

## SUPRANATIONAL RULINGS AS JUDGMENTS AND PRECEDENTS

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Why do domestic courts routinely enforce arbitral awards rendered by tribunals operating abroad, and yet frequently refuse to defer to the decisions rendered by supranational judicial bodies? Scholars of international and foreign relations law have increasingly engaged the “interjurisdictional problem” concerning the relationship between domestic and supranational courts,<sup>1</sup> but this literature frequently pays relatively little attention to the burgeoning phenomenon of international arbitration.<sup>2</sup> Although contributors to this Symposium have debated whether international arbitration is really crowding out traditional litigation as the most important method for resolving transnational disputes,<sup>3</sup> there is no doubt that international arbitration is a highly successful phenomenon. Nor can one deny the existence of a marked disparity between the receptivity of domestic courts to transnational arbitral awards, on the one hand, and the considerably greater skepticism with which such courts greet

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1. See, e.g., Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Jenny Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997). For my own contribution to this literature, see Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005) [hereinafter Young, *Institutional Settlement*].

2. There are, of course, exceptions. See, e.g., Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 700 (2003) (considering the arbitral model as one of several different models for the relationship between domestic and supranational courts).

3. Compare Thomas E. Carbonneau, *Commercial Peace and Political Competition in the Crosshairs of International Arbitration*, 18 DUKE J. COMP. & INT'L L. 308 (2008) (asserting that arbitration is supplanting traditional litigation), with Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 447 (2008) (questioning the actual dominance of arbitration).

the decisions of supranational courts like the International Court of Justice (ICJ).

Some have suggested that this disparity can be traced to a distinction between “public” law, which “regulat[es] the relations of individuals with the government and the organization and conduct of the government itself,”<sup>4</sup> and “private” law, which is “concerned with private persons, property, and relationships.”<sup>5</sup> To be sure, the great bulk of international arbitral awards have concerned private contractual disputes, and these sorts of awards seem to engender the least resistance to their enforcement.<sup>6</sup> The most prominent domestic decisions refusing to defer to supranational courts, on the other hand, have come in the public law area.<sup>7</sup> But the Legal Realists taught American lawyers to be skeptical of sharp distinctions between the “public” and “private” spheres, and it is not hard to trace the public implications of even purely contractual norms being developed in supranational arbitral rulings. I want to suggest a different ground for distinction in this brief essay: The commercial arbitral awards that are so readily enforced by domestic courts are simply *judgments*, which do not implicate the law declaring functions of courts. Domestic courts have been considerably more skeptical, however, when asked

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4. MERRIAM-WEBSTER ONLINE, [http://www.merriam-webster.com/dictionary/public%20-law](http://www.merriam-webster.com/dictionary/public%20law) (last visited Feb. 22, 2008); see also BLACK'S LAW DICTIONARY 1230 (6th ed. 1990) (defining “public law” as “[a] general classification of law, consisting generally of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another”).

5. MERRIAM-WEBSTER ONLINE, *supra* note 4; see also BLACK'S LAW DICTIONARY, *supra* note 4, at 1196 (defining “private law” “as used “in contradistinction to public law,” as “that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals”). The mission statement for the conference panel to which this essay contributes, for example, asks “Why are many states seemingly not as receptive to the decisions of public international courts as they are to private arbitral decisions?” Ralf Michaels, Opening Remarks, *Public and Private Law in the Global Adjudication System – Three Questions to the Panelists*, 2008 Duke Journal of Comparative & International Law Symposium, in 18 DUKE J. COMP. & INT'L L. 253 (2008).

6. See 9 U.S.C. § 2 (2006) (“[A] contract evidencing a transaction involving commerce to settle by arbitration thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . . .”); see, e.g., *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) (applying the Federal Arbitration Act to private contract claims); *Siemens Westinghouse Power Corp. v. Dick Corp.*, 293 F. Supp 2d 344, 346-47 (S.D.N.Y. 2003) (same).

7. See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006) (refusing to defer to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations).

to defer to the *precedential* effect of supranational decisions or the *interpretive* authority of the supranational courts that issue them.

I also want to argue that this disparity in treatment, when viewed as one between the force of supranational decisions as judgments and as precedents, makes eminent good sense. The law-declaring function of courts implicates the interests of autonomy and accountability that lie at the heart of any credible notion of sovereignty. Domestic courts are properly hesitant to cede this function to supranational bodies, especially when the democratic legitimacy (and possibly the procedural transparency and integrity) of those tribunals is dubious. By contrast, the enforcement of a judgment, without more, typically settles the dispute between the parties without resolving the rights of parties not before the court. Particularly where the parties have already consented to the arbitral forum, there are few sovereign concerns to outweigh the efficiency gains to be had from barring relitigation.

Even when we are concerned with the force of foreign rulings as judgments rather than precedents, however, those rulings do not automatically have domestic force. Foreign arbitral awards are binding domestically because Congress has ratified the treaty governing such awards and incorporated that treaty into domestic statutes. Where such legislative implementation is absent, courts have been—and ought to be—far more hesitant to accord domestic force to foreign and supranational judgments.

This essay has two parts. Part One develops the puzzle of domestic deference to foreign decisions in arbitral cases and skepticism of such decisions in “public” cases. Part Two rejects accounts of this distinction grounded in a sharp dichotomy between public and private, and advances an alternative account grounded in two other variables: the distinction between judgments and precedents, and the primary role of Congress in determining when foreign rulings will have domestic force. I suggest some broader implications of this analysis in the Conclusion.

### I. A PUZZLING DISPARITY?

Many observers have remarked on the unfortunate disconnect between public and private international law. That disconnect can distort our perceptions of the nascent global judicial system. On the public side, potential intrusions by supranational judicial bodies—e.g., the International Court of Justice or the World Trade Organization (WTO) Appellate Body—into domestic litigation seem unusual and

suspect, despite the frequency with which foreign decisions impact domestic entities and disputes in the context of commercial arbitration. On the other side of the coin, the success of commercial arbitration at performing certain functions in certain kinds of disputes may tempt private international lawyers to underestimate the difficulty of incorporating supranational decisions that play more public roles into the domestic legal system. I ultimately argue here that the international arbitration model should *not* influence, to any great extent, the ways in which domestic courts treat supranational decisions that purport to declare the law rather than simply resolve disputes. But that is not to deny that we can learn a great deal from the comparison. There *is* a significant disparity between the treatment of foreign decisions in the arbitration and public law contexts, and unearthing the reasons for it can help us better understand the enterprise of transnational decisionmaking in each context.

#### A. Domestic Enforcement of Foreign Arbitral Awards

Arbitral awards originating outside the American legal system are routinely enforced, in keeping with a more general enthusiasm for arbitration in the domestic legal system.<sup>8</sup> Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>9</sup> commonly known as the New York Convention, domestic courts apply a highly deferential standard of review. “The Convention does not give courts the power to refuse enforcement of an award because it disagrees with the substantive outcome on the merits”;<sup>10</sup> rather, courts are obliged to enforce the award unless one of the narrow grounds for refusal specified in the treaty is met.<sup>11</sup> Both

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8. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (striking down a California law restricting arbitration agreements and declaring “a national policy favoring arbitration”); Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 60 (1997) (“The judiciary’s attitude toward arbitration has undergone a startling transformation” that “has assured the liberal interpretation and enforcement of arbitration agreements” and “has disabled public policy objections to the arbitration of certain statutory claims.”).

9. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 *U.S.T.* 2517, 330 *U.N.T.S.* 38 [hereinafter *New York Convention*].

10. Howard A. Ellins & Christopher H. Withers, *Judicial Deference to the Authority of Arbitrators to Interpret and Apply Federal Antitrust Laws*, 12 *AM. REV. INT’L ARB.* 387, 397 (2001).

11. See generally Alford, *supra* note 2, at 700-04; Michael A. Rosenhouse, Annotation, *Confirmation of Foreign Arbitral Award Under Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 194 *A.L.R. FED.* 291 (2004).

Congress and the federal courts have enthusiastically assimilated this treaty obligation into domestic law. Congress has explicitly incorporated the New York Convention into the Federal Arbitration Act (FAA),<sup>12</sup> and the Court has suggested that the FAA's general policy favoring arbitration is even more compelling in the international context.<sup>13</sup>

The New York Convention appears to envision that the courts of the country in which the arbitration takes place will furnish the primary check on arbitral proceedings. As Judge Wiener has explained, the Convention "mandates very different regimes for the review of arbitral awards (1) in the countries in which, or under the law of which, the award was made, and (2) in other countries where recognition and enforcement are sought."<sup>14</sup> The former courts have "primary jurisdiction" over the award, and the Convention "does not restrict the grounds on which primary-jurisdiction courts may annul an award."<sup>15</sup> Those courts thus "have much broader discretion to set aside an award" than courts in other nations, which exercise a "secondary" jurisdiction over actions to enforce the award.<sup>16</sup> Secondary jurisdiction courts may refuse recognition only on one of several specific bases set forth in the Convention.<sup>17</sup>

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12. 9 U.S.C. §§ 201-08 (2006).

13. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974) (citations omitted):

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

14. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 (5th Cir. 2003) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)).

15. *Id.* at 368.

16. *Id.*

17. Secondary jurisdiction courts do *not*, however, appear to be bound by the outcome of challenges to an award in the country of primary jurisdiction. Such courts may, for instance, enforce awards held *unenforceable* in the primary country, and they may also decline recognition, notwithstanding the primary jurisdiction court's refusal to vacate an award, if the Convention's criteria are met. *See id.* at 367-68. "By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the

When the prevailing party in a foreign arbitration seeks enforcement of the award in a domestic court, Chapter V of the Convention provides several primarily procedural and quite narrow grounds upon which a domestic court may refuse to recognize the award.<sup>18</sup> Optional reservations to the Convention, both of which were incorporated in the U.S. Senate's ratification of the agreement,<sup>19</sup> restrict the Convention's coverage to awards made in other signatory countries and that arise out of commercial relationships. The most open-ended grounds for nonrecognition, however, are found in Section Two of Article V, which permits nonenforcement by a domestic court if "[t]he subject matter" of the dispute "is not capable

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Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award." *Id.* at 367.

18. Specifically, the domestic court may deny recognition if:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention, *supra* note 9, art. V(1).

19. *Id.* art. I(3):

When signing, ratifying, or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only on the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such Declaration.

The reservation restricting coverage to international awards arising out of commercial relationships is implemented in the FAA at 9 U.S.C. § 202 (providing that "[a]n agreement or award arising out of [a commercial] relationship which is entirely between the citizens of the United States shall be deemed not to fall under the Convention" unless it has some "reasonable relation with one or more foreign states").

of settlement by arbitration under the law of that country,” or if “[t]he recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>20</sup> American courts have generally construed these exceptions narrowly in order to promote the general policy favoring arbitration of disputes.<sup>21</sup> The public policy exception, in particular, has eroded significantly over the years.<sup>22</sup>

A good example of the narrowness of this exception in practice is the Second Circuit’s leading decision in *Parsons & Whittemore Overseas Co., Inc. v. Société Générale De L’Industrie du Papier (RAKTA)*.<sup>23</sup> Overseas, an American company, contracted with RAKTA, an Egyptian corporation, to build a paperboard mill in Alexandria, Egypt. In 1967, five years into the contract, the Egyptian government severed diplomatic relations with the United States in connection with the Arab-Israeli Six Day War and expelled all Americans from Egypt except those who could obtain a special visa.<sup>24</sup> When Overseas abandoned the contract, litigation ensued concerning whether termination was permitted by a *force majeure* clause in the agreement. RAKTA ultimately prevailed before an arbitral tribunal and sought to enforce the award in the American courts. Overseas opposed enforcement of the arbitral award, primarily on the ground that its abandonment of the contract was consistent with United States public policy, as indicated by the U.S. Agency for International Development’s withdrawal of financial support for the construction project. The Second Circuit, however, emphasized that “[t]he general pro-enforcement bias informing the [New York] Convention . . . points toward a narrow reading of the public policy defense.”<sup>25</sup> The Court of Appeals thus concluded that “[e]nforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”<sup>26</sup>

Unsurprisingly, given this legal framework, one finds many, many cases enforcing foreign arbitral awards without any significant

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20. New York Convention, *supra* note 9, art. V(2).

21. See Alford, *supra* note 2, at 701-04.

22. See, e.g., Davis, *supra* note 8, at 63-76 (chronicling the erosion of the public policy defense in arbitration cases).

23. 508 F.2d 969 (2d Cir. 1974).

24. *Id.* at 972.

25. *Id.* at 973.

26. *Id.* at 974.

inquiry into the underlying merits of the dispute.<sup>27</sup> The regime is thus one of extraordinary deference, largely comparable to the “full faith and credit” that American domestic courts owe to judgments rendered by the courts of their sister states.<sup>28</sup> As the next section demonstrates, however, American domestic courts are not always so receptive to foreign law in general and to the decisions of supranational courts in particular.

## B. Reception of Foreign Law and Supranational Court Decisions

Notwithstanding the deferential treatment accorded to foreign arbitral awards under the New York Convention, American jurisprudence has recently been marked by heated debates about the propriety of citing foreign decisions and legal practices, and by considerable skepticism toward the decisions of supranational tribunals. American courts have long taken account of foreign practice and decisions,<sup>29</sup> but the Supreme Court has sparked controversy by prominently citing foreign sources in a string of cases overruling prior precedent and extending the scope of constitutional rights to sexual privacy and against cruel and unusual punishment.<sup>30</sup> The debate has spilled over into the world outside the courts, as

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27. *E.g.*, *Land, Air & Sea Transp. v. El Nasr Mining Co.*, No. 06-13482, 2008 WL 612732, at \*2-3 (S.D.N.Y. Feb. 28, 2008); *Suraleb, Inc. v. Prod. Ass'n "Minsk Tractor Works,"* No. 06-3496, 2008 WL 294839, at \*1 (N.D. Ill. Jan. 31, 2008); *China Three Gorges Project Corp. v. Rotec Indus.*, No. 04-1510, 2005 WL 1813025, at \*3 (D. Del. Aug. 2, 2005); *Rintin Corp. v. Domar, Ltd.*, 374 F. Supp. 2d 1165, 1169-71 (S.D. Fla. 2005); *Shanghai Foodstuffs Imp. & Exp. Corp. v. Int'l Chemical, Inc.*, No. 99-3320, 2004 WL 213019, at \*1-3 (S.D.N.Y. Feb. 3, 2004); *Compagnie D'Enterprises CFE, S.A. v. Republic of Yemen*, 180 F. Supp. 2d 12, 14 (D.D.C. 2001); *Empresa Construtora Context Limitada v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1023-26 (S.D. Cal. 2000); *Trans Chemical Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 308-10 (S.D. Tex. 1997).

28. U.S. CONST. art. IV, § 1.

29. *See, e.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 *YALE J. INT'L L.* 1 (2006); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 *WM. & MARY L. REV.* 743 (2005).

30. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and concluding that prohibitions on homosexual sodomy violated the constitutional right to privacy grounded in the Due Process Clause); *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 402 U.S. 302 (1989), and concluding that executing mentally retarded individuals offends “evolving standards of decency” embodied in the Eighth Amendment). For a sampling of the academic debate, see *Agora: The United States Constitution and International Law*, 98 *AM. J. INT'L L.* 42 (2004) (articles by T. Alexander Aleinikoff, Roger P. Alford, Harold Hongju Koh, Gerald L. Neuman, and Michael D. Ramsey); Comment, *The Debate over Foreign Law in Roper v. Simmons*, 119 *HARV. L. REV.* 103 (2005) (essays by Vicki Jackson, Jeremy Waldron, and Ernest A. Young).



Members of Congress have even gone so far as to introduce legislation forbidding the citation of foreign materials in constitutional adjudication.<sup>31</sup>

The leading case here is *Roper v. Simmons*,<sup>32</sup> in which the Supreme Court overruled its prior decision in *Thompson v. Oklahoma*<sup>33</sup> and struck down the application of state death penalty laws to capital murderers who committed their crimes before reaching the age of eighteen. Justice Kennedy's majority opinion in *Roper* relied significantly upon the fact that few foreign jurisdictions permit the imposition of the death penalty in similar circumstances.<sup>34</sup> That reliance drew a stinging rebuke from Justice Scalia, who insisted in dissent that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."<sup>35</sup> Although Justice Scalia's position

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31. See H.R. Res. 568, 108th Cong. (2004) ("Expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States."). The resolution did not pass, but it did attract sixty co-sponsors. See *id.*; see also Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1342-43 (2007) (describing efforts by members of Congress to limit the judiciary's use of foreign law).

32. 543 U.S. 551 (2005).

33. 487 U.S. 815 (1988).

34. See *id.* at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."). Justice Kennedy acknowledged that "[t]his reality does not become controlling, for the task of interpreting the Eighth Amendment remains [the Court's] responsibility." *Id.* But he noted that "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Id.* (citations omitted). Foreign law comparison was, in fact, quite important to the Court's reasoning. See generally Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) [hereinafter Young, *Foreign Law*].

35. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting); see also *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (rejecting references to foreign law in invalidating state sodomy laws). Tellingly, Justice Scalia noted that the justices in the majority were unwilling to embrace foreign views on libel law, abortion, or separation of church and state—all areas in which the U.S. Constitution imposes unusually broad restrictions on government. *Roper*, 543 U.S. at 624-27. "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise," he observed, "is not reasoned decisionmaking, but sophistry." *Id.* at 627. Justice Scalia expounded his views in more depth in a public debate with Justice Breyer on the subject at American University. Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

was in the minority in *Roper* and other recent cases, there is reason to believe that the two justices appointed since those cases were decided—Chief Justice John Roberts and Justice Samuel Alito—may well share his skepticism.<sup>36</sup>

A similar skepticism was on full display in *Sanchez-Llamas v. Oregon*,<sup>37</sup> which concerned the degree of deference that domestic courts should pay to the interpretation of an international treaty by the International Court of Justice. *Sanchez-Llamas* involved two consolidated appeals under the Vienna Convention on Consular Relations (VCCR).<sup>38</sup> Article 36 of the VCCR requires signatory nations to inform foreign nationals arrested for crimes that they have a right to contact their consulate.<sup>39</sup> Mario Bustillo, the non-onymous petitioner in *Sanchez-Llamas*,<sup>40</sup> was a Honduran national arrested, tried, and convicted of murdering a man in Virginia. Although Virginia authorities failed to notify Mr. Bustillo of his rights under the VCCR, Bustillo failed to raise this issue until he sought collateral review in state court. The state courts accordingly held Bustillo's claim "procedurally barred" by his failure to raise the issue at trial or on direct review.<sup>41</sup> The U.S. Supreme Court affirmed,

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36. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 200-01 (2005) (statement of John G. Roberts, Jr.) (expressing "concern . . . about the use of foreign law as precedent"); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370-71 (2006) (statement of Samuel A. Alito, Jr.), available at <http://www.access.gpo.gov/congr-ess/senate/pdf/109hrg/25429.pdf> ("[T]here are situations in litigation that come up in Federal court when it is legitimate to look to foreign law, but I don't think it's helpful in interpreting our Constitution."). Perhaps significantly, Justice Kennedy did not cite foreign law in the Court's latest Eighth Amendment decision, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

37. 126 S. Ct. 2669 (2006).

38. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

39. *Id.* art. 36(1)(b).

40. The Court consolidated *Bustillo v. Johnson*, No. 05-51, together with *Sanchez-Llamas v. Oregon*, No. 04-10566, presumably because both petitions raised issues under the VCCR. The petition of Moises Sanchez-Llamas, a Mexican national convicted of attempted murder in Oregon, raised the question whether exclusion of statements made prior to notification of the foreign national's right to contact his consulate is an appropriate remedy for a VCCR violation. The Supreme Court held that it is not. See 126 S. Ct. at 2678-82. Because the ICJ has never interpreted the VCCR to require exclusion of evidence, Mr. Sanchez-Llamas's petition did not raise the issue of deference to supranational rulings. The Court did look to foreign practice in resolving the exclusionary rule question.

41. See *Sanchez-Llamas*, 126 S. Ct. at 2677. The Virginia state courts' decisions in the case are unreported. The doctrine of procedural default applied by the Virginia courts mirrors the

rejecting Bustillo's argument that the doctrine of procedural default does not apply to VCCR claims.<sup>42</sup>

Mr. Bustillo's primary argument to the Court relied on the 2004 decision by the International Court of Justice (ICJ) in the *Avena* case, brought by Mexico against the United States to vindicate the VCCR rights of fifty-one Mexican nationals on death row in various American jurisdictions.<sup>43</sup> Unlike most signatories to the VCCR, the United States was—at the time of the *Avena* litigation—a signatory to an “Optional Protocol” conferring jurisdiction on the ICJ to resolve state-to-state disputes under the VCCR.<sup>44</sup> In *Avena*, the ICJ considered and rejected the notion that VCCR claims could be barred by the doctrine of procedural default; that doctrine, the ICJ announced, impermissibly prevented the domestic courts from giving “full effect” to rights conferred by the VCCR.<sup>45</sup> Bustillo—along with a number of *amicus* briefs representing international law scholars, diplomats, and foreign sovereigns<sup>46</sup>—thus asked the U.S. Supremes to defer to the ICJ's reading of the treaty and, effectively, hold Virginia's procedural default rule preempted by the treaty's force as supreme federal law.

The Supreme Court, in a 6-3 decision written by Chief Justice Roberts, refused to do so.<sup>47</sup> The Chief Justice allowed that “[t]he

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doctrine applied in federal *habeas corpus* proceedings. See, e.g., *Massaro v. United States*, 538 U.S. 500, 504 (2003); *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977).

42. *Sanchez-Llamas*, 126 S. Ct. at 2687.

43. Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

44. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, [1970] 21 U.S.T. 325, 326, T.I.A.S. No. 6820. Only 44 of the 170 parties to the VCCR are also parties to the Optional Protocol. The U.S. exercised its right to withdraw from the Optional Protocol following the *Avena* decision. Letter from Condoleezza Rice, U.S. Sec'y of State to Kofi Annan, U.N. Sec'y-Gen. (Mar. 7, 2005), available at [http://untreaty.un.org/English/CNs/2005/101\\_200/186E.doc](http://untreaty.un.org/English/CNs/2005/101_200/186E.doc).

45. See *Avena*, 2004 I.C.J. at 72; see also *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466, 497-98 (June 27) (reaching the same conclusion).

46. E.g., Brief of Former United States Diplomats as Amici Curiae in Support of Petitioners Mario A. Bustillo and Moises Sanchez-Llamas at 6, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566), 2005 WL 3543101, at \*3-4; Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 9-10, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566), 2005 WL 3597807, at \*20-24; Brief for Amici Curiae Republic of Honduras and Other Foreign Sovereigns in Support of Petitioners at 9-10, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566), 2005 WL 3597807, at \*9-15.

47. Chief Justice Roberts wrote for himself and Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg concurred in the judgment, but she agreed with the Chief in refusing to defer to the ICJ's reading of the treaty. See *Sanchez-Llamas*, 126 S. Ct. at 2689 (Ginsburg, J., concurring). Justice Breyer dissented, joined by Justices Stevens and Souter.

ICJ's interpretation deserves 'respectful consideration,'" but he insisted that the Supreme Court's power "to say what the law is" extends to treaties.<sup>48</sup> The majority's analysis, moreover, made relatively short work of the ICJ's interpretation of the treaty, noting that the VCCR itself mandates that the rights it conferred be implemented according to the procedural rules of each domestic legal system.<sup>49</sup> Chief Justice Roberts also suggested that the judges of the ICJ—most of whom were trained in civil law systems with inquisitorial models of criminal prosecution—misunderstood the critical role of procedural default rules in an adversary system of justice.<sup>50</sup>

By contrast, Justice Breyer's dissent would have read the VCCR in a manner "consistent with the ICJ's reading of the Convention."<sup>51</sup> Justice Breyer assumed—apparently without deciding—"that the ICJ's interpretation does not *bind* this Court,"<sup>52</sup> and much of his opinion was devoted to developing a strained reading of the ICJ's opinion that the Court would not have to reject as inconsistent with domestic law.<sup>53</sup> Nonetheless, the dissent's view of "respectful consideration" was plainly far more deferential to the ICJ than that of the majority.<sup>54</sup>

*Sanchez-Llamas* is unlikely to end debate on the Court on the more general question of interpretive deference to supranational rulings—a question I have canvassed in more depth in a companion

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48. *Id.* at 2683-84 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

49. *Id.* at 2682-83.

50. *Id.* at 2685. Procedural default rules also play a crucial role in mediating potential conflicts between parallel systems of courts. See Young, *Institutional Settlement*, *supra* note 1, at 1180-88. International lawyers have generally discounted such concerns, invoking the principle that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331. However, this principle will have to be interpreted more narrowly if the international and domestic legal systems are to be successfully integrated. Young, *Institutional Settlement*, *supra* note 1, at 1180-82. The current international law approach—which insists on ignoring how domestic legal systems actually operate—is hardly promising.

51. *Sanchez-Llamas*, 126 S. Ct. at 2697 (Breyer, J., dissenting).

52. *Id.* at 2700 (emphasis added).

53. See Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 107.

54. See generally Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65, 101-08 (2007) (reading the dissent as embracing a more deferential "comity model" of interpretive authority).

essay to this one.<sup>55</sup> The important point for present purposes is that its holding strongly encourages domestic courts to exercise independent judgment in interpreting treaties, even when foreign or supranational courts have already spoken.<sup>56</sup> Neither the *Sanchez-Llamas* majority nor the dissent was prepared to give the ICJ's opinion in *Avena* the kind of deference that domestic courts accord to arbitral awards under the New York Convention—that is, minimal procedural scrutiny combined with an almost categorical refusal to second-guess the foreign ruling on the merits.

The Court took a further, non-deferential step in its most recent decision, *Medellín v. Texas*.<sup>57</sup> José Ernesto Medellín confessed to brutally raping and murdering two teen-age girls as part of a gang initiation in Houston, Texas. The Texas state courts tried and convicted him of capital murder and sentenced him to death.<sup>58</sup> As a Mexican national, however, Medellín was entitled to consular notification under the VCCR, and the Mexican government has

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55. See Ernest A. Young, *Treaties as "Part of Our Law"* (unpublished manuscript on file with author) [hereinafter Young, *Part of Our Law*].

56. In her remarks at this Symposium, Melissa Waters suggested that the "respectful consideration" stance adopted by the majority reflects a term of art, and that the standard adopted in *Sanchez-Llamas* is actually more deferential than most commentators have interpreted it to be. See Public and Private Law in the Global Adjudication System - part 3 (Feb. 15, 2008) (webcast, available at <http://www.law.duke.edu/webcast/>). Professor Waters rightly notes that the "respectful consideration" language also appears in a line of cases involving U.S. Supreme Court review of state court decisions on state law matters. See *id.* Such review is ordinarily blocked by the adequate and independent state grounds doctrine, which holds that "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the Supreme Court's] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). But sometimes the Court is willing to address the state law ground in order to ensure that the state courts are not manipulating state law in order to defeat the assertion of federal rights. See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (reviewing a state court's determination that no contract existed because that determination was antecedent to a federal claim of impairment under the Contract Clause). When the Court engages in this sort of review—which is rare—it "accord[s] respectful consideration and great weight to the views of the state's highest court." *Id.* at 100. As I explain at greater length elsewhere, see Young, *Part of Our Law*, *supra* note 55, I doubt that "respectful consideration"—even if that term is the same as "respectful consideration and great weight"—has a settled meaning in this context, as the review-of-state-courts cases themselves are highly sporadic and inconsistent. Normatively speaking, it would be inappropriate to accord the same level of deference that the federal courts give to state judicial interpretations of the state's own law in a case like *Sanchez-Llamas*, in which a federal court interpreted a treaty of the United States which is part of *federal* law under the Supremacy Clause. *Sanchez-Llamas*, 126 S. Ct. at 2681-84.

57. 128 S. Ct. 1346 (2008).

58. See *Medellín v. State*, Order, No. AP-71,997, slip op. (Tex. Crim. App. Mar. 19, 1997).

argued that, with its aid and advice, Medellín might have pled guilty to a non-capital charge or at least achieved a more favorable result at the sentencing phase of his trial.<sup>59</sup> Texas conceded that it failed to meet its VCCR obligations in this case, but it argued—and both the state courts and the lower federal courts agreed<sup>60</sup>—that Medellín’s VCCR claim was barred by procedural default on account of his failure to raise it in the state trial courts or on direct appeal.

Mr. Medellín thus found himself in a similar position to Mr. Bustillo in *Sanchez-Llamas*. Unlike Bustillo, however, Medellín is one of the fifty-one Mexican nationals covered by the ICJ’s judgment in the *Avena* case. Whereas Bustillo had to ask the U.S. Supreme Court to defer to the precedential force of the ICJ’s interpretation of the VCCR to preempt domestic procedural default rules, Medellín sought to invoke the force of the ICJ’s ruling as a binding judgment. That effort was unavailing, however. The Supreme Court held, 6-3,<sup>61</sup> that the *Avena* judgment was not “self-executing”—that is, that it did not “create[] binding federal law in the absence of implementing legislation” enacted by Congress.<sup>62</sup> Chief Justice Roberts’ majority

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59. See Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín at 2-3, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) (arguing that “Mexico has provided critical resources to aid in the defense of its nationals facing the death penalty”). It is worth noting, however, that unlike many VCCR claimants, Medellín was hardly a stranger in a strange land. He had lived in the United States since the age of three, attended American schools, was fluent in English, and was no stranger to the American criminal justice system. See *Medellín v. Dretke*, 371 F.3d 270, 275-76 (5th Cir. 2004). The Texas trial court, moreover, found—as an alternative holding to its procedural default ruling—that Medellín had not been prejudiced by the State’s failure to observe his VCCR rights. See Brief for Respondent at 49-50, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) (noting that the trial court found that the failure to notify the Mexican consulate did not prejudice the defendant and that “[t]he Texas Court of Criminal Appeals agreed”). On the potentially critical importance of this holding, see *infra* notes 168-171 and accompanying text.

60. See *Ex parte Medellín*, No. WR-50,191-01 (Tex. Crim. App. Oct. 3, 2001) (not designated for publication); *Medellín v. Dretke*, 371 F.3d 270, 279-80 (5th Cir. 2004).

61. Chief Justice Roberts wrote for himself and Justices Scalia, Kennedy, Thomas, and Alito. *Medellín*, 128 S. Ct. at 1352. Justice Stevens concurred in the judgment, agreeing that the relevant treaties did not render the *Avena* judgment self-executing. See *id.* at 1372 (Stevens, J., concurring in the judgment). Justice Breyer dissented on behalf of himself and Justices Souter and Ginsburg. *Id.* at 1375.

62. *Id.* at 1357. The Court also rejected an effort by President George W. Bush to “execute” the *Avena* judgment by issuing an order to the state courts, holding that “the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect.” *Id.* at 1371; see also *infra* notes 155-159 and accompanying text.

In the interest of full disclosure, I note that I was a primary author of *amicus* briefs in support of Texas in both the Texas Court of Criminal Appeals and the U.S. Supreme Court. Those briefs, which addressed only the President’s memorandum, argued that the President’s action was an unconstitutional intrusion not only on Congress’s authority but also on judicial

opinion reached this conclusion based on the language of the Optional Protocol and the U.N. Charter, which respectively confer jurisdiction on the ICJ and impose on U.N. members states an obligation to comply with the ICJ's rulings.<sup>63</sup> The Court relied as well on the existence of an alternative enforcement mechanism for ICJ rulings at the Security Council and the fact that "neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts."<sup>64</sup> In dissent, Justice Breyer complained that "insofar as today's holdings make it more difficult to enforce the judgments of international tribunals . . . those holdings weaken that rule of law for which our Constitution stands."<sup>65</sup>

Taken together, *Sanchez-Llamas* and *Medellín* seem to embody a strong skepticism of supranational rulings as both precedents *and* judgments. This skepticism is, as I have noted, a far cry from the warm reception that foreign arbitral rulings receive in U.S. courts under the New York Convention. I explore some possible explanations for this striking difference in treatment in the next Part.

## II. EXPLAINING THE DISPARITY

One could be forgiven for finding the attitudes struck by American courts toward foreign and international rulings somewhat schizophrenic. Our courts warmly embrace foreign arbitral awards under the New York Convention and narrowly construe the Convention's permissible grounds for challenging such awards. Yet any effort by American jurists to cite foreign authority in constitutional interpretation is contentious, and interpretations of U.S. treaties by supranational courts in cases like *Sanchez-Llamas* and *Medellín* are greeted with considerable skepticism. What is going on?

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independence and state autonomy. See Amicus Curiae Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984), available at <http://www.debev-oise.com/publications/pdf/-TexasconstitutionalandintlawscholarsamicusMedellin2007.PDF> [hereinafter *Medellín Scholars' Brief*]; Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent, *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75-207), available at <http://www.debevoise.com/publications/pdf/CCA%20State%20Am-icus.PDF>.

63. *Medellín*, 128 S. Ct. at 1357-59; see also *infra* notes 144-147 and accompanying text (discussing the provisions of the Optional Protocol and the Charter).

64. See 128 S. Ct. at 1359-60 (discussing the Security Council procedure); *id.* at 1363-64 (discussing the practice of other nations).

65. *Id.* at 1391 (Breyer, J., dissenting).

One possibility is to think of this disparity as one between “public law” and “private law” cases. That would not in itself be an explanation, but it might suggest some plausible hypotheses regarding the relative isolation of the two fields or the different functions that courts perform in each area. I want to suggest, however, that greater deference to arbitration decisions has less to do with the public/private law dichotomy than it does with two other factors: the difference between enforcing a judgment settling a particular dispute and establishing a general rule of law to guide future disputes, and the presence or absence of legislative action specifying the status of supranational rulings. U.S. courts’ emphasis on these factors strikes me as entirely correct. A dramatically lesser degree of deference for foreign precedents than for foreign judgments is entirely appropriate in both “public” and “private” law settings. And congressional primacy concerning the status of foreign judgments is appropriate, in most circumstances, even if one believes that the underlying treaties should generally be considered self-executing. Before developing these points, however, I want to start with some reasons to question the comparison between arbitral awards under the New York Convention and cases like *Sanchez-Llamas* and *Medellín*.

#### A. Apples or Oranges?

For the disparity in treatment between foreign arbitral awards and foreign public law decisions to be meaningful, the two sets of cases need to be at least somewhat analogous. In this section, I suggest that the comparison is more tenuous than might appear at first glance. The distance between arbitral enforcement cases and the use of foreign decisions in cases like *Roper v. Simmons*, for instance, should be obvious: *Roper* did not involve “enforcement” of any foreign decisions, and the legal provisions interpreted in those decisions—national constitutions and statutes, international custom and treaties—were different from the provision at issue in the U.S. case. And while *Sanchez-Llamas* did involve the force of a supranational court decision interpreting the same treaty on the same issue before the domestic court, it involved the *precedential* force of the foreign opinion rather than the respect due to the foreign *judgment*—a crucial distinction that I take up in the next section. In this section, I want to focus on some additional distinctions between foreign arbitral awards under the New York Convention and the judgments of supranational tribunals. While some of these



distinctions may seem technical, I suggest that they stem from important functional differences between the two situations.

Most of the cases enforcing arbitral awards involve *foreign* rather than *supranational* arbitrators. As Roger Alford has demonstrated, there are all sorts of difficulties bringing supranational tribunals within the requirements of the New York Convention. “The text and preparatory materials,” he notes, “suggest that international tribunals established solely to resolve interstate disputes are not intended to be subject to traditional enforcement mechanisms under the New York Convention.”<sup>66</sup> Where the agreements establishing supranational arbitral bodies are entered into by states, moreover, it is unclear whether awards secured by or against *private* parties are covered by “an agreement in writing” to arbitrate within the meaning of the Convention; in such cases, the Convention will apply only if the nation’s agreement is imputed to its private nationals.<sup>67</sup> Moreover, “[m]ost international tribunals render ‘anational’ awards governed by the international legal system and not subject to the control of a single national state. They therefore should not be viewed as arbitral awards subject to New York Convention enforcement.”<sup>68</sup>

These are not just technical impediments. Consider, for example, the potential extension of the Convention to cover supranational decisions, where the arbitral award involves individuals who were not themselves parties to the agreement creating the forum. Where the private parties are plaintiffs, such extension of arbitration

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66. See Alford, *supra* note 2, at 708.

67. See *id.* at 705-07. See New York Convention, *supra* note 9, art. II(1)-(2) (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect to a defined legal relationship, whether contractual or not . . . . The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”). In *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 887 F.2d 1357, 1363 (9th Cir. 1989), for example, the U.S. Court of Appeals for the Ninth Circuit held that the New York Convention required enforcement of an award by the Iran-U.S. claims tribunal against a private party, even though that party was not a party to the agreement creating the tribunal. According to Judge O’Scannlain, “the real question is not whether Gould entered into a written agreement to submit its claims against Iran to arbitration, but whether the President—acting on behalf of Gould—entered into such an agreement. The answer is clearly yes.” *Id.*

68. Alford, *supra* note 2, at 709 (citation omitted). See New York Convention, *supra* note 9, art. I(1)-(2) (“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . . . The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”).

agreements entered into by state parties to cover claims by one of the states' nationals would effectively create a private right of action for individual plaintiffs. Such private rights of action are relatively rare in international law, and they are controversial where they do exist.<sup>69</sup> Where arbitral awards are enforced *against* private parties who did not individually consent to the supranational forum,<sup>70</sup> on the other hand, a crucial line between arbitration and adjudication is crossed. As the U.S. delegation that participated in drafting the Convention reported,

[i]t is definitely understood . . . that the convention applies only to awards resulting from arbitrations to which the parties have submitted voluntarily. If the arbitration were conducted by a permanent body to which the parties are obligated to refer their disputes regardless of their will, the proceedings are judicial rather than arbitral in character and the resulting award consequently could not come within the purview of the convention.<sup>71</sup>

Further, there may well be significant functional differences between arbitral awards rendered by panels under the auspices of a particular state and those rendered by supranational bodies. On the judicial side, after all, courts and commentators have frequently been more willing to defer to foreign courts than to supranational ones.<sup>72</sup> The reason is that foreign tribunals are generally enmeshed in a system of checks and balances created by domestic law, and the foreign state's political branches will have an interest in ensuring that neither courts nor arbitral bodies treat foreign parties arbitrarily.<sup>73</sup>

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69. See, e.g., Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, at A20; see also Ahdieh, *supra* note 1, at 2154 (“[I]ndividual access can be expected to enhance international court influence, both by creating a domestic constituency for the Court’s rulings and eliminating discretionary barriers to the review of sensitive cases.”).

70. This was the case in *Gould*, as described by Professor Alford. See Alford, *supra* note 2, at 705-07.

71. United Nations Conference on International Commercial Arbitration, May 20-June 10, 1958, Official Report of the United States Delegation 6 (Aug. 15, 1958) (quoted in Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1061 n.54 (1961).

72. See, e.g., Alford, *supra* note 2, at 716-21 (noting that federal courts afford comity to judgments by foreign courts but observing that “there are no reported instances in the past century in which decisions of an international tribunal have been subject to enforcement and recognition” similar to judgments by foreign courts).

73. Cf. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2012 (2004) (arguing that U.S. courts should

The extent to which these checks actually operate will, of course, vary significantly depending on the particular foreign state involved. But tribunals existing wholly outside any such structure seem likely to be less accountable still.

Where an award *is* subject to Convention enforcement because it is controlled by a particular state's domestic law, the analogy to cases like *Sanchez-Llamas* fails on a different ground—that is, that the domestic court enforcing the award is not deferring to the supranational panel's interpretation of *international* law. If, for example, an American court were asked to defer to a NAFTA arbitration panel's interpretation of Canadian law, there is no *a priori* reason to think that the supranational arbitrators have any compelling advantage in expertise. And while a supranational body might be better positioned to encourage uniform interpretations of international law, that is hardly the case with respect to *domestic* law. The only interpreters with a clear claim to deference concerning the law of a foreign state are the courts of that state.<sup>74</sup>

These differences between enforcement and recognition in the arbitration context and the question in cases like *Sanchez-Llamas* and *Medellin* might be sufficient to explain the different results that occur in each context. But I also think the organizers of this conference are right to suspect that something more fundamental is going on. After all, the presence of a statute mandating recognition of arbitration awards simply begs the question: *Why* has Congress not mandated similar deference to ICJ decisions? The reason, I think, has less to do with the public/private distinction than with the different functions that arbitral tribunals and courts perform in resolving disputes.

## B. Public and Private Law

It is somewhat tempting to explain the disparity between enforcement of arbitral awards and non-deference to courts like the ICJ in terms of the longstanding distinction between “private” and “public” law. Harold Maier has observed that, “[h]istorically, public international law and private international law have been treated as

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enforce the delegation doctrine more strictly “in the foreign context where political checks on international agency action are weak”); Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 196 (“The [American] judiciary remains accountable to the other branches of government and cannot stray too far from their preferences.”).

74. *Cf. Salve Regina College v. Russell*, 499 U.S. 225 (1991) (holding that federal circuit courts should not defer to federal district courts construing the law of the state in which they sit).

two different legal systems that function more or less independently.”<sup>75</sup> The New York Convention itself furthers this temptation to ground the disparity in domestic treatment of foreign rulings in the public/private dichotomy; after all, the Convention (as adopted by the United States) restricts its coverage to disputes arising out of “commercial” relationships. Hence, Roger Alford has suggested that “[m]any international tribunals are engaged in functions that intuitively one would exclude from the category of arbitration. Among these include tribunals responsible for prosecuting crimes, determining human rights violations, and resolving personnel and administrative disputes.”<sup>76</sup>

I want to resist relying on any sort of “public/private” or “commercial/noncommercial” distinction, however. As John Gotanda has noted, at least some sorts of international arbitrations “may involve public and/or private international law. At times, the divide is clear, but in many cases it is not.”<sup>77</sup> For one thing, it is not impossible to imagine extending arbitration to the areas Professor Alford cites. “Personnel and administrative disputes,” for example, are sometimes subject to arbitration in the domestic sphere,<sup>78</sup> and there is no reason in principle that an arbitrator could not decide a human rights claim. While a public/private or commercial/noncommercial distinction surely has intuitive appeal, such distinctions are notoriously slippery in practice. The Legal Realists have left American lawyers highly skeptical of public/private dichotomies,<sup>79</sup> and it is easy to see the public interest ramifications of

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75. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 280 (1982).

76. Alford, *supra* note 2, at 707.

77. John Gotanda, *Damages in Private International Law*, 326 RECUEIL DES COURS 73, 91 (2007).

78. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) (permitting arbitration for an age discrimination claim regardless of the EEOC's role in regulating employment disputes); *Olroyd v. Elmira Sav. Bank*, 134 F.3d 72, 76-77 (2d Cir. 1998) (concluding that an employee's claim that he was unlawfully terminated as a whistleblower was subject to an agreement to arbitrate employment disputes); *Mgt. Recruiters Int'l, Inc. v. Nebel*, 765 F. Supp. 419, 422 (N.D. Ohio 1991) (holding that “nonunion account executives[] do not fall within the exception outlined in § 1 of the FAA” and enforcing and compelling arbitration between the employees and their employer).

79. *See, e.g.*, Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 519 (2005) (“[T]he public/private distinction in international law is difficult to maintain in light of the extensive critique of all public/private distinctions that has been mounted by legal realists . . .”); Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 856-57 (2006) (“In

large-scale arbitrations that affect, say, the business prospects of key domestic employers, the availability of insurance proceeds to clean up toxic waste dumps,<sup>80</sup> or rights to reproduce life-saving drugs.<sup>81</sup>

Likewise, American courts have struggled for two centuries to define the boundaries of “commercial” activity.<sup>82</sup> Current law equates “commercial” with “economic” activity<sup>83</sup>—a broad category indeed—and a vocal minority would extend the reach of Congress’s power over “commerce” further still, including to human rights concerns such as violence against women.<sup>84</sup> At a minimum, any plausible definition of “commercial” seems likely to include large swathes of “public” law. What would one do with a case like *Crosby v. National Foreign Trade Council*,<sup>85</sup> for example, which involved trade sanctions imposed by the Commonwealth of Massachusetts on Burma? Massachusetts disadvantaged companies bidding for state contracts if the company in question also did business in Burma. The point of the trade sanctions, of course, was to vindicate the strong view of the People of Massachusetts that the military *junta* in Burma had a deplorable human rights record. On the other hand, the case involved the right to bid on contracts—frequently involving multinational corporations—and in fact several foreign nations

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the United States, few would still defend the autonomy of private law; it is commonplace that the public/private distinction is an illusion.”).

80. See, e.g., *Disston Co. v. Sandvik, Inc.*, 750 F. Supp. 745, 749 (W.D. Va. 1990) (granting motion to compel arbitration of CERCLA claims concerning toxic waste disposal); *Leksi, Inc. v. Federal Ins. Co.*, 736 F. Supp. 1331, 1335 (D.N.J. 1990) (“[I]t is difficult to imagine any interest that New Jersey could have that would be more compelling . . . than its interest in determining the availability of funds for the cleanup of hazardous substances located within its boundaries.”).

81. See, e.g., James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J.L. & TECH. 291, 305-08 (2002) (describing the tension between private patent rights and public health initiatives in light of a patent arbitration decision ordering Canada to “repeal statutory provisions that allowed generic drug manufacturers to stockpile patent products” and noting the acute problems associated with the AIDS crisis in Africa).

82. Compare, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (defining “commerce” as navigation or “intercourse”), and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (defining “commerce” narrowly to exclude manufacturing), with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (defining Congress’s power over “commerce” to include labor practices concerning manufacturing employees), and *United States v. Lopez*, 514 U.S. 549 (1995) (holding that possession of a firearm was not “commercial” activity).

83. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (holding that the regulation of the use of homegrown marijuana for medicinal purposes falls exclusively under Congress’s Commerce Power).

84. See *United States v. Morrison*, 529 U.S. 598, 664 (2000) (Breyer, J., dissenting).

85. 530 U.S. 363 (2000).

sought to challenge Massachusetts' policy through arbitration under the WTO agreement.<sup>86</sup> Such a case straddles virtually any conceivable definition of public/private or commercial/noncommercial, and while *Crosby* itself may be an unusually vivid illustration, the general problem is likely to arise far more frequently.

This is not to say that the public/private distinction has *no* relevance to the deference disparity in domestic courts' treatment of supranational decisions. The parties to certain kinds of disputes—e.g., large contractual disputes between corporations—may well be more willing than others to submit their claims to a forum that will render a decision as to who gets what but not articulate a general principle of law to bind future cases. If that is the case, it may be because principles of private international law are more widely seen to be settled than principles in the public sphere, which continues to feature fundamental disagreements on the scope of human rights, the importance of national sovereignty, and other foundational questions. Under those circumstances, one would expect nations to be more willing to cede to foreign and supranational actors the authority to resolve disputes under the law as settled while reserving authority over the declaration of public norms.

As I have already suggested, one hates to generalize about categories as broad and ambiguously-defined as “public” and “private” law. In any event, these last points suggest that correlations between deference to foreign and supranational tribunals, on the one hand, and the public or private nature of the dispute, on the other, are driven by the relative importance in each circumstance of the dispute settlement and law-declaring functions of courts. I consider those functions in the next section.

### C. The Dispute Settlement and Law-Declaring Functions of Courts

Most legal decisions perform a dual function: they settle the dispute between the parties, and in so doing they declare the law governing that dispute. As John Marshall so famously put it, “the province and duty of the judicial department” is “to say what the law is.”<sup>87</sup> The two functions are, of course, closely connected. Chief

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86. *Id.* at 383; see also Mitsuo Matsushita, *Major WTO Dispute Cases Concerning Government Procurement*, 1 *ASIAN J. OF WTO & INT'L HEALTH L. & POL'Y* 299, 310 (2006). For a more extended discussion of *Crosby*, see Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 *GEO. WASH. L. REV.* 139 (2001).

87. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Justice Marshall explained that “[t]he province of the court is, solely, to decide on the rights of individuals”—to resolve, in other words, the dispute that the parties have brought before it—but “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>88</sup> Indeed, the most persuasive reading of *Marbury* grounds the power of judicial review—surely the most dramatic instance of American courts’ law-declaring function—squarely in the court’s obligation to decide all issues necessary to resolve the particular dispute before it.<sup>89</sup>

Although the dispute settlement and law-declaring functions of judicial decisions are generally connected, it is possible—at least formally—to disaggregate them. Some judicial systems, both abroad and in the American states, permit courts to issue advisory opinions, which may declare the law on a particular issue without the close connection to a litigated dispute between particular parties that is required in the U.S. federal courts by Article III of the Constitution.<sup>90</sup> Arbitration, on the other hand, typically aims to settle the dispute between the parties without necessarily stating a rule for future cases; in many circumstances, the arbitrator need not even articulate the grounds of his decision. To be sure, an advisory opinion may well effectively settle a legal dispute that has not yet been brought to

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88. *Id.* at 170, 177.

89. *See, e.g.,* *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (“The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to legislative branch of the Government.”); RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 67 (5th ed. 2003) [hereinafter *HART & WECHSLER*].

90. *Compare, e.g.,* MA. CONST. pt. 2, ch. 3, art. 2, *amended by* MA. CONST. amend. LXXXV (permitting the governor or the legislature “to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions”); *and* *HART & WECHSLER, supra* note 89, at 85 (“Like the constitutional courts of many European nations, the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights all enjoy explicit grants of jurisdiction to decide properly presented abstract questions.”), *with* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 598 n.4 (1992) (Blackmun, J., dissenting) (“The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties.”). *See generally* *HART & WECHSLER, supra* note 89, at 78-85 (discussing the general prohibition on advisory opinions in the federal courts and comparing state and foreign examples).

court, and a string of consistent arbitral awards may effectively establish a norm that other parties can follow.

Such disaggregation has costs. Requiring a litigated dispute constrains the power of courts by reducing the courts' opportunities to exercise power and narrowing their ability to control their own agendas.<sup>91</sup> Tying law-declaration to settlement of particular disputes also aims at assuring "the functional requisites of effective adjudication"—that is, the adversary presentation and concrete factual backdrop that will generally assist the court in framing and deciding the issues before it.<sup>92</sup> Advisory opinions expand the circumstances in which courts may act and, at the same time, deprive them of some of the inputs necessary for an effective decision. Dispute settlement without law-declaration, on the other hand, removes important elements of judicial discipline, such as the need to articulate a principled ground of decision and to consider the potential impact of that principle on the decision of future cases.<sup>93</sup> One of the principal criticisms of the Supreme Court's intervention in *Bush v. Gore*,<sup>94</sup> after all, was that the Court insufficiently explained the basis of its reasoning, combined with the fear that the Court's rationale was "a restricted railroad ticket, good for this day and train only."<sup>95</sup>

Just as courts exercise both dispute settlement and law-declaring functions, their decisions can be authoritative in two corresponding ways: as judgments and as precedents. Within the domestic legal system, the judgment force of a court's prior decision is expressed

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91. See HART & WECHSLER, *supra* note 89, at 67-68; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-68 (1973); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77-78 (2007).

92. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 51 (1984).

93. See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374-75 (1995) ("[T]he true test [of a decision] comes when the writing judge reasons it out on paper," and that "[i]t is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because 'it just won't write.'"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

94. 531 U.S. 98 (2000).

95. Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 695 (2002) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)); see also David A. Strauss, *Bush v. Gore, What Were They Thinking?*, in *THE VOTE: BUSH, GORE AND THE SUPREME COURT* 184, 185 (Cass R. Sunstein & Richard A. Epstein eds., 2001) ("[T]he majority opinion insisted that its rationale was to be applied, essentially, only in this case - basically conceding that the result, not the legal principle, dictated the outcome.").



through the rules of full faith and credit and *res judicata*.<sup>96</sup> Ordinarily, the judgment will fix the rights and obligations of the parties, subject to quite narrow grounds for challenging the original court's jurisdiction and/or procedures.<sup>97</sup> When the original judgment has been rendered by a foreign court, strong norms of international comity<sup>98</sup> likewise prescribe enforcement with minimal second-guessing by the domestic court.<sup>99</sup> The New York Convention, of course, codifies an even stronger version of the comity principle for foreign arbitral awards.<sup>100</sup>

The precedential force of a ruling, on the other hand, refers to the ruling's authoritative force in a new proceeding not encompassed

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96. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State."); 28 U.S.C. § 1738 (2006) (requiring federal courts to give full faith and credit to state judgments); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 13-15 (1982) (detailing the rules of *res judicata*).

97. *See, e.g.*, *Montana v. United States*, 440 U.S. 147, 153 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a 'right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . .'" (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897))).

98. International "comity" is often used to connote an amorphous set of norms requiring deference to foreign law or tribunals. *See generally* Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893 (1998) (surveying and criticizing the various uses of "comity"). Respect for foreign judgments is the most precise and well-settled form of "international comity" and, as such, is relatively uncontroversial. *See id.* at 897.

99. *See Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895):

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

Although *Hilton* was decided over a century ago, its approach has largely been codified in present law. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4, 13 (pt. 2) U.L.A. 58-59 (2002); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481, 482 (1987).

100. Despite efforts to conclude an enforcement treaty on the New York Convention model for foreign judicial judgments, such efforts have thus far been unsuccessful. Hence, it would go too far to equate the judgment force of foreign court decisions with that accorded to foreign arbitral awards.

by the prior judgment. I want to use both “precedent” and “authority” broadly for purposes of the present discussion. As used here, precedent includes both the “vertical” force of decisions issued by a court with power of appellate review over a second court, and the “horizontal” force of decisions issued by the same court (which that court can overrule) or by courts outside the line of appellate hierarchy. As my inclusion of the latter kind of precedent will suggest, I take “authority” to include not only the power to *bind* another court but also any situation in which the prior decision carries some degree of weight beyond the purely persuasive force of its reasoning.<sup>101</sup> In *Sanchez-Llamas*, for example, the question was whether—apart from whatever reasons could be mustered in support of the ICJ’s interpretation of the VCCR on the merits—it should count for anything that that interpretation had been issued *by the ICJ* as opposed to a brief or a law review article.<sup>102</sup> This additional weight might derive from the perceived expertise of the other tribunal, the need to respect an international tribunal as a matter of foreign relations, the need for all courts to coalesce around a uniform and settled interpretation, or similar reasons.

Within the domestic legal system, we generally draw a radical distinction between the judgment and precedential force of a court’s decision in a prior case. Consider, for example, a state court lawsuit involving a question of federal law, in which the losing party does not appeal and the trial court’s ruling thus stands undisturbed as a final judgment. As a judgment, the state trial court’s resolution definitively binds the parties, and as a matter of *res judicata* it will bind any court in the land in which enforcement might be challenged—up to and including the U.S. Supreme Court. Equally obviously, however, the *precedential* force of the state court’s ruling on the federal question before it is extremely limited. It will have no force at all—beyond the persuasive force of the judge’s reasoning—on any other state’s courts, much less a lower federal court or the U.S. Supreme Court.

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101. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 3-27 (1979) (defining legal authority as existing any time the existence of a legal rule counts as a reason for doing or not doing something, independent of the underlying reasons for the rule); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1986); see also Young, *Foreign Law*, *supra* note 34, at 151-56 (applying this definition to the Supreme Court’s citation of foreign decisions and practices).

102. I suppose that there are circumstances when a law review article or a brief might carry authoritative weight apart from the persuasiveness of its reasoning—the views on procedure of the late Charles Alan Wright come to mind. But that’s not how the courts treat *my* articles or briefs.

As I have already suggested, deference to foreign arbitral awards stems from their treatment as judgments that definitively settle the dispute between the parties. When an ordinary court settles such a dispute, the force of the judgment stems from the legitimacy of the judicial system as a whole, which in turn derives from factors such as the courts' constitutional mandate and the perceived quality of their deliberations and procedures. The force of arbitral judgments, on the other hand, derives from the consent of the parties.<sup>103</sup> Hence, the Supreme Court has made clear that strong judicial deference to arbitral awards is tied directly to the fact that the parties have agreed to have their dispute settled in such fashion:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.<sup>104</sup>

Arbitration is thus, in many respects, equivalent to any other out-of-court settlement by the parties to a dispute. Such settlements are enforceable in court as a matter of contract,<sup>105</sup> generally without any inquiry into whether the settlement agreement "correctly" resolved the dispute as a matter of law.

While we may be content to let parties settle their disputes any way they like, ceding the law-declaring function of a court to some other body is considerably more problematic. Law declaring is a

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103. See, e.g., *Davis*, *supra* note 8, at 51 ("The central element of arbitration is the intention of the parties as expressed in the arbitration agreement."); *Astoria Med. Group v. Health Ins. Plan*, 182 N.E.2d 85, 87 (N.Y. 1962) (stating that arbitration is "essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes"). The Court's decisions suggest that their solicitude for arbitration stems from the parties' consent, not the enhanced efficiency of arbitration. In *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), for example, the Court upheld the parties' agreement to arbitrate certain state law claims, even though it would have been more efficient to stay arbitration pending resolution of parallel federal claims being litigated in federal court.

104. *United Paperworkers Int'l, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987).

105. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (holding that a breach of a settlement agreement is "a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit").

public, sovereign function; it affects not only the parties to the dispute before the court, but also all other parties that might be affected by the legal rule that the court declares. In those circumstances, the consent of the parties cannot compensate for the lack of a decisionmaker constituted by and proceeding according to the ordinary constitutional and statutory rules governing judicial institutions. No one thinks, for instance, that the reasons articulated in an ordinary domestic arbitration award should have precedential authority in subsequent litigation in the courts involving different parties, other than the persuasive force of the arbitrator's reasoning. Party consent can confer authority on a non-judicial decisionmaker to settle the dispute between them, but they cannot empower that decisionmaker to declare law that will be authoritative in other proceedings.

This intuition is confirmed by a number of doctrines that protect the law-declaring function of the government from being undermined through various forms of contractual agreements. For example, the ordinary rule in the federal courts is that, when a dispute becomes moot on appeal to a higher court, the opinion of the court below must be vacated and the case dismissed.<sup>106</sup> When such a case becomes moot by reason of settlement of the parties, however, the opinion below is presumptively *not* subject to vacatur, the reason being that “[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur.”<sup>107</sup> When the government itself enters into contracts, established doctrine holds that agreements to surrender sovereign powers must be stated with unmistakable clarity,<sup>108</sup> and that in any event, certain sovereign powers simply cannot be contracted away.<sup>109</sup> These latter cases, while not involving

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106. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

107. *United States Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

108. *See, e.g.*, *Bowen v. Pub. Agencies Opposed to Soc. Security Entrapment*, 477 U.S. 41, 52 (1986); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 421 (1837); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 536-38 (1830).

109. *See, e.g.*, *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977); *Stone v. Mississippi*, 101 U.S. 814, 817-18 (1880); *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 519-20 (1848) (holding that a State's contracts do not surrender its eminent domain power). Both the unmistakability and reserved powers or sovereign acts doctrines are construed in great detail in *United States v. Winstar*, 518 U.S. 839 (1996) (plurality opinion).

the law-declaring power of *courts*, do confirm that lawmaking is a public function that generally cannot be compromised by private agreement.

Another set of doctrines protect the law-declaring function of the U.S. Supreme Court with respect to questions of federal law. (And remember, the meaning of the VCCR in *Sanchez-Llamas* was, under the Supremacy Clause, a federal question.<sup>110</sup>) The Supreme Court has the last word on the meaning of federal law, overriding conflicting interpretations of that law by the state supreme courts,<sup>111</sup> state executive officials,<sup>112</sup> the President,<sup>113</sup> and—in the case of constitutional law not subject to change through ordinary legislation—Congress itself.<sup>114</sup> When Congress shifts federal judicial business to non-Article III fora, such as adjudication before a federal administrative agency, it ordinarily must allow for some degree of Article III judicial review, particularly of questions of law.<sup>115</sup> And while Congress plainly has some power to restrict the jurisdiction of the Supreme Court under Article III’s “Exceptions Clause,”<sup>116</sup> prominent scholars have argued that that power does not include the authority to eliminate the Court’s “essential functions,” defined as “maintaining the uniformity and supremacy of federal law.”<sup>117</sup>

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110. See generally Young, *Part of Our Law*, *supra* note 55 (emphasizing that U.S. treaties are part of federal law).

111. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

112. *Cooper v. Aaron*, 358 U.S. 1 (1958).

113. *United States v. Nixon*, 418 U.S. 683 (1974).

114. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

115. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *Crowell v. Benson*, 285 U.S. 22 (1932).

116. U.S. CONST. art. III, § 2, cl. 2 (providing that “the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make”). See generally HART & WECHSLER, *supra* note 89, at 337-42 (discussing Congress’s power to restrict the jurisdiction of the Supreme Court).

117. Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201-02 (1960). The original version of the “essential functions” argument appeared in Henry Hart’s seminal dialogue on jurisdiction-stripping. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953). Other scholars have argued that the Court’s law-declaring authority over federal law is central to the Supreme Court’s textually mandated position of supremacy over the “inferior” federal courts. See generally James Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEXAS L. REV. 1433 (2000); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). My own view is that the “essential functions” of the Court may not be susceptible of a sufficiently precise definition to make them the crux of doctrine limiting jurisdiction-stripping, see Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the*

Law-declaring is, then, very different from dispute settlement. The difference is, in fact, grounded in a dichotomy of public and private after all—not public and private *law*, but rather the public and private function of *courts*.<sup>118</sup> That dichotomy is, in turn, reflected in the distinction between the precedential and judgment effects of judicial rulings. In my view, this is an entirely sufficient justification for the disparity between deference to foreign arbitral awards and non-deference to the decisional rationales of foreign and supranational courts. When a foreign decision has only judgmental force, we are generally content to defer to the parties' decision to resolve their dispute through foreign arbitration. But domestic courts are considerably more leery of ceding their law-declaring function to foreign and supranational courts by deferring to the precedential force of foreign decisions.

One potential objection to this view is grounded in the finer points of *res judicata* law, which in some circumstances extends the judgment force of a prior ruling to parties not involved in the original litigation. Under the doctrine of non-mutual collateral estoppel, a party to the original decision may sometimes be bound by factual or legal determinations in that decision, even when the original judgment is invoked by a non-party to the original litigation.<sup>119</sup> This doctrine blurs, if only to a minor extent, the distinction between the dispute settlement and law-declaring functions of judicial decisions, because it turns the judgment force of the prior court's resolution of the dispute between the initial parties into a rule binding at least *some* subsequent cases involving other persons.<sup>120</sup> Nonmutual collateral estoppel suggests, in other words, that even the judgment force of a prior decision may have an impact on future cases.

This objection has two answers within the law of judgments,

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*Preservation of Judicial Review*, 78 TEXAS L. REV. 1549 (2000), but there is no doubt that law-declaring is central to our conception of the Court's constitutional role.

118. It is worth noting that, to some extent, arbitration may protect the courts' law-declaring function by taking cases in which dispute settlement is the preeminent interest at stake out of the system, leaving more resources to concentrate on declaring the law in the cases that remain. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

119. See, e.g., *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) (abandoning the requirement of mutuality of parties for assertion of collateral estoppels); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-33 (1979) (permitting, in some circumstances, the "offensive" use of collateral estoppels by a nonparty to a prior lawsuit).

120. It is worth noting, however, that this blurring occurs only in a very narrow category of cases. See, e.g., *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 358 F.3d 31, 38 (D.C. Cir. 2004) (noting that although the Supreme Court has permitted using nonmutual collateral estoppel, it has "disallow[ed] preclusion where it would create perverse incentives or unfairness").

however, and although both are somewhat technical, each points to a broader structural principle that reinforces my claim here. First, established doctrine prohibits the use of nonmutual collateral estoppel against the Government.<sup>121</sup> This is significant because the core of the “public international law” category—e.g., human rights claims, international law-based challenges to domestic legislation—will tend to involve the Government as a litigant, so that limiting the judgment force of decisions in these areas protects the political branches’ authority to participate in the ongoing process of interpreting international law and determining the extent to which it should be integrated into the domestic legal system. Moreover, the rationale for the exception has been grounded explicitly in the need to protect the courts’ law-declaring function. The Supreme Court has thus observed that, because “the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues,” “[a] rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.”<sup>122</sup>

A second answer stems from the rule limiting the res judicata effect of a ruling on a question of federal law when a court’s resolution of that question cannot be appealed to the U.S. Supreme Court. This unusual situation may arise when a state court decides a question of federal law, but because the strict rules of justiciability under Article III do not apply to state courts, the issue is decided in a case that the U.S. Supreme Court cannot hear on appeal.<sup>123</sup> In such cases, the Court has said that the state court’s decision of the federal issue would not be res judicata for purposes of later proceedings in federal court.<sup>124</sup> This rule suggests, for example, that a foreign or supranational tribunal’s interpretation of a U.S. treaty—a question, as the *Sanchez-Llamas* Court pointed out, not only of international but

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121. See, e.g., *United States v. Mendoza*, 464 U.S. 154, 162 (1984).

122. *Id.* at 160.

123. See, e.g., *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam) (finding that though the state court decided the federal constitutional issue because the plaintiffs were allowed, under state justiciability rules, to assert the rights of third parties, the U.S. Supreme Court lacked jurisdiction over the appeal because the plaintiffs lacked standing under federal law); *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (similar).

124. See *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U.S. 123, 130 (1927); see also HART & WECHSLER, *supra* note 89, at 138-40 (discussing this rule).

also of *federal law*<sup>125</sup>—would not bind the federal courts whether or not there was mutuality of parties. After all, the foreign decision would not have been within the U.S. Supreme Court’s appellate jurisdiction. In any event, the broader point of the rule is that the rules of *res judicata* must give way where necessary to preserve the Supreme Court’s power “to say what the law is.” The law-declaring authority of the domestic courts over domestic law thus trumps any deference ordinarily owed to a prior judgment.

Finally, it is worth noting that the structure of many—if not most—supranational tribunals emphasize the dispute settlement function over the law-declaring function. The Statute of the International Court of Justice, for example, declares that the ICJ’s decisions have “no binding force except between the parties and in respect of that particular case.”<sup>126</sup> Likewise, supranational litigation under the NAFTA and the WTO agreement is conducted on an explicitly arbitral model, with no formal doctrine of precedent.<sup>127</sup> These arrangements at the international level reflect the civil law tradition that “judicial decisions are not a source of law. It would violate the rules against judicial lawmaking if decisions of courts were to be binding on subsequent courts.”<sup>128</sup> The relevant agreements thus seem to contemplate that supranational decisions will have force as judgments, not as precedents.

To be sure, it is always hard to know quite what to make of a judicial body’s profession to be not bound by precedent. After all, as Evan Caminker has noted, “frequent adherence to precedent is a prerequisite to effective adjudication: Courts simply do not have the time to fully address each legal issue raised by every case.”<sup>129</sup> And in fact, many have noted that the formal rejection of precedent in the

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125. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 2684 (2006).

126. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062. The *Sanchez-Llamas* majority emphasized this language in refusing to defer to the ICJ’s interpretation of the VCCR in *Avena*. See 126 S. Ct. at 2684.

127. See, e.g., Allan Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 280 (1997) (“As part of public international law, GATT/WTO law does not incorporate the formal common law doctrine of *stare decisis* which makes judicial precedents binding.”).

128. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 46 (3d ed. 2007).

129. Caminker, *supra* note 117, at 827; see also Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1144 (1994) (“We want to avoid being like the man who cannot get to work in the morning because he must keep returning home to make quite sure he has turned off the gas.”).



civil law tradition masks a considerably more complicated reality.<sup>130</sup> The same is true of the ICJ and of arbitrations under the NAFTA and WTO agreements, as well as international arbitration more generally.<sup>131</sup> Still, it surely counts for something that these supranational bodies exercise a law-declaring function only in the teeth of their enabling agreements, and often without the discursive traditions or institutional continuity that are important to maintaining a coherent doctrine of *stare decisis*.<sup>132</sup>

#### D. The Primacy of Congressional Choice

If I am right that the difference between judgments and precedents is critical in determining how domestic courts treat foreign and supranational rulings, that suggests that the *Medellín* case, decided this past Term, is a very different case from *Sanchez-Llamas*. *Sanchez-Llamas*, after all, involved the precedential force of the ICJ's *Avena* decision; Mr. Medellín, on the other hand, is one of the 51 Mexican nationals explicitly covered by the *Avena* judgment. Does that mean Medellín should have been entitled to the relief on his VCCR claim that was denied to Mr. Bustillo in *Sanchez-Llamas*?

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130. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 128, at 47 (“[A]lthough there is no formal rule of *stare decisis*, the practice is for judges to be influenced by prior decisions. . . . [T]he fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States.”).

131. A prominent ICJ judge has emphasized, for example, that “a court cannot only resolve a particular case but can contribute to the growth of the legal system which resolves future cases. That has preeminently been the case in the common law. It is true in the international legal system as well.” Stephen M. Schwebel, *The Docket and Decisionmaking Process of the International Court of Justice*, 13 SUFFOLK TRANSNAT'L L.J. 543, 546-47 (1990). Similarly, NAFTA and WTO awards frequently parse prior case law. See also, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1611-12 (2005) (observing that although “[t]he ICJ Statute suggests that tribunals should not rely on private arbitral decisions as binding authority . . . [a]s a practical matter . . . private investors, governments, and arbitral tribunals rely on previous awards to interpret similar provisions in investment treaties”); Alex M. Niebruegge, *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, 8 CHI. J. INT'L L. 355, 372 (2007) (“[I]n practice, arbitral awards tend to be regarded as a form of soft precedent.”); Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341, 370 (2007) (arguing that, “[u]nlike domestic arbitration, the international arbitration system has also created public goods through an informal system of precedent”); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 716 (2007) (observing that “[a]lthough ICSID awards do not possess the force of precedent, ICSID arbitral tribunals frequently rely on past awards”).

132. ICJ judgments are often quite conclusory in exposition, which can make it quite difficult to determine the meaning of a judgment as precedent. WTO and NAFTA panels, on the other hand, sit for a single case only.

Chief Justice Roberts' opinion for the *Medellín* majority said “no,”<sup>133</sup> and I want to defend that answer as correct here, notwithstanding the weight that I have just put on the distinction between precedents and judgments.<sup>134</sup> The reason derives from the distinction between the force of a treaty on the international plane and its implementation within the domestic legal system. There is no question that the ICJ's judgment in *Avena* binds the U.S. as a matter of international law,<sup>135</sup> and Texas's subsequent execution of Mr. Medellín—if and to the extent that it was carried out without providing the “review and reconsideration” mandated by the ICJ's order<sup>136</sup>—placed the U.S. in violation of the judgment. The question, however, is how the binding force of that judgment is to be implemented within the domestic legal system. On that question, *Medellín* confirmed the primary role of *Congress* in specifying, through legislation, how foreign and supranational judgments are to be enforced in domestic courts.<sup>137</sup>

Much of the discussion in (and about) *Medellín* concerns the general question when treaty-obligations are “self-executing”—that is, when they may be given effect by domestic courts without further action by the political branches. That is an interesting question,<sup>138</sup> but the actual issue in *Medellín* was narrower. As the Court recognized, the “self-execution” question breaks down into a number of quite distinct issues.<sup>139</sup> While the VCCR is plainly “self-executing” in the sense that federal, state, and local law enforcement officers are

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133. *Medellín v. Texas*, 128 S. Ct. 1346, 1353 (2008).

134. I put to one side the possibility, noted by the Court but not apparently relied upon as the basis for the Court's ruling, that Medellín cannot be considered a “party” to the *Avena* judgment in the relevant sense. Compare *Id.* at 1360 (“[T]he ICJ can hear disputes only between nations, not individuals. . . . The dissent does not explain how Medellín, an individual, can be a party to the ICJ proceeding.”), with *id.* at 1387 (Breyer, J., dissenting) (“Mexico brought the *Avena* case in part in the exercise of its right of diplomatic protection of its nationals . . . including Medellín . . . . Such derivative claims are a well-established feature of international law . . . .” (internal quotation marks and citations omitted)).

135. See *id.* at 1365.

136. See *infra* notes 169-71 and accompanying text.

137. See *Medellín*, 128 S. Ct. at 1365-66.

138. See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vazquez, *Laughing*].

139. See *Medellín*, 128 S. Ct. at 1356-57 & nn. 2-3. See generally Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (highlighting several distinct issues often lumped together under the notion of “self-executing” treaties).

obliged to provide consular notification even in the absence of federal implementing legislation,<sup>140</sup> that conclusion does not speak to the distinct issues of individual rights to assert VCCR violations in domestic courts,<sup>141</sup> the remedies to be provided for such violations,<sup>142</sup> or the implementation of ICJ judgments. Indeed, even if the Supremacy Clause's inclusion of treaties as the "law of the land" created a general presumption in favor of self-execution,<sup>143</sup> there is no obvious reason to treat *judgments*—which the Clause does not mention—in the same fashion.

The *Medellin* Court treated the self-execution question as a particularistic one, eschewing broad default rules in favor of close analysis of the relevant treaty provisions. Its holding thus rested on an interpretation of the VCCR's Optional Protocol and the United Nations Charter, under which "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."<sup>144</sup> The Court accepted the Executive Branch's construction of the Charter's language as "a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision."<sup>145</sup> Alongside the text, the Court also pointed to the Charter's structure. In particular, Chief Justice Roberts emphasized the Charter's "sole remedy for noncompliance" with an ICJ ruling: "referral to the United Nations Security Council by an aggrieved state."<sup>146</sup> The presence of this "nonjudicial" remedy, the Court reasoned, was "itself evidence that ICJ judgments were not meant to be enforceable in domestic

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140. See *Cornejo v. County of San Diego*, 504 F.3d 853, 856-57 (9th Cir. 2007) ("There is no question that the Vienna Convention is self-executing.").

141. See, e.g., *United States v. Li*, 206 F.3d 56, 67-68 (1st Cir. 2000) (Selya & Boudin, JJ., concurring) (concluding that the VCCR does not create rights enforceable by individuals).

142. See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2682 (2006) (rejecting exclusion of evidence as a remedy for a VCCR violation); *De Los Santos Mora v. New York*, 524 F.3d 183 (2d Cir. 2008) (rejecting a foreign national's claim for damages for a VCCR violation under 42 U.S.C. § 1983); *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (permitting a § 1983 claim); *United States v. Bustos de la Pava*, 268 F.3d 157, 163-66 (2d Cir. 2001) (considering counsel's failure to raise a VCCR argument as the predicate for a Sixth Amendment ineffective assistance of counsel claim).

143. See, e.g., *Vazquez*, *Laughing*, *supra* note 138, at 2172 (so arguing).

144. U.N. Charter art. 94(1).

145. Brief for the United States as Amicus Curiae Supporting Respondent at 34, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (emphasis in original), *quoted at* 128 S. Ct. at 1358 ("We agree with this construction of Article 94.").

146. 128 S. Ct. at 1359 (citing the U.N. Charter).

courts.”<sup>147</sup> This reasoning resonates with a line of decisions in domestic civil rights cases holding that remedies against state and federal officers under 42 U.S.C. § 1983 and the *Bivens* decision,<sup>148</sup> respectively, are unavailable if Congress has provided an adequate alternative remedy.<sup>149</sup>

In the case of arbitral awards under the New York Convention, Congress has enacted a statute that expressly obligates and empowers the domestic courts to enforce such awards.<sup>150</sup> Express statutes likewise govern the enforcement of awards under the investor-state arbitration provisions of the North American Free Trade Agreement, although the statutory rules are more nuanced. Such awards are generally enforceable in domestic courts pursuant to the New York and ICSID Conventions,<sup>151</sup> which are in turn implemented by specific domestic legislation.<sup>152</sup> But the NAFTA implementing legislation

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147. *Id.* The Court also emphasized that “[t]he Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.” *Id.* at 1361 (citing Brief for United States as Amicus Curiae Supporting Respondent, *supra* note 145 at 27-29). The Court did *not* accord interpretive deference to the ICJ’s own views about the binding force of that court’s judgments, noting that courts generally do not have authority to determine the res judicata effects of their own judgments. *See id.* at 1361 n.9.

148. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a federal common law right of action, implied under the Constitution itself, for violations of constitutional rights by federal officers).

149. *See, e.g., Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (holding that fisherman could not use § 1983 as a vehicle for asserting claims under federal environmental statutes, because those statutes had their own “elaborate enforcement provisions”); *Bush v. Lucas*, 462 U.S. 367 (1983) (denying *Bivens* relief for a federal employee alleging retaliatory discharge in denial of his First Amendment rights, on the ground that Congress had provided for a statutory remedy before the Civil Service Commission); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting plaintiffs’ Due Process challenge, under *Bivens*, to denial of Social Security benefits on the ground that the Social Security Act provided its own administrative and judicial remedies).

150. *See* 9 U.S.C. § 207 (2006) (“Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”).

151. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1136(6), Dec. 8, 1993, 32 I.L.M. 605, 643; Renee Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 287 (“An investor can seek enforcement of an award under the ICSID Convention, the New York Convention, or the Inter-American Convention.”).

152. The statute implementing the ICSID convention provides that “[a]n award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID Convention] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final

strictly limits the ability of parties other than the U.S. to invoke NAFTA in domestic litigation, and these limitations presumably limit the invocation of supranational NAFTA *judgments* as well.<sup>153</sup> The important point, of course, is that for all these arbitration awards, the effect of foreign and supranational judgments is defined and limited by congressional act.

There is no such statute for ICJ judgments rendered under the VCCR and its Optional Protocol. I have little doubt that Congress could have enacted a statute specifying how ICJ judgments should be enforced, or that such a statute could, if Congress so chose, preempt state rules of procedural default.<sup>154</sup> Congress has not done so, however, and the critical importance of that omission was underscored by the *Medellín* Court's rejection of President George W. Bush's effort to fill the gap by executive fiat. The President had

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judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a (2006).

153. See 19 U.S.C. § 3312(b)(2) (2006) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid."); *id.* § 3312(c) ("No person other than the United States . . . shall have any cause of action or defense under . . . the Agreement or by virtue of Congressional approval thereof . . ."). The WTO agreement has been implemented similarly. See *id.* § 3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."); *id.* § 3512(c)(1)(B) (prohibiting challenges to government conduct on the ground that the conduct violates WTO obligations).

154. A potentially difficult question would remain, however, concerning Congress's authority to require the *state* courts to provide the "review and reconsideration" mandated in *Avena*. See generally *Medellín Scholars' Brief*, *supra* note 62, at 18-26 (arguing that the President's order mandating state court review violated principles of federalism and judicial independence that also apply to Congress). As Henry Hart observed a half-century ago, "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954). A congressional mandate for state-court review and reconsideration in the *Avena* cases, notwithstanding procedural defaults like Mr. Medellín's failure to raise the issue at trial or on direct appeal, would require those courts to set aside a neutral, generally-applicable procedural rule limiting state court jurisdiction. The general rule has long been that although state courts are obligated to hear federal claims, see *Testa v. Katt*, 330 U.S. 386, 393 (1947), that obligation does not require them to set aside neutral, generally-applicable jurisdictional constraints, see *Alden v. Maine*, 527 U.S. 706, 752 (1999) (describing *Testa's* holding as applying to "state courts of 'adequate and appropriate' jurisdiction"); *Felder v. Casey*, 487 U.S. 131, 141 (1988) (holding that federal law preempted a state notice-of-claim statute that would have barred a federal § 1983 claim, but emphasizing that the statute was not "a neutral and uniformly applicable rule of procedure"). This problem could be avoided, however, by a statute that required *federal* courts to review the *Avena* cases notwithstanding the petitioners' procedural default in state court.

responded to *Avena* by issuing a memorandum stating that “the United States will discharge its international obligations under [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity.”<sup>155</sup> The Texas Court of Criminal Appeals held that this order exceeded the President’s constitutional authority,<sup>156</sup> however, and the *Medellín* majority agreed.<sup>157</sup>

The non-self-executing nature of the *Avena* judgment was critical to this holding about executive power; as Chief Justice Roberts explained, “the non-self-executing character of a treaty constrains the President’s ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts.”<sup>158</sup> If there were some general principle that judgments issued under a treaty bind domestic courts in the absence of congressional action to the contrary, then presumably the President would have authority to “execute” such judgments. Instead, however, the Court said that

the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so. When the President asserts the power to “enforce” a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson’s third category [from *Youngstown*], not the first or even the second.<sup>159</sup>

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155. George W. Bush, Memorandum for the Attorney General on Compliance with the Decision of the International Court of Justice in *Avena*, Feb. 28, 2005, attached as Appendix 2 to Brief for the United States as Amicus Curiae Supporting Respondent, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). The President’s memorandum only covered “cases filed by the 51 Mexican nationals addressed in [*Avena*].” *Id.* It thus required state courts to give effect to *Avena*’s force as a *judgment*, not as a precedent.

At the same time that he issued this memorandum, the President also announced that the U.S. would withdraw from the Optional Protocol consenting to ICJ jurisdiction in VCCR cases. See Letter from Condoleezza Rice, *supra* note 44.

156. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

157. 128 S. Ct. at 1367-72. Justice Breyer’s dissent purported not to reach the executive power question, but could not resist expressing considerable skepticism of the majority’s conclusion. See *id.* at 1390-91 (Breyer, J., dissenting).

158. *Id.* at 1371 (majority opinion).

159. *Id.* at 1369 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).

*Medellín* thus makes clear that *Congress*—not the President, and not the courts—must determine when foreign and supranational judgments will be enforced in the domestic courts of the United States.

Finally, in light of the generally negative reaction to *Medellín* in the international law community, it is worth stressing that the Supreme Court's refusal to give automatic binding force to a supranational judgment, as a matter of domestic law, was completely *typical* of the treatment of such judgments around the world. In Europe, for example, judgments of the European Court of Human Rights (ECHR) lack automatic domestic effect, even though they are binding on member states of the Council of Europe as a matter of international law.<sup>160</sup> As in U.S. law, it is up to the legislatures of the respective member states to determine the effect that ECHR judgments will have in domestic courts. Indeed, these member states are currently in the process of addressing—by *statute*—precisely the issue confronted in *Medellín*; as Laurence Helfer reports, “[i]n 2000, the Committee of Ministers launched an ambitious programme to convince national governments to authorize their courts to reopen judicial proceedings following an adverse ECtHR judgment.”<sup>161</sup> What these reform efforts directed at national legislatures make crystal clear, of course, is that there is nothing unusual about *Medellín*'s holding that *Congress* must decide whether ICJ judgments should be enforceable in domestic courts.<sup>162</sup>

## CONCLUSION

One hesitates to dismiss distinctions between “public” and “private” international law as entirely meaningless, but I doubt that such distinctions offer a helpful guide to the effect of supranational judgments in domestic courts. Not only are the relevant lines difficult

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160. See Laurence R. Helfer, *Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 136 (2008); Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEXAS INT'L L.J. 359, 374 (2005).

161. Helfer, *supra* note 160, at 150; see also *id.* (“As of 2006, such remedies are now available in 80 per cent of member states in criminal cases and about half of the Convention countries in civil and administrative cases.”).

162. The *Medellín* majority recognized as much, noting that “neither *Medellín* nor his amici have identified a single nation that treats ICJ judgments as binding in domestic courts.” 128 S. Ct. at 1363.

to draw, but at the end of the day there is a powerful public interest in the peaceful and efficient resolution of private disputes. I have suggested here that the disparity between the domestic courts' receptivity to foreign arbitral awards and their skepticism of supranational judicial rulings in cases like *Sanchez-Llamas* is best understood as a function of two variables: whether the supranational or foreign ruling is invoked as a precedent or as a judgment, and whether Congress has addressed by statute the effect to be given such rulings.

These variables offer not only a descriptive explanation for what goes on when domestic courts address supranational and foreign rulings, but also a normative justification for the ways in which such cases usually come out. The *judgment* force of a judicial ruling invokes primarily the dispute-resolution function of courts, and in this context, it makes sense to maximize efficiency and respect for the agreement of the parties to the particular dispute. The *precedential* force of such rulings, on the other hand, implicates the courts' law-declaring function—a function in which sovereignty-based values of accountability and coherence with domestic law play a much greater role. These same values support the Supreme Court's insistence, in cases like *Medellin*, that Congress must have the final say concerning the effect that domestic courts give to foreign and supranational rulings.

The remaining question is whether this account can throw any normative light on other aspects of our practice regarding foreign and supranational rulings. In this brief Conclusion, I want to suggest two areas that may warrant rethinking. The first concerns the exceedingly narrow scope given to the "public policy" exception under the New York Convention. Consider, for example, the *RAKTA* case discussed in Part I,<sup>163</sup> which enforced a foreign arbitral award against an American company that had abandoned a contract to build a facility in Egypt in the wake of the Arab-Israeli War of 1967. The American company argued that enforcing the award would be contrary to public policy because the United States had cut off diplomatic relations with Egypt and withdrawn financial support for the construction project. The Second Circuit, however, seemed to reject the notion that the relevant "public policy" was that of the United States:

In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public

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163. See *supra* notes 23-26 and accompanying text.



policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.<sup>164</sup>

This language is, quite frankly, startling: The notion that a court, based on its reading of some legislative history indicating a strong presumption in favor of arbitration,<sup>165</sup> could dismiss the foreign policy interests of the United States—in a volatile war zone, no less—as “parochial” “vagaries of international politics” simply strains credulity, and it is hard to imagine the Supreme Court endorsing that extreme approach today. But perhaps the Second Circuit simply meant that international arbitration also carries significant public policy weight, and a substantial showing is required to overcome that presumption.<sup>166</sup>

In any event, the important point for present purposes is that even enforcement of judgments between two parties may interfere with sovereign functions of law declaration—not simply of courts, but of the national political branches as well. Courts should be cautious in construing general statutes governing arbitration, which are designed to settle the obligations of private parties, in such a way as to undermine articulated governmental policies of more general applicability. Much less should courts dismiss such policies as “parochial” in favor of some “supranational” commitment to arbitration. As cases like *Sanchez-Llamas* and *Medellin* have demonstrated, American law jealously guards the prerogatives of domestic institutions to make parochial policies in response to the democratically-expressed desires of their constituents.

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164. *Parsons & Whittemore Overseas Co., Inc. v. Société De L'Industrie du Papier (RATKA)*, 508 F.2d 969, 974 (2d Cir. 1974).

165. *See id.* at 973 (drawing the court's reading from “the history of the Convention as a whole” rather than from any particular text).

166. Elsewhere in its opinion, the Second Circuit did suggest that, while the bar is high, the relevant public policy is that of the forum state and not some diffuse international community. *See id.* at 974. *But see* Hans Smit, *Comments on Public Policy in International Arbitration*, 13 AM. REV. INT'L ARB. 65, 65 (2002) (arguing that “[t] was international public policy that was decisive” in *RAKTA*).

My second suggestion concerns the need for Congress to think through its approach to supranational judgments in areas with public law implications (however fuzzily defined). A final judgment model works best when participants in an international regime view settlement of particular disputes as more important than retaining control over the content of the law going forward. For this reason, ICJ judgments concerning the VCCR—which have become means to a broader end of attacking the U.S. practice of capital punishment<sup>167</sup>—are hardly a promising candidate for supranational resolution. The President was thus surely right to withdraw the U.S.’s consent to ICJ jurisdiction over such cases.

On the other hand, what the President’s withdrawal—coupled with his clumsy effort to secure state court compliance with *Avena*—implicitly acknowledges is that judgments have special significance, even when we are not prepared to acknowledge supranational authority to definitively declare the law. Congress must ultimately determine how supranational judgments will be enforced domestically, but that hardly means that such judgments can be ignored without cost, both to America’s reputation and to the rule of law in international affairs. Congress and the President need to extract the U.S. from supranational jurisdiction where the U.S. is not prepared to respect the resulting judgments, and to provide a statutory basis for domestic enforcement (subject to reasonable exceptions as described above) where supranational jurisdiction is retained. The impulse to respect *Avena* yet prevent future recurrences fits this twofold imperative.

It is worth noting, moreover, that Texas’s course of action in executing Mr. Medellin following the Supreme Court’s ruling<sup>168</sup> need not be seen as a departure from this approach. Multiple Texas courts had previously found, as an alternative holding, that Medellin had not been prejudiced by the Houston police’s failure to accord him his

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167. See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1512 (2003) (describing Mexico’s VCCR litigation as “part of a broad international-law assault on the U.S. death penalty”).

168. See Allan Turner & Rosanna Ruiz, *Medellin Executed for Rape, Murder of Houston Teens*, HOUSTON CHRON., Aug. 6, 2008, available at <http://www.chron.com/disp/story.mpl/front/5924-476.html>. Despite a new petition from Medellin’s attorneys, the Supreme Court refused to halt Medellin’s execution to permit time for legislative efforts to implement the *Avena* judgment. See *Medellin v. Texas*, 2008 U.S. LEXIS 5362 (Aug. 5, 2008). This action was unsurprising, given the highly uncertain ability of Congress to act promptly in an election season, as well as the fact that the Texas legislature will not meet until 2009.

VCCR rights,<sup>169</sup> and Texas relied on this finding to argue that the ICJ's mandate had been satisfied.<sup>170</sup> Reasonable minds may differ over whether the Texas courts applied the correct prejudice standard in making this finding, but because *Avena* did not define that standard, Texas's reliance on the state courts' finding hardly amounts to defiance of the *Avena* judgment. Texas's filing before the U.S. Supreme Court, moreover, undertook to provide the necessary "review and reconsideration" for all other persons covered by the *Avena* judgment who remained on Texas's death row.<sup>171</sup> Critics who simply assert that Medellin's execution violated *Avena*, without analyzing the state courts' prior consideration of prejudice, are far too hasty.

In any event, it seems clear that we have progressed past the point that questions about the domestic effect of supranational and foreign rulings can be resolved by first principles. This is as true of the distinction between judgments and precedents as it is of any other dichotomy; sometimes it will make sense to accord precedential deference to supranational rulings, and sometimes we will appropriately resist the enforcement of supranational judgments. Congress will ultimately have to decide in both cases, and it is high time that legislators thought more systematically about the architecture of supranational adjudication.<sup>172</sup> It may be that history is on the side of Anne-Marie Slaughter's vision of a global "community of courts."<sup>173</sup> If so, however, Congress must be the institution to build it.

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169. See *supra* note 59; see also *Medellin*, 2008 U.S. LEXIS at \*2-3 (noting that "[t]he United States has not wavered in its position that petitioner was not prejudiced by his lack of consular access").

170. See Respondent's Brief in Opposition in Nos. 08-5573, 08A98, *Medellin v. Texas* (Aug. 4, 2008), at 13-16, available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/texas-bio-05-5573.pdf>.

171. *Id.* at 17-18.

172. For an effort to provoke thought along these lines, see Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L. J. 93 (2007).

173. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 100 (2004).