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Jean Galbraith
University of Pennsylvania Law School, jwg78@crab.rutgers.edu

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Article

Treaty Options: Towards a Behavioral Understanding of Treaty Design

Jean Galbraith
Rational choice theory is the dominant paradigm through which scholars of international law and international relations approach treaty design. In this Article, I suggest a different approach using a combination of empirical observations of state behavior and theoretical insights from behavioral economics. I focus on one aspect of multilateral treaty design: namely, treaty reservations and associated legal mechanisms which allow states to vary the degree of their formal commitments to treaties. I call these mechanisms “treaty options.” I argue that the framing of treaty options matters powerfully — and does so in ways inconsistent with rational choice theory, but consistent with insights from behavioral economics. This finding has important implications for the theory, law, and practice of treaty-making and for our understandings of state behavior more generally.
INTRODUCTION

What causes states to consent to international legal obligations? Particularly in treaty-based law, this is a question of fundamental importance since states are only bound by treaties to which they have expressly consented. Yet it is also a question that international legal scholars rarely address. In contrast to the multiplicity of theories about why states do (or do not) obey existing international legal obligations, scholarship on why states create such obligations in the first place tends to rest on one largely unexamined assumption.

This assumption is that states consent to international legal obligations based upon rational decisions aimed at advancing their own interests. It implicitly underlies Louis Henkin’s analysis of international law-making in How Nations Behave,¹ and explicitly guides substantial recent work by scholars in both international law and international relations.² As

1. See LOUIS HENKIN, HOW NATIONS BEHAVE 36 (1979) (“A government’s policy as to whether some activity of international interest should remain unregulated, or what form regulation should take, is a political decision like others made by policy-makers in light of the national interest as they see it.”).

assumptions go, it is intuitively attractive, methodologically useful, and deeply reassuring. The idea that states act rationally to advance their interests seems entirely sensible and generates a model — rational choice theory — with clear parameters. This model leaves ample room for debate as to what constitutes state interests or their rational pursuit, but is also comfortingly bounded: under a rational choice approach, one need not concern oneself with questions like whether key negotiations took place before or after lunch, or which of two legally equivalent framings is used to set forth a commitment. While even strict proponents of rational choice theory will acknowledge that states sometimes act irrationally, they deny that these deviations can be predicted and theorized.

Such ready reliance on rational choice theory as a model for understanding state consent comes at a time when this theory has increasingly come into question as a model for understanding individual decision-making. Research in cognitive psychology and behavioral economics has shown that individuals frequently deviate in predictable ways from rationally optimal behavior — even to the point of making very different decisions before or after lunch. One finding is that individuals are far more subject to framing effects than a rational choice model would predict; that is, to basing decisions partly or fully on the way in which choices are presented rather than on their substantive content. Consider, for example, people’s willingness to be organ donors. Austria, Belgium, Sweden, and France presume people to be organ donors unless they explicitly opt out, and in these countries 85% or more consent to be donors. By contrast, Germany, the Netherlands, Denmark, and the United Kingdom presume people not to be organ donors unless they affirmatively opt in, and in these countries 28% or fewer consent to be donors. This bias in favor of the status quo, in company with other framing effects, is borne out by numerous studies of individual decision-making. But so far, this research has had relatively little impact on international legal scholarship and almost none on the question of why

3. Shai Danziger et al., Extraneous Factors in Judicial Decisions, 108 P.N.A.S. 6889 (2011) (finding that judges granted a significantly higher percentage of parole requests in cases that they heard immediately after food breaks).

4. Eric J. Johnson & Daniel G. Goldstein, Defaults and Donation Decisions, 78 TRANSPLANTATION 1713, 1715 (2004). Randomized experiments where respondents “could at a mouse click change their choice, largely eliminating effort explanations” also revealed a sharp framing effect. Id. at 1714–15 (finding that 82% of subjects agreed to be organ donors under an opt-out condition while only 42% agreed under an opt-in condition).

5. Id.

6. For a discussion of some of this extensive literature, see infra Part III.B.1.

7. This is beginning to change, particularly in the context of human rights law. See SOCIAL SCIENCE AND HUMAN RIGHTS (Ryan Goodman et al., eds., forthcoming 2012) (exploring insights that social science research can bring to human rights law) (introduction available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910684); Ryan Goodman & Derek Jinks,
states consent to international obligations. Scholars like Jack Goldsmith and Eric Posner nod to this research but dismiss it, observing that “individual cognitive errors might have few if any macro effects on international relations.”

In this Article, I challenge the rational choice approach to state consent and argue that state decision-making can instead reflect predictable cognitive biases similar to those found in individual decision-making. I do this by looking empirically at certain forms of state consent and arguing that the results are better accounted for by insights from behavioral economics than by rational choice theory. In particular, I show that, counterintuitive as it may be, states appear subject to framing effects similar to those discussed above in the organ donation example. I argue that these effects could result either from direct cognitive biases on the part of state agents, or from these agents’ expectations that their constituencies are subject to cognitive biases. My conclusions in turn have powerful implications for the design of international agreements. In particular, I argue that rather than assuming rational action on the part of states, negotiators designing treaty regimes should draw explicitly on principles from behavioral economics, especially the sub-field that Richard Thaler and Cass Sunstein have termed “choice architecture.”

More specifically, this Article focuses on an area of international law notorious for its “unusual — in fact baffling — complexity.” This is the law of treaty reservations and associated mechanisms built into multilateral treaties that permit states to vary their formal commitments to treaties. These mechanisms, which collectively I will call “treaty options,” effectively make certain parts of treaties optional for state parties. The most well-known of these mechanisms is the law of treaty reservations, which in essence allows individual states to join treaties subject to

reservations, or unilateral rejections of portions of the treaties, so long as
the treaties do not provide otherwise and these reservations are compatible
with the treaties’ object and purpose. Treaty reservations are a favorite
subject of study for international law scholars, including some applying a
rational choice approach.11 Importantly, however, this Article also
considers other forms of treaty options that are prevalent in practice but
largely neglected by the scholarship — namely, options that treaty
negotiators explicitly write into the treaties and associated documents.
Such options, which I will call “negotiated options,” include opt-in clauses
and optional protocols, which allow states to opt in to additional
commitments, and opt-out clauses, which allow states to opt out of
otherwise-required commitments.

In understanding treaty options, it is important to keep in mind the
distinct roles that states play as treaty negotiators and as treaty ratifiers. These
two stages involve different types of decision-making. At the negotiating
stage, states reach collective agreement about what treaty options to permit
in a treaty; while at the ratification stage they make individual decisions
about whether or not to join the treaty and, if so, whether or not to take
advantage of available treaty options. These stages also involve somewhat
different state agents. At the negotiating stage, states are typically
represented by diplomats with foreign affairs expertise or actors with
particular expertise in the subject matter of the treaty, while ratification
typically involves a wider range of state actors, including state legislative
bodies. The gaps between negotiation and ratification are further
magnified by the long time lags that can pass between negotiation and
ratification, as well as by the facts that not all negotiating states necessarily
ratify a treaty and, conversely, not all ratifying states necessarily take part in
treaty negotiations. Accordingly, treaty negotiators must engage in some
prediction as to how treaty ratifiers will respond to treaty options.

Treaty options provide an opportunity to study framing effects because
negotiators often use different types of treaty options for quite similar
substantive provisions across different treaties. By studying how ratifying
states respond to different treaty options, I can explore whether these
states appear to behave rationally or instead seem unduly subject to
framing effects. In this paper, I focus in particular on two types of
variations (described in the following two paragraphs). In both instances, I

11. For scholars applying a rational choice approach, see Goldsmith & Posner, supra note 2, at
127–28; Edward Swaine, Reserving, 31 Yale J. Int’l L. 307 (2006); Francesco Parisi & Vincy Fon, The
Economics of Treaty Ratification, 5 J. L. Econ. & Pol’y 209 (2009); Francesco Parisi & Catherine
Sevcenko, Treaty Reservations and the Economics of Article 21(2) of the Vienna Convention, 21 Berkeley J.
Int’l L. 1 (2003). For citations to some of the enormous doctrinal literature generated by the law of
treaty reservations, see the sources cited in Catherine Redgwell, Universality or Integrity?: Some Reflections
find evidence which strongly suggests that states are subject to framing effects — and that their decisions about whether or not to consent to certain obligations are far more influenced by framing than a rational choice approach would suggest.

First, I look at ways in which ratifying states respond to treaty clauses that give them the option of agreeing to International Court of Justice (ICJ) jurisdiction over disputes arising from the treaty. Such clauses are common, but they can be framed in different ways. Some treaties have such clauses and implicitly allow states to make reservations to them; other treaties have such clauses and explicitly allow states to opt out of them; and still other treaties have such clauses but require states explicitly to opt in to them. All else being equal, if states are rational actors then differences in framing should have little impact on whether or not these states accept ICJ jurisdiction. Yet my review of an important dataset of treaties shows a dramatic correlation between framing and state consent. On average, where states have the implied authority to reserve out of ICJ jurisdiction, 95% continue to accept it; and where states have the explicit right to opt out of ICJ jurisdiction, 80% continue to accept it. But where states can explicitly opt in to ICJ jurisdiction, only a mere 5% of state parties do so on average.

Second, I look at the extent to which ratifying states embrace optional compliance mechanisms in human rights treaties where these mechanisms are presented through opt-in clauses in the main text and where they are instead offered through optional protocols. As a legal matter, these mechanisms are basically equivalent: both allow states to take on optional commitments of a similar nature. In practice, however, ratifying states have proved much more willing on average to embrace these commitments when they are presented in optional protocols, which are separate documents from the main treaty and thus more salient, than when these commitments are presented in opt-in clauses.

My findings thus show a strong correlation between framing and state consent. Of course, a correlation does not necessarily imply causation, and there is no way to prove causation with the kind of empirical rigor that would be available if one could conduct randomized experiments on states. There may indeed be selection effects. For example, negotiators might choose to use opt-in ICJ jurisdictional clauses for treaties where there is less support for ICJ jurisdiction, and opt-out clauses where there is more support. But I do not think these selection effects can fully explain the results in light of both the magnitude of the effect (a 75% spread in average take-up rates between ICJ opt-in and opt-out clauses) and qualitative evidence drawn from records of treaty negotiations. I thus argue that the best explanation for at least much of the correlations is a simple causation story: framing matters. In the case of ICJ jurisdictional
clauses, ratifying states exhibit an overwhelming preference in favor of the default option, suggesting that they are subject to something akin to the status quo bias found in individual decision-making. In the case of compliance mechanisms in human rights treaties, ratifying states appear more willing to accept these mechanisms where the option to do so is presented to them in a more salient way, suggesting that they are subject to something akin to another cognitive bias — a salience bias — shown in research on individual decision-making. These biases could arise from cognitive biases on the part of the state agents involved in ratification. Alternatively, they could arise from real or perceived cognitive biases on the part of these agents’ constituents (as where ratifying actors anticipate that their constituents have a status quo bias and thus are reluctant to depart from whatever default treaty option is written into the treaty).

My argument has implications for treaty design that are both alarming and promising. On the one hand, it is alarming to think that state decision-making may reflect cognitive biases. On the other hand, however, if negotiators understand these potential biases, then they have promising opportunities available to them. They can undertake “nudges” by using choice architectural principles to frame options in ways that will increase the likelihood that state ratifiers will make the choices preferred by the treaty negotiators. I close the Article with considering some of these possible implications, urging further research in relation to them, and arguing that even without such research, policy-makers should keep these possible implications in mind.

* * *

Part I of this Article surveys the law and practice of treaty options available to treaty negotiators. I discuss the legal doctrines underlying both treaty reservations and negotiated options and quantitatively assess their relative uses in a dataset of over 300 multilateral treaties. Turning to the behavior of treaty ratifiers, Part II looks empirically at states’ use of treaty options in relation to both ICJ dispute resolution clauses and compliance mechanisms in human rights treaties. Quantitatively, I show a strong relationship between framing and state participation rates; and qualitatively, I draw on additional evidence, including treaty negotiating histories, to show that this relationship is likely largely a causal one. Part III argues that the results in Part II fit poorly with rational choice theory, and instead are best explained by reference to choice architecture.

12. See infra Part III.
13. See THALER & SUNSTEIN, supra note 9.
principles. Finally, Part IV discusses some implications of my findings for the theory, law, and practice of treaty making.

I. TREATY OPTIONS IN TREATY NEGOTIATION

To the extent that treaty negotiators wish to build an agreement containing uniform commitments, they must choose between stronger terms that may attract fewer states and weaker terms that may attract more states. Treaty options offer a partial solution to this “broader-deeper tradeoff” by allowing states to vary their level of consent to multilateral treaties.\(^{14}\)

This Part explores the extraordinarily complex doctrine and practice of treaty options. I begin by outlining the history and contours of the most well-known form of treaty option: the law of treaty reservations. I also discuss the ways in which treaty negotiators can contract out of the law of treaty reservations by limiting or banning states’ rights to make reservations by including “no-reservation clauses” in treaties. I then turn to other ways in which treaty negotiators can explicitly give states flexibility in terms of the scope of their consent to multilateral treaties — ways which I call “negotiated options.” I focus in particular on opt-in and opt-out clauses. Finally, I survey the availability of these different mechanisms in a set of over 300 multilateral agreements that includes many of the world’s most important treaties. I demonstrate that both no-reservation clauses and negotiated options are far more commonly used than the scholarly literature has recognized to date. Notably, around 46% of treaties in my set

\(^{14}\) Swaine, supra note 11, at 311. Besides treaty options, there are other ways in which negotiators can tailor treaties to accommodate a range of commitments across states. These include differentiating between states in the text of the treaty, enabling states to temporarily suspend treaty obligations through escape clauses, and authorizing states to terminate their commitment to the treaty. See, e.g., Richard B. Bildner, MANAGING THE RISKS OF INTERNATIONAL AGREEMENTS 64–77 (1981) (describing array of structural mechanisms for controlling state commitment to multilateral treaties); Laurence Helfer, Flexibility in International Agreements in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: TAKING STOCK (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930379 (describing various mechanisms); Peter Rosenzweig & Helen V. Milner, The Optimal Design of International Trade Institutions: Uncertainty and Escape in RATIONAL DESIGN, supra note 2 (analyzing role of escape clauses in trade agreements); Michael J. Gilligan, Is There a Broader-Deeper Trade-off in International Multilateral Agreements?, 58 INT’L ORG. 459 (2004) (arguing that differentiating between state levels of commitment in the text allows negotiators to escape the trade-off between strength and participation); see also Kal Raustiala, Form and Substance in International Agreements, 99 AM. J. INT’L L. 581, 610–13 (2005) (discussing how non-binding pledges can offer states greater flexibility than binding contracts and thus increase the depth of agreements); Barbara Koremenos, Loosening the Tie that Binds: A Learning Model of Agreement Flexibility, 55 INT’L ORG. 289 (2001) (discussing how limiting the duration of treaties can increase state willingness to cooperate in the face of uncertainty). I focus here on treaty reservations and negotiated options, but I note implications of my argument for some of these other mechanisms in Part IV.
since 1951 include some form of no-reservations clause, and 51% of all treaties in my set include at least one opt-in or opt-out clause.

A. Treaty Reservations

During the twentieth century, international law-makers struggled with the question of how much flexibility states should have in consenting to treaties. Much of this struggle focused on the law of treaty reservations. A treaty reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

At the beginning of the twentieth century, the law of treaties frowned upon treaty reservations. The presumption was that a state had to accept a treaty “as is” or not join at all, unless it could persuade all other state parties to let it make a reservation. The rule that all treaty parties must accept a reservation ensured common agreement among them all about the extent of a treaty’s application and reduced the likelihood that states would propose reservations. But this unanimity rule came at a price in terms of participation, since any one state could keep a reserving state entirely out of a treaty by objecting to its reservation.

Over the course of the next half-century, various other approaches developed. Treaty negotiators could — and sometimes did — contract around the unanimity rule by specifying different procedures in the text of the treaty. In addition, two important international organizations developed ongoing practices that differed from the unanimity rule. The Pan American Union (the predecessor to the Organization of American States) developed an approach that made it easier for states to make their own reservations to treaties negotiated under its auspices but that fractured the unity of treaty membership. Under this approach, a reserving state became a party to a treaty with regard to states that accepted its reservations, but not with regard to states that objected to its reservations. By contrast, the International Labor Organization (ILO)


17. For examples, see id. at 37–39.

took a very different approach. It developed a practice that allowed states to vary the degree to which they committed to a treaty, but only if these variations were negotiated in the text of the treaty itself. In its function as depository for these treaties, the ILO would refuse to accept ratifications that were accompanied by any reservations other than those expressly permitted by the terms of the treaty.\textsuperscript{19} Where the Pan American approach allowed states to formulate reservations on their own initiative subject to the consent of individual states, the ILO required that variations in state commitment to a treaty be negotiated collectively at the time of a treaty’s drafting.

Shortly after World War II, a sharp controversy developed over the ratification of the Genocide Convention. The Convention contained a clause providing for ICJ jurisdiction over disputes arising under this Convention.\textsuperscript{20} In ratifying the Convention, the Soviet Union attached a reservation to this clause, and other states objected to its reservation.\textsuperscript{21} The Secretary-General of the United Nations, who served as the depository for the Convention,\textsuperscript{22} then faced the question of whether the Soviet Union’s ratification was valid. He asked for advice from the General Assembly, which in turn requested an advisory opinion from the ICJ.\textsuperscript{23}

In 1951, the ICJ radically transformed the law of treaty reservations in its \textit{Reservations to the Genocide Convention Case}.\textsuperscript{24} The majority urged “a new need for flexibility in the operation of multilateral conventions.”\textsuperscript{25} In its view, the unanimity rule was too strict: it unduly favored the unity of treaty commitments at the expense of state participation.\textsuperscript{26} But what to put in its place? Both the Pan American Union and the ILO had briefed the court on their respective approaches. In essence, the ICJ ignored the ILO’s
approach and embraced a modified version of the Pan American approach. Like the Pan American Union, the ICJ endorsed a rule that allowed reserving states to become treaty parties with states that accepted their reservations, but not with states that objected to the reservations. Unlike the Pan American approach, however, the ICJ added the requirement that reservations should be “compatible” with the “object and purpose” of the treaty at issue.

The ICJ’s approach ultimately formed the basis for the law of treaty reservations set out in the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention did not settle all questions relating to treaty reservations — indeed, a massive project underway at the International Law Commission (ILC) is addressing continuing uncertainties — but it did resolve many of them. For current purposes, four features from the Vienna Convention are noteworthy. First, the Vienna Convention establishes default rules rather than absolute ones. It recognizes that treaty negotiators can contract around these default rules in the text of their treaties.

Second, for most treaties the default rules are those suggested by the ICJ. Where a treaty is silent about reservations, a state may attach reservations that are not “incompatible with the object and purpose of the treaty,” and the treaty will enter into force between this state and states that do not object to the reservations. Indeed, the Vienna Convention places an even higher premium on participation than did the ICJ by providing that the treaty will also enter into force between a reserving state and an objecting state, unless the objecting state insists otherwise.

Third, the Vienna Convention embraces a principle of reciprocity: a state that reserves out of a particular treaty obligation cannot


28. See id. at 24. The ICJ also suggested that states should only object to reservations they found incompatible with the treaty’s object and purpose, but hinted at the possibility that a state could object to more minor reservations in a way that would not otherwise prevent the treaty from entering into force between it and the reserving state. See id. at 27.

29. This study on Reservations to Treaties, led by Special Rapporteur Alain Pellet, was begun in 1993. It is now hopefully nearing completion after generating sixteen reports and resulting in a Guide to Practice on Reservations to Treaties (Guide to Practice) that the ILC has provisionally adopted. See Summaries: Reservations to Treaties, INT’L LAW COMM’N, http://untreaty.un.org/ilc/summaries/1_8.htm (last updated Oct. 11, 2011) (containing links to the sixteen reports and the Guide to Practice).

30. See, e.g., Vienna Convention, supra note 15, art. 19 (noting that a treaty can prohibit reservations or permit only specified ones); Id. art. 20(4) (stating rules that apply “unless the treaty otherwise provides”); Id. art. 22 (stating the same).

31. Id. arts. 19–20. The default rules differ for two particular subsets of treaties. First, for treaties where it appears that “the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty,” the unanimity rule applies. Id. art. 20(2). Second, where the treaty is “a constituent instrument of an international organization,” the reservation must be accepted by the organization. Id. art. 20(5).

32. Id. art. 20(4)(b).
demand that other states perform this obligation.\footnote{See id. art. 21 (drawing certain finer differences between the reserving states’ relationship with accepting and objecting states); see also Swaine, supra note 11, at 319–20.} Fourth, the Vienna Convention establishes very different timing rules with regard to the making of a reservation and the subsequent withdrawal of a reservation. Making reservations is a “use it or lose it” game: states can only do so at the time they join the treaty.\footnote{See Vienna Convention, supra note 15, art. 19. Here and throughout this article, I use “join” as shorthand for signing, ratifying, accepting, approving or acceding. Although signature does not necessarily give rise to membership in the treaty, and the default rule is that reservations made at signature must be confirmed at ratification, see id. art. 23(2), for my purposes I do not treat it separately here.} By contrast, states can withdraw reservations at any time.\footnote{See id. art. 22.}

Because the Vienna Convention establishes only default rules, treaty negotiators have the option of establishing different rules regarding reservations in the treaty they are negotiating. Importantly, treaty negotiators can contract away from the law of reservations by using what are called “no-reservation clauses.”\footnote{The use of no-reservation clauses has led in part to the rise of “declarations” by states at the time of ratification. See generally Int’l Law Comm’n, Guide to Practice on Reservations to Treaties in \textit{United Nations, Yearbook of the International Law Commission} 2011 (forthcoming) (manuscript at § 1, 4.7), \url{available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf} [hereinafter Guide to Practice] (outlining the distinctions between declarations and reservations and offering a framework for distinguishing between the two). Consideration of declarations falls beyond the scope of this Article.} For example, the United Nations Framework Convention on Climate Change provides flatly that “[n]o reservations may be made to the Convention.”\footnote{U.N. Framework Convention on Climate Change art. 24, \textit{opened for signature} June 4, 1992, 1771 U.N.T.S. 107.} Other no-reservation clauses can leave states with somewhat more flexibility. As I discuss in the next section, some treaties have clauses banning traditional reservations, but permit states to opt out under a negotiated option. Still other treaties contain what I will call weak no-reservation clauses: clauses that do not fully ban reservations, but nonetheless set stricter limits on their use than the Vienna Convention’s default rules do. This category includes clauses that ban reservations to which a certain percentage of state parties object,\footnote{E.g., Convention Relating to the Status of Stateless Persons art. 38, Sept. 28, 1954, 360 U.N.T.S. 130 (allowing reservations at the time of joining except as to an enumerated list of articles).} and clauses that prohibit reservations to certain portions of a treaty.\footnote{E.g., International Convention to Facilitate the Importation of Commercial Samples and Advertising Material art. 14, Nov. 7, 1952, 8 U.S.T. 1637, 221 U.N.T.S. 255 (imposing a unanimity rule); Convention Concerning Customs Facilities for Touring art. 20, June 4, 1954, 8 U.S.T. 1294, 276 U.N.T.S. 230 (banning reservations unless a majority agrees to them upon signature, or less than one-third object upon ratification).} Finally, some treaties contain exactly the opposite of no-reservation
clauses: clauses that explicitly permit states to make reservations to the treaty.\textsuperscript{40}

\section*{B. Negotiated Options}

Negotiated options are the under-studied cousins of treaty reservations. Although negotiated options have received attention in the context of specialized or regional international organizations where they are frequently used, (such as the ILO, the Council of Europe, and the Hague Conference on Private International Law),\footnote{See Sia Spiliopoulou Akermark, \textit{Reservation Clauses in Treaties Concluded within the Council of Europe}, 48 INT'L & COMP. L. Q. 479 (1999) (mentioning the use of negotiated options in the Council of Europe); W. Paul Gormley, \textit{The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe—Part One}, 39 FORDHAM L. REV. 59, 67 (1970) (mentioning the use of negotiated options in the ILO); W. Paul Gormley, \textit{The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe—Part Two}, 39 FORDHAM L. REV. 413 (1971) (mentioning the use of negotiated options in the Council of Europe); Georges A. L. Droz, \textit{Les réserves et les facultés dans les Conventions de La Haye de droit international privé}, 1969 RCDIP 381 (mentioning the use of negotiated options in the Hague Conference).} outside of these limited contexts scholars of treaty design tend to overlook them or treat them as asides to treaty reservations.\textsuperscript{41}

Negotiated options have much in common with treaty reservations, but also important differences. Like reservations, negotiated options provide states with flexibility, but unlike reservations, this flexibility is explicitly negotiated for and relates only to specified provisions. Negotiated options thus come with more certainty than traditional reservations. As the dissenters in the \textit{Reservations to the Genocide Convention Case} observed long ago, the object and purpose test for reservations is unsatisfyingly vague, and states attaching reservations can lack certainty as to whether their

reservations meet the test. By contrast, negotiated options offer a high
degree of certainty: if a treaty presents states with a negotiated option, then
it is perfectly clear that states can exercise their rights either way in
accordance with the option. Relatedly, while states can object to
reservations made by another state, they cannot legitimately object to
another state’s exercise of a negotiated option, as that state’s right to
exercise the option is an explicitly negotiated term in the treaty.

Negotiated options can take various forms. Here, I briefly describe two
of the most common forms — opt-in and opt-out clauses — and note
some other variations.

1. Opt-in Clauses

Opt-in clauses allow states to commit to obligations beyond those
undertaken through simple treaty ratification. These clauses typically
provide that a state may declare that it takes on the additional obligation
contained in the clause.

The most well-known treaty opt-in clause is Article 36(2) of the Statute
of the ICJ, which provides that “[t]he states parties to the present Statute
may at any time declare that they recognize as compulsory ipso facto and
without special agreement, in relation to any other state accepting the same
obligation, the jurisdiction of the Court in all legal disputes” concerning
international law. Like almost all opt-in clauses that I have seen, the
language makes clear that a treaty party can opt in “at any time,” not
simply at the time that state joins the treaty. This feature allows states
that have undertaken only the basic treaty obligations at the time of joining
to embrace the additional obligations later. While some opt-in clauses also
provide explicitly that states can withdraw their opt-ins at any time, Article
36(2) does not explicitly authorize the withdrawal of an opt-in.

2. Opt-out Clauses

Opt-out clauses explicitly authorize states to disavow parts of a treaty. A
state must affirmatively declare that it is taking advantage of an opt-out
clause; otherwise, it will be subject to the legal obligation referred to in that
clause. The presumption is thus the opposite from that in opt-in clauses,

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43. Reservations to the Genocide Convention Case, 1951 I.C.J. at 43 (dissenting opinion of Judges
Guerrero, McNair, Read, and Hsu Mo).
44. Guide to Practice, supra note 36.
1179.
46. Id.
47. Article 36(2) does make clear, however, that states can frame their opt-ins so as to reserve the
right of withdrawal. See id. Moreover, in practice the right of withdrawal from Article 36(2) is well
established. See AUST, supra note 10, at 291.
which require states to affirmatively declare that they are taking on additional legal obligations.

Opt-out clauses come in various forms. The UN Convention Against Transnational Organized Crime, for example, provides for dispute settlement through arbitration or the ICJ, but further states that “[e]ach State Party may, at the time of signature, ratification, acceptance, or approval of or accession to this Convention, declare that it does not consider itself bound by” these provisions for dispute settlement — in which case other states will not be bound against that state. Opt-out clauses, however, allow states to opt out at any time (sometimes upon a certain amount of notice) rather than simply when they join the treaty. The UN Convention on the Assignment of Receivables in International Trade, for example, provides that state parties can opt out of certain provisions “at any time” after giving six months notice. Most opt-out clauses further provide that states may withdraw their opt-outs (that is, opt back in) at any time.

Opt-out clauses share a great deal in common with both treaty reservations and opt-in clauses. Like treaty reservations and unlike opt-in clauses, they provide a way for states to disavow certain obligations under a treaty. Unlike treaty reservations and like opt-in clauses, however, state opt-outs under opt-out clauses have been expressly authorized by the treaty negotiators. Indeed, opt-out clauses are sometimes found in conjunction with no-reservation clauses that bar any reservations to the treaty other than those explicitly set forth in opt-out clauses. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, for example, provides that “no reservation may be made to this Convention” but qualifies that this language is “without prejudice” to four specific opt-out clauses.

49. Effectively, this can be done in two ways. First, by specifying in the opt-out clause that the opt-out can be done at any time. Alternatively, it can be done by providing in a denunciation clause that states can separately denounce this portion of a treaty.
51. Despite the parallels between opt-in and opt-out clauses, the ILC’s Guide to Practice draws a stark distinction between them. It treats state opt-outs under opt-out clauses as treaty reservations (where these opt-outs must be made at the time of joining) but ignores state opt-ins under opt-in clauses as outside its scope. Guide to Practice, supra note 35, §1.1.6, §1.5.3. Despite the Guide to Practice and for the sake of convenience, in this paper I use “treaty reservations” to refer narrowly only to reservations made outside the context of opt-out clauses.
52. International Convention for the Protection of Performers, Producers of Phonograms and
3. Variations

Straightforward opt-in and opt-out clauses are not the only types of negotiated options. Some treaties use opt-in or opt-out clauses that have restrictions on their use. A 1953 narcotics control treaty, for example, has an opt-in clause available only to certain countries, and the Rome Statute of the International Criminal Court has an opt-out clause that is valid only for seven years after ratification. Negotiated options can also take the form of requiring states to choose from among a set of options. For example, the Law of the Sea Convention allows states to choose their preferred dispute settlement body from a set of four options, but requires that they accept the jurisdiction of at least one of these options.

Finally, some treaties enable states to take on additional obligations through the use of optional protocols. To give one example, the Vienna Convention on Diplomatic Relations has an Optional Protocol on the Compulsory Settlement of Disputes that states can ratify separately if they wish to accept ICJ jurisdiction over disputes arising out of the main treaty. Where these optional protocols are done at the same time as the main treaty and are available only to treaty parties, they are functionally similar to opt-in clauses. As I discuss in Part III, however, the choice of form between opt-in clauses and optional protocols may nonetheless prove significant in terms of state participation.

C. Negotiators’ Choices of Treaty Options

As the prior sections have shown, treaty negotiators have powerful tools available for controlling the ways in which states can vary the depth of their consent to treaties. This section offers a birds-eye picture of how treaty negotiators make use of these tools by quantifying the use of opt-in, opt-out, and no-reservation clauses in an important and wide-ranging collection of multilateral treaties.

Specifically, I look at treaties from the database of Multilateral Treaties Deposited with the Secretary-General (MTDSG) of the United Nations.

53. Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium art. 5(2), June 23, 1953, 456 U.N.T.S. 3 (providing that those countries which the protocol permitted to produce opium could agree through a declaration made at any time to cease being opium producers).
This dataset contains treaties for which the Secretary-General performs depository functions. The MTDSG is a selective group of treaties: the Secretary-General typically is willing to serve as the depository only for “open multilateral treaties of worldwide interest” or regional agreements negotiated under UN auspices.\textsuperscript{58} It includes many of the world’s most important treaties in twenty-nine subject matters, including human rights, the environment, arms control, transportation, and commodities.\textsuperscript{59} The MTDSG contains over 500 entries, and, for reasons explained in a footnote, I work with a set of 326 treaties from these entries.\textsuperscript{60}

Table 1 shows how often treaty negotiators contract out of the default law of treaty reservations. Out of the 326 treaties just mentioned, I look only at the 276 of these in which the negotiations were finalized after 1951, since prior to the ICJ’s Reservations to the Genocide Convention Case, treaty

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58. See United Nations Treaty Section of the Office of Legal Affairs, Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, at 49–55 (1994), available at http://treaties.un.org/doc/source/publications/practice/summary_english.pdf. The MTDSG treaties are not a random sample of multilateral treaties and thus cannot be taken as representative of all multilateral treaties. Rather, the results I offer here are important because they show how negotiated options are used in this collection of exceptionally important treaties. Specifically, the MTDSG contains: “(a) all multilateral treaties, the originals of which are deposited with the Secretary-General; (b) the Charter of the United Nations . . . ; (c) multilateral treaties formerly deposited with the Secretary-General of the League of Nations or other depositories, to the extent that subsequent formalities or decisions affecting them have been taken within the framework of the United Nations; and (d) certain [other] pre–United Nations treaties . . . which were amended by protocols adopted by the General Assembly of the United Nations,” Id. at 2. The database includes treaties from 1904 to the present. Some of these treaties are no longer in force, and others have not entered into force. The Secretary-General’s practices as a depository are transparent and have closely tracked the changing law of treaty reservations. See id. at 1–2.

59. For the categories, see Multilateral Treaties Deposited with the Secretary-General, United Nations Treaty Collection, http://treaties.un.org/pages/ParticipationStatus.aspx (last visited Nov. 4, 2012). Of course, some important multilateral treaties have other depositories, such as the Geneva Conventions (for whom Switzerland serves as depository) or WTO Agreements (for whom the WTO Director-General serves as depository). See Switzerland as depository state of the Geneva Conventions, Federal Department of Foreign Affairs, http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/gecons/gechde.html (last visited Nov. 4, 2012) (discussing Switzerland as depository state of the Geneva Conventions); Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations art. 6, Apr. 15, 1994, 1867 U.N.T.S. 3, available at http://www.wto.org/english/docs_e/legal_e/03-fa.pdf.

60. I have narrowed the database down to initial treaties and to protocols or agreements that are reasonably distinct from these treaties. More specifically, I have culled out entries that are (1) only depository lists; (2) amendments to treaties, protocols that simply set forth amendments to treaties, and subsequent versions of already listed treaties incorporating amendments; (3) regulations made pursuant to treaties (most notably the 126 separately listed regulations to a 1958 European treaty standardizing vehicle parts); (4) treaties that simply extend the duration of other treaties; and (5) relatively trivial protocols, such as ones specifying the location of an agency headquarters. Removing these entries gives a clearer sense of the overall arc of major treaty-making by preventing quite discrete changes to treaties from being counted as equivalent to the treaties themselves. It also has the added benefit of reducing the need for complicated judgment calls about coding the interactions between these entries and the initial treaties to which they relate. As with any selection, some calls were close ones and could reasonably have gone either way.
negotiators would presumably have viewed the unanimity rule as applicable. Table 1 gives both the percentage and number (in parentheses) of treaties that (1) have no specific clause about reservations; (2) have a clause affirmatively permitting reservations in line with the default rules or even more permissively (“pro-reservation clause”); or (3) have a no-reservation clause, with further sub-categorization as to whether this clause is absolute, implicitly or explicitly applies except with respect to negotiated opt-outs, or is weak.

Table 1: Treatment of Reservations in MTDSG Treaties after 1951

<table>
<thead>
<tr>
<th>Clause Type</th>
<th>Percentage</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Clause (Default Rules)</td>
<td>48%</td>
<td>133</td>
</tr>
<tr>
<td>Pro-Reservation Clause</td>
<td>6%</td>
<td>16</td>
</tr>
<tr>
<td>No-Reservation Clause</td>
<td>46%</td>
<td>127</td>
</tr>
<tr>
<td>- Strict</td>
<td>20%</td>
<td>55</td>
</tr>
<tr>
<td>- Except Opt-Outs</td>
<td>22%</td>
<td>60</td>
</tr>
<tr>
<td>- Weak</td>
<td>4%</td>
<td>12</td>
</tr>
</tbody>
</table>

As Table 1 shows, treaty negotiators are quite willing to depart from the default rules on treaty reservations and in fact do so in a slight majority of treaties. Importantly, most of these departures seek to restrict the flexibility available to states under the default rules through the use of absolute or qualified no-reservation clauses: 46% of the treaties contained such no-reservation clauses. This impressively high percentage also suggests that the ICJ may have exaggerated the need for flexibility in multilateral conventions, given how frequently states contract back towards no-reservations clauses. Put another way, while the ILO approach of banning treaty reservations except for specifically negotiated options failed to take hold in the law of treaties, it has proved exceedingly attractive to treaty negotiators in practice.

Table 2 examines the frequency with which negotiators write certain negotiated options into treaties. More specifically, it looks at uses of opt-in or opt-out clauses in the main text of treaties. I take a conservative

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61. See discussion supra notes 16, 23–26 and accompanying text.

62. Several more nuances about this break-down are as follows. First, I do not try to distinguish between treaties that otherwise would follow the usual default rules and treaties that create international organizations that therefore would follow the default rules specific to such treaties, as discussed supra note 31. (Distinguishing between these two types of treaties is not always an easy task.) Second, I focus here only on the right of reservations to the treaty under consideration and not to its annexes. Third, this kind of categorization inevitably involves borderline choices; and reasonable people might make different calls on the margin. The important point here is less the precise percentages I provide than the overall sense they give of the high frequency with which no-reservation clauses are used.
approach to counting opt-in and opt-out clauses, and exclude clauses that explicitly limit their applicability to specific states, to specific time periods, or impose other restrictions on their exercise.63

Table 2: Opt-in and Opt-out Clauses in MTDSG Treaties

<table>
<thead>
<tr>
<th>Clause</th>
<th>Percentage</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both</td>
<td>14% (46)</td>
<td></td>
</tr>
<tr>
<td>Opt-out</td>
<td>21% (68)</td>
<td></td>
</tr>
<tr>
<td>Opt-in</td>
<td>16% (53)</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>49% (159)</td>
<td></td>
</tr>
</tbody>
</table>

As Table 2 shows, negotiators are quite willing to use opt-out and opt-in clauses. A slight majority (51%) of all the treaties in the dataset have one or more of such clauses. In terms of content, two types of opt-in and opt-out clauses occur especially often. The first are territorial opt-in or opt-out clauses, whereby states can decide whether to apply the treaty to their dependent territories. Sixty treaties have territorial opt-in clauses and twenty-three have territorial opt-out clauses. (Most of these treaties are from the 1940s to 1970s, when colonialism was more prevalent.) The second and most common type of opt-in or opt-out clauses are dispute settlement clauses. Thirty-four treaties have opt-in clauses and seventy-two treaties have opt-out clauses regarding ICJ jurisdiction, arbitration, or some other compliance mechanism. (Where these clauses deal with state-to-state disputes, they typically require reciprocity, that is, they apply only where both states have opted in or not opted out.) In addition to these two recurrent types of clauses, negotiators sometimes use opt-in or opt-out clauses for treaty-specific substantive provisions. To give just one example, the Second Optional Protocol to the International Covenant on Civil and Political Rights has a provision banning the death penalty but provides that states may specifically reserve the right to apply the death penalty to certain crimes during wartime.64

The willingness of treaty negotiators to use no-reservation clauses and negotiated options rather than simply relying on the default rules of treaty reservations may come as a surprise to scholars of treaty reservations. At the negotiation of the Vienna Convention, treaty expert Sir Ian Sinclair

63. I do, however, count as opt-out clauses any clauses that simply states that reservations may be made to specified articles of a treaty. (These clauses are sometimes known as reservation clauses. See Guide to Practice, supra note 36, commentary 1.1.6.) In addition, I count clauses that have no explicit limitations as to applicability but may in practice have actual ones — i.e., I count clauses allowing states to opt in or out of applying the treaty to their dependent territories, even though in practice these clauses are relevant only to states that have dependent territories in the first place.

remarked that “practical experience showed that, more often than not, [a] treaty was silent on the matter [of reservations], not necessarily because the negotiating States had ignored the question of reservations, but usually because they had been unable to reach an agreed solution.” Affirmative agreement is required to get beyond the default rules — and yet this survey has shown that more often than not, such affirmative agreement is reached with regard to both reservations clauses and treaty options.

II. Treaty Options and State Ratification

The prior Part discussed ways in which treaty negotiators can allow states to vary their formal commitments to multilateral treaties. In this Part, I turn to a related question: what treaty options should treaty negotiators use to best accomplish their design goals? More specifically, I investigate how the type of treaty option used by treaty negotiators relates to the substantive choices made by ratifying states.

This issue has enormous implications for treaty design. If ratifying states make the same substantive decisions regardless of whether they are presented with an opt-in or opt-out clause, for example, then treaty negotiators need not worry about their choice between the two. On the other hand, if ratifying states make different substantive decisions when confronted with an opt-in clause than with an opt-out clause, then treaty negotiators need to be exceedingly alert in structuring a treaty. To create a treaty regime that most corresponds to their goals, they will need to understand the conditions under which presentation influences substance, and the ways in which it does so.

To study the relationship between the type of treaty option used and states’ substantive choices, I look at two contexts in which states have responded to different types of treaty options that present them with similar substantive choices. First, I compare the extent to which states accept ICJ jurisdiction: (1) in treaties that contain clauses allowing states to opt-in to ICJ jurisdiction; (2) in treaties that contain clauses allowing states to opt-out of ICJ jurisdiction; and (3) in treaties that provide for ICJ jurisdiction but where traditional reservations are permitted. Second, I compare the extent to which states agree to two different forms of opt-in provisions used for compliance mechanisms in human rights treaties: (1) opt-ins done through clauses in the main text of the treaties; and (2) ones done through the use of optional protocols. As I show below, the data suggest that presentation matters tremendously under both of these comparisons. While I cannot rule out the possibility that the observed

65. Quoted in Swaine, supra note 11, at 325 n.105 (collecting more recent scholarly assertions suggesting that no-reservation clauses are not widely used).
differences stem solely from other causes, I think this is unlikely for the reasons discussed in each sub-section.

A. ICJ Jurisdiction Clauses

As discussed earlier, dispute resolution clauses are frequently framed as opt-in or opt-out clauses. Here, I look to see how states behave when confronted with different framings of dispute resolution clauses providing for ICJ jurisdiction. Specifically, I look at state responses to three different types of clauses: (1) clauses that allow states to opt in to ICJ jurisdiction; (2) clauses that allow states to opt out of ICJ jurisdiction; (3) and clauses that provide for ICJ jurisdiction with any specific opt-outs or opt-ins, but where the state is otherwise entitled to make reservations (either under the default rules or because the treaty specifically authorizes reservations). The treaties I examine come from the set of treaties discussed in the prior section. Of these treaties, twenty-five provide for ICJ jurisdiction through opt-in clauses in their main text, thirty-five provide for it through opt-out clauses (and have at least one ratifying state), and eight treaties made after 1951 provide for ICJ jurisdiction without any opt-in or opt-out clauses, but do permit treaty reservations.66

Figure 1 shows how these three approaches compare in terms of state participation in the ICJ clauses. For each approach, it shows the average percent of state treaty parties who have accepted ICJ jurisdiction.

66. The specifics of these dispute resolution clauses vary. Some provide solely for ICJ jurisdiction while others provide for it as one of several possible forms of dispute resolution; some give the ICJ jurisdiction only over limited issues within the treaty while others give it jurisdiction over all interpretive disputes arising from the treaty; and so forth. It is also worth noting that the treaties I look to here are not the only ones in my dataset that provide for some form of ICJ jurisdiction. For example, I do not use treaties from before 1951 that provide for jurisdiction of the ICJ (or its predecessor, the Permanent Court of International Justice (PCIJ)) without negotiated options, since prior to the Reservations to the Genocide Convention Case the unanimity rule was widely thought to apply. I also do not include treaties that mandate participation in ICJ dispute-resolution clauses (i.e., by banning reservations), provide for ICJ jurisdiction in separate optional protocols (except to the extent that these contain further ICJ opt-in provisions), provide only for ICJ advisory opinions, provide for ICJ jurisdiction only if both states specifically consent to it at the time of the dispute, or follow the complicated jurisdictional system set out in the Law of the Sea Convention. Finally, I do not include treaties which no states have yet ratified.
The difference in state responses is stunning. On average, treaties with opt-in clauses are thoroughly ineffective at getting states to accept ICJ jurisdiction. For the twenty-five treaties that have ICJ opt-in clauses, only an average of 5% of treaty parties opt in to accept ICJ jurisdiction. For a particularly dismal example, consider the United Nations Framework Convention on Climate Change (UNFCCC). It has 195 state parties — more states than belong even to the United Nations — but only one of these states, the Netherlands, has opted in to the ICJ jurisdictional clause.67 The clause is thus currently useless in practice, and has been so since the treaty was made in 1992.

By contrast, ICJ opt-out clauses are associated with dramatically higher state participation rates. Across the thirty-five treaties where opt-out clauses are used, 80% of treaty parties accept ICJ jurisdiction on average. In other words, only 20% of treaty parties on average exercise their right to opt out. As examples, only 21 of 149 state parties to the 1984 Convention Against Torture have taken advantage of the opt-out written

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67. Depository Status of UNFCCC, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter =27&Temp=mtdsg3&lang=en (last visited Nov. 4, 2012). Like other environmental treaties with opt-in jurisdictional clauses, the UNFCCC allows states to opt in to either or both of ICJ jurisdiction or arbitration. The Netherlands has opted in to both and one other country, the Solomon Islands, has opted into the arbitration provision. Id.
into its ICJ jurisdiction clause (meaning that 86% have accepted ICJ jurisdiction),\textsuperscript{68} and only 35 of 154 parties to the 2003 UN Convention Against Corruption have taken advantage of its ICJ opt-out clause (meaning that 77% have accepted ICJ jurisdiction).\textsuperscript{69} The states that opt out vary, but ones that do so frequently include Algeria, Bahrain, El Salvador, China, Cuba, India, Indonesia, Israel, Laos, Lithuania, Myanmar, Saudi Arabia, Singapore, South Africa, Thailand, Tunisia, Turkey, the United States, and Venezuela.

Finally, the average state participation rate in ICJ jurisdiction clauses for the eight post-1951 treaties that generally permit reservations is the highest of all: 95%. Of the sixty-five parties to the 1956 Convention on the Recovery Abroad of Maintenance, for example, only Algeria and Argentina made reservations regarding the ICJ jurisdiction clause, leaving 97% of state treaty parties participating in the ICJ jurisdiction clause.\textsuperscript{70}

The stark differences in state participation rates between opt-in clauses and other forms of treaty options are similarly glaring when the data is viewed at the level of individual treaties. Figure 2 shows the relationship between the number of parties to a treaty and the percentage of state parties accepting the ICJ jurisdictional clause for the different types of treaty options. It shows that while state participation rates vary a bit within each type of treaty option (particularly where the treaty has fewer total state parties), opt-in clauses are almost always associated with far lower participation rates. Of the treaties with ICJ opt-in clauses, all except one have ICJ participation rates of only 13% or less. By contrast, all except two treaties with ICJ opt-out clauses have participation rates of 62% or higher,\textsuperscript{71} and all treaties with ICJ clauses where states could make traditional reservations have ICJ participation rates of 86% or higher.

\textsuperscript{71} The two exceptions are treaties that each have only one treaty party to date.
These results show a powerful correlation between the form of treaty option and state participation rates, particularly when comparing opt-in clauses to other options. While these results do not prove a causal relationship between form and participation, they are highly suggestive of such a relationship. In Part III, I will present a positive argument for why I think a causal relationship exists — in other words, for why the form of treaty option matters enormously. As importantly, however, it is hard to think of a third factor that would fully account for the reliably impressive difference in participation rates.

To begin with, I doubt that this difference is due entirely to selection effects. Although the issue is unlikely to be a hard-fought point of contention (given that both approaches will leave each state with the ability to embrace or evade ICJ jurisdiction), it may be that negotiators deliberately choose opt-in clauses for treaties where support for ICJ jurisdiction is weaker and opt-out clauses for treaties where such support is stronger in order to reduce overall transaction costs. But I am skeptical that this is the case to an important degree. Importantly, the text of many ICJ jurisdictional clauses imply that treaty negotiators have negotiating fatigue by the time they reach these clauses. They tend to take a heavily cut-and-paste-based approach in selecting their negotiated options, usually...
adopting whatever was done in prior treaties in the same subject area. Most of the environmental treaties, for example, use a cookie-cutter opt-in clause, and most of the penal matters treaties use a cookie-cutter opt-out clause. This suggests that treaty negotiators do not devote a lot of time or thought to how they structure optional jurisdictional clauses. Instead, as other scholars have also observed, treaty negotiators tend to rely on boilerplate for these and other final clauses.

Moreover, even assuming that negotiators consciously choose opt-in clauses where there is less support for ICJ jurisdiction and opt-out clauses where there is more, I doubt this choice would fully explain the vast disparity in state participation rates. If deliberate decision making were the principal cause of the difference between opt-in and opt-out participation rates, presumably some of these negotiating decisions would be close calls. We would therefore expect to see some treaties with ICJ participation rates of close to 50%, since the parties in a “close call” negotiation would be roughly evenly split between parties which wanted ICJ jurisdiction, and those that did not. But this has not proved true in practice. Instead, as Figure 2 shows, there are virtually no treaties with ICJ participation rates close to 50%. Indeed, there is only one treaty where between 13% and 62% of state parties have accepted ICJ jurisdiction. The vast disparity between participation rates in opt-in treaties and opt-out treaties suggests that something other than shrewd negotiating decisions must account for much of the difference.

I also do not think that the subject matter of the treaties fully accounts for the difference in participation rates. As mentioned, there is indeed a connection between the subject matter of a treaty and the type of treaty

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72. The environmental treaties typically provide that a party can opt in to either or both of ICJ jurisdiction and arbitration (using virtually identical language across treaties). The penal matter treaties typically provide for arbitration with ICJ jurisdiction as a fallback and allow parties to opt out of either or both (also using virtually identical language across treaties). My review of state declarations indicates that states opt in or opt out of the arbitration provisions at close to the same rates that they opt in or out of ICJ jurisdictional provisions.

73. Even in the drafting of perhaps the most important optional treaty clause anywhere — Article 36 of the Statute of the ICJ — there was little discussion on the merits of opt-out clauses versus opt-in clauses. Instead, the debate centered on whether ICJ jurisdiction should apply to all parties or instead be available through an opt-in clause. The prospect of using an opt-out approach came up once in the lengthy deliberations, but was not considered in any depth. See U.N. Comm. of Jurists, Report on Draft of Statute of an International Court of Justice Referred to in Chapter VII of the Dumbarton Oaks Proposal, (April 20, 1945) in 14 Doc. U.N. Conf. on Int’l Org. 648, 667 (1945) (observing that the Egyptian delegate floated the possibility of an opt-out clause as a compromise and simply stating that the Committee did not accept this view).

option used. The twenty-five treaties with ICJ opt-in clauses fall into five subject matter classifications, but most of them — nineteen — are environmental treaties. The thirty-five treaties with ICJ opt-out clauses cover eight subject matters, including twelve penal matters treaties, eleven transportation treaties, and four human rights treaties. It could be that for some reason states are exceptionally reluctant to accept ICJ jurisdiction for environmental treaties and this in turn is what causes ICJ participation rates to be so low with regard to the opt-in clauses in these treaties. Even setting aside the obvious limits of this explanation — which would not explain, for example, why there are similarly low participation rates in the non-environmental treaties with ICJ opt-in clauses — I find it unlikely for two reasons.

First, the category of environmental treaties is a broad one. It covers treaties dealing with localized problems arising from industrial accidents, treaties dealing with global problems like climate change, treaties focused on the procedures of access to environmental information, and many other quite dissimilar treaties. Given this, it is hard to pin down an all-encompassing rationale for why states would be resistant to ICJ jurisdiction in environmental treaties. For example, one could opine that states avoid ICJ jurisdiction because environmental problems are often collective rather than bilateral — but in fact some environmental treaties do deal with trans-boundary issues that are likely to give rise to localized, bilateral disagreements, rather than collective ones.

Second, even treating environmental treaties as a cohesive category, it is unclear why states would be so much more reluctant to accept ICJ jurisdiction in environmental treaties than in treaties addressing penal matters or human rights. The parallel with human rights treaties is particularly instructive. Human rights treaties, like many environmental treaties, deal with collective rather than bilateral concerns, and they present even greater intrusions on state sovereignty interests than do environmental treaties. If anything, one would thus expect states to be more reluctant to accept ICJ jurisdiction for human rights treaties than for environmental treaties — if one considers only the subject matter of the treaties and does not also consider the type of negotiated option used.

Finally, neither the number of treaty parties, nor the date at which the treaty was made explain the effect on participation rates. As Figure 2

75. Both ICJ opt-in and opt-out clauses can be found in only one subject matter — privileges and immunities, diplomatic and consular relations.
shows, the number of treaty parties does not account for this difference, as it appears in both treaties with fewer parties (often regional treaties) and ones to which most countries in the world belong. Furthermore, my research has shown that the date at which a treaty was made also does not substantially account for this difference in participation.\footnote{In the 1980s, for example, three treaties with opt-in clauses were completed, as were three treaties with opt-out clauses. There is considerable overlap in the states participating in these treaties (as shown by the fact that one of the treaties with opt-ins has over 190 parties, and one of the treaties with opt-outs has over 180 parties). Although these six treaties were written in the same decade, striking differences in participation remain. Less than 3% of participants in each of the opt-in treaties have accepted ICJ jurisdiction, while over 85% of participants in each of the opt-out treaties have done so.}

In short, my findings suggest that opt-in ICJ jurisdictional clauses result in dramatically lower state participation than do ICJ jurisdictional clauses framed as opt-outs or to which states can make traditional reservations. The choice of form matters, and matters enormously. It may also be that the choice of treaty option also drives the difference in average participation rates between opt-out ICJ jurisdictional clauses (80%) and ones to which states simply can make traditional reservations (95%), but I am not as certain on this point. For one thing, this comparison rests on evidence from fewer treaties, with only eight treaties allowing traditional reservations. For another, the differences between opt-out clauses and traditional reservations go beyond presentation. As discussed earlier, where traditional treaty reservations are used, other states can object to these reservations and prevent the entry into force of the entire treaty between themselves and the reserving state. Indeed, with some of these eight treaties, certain states \textit{did} object to reservations to the ICJ jurisdictional clauses and prevented the treaties from entering into force between themselves and the reserving state.\footnote{E.g., \textit{Depository Status of the Convention on the Political Rights of Women}, UNITED NATIONS TREATY COLLECTION, \url{http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en} (last visited Nov. 4, 2012) (noting various objections to reservations made to Article 9 of the treaty, which was the ICJ jurisdiction clause). This treaty specifically provides that no treaty relationship arises between reserving states and states which object to the reservations. \textit{See} Convention on the Political Rights of Women art. 7, Mar. 31, 1953, 193 U.N.T.S. 135. Since the time of this treaty (and others that I look at here), a stronger consensus may have developed in international law that reservations to dispute settlement mechanisms are usually not incompatible with a treaty’s object and purpose. \textit{See} Guide to Practice, supra note 35, at § 3.1.13. \textit{But see} Jacob Katz Cogan, \textit{The 2010 Judicial Activity of the International Court of Justice}, 105 AM. J. INT’L L. 477, 490–91 (2011) (suggesting that at least one ICJ justice thinks otherwise).} States might not want to risk this result and therefore be more reluctant to make traditional reservations than they would be to exercise their right to opt-out under an opt-out clause.

One final point bears mention. Figure 2 reveals that the ICJ opt-in clause in one particular treaty has a much higher participation rate — 34% — than all the other such treaties. This treaty is the Statute of the
International Court of Justice, as to which which 66 out of 192 state parties to the Statute have opted into ICJ jurisdiction. This comparatively high percentage is especially fascinating because the opt-in clause in the Statute of the ICJ is by far the most significant ICJ opt-in clause in any treaty. It gives the ICJ jurisdiction over any international law dispute between states that have both opted in (whereas other ICJ opt-in clauses at most give the ICJ jurisdiction only in relation to the subject matter of the specific treaty at issue). In other words, states have proved more willing to opt in to the greater obligation contained in the Statute of the ICJ’s opt-in clause than to the more modest obligations contained in ICJ opt-in clauses in other treaties. This is a puzzle, and one to which I will return to briefly in Part III.

B. Compliance Mechanisms in Human Rights Treaties

Treaty options are heavily used in human rights treaties. Scholars of treaty design tend to focus their attention on reservations to human rights treaties, but negotiated options frequently appear in these treaties as well. Many of the nine “core” human rights treaties open to universal participation employ a mix of negotiated options in relation to dispute resolution. Besides opt-out clauses providing for ICJ jurisdiction in certain contexts, these treaties frequently allow states to opt in to one or both of two other separate but related compliance mechanisms. Here, I look to see how form relates to participation with regard to these two mechanisms. Because the number of treaties is small, my analysis rests not only on


81. Article 36 thus reduces the importance of other ICJ jurisdictional clauses, as it can provide an alternate basis for ICJ jurisdiction where both countries have opted in under it.

82. Another exception is Article 66 of the Vienna Convention on the Law of Treaties, which provides for ICJ jurisdiction over disputes about a treaty’s invalidity or a party’s withdrawal from a treaty.

83. According to the Office of the U.N. High Commissioner for Human Rights, the nine “core” human rights treaties are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), The Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and the Convention on the Rights of Persons with Disabilities (CRPD). See The Core Human Rights Instruments, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/law/index.htm#core (last visited Nov. 5, 2012). All these treaties belong to the MTDSG, as the Secretary-General acts as their depository. CRC is the only one of these treaties not to employ either of the optional compliance mechanisms discussed in this section.
participation rates but also on qualitative information drawn from the drafting histories.

First, five of these treaties enable states to opt in to a system whereby a committee of experts can hear complaints between states. (A sixth treaty simply includes this system without the need for opt-in.)84 For example, Article 41 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. . . . A declaration may be withdrawn at any time [as to future complaints] by notification to the Secretary-General.85

This compliance mechanism does not carry any sanctions with it. Rather, the Committee’s role is to facilitate a satisfactory resolution between the states using its good offices and a limited reporting power.86 The substance of this provision closely resembles those set forth in the other treaties.87 So does its form — three of the other treaties with similar

86. See id. More specifically, if the states fail to work the matter out among themselves within nine months of the filing of the complaint or through the Committee’s good offices, the Committee can meet to consider the complaint and prepare a report that is “confine[d] to a brief statement of facts.” Id.; see also id. art. 42 (providing for a further conciliation process if both states agree to it at that time).
87. The opt-in clauses in the various treaties mostly look like cut-and-paste versions of each other, but there are some minor differences. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 21, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (tracking the ICCPR provisions almost word for word except without the further conciliation process set forth in ICCPR art. 42); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 76, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW] (tracking CAT art. 21 except further allowing the Committee to share its “views” with the states involved in a complaint); Optional Protocol to International Covenant on Economic, Social, and Cultural Rights art. 10, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008). It should be noted that ICESCR art. 10, like ICRMW art. 76, is not yet in force. Also of note is that CPED is the least like the three previous treaties in two respects. First, while it tracks the others in allowing states to “declare that [they] recognize[] the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention,” it has no further provisions for how the Committee is to deal with these complaints. International Convention for the Protection of All Persons from Enforced Disappearance art. 32, G.A. Res 61/177, U.N. Doc. A/Res/61/177 (Dec. 20, 2007) [hereinafter CPED]. Second, where all the other treaties (except ICERD which does not use an opt-
compliance mechanisms present them through opt-in clauses within the text of the core treaty, while a fourth presents it through an opt-in clause within the text of a broader optional protocol.

Second, eight of the nine human rights treaties enable states to opt in to a system whereby a committee of experts can consider complaints brought against them by individuals. By way of example, Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that:

A State Party may at any time declare that it recognizes the competence of the Committee [on the Elimination of Racial Discrimination] to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. . . . A declaration may be withdrawn at any time [as to future complaints] by notification to the Secretary-General.88

As with the state-to-state complaints, the Committee has no authority to impose sanctions on states. Its power is limited to considering a case, making recommendations to the individual and state at issue, and summarizing the case in its annual report.89 Once again, the substance of these provisions resembles those in the other treaties.90 Interestingly,
however, these provisions vary dramatically in their presentation. Three treaties besides ICERD use opt-in clauses within the main text. Four other treaties, however, present this compliance mechanism through an optional protocol to the core treaty. The ICCPR and the Convention on the Rights of Persons with Disabilities (CRPD) use optional protocols done at the same time as the core treaties, while ICESCR and the Committee on the Elimination of Discrimination against Women (CEDAW) use optional protocols negotiated many years after the core treaties.

Why do these extra commitments sometimes appear as opt-in clauses in the core human rights treaties and sometimes instead as optional protocols to the core treaties? The drafting history of the ICCPR gives us some clues as to how the use of these two different processes began. During its negotiation, the incorporation of a state-to-state complaint mechanism was mildly controversial. Some negotiators claimed that a mandatory mechanism would trigger sovereignty concerns for states and result in lower participation in the treaty overall. Accordingly, the parties agreed to make the mechanism available through an opt-in clause, which “[m]ost representatives . . . thought . . . would provide a satisfactory solution to the main problems raised during the debate.” When it came to designing a mechanism by which individuals could complain about their own states, however, the negotiators proved much more hesitant. They felt such a mechanism would be an even greater intrusion on state sovereignty and would erode the traditional state-to-state nature of international law. The Netherlands proposed another opt-in clause in the core text. Some delegates thought, however, that this proposal was still “dangerous” and might erode state participation in the treaty as a whole. They proposed using an optional protocol instead. The delegates recognized that they were debating an issue of form and that “the difference between an optional article and a separate protocol was legally unimportant.”

written responses to the Committees’ suggestions, to give publicity to the treaties as well as the Committees’ actions, and not to discriminate against complainants. Finally, OP-ICESCR, OP-CEDAW, and OP-CRPD also allow states to opt-in or opt-out of a system whereby their Committees can initiate investigations sua sponte.

92. Id.
93. Id at 653 (quoting A/6546 para 413 (Third Committee 1966)).
94. Id. The adoption of an optional state-to-state mechanism passed sixty-five to zero with twenty-three abstentions. The negotiators do not appear to have considered the use of an opt-out clause rather than an opt-in clause.
95. Id at 797.
96. Id at 796.
97. Id at 797–98.
98. Id.
99. Id at 798–99.
Nonetheless, the states that favored a stronger human rights compliance regime wanted the individual complaint mechanism as an opt-in in the main text, while the other states preferred an optional protocol. After a close vote, the article was moved to an optional protocol.

For human rights advocates, then, the optional protocol was a second-best alternative to the opt-in clause. Table 3 shows how states have responded to these different forms in practice. For each compliance mechanism used for each treaty, it gives both the percentage and fraction of treaty parties to the core treaty who have opted into the compliance mechanism.

100. Id.
101. Id.
Table 3: State Participation in Optional Compliance Mechanisms in Human Rights Treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Main Text Opt-In</th>
<th>Optional Protocol</th>
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<tbody>
<tr>
<td></td>
<td>State-to-State Complaints</td>
<td>Individual Complaints</td>
</tr>
<tr>
<td>ICERD</td>
<td>Mandatory</td>
<td>31% (54/174)</td>
</tr>
<tr>
<td>ICCPR</td>
<td>29% (48/167)</td>
<td>–</td>
</tr>
<tr>
<td>ICESCR</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>CEDAW</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>CAT</td>
<td>41% (60/147)</td>
<td>44% (64/147)</td>
</tr>
<tr>
<td>ICRMW</td>
<td>2% (1/44)</td>
<td>5% (2/44)</td>
</tr>
<tr>
<td>CPED</td>
<td>38% (11/29)</td>
<td>34% (10/29)</td>
</tr>
<tr>
<td>CRPD</td>
<td>–</td>
<td>–</td>
</tr>
</tbody>
</table>

* Optional protocol negotiated subsequent to core treaty.
* Available as an opt-in within the optional protocol.

These results might well surprise human rights treaty negotiators. They show that, for the most part, states join optional protocols at much higher rates than they join opt-in clauses embedded in the text of a treaty. For all the compliance mechanisms created through opt-in clauses in the main text, less than half of state treaty parties have joined these mechanisms. By contrast, in three of the four treaties where optional protocols are used to set forth the compliance mechanism, well over half the treaty parties have joined these mechanisms.102

102. The exception is the optional protocol to ICESCR, which was adopted less than three years ago (long after the main treaty).
This difference is surprising for several reasons. First, as noted above, the difference in form between opt-in clauses and optional protocols is legally unimportant. Second, to the extent there are differences between the two mechanisms, they would seem to cut in favor of greater participation in the opt-in clauses set forth in the main texts. For one thing, the optional protocols tend to impose slightly stronger obligations (such as a notice period prior to withdrawal), and one might think states would prefer weaker obligations. For another, to the extent that optional protocols were used for the more controversial issues at the time of negotiation — as was done with regard to the ICCPR — one would think states would be less willing to join them. The ICCPR negotiators would doubtless be surprised to learn that of the 167 states that are parties to the ICCPR, only 29% have opted in to the state-to-state complaint mechanism contained in the main text, while 68% have joined the optional protocol establishing the individual complaint mechanism.

It could be, of course, that the relationship between form and participation rates is caused solely by some third factor. For example, one could hypothesize that there is a selection effect — that treaty negotiators use optional protocols for more universally acceptable commitments and main-text opt-ins for more controversial ones. This seems implausible, however, in light of the ICCPR drafting history suggesting exactly the opposite. Another possibility is that the differences arise because different states are participating in the different treaties. My review of individual state decisions, however, suggests that this is not the case.

Yet another possibility is that the different human-rights subject matters of the various treaties give rise to different levels of willingness by states to accept compliance mechanisms in a way that just happens to conform quite closely with the form of opt-in used. It may be that states are simply more likely to accept a compliance mechanism with regard to political rights, civil rights, women’s rights, and the rights of disabled persons than

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103. See supra note 90. In addition, because optional protocols are themselves treaties, they will require whatever domestic process is required for treaty ratification, while decisions about opt-in clauses might require less effort at the domestic level (i.e., be left to the discretion of the executive branch in some jurisdictions).


105. For example, 141 of the 147 state parties to CAT are also parties to the ICCPR. Of these 141 parties, 108 have ratified the Optional Protocol to the ICCPR while only 64 have opted in to CAT article 22. For another example, of the 102 state parties to the Optional Protocol to CEDAW, 99 are also parties to ICERD but only 48 of these state parties have opted in to ICERD article 14.
they are with regard to torture, enforced disappearances, and to the rights of racial minorities. This is possible, although not obviously intuitive. I, however, do not think this provides a complete answer because it does not explain the demonstrated variations in state participation in the state-to-state and individual compliance mechanisms. If we look at the three treaties that offer both the state-to-state and individual complaint forms of compliance mechanisms through opt-in clauses embedded in the main text, we see that the participation rates for these two mechanisms are roughly the same within each treaty. The greatest difference, found in the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), is a mere 4%; 38% of state parties have opted into state-to-state complaints and 34% into individual complaints. Yet the one treaty that separates their form — the ICCPR — shows an enormous spread: only 29% of states have opted into the state-to-state complaint mechanism, while 68% have joined the optional protocol enabling individual complaints. It is difficult to think of any reason other than form why states would accept the two mechanisms at roughly the same rates for most treaties and yet diverge so dramatically for the ICCPR.

Given the limits of other explanations, it seems at least reasonably likely that framing may partially drive the differences in state participation rates. Optional protocols may simply be a better way of gaining state participation than are opt-in clauses embedded in the main text. Indeed, up to a point, variations in framing may even matter more than variations in substance. It is interesting that where the same framing is used (that is, opt-in clauses in the main text), state participation rates in the state-to-state complaint mechanisms and in the individual-complaint mechanisms are almost the same. If states are indeed more fearful of stronger substantive commitments, one might expect that there would be notably higher participation in the state-to-state complaint mechanism than in the individual-complaint mechanism. For one thing, the individual complaint mechanism lacks reciprocity, meaning that states accrue only obligations

106. Relatively, it could be that states happen to receive more international rewards from joining one set of treaties than the other set of treaties. Recent work by Beth Simmons and Richard Nielson suggests, however, that international rewards are not tied to human rights treaty ratification. See Richard Nielson & Beth Simmons, Rewards for Rights Ratification? Testing for Tangible and Intangible Benefits of Human Rights Treaty Ratification, (Jan. 11, 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451630 (finding no statistically significant evidence that international rewards flow from the ratification of the human rights treaties they examined, including the Optional Protocol to the ICCPR and Article 22 of CAT).

107. I have also looked to see whether state treaty parties participate in optional protocols providing for ICJ jurisdiction at higher rates than they do in opt-in clauses providing for ICJ jurisdiction. Four treaties in my MTDSG data set provide for ICJ jurisdiction through optional protocols made at the same time as the main treaties, and the average percentage of parties to the main treaties who also join these protocols is 43%. This is a strikingly higher number than the 5% average participation rate with regard to ICJ opt-in clauses embedded in the main text of treaties.
rather than rights under it. For another, the individual complaint mechanisms have proved much more powerful in action: the state-to-state complaint mechanisms have never been used in practice in any of these treaties, but the individual complaint mechanisms have received at least modest use. Yet states seem as willing (or, depending on presentation, more willing) to embrace the more significant obligation as the lesser one.

III. TREATY OPTIONS IN THEORY

Part II argued that the way in which treaty options are presented can affect ratifying states’ willingness to undertake them. This Part considers why this might be the case. What theory of state behavior can explain this result, and what else might it tell us about state decision-making? I begin by considering rational choice theory, which is probably the most popular model used by scholars of treaty design in international law and international relations today. I argue that it does a poor job of accounting for the results in Part II. Instead, I suggest these results are better explained through the lens of what Richard Thaler and Cass Sunstein call “choice architecture” and explain why it might be appropriate to apply this framework, which is primarily grounded in individual decision-making, to state behavior.

A. Rational Choice Theory

Treaty design has received much attention from rational choice scholars in international law and international relations. Although these scholars vary in their particular approaches, they typically assume that states are unitary rational actors and further use this assumption to explain and predict state behavior in treaty-making, or to theorize about the best ways to structure treaty design. In their view, “design differences [between treaties] are not random. They are the result of rational purposive interactions, among states and other international actors to solve specific

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110. See THALER & SUNSTEIN, supra note 9, at 3.
Among other things, rational choice theory has been used to analyze the default rules of treaty reservations, the use of dispute-resolution clauses in treaties, and states’ use of reservations to human rights treaties.

Negotiated options, however, have received comparatively little attention from rational choice scholars. Some overlook negotiated options entirely. Andrew Guzman and Barbara Koremenos each have articles devoted to using a rational choice approach to explain when dispute resolution mechanisms are or are not included in international agreements. Yet neither scholar mentions the fact that these mechanisms are frequently framed as negotiated options or discusses how states respond to these negotiated options.

Other scholars applying a rational choice approach note the existence of negotiated options but nowhere suggest that the choice between opt-in and opt-out clauses can affect state conduct. For example, in an article devoted to using a rational choice approach to assess why states do or do not accept ICJ jurisdiction in treaties, Emilia Powell and Sara Mitchell never consider whether the form of negotiated option might play a role.

Here, I consider the extent to which a rational choice approach can explain the results shown in Part II. I argue that it cannot explain these results — or, more precisely, that it cannot explain them in a persuasive way. This holds regardless of what precise version of the rational choice approach is used (for example, what assumptions one makes about underlying state preferences or how much one factors in reputational concerns). In particular, the behavior of ratifying states deviates notably from what rational choice theory would predict in at least two ways.

First, rational choice theory does not provide a persuasive answer for why the framing of negotiated options strongly affects state participation rates. My findings demonstrate that states embrace ICJ jurisdiction in

111. RATIONAL DESIGN, supra note 2, at 2.
115. See generally Guzman, supra note 113; Koremenos, supra note 113.
116. Id.
117. Emilia Justyna Powell & Sara McLaughlin Mitchell, The International Court of Justice and the World’s Three Legal Systems, 69 J. OF POLITICS 397 (2007); see also Swaine, supra note 11, at 325 (noting in passing the possibility of “optional clauses that states are free to accept or reject”).
treaties with opt-out clauses (80% participation on average) but decline to accept it in treaties with opt-in clauses (5% participation on average). If this finding reflects a causal connection at least partially, as I argue that it does, then this result is deeply puzzling from a rational choice perspective. It is explainable by rational choice theory only if (a) most states are rationally indifferent to the presence of an ICJ jurisdictional clause, or (b) there are significant reputational costs to opting out and no comparable reputational gains from opting in. Neither explanation seems likely. Ratifying states may well be mostly indifferent to the possibility of ICJ jurisdiction, given how little use the ICJ actually gets in practice and the absence of police power to ensure the enforcement of ICJ decisions. But it is hard to believe that rational states are so indifferent to ICJ jurisdiction that they will not bother to exercise the iota of effort required to make use of a negotiated option. While the chances of an ICJ case arising are small, they are not nil; and in any event acceptance of ICJ jurisdiction may trigger shadow-of-the-law effects.

The reputational argument is similarly unconvincing. Because negotiated options are negotiated, states who take advantage of them are playing by the book. To the extent that their reputations are implicated, it is not with regard to their procedural fair play but rather with regard to their overall willingness to accept the international rule of law, to the extent that this is embodied in ICJ jurisdiction. It is unclear whether such reputational effects should matter much to states under a rational choice approach.

118. Counting both contentious and advisory cases, only 152 cases have been brought before the ICJ since it began in 1946. See Cases, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/docket/index.php?p1=3 (last visited Nov. 11, 2012). For a detailed discussion of the role that ICJ jurisdictional clauses play in these cases, see Christian J. Tams, The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction 161, in A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE (Thomas Giegerich ed., 2009).

119. At the domestic level, the decision can be made in tandem with whatever other decisions are needed to effectuate the treaty’s ratification; and at the international level, the state need only to make a one-sentence declaration accompanying the deposit of a treaty ratification.

120. See MITCHELL & POWELL, supra note 113, at 412 (suggesting that state acceptance of ICJ jurisdiction is correlated with a higher likelihood of reaching and complying with agreements over contentious issues).

121. Jack Goldsmith, Eric Posner, and Andrew Guzman do not rely on the possibility of such global-citizen reputational effects, instead focusing on reputation as it relates to compliance or non-compliance with specific legal obligations. GOLDSMITH & POSNER, supra note 2, at 100–104 (focusing on reputation only in relation to compliance and further suggesting that it may not matter much even in that context); GUZMAN, supra note 2, at 33 (explaining that he is “interested primarily in a state’s reputation for compliance with international law rather than other types of reputation one can imagine”); see Rachel Brewster, Unpacking the State’s Reputation, 50 HARV. J. INT’L L. 231, 238–241 (2009) (noting differences between reputation regarding global standing and reputation regarding compliance with international law).
depends on the substance of whether or not it commits to ICJ jurisdiction, one would expect states to consistently embrace (or consistently reject) ICJ jurisdiction rather than to follow the default. It could be, of course, that a state’s reputation depends in part on whether it deviates from the default. From a rational perspective, this would follow since deviations from the default require more effort than adherence to the default and thus signal more information about a state’s interest in accepting the international rule of law. Accordingly, a state’s reputation for accepting the rule of law might suffer more from affirmatively opting out of ICJ jurisdiction than from passively failing to opt in to it. This argument is unpersuasive, however, in light of how little effort is actually required for states to exercise an opt-out or opt-in right. Because it takes little effort to opt in or opt out of a jurisdictional clause, under a rational choice approach the signal sent by this exercise of effort should be deemed a weak one.

A rational choice approach similarly does not explain why ratifying states would be more likely to embrace human rights compliance mechanisms when they are presented in optional protocols rather than as opt-ins within a treaty’s main text. Both options require affirmative action from states — with perhaps even more required in the case of optional protocols — so indifference cannot be the cause. Perhaps one could argue that the difference is due to sheer ignorance: that at least some states are so indifferent to the content of human rights treaties that they only look at their titles and do not bother to read them. Such states might overlook opt-in clauses in the main text but notice optional protocols. Such behavior, however, would be reckless rather than rational: it is hard to imagine that states could rationally be so indifferent to the content of treaties that they would not even make the effort to read them.

A second way in which my results rest uneasily with rational choice theory specifically involves the nature of ICJ dispute settlement clauses, as interpreted by the ICJ. These clauses typically turn on reciprocity: both states must embrace the dispute settlement clause in order for one state to use it against another. Importantly, however, this reciprocity is not measured at the time of the events giving rise to the suit, but at the time the suit is brought. For example, in the Right of Passage over Indian Territory Case, the ICJ exercised jurisdiction over Portuguese claims against India dating back at least to 1954 even though Portugal had only accepted the

122. E.g., Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 1998 I.C.J. 275, ¶ 23–27 (June 11) (reaffirming multiple prior rulings in finding that, for purposes of Article 36(2) of the ICJ Statute, reciprocity is measured at the time a suit is brought). States have some power to change this approach: for example, many states have attached declarations to their opt-ins under Article 36(2) of the ICJ Statute providing that other states can only sue them if certain timing conditions are satisfied. See Mitchell & Powell, supra note 113, at 168–169.
ICJ’s jurisdiction under Article 36(2) of the Statute of the ICJ on December 19, 1955.123 This structure creates a classic Prisoners’ Dilemma. A rational state would presumably favor the existence of a dispute settlement mechanism where it wishes to sue another state, but not where it might itself be sued.124 Thus, the best strategy for such a state would be to wait to opt in to an ICJ jurisdictional clause until it wishes to sue a participating state (if there is an opt-in clause) or alternatively to opt out of an ICJ jurisdictional clause initially and opt back in only when it wishes to sue a participating state (if there is an opt-out clause). If all states were to act rationally, then one would expect no states to embrace ICJ jurisdiction available through negotiated options, regardless of whether opt-in or opt-out clauses are used.

In practice, however, ratifying states confronted with opt-out clauses do not act in accordance with this prediction. As discussed above, most of these states accept ICJ jurisdiction rather than opting out. Of course, some states do follow the rational actor predictions. The United States now typically opts out of ICJ jurisdiction, as do several other major powers.125 Most states, however, do not. They are willing to accept the ICJ’s jurisdiction and thus be “sitting ducks” to states that wish to game the system.126 It could be that other preferences motivate these states, such as the desire to bolster the ICJ as an instrument of the international rule of law or at least to signal their support for it. If so, however, then it is puzzling that most of these states do not also embrace the ICJ when confronted with opt-in clauses. There is a puzzle here — one that rational choice theory cannot easily explain.

123. See Case Concerning Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, 1957 I.C.J. 125, at 141, 151 (November 26); Case Concerning Right of Passage over Indian Territory (Port. v. India), Merits, 1960 I.C.J. 6, at 33–34 (April 12). While most of the ICJ’s jurisprudence on this issue relates to Article 36(2), its approach would presumably extend to other opt-in clauses too, since the language of these opt-in clauses does not specify a different approach to timing. As another example (albeit one involving an optional protocol rather than an opt-in clause), Mexico ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations less than a year before suing the United States for violations of the rights of Mexicans on death row that had, at least in some cases, taken place long in the past. See William J. Aceves, Avena and Other Mexican Nationals (Mexio v. United States), Provisional Measures Order, 97 AM. J. INT’L L. 923, 924 n.13 (2003). States sometimes craft their declarations under Article 36(2) so as to make it harder for other states to game the system against them. My review of declarations in relation to other opt-in or opt-out ICJ jurisdictional clauses, however, indicates that this practice is rare with regard to other treaties.

124. Cf. Guzman, supra note 113, at 308 (suggesting that states enter into dispute-resolution clauses in order to have the ability to sue other states but that they do not desire to be sued).

125. See supra Part II.A (identifying other frequent opt-outers, including China, India, and South Africa).

B. Choice Architecture

Although rational choice theory cannot easily explain the results in Part II, these results line up extraordinarily well with a very different body of empirical research. This is the large and growing body of empirical work in behavioral economics and related fields on individual decision-making — research which reveals that individual decision-makers frequently deviate in predictable ways from rationally optimal behavior. Much of this work addresses what Richard Thaler and Cass Sunstein call choice architecture: the study of how the ways in which options are presented affect individual decision-making.\(^\text{127}\) Here, I describe some findings regarding choice architecture and then explain how and why they might explain the responses of ratifying states to treaty options.

1. The Literature on Individual Decision-Making

Three of the findings generated by research on choice architecture are of particular interest for my purposes. These are the status quo bias, the salience bias, and peer effects, each of which is described briefly below.

a. Status Quo Bias

Empirical studies based both on real-life observations and on randomized experiments show that individuals tend to be biased in favor of whatever option is framed as the status quo. People are much more willing to be organ donors when they must opt out than when they must opt in.\(^\text{128}\) They use 401(k) programs at much higher rates when they are automatically enrolled with a withdrawal option than when they must affirmatively join.\(^\text{129}\) They tend to prefer the automobile insurance coverage level that is presented to them as the default.\(^\text{130}\) They are much more likely to agree to receive further solicitations from websites that allow opt-out than from similar websites that allow opt-in.\(^\text{131}\) In short,

\(^{127}\) See THALER & SUNSTEIN, supra note 9, at 3.

\(^{128}\) Johnson & Goldstein, supra note 4 at 1714–15.

\(^{129}\) E.g., James Choi et al., *For Better or For Worse: Default Effects and 401(k) Savings Behavior, in Perspectives in the Economics of Aging* 81, 83 (David Wise ed., 2003) (looking at several companies that changed from 401(k) opt-ins to opt-outs and finding that when opt-ins were used, only 26–43% of employees participated within their first six months, while when opt-outs were used, over 85% of employees participated).

\(^{130}\) E.g., Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions, 7 J. of Risk & Uncertainty* 35, 48 (1993) (describing how New Jersey and Pennsylvania each offered automobile insurance whereby individuals could obtain a full right to sue by paying a higher premium, and finding that in New Jersey, where opt-in was required, only 20% did, so while in Pennsylvania, which used an opt-out, 75% did so).

\(^{131}\) E.g., Eric J. Johnson et al., *Defaults, Framing, and Privacy, 13 Marketing Letters* 5, 9 (2002) (finding in a randomized experiment that participants given the chance to opt-in to being contacted for further health surveys were willing to be so contacted at a much lower rate (48.2%) than were
people accept status quo options at rates well beyond what we would expect from rational actors. The reasons why this is true are debated. One proposed reason is that individuals perceive default options as reflecting an endorsement of this default (for example, individuals may believe that their 401(k) default reflects a recommendation from their employer). Another proposed reason is loss aversion. Individuals tend to weigh losses more than gains in decision-making, and so may weigh the risks of switching from a default option more heavily than the possible gains. Yet another proposed reason is procrastination: individuals continue to put off the decisions, perhaps naively expecting that they will make these decisions at a later time.

b. Salience Bias

Empirical research also suggests that the salience with which information is presented affects the average extent to which individuals make use of it, in a way that goes beyond what we would expect from rational actors. When individuals fill out surveys about overdraft fees — thus bringing the issue to their minds — they are significantly less likely to incur such fees in the following months. The use of electronic toll

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133. E.g., John Beshears et al., The Importance of Default Options for Retirement Saving Outcomes: Evidence from the United States in SOCIAL SECURITY POLICY IN A CHANGING ENVIRONMENT 167, 184–87 (Jeffrey Brown et al. eds., 2009) (discussing this endorsement effect); Johnson et al., supra note 131, at 7.

134. E.g., Samuelson & Zeckhauser, supra note 132, at 35–36; see also Richard Thaler, Toward a Positive Theory of Consumer Choice, 1 J. OF ECON. BEHAV. AND ORG. 39, 44 (1980) (coining the phrase endowment effect to describe this phenomenon).

135. E.g., Beshears et al., supra note 133, at 184; Johnson et al., supra note 131, at 7.

136. E.g., Shelley E. Taylor, The Availability Bias in Social Perception and Interaction, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, 190, 192 (Daniel Kahneman et al. eds., 1982) ("Salience biases refer to the fact that colorful, dynamic, or other distinctive stimuli disproportionately engage attention and accordingly disproportionally affect judgments."); George A. Akerlof, Procrastination and Obedience, 81 AM. ECON. REV. 1, 2 (1991); see also, e.g., Johnson et al., supra note 131, at 39–40 (describing an experiment in which individuals asked how much insurance they would purchase for "acts of terrorism" or "disease" gave significantly higher answers than those asked how much insurance they would purchase for "any reason"). For a useful review of the literature, see Deborah Schenk, Exploiting the Salience Bias in Designing Taxes 11–16 (N.Y. Univ. Sch. of Law, NYU Ctr. for Law, Econ. & Org., Working Paper No. 10–37, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661322.

collection systems such as E-ZPass makes drivers less responsive to toll increases.\textsuperscript{138} Grocery shoppers are less likely to buy goods when the price displayed includes the sales tax, even when these shoppers are already well-informed about the sales tax.\textsuperscript{139} In short, this research suggests that where information is presented more saliently (even if it is already known), it is likely to have a greater influence on individual decision-making.

c. Peer Effects

Individual decision-making can also be affected by information about how peers approach the same issue. Experiments on household energy consumption, for example, have shown that people change their behavior in response to information about their neighbors’ behavior. One such set of experiments by Ian Ayres, Sophie Raseman, and Alice Shih found that high-consuming households reduced their average energy consumption — and low-consuming households increased their average energy consumption — in response to information about their neighbors’ behavior.\textsuperscript{140} This is just one example of an extensive literature researching the influence of social norms on individual behavior. Broadly speaking, this literature indicates that individuals gain social and psychological benefits from conforming to the expectations or behavior of the group within which they are situated.\textsuperscript{141} These benefits can shape individual choices about how to behave, at least where individuals have information available about the choices made by other members of the group.

d. Implications for Law

This literature on individual decision-making is playing an increasingly important role in domestic legal scholarship and in the design of domestic structures. It offers instrumental insights into how preferred policy outcomes can best be achieved without depriving individuals of decision-making authority. Indeed, scholars have suggested using choice architecture to “nudge” people towards desired practices in areas as diverse as tax, personal finances, plea bargaining, health, and antitrust.\textsuperscript{142}

\textsuperscript{141} Goodman and Jinks, supra note 7, at 640–41.
\textsuperscript{142} See, e.g., Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer
In international legal scholarship, however, we see far less use of this literature. To date, its most prominent use has occurred in constructivist accounts of human rights law, where Ryan Goodman and Derek Jinks draw upon research on peer effects and social norms in proposing their acculturalization model of state behavior. In international relations, the influence of research in social psychology has a more substantial history, but one plagued with doubts about whether and how insights drawn from research on individual decision-making can translate to the broader world of international affairs.

2. Choice Architecture Applied to Treaty Options

The findings described above in choice architecture research map impressively well onto the results set forth in Part II. Between them, the status quo bias, salience bias, and peer effects provide a powerful explanation both for why ratifying states might accept ICJ jurisdiction at much higher rates when presented with opt-out clauses than with opt-in clauses and for why these states might accept human rights compliance mechanisms at higher rates when presented with optional protocols rather than opt-in clauses. This subsection explains this connection and then considers why it might exist — in other words, why biases found in individual decision-making might also occur in the behavior of states.

Consider first the showing that, on average, 80% of countries accept ICJ jurisdiction in treaties that allow them to opt out, while only 5% of countries embrace it in treaties that allow them to opt in. This result closely resembles the opt-in versus opt-out differences in individual behavior on organ donation, 401(k) plan enrollment, and so forth. Just as the individuals in these studies exhibit status-quo biases, so states seem to be exhibiting status-quo biases in the course of treaty ratification. They tend to embrace the default terms of the negotiated treaty and not take advantage of opt-ins or opt-outs in relation to ICJ jurisdiction. The fact that ICJ jurisdiction is a relatively minor aspect of most of these treaties


143. Goodman and Jinks, supra note 7; see also additional sources cited supra note 7.

144. E.g., Rose McDermott, Risk-Taking in International Politics: Prospect Theory in American Foreign Policy (1998); J. M. Goldgeier & P. E. Tetlock, Psychology and International Relations Theory, 4 ANNU. REV. POLIT. SCI. 67 (2001). For doubts, see, e.g., Goldsmith & Posner, supra note 2, at 8 (observing that “individual cognitive errors might have few if any macro effects on international relations”); cf. Jack S. Levy, Prospect Theory, Rational Choice, and International Relations, 41 INT’L STUD. Q. 87 (1997) (noting both the possible gains and pitfalls of applying psychological research on individual risk-taking to international relations). Some scholars working broadly within a rational choice framework do build in principles such as risk aversion into their models. See, e.g., Rational Design, supra note 2, at 22.
doubtless strengthens the effect of the status quo bias. It is unlikely to be a coincidence that the treaty which assigns the most important role to ICJ jurisdiction and which serves the greatest signaling role — the Statute of the ICJ — is also the treaty where state participation least tracks the status quo.

In addition, the salience bias might help explain why average state participation in ICJ jurisdictional clauses is higher in treaties that simply permit reservations (95%) than in treaties that explicitly note states’ rights to opt out (80%). An opt-out clause serves as an explicit reminder to states that they can opt out. State ratifiers do not have to go through the hoops of first remembering the background rules of treaty reservations and then further identifying the ICJ jurisdictional clause as one that might merit a reservation. Opt-out clauses are thus more salient than are the ordinary rights of reservation, and the salience bias may help explain the observable differences in state participation. I offer this possibility with a grain of salt, however, since, for the reasons discussed in Part II, I also think it possible that the observable differences here are entirely due to other factors.

The salience bias also provides a plausible explanation for why states might be more likely to ratify optional protocols than to opt in to equivalent clauses in the main text of the treaty. Optional protocols are much more salient than opt-in clauses. Whereas opt-in clauses are buried discretely in the main text of treaties, optional protocols are separate treaties with their own names. Ratifying states may thus be subject to a salience bias that causes them to be more aware of optional protocols — and perhaps also more willing to view their content as important — than opt-in clauses. In addition, because a salience bias might cause more attention to be paid to an optional protocol ratification than to a substantively equivalent opt-in option under an opt-in clause, states might realize greater reputational gains from the optional protocol ratification and thus be more inclined towards it. Peer effects might further accentuate the effects of a salience bias: if countries observe that other countries are ratifying an optional protocol then they may be more likely to do so as well.

Peer effects might also contribute to the difference in state participation between ICJ opt-in clauses and ICJ opt-out clauses. Information on whether states opt in or opt out of these clauses is a matter of public record and easy to obtain (unlike information on whether one’s neighbors are organ donors or have 401(k) plans). If states that ratify the treaty early on tend to follow the status quo, then that may make states that ratify the treaty later even more likely to do the same. In effect, there would be a positive feedback loop: the fewer states opt out, the less likely other states
are to do so; and, similarly, the fewer states that opt in, the less likely other states are to do so.\textsuperscript{145}

Choice architecture principles thus provide a powerful explanation for why the way in which treaty options are framed might affect the responses of ratifying states. For this explanation to be believable, however, there must be good reasons for thinking that state decision-making might reflect the same kind of biases found in individual decision-making. As José Alvarez has observed, models that project cognitive biases onto states run the risk of “pop psychology without people,” leaving the mechanisms that make them applicable “as opaque as the black billiard balls that realists call ‘states.’”\textsuperscript{146} Fittingly, the answer to why states might reflect these cognitive biases turns on the fact that state ratification decisions are made by people, and that these people are in turn usually answerable to other people. Accordingly, there are multiple plausible pathways by which state decision-making could reflect cognitive biases.

The first and most obvious pathway is that the decision-makers within the ratifying states could have cognitive biases.\textsuperscript{147} State processes for treaty ratification vary, but most will involve a decision by executive actors (such as foreign service officers or heads of state) to submit a treaty to the legislature, approval by the legislature, and transmission of the ratification, plus any accompanying declarations or reservations, to the treaty depository. Unless the legislature occupies itself closely with the micro-details of the treaty, the main decision-making about treaty options is likely to lie with the executive actors. These actors may have an instinctive bias towards whatever status quo is written into the treaty, for reasons similar to individual status quo biases. These actors may consider the default options to have the endorsement of the negotiating conference, or simply, to be loss averse and therefore the actors may be reluctant to change the status quo.\textsuperscript{148} They might similarly be subject to salience biases or

\textsuperscript{145} Cf. Helfer, supra note 42, at 369–70 (noting that states that are later to ratify have more information available about the actions of prior states and suggesting that this might lead to a first-mover disadvantage).

\textsuperscript{146} José E. Alvarez, Do States Socialize?, 54 DUKE L.J. 961, 969 (2005). For another good discussion of the aggregation problem, see Levy, supra note 144, at 102–04.

\textsuperscript{147} There is a developing literature on how group decision-making can reflect individual cognitive biases, as well as other biases introduced through the organizational process. \textit{E.g.}, Colin F. Camerer & Ulrike Malmendier, Behavioral Economics of Organizations, in Behavioral Economics and Its Applications 235 (Peter Diamond & Hannu Vartiainen eds., 2007); Samuelson & Zeckhauser, supra note 132, at 45–46. For a study on how cognitive biases by state decision-makers can affect policy decisions in the context of policy diffusion across borders, see Kurt Weyland, Theories of Policy Diffusion: Lessons from Latin American Pension Reform, 57 World Pol. 262, 269, 281–94 (2005).

\textsuperscript{148} Procrastination is another possible reason why state actors might have a status quo bias, but it seems less likely than in the organ donation or 401(k) context for two reasons. First, state actors have stronger incentives to not procrastinate because the political effort required to revisit an ICJ jurisdictional clause after ratification will probably be significantly greater than the political effort
influenced by peer effects, particularly if they view themselves as situated within a community of nations.

Second, even if state decision-makers have no cognitive biases, their decision-making may nonetheless be affected by the real or perceived cognitive biases of other actors. For example, a head of state might embrace the default option written into a treaty if she projects loss aversion onto her domestic audience and thus thinks she faces greater political risks from making an active decision rather than a passive one. As another example, a salience bias on the part of human rights groups or international organizations seeking to persuade states to join compliance mechanisms might cause them to push harder in relation to compliance mechanisms set forth in optional protocols than to those set forth in opt-in clauses. This in turn would incentivize state actors to prioritize optional protocols more than opt-in clauses.

In suggesting that state decision-making may reflect cognitive biases similar to those found in individual decision-making, I do not mean to suggest that these biases will appear equally across states. Not only do states have heterogeneity in their interests, but they also likely have different levels of susceptibility to various cognitive biases. The United States, for example, is quite consistent in its approach to ICJ jurisdictional clauses and human rights compliance mechanisms, regardless of how these are framed. There may be institutional features that predict the extent to which states respond to various cognitive biases. A state that has each treaty reviewed internally by numerous lawyers may be institutionally less susceptible to the salience bias than a state where treaty review is conducted primarily by one overworked official. A state whose ratifying actors have been heavily involved in a treaty’s negotiations may be less influenced by a status quo bias in relation to an opt-in or opt-out clause than a less-involved state because of its comparative familiarity with the negotiating context. A large state may be less responsive to peer effects than a small state. In short, the effects of choice architecture may vary predictably across states.

IV. IMPLICATIONS

The previous Parts have argued that we can better understand how ratifying states approach treaty options if, instead of simply using rational choice theory, we instead project at least some of the biases common in individual decision-making onto state behavior. Here, I consider some implications of this argument. I begin narrowly by considering how choice

required to opt in at the time the treaty is ratified. Second, procrastination is usually not an option with regard to ICJ opt-out clauses, as parties typically can only exercise their right to opt out at the time they join the treaties.
architecture principles can aid negotiators going forward. I then turn to some of the broader implications that flow from understanding states as subject to some of the same cognitive biases found in individuals. I suggest several other ways in which choice architecture might improve international regime design.149

The broader implications presented here come with an important caveat. While reasoning from choice architecture principles may offer gains in both predictive power and usefulness to policy-makers as compared with a rational choice model, these improvements will depend on understanding what biases states are subject to and under what situations. Unfortunately, there is no single overarching answer to this question, as compared with the simplicity and elegance of a rational choice model. Even in the individual decision-making context, this answer is context dependent.150 In the state context, the additional difficulties associated with projecting individual cognitive biases onto state behavior make it even more difficult to determine what biases to look for when. While I can offer thoughts about how this approach operates in the specific context that I am studying — treaty options — with a reasonably high degree of confidence, I can only hypothesize about how choice architecture principles may apply to other aspects of international regime design. Even without more research, however, international legal actors might well wish to incorporate insights from choice architecture into their decision-making, at least with regard to framing. If framing does not matter, then no harm is done; and if it does in fact matter, then its instrumental use can benefit these actors.

A. Treaty Options

Treaty negotiators should take insights from choice architecture into account in choosing among treaty options. Negotiators should select treaty options with an awareness of how phenomena like the status quo bias, the salience bias, and peer effects may affect the behavior of ratifying states. Some negotiators doubtless have some intuitive grasp of these factors. At the Review Conference of the Rome Statute of the International Criminal

149. My argument presumes a system that relies on state consent, whether explicit or implicit. I do not consider broader questions of whether international law should move away from its current acceptance of the need for some form of state consent in most circumstances. But see generally Andrew T. Guzman, Against Consent, 52 VA. J. INT’L L. 747, 775–78 (2012) (arguing that international law should rely less on state consent overall).

150. E.g., Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CALIF. L. REV. 1051, 1057–58 (2000) (observing that, “This movement . . . lacks a single, coherent theory of behavior,” but that “one can analyze the appropriate legal command in any given circumstance without a grand, overarching theory of behavior so long as one has a due regard for the relevant decision-making capacities of the actors in that specific setting.”).
Court, for example, negotiators closely considered the choice of treaty option that would give rise to the court’s jurisdiction over the crime of aggression. However, there can be astonishing heedlessness even among experts. Negotiators may think choosing between an opt-in and an opt-out is “merely [a matter] of formulating a rule one way or the other,” as one expert once remarked, and not appreciate the role that framing can play in affecting state decisions.

Most directly, the results from this Article indicate that negotiators interested in more robust treaties should avoid opt-in clauses whenever possible. Instead, where they think participation in a certain part of the treaty must be made optional in order to ensure participation in the treaty more broadly, they should make use of opt-out clauses or simply leave it to states to reserve out of controversial clauses. If neither of these alternatives is achievable, the negotiators should still steer clear of opt-in clauses set in the main text and instead favor optional protocols. This approach would harness the status quo and salience biases in favor of more robust treaty obligations. Of course, these biases are likely to have greatest effect where underlying state preferences are weak. Even on issues on which most states have strong preferences, however, framing might influence the decision-making of at least some states.

Choice architecture also offers insights for treaty negotiators as they choose timing rules to incorporate into opt-in or opt-out clauses. Negotiators can word a clause to permit opt-in or opt-out at any time or instead only at the time a state joins a treaty. The apparent trade-off here is between immediate participation and long-term participation: allowing states to opt in at any time may favor long-term participation but deter immediate participation relative to opt-in decisions that must be made at the time of joining; and conversely allowing states to opt out at any time may favor immediate participation over long-term participation relative to


152. United Nations Conference on the Law of Treaties, 2nd Sess., Vienna Apr. 9–May 22, 1969, Official Records, 34, U.N. Doc. A/CONF.39/11/Add.1 (1970) (remarks of Sir. Humphrey Waldock, who had been the Special Rapporteur for the International Law Commission on the Law of Treaties and was present as an expert consultant). This remark arose during the drafting of the Vienna Convention during a debate about how to frame the consequences of a state’s objection to another state’s reservation: should this objection preclude the treaty from entering into force between these states unless the objecting state specified otherwise, or instead should this objection preclude the treaty from entering into force between these states only if the objecting state explicitly stated that it desired this result? Sir Humphrey Waldock further observed that “from the point of view of substance it was doubtful if there was any great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear.” Id. But see Special Rapporteur, The Law and Practice Relating to Reservations to Treaties, Int’l Law Comm’n, 28 & 28 n.133, U.N. Doc. A/CN.4/470 (May 30, 1995) (by Alain Pellet) (citing Sir Humphrey Waldock’s comments and observing that “the reversal of the presumption may, however, seem innocuous.”).
opt-out decisions that must be made at the time of joining. But choice architecture suggests that treaty negotiators should take into account the possibility that, given the chance, states will procrastinate in making affirmative decisions about opt-ins or opt-outs at levels that go beyond what we would expect from rational actors. Where opt-in clauses are used, then, both immediate and long-term participation rates could conceivably be strengthened by only allowing states to opt in at the time they joined the treaties (although such restrictions on timing might be difficult to make credibly). Conversely, where states are allowed to opt out of treaty provisions or make reservations “at any time” rather than simply when they join the treaty, they may not only participate in these provisions at higher rates initially but also delay opting out or reserving in the future in ways that result in higher long-term participation rates as well. To be clear, I am not saying that strict timing rules with opt-in clauses and relaxed ones with opt-out or reservations clauses are always better, but only that choice architecture suggests that such rules might have more advantages than we would otherwise anticipate.

Choice architecture also provides insights for negotiators to consider in choosing among negotiated options, the default rules on treaty reservations, and no-reservations clauses. Most intriguingly, some choice architecture principles suggest that treaty negotiators might consider trusting more to the default rules on treaty reservations than they do in practice. The default rules give rise to the concern that ratifying states will opportunistically attach reservations even if these reservations are not material to their decisions to join the treaties. One partial solution used in many treaties — including 60 treaties in my dataset — is to include a no-reservation clause accompanied by specific opt-out provisions. This approach is attractive because it gives ratifying states flexibility on collectively recognized issues of disagreement but cabins their ability to make reservations of their own choosing. In considering this approach, however, negotiators should consider that the risk that states will attach opportunistic reservations is likely reduced in the first place by the status quo bias, especially with regard to less important matters. In addition,


154. This might be especially true to the extent that there is social pressure from other states against exercising a right of subsequent opt-out. Such social pressure can be found, for example, where states exercise their right to withdraw from a treaty under a termination clause and then rejoin with reservations. See Helfer, supra note 42, at 371–75 (discussing various examples but noting that states have reputational incentives not to engage in such behavior).

155. See Parisi & Fon, supra note 11, at 209.

156. Cf. id. ("The study of reservations in multilateral treaties reveals a striking paradox: the number of reservations attached to international treaties is relatively low despite the rules governing
these negotiators should also keep in mind that by saliently identifying issues where opt-out is permissible, they may inspire states to opt out at higher rates than they would do if the default rule on treaty reservations were instead applicable. The default rules on treaty reservations thus may have more merit than commentators often suggest. Nonetheless, to the extent that negotiators are concerned about the behavior of states that seem structurally more immune to cognitive biases, such as the United States, these negotiators might be wary of trusting to the default rules on treaty reservations.

Finally, to the extent that negotiators wish to discourage ratifying states from making reservations or taking advantage of opt-out clauses without fully banning these states’ rights to do so, then the negotiators could draw on choice architecture principles to set up further nudges in favor of full participation in the treaty. For example, negotiators could include a clause that requires states to renew opt-outs or reservations after every few years, thus changing the status quo from presumptive continuation of an opt-out or reservation to presumptive termination. Negotiators could also seek to strengthen peer influence against reservations by requiring states to present their reservations every few years to the conference of the parties, if one is established by the treaty.

B. Broader Applications

Beyond treaty options, choice architecture principles offer powerful insights into the design of international regimes more generally. By drawing on choice architecture, regime designers can potentially increase state participation, bolster the power of international institutions, and improve compliance with international law. As noted earlier, the significance of choice architecture may vary depending on the circumstances, but prudent regime designers would do well to factor in its possible influences. Here, I outline five possible ways in which choice architecture principles might affect regime design.

First, treaty negotiators may be subject to cognitive biases. Although I have focused this Article on the possible biases of treaty ratifiers, negotiators may also be influenced by status quo biases, salience biases, peer effects, and other cognitive biases. For example, a status quo bias might make them exceptionally inclined to borrow from the templates used in previous treaties in the same subject matter.157 As Jose Alvarez has

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157. This prediction is consistent with negotiating choices on treaty options. While negotiators frequently contract around the default rules on treaty reservations, as I showed in Part I.C., their choices in this regard often look quite a lot like cut-and-paste copies of prior treaties in the same

reservations set forth in the Vienna Convention that create a natural advantage in favor of the reserving state.) Parisi & Fon attempt to explain this “paradox” using rational choice theory, but a status quo bias can also explain much of it.
observed, “[o]nce a particular model has been successfully negotiated in a given field, negotiators in that field will tend to follow it simply because it is familiar or has been shown to work.” Treaty negotiators should take this status quo bias into account. In negotiating initial treaties in a field, for example — even temporary or ad hoc treaties — they should be aware that their choices will likely have an exceptional influence over the shape of treaties to come. Similarly, negotiators of later treaties should be aware that they may be overly biased in favor of the status quo and consider taking steps to counteract this bias.

Second, choice architecture principles may provide support for structuring international agreements as pledges rather than contracts. As Kal Raustiala has observed, at the highest level of generality, international actors must choose between pledges and contracts, each of which can be done in a variety of ways. He notes that because pledges are not legally binding, states may be more willing to commit to significant substantive changes through them rather than through contracts. If states are subject to similar cognitive biases as individual decision-makers, then this would strengthen his argument even more. For example, risk aversion and loss aversion may lead states to have exaggerated concerns about substantively deep contracts and thus increase the relative attractiveness of pledges. Once a pledge is made, however, the status quo bias and peer effects may make states less likely to abandon their pledges than they anticipate at the time they make these pledges.

Third, choice architecture may offer insights for how specifically negotiators should frame treaty commitments, especially in relation to compliance. Some behavioral economics research shows that, under certain conditions, parties undertake higher levels of performance towards each other — or at least are less inclined to breach — where contracts rely implicitly on background social norms than where they spell out obligations and consequences of breach at high levels of specificity. The

subject matter. For example, environmental treaties typically have virtually identical opt-in jurisdictional clauses (despite their tiny take-up rates) and no-reservation clauses, and penal matters clauses typically use virtually identical opt-out jurisdictional clauses. See supra note 72. The final clauses used in one treaty thus seem to become the drafting template for the final clauses used in the next related treaty — and this likely explains in part why negotiators continue to prove willing to contract around the Vienna Convention’s default rules.

160. Id. at 582–83.
161. E.g., George A. Akerlof, Labor Contracts as Partial Gift Exchange, 97 Q. J. Econ. 543, 549 (1982) (arguing that certain interactions within the labor market derive from a model of mutual gift exchange rather than contract); Uri Gneezy & Aldo Rustichini, A Fine is a Price, 29 J. LEGAL STUD. 1, 15 (2000) (showing that parents were more likely to pick up their children late from day care where modest fines were imposed than when no fines at all were imposed); Tess Wilkinson-Ryan, Do
theory is that more specific, market-oriented terms “crowd out” the background social norms. It would be valuable to know whether this phenomenon applies in relation to treaties, which often include weak provisions for enforcement. If crowding out applies to state behavior, then such provisions might sometimes make states more inclined towards breach than they would be in the absence of any enforcement provisions at all.

Fourth, choice architecture principles might also support making treaties easy to exit from on paper. States have many reasons to value the right of exit from a treaty highly. To the extent that they are risk averse, however, they may value this right even more highly going into a treaty than one would otherwise expect — and thus, as with pledges, be willing to accept notably deeper substantive commitments in return. Once in the treaty, however, the status quo bias and peer effects may make them unwilling to exercise their right of exit in ways that go beyond straightforward concerns about the substantive or reputational costs of exit.

Finally, choice architecture may offer useful insights for international actors who are implementing treaty regimes. Consider, for example, the Human Rights Committee of the ICCPR, which has great trouble getting states to comply with the reporting obligations that the ICCPR imposes on these states. The Committee has taken the approach of threatening to issue its own reports with regard to truly delinquent states — and then issuing these reports if the states remain unresponsive. Instead of this approach, or as a complement to it, the Committee could increasingly experiment with tactics like those shown to work in the context of household electricity consumption — that is, notifying offending states that neighboring states are in compliance with the reporting requirements.

* Liquidated Damages Encourage Breach? A Psychological Experiment, 108 Mich. L. Rev. 633 (2010) (showing that participants in an experiment were more willing to breach a contract where liquidated damages were specified).

162. DAN ARIELY, PREDICTABLY IRRATIONAL 68 (2008).

163. Cf. Goodman & Jinks, supra note 7, at 675–700 (suggesting that under their acculturalization model of state behavior, precision in treaty obligations and sanctions can sometimes be counterproductive).


166. See id. at 13–17 (noting the adoption of this approach and its application in specific contexts). Where the Committee threatens to issue its own report, states sometimes but not always head it off by submitting their own reports. See id. (discussing how Surinam, Kenya, Barbados, Nicaragua, and San Marino submitted reports to forestall the Committee, but Gambia, Equatorial Guinea, Saint Vincent and the Grenadines, and Grenada did not).
It may be, of course, that such nudges will not translate to the international context. If they do not, however, then little harm will be done by trying them — and if they do, then the gains may be valuable indeed.

V. CONCLUSION

When the Statute of the International Court of Justice was drafted, treaty negotiators wavered between two main proposals regarding the ICJ’s jurisdiction. The first would have given the ICJ jurisdiction over all international legal disputes between states. The second — the one that ultimately became Article 36(2) — allowed states to opt in to such jurisdiction. Today, only about 34% of United Nations member states have done so.

The findings in this Article suggest these treaty negotiators (and many others) missed an easy opportunity to bolster state acceptance of ICJ jurisdiction. Although they barely considered the possibility of an opt-out clause, its use likely would have resulted in greater acceptance of ICJ jurisdiction. Such a clause would also likely have been acceptable to treaty negotiators wary of straight-up compulsory jurisdiction, as it would have left states with the right to opt out of such jurisdiction. We can only imagine what the ICJ’s increased role would look like under such a circumstance; and what its bolstered authority and significance might mean for the rule of international law.

The specific argument of this Article is that the way in which a treaty option is framed can affect the likelihood that states will accept it. There is low-hanging fruit out there for treaty negotiators interested in increasing state participation without sacrificing strength. More broadly, and even more importantly, this Article reveals an urgent need for future research into the implications that choice architecture holds for international regime design. If states are responsive to framing effects and other cognitive biases, as the findings of this Article suggest, then design choices that take

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168. See id. This approach followed that taken in the Statute of the Permanent Court of International Justice. See generally Lorna Lloyd, A Springboard for the Future: A Historical Examination of Britain’s Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 AM. J. INT’L LAW 28 (1985) (detailing the drafting history of the PCIJ’s optional clause).

169. At a preliminary conference, the Egyptian delegation briefly floated the possibility of making jurisdiction compulsory but allowing “each State to escape it by a reservation.” U.N. Comm. of Jurists, supra note 73. For the most part, though, debate over striking a compromise between an opt-in clause and obligatory jurisdiction focused on a proposal made by New Zealand of allowing reservations to the scope of the ICJ’s jurisdiction but not to the overall fact of its jurisdiction. See Report of Subcommittee D to Committee IV/1 on Article 36 of the Statute of the International Court of Justice, (May 31, 1945) in 13 Doc. U.N. Conf. on Int’l Org. 557, 557–561 (1945) (discussing the attached New Zealand proposal specifically and the jurisdiction generally).
these effects into account could considerably enhance the effectiveness of international regimes.