization. But, contrary to rational choice predictions, ILO officials, not member states, were the principal proponents of change. They framed the organization's responses to these events in the form of new treaties, a constitutional amendment, and expanded monitoring mechanisms. Even more striking is the paucity of

evidence of states attempting to thwart or undo changes that enhanced the authority of ILO officials.³²³ Far from consciously redesigning the ILO to check these new powers, member states largely acquiesced in their incremental expansion.

These unchecked advances in lawmaking and monitoring suggest that neofunctionalism more accurately predicts the ILO's evolution and survival. Yet this theory's hypotheses, too, ultimately come up short. Neofunctionalism asserts that expansions of IO authority result from endogenous and incremental changes sought by domestic interest groups, who recognize the benefits of IOs for achieving their goals. Neofunctionalist theory predicts that these groups will forge alliances with IO officials and work to enhance the authority of those officials. As support for IOs from domestic interest groups grows, cooperation takes on a self-reinforcing character, spilling over into areas that are logically and functionally related to the organization's initial mandate. Ultimately, neofunctionalism expects this process to shift loyalties from states to IOs.³²⁴

The history of the ILO does not bear out these claims. Alliances between ILO officials and national trade unions were, as neofunctionalism predicts, critical to the expansion of lawmaking and monitoring activities during the organization's first two decades. But these linkages weakened rather than strengthened after World War II. With the inclusion of socialist and developing countries, ILO officials could no longer count on the support of autonomous trade unions in all member states. Yet international confederations of trade unions continued to dominate worker delegations at the ILO. The organization's links to domestic labor groups atrophied still further with the decline of unions in industrial democracies that began in the 1970s. These events weakened a crucial source of political support for ILO officials, a weakness only recently being redressed by the cultivation of contacts with a broader array of labor rights NGOs. Yet these new connections are occurring in an IO that has contracted, not expanded, its subject matter mandate, contradicting a key hypothesis of neofunctionalism.

In contrast to rational choice and neofunctionalism, the basic premise of historical institutionalism—that history matters—finds ample support in this Article's study of the ILO. Stated more concretely, historical institutionalists claim that the origin and

323. Notably, the only meaningful rejoinder to the ILO's overreaching—the withdrawal of the United States between 1977 and 1980—was not a response to incremental expansions of ILO lawmaking and monitoring, but rather an effort to check the foray by other member states into unrelated geopolitical issues. See IMBER, *supra* note 125, at 64–66.

324. See *supra* Part II.B.

evolution of IOs are important predictors of their current functions and the constraints they impose on member states.³²⁵ This is certainly true of the ILO, which still bears the historical imprint of the unique social and political forces that animated its birth and shaped its constitutional structure.

Historical institutionalism is less successful at predicting the specific sources of change in the ILO. The organization evolved in response to both endogenous and exogenous factors, a combination that dovetails with some historical institutionalist accounts. But these accounts are, as I explain below, less adept at specifying a more precise causal relationship between these two factors.

First, the distinct phases of the ILO's history illustrate important variations in the comparative pressure of exogenous and endogenous forces during different phases of an IO's life cycle. Periods of major economic or political instability created opportunities to overhaul the organization's mandate and functions. Yet the ILO did not always capitalize on these critical junctures, with the result that more consequential and longer-lasting changes occurred during periods of relative quiescence. As historical institutionalists predict, path dependence is an important factor here.³²⁶ The effects of early, endogenous changes (such as the lawmaking and monitoring improvements implemented by ILO officials in the 1920s and 1930s) persisted for decades, influencing behavior of the ILO membership long after the effects of exogenously-driven changes had dissipated.

Second, the presence or absence of competitor IOs was a key factor in fomenting change within the ILO. For more than two decades after its founding, the ILO was the world's most successful multilateral organization. In this unfettered environment, ILO officials could expand the organization's lawmaking and monitoring powers with little risk that states would shift their support to a competing organization. The creation of the United Nations ended this period of institutional hegemony and increased the ILO's insecurity.³²⁷ ILO officials reacted by pressing for an expansion of the organization's subject matter mandate—an expansion that its preexisting lawmaking and monitoring functions were ultimately ill-equipped to handle.

Third, the chronicle of the ILO's survival suggests that the trajectory of IO evolution is not unidirectional, leading inexorably to

325. See *supra* Part II.C.

326. See PIERSON, *supra* note 37, at 17–53.

327. See Barnett & Coleman, *supra* note 31, at 599–600 (identifying “organizational insecurity” as one of two explanatory variables that affect how IOs respond to pressures in their external environments).

expansion (as neofunctionalists claim) or, conversely, to stagnation and decline (as some historical institutionalist accounts suggest). Moreover, when shifts in direction do occur, they do not follow the predictions of any one theoretical paradigm. For example, the expansion of the ILO's authority did not trigger a backlash from states—a claim frequently made by rational choice scholars. Nor, when states reacted, did they efficiently recalibrate design features to restore their control over the organization or achieve other functional goals. To the contrary, the incremental competence-enhancing changes by ILO officials and staff were difficult to reverse, particularly where they resonated with the organization's foundational principles.

Finally, and perhaps most importantly, the ILO has learned from other IOs and from its own past the benefits of focusing on core values. Over the last decade, the ILO has adopted a strategy of retrenchment, narrowing its mandate to emphasize compliance with a limited group of fundamental labor rights. This strategy casts doubt on accounts of institutions that emphasize their inherently expansionist tendencies. It also belies the recent claim that “IOs appear to be steadily expanding their mandates in a convergent direction” by becoming “increasingly involved in the domestic affairs of states.”³²⁸

The rich history of the ILO explored in this Article poses new theoretical challenges for scholars who study how and why international organizations change. These challenges include determining the factors that define the “strategic space” within which IO officials and staff can act autonomously;³²⁹ identifying when putative reforms produce more effective institutions as opposed to creating the appearance of efficiency without producing tangible results; and specifying the conditions under which IO officials choose to constrict their authority rather than expand it.

328. BARNETT & FINNEMORE, *supra* note 50, at 164; see Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1605–07 (2004) (reviewing scholarship claiming that international organizations exhibit “mission creep” and seek to expand their mandates).

329. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AMER. J. INT'L L. 247, 248–49 (2004).