# INSTITUTIONAL SETTLEMENT IN A GLOBALIZING JUDICIAL SYSTEM

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ABSTRACT

*This article argues that the field of "Federal Courts" scholarship ought to expand to consider the relations not just between state and federal courts, but also between domestic courts and judicial institutions operating at the international level. Both relationships raise similar sorts of "interjurisdictional" problems—issues of standards of review, abstention, procedural defaults, and the like. Moreover, the study of supranational courts would benefit from the Legal Process jurisprudence that dominates the field of domestic Federal Courts law. In particular, I emphasize Henry Hart and Al Sacks' notion of "institutional settlement," which holds that decisions should be allocated to particular institutions on the basis of institutional competence and that decisions by the primary institution, once made, should generally be respected absent a sufficiently good reason for overruling them.*

*I illustrate how a Legal Process approach to supranational courts might work through two primary sets of examples. The first involves the tug of war between American domestic courts and the International Court of Justice over foreign nationals convicted of capital crimes in state courts after failure by local authorities to notify the accused of his rights to consular notification under the Vienna*

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*Convention on Consular Relations. This issue recently came to a head in the Medellin case, which the Supreme Court elected not to resolve last Term but is likely to see again. The central question in these cases is whether the ICJ should respect domestic rules of procedural default, which bar litigation of Vienna Convention claims in domestic habeas corpus proceedings where those claims were not first presented to the state trial court. The second set of examples involves arbitration proceedings under Chapter 11 of the North American Free Trade Agreement. In the Mondev and Loewen cases, NAFTA panels engaged in what was, for all practical purposes, appellate review of state courts on questions of state law. The question here is whether international law should sanction "denial of justice"-type claims that make domestic law questions re-litigable at the supranational level, and, if so, whether supranational tribunals should adopt a more deferential standard of review. Institutional settlement, I argue, has a good deal to say about both sets of questions.*

*The last part of the article speculates more generally about what a Legal Process approach can tell us about supranational adjudication. It considers some international law principles—like the "margin of appreciation" in the jurisprudence of the European Court of Human Rights, as well as the principle of "complementarity" in the statute of the International Criminal Court—that already incorporate norms of institutional settlement. I argue that institutional settlement has something to offer both skeptics and enthusiasts of supranational adjudication: it can moderate the intrusiveness of such adjudication, while at the same time increasing its legitimacy.*

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> *International law . . . has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality.*
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> *– Justice Benjamin Cardozo*[1]

There was a time when international lawyers had to defend their discipline against the charge that "international law" is an oxymoron. John Austin famously argued that international law can't really be "law" because there is no single sovereign to enforce it,[2] and H.L.A. Hart more recently reached much the same conclusion because, among other deficiencies, international law lacks "secondary rules of change and adjudication which provide for legislature and courts."[3]

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1. New Jersey v. Delaware, 291 U.S. 361, 383 (1934).

2. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 152 (David Campbell & Philip Thomas eds., Dartmouth Publishing 1998) (1832).

3. H.L.A. HART, THE CONCEPT OF LAW 209 (1961).

Even worse, political scientists in the Realist tradition argued that law is practically irrelevant to international relations; that field, they insisted, is instead dominated by national power and self-interest.[4] These debates seem to be fading now. Although international law still confronts serious debates about its legitimacy, efficacy, and content, it is increasingly clear that international law functions as *law* in many important contexts.[5] This is true in part because of the proliferation of supranational institutions for the interpretation, application, and enforcement of law, such as the European Court of Human Rights or the tribunals established under the World Trade Organization (WTO) and North American Free Trade Agreements (NAFTA).[6]

We are, indeed, increasingly surrounded by supranational courts. Eight years ago, Laurence Helfer and Anne-Marie Slaughter spoke of a "renewed millennial faith in the ability of courts to hold states to their international obligations."[7] As Jenny Martinez recently pointed out, "there are now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years."[8] Professor Martinez goes on to observe that

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4. *See, e.g.*, GEORGE F. KENNAN, AMERICAN DIPLOMACY, 1900–1950, at 89–101 (1951); HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 244 (4th ed. 1967) ("Where there is neither community or interest nor balance of power, there is no international law."). For a more recent example of unabashed Realist thinking, see generally JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001).

5. *See, e.g.*, Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993) (arguing that doubts about the force of international law have largely been resolved in the last several decades). This need not mean the end of Realist thinking; what it does mean is that Realists, to be realistic, will incorporate the operation of international law and institutions into their theories of power competition among states. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 225 (2005) ("International law is a real phenomenon, [but] the best explanation for when and why states comply with international law [is] simply that states act out of self-interest."); MEARSHEIMER, *supra* note 4, at 364 ("[S]tates sometimes operate through institutions [and may use them to] maintain, if not increase, their own share of world power.").

6. Perhaps the *most* successful example is the European Union's Court of Justice, but it may be better to think of that court as the supreme tribunal of an emerging federal state. *But see* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 84 (2004) ("[L]eading national courts [in the EU] . . . see themselves as still interacting with a supranational rather than a federal tribunal."). The critical point for my purposes is that unlike most supranational courts, the ECJ is attached to a full-fledged government with executive and legislative functions, broad regulatory powers of its own, and more developed lines of political accountability than other supranational organizations.

7. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 387 (1997).

8. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430 (2003); *see also id.* at 436–44 (surveying many of these institutions).

"[i]nternational courts are acting more and more like, well, courts: They are convicting people of international crimes and sending them to prison; they are exercising compulsory jurisdiction over trade disputes; they are enforcing the rights of individuals against governments."[9] Nor are these supranational bodies acting in a vacuum; rather, we see "a growing pattern of transnational interactions among courts," including "a strong dimension of judicial 'review'" of national courts.[10] Although many of these supranational adjudicatory bodies remain controversial, there is little doubt that legal scholars must take them seriously.

But the acceptance of international law as law carries with it certain difficult obligations and responsibilities. Discourse about international law has often been aspirational in tone; the articulation of broad human rights, for example, has sometimes been seen as a method of progressive pressure on less enlightened governments without any real expectation that the rights in question will be implemented immediately or directly. In these situations, the mechanics of implementation—for instance, the relationship among various national and supranational adjudicatory bodies that must administer the rights in question—tend to get relatively little attention. Moreover, the discussion of implementation that does occur tends to be compartmentalized within categories like human rights or international trade, with relatively little cross-fertilization.[11] As Cesare Romano has observed, "[t]o date, the international judicial process and organization has not been considered as a field of study in itself."[12]

That needs to change. The more international law operates *as law*, the more we are going to have to think about these issues of institutional detail—the structure and composition of supranational bodies, and their relationships to one another and to domestic courts.

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9. *Id.* at 432.

10. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2032 (2004).

11. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 795 (2002) (noting this problem and providing a rare counterexample of synthesis across subject matters).

12. CESARE P.R. ROMANO, PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, MATERIALS AND PUBLICATIONS: MATRIX: INTRO (1999), *at* http://www.pict-pcti.org/matrix/matrixintro.html. The research matrix itself is a very cool interactive graphic displaying the characteristics of a variety of supranational adjudicatory bodies. MATERIALS AND PUBLICATIONS: MATRIX: RESEARCH MATRIX (2000), *at* http://www.pict-pcti.org/matrix/Matrix-main.html.

This is necessary on the level of theory if international law is to meet H.L.A. Hart's challenge to develop "secondary rules of change and adjudication." But it is even more essential on the level of practice. As international law begins to have a real impact on the internal workings of societies, like the United States, that had basically seen themselves as legally self-sufficient, that law is beginning to generate real opposition. Proponents of the death penalty and opponents of gay rights, for example, have protested the use of international law to forbid forms of capital punishment or prohibitions on sodomy;[13] likewise, but from a very different political perspective, environmentalists and other critics of globalization have criticized the impact of free trade agreements on domestic regulation.[14] Developing doctrines and institutional practices to mediate conflict between supranational and domestic institutions may be a key to international law's ability to weather these sorts of storms.

American lawyers have seen similar sorts of problems before. For over two centuries we have operated a dual judicial system: two parallel systems of courts, each with generally concurrent jurisdiction to apply two parallel systems of law.[15] Many of the great political conflicts of our history have had important echoes in the ebb and flow

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13. *See, e.g.*, Phyllis Schlafly, *Whom is the Supreme Court Listening To?*, eagleforum.org, (Nov. 10, 2004), *at* http://www.eagleforum.org/column/2004/nov04/04-11-10.html (discussing the Supreme Court's references to the European Court of Human Rights and other foreign sources in its famous sodomy ruling, *Lawrence v. Texas*). The Supreme Court's recent decision invalidating the juvenile death penalty, which relied in part on international views on the capital punishment, Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005), is likely to further galvanize this opposition. *See, e.g.*, Jonah Goldberg, *Justice Kennedy's Mind*, NAT'L REV. ONLINE, (Mar. 9, 2005) *at* http://www.nationalreview.com/goldberg/goldberg200503090749.asp (criticizing references to foreign law in constitutional cases generally, and in *Roper* in particular).

14. *See, e.g.*, Public Citizen, *"GATT-Zilla vs. Flipper" Dolphin Case Demonstrates How Trade Agreements Undermine Domestic Environmental, Public Interest Policies* (Apr. 11, 2003), *at* http://www.citizen.org/trade/wto/ENVIRONMENT/articles.cfm?ID=9298 (arguing that trade agreements "lead to the erosion of domestic public interest policies").

15. For the first century of our history, the state courts were in fact the *primary* forum for litigating claims under federal law, because the lower federal courts lacked general jurisdiction over cases raising a federal question prior to 1875. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320 (5th ed. 2003) [hereinafter HART & WECHSLER]. There is still a strong presumption that state courts are competent to hear federal claims. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990); *see also* Testa v. Katt, 330 U.S. 386, 393–94 (1947) (holding that state courts generally cannot refuse to recognize claims under federal law). Likewise, the federal courts have broad jurisdiction over questions of state law in cases that involve parties from different states or where plaintiffs plead both federal and state claims. *See* 28 U.S.C. § 1332 (2000) (covering diversity jurisdiction); 28 U.S.C. § 1367 (2000) (authorizing supplemental jurisdiction over state claims in federal question cases).

of authority and jurisdiction between these two judicial systems. The first great expansion of federal court jurisdiction was repealed in 1802 as a threat to the Jeffersonian Republican revolution of 1800; the creation of broad federal question jurisdiction and the expansion of federal remedies for violations of federal civil rights were key components of Reconstruction in the late Nineteenth Century; and much of the reaction against the Warren Court's revolution in criminal procedure found its expression in new limits on the ability of federal courts to review state criminal proceedings via the writ of habeas corpus.[16] Throughout this history, these two judicial systems worked out ways to live together by developing an intricate web of interjurisdictional doctrines and statutory provisions.

These doctrines are at the center of the field of legal inquiry known, somewhat misleadingly, as "Federal Courts" law. A better term would be closer to the title of the leading treatment of the subject, Henry Hart and Herbert Wechsler's pathbreaking casebook/treatise *The Federal Courts and the Federal System*.[17] This field, existing at the intersection of constitutional law and procedure, once enjoyed great prestige in the legal academy; more recently, however, some of its leading lights have worried that the field is stagnant or dead.[18] The central point of this Article is to propose a new research agenda for the discipline. We need to extend the "Federal Courts" idea outward, to encompass not only the way that domestic institutions relate to one another but also how those institutions relate to *supranational* courts and organizations.

It is not just the subject matter of federal courts law that is critical, however. In American law, that field remains dominated by a particular jurisprudential paradigm: the "Legal Process School" pioneered by Hart, Wechsler, Albert Sacks, and others in the 1950s. I argue here that the development of interjurisdictional rules relating supranational courts to domestic courts should likewise reflect this Legal Process approach. In particular, such rules must pay heed to the Legal Process principle of "institutional settlement," which holds that law should allocate decisionmaking to the institutions best suited to

16. *See* HART & WECHSLER, *supra* note 15, at 34–36, 1296–97.

17. *See id*.

18. *See, e.g.*, Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994); *see also* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 954–55 (1994) (noting a "restiveness . . . among many Federal Courts teachers" toward the "Hart and Wechsler paradigm").

decide particular questions, and that the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion.

This will strike some readers as an elementary, even banal principle, but I contend that it is far too often ignored or discounted in debates about the allocation of authority between domestic and supranational courts. Indeed, the most distinctive thing about the present Article in the emerging literature on supranational courts is that I write from a perspective of what Ken Anderson has called "democratic sovereignty."[19] That view holds that "[s]overeignty is justified as a means of expressing and respecting the democratic will of a particular political community"; it emphasizes "the fidelity of the state to its own internal democratic processes" over "any exterior structure of rules, law, or commands from larger global institutions."[20] This perspective does not necessarily preclude a high degree of respect for and involvement in supranational institutions. It insists, however, that those institutions respect the "settlement" of important prerogatives in domestic bodies.

Someone needs to write a sequel to the Hart and Wechsler casebook called something like *The Federal Courts and the* Global *System*. I hasten to add that this Article does *not* attempt to write that sequel—it simply presents an argument for why it *should* be written. My goal is not to press for particular conclusions, but rather to point out directions for future scholarship. The argument has four parts. The first Part briefly surveys the interjurisdictional problem as it appears both in foreign affairs law and in American federal courts law; I also present an overview of the Legal Process approach, with particular emphasis on the principle of institutional settlement. Although a "Legal Process" school of international law scholarship already exists, I suggest that this school has not emphasized either the interjurisdictional sorts of questions upon which Professors Hart and Wechsler focused or the principle of institutional settlement.

Part Two develops two examples of interjurisdictional problems in foreign affairs: recent litigation in the federal courts and the International Court of Justice (ICJ) involving federal habeas corpus remedies for state violations of the Vienna Convention on Consular

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19. Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks*, 118 HARV. L. REV. 1255, 1261 (2005) (book review).

20. *Id.*

Relations and two decisions by NAFTA arbitral tribunals conducting what is, in essence, review of state court decisions on questions of state law. I bring the Legal Process notion of institutional settlement to bear on these questions in Part Three, indicating several different aspects of supranational adjudication in the Vienna Convention and NAFTA contexts that are problematic from this perspective. Part Four offers some tentative suggestions for promoting institutional settlement in relationships between supranational and domestic courts.

## I. BACK TO THE FUTURE: SUPRANATIONAL ADJUDICATION AND THE LEGAL PROCESS SCHOOL

The "Federal Courts" model that I want to apply to supranational adjudication has two components: First, it identifies a set of legal issues that may seem widely varied but that share a common element—that is, they all involve the allocation of decisional authority among different judicial and quasi-judicial institutions. Second, it approaches that set of questions through the jurisprudential lens of the Legal Process School that originated as a response to American Legal Realism during the 1950s. This introductory Part develops an initial view of both these components.

### *A. The Interjurisdictional Problem in Foreign and Domestic Affairs*

The central "problem" motivating this Article is the peaceful coexistence of courts and other adjudicatory institutions operating at both the domestic and international level.[21] As Anne-Marie Slaughter has observed, "a rough conception of checks and balances, both vertical and horizontal," is an "organizing principle[]" of an emerging global "community of courts."[22] But this "rough conception" stands in need of both refinement and institutional support. Two critical developments have brought international law to a place where it needs a "Federal Courts" course of its own. The first involves changes in the character of international law itself; the second has to do with the expansion of *institutions* at the supranational level.

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21. *See, e.g.*, Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1863 (2003) ("Two leading systems exist today for protecting the fundamental rights of individuals: constitutional law and human rights law. Both systems assert an ultimate authority to evaluate whether governmental practices comply with fundamental rights, and each system sits potentially in judgment over the other.").

22. SLAUGHTER, *supra* note 6, at 68.

Many scholars have noted the changing concerns of international law. Jack Goldsmith, for example, has written that while "[f]oreign relations was traditionally understood to be relations among the national governments of sovereign nation-states," more recently "the traditional agenda of foreign relations has been replaced by a variety of issues formerly the concern of domestic governance alone."[23] These issues include human rights, migration and asylum, environmental protection, drug trafficking and other forms of international crime, epidemics and other health issues, and trade.[24] Modern international law thus replicates many central concerns of the domestic regulatory state. Time has also expanded the set of actors with whom international law is concerned: where before that law primarily dealt with relations among states, it now takes a keen interest in the way states treat their own citizens.[25]

Even in areas where international law retains a more traditional focus on a state's treatment of *foreigners*, modern international law tends to confer rights more broadly than in the past. International law has always recognized that one state has an interest in another state's treatment of the first state's citizens,[26] but a combination of widespread travel and immigration with broad rights-creating treaties like the Vienna Convention on Consular Relations means that these issues seem to come up more often. More importantly, international law now sometimes permits the affected foreign citizen to raise claims against a state, rather than having to persuade her home government to espouse her claim for her.[27] That development tends to minimize

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23. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1670–71 (1997).

24. Ivo D. Duchacek, *Perforated Sovereignties: Towards a Typology of New Actors in International Relations*, *in* FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS 1, 2 (Hans J. Michelmann & Panayotis Soldatos eds., 1990); *see also* Goldsmith, *supra* note 23, at 1671–72.

25. Goldsmith, *supra* note 23, at 1672.

26. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 497 (6th ed. 2003) (citing EMERICH DE VATTEL, LE DROIT DES GENS [THE LAW OF NATIONS] bk. 11, ch. 6, ¶ 71 (Joseph Chitty ed. & trans., Phila., T. & J.W. Johnson 1876) (1758)).

27. *See* Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 438–39 (2001) (discussing individual claim mechanisms under several human rights treaties); Renée Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 244 ("[The] concept of the state alone having a legal personality in international fora began to crumble with the advent of international arbitration conventions in the 1950s and 60s.").

political and inertial checks on litigation, as the domestic experience with "private attorneys general" amply demonstrates.[28]

The second development is the advent of institutions at the international level that make and apply law. For much of its history, the lawmaking and law-applying organs of international law were the states themselves along with their domestic institutions. H.L.A. Hart's critique argued that international law was not a legal system because it lacked law-making and law-applying institutions of its own: "The absence of these institutions," he argued, "means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which . . . we are accustomed to contrast with a developed legal system."[29] But this situation is changing. Our globalizing world order increasingly features "vertical networks" that "replicate the governing functions that states exercise regarding their citizens."[30] Any number of supranational courts now apply international law, and in the wake of Legal Realism we know that such "application" of the law is often tantamount to making it. It is harder to find overt examples of supranational legislation,[31] although the WTO's power to adopt binding interpretations of its open-ended trade agreements by a three-fourth's vote of its members would seem to come close.[32] In any event, modern international law is hardly institution-less in the way that it once was.

These developments, especially in combination, drive an urgent need for principles to govern the interaction of supranational and domestic institutions. For example, Professor Helfer and Dean Slaughter have discussed the impact of private rights of action in

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28. *See, e.g.*, Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1810–22 (1993) (arguing that "private attorneys general" undermine accountability).

29. HART, *supra* note 3, at 209.

30. SLAUGHTER, *supra* note 6, at 20.

31. The European Union would provide an obvious and dramatic example, but in my view integration has progressed to the point that the EU institutions are no longer "supranational" in the same sense as the WTO or the United Nations. *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 56 (2003) ("[T]he Union is in so many respects a constitutional system and not a construct governed by classical principles of international law."); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1641–42 (2002) (suggesting that the EU is best viewed as a form of federal system).

32. *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1574 (2003) [hereinafter Bradley, *International Delegations*] ("The WTO has the power to adopt binding interpretations of the various trade agreements by a three-fourth's vote.").

conjunction with supranational judicial institutions in Europe. They observe that

> The provisions for such jurisdiction in the founding documents of [the European Court of Justice and the European Court of Human Rights] provide a point of departure for penetrating the surface of the state, allowing the tribunals to interact directly with the principal players in national legal systems. Further, stripping the state of its unitary facade creates the possibility of direct relationships between the tribunals and different governmental institutions such as courts, administrative agencies, and legislative committees.[33]

Helfer and Slaughter go on to note that "the right of individual petition is spreading rapidly, both to other human rights tribunals and to various entities charged with resolving trade-related disputes."[34] Such developments put a premium on addressing the ways in which relationships between supranational and domestic legal institutions should develop.

The "Federal Courts" paradigm offers a good place to start. America's parallel judicial systems may be viewed as an early example of Dean Slaughter's "disaggregated state."[35] Once our Founders "split the atom of sovereignty,"[36] the states and the national government have not confronted one another as sovereign "black boxes"; rather, they have developed complex vertical networks relating state and national actors in the legislative, bureaucratic, and judicial spheres. The judicial aspects of those relations are the central concern of Federal Courts doctrine and scholarship.

Federal Courts law has addressed these interjurisdictional issues through a variety of statutory and judge-made rules. I list a few examples here in order to suggest the sort of interjurisdictional rules that foreign affairs law may need to develop:

*Rules of justiciability:* A key limit on the power of the federal courts to interfere with the workings of other governmental

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33. Helfer & Slaughter, *supra* note 7, at 277; *see also* Ahdieh, *supra* note 10, 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.").

34. Helfer & Slaughter, *supra* note 7, at 281.

35. *See* SLAUGHTER, *supra* note 6, at 5; Kal Raustiala, *Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 10–11 (2002).

36. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

institutions—both state and federal—has been the confinement of the power of judicial review to "cases and controversies."[37] Doctrines of standing, ripeness, and mootness determine who can seek judicial review and at what point in a dispute; in consequence, they constrain the opportunities of courts to exercise power.[38]

*Rules of abstention, exhaustion, and noninterference:* Federal law has long barred federal courts from issuing "a writ of injunction . . . to stay proceedings in any court of a state."[39] The courts have embroidered this statutory principle with a variety of judge-made doctrines designed to protect state court proceedings from federal interference.[40] Other principles require that, in some instances, federal claims be presented to state authorities prior to bringing suit in federal court.[41]

*Standards of review and limits on collateral attack:* Federal courts review state court decisions both when federal questions are appealed to the U.S. Supreme Court and when state criminal convictions are attacked collaterally under federal habeas corpus.[42] Both statutory and judge-made rules have limited the scope of this review and

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37. U.S. CONST. art. III, § 2.

38. *See generally* Allen v. Wright, 468 U.S. 737 (1984); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries', and Article III*, 91 MICH. L. REV. 163 (1992).

39. Act of March 2, 1793, § 5, 1 Stat. 335. The present version of the Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (2000). *See generally* Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970). On the state side, the Supreme Court has held—without any statutory analog to the Anti-Injunction Act—that state courts generally lack the power to enjoin federal court proceedings. *See* Gen. Atomic Co. v. Felter, 434 U.S. 12 (1977) (per curiam); Donovan v. City of Dallas, 377 U.S. 408 (1964).

40. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 41 (1971) (holding that federal courts should generally abstain from interference with pending state criminal proceedings); Rooker v. Fid. Trust Co., 263 U.S. 413, 416 (1923) (holding that the federal courts lack jurisdiction to "entertain a proceeding to reverse or modify" a state court judgment).

41. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (concluding that federal courts may not hear takings challenges to state or local action until the plaintiff has first sought relief from the relevant governmental agency); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that a petitioner's failure to present his federal claims to the state courts in accordance with state procedural rules generally bars federal habeas review).

42. *See* 28 U.S.C. § 1257 (2000) (covering direct appeals from state courts to U.S. Supreme Court); 28 U.S.C. § 2254 (2000) (providing federal habeas corpus for state prisoners).

provided for deference to the state courts' rulings, especially (but not exclusively) on questions of state law.[43]

*Remedial doctrines and governmental immunities:* Federal Courts law concerns not only the relation of different judicial systems to one another but also the relations of courts to other political institutions. One critical variable is the ability of courts to provide remedies enforceable by private individuals;[44] another concerns their ability to impose liability on governmental entities or compel them to undertake or forego certain policies.[45]

*Res judicata and recognition of judgments:* Federal law requires both federal and state institutions to give "full faith and credit" to one another's public acts and judicial proceedings.[46] Because state and federal courts have developed their own preclusion rules, judges have had to grapple with complicated questions concerning which preclusion principles apply to judgments rendered in other courts.[47]

*Horizontal and vertical choice of law:* Horizontal choice of law is familiar to international lawyers, but federal systems have also had to grapple with *vertical* choice of law where disputes arise as to whether state or federal law governs a case. The most important questions have involved preemption, that is, determining the extent to which

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43. *See, e.g.*, 28 U.S.C. § 2254(d)(1) (2000) (barring habeas relief unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"); Murdock v. City of Memphis, 87 U.S. 590, 626 (1875) (limiting the Supreme Court's inquiry on direct appeal to questions of federal law).

44. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) (discussing private rights of action under 42 U.S.C. § 1983 for federal statutory violations); *see also* Alexander v. Sandoval, 532 U.S. 275, 286–90 (2001) (discussing availability of implied private rights of action under federal statutes); Cannon v. Univ. of Chicago, 441 U.S. 677, 688–95 (1979) (same).

45. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) (holding that Congress may not generally abrogate the states' sovereign immunity from suits for money damages under federal law); *Ex parte* Young, 209 U.S. 123, 148–49 (1908) (holding that federal courts may issue injunctive relief against state officers to prevent them from violating federal law).

46. *See* U.S. CONST. art. IV, § 1 (requiring states to give full faith and credit to other states); 28 U.S.C. § 1738 (2000) (requiring the federal courts to give full faith and credit to state court proceedings). The Supremacy Clause, U.S. CONST. art. VI, effectively requires state governments to give full faith and credit to federal acts and judgments. *See generally* Allen v. McCurry, 449 U.S. 90 (1980).

47. *See, e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (discussing the preclusive effect of federal court judgments in diversity cases on future state court litigation). *See generally* Patrick Woolley, *The Sources of Federal Preclusion Law after* Semtek, 72 U. CIN. L. REV. 527 (2003).

federal law on a question ousts state law on the subject,[48] and the power of federal courts to fashion common law rules where federal enacted law does not apply.[49]

*Principles of avoidance and judicial restraint:* American courts have developed prudential principles designed to narrow the scope of judicial decisions and, in particular, to avoid decisions of constitutional matters.[50] Prominent examples include canons of construction that disfavor readings of ambiguous statutes that raise difficult constitutional problems[51] and order of operations rules that counsel resolution of cases on nonconstitutional grounds if possible.[52]

International law has given more thought to some of these areas than others. Recognition of foreign judgments, for example, has drawn extensive attention in private international law,[53] whereas the ability of a supranational tribunal like the ICJ to enjoin governments from taking particular actions pending resolution of a case remains much disputed.[54] This is an important time to address such questions: many supranational courts are in their formative stages, and they ought to be structured in such a way as to ensure their ability to

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48. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000) (holding that federal airbag regulations preempted state product liability rules); *see generally* Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743 (1992); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 41–45, 130–34 (2004).

49. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts generally lack power to fashion common law rules in the absence of federal statutes or regulations). *See generally* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

50. *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing various doctrines in this vein).

51. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). *See generally* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

52. *See Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of."). *See also* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941) (holding that a federal court should abstain altogether from deciding a case involving difficult constitutional issues where a state court might be able to resolve the case on state law grounds).

53. *See generally* Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167 (1998).

54. *See* Brief for the United States as Amicus Curiae at 49, Breard v. Greene, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214) (noting "substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding").

develop workable interjurisdictional rules. Moreover, doctrines that mitigate conflict between supranational and domestic institutions may offer the best hope of preserving a role for supranational adjudication in the face of attacks on its basic legitimacy.

I do not suggest that the field has lain fallow until now. Jenny Martinez recently outlined an ambitious vision of an "international judicial system," and that vision included some of the same sorts of intermediary doctrines that I discuss here.[55] Likewise, the Helfer and Slaughter study of supranational adjudication considers some aspects of interjurisdictional relations.[56] Nonetheless, I find myself a good bit more skeptical of supranational institutions than many of these scholars. In particular, I think that scholars with a primary focus on international law have been too driven by a perceived need to "build up" international law and institutions[57] and not focused enough on the need to preserve institutional arrangements at the domestic level. Equally important, the American study of interjurisdictional conflict and cooperation at the domestic level offers not only a laundry list of issues but also a particular jurisprudential orientation that may well be central to the success of institutional accommodation. I discuss that orientation in the next section.

### *B. Institutional Settlement and the Legal Process Tradition*

Perhaps more than any other field of law, Federal Courts law is dominated by a particular jurisprudential paradigm. That paradigm derives from Henry Hart and Herbert Wechsler, who authored what remains the dominant casebook in the field.[58] As Richard Fallon has observed, "Hart and Wechsler defined the field as we now know it, and . . . their definition links the subject matter of Federal Courts

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55. *See generally* Martinez, *supra* note 8.

56. *See generally* Helfer & Slaughter, *supra* note 7; *see also* Alford, *supra* note 11 (surveying the question of deference by domestic courts to supranational ones across a wide variety of subject areas).

57. *See, e.g.*, Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 683 (1998) [hereinafter Henkin, *Provisional Measures*] (criticizing the Supreme Court's decision in *Breard v. Greene* on the ground that it "did not contribute to the rule of law in international affairs" and "did not strengthen the place of international law in the law of the United States").

58. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). Akhil Amar has described the book as "probably the most important and influential casebook ever written." Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 688 (1989) (book review). Except where otherwise noted, I will refer to the present edition that appeared in 2003. *See* HART & WECHSLER, *supra* note 15.

inquiries almost inextricably to the Legal Process methodology that they likewise pioneered."[59] The "Legal Process," of course, refers not only to a jurisprudential school but to another influential set of teaching materials authored by Henry Hart and Al Sacks in 1958.[60] In this Article, I urge that the law of foreign affairs should both focus on the sorts of interjurisdictional problems that characterize the Federal Courts course and adopt the basic jurisprudential approach that the Legal Process School brought to those problems.

The allocation of decision-making authority is central to the Legal Process tradition.[61] Professors Hart and Sacks distinguished between "*substantive* understandings or arrangements about how the members of an interdependent community are to conduct themselves" and "*constitutive or procedural* understandings or arrangements about how questions in connection with arrangements of both types are to be settled."[62] They argued that "[t]hese institutionalized procedures and the constitutive arrangements establishing and governing them are obviously more fundamental than the substantive arrangements in the structure of a society . . . since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively."[63] More fundamentally, Hart and Sacks found implicit in these constitutive and procedural understandings a principle of "institutional settlement." They recognized that the basic facts of social living give rise both to disputes and to differing ideas about how those disputes should come out. Under these conditions, "[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision."[64] The principle of institutional

59. Fallon, *supra* note 18, at 956.

60. HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994). For an account of these materials, see the introductory essay by Professors Eskridge and Frickey. *Id.* at xi. On the Legal Process School generally, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205–99 (1995).

61. *See, e.g.*, Amar, *supra* note 58, at 691 ("The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made."). For a somewhat different account, stressing the school's commitment to "reasoned elaboration" of the grounds for judicial decisions, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, reprinted in G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136 (1978).

62. HART & SACKS, *supra* note 60, at 3–4.

63. *Id*.

64. *Id.* at 4.

settlement reflects the respect that members of the society owe to the outcome of these agreed-upon procedures; as Hart and Sacks put it, institutional settlement "expresses the judgment that decisions which are the duly arrived-at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."[65]

In the Legal Process tradition, domestic notions of federalism and separation of powers are simply manifestations of this idea of institutional settlement. A central task of governance is to assign particular decisions to particular institutions, like the President, or Congress, or federal administrative agencies, or state courts.[66] Once a decision is assigned to an institution, that institution's decisions are taken as settled absent some particularly powerful reason for changing them.[67] "Settled" need not mean conclusive; there may be varying degrees of weight or deference. But at least some of the time, we must accept an institution's resolution of an issue even though we, as observers or participants in some other institution, might have resolved the matter differently.[68] The class of cases in which this is true may vary in size, depending on how much deference we accord to the original decisionmaker. What remains constant is that the argument for overruling the initial institution's decision must include something more than the mere contention that the initial decisionmaker got that decision wrong on the merits.

In assigning tasks to particular institutions, the Legal Process school emphasized considerations of *comparative institutional competence*.[69] We determine which institution should be assigned a particular task, and how much deference that institution's decisions should get, by considering the particular capacities and liabilities that each institution brings to the task. In an area where technical expertise is at a premium, for example, a court may defer to the superior competence of an expert administrative agency by applying a

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65. *Id*.

66. *See* DUXBURY, *supra* note 60, at 255.

67. *Cf.* White, *supra* note 61, at 148 (noting that the Legal Process School "favored institutional conservatism in the judiciary").

68. *See* Fallon, *supra* note 18, at 962 ("[A]uthority to decide must at least sometimes include authority to decide wrongly.").

69. The Hart & Sacks materials thus put as central questions, "What is each of these institutions good for? How can it be made to do its job best? How does, and how should, its working dovetail with the working of the others?" HART & SACKS, *supra* note 60, at 158.

very lenient standard of review to the agency's actions.[70] The role of courts in the Legal Process tradition is often similar to that of a point guard on a basketball team: the court takes provisional responsibility for a dispute, but may well decide to pass it off to other actors in the system, either through mechanisms of direct referral or, more likely, by deferring to prior judgments by legislative, executive, or private actors.[71] The key point, however, is that these decisions about who gets the ball are made according to assessments of comparative institutional strengths and weaknesses in dealing with particular sorts of problems.

Another important Legal Process insight is that the means of institutional settlement include not only the classic constitutional principles of limited powers, but also the host of more interstitial doctrines about jurisdiction, justiciability, standards of review, choice of law, and remedies that I identified earlier.[72] Professors Hart and Wechsler argued that these more "technical" doctrines would often surpass overt limits on governmental power in terms of their practical importance.[73] Those sorts of technical rules governing the interactions of judicial bodies at various levels are my focus here. Although much of the literature on supranational adjudication has focused on what Hart and Wechsler called questions of "ultimate power"—that is, on what tasks the Constitution does or does not permit our government to assign to supranational institutions[74]—I want to emphasize instead

70. *See, e.g.*, Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

71. I am indebted to Bill Powers for the "point guard" metaphor.

72. *See supra* notes 37–52 and accompanying text.

73. The first Preface to the Hart and Wechsler casebook argued that "[f]or every case in which a court is asked to invalidate a square assertion of state or federal legislative authority, there are many more in which the allocation of control does not involve questions of ultimate power"; in the latter cases, "[C]ongress has been silent with respect to the displacement of the normal state-created norms, leaving courts to face the problem as an issue of the choice of law." HART & WECHSLER, *supra* note 58, at xi.

74. *See generally* Bradley, *International Delegations*, *supra* note 32; Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1 (2000). This work is important; there may well be constitutional limits on the ability of the United States to accede to various forms of supranational adjudication. I want to suggest, however, that the most important issues will be played out in the details of interjurisdictional interactions.

questions of how those institutions should behave in relation to the domestic legal system.

It may seem strange to suggest that one of the most cutting-edge legal developments of our time—globalization and the advent of supranational decisionmaking—should be addressed by recourse to a jurisprudential approach developed in the 1950s. The Legal Process school in general, and the Hart and Wechsler paradigm in Federal Courts law in particular, have had their critics.[75] I tend to agree with Richard Fallon, however, that "no one has yet advanced a better paradigm for the study of Federal Courts issues than the Legal Process paradigm pioneered by Hart and Wechsler."[76] The principle of institutional settlement, moreover, is based on the judgment that members of a society are unlikely to agree on many primary questions of law and morality; hence, the best we can hope for is agreement on a process for resolving these disputes, and the results of that process should then be accepted as legitimate.[77] That insight seems even more compelling in an international environment featuring vast disagreements of morality and policy and lacking any sovereign able to *compel* agreement on contested questions.

To be sure, the Legal Process school has not lacked adherents in international legal circles.[78] Harold Koh coined the phrase "Transnational Legal Process" back in 1995 in his Pound Lecture at the University of Nebraska.[79] His lecture, however, was concerned with rebutting the claim that international law is not law; the term "transnational legal process" refers to a process-based account of why nations *obey* international law.[80] Abram and Antonia Chayes' important work on "The New Sovereignty" likewise stressed the

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75. *See generally* Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENT. 557 (1994–95); White, *supra* note 61, at 153–61 (arguing that, by the 1970s, the Legal Process model prescribed an overly modest role for courts in society).

76. Fallon, *supra* note 18, at 971; *see also* DUXBURY, *supra* note 60, at 208 (noting the Legal Process school's continuing relevance).

77. Fallon, *supra* note 18, at 964.

78. *See, e.g.*, ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (1969); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999).

79. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996).

80. *See id.* at 205 ("Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes."); O'Connell, *supra* note 78, at 351 ("Chayes, Ehrlich and Lowenfeld developed international legal process to demonstrate that law does play a role in international affairs."); *see also* Burley, *supra* note 5, at 213.

importance of process as a spur to compliance, without focusing on how that process should be structured to ensure the continued viability of domestic constitutional arrangements.[81] The international law version of Legal Process thus has not tended to stress the value of institutional settlement.[82]

My task here is to apply the Legal Process model to the questions that arise once we take Dean Koh's case as largely proven: assuming that international law is law and will generally be obeyed, how should the various supranational and domestic institutions that make up the resulting legal structure interact? My focus diverges from the "International Legal Process" of Professor Chayes, Dean Koh, and others in two principal respects: First, I emphasize the value of institutional settlement as a component of the Legal Process perspective. Second, my attention is directed not so much at the interactions of state actors and supranational institutions on the international plane, but rather on the relationship between supranational and domestic judicial institutions, that is, the problem of parallel judicial structures. These are the sort of concerns that have traditionally preoccupied the Hart and Wechsler branch of Legal Process; they are the place where Federal Courts scholars may, perhaps, make their own contribution.

## II. TWO EXAMPLES OF THE INTERJURISDICTIONAL PROBLEM

I want to explore these questions through two different examples. The first concerns the remedies for breach by American state officials of our treaty obligations under the Vienna Convention on Consular Relations.[83] That issue came to a head in two recent cases: the *Avena* decision by the International Court of Justice in 2004,[84] and the *Medellin* case heard by the U.S. Supreme Court in 2005.[85] *Avena* held that the U.S. had violated its obligations under the Convention and ordered "review and reconsideration of the

81. *See generally* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

82. *See* O'Connell, *supra* note 78, at 338–39 (observing that "confidence in institutional settlement" was "not originally incorporated" into international legal process and that more recent scholarship has focused on supplementing traditional legal process perspectives with a greater emphasis on normative values).

83. Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

84. Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), (Mar. 31, 2004), *at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm [hereinafter *Avena*].

85. Medellin v. Dretke, 125 S. Ct. 2088 (2005).

convictions and sentences" of approximately 50 Mexican nationals.[86] *Medellin*, a federal habeas corpus suit brought by one of those Mexican nationals, asked the U.S. Supreme Court to determine the appropriate response of domestic courts to the *Avena* ruling.[87]

The second example arises out of international arbitrations under Chapter 11 of the North American Free Trade Agreement. Chapter 11 guarantees the rights of foreign investors against "expropriation" by NAFTA parties, and it provides individual investors with a private right of action against the host state before a NAFTA tribunal.[88] In two recent cases, *Loewen* and *Mondev*, such tribunals effectively have conducted appellate review of state court decisions resolving questions of state law.[89]

Each of these examples raises difficult questions concerning the relations between supranational and domestic adjudication. I cannot hope to deal with those questions in any sort of comprehensive way here. These examples should, however, indicate the need for a web of statutory and doctrinal mechanisms to mediate the developing conflicts between these two levels of courts.

### *A.* Avena, Medellin, *and the Vienna Convention on Consular Relations*

José Ernesto Medellin was tried and convicted of capital murder in a Texas state court in 1994. His confession related that, as part of a gang initiation in Houston, he participated in the brutal gang rape of fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena. Medellin recounted that, following the rape, he strangled the two girls with one of his shoelaces. A jury sentenced him to death.[90]

Medellin had spent most of his life in the United States, attended American schools, and was fluent in English. Indeed, he was no stranger to the American justice system, having once been a juvenile

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86. *Avena*, *supra* note 84, at ¶ 153.

87. *Medellin*, 125 S. Ct. at 2089 (discussing the questions on which the Court granted *certiorari*).

88. *See infra* notes 119–24 and accompanying text.

89. *See* Mondev Int'l Ltd. v. United States (Can. v. U.S.), ICSID Case No. ARB(AF)/99/2 42 I.L.M. 85 (NAFTA Ch. 11 Arb. Trib. 2002) [hereinafter *Mondev*]; Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003) [hereinafter *Loewen*].

90. *See* Medellin v. State, Order, No. 71997 (Tex. Crim. App. Mar. 19, 1997), *reprinted in* Joint Appendix to Petition for Certiorari in Medellin v. Dretke, No. 04-5928, at 4a-6a; Joint Appendix for Certiorari in Medellin v. Dretke, No. 04-5928, at 14–18 (on file with author).

probationer.[91] Nonetheless, he remained a Mexican national. As such, he was entitled to important rights under the Vienna Convention on Consular Relations. Article 36 of the Convention provides that "if [the accused] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."[92] Moreover, the host country's officials must "inform the person concerned without delay of his rights" under the Convention.[93]

There is no dispute that Texas failed to meet this treaty obligation, although the State did provide Medellin with American counsel as required by domestic law.[94] Medellin failed to raise this treaty claim, however, as an objection at his trial or as an appellate issue on direct review of his conviction. The issue appeared for the first time in his state habeas petition filed four years after the initial conviction. The state courts rejected this claim, but Medellin tried again in a federal habeas petition filed in 2001.[95] The federal district court denied relief on all of Medellin's claims, including the Vienna Convention argument. Because Medellin had failed to raise that

91. *See* Medellin v. Dretke, 371 F.3d 270, 275–76 (5th Cir. 2004).

92. Vienna Convention, *supra* note 83, art. 36(1)(b).

93. *Id.*

94. Like many habeas petitioners, Medellin argued that his appointed counsel were ineffective at the original trial. Space does not permit discussion of the grounds of the alleged ineffectiveness, but to this observer—as to the district court and the Fifth Circuit—they were distinctly underwhelming. *See Medellin*, 371 F.3d at 275–79. While concerns about the quality of counsel in capital cases persist, the Supreme Court has tightened up application of the Sixth Amendment standard considerably in recent years. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).

95. For readers unfamiliar with the federal habeas corpus statute, 28 U.S.C. § 2241 et seq., federal law since 1867 has provided for federal review of state criminal convictions and/or sentences alleged to have been imposed in violation of federal law. Brown v. Allen, 344 U.S. 443, 499 (1953) (plurality opinion) (Frankfurter, J.). Because treaties are the supreme law of the land under the Supremacy Clause, U.S. CONST. art. VI, Medellin's claim under the Vienna Convention was a federal one cognizable on habeas review. Such review constituted a new civil proceeding wholly separate, as a procedural matter, from Medellin's trial and conviction in state court. It was thus also independent of, and in addition to, Medellin's right to appeal his state court conviction or sentence to the U.S. Supreme Court on any alleged error of federal law. *See* 28 U.S.C. § 1257 (2000). Habeas review is a "second bite at the apple" with few analogs in other legal systems. *See infra* note 174 and accompanying text.

Many states, including Texas, provide *state* habeas procedure in the state courts, which typically takes place between the state direct appeal and the filing of the federal habeas petition. These state collateral review proceedings are most often of limited significance. *But see infra* notes 115–17 and accompanying text (discussing a new round of state collateral proceedings now pending in *Medellin*).

argument in the Texas trial court, the district court held, it was barred by the doctrine of "procedural default."[96]

The procedural default doctrine holds that a habeas petitioner must first present his federal law argument to the state courts in compliance with state procedural rules. Failure to do so will bar any attempt to present that argument to the federal courts on collateral review.[97] A petitioner may evade this bar only by showing "cause" and "prejudice" for the default—that is, by stating a good reason for not presenting the federal claim to the state courts,[98] and by showing that the federal error worked to the petitioner's "actual and substantial disadvantage."[99] Medellin seems not to have pressed any argument for cause and prejudice under domestic law.

While Medellin's federal habeas appeal was pending in the U.S. Court of Appeals for the Fifth Circuit, the International Court of Justice rendered its holding in the *Avena* case. That decision concerned 54 Mexican nationals—of whom Medellin was one—held on death rows in various American states. Mexico asserted that each of these persons had been denied their rights of consular notification or consultation under the Vienna Convention, and that they were therefore entitled to "*restitutio in integrum*"—that is, to a new trial and exclusion of any evidence obtained by interrogation prior to consultation with the consulate.[100] With respect to the overwhelming majority of the prisoners—again including Medellin—the ICJ agreed that the U.S. had violated the relevant treaty requirements and ordered that the U.S. provide "review and reconsideration" of each

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96. *See Medellin*, 371 F.3d at 279 (describing the district court's unpublished ruling).

97. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 84–85 (1977) (discussing the rule in the context of admissibility of inculpatory statements). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.5.2, at 905–21 (4th ed. 2003).

98. The Supreme Court has interpreted "cause" narrowly. In general, a habeas petitioner may establish cause by showing (1) that he is relying on a "novel" constitutional claim, *see, e.g.*, Reed v. Ross, 468 U.S. 1, 12–16 (1984); *but see* Teague v. Lane, 489 U.S. 288, 315–16 (1989) (holding that habeas petitioners may not generally rely on "new" rules of constitutional law), (2) that his lawyer's failure to raise the federal issue in state court amounted to ineffective assistance of counsel under the Sixth Amendment, *see* Murray v. Carrier, 477 U.S. 478, 488 (1986), or (3) that the State created an "external impediment" to the presentation of the petitioner's claim, *see* Amadeo v. Zant, 486 U.S. 214 (1988).

99. United States v. Frady, 456 U.S. 152, 170 (1982). A state court procedural default can also be excused in certain circumstances where the petitioner makes a strong showing of "actual innocence" of the underlying offence. *E.g.*, Sawyer v. Whitley, 505 U.S. 333 (1992); Schlup v. Delo, 513 U.S. 298 (1995).

100. *Avena*, *supra* note 84, ¶ 13. "*Restitutio in integrum*" means, literally, "restoration to original condition." WIKIPEDIA, *at* http://en.wikipedia.org/wiki/Restitutio_in_integrum.

prisoner's conviction and sentence in the domestic courts.[101] The ICJ also made clear that, in its view, application of procedural default rules to bar the Mexican prisoners' claims would violate the Convention's requirement that domestic law "must enable full effect to be given" to consular rights.[102]

One state governor, in Oklahoma, responded to *Avena* by commuting the capital sentence of a Mexican national to life imprisonment.[103] Texas, however, continued to contest Medellin's entitlement to relief. The Fifth Circuit rejected Medellin's argument that *Avena* required it to disregard his procedural default and reconsider his conviction and sentence in light of the treaty violation.[104] The court relied on a prior Supreme Court decision, *Breard v. Greene*,[105] which had held a similar Vienna Convention

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101. *Avena*, *supra* note 84, ¶¶ 106, 133–134, 139–141. The ICJ rejected Mexico's argument that *restitutio in integrum* was required, directing American courts to instead consider whether the prisoners were actually prejudiced by the treaty violations. *See id.* ¶¶ 120–125. On the other hand, the ICJ also rejected the U.S.'s suggestion that adequate "review and reconsideration" could be provided through executive clemency proceedings. *See id.* ¶¶ 142–143.

102. *Id.* ¶¶ 108–113, 134 (citing Art. 36, ¶ 2 of the Convention). On this point, the ICJ relied on its earlier rejection of procedural default rules in the *LaGrand* case. (F.R.G. v. U.S.) 2001 I.C.J. 466, 514–517 (June 27), *at* http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm.

103. *See* Press Release, *Gov. Henry Grants Clemency to Death Row Inmate Torres*, May 13, 2004, *at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1. Mr. Torres's case for clemency was a relatively strong one, because he was not the "trigger man" in the murder for which he was sentenced to die. *See id*. The Governor's action came on the same day that the Oklahoma Court of Criminal Appeals issued a stay of Torres' execution, also in light of the *Avena* ruling. *See id.*

104. Medellin v. Dretke, 371 F.3d 270, 279–80 (5th Cir. 2004).

105. 523 U.S. 371 (1998). Angel Breard was convicted of capital murder in Virginia state court, notwithstanding state authorities' failure to notify him of his rights under the Vienna Convention. As in *Medellin*, Breard failed to present his treaty argument to the state trial court, and his federal habeas petition was accordingly barred by procedural default. Paraguay sued the U.S. in the ICJ, which issued a "provisional measures" order requiring the U.S. to stay Breard's execution pending a final ruling by the ICJ on the merits. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9). The Supreme Court, however, accepted the Clinton Administration's position that such orders were not binding and that the president lacked power to compel Virginia to stay the execution. *See id.* at 378. Although Secretary of State Madeleine Albright wrote a letter to Virginia Governor James Gilmore requesting that he postpone the execution in the interests of comity, *see* Letter from Madeleine K. Albright to James S. Gilmore III (Apr. 13, 1998), attached as Appendix F to Brief for the United States as Amicus Curiae, Breard v. Greene, 523 U.S. 371 (1998) (Nos. 97–1390, 97–8214), Gilmore declined that request. Breard died by lethal injection on April 14, 1998. *See Paraguayan National Executed After Appeals Fail*, (Apr. 15, 1998), *at* http://www.cnn.com/WORLD/americas/9804/15/paraguay.execution.on/. Much of the literature on consular convention claims and the domestic effect of ICJ judgments addresses this earlier litigation. For an introduction, see *Agora:* Breard, 92 AM. J. INT'L L. 666 (1998).

claim barred by procedural default. As an alternate ground, the court also relied on circuit precedent holding that the Convention "does not create an individually enforceable right."[106] The Fifth Circuit panel noted that the ICJ had held to the contrary in the *LaGrand* case, but found itself bound by prior precedent.[107]

The Supreme Court granted Medellin's ensuing petition for certiorari in order to consider "[f]irst, whether a federal court is bound by the International Court of Justice's [*Avena*] ruling . . . and second, whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment."[108] It thus seemed likely that the Court would issue an important decision on some of the basic interjurisdictional questions that it had largely avoided in *Breard*.[109]

In February of 2005, however, President Bush issued a memorandum stating that

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the [*Avena* case] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[110]

Although the memorandum avoided mandatory language, the United States' accompanying brief to the Supreme Court characterized the memo as a "binding federal rule" and stated that state procedural

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106. 371 F.3d at 280 (citing United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001)).

107. *Id.*

108. Medellin v. Dretke, 125 S. Ct. 2088 (2005) (citing the original grant at 125 S. Ct. 686 (2004)).

109. The key difference between the cases was that, in *Breard*, there was only a *provisional* order from the ICJ; in *Medellin*, the ICJ had issued a final judgment. *See Medellin*, 125 S. Ct. at 2106 (Souter, J., dissenting) (noting the potential importance of this difference). *Breard* also raised yet another interjurisdictional question because it involved not only a habeas petition by the prisoner but also a separate federal civil action by Paraguay against the Commonwealth of Virginia. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272 (E.D. Va. 1996), *aff'd*, 134 F.3d 622, 627 (4th Cir. 1998), *cert. denied per curiam*, 521 U.S. 371, 378 (1998); Carlos Manuel Vazquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 8–22 (1998).

110. George W. Bush, Memorandum for the Attorney General, Feb. 28, 2005, attached as Appendix 2 to Brief for the United States as *Amicus Curiae* Supporting Respondent in No. 04-5928, *Medellin v. Dretke* (Feb. 2005).

default rules "must give way," under the Supremacy Clause, to the required reconsideration of the Mexican prisoners' claims.[111] The Administration paired its effort to mandate compliance with the *Avena* ruling with an announcement that the U.S. was withdrawing from the Optional Protocol consenting to ICJ jurisdiction in Vienna Convention cases.[112] The *Avena* story thus bears out the prediction that aggressive interference by supranational bodies with domestic institutional arrangements risks a domestic backlash against international law and institutions.[113]

In light of the President's order, a divided Supreme Court dismissed the writ of certiorari in *Medellin* as improvidently granted in a per curiam opinion.[114] The action has now shifted to the Texas Court of Criminal Appeals, where Medellin has filed a new application for a writ of habeas corpus under state law.[115] Although state procedural default rules probably still bar Medellin's petition, he has argued that both the ICJ's order, of its own force, and the President's memorandum override those rules.[116] The State of Texas, on the other hand, has argued that the ICJ's order lacks direct effect and that the President lacks constitutional power to mandate compliance by the state courts, absent some valid act of Congress delegating such power.[117] If the Texas court rules against Medellin, the

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111. Brief for the United States, *supra* note 110, at 42, 43.

112. *See id.* (noting that "[i]n a two-paragraph letter dated March 7, Secretary of State Condoleezza Rice informed U.N. Secretary General Kofi Annan that the United States 'hereby withdraws' from the Optional Protocol to the Vienna Convention on Consular Relations").

113. *See, e.g.*, *Defensible Diplomacy*, WASH. POST, March 16, 2005, at A22 (approving the President's decision "not to continue to submit to the jurisdiction of an international court with so little regard for U.S. constitutional norms and procedures").

114. 125 S. Ct. at 2092. For an account of the Court's action, see *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 327 (2005).

115. *See* Order on Application for Writ of Habeas Corpus in No. AP-75,207, June 22, 2005 (on file with author).

116. Brief of Applicant Jose Ernesto Medellin on Application for Writ of Habeas Corpus, No. AP-75,207 (July 29, 2005), *available at* http://www.debevoise.com/publications/pdf/MeritsBriefofPetitionerJoseErnestoMedellin.pdf.

117. *See* State's Brief in Response, in *Ex parte* Jose Ernesto Medellin, No. AP-75,207, Texas Court of Criminal Appeals (filed Aug. 31, 2005), at 21–30, 39–41. In the interest of full disclosure, I note that I have filed an *amicus curiae* brief on behalf of several interested state governments arguing that the President's Memorandum does not actually *order* state courts to do anything, and that if it did, it would be unconstitutional. *See* Brief of the States of Alabama, Montana, Nevada, and New Mexico as *Amici Curiae* in Support of Respondent, *Ex Parte* Jose Ernesto Medellin, No. AP-75,207, Texas Court of Criminal Appeals (filed Aug. 31, 2005), *available at* http://www.debevoise.com/publications/pdf/CCA%20State%20Amicus.PDF.

case will likely return to the Supreme Court for decision of the issues that were avoided the first time around.[118]

### *B. NAFTA Chapter Eleven and the* Loewen *and* Mondev *Cases*

My second example is really two cases, both decided by international arbitration panels under Chapter 11 of NAFTA.[119] That chapter protects a broad class of "investments" in several distinct ways. Article 1102 imposes a "national treatment" obligation; it requires that each party, as well as states or provinces of a party, "accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors . . . ."[120] Article 1105, on the other hand, sets out a nonrelative, "minimum standard of treatment," requiring that each party treat the others' investors "in accordance with international law, including fair and equitable treatment and full protection and security."[121] Finally, Article 1110 generally prohibits nationalization or "expropriation" of investments.[122] Chapter 11 is unusual among major trade treaties in that it provides a private right of action for investors against signatory governments, rather than requiring would-be plaintiffs to persuade their home countries to espouse their claims in a more traditional state vs. state action.[123] Not surprisingly, this decoupling of Chapter 11 enforcement from the political discretion of the signatory states themselves has given rise to considerable litigation and controversy.[124]

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118. It is possible that the State court will reject Medellin's petition on the ground that he was not prejudiced by the Consular Convention violation, without passing on the binding effect of the *Avena* judgment or the President's memorandum. That resolution might raise difficult interjurisdictional problems of its own, concerning the proper standard for prejudice under the Convention, that the Supreme Court would still need to resolve. *See The Supreme Court, 2004 Term*, *supra* note 114.

119. North American Free Trade Agreement, Dec 17, 1992, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 289, 605.

120. *Id.* art. 1102(1); *see also id.* art. 1102(3) (imposing this obligation on states and provinces).

121. *Id*. art. 1105.

122. *Id.* art. 1110. Specifically, Article 1110 permits "taking" an investment only if the taking is "(a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and the general principles of treatment provided in Article 1105(1); and (d) upon payment of compensation [as set out in the treaty]." *Id.* art. 1110(1). *See also* arts. 1103 (most favored nation treatment), 1106 (performance requirements), and 1109 (capital transfers).

123. The WTO agreement, for instance, retains the traditional requirement that only states may initiate litigation. *See* Lerner, *supra* note 27, at 289.

124. *See* Ahdieh, *supra* note 10, at 2056–57. The provision for individual rights of action tends to make interjurisdictional problems more urgent. *See supra* text accompanying notes 33–

The Chapter 11 cases both involve what is, functionally speaking, appellate review of domestic state court decisions by arbitral panels constituted under NAFTA.[125] *Mondev*[126] concerned an urban redevelopment scheme gone bad in Boston's infamous "Combat Zone." Mondev International, a Canadian corporation, entered into a complicated agreement with the City of Boston and the Boston Redevelopment Authority to build a shopping mall, parking garage, and hotel in the area; the deal eventually foundered, however, on disagreement over the price for a parcel of land that the City was to transfer to Mondev as part of the project. Mondev sued the City and the Authority for breach of contract and also for tortious interference with Mondev's contractual relations with Campeau Massachusetts, Inc., another Canadian developer to whom Mondev had eventually leased its rights. Although Mondev prevailed on both counts before a jury in state court, the trial judge entered judgment notwithstanding the verdict on the tort claim, holding that the Authority—a public entity—was immune from suit under the Massachusetts Tort Claims Act. The Massachusetts Supreme Judicial Court (SJC), in an opinion by then-Justice (now Harvard Law professor) Charles Fried, affirmed the lower court on the immunity question and reversed on the contract issue, holding that the City and Authority had not breached the agreement. The SJC thus rejected both of Mondev's claims and entered judgment for the defendants.[127]

Because the events underlying Mondev's claim occurred prior to NAFTA's entry into force on January 1, 1994, Mondev could not have brought its initial suit as a Chapter 11 arbitration.[128] Instead, Mondev argued that the Massachusetts SJC's rejection of its claims was *itself* a NAFTA violation—as the NAFTA tribunal put it, "that by the decisions of its courts, the United States effectively expropriated the value of the rights to redress arising from the failure

34. That is not to deny, however, that the WTO and other trade agreements that impose broad obligations on signatory governments and create supranational dispute resolution mechanisms may raise many of the same problems. *See* Ahdieh, *supra* note 10, at 2152 (noting that "GATT/WTO tribunals have exhibited at least some willingness to review national courts").

125. *See* NAFTA, *supra* note 119, arts. 1115–1138 (detailing the arbitral mechanisms for settlement of disputes under Chapter 11).

126. *Mondev*, *supra* note 89.

127. *See* Lafayette Place Assocs. v. Boston Redevelopment Auth., 694 N.E.2d 820, 836–37 (Mass. 1998). For further background on the facts and legal arguments in *Mondev*, see Dana Krueger, Note, *The Combat Zone:* Mondev International, Ltd. v. United States *and the Backlash Against NAFTA Chapter 11*, 21 B.U. INT'L L. J. 399 (2003).

128. *See Mondev*, *supra* note 89, ¶¶ 57–58.

of the project."[129] The tribunal accepted this theory as pleading a "denial of justice" under Art. 1105(1)—the minimum standard of treatment provision—of NAFTA. "Denial of justice" is a longstanding but somewhat vague concept in international law.[130] In the NAFTA context, it implicates both "improper procedures and unjust decisions."[131] The principle "recognizes that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgment itself."[132] The rationale for this principle, as Renée Lettow Lerner has explained, is to use "the substantive injustice as indirect evidence of partiality . . . in the tribunal."[133]

Mondev's NAFTA claim focused on this substantive element. The argument, in essence, was that the Massachusetts courts got the relevant state law *so wrong* that they denied justice to the Canadian investors under Art. 1105. The most important thing about the *Mondev* panel's ruling is that it accepted this basic theory of a NAFTA violation. In so doing, however, the panel insisted that it was not conducting appellate review of the Massachusetts SJC's decision:

> It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal.[134]

This disavowal of an appellate function did not, however, prevent the arbitral panel from reviewing the state court's decision on its merits. Instead, the tribunal asserted that it would apply a more deferential standard than an appellate court would ordinarily employ:

> In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available

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129. *Id.* ¶ 59.

130. *See, e.g.*, Charles de Visscher, *Le déni de justice en droit international*, 52 RECUEIL DES COURS 369, 369 (1935) (calling the doctrine "one of the oldest and one of the worst elucidated in international law") (quoted and translated in Lerner, *supra* note 27, at 248 n.89); Ahdieh, *supra* note 10, at 2128–33 (surveying the development of denial of justice claims).

131. Lerner, *supra* note 27, at 251.

132. ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 309 (1938).

133. Lerner, *supra* note 27, at 262.

134. *Mondev*, *supra* note 89, ¶ 126.

> facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[135]

The tribunal acknowledged that this was "a somewhat open-ended standard," but despaired of offering a "more precise formula . . . to cover the range of possibilities."[136]

Applying this standard, the tribunal ultimately found that the Massachusetts SJC had *not* breached the United States' NAFTA obligations. Three aspects of the tribunal's opinion are important for present purposes: First, as I have already noted, the tribunal accepted the basic contention that a domestic court's decision may be *so wrong*, as a matter of domestic law, as to amount to a violation of NAFTA's Chapter 11.[137] Second, the tribunal engaged in what most lawyers would consider to be pretty searching review of the Massachusetts SJC's reasoning on the contract claim.[138] Despite the tribunal's protestations, it is hard to see how its opinion would have looked much different on this point if it had forthrightly admitted that it was conducting an appellate review of the SJC's decision. Finally, the tribunal came perilously close to holding that the state statutory immunity of the Redevelopment Authority—a fairly common form of governmental immunity in the United States[139]—violated NAFTA's guarantee of "treatment in accordance with international law."[140] The tribunal rejected that conclusion only after extensive consideration of

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135. *Id.* ¶ 127.

136. *Id*.

137. *Id*.

138. *See id.* ¶¶ 129–138.

139. A number of states have abolished the common law doctrine of municipal immunity, *see, e.g.*, Jackson v. City of Florence, 320 So. 2d 68, 74 (Ala. 1975); Vanderpool v. State, 672 P.2d 1153, 1156–57 (Okla. 1983), but some have not, *see, e.g.*, Gordon v. Bridgeport Housing Auth., 544 A.2d 1185, 1188–89 (Conn. 1988). One frequently sees a pattern in which state courts acknowledge a traditional doctrine that municipalities are immune for acts taken in the performance of all governmental functions, later abolish that doctrine, but then uphold legislative acts providing for municipal immunity in more limited contexts or for claims above a certain amount. *See, e.g.*, Dickey v. City of Flagstaff, 66 P.3d 44, 47–49 (Ariz. 2003) (upholding statute providing for immunity for recreational activities); Zimmerman *ex rel.* Zimmerman v. Village of Skokie, 697 N.E.2d 699, 706–08 (Ill. 1998) (rejecting argument for exception to the state Local Governmental and Governmental Employees Tort Immunity Act); Wilson v. Gipson *ex rel.* Gipson, 753 P.2d 1349, 1351–53 (Okla. 1988) (upholding the state Political Subdivisions Tort Claims Act, which waives municipal immunities only up to certain limits). The immunity challenged in *Mondev* was one of these statutory immunities, limited only to intentional torts.

140. *Mondev*, *supra* note 89, ¶¶ 139–156.

European jurisprudence and other comparative sources, and it stated that "circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA."[141] If a subsequent NAFTA panel were to take this next step, such a holding would require a fairly extensive restructuring of remedies against American public entities whenever the plaintiff is a Canadian or Mexican investor.

The *Loewen* case[142] likewise began life as a business tort case in state court. The suit involved feuding funeral homes in Mississippi. Loewen was a large Canadian concern that had undertaken to acquire funeral homes all across North America. Its expansion into the Gulf Coast region brought it into conflict with Jeremiah O'Keefe, Sr., whose family owned a much smaller group of funeral homes in the area. The O'Keefe clan ultimately ended up suing Loewen in state court for breach of contract, common law fraud, and violations of Mississippi antitrust law.[143]

The technical term for what happened to Loewen over the course of a seven-week trial in Mississippi state court is "home cooking." Although both parties tried to ingratiate themselves to the local, largely African-American judge and jury by hiring prominent African-American lawyers, the O'Keefes were much more effective. Moreover, the O'Keefes' lawyers repeatedly appealed to the jury's patriotism and antiforeign sentiment, contrasting Mr. O'Keefe's American military service with Loewen's Canadian origins. Although the O'Keefes had only requested $5 million in compensatory damages, the jury awarded them $500 million, including $75 million for emotional distress and $400 million in punitives. To make matters worse, state law required Loewen to post a bond equal to 125 percent of the judgment in order to stay execution pending appeal. When the Mississippi courts refused to reduce the appeal bond, Loewen felt forced to settle the case for $175 million.[144]

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141. *Id.* ¶ 151.

142. *Loewen*, *supra* note 89.

143. *See id.* ¶¶ 30–38. The state proceedings are unreported. For a helpful discussion of the *Loewen* litigation in both the state courts and the NAFTA tribunal, *see generally* William S. Dodge, Loewen v. United States: *Trials and Errors under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563 (2002). For a fascinating journalist's account of the events and personalities underlying the state court trial, see Jonathan Harr, *The Burial*, NEW YORKER, Nov. 1, 1999, at 70.

144. *See Loewen*, *supra* note 89, ¶¶ 4–7.

Loewen then turned to NAFTA arbitration. It did not argue that its investment in its Mississippi funeral homes had been expropriated by state executive or legislative action; rather, it challenged the state *court* proceedings as an independent NAFTA violation. Loewen asserted that the trial court's allowance of anti-Canadian testimony violated Art. 1102's prohibition of discrimination and Art. 1105's "duty of full protection and security" for foreign investors;[145] that the excessive verdict and the bonding requirement likewise violated Art. 1105; and that the discriminatory conduct of the trial, the excessive verdict, and the bonding requirement amounted to an expropriation of Loewen's investment under Art. 1110.[146] Although the challenge to the damages verdict implicated the same substantive aspect of denial of justice at issue in *Mondev*,[147] most of Loewen's claims focused on the conduct of the trial and the bonding requirement. They thus raised the procedural aspect of denial of justice.[148] Loewen claimed $725 million in damages from the United States.[149]

The NAFTA panel, which included Judge Abner Mikva, formerly of the United States Court of Appeals for the District of Columbia Circuit, largely accepted Loewen's arguments on the merits. The panel found the O'Keefes' trial strategy outrageous, and it chastised the state trial judge for failing to put a stop to O'Keefe's appeals to what the tribunal saw as xenophobia and class or racial prejudice. "Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial," the panel wrote, "we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law."[150]

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145. The failure of Loewen's counsel to object to most of the allegedly prejudicial arguments and testimony at trial meant that Loewen could probably not have sought appellate review of those matters in the state courts. *See* Dodge, *supra* note 143, at 565. The *Loewen* case thus raises many of the same "procedural default" issues that I discuss in connection with *Medellin*. *See infra* notes 168–89 and accompanying text.

146. *See Loewen*, *supra* note 89, ¶¶ 39–40.

147. *See* Lerner, *supra* note 27, at 264–65.

148. *See id.* at 251–61.

149. *See* Notice of Claim, The Loewen Group, Inc. v. United States, Oct. 30, 1998, at 67, *at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/claim1.pdf.

150. *Loewen*, *supra* note 89, ¶ 54. It is always difficult to gauge the impact of different arguments on a trial after the fact. Interestingly, the *New Yorker* account of the trial, while extensive in its discussion of the lawyers' strategies, does not mention the appeals to nationalism

Ultimately, the United States avoided liability in *Loewen*, but on technical grounds that seem unlikely to impede future challenges to state court judgments in similar cases.[151] Loewen's first problem was that it had failed to pursue available local remedies, including a petition for *certiorari* to the U.S. Supreme Court.[152] There was also a jurisdictional pitfall: Loewen had gone into bankruptcy, partly as a result of the Mississippi verdict, and the entity that ultimately emerged from bankruptcy was organized as a United States corporation. Finding that "there must be continuous national identity from the date of the events giving rise to the claim . . . through the date of the resolution of the claim," the panel found that Loewen was no longer entitled to pursue its NAFTA remedies and accordingly dismissed the case for want of jurisdiction.[153]

Notwithstanding the panel's ultimate rejection of Loewen's claims, the striking thing about the panel's opinion is the extent to which it was willing not only to second-guess a state court judgment on state law issues but to condemn that court's entire course of proceeding as a violation of international law.[154] As in *Mondev*, the NAFTA tribunal began by insisting that it "cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment."[155] But, as in *Mondev*, that is exactly what the NAFTA tribunal did. The panel's critique of the trial proceedings occupies 43 pages in the opinion preceding the ultimate dismissal of the claim on jurisdictional grounds, making that discussion one of the

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and xenophobia that the NAFTA panel found so significant in the transcript. *See* Harr, *supra* note 143, at 86–92.

151. *See* Ahdieh, *supra* note 10, at 2041 (noting that the "technical and . . . perhaps fortuitous nature" of the grounds of dismissal "offers little reason to believe that liability for U.S. judicial conduct will not be imposed in the future").

152. *See Loewen*, *supra* note 89, ¶ 149 (citing the "local remedies rule," which "requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law"). Notably, the NAFTA panel declined to find that a *cert* petition *was* an adequate remedy—rather, it held that Loewen had simply failed to carry its burden of presenting evidence explaining its business decision to settle the case rather than to pursue the petition. *Id.* ¶¶ 207–17.

153. *Id.* ¶ 225, ¶ 240.

154. The panel may have felt emboldened to castigate the state courts precisely because the panel's ultimate resolution avoided the need to frame any relief. But the panel's dictum now stands available for the next case, where jurisdictional avoidance may be more difficult. This is the sort of behavior one might fear from a "court" that is constituted for one case only, and thus relieved of the need to live tomorrow with its rulings of today. *See infra* notes 277–83 and accompanying text.

155. *Loewen*, *supra* note 89, ¶ 51.

most impressive displays of dictum since *Marbury v. Madison*.[156] And while one can readily share the panel's discomfort with some aspects of the state court proceedings, it seems likely that losing defendants could make similar arguments in any number of cases—provided that they can qualify as foreign investors under NAFTA Chapter 11.

John Echeverria has described NAFTA proceedings like *Mondev* and *Loewen* as "the biggest threat to United States judicial independence that no one has heard of and even fewer people understand."[157] Although the issues on the merits in such cases—and their political valences—are quite different from cases like *Medellin* and *Avena*, both sets of cases raise similar and fundamental questions about the relationship between international tribunals and domestic courts. I survey some of those questions in the next Part.

## III. TAKING TRANSNATIONAL LEGAL PROCESS SERIOUSLY

Cases like *Medellin*, *Mondev*, and *Loewen* replicate the classic concerns of Federal Courts law at the supranational level. In *Medellin*, a *federal* court conducted collateral review of a *state* court proceeding for compliance with *international* law. A *supranational* court then construed the relevant treaty and issued an order seeking to impose its interpretation on the state and federal institutions involved. In *Mondev* and *Loewen*, a supranational tribunal tried to discern whether *state* courts had construed their own law in such a way as to violate supranational treaty rights. Each case involved multiple layers of both law and courts, and the potential for conflict and misunderstanding between these layers is obvious.

Henry Hart and Herbert Wechsler famously developed the "Federal Courts" curriculum to deal with just these sorts of conflicts. The heart of the course concerns the intricate web of constitutional, statutory, and doctrinal rules needed to allow two parallel judicial systems—state and federal—to live with one another in at least relative harmony. Constitutional and prudential rules of justiciability,

156. 5 U.S. (1 Cranch) 137, 154–167 (1803) (opining that Madison illegally refused to deliver Marbury's commission, and that the federal courts had power to require senior executive officials to perform such duties, before ultimately holding that the Court lacked jurisdiction to hear the case).

157. Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, at A20 (quoting Professor Echeverria); *see* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2025 (2004) (characterizing NAFTA and WTO panels as a "threat to self-government").

state-federal conflict of laws, the Anti-Injunction Act and abstention doctrines, federal deference to state courts on state law questions, and the intricate rules of federal habeas corpus are all designed to mediate a relationship between state and federal courts that is *not* strictly hierarchical.[158] Both constitutional values of federalism and the practical realities of the system—in particular, the inability of the federal courts to handle even all cases raising questions of federal law—mandate an emphasis on preserving *both* sets of courts as viable and respected institutions.

If we are now to graft another layer of courts onto this system—the ICJ, NAFTA and WTO panels, perhaps an International Criminal Court (ICC)—then we will need to develop a comparable set of tools to mediate the new set of conflicts that will surely arise. Even a skeptic of supranational institutions cannot help but relish that prospect; after all, the globalization of the Federal Courts field seems likely to function as a full employment act for Federal Courts scholars. It is important for such scholars to seize this opportunity: if the interaction between domestic and supranational courts is left to specialists in *international* law, then the field will likely develop in ways that are relatively less concerned with maintaining the integrity of domestic structures.

This Article does not attempt a comprehensive analysis of these questions. I want simply to highlight some implications of the Legal Process notion of institutional settlement in cases like *Medellin*, *Mondev*, and *Loewen*. I hope to provide some concrete examples of what a Legal Process approach to foreign affairs law might look like and point out some directions in which a globalized Federal Courts literature needs to go next.

### *A. International Law and Institutional Settlement*

Institutional settlement means entrusting certain institutions to make particular decisions and deferring to those decisions even in situations in which other institutions might have decided the same issue differently. That deference may have—for lack of better terms—both substantive and procedural dimensions. The federal habeas statute, for example, provides that a federal court may overturn a state court's application of law to fact only if the state

158. *See generally* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

court's ruling "involved an unreasonable application of . . . clearly established federal law,"[159] and the Supreme Court has made clear "that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[160] This deference to the substance of the state court's ruling exists alongside deference to the state court's procedural arrangements under rules of exhaustion and procedural default.[161] These rules ensure that state courts will have the opportunity to rule on federal issues in the first instance by providing that federal courts will not consider grounds for habeas relief that have not first been presented to the state courts in accord with state procedures. The effect is to "settle" in the state courts the primary authority to adjudicate federal defenses in state criminal prosecutions.

The most successful supranational institutions have thrived because they have achieved the respect and deference inherent in this notion of institutional settlement. Richard Kay has said that the widespread acceptance of judgments of the European Court of Human Rights "cannot be attributed to their often quite disputable results, nor to the sometimes uneven logic of the reasons the Court gives for them. Rather they are accepted now . . . simply because the Court has earned acceptance as the authoritative interpreter of binding legal rules."[162] And yet, international law—and international lawyers—often have little patience for the sort of rules designed to respect *domestic* institutional settlements. As Dean Slaughter has acknowledged, deference to domestic institutions "is a radical departure for most international lawyers and diplomats, who are accustomed to operating on the international plane as something apart from and presumably superior to the particularities and prejudices of domestic institutions."[163]

In this spirit, international lawyers have frequently reacted to American courts' application of the procedural default doctrine in consular relations cases by insisting that domestic law may not excuse

159. 28 U.S.C. § 2254(d)(1) (2000).

160. Williams v. Taylor, 529 U.S. 362, 410 (2000); *accord* Bell v. Cone, 535 U.S. 685, 694 (2002).

161. *See* 28 U.S.C. § 2254(b)(1) (2000) (requiring exhaustion of remedies available in state court); Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (holding that state-court procedural default bars federal habeas relief).

162. Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217, 220 (1993).

163. SLAUGHTER, *supra* note 6, at 149–50.

a violation of rights under international law.[164] Likewise, the NAFTA panels in *Mondev* and *Loewen* were relatively unwilling to defer to the state courts' construction of state law in those cases.[165] And in both the trade and human rights contexts, internationalists have argued for loosening the formal institutional constraints on federal lawmaking in order to facilitate the creation and enforcement of international agreements.[166] I argue in this Section that each of these developments undermines both domestic institutional settlements and the attempt to develop a viable system of supranational adjudication.

1. *Domestic Law "Excuses" for International Law Violations*. The best support for the notion that domestic law may not "excuse" an international law violation comes from the Vienna Convention on the Law of Treaties. Article 27 states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[167] That language might mean at least two different things, however. Doctrines like procedural default are not "justifications" for violations of federal law in the sense that, say, self-defense can be a "justification" for homicide. Rather, such doctrines simply limit the remedies available when the federal right-holder fails to meet certain procedural requirements. The federal courts' invocation of procedural default, in other words, was not a ruling that Texas officials had no obligation to notify Medellin of his treaty rights. The Treaties Convention thus may have no application at all to such doctrines; indeed, that interpretation would be consistent with

164. *See, e.g.*, Henry J. Richardson III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMP. INT'L & COMP. L.J. 121, 127 (1998) ("It is basic that neither the United States, nor any other state, can plead the authority of its internal law to mitigate its international legal obligations."); Jordan J. Paust, Breard *and Treaty-Based Rights under the Consular Convention*, 92 AM. J. INT'L L. 691, 693 (1998) (calling *Breard*'s holding that treaty compliance must respect domestic procedural rules "a miserly misstatement of the law of treaties").

165. *See supra* notes 138–41, 150 and accompanying text.

166. *See, e.g.*, Henkin, *Provisional Measures*, *supra* note 57, at 680–81 (arguing that executive pronouncements should have the force of law in the context of Vienna Convention cases); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.").

167. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 27, 1155 U.N.T.S. 331.

the international norm that treaty implementation is governed by the procedural rules of the forum state.[168]

The Court's critics seem to read the Treaties Convention more broadly, however. The idea seems to be that domestic rules are irrelevant in determining whether a signatory nation has breached its obligation under international law to "comply" with the treaty.[169] Once the Houston police failed to tell Medellin that he could speak to the Mexican consulate, the Consular Convention obliged the United States to rectify this mistake. And while the U.S. could use whatever procedural vehicles it liked to afford redress—e.g., state court appeals, federal habeas corpus review, perhaps even a presidential stay of execution—the only way to avoid a treaty violation was if those vehicles *in fact* provided Medellin with redress. Compliance with local procedural rules could not *itself* have prevented such a violation of international law; treaty compliance is measured only by *outcomes* of domestic processes.

That strikes me as an overly simplistic vision of "compliance" with international law in the context of a complex domestic legal system. Consular Convention obligations may fall on any of the over one million state and local law enforcement personnel in the United States.[170] The United States cannot "guarantee" compliance by all of those people in the way that it might "guarantee" compliance with a more traditional form of agreement—say, to withdraw its armed

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168. *See* Breard v. Greene, 523 U.S. 371, 375 (1998) (noting that "the Vienna Convention itself . . . provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended'" (quoting Vienna Convention on Consular Relations, art. 36(2), 21 U.S.T. at 101)).

169. *See, e.g.*, Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, May 1, 1998, *at* http://web.amnesty.org/library/Index/ENGAMR510271998?open&of=ENG-392 ("[N]ational constitutional, legislative or regulatory norms cannot be invoked to avoid or modify the fulfillment of international obligations."); Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253, 267 (2001) ("From the international community's perspective, the superiority of international legal order over domestic law seemed to be less questionable than ever. The states could disregard or violate international obligations and rules but they could not appeal to their domestic regulations to justify such conduct.").

170. *See* Brian A. Reaves & Matthew J. Hickman, *Census of State and Local Law Enforcement Agencies, 2000*, Bureau of Justice Statistics Bulletin, Oct. 2002, at 1. The overwhelming majority of U.S. law enforcement personnel work for state and (mostly) local governments, rather than for national agencies. *See* William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J. L. & PUB. POL'Y 665, 665 (2002).

forces from a particular territory or to destroy a certain number of nuclear missiles. Before the ICJ, the United States asserted a quite modest version of "compliance," noting programs to educate state and local law enforcement on the Consular Convention.[171] Mexico and other nations have instead argued that the Convention creates rights enforceable by foreign nationals in the U.S. courts.[172] But even the latter view does not necessarily—and *cannot* practically—entail a right to a new trial every time the Convention is violated. Even if the Convention creates enforceable individual rights, it is quite another thing to say that those rights must *prevail* even where they are not asserted in the way required by domestic legal processes.

Two examples may help illustrate the point. Consider what would have happened to Mr. Medellin in a much simpler procedural system without collateral review for criminal convictions. Medellin completed his direct appeals in the Texas courts without mentioning his Consular Convention claim. In most court systems, that would be the end of the matter; courts generally only respond to defenses that are argued to them, and final judgments generally remain final. The procedural default doctrine arises because American judicial arrangements provide—somewhat unusually—for multiple layers of collateral review that supervise enforcement of federal criminal rights.[173] Is the claim that all countries are required, under international law, to have collateral review procedures, or at least some means of reopening a case after final judgment, whenever someone later discovers a possible treaty violation?

That may, in fact, be the argument. If it is, though, then international lawyers should be clear that they are asking not only for the basic treaty obligation of notification, but also for a procedural restructuring of many countries' judicial systems. American-style habeas review is hardly a universal practice, and legal systems vary in the extent to which they will reopen criminal judgments to take account of new arguments.[174] If such proceedings are *not* required,

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171. Counter-Memorial of the United States (Mex. v. U.S.), (Nov. 3, 2003), *at* http:www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_20031103_c-mem_06.pdf.

172. *See, e.g.*, *Avena*, *supra* note 84, ¶ 126 (noting Mexico's argument for an "exclusionary rule" barring use at trial of statements made by foreigners prior to consular notification).

173. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 533–34 (1953) (noting that habeas corpus is an exception to ordinary rules of *res judicata*).

174. While many legal systems permit some sort of postconviction review or collateral attack, most of these procedures seem considerably more limited than the American habeas corpus regime. Several permit relief only under a "miscarriage of justice" standard. *See* Kent W.

however, then it is hard to see why the United States should be faulted for failing to be more generous in its treatment of Medellin's claims on collateral review when it had no obligation to provide collateral review in the first place. In any event, the extra complexity of procedures for collateral attack or reopening of judgments imposes significant costs on a judicial system, in terms of both inefficiency and interjurisdictional conflict. Institutional settlements like the procedural default doctrine are designed to mitigate those costs while maintaining some of the advantages of a second bite at the apple, and people who wish to take that second bite—like Medellin—should have to follow the ordinary rules governing the procedure.[175]

A second illustration would compare Medellin's case to that of someone with an analogous claim under domestic law. Consider a habeas petitioner who claims that his murder confession has been beaten out of him by the police. That petitioner would state an extremely serious claim under the Fifth Amendment, and yet, if he fails to object when his confession is introduced against him at his state court trial, then he will have procedurally defaulted the claim; as a result, he will be foreclosed from raising it on federal habeas review. Our Fifth Amendment claimant is, in other words, in exactly the same

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Roach, *Canada*, *in* CRAIG W. BRADLEY, ED., CRIMINAL PROCEDURE: A WORLDWIDE STUDY 53, 78 (1999) (describing Canada's system for postconviction review by the Minister of Justice); Eliahu Harnon & Alex Stein, *Israel*, *in* BRADLEY, *supra*, at 217, 236 (discussing Israeli petitions for a new trial). Others seem to allow relief only for errors that go to the actual innocence of the defendant, which a Consular Convention claim would not. *See* Richard S. Frase, *France*, *in* BRADLEY, *supra*, at 143, 184–85 (describing petitions in the Court of Cassation based on "certain post-trial events or newly discovered evidence"); Rachel VanCleave, *Italy*, *in* BRADLEY, *supra*, at 245, 281–82 (describing "requests for revision" available "only when there is new evidence which . . . demonstrates that the convicted person must be absolved, or the conviction was based on false or fabricated evidence"); Richard Volger, *Spain*, *in* BRADLEY, *supra*, at 361, 393 (describing "revision" proceedings available "[i]n the event that new evidence is discovered casting doubt on the conviction"); *see also* German Criminal Procedure Code, § 359 StPO (Federal Ministry of Justice trans.), *at* http://www.iuscomp.org/gla/statutes/StPO.htm#359 (last visited January 26, 2005) (permitting relief only for errors going to guilt or for violation of the European Convention on Human Rights). Some systems have regimes that permit habeas review in principle but make it a "dead letter" in practice. Daniel H. Foote, *"The Door That Never Opens?": Capital Punishment and Postconviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT'L L. 367, 416 (1993) (describing the Japanese system).

175. Likewise, where the Supreme Court has forced reopening of criminal convictions based on new evidence, it has adopted a standard of review very deferential to the judgment. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993) (suggesting that federal habeas relief would be available where the petitioner could show new evidence indicating his innocence and the state provided no avenue for the claim, but that the threshold for such claims would be "extraordinarily high").

procedural boat as Mr. Medellin.[176] The debate over Consular Convention claims often overlooks that they are treated precisely the same in our system as claims by U.S. nationals raised under our fundamental law.

What I am suggesting would be something like "national treatment" for treaty rights—that is, a treaty signatory must afford equivalent procedural protections and remedies for rights asserted under a treaty as it does for similar rights protected under domestic law. In many areas, the fundamental aspiration of international law has been to be incorporated directly into domestic legal systems. Debate currently rages, for example, over whether *customary* international norms have direct effect in American courts,[177] and similar disputes have arisen about the self-executing effect of treaties.[178] It is more than a little odd in the Consular Convention context, then, to hear international lawyers argue that treaty norms should *not* be treated similarly to other well-established norms of federal law.

This gets back to what we should take to be a *violation* of a treaty norm. I want to distinguish between whether the Houston police "violated" the Convention and whether the United States can be said to be "in violation" of the treaty on the international plane. There is little question that the first sort of violation occurred, but did the second? Suppose, for example, that the United States conceded that the Consular Convention creates rights enforceable by private individuals and provided that those rights should be treated by domestic courts in exactly the same manner that those courts would

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176. *See* Breard v. Greene, 523 U.S. 371, 376 (1998) (observing that "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply").

177. *Compare, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997) (arguing that customary international law is not directly effective as federal law and may not be applied by courts without legislative authorization), *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998) (defending the conventional wisdom among American international lawyers that customary international law *is* federal law). For my own entry, *see* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 369 (2002) [hereinafter Young, *Customary International Law*] (arguing that customary law is not federal law but that courts may sometimes give it effect even without specific legislative authorization).

178. *Compare, e.g.*, John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1961 (1999) (arguing against self-execution), *with* Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2154–55 (1999) (arguing for self-execution).

treat violations of the Fifth Amendment or other basic constitutional rights. Does it make sense to require more than that?[179]

In answering this question, it may help to distinguish between two different goals in crafting remedies for violations of treaty rights. Richard Fallon and Daniel Meltzer—Federal Courts scholars writing in the Legal Process tradition—have distinguished between *Marbury v. Madison*'s principle of an individual remedy for every right[180] and "[a]nother principle, whose focus is more structural, [that] demands a system of constitutional remedies adequate to keep government generally within the bounds of law."[181] The former principle demands justice in each individual case, but it is often compromised by sovereign immunity, jurisdictional limits, and the like. The latter principle "is more unyielding in its own terms, but can tolerate the denial of particular remedies, and sometimes of individual redress."[182] One way to approach treaty obligations like the Consular Convention might be to say that although the Houston police "violated" Mr. Medellin's treaty right, the U.S. is not "in violation" of the treaty so long as it provides a general system of remedies that is adequate to ensure reasonable compliance with international law. One might then sketch a division of labor between national and supranational courts, such that national courts would be responsible for providing remedies in individual cases, while the ICJ would determine the structural adequacy of the remedial system provided by national law.

Providing "national treatment" for treaty rights will not always satisfy this structural standard. A totalitarian regime might sign on to the Consular Convention, then forbid any claims under it in the regime's own courts on the ground that those courts respect no rights under domestic law, either. Under my proposed division of labor, these sorts of structural inadequacies would remain a proper concern for supranational courts. And, in fact, the problem in cases like *Avena*

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179. In fact, I wonder if the Constitution would *permit* more than that. If the Consular Convention were treated as a "super right" not subject to procedural default on habeas review, I would think that the American citizen in the cell next door to Medellin's on Texas's death row, who might well have had a federal constitutional claim that failed on procedural default grounds, would have a very interesting equal protection claim.

180. *See* 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

181. Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

182. *Id.* at 1779.

may lie not with the requirement that persons raising treaty rights comply with local procedural rules, but rather with the specific procedural rules in question. The procedural default doctrine has gone through different iterations over the years,[183] and many American scholars believe that current law on the subject is fairly harsh.[184] That judgment seems implicit in the ICJ's ruling in *Avena* that the default doctrine prevents U.S. courts from giving full effect to the Consular Convention;[185] after all, it was the very nature of the treaty violation by local authorities that the breach deprived the foreign defendants of information about their legal options, so that those defendants may not have been aware of their rights.

One may or may not find the ICJ's analysis of procedural default persuasive.[186] For present purposes, I want to make three broader points. The first is that once we acknowledge *any* notion of procedural default—that is, the strict version applied by the Fifth Circuit in *Medellin* or a more liberalized one—at the international level, we have considerably undercut the broad principle that domestic rules are irrelevant in determining whether a signatory nation has breached its obligation to "comply" with the treaty. Although the ICJ's discussion suggests an intention to police the basic adequacy of domestic remedies, it nonetheless also seems to acknowledge that domestic rules are critical in the following way: a treaty "violation" in the basic sense (Texas's failure to read Medellin his consular rights) may nonetheless not lead to a "violation" in the broader sense (that the U.S. would be out of compliance with the Convention) if the treaty right-holder fails to comply with domestic

183. *Compare, e.g.*, Brown v. Allen, 344 U.S. 443, 487 (1953) ("A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus."), *with* Fay v. Noia, 372 U.S. 391, 438 (1963) *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992) (excusing state court procedural defaults absent a showing that the petitioner "deliberately bypassed" state court procedures), *with* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) (state court procedural default bars habeas review absent a showing of "cause" and "prejudice" for the default). *See generally* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986).

184. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1652 (2003) (complaining of "the extraordinarily harsh doctrinal framework of habeas 'procedural default'"). I take no position here on whether the current rules for overcoming such defaults are unfair; the important point is simply that *some* doctrine of procedural default is essential to a viable dual system.

185. *See Avena*, *supra* note 84, ¶ 113.

186. One may legitimately ask whether ICJ judges—most of whom have been trained in unitary legal systems lacking collateral review—have any particular expertise on the question. Certainly their conclusory pronouncements do not display any serious analysis of the issue.

procedural and remedial rules. Acknowledging that principle, in itself, would be an important step.

The second point is that the need for a procedural default doctrine arises chiefly from the effect that *not* having one has on the judicial system being reviewed. The Supreme Court has observed that liberal default rules for federal habeas review undermine the finality of state court judgments and encourage state courts to disregard their own procedural rules in the first instance.[187] After all, if a state court knows that the federal courts will review a defendant's claim on collateral attack notwithstanding a procedural waiver in state court, the state tribunal has a strong incentive to go ahead and hear the claim; otherwise, its resolution of the other issues in the case may become irrelevant. Collateral review by the ICJ of *both* state and federal courts in cases like *Medellin* seems likely to have similar effects. In fact, the mechanism is considerably simpler: the ICJ's *Avena* decision simply *ordered* the U.S. courts to ignore the violations of state procedural rules in Consular Convention cases.[188] If the U.S. courts comply, they may face pressure to "level the playing field" by ignoring procedural defaults in cases involving American nationals with wholly domestic claims.

Finally, there is the question whether the procedural default rules and similar principles governing review of domestic courts by international tribunals should themselves be established as a matter of international or domestic law. I focus on this question at greater length in Section C, but the argument can be stated briefly here: doctrines like procedural default are calibrated to an assessment of the relative institutional competences of the reviewing and reviewed courts. Hence, debates about the scope of federal habeas corpus review of state court criminal convictions have been centrally concerned with the issue of "parity" between state and federal courts: to what extent do we trust state courts to be the front-line enforcers of certain federal rights?[189] Consular Convention claims confront a similar question of parity: to the extent that we trust domestic courts

187. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 747–51 (1991); Engle v. Isaac, 456 U.S. 107, 126–29 (1982); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting).

188. Likewise, the Justice Department interpreted the President's memorandum as ordering the state courts to ignore their own procedural rules and grant new hearings. *See supra* note 111.

189. Many forests have perished over parity. For a sampling of the debate, see HART & WECHSLER, *supra* note 15, at 322–26; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

as generally competent and fair institutions, we will be willing to establish rules of review that are generally deferential. If we *don't* trust domestic courts in this way—as the ICJ apparently did not trust the American courts—then we will be inclined to disregard domestic procedures and the like. My point, however, is that our trust level may well vary from one domestic legal system to another. If so, then it will be hard to establish the *rules* of deference as a matter of uniform international law. While some sort of international law floor may be desirable, most doctrines governing the relationship between domestic and international tribunals will likely have to be worked out as part of the foreign affairs law of individual nations.

The view that internal law and structures are irrelevant to the application of international law seems rooted in the fiction that states are monolithic entities.[190] One need not go all the way with Dean Slaughter's notion of "disaggregated" sovereignty—that is, the notion that "individual national government institutions could become bearers of the rights and responsibilities of sovereignty in the global arena"[191]—to think that international law must increasingly take account of internal domestic structures. After all, it is precisely the operation of those internal institutions agreements like the Consular Convention regulate. As I have already suggested, the U.S.'s recent decision to withdraw consent to ICJ jurisdiction in Consular Convention cases after *Avena* demonstrates that, if supranational institutions show no inclination to respect domestic institutional settlements, domestic actors are likely to reciprocate.

2. *Second-Guessing Domestic Courts on Domestic Law*. *Mondev* and *Loewen* raise a different problem. Domestic law is not *irrelevant* to the international law issue in those cases—indeed, it is the alleged *misconstruction* of domestic law or the procedural inadequacies of domestic proceedings that is the basis of the treaty violation. The whole notion of denial-of-justice claims in these sorts of cases is that the complaining party has been denied—presumably because it is a foreigner—rights that are substantively provided by domestic law. In *Mondev* and *Loewen*, that meant that the state

190. *See* SLAUGHTER, *supra* note 6, at 13 (insisting that this fiction entails the "willful adoption of analytical blinders").

191. *See id.* at 34; *see also* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649, 652–53 (2002) (arguing that "exclusion of state governments from foreign relations activity . . . should be reexamined in globalization's wake").

courts were alleged to have erred so badly in the application of state law as to trigger the treaty's protections.

For present purposes, I want to focus on the substantive aspects of the denial-of-justice claims. We have no precise analogue to such claims in American law, but we do have a principle that state courts may not manipulate state law so as to "deny" a federal right. The issue arises in a wide variety of situations in which vindication of a federal right may depend, at least in part, on how a state court answers a question of state law. The question then arises to what extent the U.S. Supreme Court—which is supreme only on *federal* questions and generally lacks power to authoritatively interpret state law[192]—may second-guess a state court's construction of the state-law predicate to a federal claim.[193]

A leading early example is *Fairfax's Devisee v. Hunter's Lessee*,[194] which involved federal rights under the treaties that ended the Revolutionary War. Land belonging to Denny Martin Fairfax, a British subject, was seized during the war by the State of Virginia and ultimately granted to Hunter. The treaties ending the war provided that seizures before a certain date would be honored but that seizures *after* the effective date would not. Fairfax's right to the land, a federal right under the treaty, thus depended on the effective date of the seizure, a question of *state* law.[195] Although the decision of a state's highest court is ordinarily conclusive on state law questions, there was some reason to fear that the Virginia Court of Appeals was hostile to the federal peace treaties and might manipulate the state law question to avoid vindicating federal treaty rights.[196] In this sort of situation, the Hart & Wechsler authors argue, "some review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination."[197]

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192. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

193. For two recent treatments, see Henry Paul Monaghan, *Supreme Court Review of State Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003); Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002).

194. 11 U.S. (7 Cranch) 603 (1813).

195. *See id.* at 617–20.

196. *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 39 (4th ed. 2005) (noting that the Virginia Court of Appeals "was headed by Spencer Roane, an ardent states' righter and bitter foe of [John] Marshall").

197. HART & WECHSLER, *supra* note 15, at 493; *see also* Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977) ("[T]he state court does not speak the final word on

Hence, in *Fairfax's Devisee*, the Supreme Court reviewed—and reversed—the Virginia Court of Appeals' determination, as a matter of state law, that title to the land had vested in Virginia prior to the treaties' effective date.[198]

Similar problems have arisen in more recent cases. Under the Contracts Clause, for instance, a state legislature may not "impair[] the Obligation of Contracts";[199] whether a contract exists at all, however, is generally a question of state law. The Court has thus occasionally reviewed a state court's decision that no contract existed in order to ensure that federal law rights under the Contracts Clause are not evaded.[200] Similarly, a claim that the State has deprived someone of liberty or property without due process of law in violation of the Fourteenth Amendment, or taken their property without just compensation, depends on liberty and property interests typically created and defined by state law,[201] and the Court could review state court determinations of such interests. Most recently, the controversial decision in *Bush v. Gore*[202] involved a claim that the Florida courts had altered state election law in a way forbidden by Article II of the Federal Constitution, which provides that rules for choosing presidential electors must be made by the state *legislature*.[203]

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the state question" where the "existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law.").

198. 11 U.S. (7 Cranch) at 627–28. The Virginia Court of Appeals then defied that ruling, arguing that the statutory provision giving the U.S. Supreme Court appellate jurisdiction over state court rulings was unconstitutional. That dispute was resolved by the Court's well-known ruling in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816). Justice Story's opinion in *Martin* defended the Court's earlier review of the Virginia land title issue in Fairfax's Devisee. *See id*. at 358 ("From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title."); *see also* Smith v. Maryland, 10 U.S. (6 Cranch) 286, 305 (1810) (defending the Court's independent review of state law in another treaty case on the ground that "[t]he construction of [state] laws . . . is only a step in the cause leading to the construction and meaning of this article of the treaty").

199. U.S. CONST. art. I, § 10, cl. 1.

200. *See* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938):

> [I]n order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired it obligation. This involves an appraisal of the statutes of the State and the decisions of its courts.

*See generally* Monaghan, *supra* note 193, at 1976–83.

201. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031–32 (1992) (takings); Bd. of Regents v. Roth, 408 U.S. 564, 567 (1972) (due process); Perry v. Sindermann, 408 U.S. 593, 602 n.7 (1972) (same).

202. 531 U.S. 98 (2000) (per curiam).

203. *See* U.S. CONST. art. II, § 1.

The concurring justices who relied on this ground thus had to consider whether the Florida Supreme Court's interpretation of state election law had departed so greatly from the "correct" interpretation of those statutory rules as to amount to forbidden judicial lawmaking.[204]

This sort of review is quite controversial. When the U.S. Supreme Court reverses a state court on state law grounds, it threatens the supremacy of state courts over state law. That principle, most clearly established in the Reconstruction-era case of *Murdock v. Memphis*,[205] is one of the pillars of our federalism. Martha Field has explained that if the federal Supreme Court were allowed to substitute its own view of state law for that of the highest state court, "it would not be possible to identify any body of law as 'state law.' It is thus because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one."[206]

The trick, then, is to allow enough federal oversight to foreclose hostile state courts from manipulating state law to thwart federal rights, but not so much federal second-guessing as to eliminate state court supremacy over state law. The Supreme Court has walked this line by according substantial deference to state court interpretations of state law, even when the state law question is antecedent to a federal right. Hence the Court said in *Indiana ex rel. Anderson v. Brand* that "we accord respectful consideration and great weight to

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204. *See* 531 U.S. at 112–20 (Rehnquist, C.J., concurring); *see also* Monaghan, *supra* note 193, at 1928–34 (framing the review of state law issue in *Bush v. Gore*). For additional cases reviewing state-court determinations of state law, see Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (reviewing a state court's determination that, contrary to state precedent, a state trespass law applied to black sit-in demonstrators); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466–67 (1958) (reviewing the Alabama Supreme Court on a point of state appellate procedure, in a case involving a contempt judgment entered against the NAACP for civil rights activities). Both *Bouie* and *Patterson* are surely best explained by the Court's warranted skepticism that state courts in the South during the Civil Rights Movement would give a fair hearing to black protesters.

205. 87 U.S. (20 Wall.) 590 (1875). *Murdock* interpreted the Supreme Court's jurisdictional statute generally to permit review only of *federal* issues in cases on direct appeal from the state supreme courts, leaving the state issues as settled by the state courts' opinions. The Court offered this interpretation in part to avoid the constitutional question that would have been presented by a statutory attempt to extend the Supreme Court's appellate jurisdiction to cover all state law issues in a case. *Id.* at 633. Whether *Murdock* is a statutory or constitutional principle, however, it has become "such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it." Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 920 (1986).

206. Field, *supra* note 205, at 922.

the views of the State's highest court" on state law questions.[207] One leading case described the Court's inquiry as limited to determining whether the state court's construction of state law had "fair support":

> Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis . . . But if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, . . . this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.[208]

This "fair support" standard has been challenged, and it seems likely that the precise level of deference may vary depending on the situation and the nature of the underlying federal right at issue.[209] But

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207. 303 U.S. 95, 100 (1938).

208. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944) (quoting Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930)).

209. Henry Monaghan has argued that "the fair support rule should be viewed as a rule of practice only," and that "the Court possesses ancillary jurisdiction *independently* to determine the content of state law whenever the Federal Constitution directly constrains its operation or incorporates it." Monaghan, *supra* note 193, at 1964. Although Professor Monaghan has found instances of such independent review, the predominant weight of case law seems to acknowledge some obligation of deference. Monaghan's argument is particularly inapplicable to denial-of-justice claims under international law for several reasons. First, Monaghan discusses a relatively narrow class of situations in which some specific norm of federal constitutional law implicates or incorporates a state law question. A less deferential standard might be tolerable in this limited range of cases, but denial of justice applies to *any* application of state law, so long as a foreigner is involved. Second, one important argument for Monaghan's position is that independent review of state law questions would avoid the need for the U.S. Supreme Court to attribute "bad faith" or "intellectual incompetence" to state judges in order to reverse them; instead, the Court could simply invoke honest disagreement on the merits. *See id.* at 1965. But the denial-of-justice principle *always* requires the imputation of bad faith, with an additional patina of xenophobia thrown in for good measure. Third, in the context of supranational review of the decisions of state courts or the lower federal courts, the Supreme Court itself stands available as an alternate forum to review the application of state law to foreigners. To the extent that current jurisdictional arrangements foreclose such review, they could be amended if a more rigorous inquiry into "denial of justice" claims really seems necessary. Such review would be preferable to (and more acceptable politically than) nondeferential review by alien tribunals. In any event, Monaghan acknowledges that "'fair support' or deference review . . . should mark the ordinary measure of the [Supreme] Court's appellate review," *id.* at 1926, and I doubt he would disagree that it likewise should be the standard for denial-of-justice claims before supranational courts—if such claims are to be permitted at all.

The more compelling argument against "fair support" as an across-the-board standard is that the cases in fact reflect different degrees of deference in different situations. The *Bush v. Gore* concurrence, for example, was less deferential, suggesting that the Court should "undertake an independent, if still deferential, analysis of state law," 531 U.S. 98, 114

more important than the language used to describe the standard is the rarity of its application. State law questions are antecedent to federal ones in a vast range of cases; indeed, the application of the adequate and independent state grounds doctrine to block U.S. Supreme Court review of a federal claim on appeal from the state courts depends on this antecedent relationship. And yet the Supreme Court refuses to accept state court interpretations of state law as binding in only a small fraction of cases.[210]

The NAFTA decisions in *Mondev* or *Loewen* replicated this pattern and raise similar concerns.[211] The legitimate fear from the international perspective is that domestic courts may manipulate domestic law—the rules of contract or municipal immunity in *Mondev*, the rules of trial and appellate procedure in *Loewen*—so as to deny the treaty rights of foreigners to fair and equal treatment. For that reason, supranational tribunals have inquired into the correctness of domestic court constructions of domestic law, in the same way that the U.S. Supreme Court might probe the plausibility of state court interpretations of state law in cases like *Fairfax's Devisee*. But the risks are also similar. Too much supranational review of domestic

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(Rehnquist, C.J., concurring), but suggested that this lesser deference was necessary to protect "the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id*. at 115. The key points for present purposes, however, are that reduced deference in such cases is generally occasioned by some specific constitutional constraint on state law in a particular area, e.g., law governing presidential elections, and that nearly *all* the cases command *some* level of deference to state court interpretations.

210. The adequate and independent grounds doctrine nowadays is enforced primarily at the stage when the Supreme Court decides to grant or deny *certiorari*; thus, when the Court determines that a state law ground blocks review of a federal issue, the ordinary result is an unexplained denial of *certiorari* rather than an opinion construing the adequate and independent state grounds doctrine or affirming the plausibility of the state court's interpretation of state law. *See generally* ROBERT L. STERN, EUGENE GRESSMAN, & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 170 (6th ed. 1986). For that reason, the criteria by which the Court decides, in the unusual case, to review an antecedent state law question remain somewhat opaque. And because the Court only takes the cases in which it has decided *not* to respect the antecedent state law ground, simply reading the reported decisions like *Fairfax's Devisee* or *Brand* or *Bush v. Gore* could create the impression that the Court routinely reverses state courts on state law questions. But that is hardly the case.

211. *See* Ahdieh, *supra* note 10, at 2059–62 (demonstrating the extent to which NAFTA panels exercise power over domestic courts and noting strong similarities to appellate review).

court decisions on domestic law would threaten domestic courts' control over the content of their own law.[212]

It is worth noting that, although both *Mondev* and *Loewen* involved supranational review of *state* court decisions, *federal* court rulings are equally vulnerable. One can imagine, for example, NAFTA panel review of a federal court's ruling that a Mexican or Canadian company was liable to an American plaintiff under the Racketeer Influenced Corrupt Organizations Act (RICO)[213] or some similar federal statute.[214] Supranational review thus threatens not only the control of state courts over state law, but also the control of *federal* courts over *federal* law. There is no reason in principle why a NAFTA panel could not consider a denial-of-justice claim involving even a federal-law decision of the U.S. Supreme Court.

One obvious objection is that *Mondev* and *Loewen* are only two cases, and cases that the U.S. *won* at that. It is not obvious that this sort of supranational review will ever become sufficiently frequent to threaten the integrity of domestic law. I am not all that reassured by this for two reasons. The first is that Supreme Court review of state court decisions is also relatively rare: the Court grants *certiorari* in a relatively small fraction of the cases in which review is sought, and those cases in turn reflect only a fraction of the cases in which review *could* be sought.[215] And yet the threat of Supreme Court revision of state-law interpretations by state courts has been thought sufficiently serious to warrant relatively strong rules of deference.

The second point is that the additional bite at the apple afforded by denial-of-justice claims seems like an incredibly attractive option

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212. The risks actually seem greater in the supranational context. As Jed Rubenfeld has noted, American courts "remain interwoven with the nation's processes of democratic self-governance" in a variety of ways. Rubenfeld, *supra* note 157, at 1997–98. Those processes, however, hold little sway over supranational tribunals.

213. 18 U.S.C. § 1961 et seq. (2000). Although the RICO statute was originally created to combat organized crime, it has become a frequent weapon in commercial disputes. *See, e.g.*, PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 402–03 (2003) (featuring RICO claims in a suit over managed health-care reimbursements).

214. Indeed, since the same diversity of citizenship that is a predicate for NAFTA jurisdiction will generally permit federal court jurisdiction even over cases involving state law claims, one would expect to see many of the same sorts of state-law contract and tort claims considered in *Mondev* and *Loewen* initially adjudicated in the federal courts.

215. In the October 2002 Term of Court, for example, the Court granted review in 91 cases out of 8340 requests, for a grant rate of 1.1 percent. *See The Supreme Court, 2002 Term: The Statistics*, 117 HARV. L. REV. 480, 487 (2003). The grant rate was identical in the 2001 Term. *See The Supreme Court 2001 Term: The Statistics*, 116 HARV. L. REV. 453, 460 (2002).

for litigants who can meet the jurisdictional requirements of NAFTA.[216] If a Canadian or Mexican plaintiff thought it had a sufficiently plausible claim under domestic law to bring suit in the first place, or a defendant thought it had a sufficiently plausible defense to file a domestic appeal, why not pursue those arguments one procedural stage further—especially under a trade regime designed to protect the interests of foreigners and under which the judges are likely to have more concern for free trade than for local substantive or procedural rules?[217] William Dodge has suggested, moreover, that "because Chapter 11 review is less determinate and less accountable than domestic court review, it is likely to be most attractive to those foreign investors with the weakest claims."[218] To be sure, NAFTA litigation will involve considerable trouble and expense, but that may often be a plus for parties with greater resources than the opposition. I suspect that the chief reason we do not currently see considerably more cases like *Mondev* and *Loewen* is that the availability of supranational remedies has yet to fully penetrate the legal consciousness.[219]

If I am right, then we need to think hard about the viability of denial-of-justice theories and the appropriate standards of review. Two problems are especially salient: the lack of a screening process for claims and NAFTA panels' insufficient deference to domestic courts. In the American system, the Supreme Court screens out most cases in which parties seek review of state law questions antecedent to federal rights by simply denying *certiorari*; the Court may take a quick look at the state law issue based on the *cert* petition and opposition, but if it finds the state court's decision plausible it will simply get rid

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216. Because the volume of Canadian and Mexican trade with and investment in the United States is so high—and NAFTA is intended to increase it—this is a nontrivial category of litigants.

217. Article 1121(1)(b) ordinarily requires parties to challenge a domestic measure *either* in a domestic proceeding or in a NAFTA proceeding; initiating the latter requires a waiver of the former. But the *Loewen* panel gutted this requirement by accepting the argument that denial-of-justice claims challenge the domestic adjudication itself, counting that adjudication as a *new* NAFTA violation. *See Loewen*, *supra* note 89, ¶ 164. It thus should be possible in most instances to litigate the initial claim in domestic court, then—if unsuccessful—challenge the domestic court's adverse decision as a denial of justice under NAFTA.

218. Dodge, *supra* note 143, at 575.

219. *See* Ahdieh, *supra* note 10, at 2141 (suggesting that "the limited volume of Chapter 11 review of national courts can largely be ascribed to the relative youth of Chapter 11 and limited awareness of its potential application to judicial conduct"); *see also id.*, at 2041–43 (giving reasons why such claims "are likely to proliferate" in the future).

of the case without further comment. The NAFTA process, on the other hand, seems to lack such a screening mechanism. Instead, the unilateral decision of a party may invoke a full-dress arbitration proceeding with a panel constituted solely for the purpose of hearing that case.[220] Not only is the mere convening of a panel likely to have distorting effects on domestic litigation, but the perspective of a panel devoted to the particular dispute is quite different from that of a busy court trying to allocate its limited time among many different cases that compete for its attention. The latter perspective is more likely to take a screening function seriously; by contrast, it is hardly surprising that the conscientious NAFTA panel members convened to hear *Mondev* and *Loewen* were reluctant to simply dismiss the claims out of hand.[221]

The apparent standard of review applied in those cases is likewise troubling. Although both panels denied that they were engaged in appellate review of the state court decisions in question, it is hard to read the opinions as anything other than that—and not very deferential appellate review, for that matter. *Loewen* actually found a denial of justice based on the Mississippi court's conduct of the trial; only technical failures averted a substantial award against the United States.[222] And although *Mondev* ultimately affirmed the Massachusetts Supreme Judicial Court's construction of state contract law, its discussion of the issues strikes this reader, at least, as relatively searching.[223] This may be attributable to an understandable wish of panelists convened to decide only a single case to do a thorough job, but that is part of my point: a court existing for only one case will likely be biased toward getting the "right answer" in that case, rather than toward deferring to a *plausible* answer advanced by

220. NAFTA, *supra* note 119, art. 2008, 32 I.L.M. at 695; *see also* David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 491 (2000) ("If the Free Trade Commission is not able to assist in resolving the dispute within thirty days, the aggrieved party may issue a written request to the Commission for the establishment of an arbitral panel; once the request is made, the Commission 'shall establish an arbitral panel.'").

221. *See* Ray C. Jones, Notes & Comments, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to be Embraced or a Sword to be Feared?* 2002 BYU. L. REV. 527, 546 (advocating a screening mechanism for Chapter 11 cases).

222. *See supra* notes 152–53 and accompanying text.

223. *Accord* Ahdieh, *supra* note 10, at 2116 (pointing to "[t]he *Mondev* tribunal's seeming willingness to police, albeit at the margins, the lawmaking of common law courts").

the domestic court. The systemic concerns that counsel deference seem likely to be felt more strongly by repeat players.[224]

3. *Supranational Adjudication and Domestic Lawmaking*. Finally, supranational adjudication may put pressure on nonjudicial domestic institutional settlements. President Bush has reacted to the ICJ's *Avena* ruling by *ordering* the state courts to provide "review and reconsideration" of the Mexican prisoners' treaty claims.[225] That order ignores our Constitution's settlement of legislative authority in Congress; indeed, it flies in the face of Congress's earlier codification of the rule of procedural default in habeas cases.[226] Similarly, when a virtually identical Consular Convention claim arose in the *Breard* case, Louis Henkin insisted that a letter from Secretary of State Madeleine Albright to Governor James Gilmore of Virginia, requesting a stay of execution, was *itself* an expression of supreme federal law that bound the State to comply.[227] That Secretary

224. Many NAFTA panelists will be repeat players if they are called upon to arbitrate in future cases. But it is not clear how often this occurs in fact, and the likelihood of such a call may well be a function of how sympathetic they are to the interests of foreign investors. More importantly, the panel itself lacks any form of institutional continuity; it is not a court with a continuing existence that must take account of its relationship to other courts.

225. *See supra* text accompanying note 111. As I have suggested, the President's action may be interpreted as nonmandatory.

226. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). In *Breard v. Greene*, 523 U.S. 371, 376 (1998), the Supreme Court construed the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(a), (e)(2) (2000), as codifying the rule of procedural default for habeas petitions like Medellin's, and the President lacks power to overturn that measure unilaterally. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . .").

227. Henkin, *Provisional Measures*, *supra* note 57, at 681. Secretary Albright stressed that the United States had "vigorously defended Virginia's right to go forward with the sentence imposed," and that the ICJ's order was "non-binding"; she went only so far as to "*request* that you exercise *your powers* as Governor and stay Mr. Breard's execution." Albright Letter, *supra* note 105 (emphasis added). Notwithstanding Secretary Albright's clear indication that *she* did not think Governor Gilmore would be bound, however, Professor Henkin claimed that "the Secretary's letter was a clear expression of U.S. foreign policy . . . [and] the state of Virginia was bound to give it effect." Henkin, *Provisional Measures*, *supra* note 57, at 681.

Even if the Secretary *had* such power, she could not have exercised it by way of ordering Governor Gilmore *himself* to issue the stay, as opposed to issuing a direct federal order prohibiting the execution. Requiring the Governor of a state to exercise his clemency or prosecutorial powers in such a way as to implement federal policy would be a clear violation of the anticommandeering doctrine. *See* Printz v. United States, 521 U.S. 898, 925–27 (1997). Of course, international lawyers have little patience for *Printz* either. *See, e.g.*, Martin S. Flaherty,

Albright's action was just a *letter* made no difference at all; according to Professor Henkin, "[t]he states are bound by U.S. foreign policy decisions even if they do not take any formal form."[228]

Our domestic institutional settlements, however, care a great deal about "formal form." Federal law is supreme by virtue of the Supremacy Clause, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."[229] That Clause says nothing about letters or general statements of foreign policy. It refers to three particular *forms* of lawmaking—the Constitution, laws, and treaties—and each of these forms comes with a specific and quite rigorous process of formation set forth in the Constitution itself. Those processes are designed to preserve the institutional balances of separation of powers and federalism, which are in turn designed to preserve liberty.[230] Such "formal" requirements as the rule that a measure must secure the support of a majority of both houses of Congress and either presidential assent or a supermajority override in order to become law, or that treaties must be ratified by two-thirds of the Senate, are not simply details to be disregarded and replaced by statements of policy by executive officials.[231]

To be sure, we have recognized alternative forms, such as Executive agreements, administrative regulations, and judge-made

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*Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1301–02 (1999).

228. Henkin, *Provisional Measures*, *supra* note 57, at 681; *see also* Carlos Manuel Vazquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 685 n.15 (1995) (asserting, with regard to a hypothetical presidential order to the Virginia governor demanding postponement of the execution, that "a letter would have differed from an executive order in form only, and I do not think anything in the constitutional analysis would turn on this difference"). Professor Henkin and others would go further and treat the ICJ's orders as binding on *both* state and federal officials, rather than simply as providing a basis for federal power to issue an order to the state of Virginia. *See* Henkin, *Provisional Measures*, *supra* note 57, at 680–81. Professor Bradley has suggested that treating the ICJ's order in this way would raise serious constitutional questions involving the delegation of legislative authority. *See* Bradley, *International Delegations*, *supra* note 32, at 1572.

229. U.S. CONST. art. VI, cl. 2.

230. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1403 (2001).

231. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 439–40 (1998) ("The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself . . . . [T]he power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" (quoting INS v. Chadha, 462 U.S. 919, 951 (1983))).

federal common law, as likewise binding the states under the Supremacy Clause.[232] But to recognize these exceptions is hardly to say that form doesn't matter. Most of them come with built-in checks of their own, either statutory or doctrinal in nature.[233] The less constrained vehicles—such as executive agreements—at least require the Executive to take political responsibility for his policy through an explicit and public act; that is often the point of formal requirements. And while vehicles like the executive agreement have undoubtedly acquired some legitimate scope, if only through some sort of constitutional adverse possession, their legitimacy is hardly so clear and uncontested as to make them a secure base from which to argue for the *further* erosion of institutional checks on executive lawmaking.[234] In any event, the point for present purposes is that a Legal Process approach to supranational adjudication needs to consider not only the relationship of supranational decisionmakers to domestic *courts*, but also to the law-making and enforcement institutions at the domestic level.

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232. *See, e.g.*, United States v. Belmont, 301 U.S. 324, 330 (1937) (executive agreements); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630–32 (1959) (federal common law); Fid. Fed. Sav. & Loan Ass'n. v. De la Cuesta, 458 U.S. 141, 153 (1982) (administrative regulations).

233. The Administrative Procedure Act constrains agency rulemaking in a myriad of ways, as does whatever remains of the nondelegation doctrine. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 320–21 (2000) (arguing that nondelegation has not died, but instead now informs various rules of statutory construction). Executive agreements are less constrained, but they are at least monitored by Congress under the Case-Zablocki Act. *See* 1 U.S.C. § 112b (amended 2004).

234. *Compare, e.g.*, Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (arguing that the congressional-executive agreement procedure under which the NAFTA and WTO were approved is legitimate, but only because of an "informal" constitutional amendment that took place in the 1940's), *with* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1229 (1995) (rejecting both the legitimacy of congressional-executive agreements and the "informal" approach to constitutional amendment). These articles debate the legitimacy of *congressional*-executive agreements, which at least follow the prescribed constitutional forms for statutes. The Court has also ascribed preemptive effect to "sole" Executive agreements, which have no congressional involvement at all. *See, e.g.*, United States v. Pink, 315 U.S. 203, 222–25 (1942); United States v. Belmont, 301 U.S. 324, 330–33 (1937). But the Court's most recent venture into this area was deeply controversial. *See* Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396 (2003) (featuring a sharp, 5–4 debate about the preemptive impact of executive agreements). And, in any event, recognizing an additional form is hardly the same as saying form doesn't matter.

### *B. The Problem of Substantive Overlap*

One reason to expect more and more clashes between domestic and supranational courts is that international law increasingly replicates rights protected under domestic law. Investment treaties include antiexpropriation provisions that overlap with the domestic Takings Clause, for example, and the International Covenant on Civil and Political Rights (ICCPR) purports to limit the death penalty in ways similar to the Eighth Amendment. Similar instances of overlap will occur in foreign legal systems that protect fundamental rights at the domestic level. Such overlap gives unsuccessful litigants in domestic courts an incentive to seek a second bite at the apple by claiming a violation of the international standard in a supranational court. And even where international law does not provide a supranational forum to adjudicate international-law rights, substantive overlap threatens to undermine the application and effect of domestic law.[235]

Similar issues arise domestically in our federal system. Federal habeas corpus review of state criminal convictions, for example, gives criminal defendants a second opportunity to contest the result of their state court trials; as Justice Jackson observed, "[c]onflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court."[236] One way to minimize these conflicts is by limiting the scope of the substantive overlap between habeas review and the initial state trial. For instance, the Supreme Court has made clear that the basic issue of a state criminal defendant's factual guilt or innocence is a *state* law issue that should not be relitigated in federal court.[237] There is leakage around the edges of this principle: a state petitioner may argue that the state court jury misapplied the federal "no reasonable doubt" standard to the facts of his case,[238] or he may use a claim of "actual innocence" to overcome a procedural default or other impediment to presenting other federal claims.[239] But

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235. *See, e.g.*, Young, *Customary International Law*, *supra* note 177, at 381–84 (discussing arguments that customary international law preempts state law).

236. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

237. Herrera v. Collins, 506 U.S. 390, 429 (1993). The Court did "assume, for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence'" would be cognizable on habeas "if there were no state avenue open to process such a claim." *Id.* at 417. But the Court said the standard for such a claim would be "extraordinarily high," *id.*, and no subsequent case has found it to be satisfied.

238. *See* Jackson v. Virginia, 443 U.S. 307, 313 (1979).

239. *See* Schlup v. Delo, 513 U.S. 298, 301 (1995) (considering a claim of innocence of the

these exceptions have been applied exceedingly narrowly based on concerns that it is disruptive in a parallel judicial system to have both sets of courts litigating the same issues.[240]

Another example arises from federal claims that a state or a state official has deprived someone of liberty or property without due process of law. These claims have broad potential to replicate rights under state law; virtually any breach of contract or tort by a state actor, for example, may be said to deprive someone of liberty or property. The problem is distinct from habeas in that there is no "second bite at the apple"; ordinary *res judicata* rules will generally not allow a plaintiff to sue first under state tort law in state court, then bring a federal court action under the Due Process Clause if the state suit fails.[241] Rather, due process claims raise the possibility that plaintiffs will bypass the substance of state tort or contract law by relying on federal constitutional law, even if the federal claim is brought—as it often is—in state court.[242] If state and local officials confront federal due process claims every time they do something that affects a private liberty or property interest, then they must structure their conduct according to *federal* standards rather than state law.

Federal law has sought to mitigate this problem in three ways. First, courts have been reluctant to recognize certain sorts of interests as protected liberty or property for constitutional purposes, where to do so would effectively federalize ordinary state-law contract or tort claims.[243] Second, the Supreme Court has required that due process violations be intentional, ruling out overlap with state claims

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underlying crime); Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (considering a claim of innocence of any aggravating factors supporting a capital sentence).

240. *See Herrera*, 506 U.S. at 417 (recognizing "the very disruptive effect that entertaining claims of actual innocence would have on finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States").

241. *Compare, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("A final judgment on the merits . . . precludes the parties . . . from relitigating issues that were or could have been raised in that action."), *with* Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 512 (1982) ("[H]abeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims.").

242. *See, e.g.*, Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 415 (1991) (reporting on an empirical study of § 1983 claims in state courts).

243. *See, e.g.*, Washington v. District of Columbia, 802 F.2d 1478, 1480–81 (D.C. Cir. 1986) (refusing to recognize a liberty interest in "an employee's right to a safe workplace" because "section 1983 must not be used to duplicate state tort law on the federal level").

requiring some lesser degree of intent.[244] Finally, the Court has held that there is no deprivation of liberty or property *without due process of law* where the state provides adequate "post-deprivation remedies," at least in cases of random or unauthorized actions by state officers that it would have been difficult for the state to anticipate beforehand.[245] Such postdeprivation remedies generally consist simply of the opportunity to bring a state-law tort action in state court. The doctrine thus tends to foreclose litigation of federal claims with clear state-law analogs, reserving federal law for situations that raise uniquely federal problems.

Developments in international law raise both the "second bite at the apple" problem and the substantive replacement problem. Denial-of-justice claims in NAFTA cases purport to recognize a right distinct from those protected under domestic law—that is, the right of foreigners to equal treatment in the domestic judicial system. But the Canadian investor's complaints in *Loewen* about prejudicial appeals to the jury, excessive punitive damages, and even elected judges all implicated rights recognized under the Fourteenth Amendment.

Compare, for example, the NAFTA right to equal justice with protections from discrimination against out-of-staters under domestic law. These domestic protections arise primarily from the Commerce Clause,[246] which both empowers Congress to regulate such commerce and (implicitly) restricts the States from regulating commerce in ways that discriminate against out-of-state interests.[247] The Commerce Clause thus permits out-of-staters to challenge discriminatory laws and practices; creating a parallel right on the international plane, however, facilitates collateral attack when the domestic claim fails. The international law standard barring *non*discriminatory regulation that "burdens" foreign commerce, moreover, may be more rigorous than its domestic analog.[248]

Loewen's challenge to the damages award and the appeal bond likewise had established domestic analogs. The Supreme Court has

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244. *See* Daniels v. Williams, 474 U.S. 327, 333 (1986).

245. *See* Zinermon v. Burch, 494 U.S. 113, 135–38 (1990); Parratt v. Taylor, 451 U.S. 527, 543–44 (1981).

246. U.S. CONST. art. I, § 8.

247. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978).

248. The Court has occasionally invalidated nondiscriminatory laws on the ground that they imposed an excessive burden on interstate commerce. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679 (1981). But this approach has been much more controversial and, arguably, less successful than the antidiscrimination principle.

recognized both substantive and procedural due process rights against excessive or inadequately constrained punitive damages awards.[249] American courts have also considered challenges to appeal bond requirements under the Due Process and Equal Protection Clauses.[250] In both instances, it may well be that Loewen would not have prevailed under domestic constitutional law.[251] But permitting collateral attack in a supranational arbitration proceeding plainly undermines the ability of the domestic courts to resolve these questions. The concerns of international law *completely* overlap with those of domestic law in denial-of-justice situations, and NAFTA's separate enforcement mechanism provides the second bite at the apple that domestic law denies.

Recent trends in death penalty litigation illustrate the potential for replacing domestic standards with international ones. In this country, challenges to capital punishment have generally been brought under the Eighth Amendment's prohibition of "cruel and unusual punishments." Despite the prevalence of capital punishment at the Founding, the Supreme Court has interpreted the Eighth Amendment to embody "evolving standards of decency";[252] under this standard, the Court has imposed extensive substantive and procedural limitations on capital punishment.[253] But the Court has stopped well short of outlawing capital punishment altogether, and for many years the Court refused to narrow it by forbidding execution of persons who committed their crimes as minors.[254] Death penalty opponents have thus turned to international law,[255] sometimes to argue that

249. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (conducting substantive due process review for excessiveness); Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994) (reviewing the procedures used in arriving at a punitive damages award).

250. *See, e.g.*, Lerner, *supra* note 27, at 271–72 (collecting cases).

251. *See id.* at 269–73 (reaching this conclusion).

252. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by . . . 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

253. *See, e.g.*, *id.* at 321 (holding that a state may not execute a mentally retarded person); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) ("[A] capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983))).

254. *See* Stanford v. Kentucky, 492 U.S. 361, 385–86 (1989).

255. *See, e.g.*, Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1086–87 (2002) [hereinafter Koh, *World Opinion*] (urging that American courts look to international law and abolish the death penalty); William A.

capital punishment is illegal generally and more often to claim that juvenile offenders may not be executed. These arguments sometimes claim that international law *preempts* state death penalty rules outright; more modestly, they have invoked both international law and foreign domestic practice as persuasive authority for interpreting the Eighth Amendment.[256]

No American court has accepted the preemption argument, but the Supreme Court did recently invoke foreign practice in interpreting the Eighth Amendment to bar the juvenile death penalty.[257] I have addressed both preemption and persuasion in other work.[258] The important point for present purposes is that these claims under international law do *not* arise because domestic law lacks individual rights provisions bearing on the subject of capital punishment. Rather, the turn to international law results simply from dissatisfaction with the content of domestic law and hope for a "better" result under international principles.[259] Likewise, as I discuss further in the next Section, NAFTA's Chapter 11 seems to offer greater protection for property rights than would be available under parallel provisions of domestic law, such as the Takings and Due Process Clauses.[260] And the denial-of-justice claim may provide an avenue for rearranging the law on tort awards and judicial elections in

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Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998) ("While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal.").

256. *See*, *e.g.*, Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 322–26 (arguing that customary international law preempts state laws permitting execution of juvenile offenders); Koh, *World Opinion*, *supra* note 255, at 1128 (arguing that foreign law should be used—as it in fact was in *Atkins*—to establish a "consensus" against the execution of the mentally retarded).

257. *See* Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005).

258. *See* Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (contending that cases like *Roper* give authoritative, not persuasive, weight to foreign law); Young, *Customary International Law*, *supra* note 177, at 462–63, 474–77 (arguing that customary norms of international law cannot trump state capital punishment laws).

259. According to a practicing civil rights lawyer, "The attraction of international human rights law to me is simple: international human rights law promises more for my clients than U.S. domestic legal standards in many instances." Paul L. Hoffman, *The "Blank Stare Phenomenon": Proving Customary International Law in U.S. Courts*, 25 GA. J. INT'L & COMP. L. 181, 181 (1995–96).

260. *See infra* notes 284–89 and accompanying text.

ways that neither American courts nor legislatures have been willing to undertake.[261]

The greater the overlap between domestic and international law, the greater the potential for such arguments. And if this overlap expands without development of doctrines designed to mitigate the conflict,[262] we should expect increasing controversy over the very legitimacy of international norms. We already see conflict over use of such norms as *persuasive* authority; for instance, the House and Senate have considered multiple resolutions condemning the Supreme Court's citations to international sources in recent decisions on gay rights and capital punishment.[263] A holding that international law *binds* domestic courts to supersede domestic law in important areas is likely to escalate such controversy rather dramatically.

The source of these overlaps between domestic law and international law is both obvious and commendable. In parts of the world, international law may provide the only meaningful guarantees of human rights; international protection of basic rules of free trade may likewise provide needed stability for investments in countries where domestic protections have been insufficiently reliable. These situations create pressure for international law to offer a "complete" system of rights rather than a set of interstitial supplements to domestic norms.[264] What we need is a way to enable international law to continue its civilizing project in areas where domestic law fails to offer adequate protections, without disrupting other domestic systems that turned their attention to basic human and economic rights long before international law did.[265] That may mean that international law

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261. *See* Lerner, *supra* note 27, at 267 (noting that NAFTA can be used to pursue these ends, but arguing that domestic-based reform is a better alternative).

262. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (holding that a plaintiff may not bring a federal due process claim for deprivation of liberty or property where state law provides an adequate postdeprivation remedy).

263. *See* S. Res. 92, 109th Cong., 1st Sess. (March 20, 2005); H.R. Res. 97, 109th Cong., 1st Sess. (Feb. 15, 2005); H.R. Res. 568, 108th Cong., 2d Sess. (March 17, 2004); Tom Curry, *A Flap Over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC, March 11, 2004, *at* http://msnbc.msn.com/id/4506232.

264. *See, e.g.*, Donoho, *supra* note 27, at 428 ("Even a casual observer of the international human rights system will discover a plethora of generally stated, abstract norms covering most aspects of human behavior."); *see also* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 337–41 (1999) (discussing the difference between "complete" and interstitial rule systems).

265. *Cf.* Rubenfeld, *supra* note 157, at 1988–90 (observing that Americans pushed international human rights norms after World War II to bring the rest of the world up to American standards—not to change American domestic law).

must abandon the claim to impose identical obligations on all societies—a point that I develop in the next Section.

### *C. Comparative Institutional Competence*

I have already discussed the Legal Process school's pervasive concern with institutional competence.[266] The basic idea is to assess the strengths and weaknesses that varied institutions—e.g., courts, legislatures, executive agencies, private markets—bring to a task, and then to "settle" primary authority over that task in the appropriate place. This emphasis prefigured what Cass Sunstein and Adrian Vermeule have described as the "institutional turn" in recent American constitutional law scholarship.[267] That concern can usefully be applied to problems arising from supranational adjudication, and this Article is hardly the first to do so. I want to make two points in this regard: The first is a relatively conventional point about the institutional weaknesses of many of our current supranational institutions. These weaknesses counsel caution in assigning new responsibilities to those institutions and deference by those bodies to domestic institutions.

The second point may be somewhat less familiar. Many practitioners of institutional analysis have insisted that such analysis must always be *comparative* in nature. That is, it does little good to say that this or that institution may be good or bad at a particular task; rather, the real question is always whether that institution would be better at it *than the alternatives*.[268] The problem in international affairs is that we must compare supranational institutions to domestic ones that vary wildly in their competences and capacities. One may think that the International Court of Justice compares rather poorly to the European Court of Justice, for example, but that it looks pretty good compared to local judicial institutions in Rwanda. This suggests that it will be hard to have a uniform set of rules prescribing the amount of deference that even a single particular supranational

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266. *See supra* notes 69–71 and accompanying text.

267. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003); *see also id.* at 937–38 (describing recent work in this vein).

268. As Neil Komesar has observed, "[i]ssues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse." NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 6 (1994).

adjudicatory body must pay to domestic legal systems; instead, it may be necessary to tailor those rules to the capacities of the domestic system in question or, perhaps, simply allow those rules to be made as part of each nation's own domestic law of foreign affairs.

1. *Institutional Capacities of Supranational Tribunals*. This is not the place for a comprehensive institutional analysis of particular supranational judicial bodies. I do, however, want to offer a brief sketch of the likely advantages and disadvantages that can be expected in assigning responsibilities to such bodies. My purpose is to illustrate the sorts of factors that should be considered in developing doctrine to govern the relationship between supranational adjudication and domestic judicial systems.

Supranational tribunals enjoy two obvious advantages over domestic courts. The first is simply the legitimacy attributable to the fact that they are *not* domestic courts. Mexico is much more likely to accept an unsuccessful outcome in the case of its national, Mr. Medellin, if it comes from the International Court of Justice than if the same outcome issues from a domestic court in the United States. Although the unwillingness of domestic judges to decide against their own governments can be exaggerated,[269] the international community is likely to accord greater legitimacy to the decisions of tribunals not beholden to one of the nations interested in the case.

The second advantage is expertise in the particular international rules to be adjudicated. Supranational tribunals are often (but not always) specialized bodies with expertise in international trade law, for example, or international human rights.[270] Given the oft-lamented unfamiliarity of American judges with international law and the relative lack of emphasis on international law in the traditional American legal education, supranational tribunals are likely to enjoy

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269. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2652 (2004) (rejecting the Bush Administration's position that a U.S. citizen held as an enemy combatant could not seek judicial review of his detention); United States v. Winstar Corp., 518 U.S. 839, 910 (1996) (holding the U.S. liable in a multibillion dollar contracts case).

270. *See* Ahdieh, *supra* note 10, at 2109 ("Chapter 11 panels include arbitrators from different countries, with expertise in international law and international trade; areas in which most domestic judges lack training."). Some courts may develop special expertise in some areas while remaining more generalist in others. *See, e.g.*, Rosalyn Higgins, *Remedies and the International Court of Justice: An Introduction*, *in* REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 1, 7 (Malcolm D. Evans ed., 1998) (touting the ICJ's expertise in boundary disputes, while acknowledging that "[t]he International Court is not a human rights court" notwithstanding its "long involvement in human rights").

a marked advantage in dealing with international sources over U.S. domestic courts.

Neither legitimacy nor expertise cut in only one direction, however. The *outward* legitimacy advantages of supranational courts—that is, the comparative legitimacy advantage that such bodies may enjoy in the eyes of the international community—is likely to be matched by an *inward* legitimacy deficit in the eyes of the affected nation that is asked to set aside its own laws or policies in favor of international principles. In the *Breard* case, for example, the Governor of Virginia suggested that his State would accept as legitimate an order from the U.S. Supreme Court setting aside Mr. Breard's death sentence but not a comparable order from the ICJ.[271] Domestic political forces obviously play a much greater role in the appointment and confirmation (and, in the case of many state courts, election) of domestic judges, and they often possess tools to hold those judges accountable through political control of jurisdiction, budgets, and the like.[272] And to the extent we are often also choosing between the application of international and domestic *law*, the latter is likely to enjoy significant legitimacy due to its greater comprehensibility to domestic audiences and the possibility, in many cases, of democratic override.[273]

A sort of democratic override for international rules exists through the "last in time" rule—that is, Congress generally may override a rule of international law by passing a contrary statute.[274]

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271. *See* Frank Green, *Inmate's Lawyers File Appeal; Treaty Rights Hearing is Sought in U.S.*, RICHMOND TIMES-DISPATCH, April 11, 1998, at A-1 ("Mark A. Miner, a [Governor] Gilmore spokesman, reiterated yesterday that Gilmore is not looking toward the State Department or the international court for guidance on Tuesday's scheduled execution—only the U.S. Supreme Court.").

272. *See, e.g.*, McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1648–49 (1995) (discussing political-branch checks on judicial decisionmaking).

273. *See, e.g.*, Young, *Customary International Law*, *supra* note 177, at 398–400 (sketching the democratic case against customary international law).

274. *See, e.g.*, Whitney v. Robertson, 124 U.S. 190, 194 (1888). Some internationalists deny even this. Critics of *Breard*, for instance, have equated each ICJ decision with a *new* treaty for "last in time" purposes. *See* Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States:* Breard v. Greene, 23 HASTINGS INT'L & COMP. L. REV. 27, 63 (1999). Others have asserted that treaty rights are "primary" to statutory rules. Paust, *supra* note 164, at 692 & n.13. Still others claim that customary international law is continuously "re-enacted" through practice, and therefore *always* later in time than a statute. *See* Ludwikowski, *supra* note 169, at 275–76. These ingenious devices for making limits on international law disappear seem to reflect a basic contempt for such limits. *See, e.g.*, Thomas M.

But the international rule remains binding on the international plane, and I want to insist that this remaining force is critical. We should strive for a regime of international rules that we can live with without having to abrogate their domestic force. That may mean working to make the development of rules on the international plane itself more responsive to concerns of democratic legitimacy.

The expertise of international tribunals likewise has a downside. That expertise flows from specialization; although one occasionally sees generalist jurists on supranational tribunals—retired judge Abner Mikva of the D.C. Circuit participated on the *Loewen* panel, for example—such tribunals often seek to maximize particularized expertise. The problem is that many of the most contentious international disputes arise at the intersection between different sorts of law. Where free trade law comes into conflict with environmental measures, for example, a panel composed of trade-law specialists will likely show a natural bias toward privileging the trade rules over environmental concerns.[275] The American judiciary has long resisted specialization,[276] and one need not presume that supranational courts should always follow American models to say that the considerations that have militated against specialized courts in this country may well be relevant to the establishment of specialized adjudicatory bodies at the international level.

The structure of some supranational institutions creates additional liabilities. Others have commented on lack of transparency and broad participation rights in trade arbitration, as well as potential bias problems arising from the appointment of the arbitrators by the parties.[277] The chief problem is that panel members are not necessarily

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Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism*, 35 HOUS. L. REV. 683, 688 (1998) ("[B]y inventing such doctrines such [sic] as the 'non-self-execution' of treaties and the 'last in time' doctrine, courts have made Swiss cheese of the notion that international law is part of the law of the United States.").

275. *See, e.g.*, David W. Leebron, *The Boundaries of the WTO: Linkages*, 96 AM. J. INT'L L. 5, 22 (2002) ("The natural inclination of WTO personnel might be to favor the norms underlying the liberal trading regime (since that is their primary mandate) [over other concerns, such as environmental policy] and to lean toward results that would prohibit trade barriers.").

276. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 147–60 (1985) (opposing proposals for specialized federal courts).

277. *See, e.g.*, Lerner, *supra* note 27, at 282–86. Ironically, when Loewen challenged the Mississippi courts on the grounds that they were elected and potentially biased by the indirect effect of campaign contributions, it did so before a panel which the parties had actually *chosen* themselves. Likewise, Loewen challenged the appeal bond as unduly constraining its right to appeal in the state courts, but the NAFTA procedure itself provides no appeal right. *See id.* at 286–88.

repeat players: "From claim to claim," as Robert Ahdieh has noted, "independent and distinct panels are formed and disbanded, with little by way of structure, or even precedent, to link them together."[278] This problem compounds difficulties arising from the generally less-binding nature of judicial precedent in international law.[279] Even a judge who is not formally "bound" by prior precedent may be disciplined by the knowledge that she is a participant in an ongoing project of defining and elaborating the law. Such a judge must ask whether a principle that appeals to her in the present case (perhaps because it achieves the "right" result) will be a rule that she can live with in the *next* case—perhaps one whose facts engage her sympathies in a different direction.[280] It would be a mistake to assume that this obligation of forward-looking prudence derives solely from the likelihood that the particular judge deciding today's case will also have to decide tomorrow's. Nonetheless, that obligation is likely to be felt considerably less strongly by a panel constituted solely to decide a particular case.

This ephemerality is troubling for two distinct reasons. The first is that it may incline supranational judges to judicial "activism."[281] A supranational judge may be more inclined to reach out and declare invalid a domestic regulatory regime based on its perceived unfairness in a particular case if she need not wrestle with the need for a limiting

278. Ahdieh, *supra* note 10, at 2141; *see also id.* at 2099 (arguing that "repeat players" are essential if NAFTA panels are to work out a viable relationship with domestic courts). The particular arbitration procedures for NAFTA Chapter 11 disputes do not establish any permanent set of arbitrators; panel members are chosen primarily by the parties. *See* NAFTA, *supra* note 119, art. 1123; *see also* Gantz, *supra* note 220, at 492 (noting that even under Chapter 20, which does envision a permanent roster of arbitrators for state-to-state disputes, "as of December 2001, no roster members . . . had been formally designated by the three governments, presumably because of difficulties in agreeing upon individuals").

279. *See* Ahdieh, *supra* note 10, at 2100 (observing that "[i]n Chapter 11, as in international law generally, there is no provision for binding precedent," but that "[t]he function of precedent as a mechanism of control . . . is essential to the legitimacy of any legal system"); *see generally* BROWNLIE, *supra* note 26, at 19 (stating that "[j]udicial decisions are not strictly speaking a formal source" of international law, although "in some instances at least they are regarded as authoritative evidence of the state of the law").

280. *See* Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

281. "Activism" is, of course, a contested and sometimes maligned term. I use it here very broadly to encompass judicial behaviors that tend to maximize the institutional role of the court vis-à-vis other institutional actors. *See generally* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002) [hereinafter Young, *Judicial Activism*].

principle that can discipline future results.[282] Second, and perhaps more important, one-time-only adjudicators are unlikely to build up the web of doctrine necessary to mediate the complicated relationships between supranational and domestic courts. On the domestic level, such doctrines as justiciability, abstention, and standards of review have developed slowly and incrementally over time.[283] Panels constituted for a single dispute will have a hard time participating in this ongoing project.

The last point, which again applies most directly to trade tribunals, is that the substantive law to be applied bears remarkable similarities to principles that, in American history, have painfully revealed the limits of judicial competence. The open-ended expropriation provisions of NAFTA's chapter 11 seem to forbid "too much" regulation of foreign investments. In the early twentieth century, the Due Process Clause of the American Constitution was interpreted similarly to bar "unreasonable" regulation of the free market.[284] More recently, the "dormant" Commerce Clause has been construed to forbid state regulation imposing excessive burdens on interstate commerce, even where the regulation in question does not distinguish between in-staters and out-of-staters.[285] And the Takings Clause has occasionally been interpreted to bar "regulatory takings"—that is, regulation that diminishes the value of private property interests even without appropriating those interests directly.[286] The American experience here, however, ought to serve

282. One recurrent criticism of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), has been that the opinion seems targeted to achieving a particular result in the instant case without binding the Court to similar holdings in similar circumstances in the future. *See, e.g.*, Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in* Bush v. Gore, 64 OHIO ST. L.J. 265, 281–82 (2003).

283. The incremental development of the *Younger* abstention doctrine, which forecloses federal courts from enjoining state enforcement proceedings, is an example. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 53–54 (1971) (stating the basic rule that federal courts may not enjoin state criminal proceedings); Steffel v. Thompson, 415 U.S. 452, 475 (1974) (limiting the doctrine to *pending* state criminal proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592, 611–12 (1975) (extending the doctrine to certain state *civil* proceedings); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996) (clarifying that *Younger* abstention only applies to claims for equitable relief).

284. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down New York's regulation of wages and hours for bakers).

285. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 678–79 (1981) (striking down Iowa's restriction on the length of trucks on state roads).

286. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), 415–16 (holding that a state regulation barring removal of some coal from a mine amounted to a taking).

not as a model but as a cautionary tale. Each of these lines of cases has been criticized as an illegitimate cover for judicial hostility to regulation.[287] Absent some way to define excessive regulation in a determinate and apolitical way—a formula that the American courts that grappled with the issue never found[288]—judicial activity in this area is likely to undermine the legitimacy of the free trade regime and, possibly, supranational adjudication in general.[289]

2. *The Problem of Comparison*. I have argued that the role of supranational adjudication ought to be defined in large part by the relative institutional competence of supranational adjudicators vis-à-vis domestic legal and political institutions. The obvious problem is there is no uniform class of either "supranational adjudicators" or "domestic legal and political institutions." A recent overview observed that the "staggering diversity" of international judicial bodies "tends to deter comparison across institutions":

> To begin with, they differ in the number of member States, ranging from universal scope to extremely narrow membership (as in the case of the Benelux Court of Justice). Some bodies give standing only to States, whereas others are, to varying degrees, open to other entities. Likewise, the kind of jurisdiction they exercise is extremely diverse. . . . Furthermore, differences in size of the staff, budget and caseload are enormous. Some bodies, like the ECJ, adjudicate

287. *See, e.g.*, *Lochner*, 198 U.S. at 74–76 (1905) (Holmes, J., dissenting) (criticizing the majority for imposing their own views of proper economic theory through the Due Process Clause); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 517 (1997) (stating that "the Lochner era Court read the economic doctrine of laissez-faire into the Constitution"); Edward J. Sullivan, *Substantive Due Process Resurrected through the Takings Clause:* Nollan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155, 155–60 (1995). Although revisionist historians have done much to undercut traditional interpretations of the *Lochner* era, *see, e.g.*, Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223–24 (1999), nothing in their account detracts from the central point here: It is simply very difficult to develop a coherent and persuasive jurisprudence to determine what amounts to excessive or unreasonable regulation.

288. *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 7 (1998) (recounting the doctrinal disintegration, over time, of the Court's freedom of contract jurisprudence).

289. *See, e.g.*, Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003) (criticizing use of NAFTA to replicate Takings doctrine); Steve Louthan, Note, *A Brave New* Lochner *Era? The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANSNAT'L L. 1443, 1445 (2001) (calling NAFTA's Chapter 11 "the most significant evisceration of state police power since the Supreme Court freed the states from *Lochner*'s shackles in 1937").

> perhaps 100 cases each year; others barely hear one each per decade. Finally, most are active, some are dormant (e.g., the Court of Justice of the Arab Maghreb Union) and others are emerging (e.g., the African Court of Human and Peoples' Rights or the International Criminal Court).[290]

These differences make categorical comparisons between domestic and supranational courts difficult: the ICJ has quite different institutional capacities and limitations, after all, than a NAFTA arbitration panel.[291] As a result, we see not one but many models of the deference that U.S. courts afford to supranational adjudicators.[292]

The problem of institutional diversity gets much more complex, moreover, when one turns to the domestic side of the comparison. As William Burke-White has observed, "the quality of justice in local courts differs dramatically."[293] The domestic judicial system of the United Kingdom obviously has highly dissimilar competences and capacities than the domestic institutions of Afghanistan or Liberia. These differences may be more limited when dealing with aspects of international law that lack universal scope; institutions such as the International Court of Justice or the World Trade Organization, for example, need interact only with the institutions of signatory countries. But even within such a narrowly limited regime as NAFTA, supranational adjudicatory bodies must interact with domestic institutions that vary rather widely in their capacities and principles of operation.

This problem makes the establishment of doctrines governing the interface between domestic and supranational institutions far more difficult than the development of such doctrines for the state and federal courts in the American system. The U.S. federal courts are relatively homogeneous in character, with specialized institutions only for relatively narrow areas like patents or bankruptcy or government contracts.[294] On the state side, one can identify important variations among the 50 state court systems: some elect their judges while some

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290. ROMANO, *supra* note 12; *see also* Alford, *supra* note 11, at 679–82 (noting the wide variety of international courts).

291. For instance, the ICJ has a permanent existence but can hear relatively few cases; the NAFTA system relies on one-time-only panels but seems, for that reason, more scalable to hear many more cases than it currently does if the need should arise.

292. *See generally* Alford, *supra* note 11.

293. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 16 (2002).

294. *See* HART & WECHSLER, *supra* note 15, at 41–43.

appoint them; some have a greater reputation for professionalism than others; and some have different histories of respect or antipathy for federal rights. To some extent, the rules of interjurisdictional relations have tried to take these differences into account.[295] But by and large the divergence among state judicial systems has been sufficiently minor to allow debates about jurisdictional relations to speak of "state courts" as a relatively homogeneous class of institutions.[296] And much of the Federal Courts canon—the willingness of federal courts to abstain in favor of state proceedings, the intrusiveness of federal habeas corpus review of state convictions, the frequency with which the Supreme Court reviews state law questions that are antecedent to federal ones, even the scope of federal question jurisdiction in civil cases—has been built around explicit or implicit assumptions about the relative institutional "parity" (or lack thereof) between state and federal courts.[297]

The generalizations that have made these debates and doctrines possible in American federal courts jurisprudence are simply unavailable in contemporary international law. As Roger Alford has observed, "[C]omparative analysis is unusually difficult, because a variety of international tribunals should be examined across a variety of national jurisdictions. While the questions may be the same across jurisdictions, the answers will be fluid, and will depend on the particular country involved."[298] Because neither side of the comparison can be held constant, it is hard to know even how to begin developing a set of interjurisdictional doctrines to allocate decisional authority between supranational courts and domestic

295. The 1996 federal habeas reform statute, for example, offered to accord greater deference to the decisions of state courts in capital cases where the state in question had adopted certain reforms pertaining to the representation of capital defendants. Inmates in such states must file their petitions under an extremely strict 180 day statute of limitations. 28 U.S.C. § 2263 (2000). No state has yet been found to meet the requirements of the Act.

296. Perhaps the period of greatest divergence involved the unwillingness of state courts in the South to enforce federal rights during the period of the Civil Rights Movement. This deficiency was thought to be sufficiently serious to motivate a substantial expansion of federal court review over state court convictions and, under the Voting Rights Act, nonjudicial review of state and local political arrangements by the national Department of Justice. 42 U.S.C. § 1973 (2000). Significantly, however, the difficulty was not so much in the capacity of the southern state courts as institutions but rather in those courts' lack of respect for uniform national standards. In any event, the important point is that these sorts of divergences have almost never been thought to require different interjurisdictional rules for different state judicial systems.

297. *See, e.g.*, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 233–35 (1988).

298. Alford, *supra* note 11, at 795.

institutions. This difficulty strongly suggests that interjurisdictional doctrine must be flexible enough to take account of varying institutional capacities at both domestic and supranational levels in different contexts. It also suggests that the rules cannot be uniform across supranational regimes and domestic legal systems. I develop these suggestions further in the next Part.

## IV. THE ARCHITECTURE OF SUPRANATIONAL JUDICIAL COOPERATION

It is far easier to criticize current approaches to the interjurisdictional problem in foreign affairs than to say where we need to go from here. In this last Part, I hope at least to identify the most salient considerations, from a Legal Process standpoint, and to advance a few suggestions about how they might be addressed. The first question, addressed in Section A, is whether interjurisdictional problems should be addressed as a matter of each nation's foreign affairs law or as a matter of international law. My own view is that a proper solution must contain elements of both—that is, some issues should be resolved on the international plane, but nations should reserve others for resolution as a matter of their own law.

Section B develops, in a very general way, possible relations between international law and courts and their domestic counterparts. I organize the discussion around two key questions: First, should jurisdiction to consider and apply international law be concurrent between domestic and international courts, or should it be restricted to international courts only? Second, if we opt for concurrent jurisdiction, should international courts have the last word on international law questions or should the views of domestic courts get equal weight? Section C then turns to the more general question whether international rules governing these matters need to be uniform, despite the varying institutional capacities of different supranational institutions and domestic legal systems. Section D briefly considers some ways in which current supranational institutions might be reformed.

Although a primary thesis of this Article is that international law has not focused adequately on these sorts of issues, it would be a profound mistake to think they have been entirely ignored. Section E thus considers some doctrinal resources already extant in international law for promoting the notion of institutional settlement. I focus, in particular, on the European Court of Human Rights'

doctrine of the "margin of appreciation" and the principle of "complementarity" in the statute creating the International Criminal Court. Finally, Section F offers some observations on the politics of judicial globalization.

Two caveats are necessary. First, some of the questions I pose in this Part may, in at least some contexts, have relatively firm answers as a matter of international law. Nonetheless, it seems to me that we are at an early enough stage of judicial globalization to treat these questions as ones of institutional design.[299] To the extent that suggestions here cut against settled understandings of international or foreign affairs law, they can be taken as proposals for reform. Second, it bears repeating that I do not presume to propose anything approaching a comprehensive approach. The web of accommodations that mediate the relationship between state and federal courts in the U.S. has developed incrementally over time, with contributions from multiple actors—not only courts, but legislatures, executive actors, and even private litigants. All the usual disclaimers thus apply with *un*usual force when we contemplate efforts to forge similar sorts of accommodations at the even more complex level of supranational institutions. I mean only to sketch some directions for future inquiry.

### *A. Foreign Affairs Law or International Law?*

Before asking what kinds of interjurisdictional rules should govern the interface between supranational and domestic courts, one must consider whether those rules should exist as a matter of foreign affairs law or international law. The American Law Institute defines the "foreign relations law of the United States" somewhat unhelpfully as "international law as it applies to the United States" and "domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences."[300] It is more useful to sever the two parts of this definition. I thus use the term "foreign affairs law" to signify the domestic law of each nation governing how that nation interacts with the rest of the world. The domestic rules governing the effect of international law in domestic

299. *See, e.g.*, SLAUGHTER, *supra* note 6, at 147 (suggesting that "the architects of the next generation of international institutions should focus on how best to structure the relations between a supranational entity and its domestic counterpart").

300. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1987).

courts, or allocating the power to declare war within the institutions of the national government, are good examples of foreign affairs law.

It follows that each nation has its own foreign affairs law, whereas there is, at least in theory, only one international law.[301] If we agree that some (perhaps reformed) doctrine of procedural default is proper in consular relations cases, for example, we must still ask at which level to formulate that doctrine. The International Court of Justice could formulate its own standard for such defaults, perhaps as an interpretation of the Convention on Consular Relations itself, and apply it to cases arising in all domestic legal systems. But the doctrine might instead be formulated by the various national courts for application in cases arising within their respective domestic jurisdictions, perhaps as part of a set of rules for determining when ICJ judgments will be honored. This Section offers some observations about what is at stake in this choice.

The most obvious issues involve control over the force of international norms. Nations seeking to maximize their own freedom of action will likely prefer interjurisdictional rules to be a matter of their own foreign affairs law; in this way, such rules can be used to limit the impact of international norms as a constraint on national action. At the same time, nations have strong interests in ensuring that other nations abide by the commitments that all have entered into. These interests will often favor fixing interjurisdictional rules at the international level, so that they can be designed for rigorous enforcement of the underlying norms. Critics of strong domestic procedural default rules in the consular relations cases, for example, have suggested that such rules encourage similar substantive breaches by other nations that may endanger Americans abroad.[302]

It is equally plain that the choice to make interjurisdictional rules at the national or supranational level will bear on those rules' legitimacy. No matter how reasonable the U.S. rule of procedural default is, some observers will view it as an attempt to evade the underlying treaty obligation; that reaction seems considerably less likely, however, if the ICJ itself were to acknowledge a comparable

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301. There are, of course, any number of treaty-based regimes that bind only the signatories. *See infra* text accompanying note 311. The point, however, is that it is rare for any international norm to take different forms within the scope of its applicability.

302. *See, e.g.*, Michael C. Dorf, *When American States Execute Citizens of Foreign Countries: The Case of Gerardo Valdez*, FindLaw's Writ (July 24, 2001), *at* http://writ.news.findlaw.com/dorf/20010724.html.

rule of default. On the other hand, parties disadvantaged by the application of international rules—say, uncompetitive domestic industries hurt by trade liberalization—are more likely to perceive remedies for international violations as legitimate if those remedies are controlled by domestic institutions.[303]

To these straightforward dynamics, however, I want to add one less obvious consideration: unless international law first carves out a place for national rules on interjurisdictional questions, there is likely always to be a significant legitimacy cost to casting such rules at the national level. National rules of deference, abstention, etc., generally cannot keep a particular action from being a breach on the international plane. The U.S. procedural default rule may be right as rain, but we will still suffer a ruling of noncompliance with the Vienna Convention unless international law acknowledges that rule. To the extent that institutional settlement is a legitimate value, then, there are reasons to incorporate that value at the international level—that is, in the definition of what international law *requires*—rather than simply at the stage where domestic institutions determine what to do about a breach of international law.[304]

Another set of considerations stems from the relationship between interjurisdictional rules and underlying substantive obligations. By hypothesis, we deal with the enforcement of substantive international rules; the question is whether the enforceability of those rules should be constrained and tempered by national or international rules. I want to suggest that there is some advantage to enabling judicial institutions to consider both substantive and interjurisdictional issues *together*, as part of the same body of law. Concerns about remedies, for example, may encourage courts to temper the substantive definition of norms or encourage them to defer to the judgments of political actors.[305] The opportunity for this interplay is lost, however, where the entities that define substantive norms are not charged with developing rules for their

303. This is probably why the NAFTA and WTO implementation acts deny *any* direct effect to WTO and NAFTA panel rulings. *See infra* note 314 and accompanying text.

304. *See supra* Section III.A.

305. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (rejecting interdistrict remedies for school desegregation based on a determination that the constitutional violation was confined to the central city school district); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218–20 (1978) (noting that institutional concerns informed the Court's interpretation of the Equal Protection Clause in *San Antonio Independent School District v. Rodriguez*).

enforcement. Since the underlying norms here are international, that may favor resolving at least some interjurisdictional questions at the international level.

The choice of foreign affairs or international law is most naturally thought of as a matter of vertical separation of powers, allocating authority between the international community as a whole and individual nations. But it has horizontal separation of powers implications as well. In international criminal law, for instance, the primary actors at the international level are *courts*;[306] likewise, in the trade area, the "legislative" arm of the WTO can act only with great difficulty, leaving much of the work of fleshing out trade agreements to arbitral panels.[307] Supranational arrangements frequently feature institutional components that have recognizable analogs within domestic separation of powers schemes, but that exist on the international plane without being enmeshed in a correspondingly complete system of checks and balances. One of the most telling objections to the International Criminal Court, for example, is that its prosecutor is isolated from the web of institutional interrelationships that ordinarily ensure that such officials are accountable.[308]

To be sure, national executives and legislatures also act on the international plane. But it seems fair to say that it is more difficult for executive and legislative actors to produce law on an ongoing basis on that plane; inertial barriers to amendment or new treaty making, each of which requires agreement of many states with divergent interests and agendas, are simply too great. As a result, assigning interjurisdictional rules to the international plane likely means that such rules will be made by *courts*, with relatively little input from other sorts of actors. This has some advantages: it suggests, for instance, that the rules will be made incrementally, case-by-case, and that seems sensible in light of the complexity of the relevant questions.[309] On the other hand, such rules will have all the usual

306. *See* Burke-White, *supra* note 293, at 95.

307. *See, e.g.*, Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 467 (2001) ("WTO lawmaking follows the GATT tradition of 'rounds,' complex multilateral negotiations that resemble constitutional conventions more than ordinary legislation.").

308. *See, e.g.*, John R. Bolton, *The United States and the International Criminal Court*, Remarks to the Federalist Society in Washington, D.C. (Nov. 14, 2002), *at* http://www.state.gov/t/us/rm/15158.htm (commenting on the dangers of an "unaccountable Prosecutor").

309. *See* Young, *Judicial Activism*, *supra* note 281, at 1182, 1206–07 (arguing in favor of incremental decisionmaking by courts).

countermajoritarian liabilities traditionally associated with judicial rulemaking.

Finally, I want to identify two issues that I think are *not* at stake in choosing the level at which to make interjurisdictional rules. The first is the uniformity or diversity of interjurisdictional doctrine. I have already suggested that, if interjurisdictional rules are to respond to the variations in institutional capacity both among supranational institutions and among domestic legal systems, those rules must be variable.[310] But I do not think that means that the rules *must* exist as part of each nation's domestic law of foreign affairs. Although we often speak of "one" international law for all nations, in reality international law is pervasively multifarious. Some countries join a particular multilateral treaty, others do not. Some signatories impose conditions and reservations on their assent that significantly alter their obligations. Customary international law means one thing to most countries, but something else to those who have "persistently objected" to the development of a particular rule. The same is true of international rules of procedure and jurisdiction: the jurisdiction of the ICJ, for instance, is generally limited to those countries that have consented to be bound by its rulings.[311] Fixing particular interjurisdictional rules at the international level will create some degree of pressure to make those rules uniform, but uniformity is not a *necessary* consequence of that decision.

The other issue is the relative authority of supranational or national courts. Nations may prefer to fix interjurisdictional rules in their own foreign affairs law as a means of controlling the impact of international norms on their actions. But deciding to set at least some interjurisdictional rules as a matter of international law need not mean that they must be authoritatively determined and interpreted by supranational courts. The next section considers a variety of relationships between supranational and domestic courts with respect to interpreting and applying international law. Although domestic courts may sometimes be subordinate to supranational ones with respect to international norms, this need not be the case. Nations ceding control of interjurisdictional rules by allowing them to be fixed in international law may regain some of that control to the extent that their domestic courts retain authority to interpret international law.

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310. *See supra* text accompanying note 298. I discuss the issue of variability further in Section IV.C, *infra*.

311. *See* BROWNLIE, *supra* note 26, at 680–82.

### *B. The Authority to Interpret and Apply International Law*

The central interjurisdictional issue concerns the allocation between supranational and domestic courts of authority to interpret and apply international law. Two issues are critical: First, should domestic courts have concurrent authority to decide questions of international law, or should those questions be vested exclusively in supranational institutions? To the extent that we choose some form of concurrent jurisdiction, a second question arises: Should the system have a hierarchy of interpretive authority, so that supranational interpretations of international law bind domestic courts? Or should it place domestic and supranational interpretations on a level plane?

1. *Concurrent or Exclusive Jurisdiction*. The jurisdiction of domestic courts to apply and interpret international law is often caught up in a debate over whether treaties should be considered "self-executing" and, more generally, over "monistic" and "dualistic" theories of international law.[312] These questions determine whether international law applies within the domestic judicial system of its own force, or whether the national political branches must take some further action in order to make international law available for judicial application. I want to sidestep these questions, however. The arguments for concurrent jurisdiction here can be taken either as arguments for self-execution or monism, or as arguments that national political institutions should take the necessary steps to create such jurisdiction under a dualist system. I want to focus on the functional effects of concurrent and exclusive jurisdiction, not the mechanisms or theory necessary to create one or the other system.

Skeptics of international law in this country have traditionally resisted the notion that domestic courts should generally be empowered to apply international rules of decision to the cases that come before them. The preference has been for domestic political institutions—chiefly Congress and the President, although occasionally state-level political institutions as well—to serve as gatekeepers, so that courts may not apply any given principle of international law until that principle has first been incorporated into

312. *See, e.g.*, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985) (stating that treaties "do not provide the basis for a private lawsuit unless they are intended to be self-executing"); Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999).

domestic law by statute or executive action. That preference motivates the position, most prominently associated with Professors Bradley and Goldsmith, that domestic courts should not apply customary international law unless expressly authorized to do so by the political branches.[313]

The same preference for presumptively excluding international law from the domestic courts seems to undergird the structure of trade regimes like NAFTA and the WTO. These regimes seek to protect the domestic legal system by denying to supranational decisions any direct domestic effect. The American statute implementing NAFTA, for example, provides that NAFTA panel decisions have no direct effect absent implementing measures by the U.S. political branches.[314] Failure to take such measures might leave the U.S. in violation of NAFTA as a matter of international law, but national political institutions control the extent to which supranational actors can intervene in domestic law.[315]

These sorts of arrangements seek to "wall off" the domestic sphere from the impact of international rules. In so doing, they confer exclusive jurisdiction to interpret and apply international law on supranational tribunals. It is not at all clear, however, that this approach will be effective in protecting the integrity of domestic

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313. *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2260 (1998) ("CIL should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so."). For a critique of this position, see Young, *Customary International Law*, *supra* note 177, at 369–70.

314. *See, e.g.*, 19 U.S.C. § 3312(b)(2) (2000) ("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."). The WTO agreement has been implemented similarly. *See* 19 U.S.C. § 3512(a)(1) (2000) ("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).

315. *See, e.g.*, Samuel C. Straight, Note, *Gatt and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 250–53 (1995); *see also* William H. Lash III, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1013–16 (1996) (dismissing sovereignty concerns about the WTO as "childish and simplistic" based on the same argument); William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1232–33 (1998) (arguing that the WTO does not threaten U.S. sovereignty because, under the implementing legislation, domestic institutions must act before WTO tribunal decisions can effect changes in U.S. law).

institutions. I have argued elsewhere against the assumption that a supranational ruling that is not *binding* on internal actors has no effect on domestic political arrangements.[316]

Consider, for example, the Mississippi state court practices at issue in *Loewen*. Congress periodically considers tort reform proposals to change such practices, perhaps by capping punitive damages or regulating the procedures by which such cases are heard. When these proposals fail, it is more likely out of political respect for state autonomy rather than any lack of constitutional *power* on Congress's part to regulate the practices in question.[317] The essence of federalism in most cases, in other words, lies in political dynamics rather than legal constraints.[318] But now consider how those dynamics change if a NAFTA tribunal orders the United States to pay $725 million on account of Mississippi's transgression. Although the NAFTA order does not *itself* change Mississippi law, the balance of political forces against federal regulation of state court procedures may well shift substantially. The instrument of change will be a federal statute, but its proximate cause will be an order of a supranational court.[319]

This is just one example of why it is mistaken to expect that international law will have no "bite" on the domestic legal system simply because it lacks direct effect. If international law is "law" at all, then it *should* matter domestically if a particular practice is declared invalid by a supranational court, even if that court depends on possibly recalcitrant domestic actors for implementation. It would have been perfectly proper for Governor James Gilmore to have stayed Angel Breard's execution out of respect for the ICJ's order

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316. *See* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 535 (2003).

317. The failure of such tort reform proposals also has a great deal to do with the strength of the trial lawyers' lobby. But I have argued elsewhere that the Framers expected such alliances of convenience between the self-interest of particular interest groups and the institutional interests of state governments to be an important mechanism for protecting federalism. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1308–10 (2004).

318. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (preferring political and institutional checks on national power rather than judicial review); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–60 (1954) (same).

319. For discussion of ways the national government might respond to a NAFTA judgment occasioned by state conduct, see Ahdieh, *supra* note 10, at 2103–04; Lerner, *supra* note 27, at 279–81.

even if everyone agreed that both the ICJ and the U.S. president lacked authority to force him to do so.[320] Even in a case like that, where supranational bodies depend on the *persuasive* force of their rulings for domestic implementation, those rulings are likely to change the domestic debate in important ways.[321] Indeed, Professor Helfer and Dean Slaughter define the ability of supranational courts to "convince[] domestic government institutions to exercise power on their behalf," notwithstanding a "lack of direct coercive power," as "the hallmark of 'effective' supranational adjudication."[322] If supranational courts *can* be effective in this way—and there is every reason to believe that they can[323]—then we need to worry about whether those courts' rulings incorporate proper deference to domestic procedures and decisionmakers in the first instance, and not simply to rely on the lack of direct effect to shield our domestic arrangements.

If international law retains both practical and normative force despite lacking direct effect, then giving supranational courts exclusive jurisdiction to interpret it seems counterproductive from the standpoint of national autonomy. American law takes the opposite approach by presuming that state courts have concurrent jurisdiction to hear claims arising under federal law absent a clear statement of Congress's intent to make federal jurisdiction exclusive.[324] The Court has emphasized that the state courts' power to adjudicate federal claims is an element of *state* sovereignty.[325] Although state courts are bound by the U.S. Supreme Court's interpretation of federal law, the

320. *See supra* note 105 (discussing the events of the *Breard* case). The issue is more complex in *Medellin* for the Texas Court of Criminal Appeals, whose discretion to grant relief is sharply restricted by statute. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5.

321. *See* Martinez, *supra* note 8, at 432 ("Compliance with the decisions of international courts is not perfect, to be sure, but the reputational and other consequences of noncompliance are factors that political actors cannot simply ignore.").

322. Helfer & Slaughter, *supra* note 7, at 387.

323. *See, e.g.*, George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 478 (1998) ("Notwithstanding reservations on the part of Congress, the [U.S.] executive branch has shown its readiness to comply with adverse WTO rulings.").

324. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 467 (1990).

325. *See id.* at 458 (observing that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause," and that "we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States").

opportunity to participate in the construction and application of federal law gives states an important voice.[326]

At the international level, Abram and Antonia Chayes have stressed that the ability to participate in international legal regimes is an element of sovereignty, not a restriction upon it.[327] In both the domestic and the international context, the power to apply another jurisdiction's law is the power to participate in the shaping of that law. Federal courts explicitly empowered to decide human rights cases under the Torture Victims Protection Act,[328] for example, can contribute to ongoing international efforts to define what counts as "torture." Domestic courts have no role, by contrast, in construing the NAFTA and WTO agreements; as a result, they have no opportunity to shape the interpretation of those provisions in ways that are respectful of domestic law and institutions. This sort of exclusion seems particularly damaging in situations where the law is left to be construed by a specialist supranational body with a built-in institutional bias favoring broad application of particular international norms. Finally, supranational courts themselves seem more likely to respect the domestic legal system when that system has itself made room for the application of international norms.

My own view is that, at least in the short term, the greater threat to domestic institutions comes not from the application of international law by domestic courts but from the exalted status that international lawyers often claim for it in that setting. Advocates for the domestic incorporation of customary international law, for example, have not helped their cause by claiming that customary law trumps state law,[329] federal statutes,[330] or even the Constitution in

326. *See, e.g.*, Local 174 v. Lucas Flour Co., 369 U.S. 95, 102–04 (1962) (holding that state courts with concurrent jurisdiction over federal labor law claims have the authority and obligation to formulate rules of federal common law to govern such cases).

327. *See* CHAYES & CHAYES, *supra* note 81, at 27. *But see* Anderson, *supra* note 19, at 1300 (noting the limitations of this definition).

328. Pub. L. No. 102-256, 106 Stat. 73 (1992). The TVPA explicitly establishes a federal cause of action for torture and extrajudicial killing, *see id.* § 2(a)(1) & (2), and it is settled that the creation of a federal cause of action confers federal question jurisdiction on the federal courts under 28 U.S.C. § 1331. *See* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

329. *E.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) [hereinafter Henkin, *International Law*]; Brilmayer, *supra* note 256, at 295–99.

330. *See, e.g.*, Henkin, *International Law*, *supra* note 329, at 1563–67 (suggesting that customary norms should trump federal statutes or treaties where the customary norms develop later in time).

some cases.[331] But one need not insist that customary international law is equivalent to supreme federal law to suggest that domestic courts should ordinarily have power to apply it; as I and others have suggested elsewhere,[332] there are various ways for domestic courts to recognize international norms without accepting internationalist assertions about those norms' position in the legal food chain. There is a large excluded middle between the "international law trumps everything" and the "keep international law out of domestic courts" positions. And the development of mediating doctrines that limit the disruption of domestic institutions is most likely when international law is applied in domestic courts.

This nationalist argument for concurrent domestic jurisdiction over international law may suggest why *internationalists* might prefer exclusive jurisdiction in supranational courts.[333] Such exclusivity might take a different form than the NAFTA implementation act; for instance, internationalists might prefer a system in which domestic courts applied international law directly but were required to refer disputed questions to supranational tribunals. That system might draw upon the European Union's "preliminary reference" procedure, whereby questions of Community law are referred from national courts to the European Court of Justice,[334] or the occasional American practice of certifying questions of state law arising in federal court to the state supreme courts for resolution.[335] This model would not be

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331. *See, e.g.*, Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1090–92 (1985); Ludwikowski, *supra* note 169, at 276 (suggesting that "any amendment or interpretation of the Constitution, bringing it in conflict with customary international law . . . would have to be recognized as unconstitutional itself").

332. *See* Young, *Customary International Law*, *supra* note 177, at 467–83; Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 555–58 (2002).

333. *See e.g.*, Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 51 (2004) ("International law scholars often assume that the best way to enforce human rights is by establishing strong international institutions that develop the law progressively and enforce it independently.").

334. *See, e.g.*, Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 423 (1996) (discussing the "preliminary reference" procedure as outlined in the Treaty of Rome).

335. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 75–80 (1997) (discussing the virtues of the certification procedure); Burke-White, *supra* note 293, at 94–95 (suggesting that national courts refer questions of international criminal law to the International Criminal Court). *But see* Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* , 29 SUFFOLK L. REV. 677, 691 (1995) (criticizing certification procedures on the domestic plane).

truly "exclusive" in the sense that national courts would be empowered to apply international law when its content was uncontroverted, and determining when a question of law is worth referring to the supranational court might itself involve the domestic court in construing international law. Nonetheless, the autonomy of the domestic courts with respect to international law would be minimal in such a system.

I want to argue against this sort of model, and not just for the nationalist reason that domestic courts should have power to shape international law to accommodate national institutions and preferences. One problem is that many disputes will involve issues of both domestic and international law, and it may distort decisions to consider them in isolation from one another. A national court confronted with an ambiguous domestic statute and a claim under international law may construe domestic law to avoid the international issue;[336] the potential for such avoidance, for example, is one reason why American abstention doctrine requires federal claims to be presented to state courts in conjunction with state claims.[337] This problem may be mitigated by presenting the international issues to the domestic court and then referring them to supranational decisionmakers, but consider the converse situation, in which international law may be construed to accommodate domestic arrangements. Under the "margin of appreciation" doctrine, for instance, the European Court of Human Rights accords a certain leeway to national governments for implementing international human rights in ways that accommodate national priorities and institutions.[338] A national court that has both domestic and international law issues before it may have an easier time applying this doctrine than a supranational court with authority to decide only the international question.

The more important arguments from the internationalist standpoint, however, have to do with securing international law's acceptance, integration, and enforcement within the domestic legal

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336. *See, e.g.*, Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (recognizing a canon of construction of federal statutes to avoid conflict with international law).

337. *See* Gov't & Civic Employees Org. Comm., CIO v. Windsor, 353 U.S. 364, 366 (1957).

338. *See generally* HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996); Carozza, *supra* note 31, at 61 (defining the "margin of appreciation" as "the breadth of deference or error the [ECHR] will allow national bodies before it will declare a violation of . . . the Convention").

system. Domestic forces skeptical of international law may be more willing to accept it when it is interpreted and applied by domestic courts. Moreover, concurrent jurisdiction provides an opportunity for supranational tribunals to build relationships with domestic courts that may enhance the power of both sets of institutions. Many observers have remarked, for example, that the European Court of Justice solidified its institutional position by enlisting national courts in the development of European law.[339] And others have suggested that the true measure of success for an international tribunal is the extent to which it can encourage domestic courts to enforce the international norm on their own initiative.[340]

For a variety of reasons, national courts will often offer the best prospects for vigorous enforcement of international law. Professor Burke-White has noted, with respect to international criminal law, that national courts are both ubiquitous and "often have the best access to information, evidence, and testimony about the alleged events"; international institutions like the ICC, by contrast, labor under severe capacity constraints.[341] Likewise, the ICJ—which decided only ninety-nine contentious cases between 1946 and 2001[342]—cannot hope to police enforcement of the Vienna Convention on Consular Relations; that is why controversy in cases like *Avena* and *Breard* focuses on the obligation of national courts to enforce the treaty themselves. If international law is truly to be *law* in the sense of regular application and enforcement touching not only states but private actors, it must be interpreted and enforced beyond the bounds of a few specialized tribunals at the supranational level.

This last point suggests a final caution about the nationalist argument for concurrent jurisdiction that I sketched earlier. Concurrent jurisdiction is a double-edged sword, simultaneously strengthening the place of international norms in our legal order while offering domestic courts an opportunity to moderate and shape their content. Hard-line nationalists may prefer to eschew this

339. *See, e.g.*, Helfer & Slaughter, *supra* note 7, at 290–93.

340. *See, e.g.*, Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120, 123 (2001); Turner, *supra* note 333, at 22; Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 246 (2000) ("[A]—if not the—primary function of public international law is . . . to influence and improve the functioning of domestic institutions.").

341. Burke-White, *supra* note 293, at 15; *see also* Carozza, *supra* note 31, at 72–73 (giving reasons why national courts may be better at enforcing human rights).

342. BROWNLIE, *supra* note 26, at 693.

compromise, accepting the risk that supranational institutions will construe international norms in ways unsympathetic to American institutions in order to deny those norms any more of a domestic foothold than they already enjoy.[343] It seems to me, however, that the hour is growing late for such a strategy. We have embraced international law on too many fronts to "wall off" our domestic institutions from its influence. Better to participate, in hopes that domestic courts can shape international law in ways that accommodate our domestic arrangements.

2. *Supremacy or Shared Law*. If national and supranational courts have concurrent jurisdiction over international law questions, then the system needs a rule governing the respective interpretive *authority* of those courts. In the American system, federal and state courts have concurrent jurisdiction over questions of federal law, but state courts are bound by the U.S. Supreme Court's constructions of that law. The federal courts—more precisely, the supreme federal court—thus exercises interpretive *supremacy* over federal law.[344] Although this aspect of the system was once contested,[345] it is no longer disputed today.

The American system offers two distinct models for implementing interpretive supremacy. The norm is an appellate model, whereby state court decisions interpreting federal law can be appealed from the highest state court to the U.S. Supreme Court.[346] The Court employs this jurisdiction to enforce the supremacy of federal law against sometimes recalcitrant state courts and, more often, to promote the uniformity of that law by resolving conflicting

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343. *Cf.* Ahdieh, *supra* note 10, at 2145 (observing that, by exercising restraint in their infancy, the ECJ and the ECHR were able to undertake much more aggressive assertions of power later on). Nationalists may well prefer to avoid a similar risk in this country.

344. State courts generally respect the views of federal district and circuit courts on federal law questions, but they are *bound* only by the pronouncements of the Supreme Court. Likewise, all federal courts—including the Supreme Court—are bound to follow the highest state court when exercising *their* concurrent jurisdiction over state law questions. *See, e.g.*, Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 204–05 (1956) (referring to cases decided by the Supreme Court of Vermont in determining how to interpret Vermont law).

345. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340–43 (1816) (rejecting the Virginia Court of Appeals' argument that, while the Supremacy Clause makes federal *law* supreme, the state courts enjoyed equal power to interpret that law); HART & WECHSLER, *supra* note 15, at 479–81 (describing attacks on the U.S. Supreme Court's authority before and after *Martin*).

346. 28 U.S.C. § 1257.

interpretations. The effectiveness of the appellate model is limited, however, by the Court's capacity to hear less than one hundred cases a year out of thousands of petitions for review.[347]

The Court's limited capacity to police state courts creates pressure for a different model of supremacy in areas where state compliance with federal norms is suspect. The primary alternative in our system is collateral review, exemplified by federal habeas corpus review of state criminal convictions.[348] Collateral review allows persons who feel that the state courts have failed to vindicate their federal rights to invoke the jurisdiction of the federal trial courts, which obviously can process a great many more cases than the Supreme Court alone.[349] Review takes place as a separate lawsuit focused on the alleged violation of federal law, rather than an appeal of the original judgment. And in the U.S. system, strong rules of deference limit the federal courts' ability to second-guess state court decisions, even on questions of federal law.[350]

Many internationalists will be tempted by some version of supremacy for supranational interpretations of international law. But it is difficult to see how either model would work in theory or

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347. Moreover, only a relatively small proportion of these cases come from the state courts. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 353 tbl.1 (2002) (noting that, between 1997 and 1999, the Court heard only ten to twelve cases a year from the state courts). For a discussion of the Court's limited docket as a constraint on its power, see McNollgast, *supra* note 272, at 1641.

348. It is no surprise that the federal courts first acquired jurisdiction to hear collateral attacks on state convictions during Reconstruction, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, when Congress did not trust southern state courts to mete out equal justice to African Americans. For a somewhat different take on the habeas analogy to supranational adjudication, see Ahdieh, *supra* note 10, at 2068–72.

349. *But see* Brown v. Allen, 344 U.S. 443, 545 (1953) (Jackson, J., concurring) (noting significant limits on the capacity of the lower federal courts to oversee state courts through the habeas system).

350. *See* 28 U.S.C. § 2254(d)(1) (2000):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

*See also* Williams v. Taylor, 529 U.S. 362, 385 (2000) (interpreting the standard of review in § 2254(d)(1) as "a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case"). When hearing direct appeals from state courts on issues of federal law, by contrast, the Supreme Court reviews the legal issues *de novo*. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119 (2000) (conducting *de novo* review of a state court's application of federal law to the facts).

practice. Perhaps because of civil law influences or simply the relative dearth of supranational tribunals, international law has not tended to accord the decisions of such tribunals the same binding authority that one finds in many domestic legal systems. Article 38 of the statute of the International Court of Justice, which is generally taken to be an authoritative statement of the sources of international law, puts judicial decisions on the same level as "highly qualified publicists" as "subsidiary means for the determination of rules of law."[351] Decisions of the ICJ, moreover, bind the parties on a contractual theory similar to agreements to be bound by arbitration, rather than as authoritative statements binding on all other interpreters.[352] It would be odd for supranational decisions construing international law to bind national courts when international law is itself so ambivalent about the force of those decisions. To say that American courts are bound by the ICJ's interpretation of the Vienna Convention in the *Avena* case (as opposed to its judgment as to the particular prisoners involved), would seem to directly contradict the ICJ statute.

A supremacy-based regime of either appellate or collateral review would also be difficult to structure. Supranational institutions like the ICJ or the ICC face similar capacity constraints in policing international law decisions by national courts to those that the U.S. Supremes confront in supervising the state courts. The generally obscure means by which supranational courts are constituted might likewise come under intense scrutiny and pressure if those courts were empowered to reverse or vacate decisions by national courts. After all, how many Americans can name a judge of the ICJ, much less explain the manner by which she came to have that position? Finally, in our own system, there are constitutional difficulties with permitting the decisions of federal courts to be reviewed by tribunals outside the national judicial system.[353]

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351. Statute of the International Court of Justice, Oct. 24, 1945, art. 38, para. 1, sec. d, 59 Stat. 1031, 1060 [hereinafter ICJ Statute]; *see also* BROWNLIE, *supra* note 26, at 19 ("Judicial decisions are not strictly speaking a formal source [of international law], but in some instances at least they are regarded as authoritative evidence of the state of the law . . . .").

352. *See* ICJ Statute, *supra* note 351, art. 59 ("The decision of the Court has no binding force except as between the parties and in respect of that particular case."); *see also* BROWNLIE, *supra* note 26, at 21 ("Strictly speaking, the Court does not observe a doctrine of precedent.").

353. Article III generally requires that the judgments of federal courts not be subject to revision by actors outside the judicial branch. Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–14 (1792); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that Congress could not require federal courts to reopen final judgments); HART & WECHSLER, *supra* note 15, at 96–107 (discussing Article III's finality requirement). An appellate model, in which a

The alternative to a regime of supranational interpretive supremacy is what we might call a system of "shared law." Perhaps the best example is the "law merchant," a form of private customary international law recognized by the Supreme Court in *Swift v. Tyson*.[354] In that case, Justice Story observed that "[t]he law respecting negotiable instruments" was "not the law of a single country only, but of the commercial world."[355] As William Fletcher has shown, that law was shared among the courts of many nations and, within the United States, among the federal and state courts.[356] No single court had interpretive supremacy over any other, so that just as the federal courts were not obliged to follow the New York Court of Appeal's view of the general commercial law governing negotiable instruments, neither were the state courts of New York required to accept the U.S. Supreme Court's.[357] This "general law" regime will seem unfamiliar and problematic to American readers who cut their jurisprudential teeth on *Erie Railroad v. Tompkins*.[358] But shared law persists in our system. A more familiar example is the Uniform Commercial Code, which is adopted separately by multiple state jurisdictions, but which nonetheless purports to describe a fairly uniform body of law. The courts of different states aim to maintain a common set of commercial

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supranational tribunal reviews federal court judgments on international questions, would almost surely run afoul of this principle. A collateral review model that accorded significant deference to the prior federal ruling, on the other hand, might be less problematic. *See, e.g.*, Tutun v. United States, 270 U.S. 568, 580 (1926) (rejecting an Article III challenge to the procedure for petitions for naturalization, which accorded such petitions only a limited *res judicata* effect in future litigation). And a form of collateral review that does not attack the original judgment would probably avoid these problems entirely. The denial-of-justice claim in *Loewen*, for instance, did nothing to the judgment obtained by the O'Keeffes in state court; rather, it sought a penalty against the U.S. This sort of procedure has other liabilities, of course, and it is unclear whether it could achieve the objective of binding, uniform interpretations of law. In any event, a complete parsing of these issues is beyond the scope of this Article.

354. 41 U.S. (16 Pet.) 1 (1842). *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2354 (1991) ("[T]hroughout the early nineteenth century, American courts regularly construed and applied the unwritten law of nations as part of the 'general common law,' particularly to resolve commercial disputes, without regard to whether it should be characterized as federal or state.").

355. *Swift*, 41 U.S. at 19.

356. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517–21 (1984).

357. *Id.* at 1538–39. *See also* TONY FREYER, HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 40 (1981) ("[N]o one imagined that federal judges possessed authority over state courts [in cases under the general common law], any more than state judges had the power to instruct their brothers on the federal bench.").

358. 304 U.S. 64, 78–80 (1938) (overruling *Swift* and holding that federal courts must apply state law in diversity suits).

rules, despite the fact that none can exercise interpretive supremacy over the others.

Regimes of shared law are even easier to find on the international plane. In most cases where two nations make a treaty that imposes obligations but creates no supranational institutions—that is, *most* treaties—it will fall to the courts of the two nations to interpret and enforce the treaty within their respective jurisdictions. Neither will exercise interpretive supremacy over the other, and there generally will be no third tribunal to which the two states can appeal to resolve conflicting interpretations. But notions of reciprocity will provide powerful incentives for the two nations to interpret the treaty similarly.[359] The treaty's provisions will thus be shared law between the two legal systems.

Despite recent proliferation of multilateral regimes enforced by supranational tribunals, then, the shared law model should be a relatively familiar alternative to interpretive supremacy. Paolo Carozza has observed, for example, that "in most contexts, there are no definitive international interpreters of the normative content of human rights."[360] Likewise, the ICJ statute recognizes not only the decisions of supranational tribunals but also national court decisions as evidence of international law.[361] The question is whether shared law regimes are a normatively attractive alternative to interpretive supremacy. To assess that question, it may help to consider Judge Fletcher's account of why the shared law regime of *Swift v. Tyson* worked relatively well for many decades, as well as the reasons that the system ultimately broke down at the end of the nineteenth century.[362]

Judge Fletcher argued that the general commercial law retained a relatively high degree of legitimacy and uniformity, despite the lack of either legislative adoption or a supreme judicial interpreter, for three primary reasons. First, because that law dealt with commercial

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359. *See, e.g.*, Olympic Airways v. Husain, 540 U.S. 644, 660–61 (2004) (Scalia, J., dissenting) (arguing that American courts should look to interpretations of a treaty by other signatories' courts to maintain uniform meaning).

360. Carozza, *supra* note 31, at 62.

361. *See* ICJ Statute, *supra* note 351, art. 38, para. 1, § d; *see also* BROWNLIE, *supra* note 26, at 22.

362. I have discussed the rise and fall of the law merchant in more detail elsewhere, in the context of inquiring whether state and federal courts might successfully "share" customary international law in the U.S. as a form of general common law. *See* Young, *Customary International Law*, *supra* note 177, at 499–503.

transactions among relatively sophisticated parties that put a premium on predictability, most actors thought it more important that issues be settled than that they be settled right.[363] Second, American courts inherited a consolidated corpus of the law merchant from English jurisprudence.[364] And third, although each state jurisdiction was in theory the equal of the U.S. Supreme Court on commercial law questions, in practice a few courts—the state supreme courts of jurisdictions like New York, and especially the U.S. Supreme Court—played leading and coordinating roles.[365]

The reasons that the *Swift* regime broke down are equally significant. One problem arose from the broadening of the general common law's scope: whereas the *Swift* regime covered only commercial matters in its early days, by the end of the nineteenth century it had spread to engage virtually all the common law subjects, such as torts and noncommercial contracts.[366] Likewise, as Lawrence Lessig has pointed out, the general common law became increasingly *normative* in its content; rather than reflecting the customary practices of merchants, it came to impose a particular normative vision held by the federal courts but often not shared by the state jurisdictions in which they operated.[367]

This history suggests reasons to worry about international law as a system of shared law. International law is increasingly pervasive in scope and normative in content; the latter point is illustrated by the shift in the sources of customary international law from primary reliance on customary practice to more normative statements of *opinio juris*.[368] Many of the issues now embraced by international

363. Fletcher, *supra* note 356, at 1562–63.

364. *Id.* at 1565–66.

365. *Id.* at 1566, 1575.

366. *See, e.g.*, Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792 (1997); FREYER, *supra* note 357, at 58.

367. *See* Lessig, *supra* note 366 (observing that the "federal general common law" under *Swift* "was less the practice of gap-filling for parties to a commercial transaction, and more a practice of norm-enforcement, covering a substantial scope of sovereign authority. The common law was no longer reflective, or mirroring of private understandings; it had become directive, or normative over those private understandings"); *see also* FREYER, *supra* note 357, at xii–xiii (arguing that the general common law became a tool for imposing preferences for *laissez faire* government, shared by large national business interests, on state governments); EDWARD PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 65–67 (2000) (same).

368. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRL. Y.B. INT'L L. 82, 89–90 (1992).

law—a state's respect for the human rights of its citizens, for instance—are not the sort of things that many will regard as more important to be settled than settled right.[369] Moreover, much of this law seems in relatively early stages of development, rather than amounting to a settled corpus like the "law merchant" principles that American courts inherited from their English predecessors. As a result, divergence among jurisdictions seems likely in the absence of some central authority with power and capacity to enforce uniform interpretations.

Fortunately, the *Swift* experience may also suggest ways to facilitate the sharing of international law among national and supranational courts in a nonhierarchical system. First, it seems important to minimize the intrusion of international law into areas of normative disagreement, either by simply not "internationalizing" certain areas, or by articulating international norms at a very high level of generality and leaving more specific development of those norms to national courts. The latter approach is consistent, for example, with the framing of many extant human rights conventions in very general terms.[370] It may also be possible to secure somewhat more agreement on interjurisdictional rules, because such rules implicate normative disagreements only indirectly.

The second point is that supranational tribunals may play an important coordinating role. As Judge Fletcher has noted, the volume of cases on commercial law decided by the Supreme Court, the prestige of its justices, and its position atop the federal hierarchy made it "*primus inter pares*."[371] One might expect supranational institutions like the ICJ, the ICC, and the WTO appellate body to perform a similar coordinating function even if national courts enjoy concurrent jurisdiction and even if the supranational bodies lack interpretive supremacy. National political actors can likewise increase the odds for consistent interpretations in such a regime by specifying

369. This may be less true in the area of international trade, which still puts a high premium on stability, uniformity, and predictability. But the problem in trade law increasingly concerns its overlap with areas, like environmental law, in which people hold strong normative preferences.

370. *See* Carozza, *supra* note 31, at 58 ("[I]nternational human rights law has been characterized by a certain normative thinness—an incapacity to specify in sufficiently determinate ways the content of its requirements—and by mechanisms of supervision and compliance that leave great latitude to states to implement and enforce the norms as they see fit.").

371. Fletcher, *supra* note 356, at 1575.

the meaning of particular aspects of international law through treaty making, or by codifying their understandings of the relevant norms in domestic legislation.[372]

This discussion hardly answers all the questions posed by a system of concurrent jurisdiction over international law questions in which no central authority enjoys interpretive supremacy. Many other questions of judicial architecture are also likely to arise in either a supremacy or shared law system. For instance, I have said little about rules of abstention, which encourage some courts to defer decisions so that other institutions may take the first crack at a question, or remedies, which may be limited and framed in ways that mitigate the disruptive impact of international law on domestic institutions. The point of this Article, however, is to mark out an agenda for future discussion, not to flesh out what a system of international judicial cooperation ought to look like.

### *C. Uniformity or "Double Standards" in International Interjurisdictional Rules*

This Section takes up the question, raised in Part III, whether interjurisdictional rules governing the relationship between supranational and domestic courts should be uniform.[373] The judgments involved are analogous to the "parity" question in Federal Courts law—that is, the degree of deference and finality accorded to state judicial institutions has depended on our confidence in the state system's competence in comparison with the federal courts.[374] Rules embodying similar parity judgments at the interface between domestic and supranational judicial institutions should be approached with due regard for the difficulty of comparing institutional competence at that level.[375] The problem with building "wholesale" parity judgments into the structure of the supranational rules is that different domestic systems differ wildly in their comparative competence vis-à-vis the supranational body. And the problem with making such parity judgments applicable to a broad range of supranational institutions is that those institutions are likewise highly

372. *See, e.g.*, Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codifying a definition of torture pursuant to Congress's power to "define and punish" violations of the law of nations).

373. *See supra* Section III.C.2.

374. *See supra* note 297 and accompanying text.

375. *See supra* Section III.C.2.

variable in their structure and competence.[376] These two difficulties can be defined, respectively, as the "vertical" and "horizontal" dimensions of the parity problem.

If rules of complementarity and deference are to reflect the variable competence of different domestic legal systems, they will almost surely have to be made retail rather than wholesale. In other words, the rules will have to treat different supranational institutions, and particularly different nations' legal systems, differently. That conclusion runs head-on into a deeply entrenched reluctance among international lawyers to embrace "double standards." Dean Koh, for example, has denounced double standards—defined as "when the United States proposes that a different rule should apply to itself than applies to the rest of the world"—as the most pernicious form of "American exceptionalism."[377] This aversion to treating different nations differently has deep theoretical roots in the doctrine of the sovereign equality of states.[378] For the same reason that Guyana and the United States have the same number of votes in the United Nations General Assembly, it is hard for international lawyers to contemplate rules that give different weight to the determinations of each country's domestic judicial system.

One attempt to avoid double standards has been to frame substantive international norms in a way that sets a uniform but relatively minimal floor. This sort of approach, which we might call a "worst case" strategy, would design the interaction between international and domestic institutions so as to facilitate the imposition of basic international norms—e.g., of human rights or free trade—on the countries that are least likely to respect them without external pressure. This view seems to undergird the pressure to develop international law into a comprehensive code of human rights; in some countries, after all, international human rights will be the only human rights that people have. Likewise, the expropriation

376. *See* Alford, *supra* note 11, at 792 (suggesting that because international tribunals have different institutional characteristics, there should be a "continuum of deference" paid by domestic courts in different circumstances).

377. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485–86 (2003) [hereinafter Koh, *Exceptionalism*].

378. *See* Burley, *supra* note 5, at 226 (observing that international law has refused "to differentiate between different types of state on the basis of domestic regime type . . . since *Grotius*," and that this view "is grounded in the very concept of 'sovereign states' as the equal and identical subjects of international law, and buttressed by the affirmative norms of sovereign equality and nonintervention").

provisions of NAFTA and many bilateral investment treaties seem to have been designed with a view toward preventing nationalization of investments by countries without a sufficiently protective (in the eyes of potential investors) notion of property rights.[379] In each instance, the worst case perspective counsels that supranational adjudicators should accord relatively little deference to domestic legal institutions. And because it is politically difficult to defer to one country's domestic institutions but not another's based on a qualitative judgment that one country's domestic courts are "better," the lack of deference becomes universal.[380]

The "worst case" approach purports to finesse the interjurisdictional problem by framing the *substantive* norms in such a way that they (hopefully) will only rarely require interference with the domestic legal system. This strategy assumes that international norms are largely duplicative of the rights protected in a well-established constitutional democracy like the United States: it is third world dictatorships that run afoul of the ICCPR, not the United States, and we can therefore expect, as a practical matter, relatively little international interference in domestic legal affairs.[381] Likewise, the expropriation provisions of NAFTA and various other investment treaties are designed to thwart socialist-style nationalizations, not to interfere with American regulation.

Recent experience suggests, however, that these assumptions have been too optimistic in expecting that international norms would simply mirror American principles. In some areas, like the death penalty, international norms have been more "progressive" than the American people;[382] in others, where rights such as free speech and

379. *See* Lerner, *supra* note 27, at 244–45.

380. One might think, for instance, that the procedural default bar to Consular Convention arguments is more acceptable in a country like the United States, which provides domestic counsel to indigent defendants regardless of their nationality, than in a country in which it is either consular assistance or nothing. But it is politically difficult to say that Convention violations should be treated differently depending on the violating country.

381. *See, e.g.*, Rubenfeld, *supra* note 157, at 1988–89 (observing that Americans have viewed "the fundamental rights guaranteed by international law" as "rights already enshrined in the United States Constitution," but "emphatically resisted" the notion "that international law could be a means of changing *internal* or *domestic* U.S. law").

382. I am skeptical that the abandonment of the death penalty in many other industrialized countries represents "progress" rather than simply a different conclusion on a contestable moral question. One cannot simply assume that political change is in the direction of improvement rather than decline. *See, e.g.*, Walter F. Murphy, *Merlin's Memory: The Past and Future*

freedom from racial oppression may trade off with one another, international and American law have simply made different choices.[383] Many observers in the trade area have been surprised to see expropriation provisions such as NAFTA's Chapter 11 brought to bear on traditional forms of American regulation.[384] In any event, it is clear that if international law is to be enforced without deference to domestic legal institutions, American political arrangements and practices will have to change just like everyone else's.

Nor is it obvious that international law ought to content itself with least-common-denominator standards. International law might demand a relatively high standard of procedural due process for accused criminals, for example, while recognizing that many quite different procedural regimes might meet that standard. Indeed, the international law objective may be met more effectively where the means can be tailored to local customs, preferences, and innovations.[385] The important point, however, is that even "worst case" standards may well spark conflicts between international law and domestic arrangements in systems with well-developed legal systems. Nondeferential interjurisdictional rules cannot be justified on the assumption that supranational courts will be dealing only with undeveloped or low-capacity national court systems.

Fortunately, "double standards" are neither as unusual nor as troubling as they have sometimes been made out to be. The common practice of ratifying treaties with reservations creates significant disuniformities in the international law that applies to different

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*Imperfect of the Once and Future Polity*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163, 172–73 (Sanford Levinson ed., 1995).

383. *See, e.g.*, Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME L. REV. 487, 493–97 (2001).

384. *See, e.g.*, Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 51 (2001) (observing that the U.S. government expected Chapter 11 "to provide a depoliciticized method of protecting U.S. investors against the arbitrary conduct of Mexican officials," but that "the promiscuous use of Chapter 11 to challenge public regulatory laws in Canada and the U.S. has thrust it into the center of a highly politicized debate"); Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 TEX. INT'L L.J. 489, 498–99 (2003) (noting that private enforcement under NAFTA Chapter 11 has gone further than any of the signatory states seem to have expected).

385. *See* Carozza, *supra* note 31, at 76 ("Transnational unification of law has its price as well, such as the dampening of potential innovation and the possible severance of the social and historical roots of the law."); *cf.* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 77–78 (1995) (collecting arguments that local autonomy improves the implementation of central policy goals).

states,[386] and the international regime tolerates these disuniformities subject only to the notion that reservations contrary to the "object and purpose" of a treaty are void.[387] Some treaty regimes, moreover, include express limitations and derogations clauses, which allow signatories to depart from treaty norms in certain exigencies or in the interest of certain values.[388] Most fundamentally, many crucial international regimes are not universal; the trade rules applicable to non-WTO members, for instance, obviously differ from those that apply to members of the club.

As I discuss in Section E, international law has developed doctrines designed to accommodate these disuniformities. In particular, the principle of complementarity, most prominent in the Rome Statute of the International Criminal Court,[389] is designed to impose an international solution only where the domestic legal system cannot meet the goal of the international regime. This is surely a "double standard"—international law intervenes in some domestic legal systems, but leaves others to their own devices—and yet it carries none of the negative connotations that Dean Koh associates with such differential treatment. There is thus nothing inherently American or obnoxious about saying that supranational bodies should defer more to well-developed domestic judicial systems with extensive competence to decide international law questions than they should to domestic institutions that lack resources, experience, adequate procedural safeguards, or guarantees against political bias.

Likewise, at least some American courts have been willing to evaluate the comparative institutional competence of domestic courts in different legal systems—even at the risk of offending international comity. In upholding an antisuit injunction by a federal district court against parallel proceedings before a French court, for example, Judge Posner found that because of "the institutional differences

386. *See* Carozza, *supra* note 31, at 60 (arguing that reservations "make[] a certain amount of state discretion over . . . treaty norms central" and create "the necessity for interpretive pluralism").

387. Vienna Convention on the Law of Treaties, *supra* note 167, arts. 20–23, 1155 U.N.T.S. 331, 337–38.

388. *See, e.g.*, ICCPR Art. 22(2) (stating that treaty rights may be restricted as "necessary in a democratic society in the interests of national security or public safety, public order . . . the protection of public health or morals or the protection of the rights and freedom of others"); *see also* Carozza, *supra* note 31, at 61 (noting that such provisions entail "greater deference to local authorities").

389. Rome Statute of the International Criminal Court, *available at* http://www.un.org/law/icc/statute/romefra.htm.

between a federal district court and the Commercial Court of Lille, the district court provides a more appropriate forum for the resolution of the parties' dispute."[390] The court was unmoved by generic comity considerations, in the absence of specific evidence of harm to international relations.[391] As Anne-Marie Slaughter has pointed out, similar instances of "adequate forum analysis" occur in a wide range of transnational cases heard by domestic courts.[392] This willingness to examine the institutional competences of foreign tribunals, she argues, does not indicate an attempt to wall off the domestic legal system; rather, it is evidence that courts are taking legal integration seriously. If courts start from the notion that "the foreign legal system is not separate and entitled to sovereign deference, but is rather part of an emerging transnational litigation space in which litigants move freely and choose different national courts to resolve their disputes," then different courts will "scrutinize each other according to the same criteria that they would apply to other domestic tribunals in the same circumstances."[393] We will see, in other words, "judges judging judges."[394]

The law should likewise take into account the comparative institutional competence of supranational tribunals vis-à-vis domestic courts in different domestic systems. "Sovereign equality" is a fiction, and while fictions often serve useful purposes, there are also times when they should not be allowed to eclipse reality. Refusal by supranational tribunals to defer in many cases to the considered judgment of sophisticated domestic judicial institutions risks pushing those institutions toward questioning the legitimacy of international norms;[395] on the other hand, deferring to *all* domestic judicial actors,

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390. Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 430 (7th Cir. 1993). Judge Posner emphasized that "[a]lthough called a 'court,' [the Commercial Court of Lille] is actually . . . composed of businessmen who devote part time to arbitrating." *Id.* at 429. Hence, "the members of the Commercial Court do not have masters, magistrates, law clerks, externs, or other staff that might enable them to assimilate the voluminous materials that have been collected in the district court." *Id*. Judge Posner was quick to emphasize that "[t]his conclusion has nothing to do with the relative merits of the French and American procedural systems" in general, and suggested that in some cases—for instance, where U.S. law would require arbitration while French law would provide "professional judges," an antisuit injunction against the U.S. proceeding would be equally appropriate. *Id.* at 430.

391. *See id.* at 431.

392. *See* SLAUGHTER, *supra* note 6, at 92–93 (collecting examples).

393. *Id.* at 94.

394. *Id.* at 91.

395. *See supra* notes 112–13 and accompanying text.

even institutions that are rudimentary or without guarantees of political independence, risks significant damage to the efficacy of international law. Treating different domestic judicial establishments differently may be the only way to steer between these dangers.

Obviously such "double standards" will be less offensive if they do not divide the United States from the rest of the world, although any set of rules stressing the domestic system's state of development, sophistication, and institutional independence is likely to implicate tensions between developing and developed countries, not to mention between democratic and nondemocratic societies.[396] It may help to state, in advance, the characteristics of a domestic legal system that will trigger greater supranational deference. This is the approach of the 1996 habeas statute, which provided certain procedural advantages to state governments that upgraded their provision of legal counsel to criminal defendants in state court.[397] Such conditions might have the salutary side-effect of encouraging reform of domestic legal systems more generally.[398]

The horizontal problem of varying institutional competence among different tribunals at the supranational level does not raise the same concerns about "double standards" and sovereign equality. As Roger Alford has demonstrated, American law already treats different supranational and foreign courts differently for a variety of reasons.[399] Here, the best domestic law analogy may be to administrative law, in which courts accord different degrees of deference to different administrative agencies in different situations, depending on the nature of the agency action, the agency's relation to the statute it is enforcing, and the agency's institutional character.[400]

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396. *See, e.g.*, Donoho, *supra* note 27, at 463–65 (suggesting that the "margin of appreciation" accorded by supranational courts to domestic interpretations of human rights law may vary across societies with varying commitments to democracy).

397. *See* 28 U.S.C. § 2263(b) (2000) (providing that states appointing counsel for indigent prisoners under sentence of death in *state* postconviction relief proceedings qualify for certain advantages: (1) a 180 day, rather than 1 year, statute of limitations for federal habeas petitions; (2) deadlines for federal habeas courts to rule; and (3) limits on federal stays of execution).

398. *See* Turner, *supra* note 333, at 8 ("[T]he complementarity provisions of the [Rome] Statute have prodded signatory countries to incorporate prohibitions on genocide, war crimes, and crimes against humanity into their criminal statutes.").

399. *See* Alford, *supra* note 11.

400. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.")

Developing similar doctrines for the interface between supranational and domestic courts may be a task of considerable complexity, but it does not seem insuperable in principle.

The differing institutional capacities of different supranational courts does suggest caution toward proposals for a common approach to interjurisdictional problems that would be developed and shared across the jurisdictional boundaries of different supranational regimes.[401] These proposals have a strong intuitive appeal. For one thing, the lack of developed case law *within* each supranational jurisdiction's own jurisprudence creates strong incentives to borrow principles and practices from the experience of other institutions. To some extent, no doubt, this is salutary. But I want to argue for a very cautious approach to the development of a general "supranational common law" addressing the relationships between supranational and domestic institutions.[402] Just as domestic legal systems vary wildly in their competence and sophistication, so, too, supranational institutions are not all created equal. All the frequently invoked cautions about transplanting legal rules from one domestic system to another[403] would seem to be equally compelling in the context of different supranational institutions embedded in different international legal regimes.

### *D. Improving Existing Supranational Courts*

The same institutional considerations that shape new interjurisdictional doctrines and arrangements may also suggest avenues for reforming existing supranational bodies. Specific proposals for reform should, of course, be developed and evaluated in the context of specific studies of the particular institutions involved. All I can hope to do here is to suggest some problematic characteristics of the current supranational legal system and, once again, point some directions for further inquiry.

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(footnotes and citations omitted); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (determining the degree of deference owed to an agency's determination based on considerations of institutional competence).

401. *See, e.g.*, Martinez, *supra* note 8, at 443–44.

402. *See* Donoho, *supra* note 27, at 338 (suggesting that international human rights institutions which are still in the process of maturing will best be served by incremental jurisprudence that will over time build both credibility and legitimacy in the eyes of governments).

403. *See, e.g.*, Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L. J. 223, 263–71 (2001).

It is no great insight to say that institutional design is shaped by expectations about the authority that the institution is likely to wield. The one-country, one-vote principle of the U.N. General Assembly makes some sense if the main concern is to provide *voice* to the different nations of the world. If that body were to exercise meaningful coercive authority, on the other hand, such a voting rule would be considerably more troubling. Likewise, the role of the relatively unknown and unaccountable experts at the U.N. Human Rights Committee in interpreting the ICCPR will be less controversial if those interpretations are merely advisory than if they were to become binding. And if the validity of domestic regulation were to turn on interpretation of the NAFTA or WTO agreements by supranational arbitral panels, one would expect a loud outcry for the restructuring of those institutions. Internationalists should thus recognize the increasing scrutiny that all these supranational institutions have encountered recently as evidence that international law increasingly *is* taken seriously.

Several aspects of our putative supranational legal system deserve consideration as that system grows in importance. The first is the sheer proliferation of bodies exercising judicial or quasi-judicial functions. The interjurisdictional doctrine of American law is extremely complex, despite the relatively homogeneous nature of the federal court system. How much more complex must the supranational counterpart of the doctrine be to accommodate institutions as disparate as NAFTA tribunals, the International Court of Justice, and the U.N. Human Rights Committee? Supranational bodies are also more likely to be perceived as legitimate to the extent that the peoples subject to their jurisdiction can understand what they do and how they work; the present hodgepodge, however, is so variegated that few international scholars seem expert on the workings of more than a few of the different bodies. Workable and legitimate interjurisdictional rules are more likely to develop if some of these various tribunals can be consolidated.

The proliferation of supranational bodies has also given rise to concerns of excessive specialization. Specialists in particular areas of international law may have idiosyncratic views that diverge from strong preferences at the domestic level.[404] Moreover, the most

404. *See, e.g.*, Turner, *supra* note 333, at 23 n.129 (noting that "[a]n overwhelming majority of international lawyers" oppose the death penalty, while "[o]utside the narrow circle of international lawyers, . . . many jurists and nonlegal scholars"—as well as domestic

difficult questions will likely arise at the intersection of different fields of legal regulation.[405] Much controversy over the free trade regime, for instance, stems from its impact on environmental protection measures that impose burdens on business.[406] Generalist domestic courts will often be better positioned to balance these competing policy concerns, and if supranational bodies are to review those sorts of decisions, then they would do well to be more generalist in character themselves. Generalist supranational judges may also gain more legitimacy to the extent that they are not identified with particular social interests, such as multinational corporations engaged in international trade.

Some supranational institutions—particularly in the free trade area—seem likely to need more permanence if they are to develop a viable set of interjurisdictional rules. NAFTA tribunals as presently constituted write tickets for this day and train only; they have no need to contemplate how they will apply today rules to tomorrow's cases, and they have at best an abstract interest in developing a working relationship with domestic courts.[407] One need not prescribe the life tenure of the American federal judiciary to urge greater continuity for these bodies; indeed, NAFTA itself provides for a standing group of arbitrators for arbitrations conducted under the state-to-state provisions of Chapter 20.[408] Appointments for more than a single case would also take the appointments process out of the hands of the parties to litigation, which would not only offer an opportunity for greater political accountability but also should reorient the tribunals' sense of mission away from purely private dispute resolution and

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populations—continue to support it). Professor Turner goes on to observe that, "[a]t the International Criminal Court, . . . debates about the death penalty have been foreclosed because of the solid consensus among international judges on the issue." *Id.*

405. *See supra* note 275 and accompanying text.

406. *See, e.g.*, William Greider, *The Right and U.S. Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, at 21 *available at* http://www.thenation.com/doc.mhtml ?i=20011015&s=greider) (arguing that NAFTA Chapter 11 and similar provisions represent an attack on environmental and other regulatory laws); Rubenfeld, *supra* note 157, at 2025; Public Citizen, *supra* note 14.

407. *See* Ahdieh, *supra* note 10, at 2099 (describing the lack of "'institutional' continuity" under NAFTA Chapter 11 as "the weakest element of the institutional design").

408. NAFTA ch. 20, art. 2008, 2009. According to Professor Brownlie, similar concerns about the oddly named "Permanent Court of Arbitration"—which was *not* a standing court and "could not develop a jurisprudence"—ultimately led to the creation of the ICJ. BROWNLIE, *supra* note 26, at 677. For recent proposals to create a permanent appellate body for Chapter 11-style trade regimes, see Ahdieh, *supra* note 10, at 2142.

toward greater concern for the public values that are often implicated in the cases.

Finally, many supranational tribunals lack adequate guarantees of transparency and accountability.[409] These two concerns dovetail to a large extent: one of the principal constraints on judicial action is the need to write a reasoned opinion justifying the result and responding to counterarguments.[410] Supranational opinions, however, are often not readily available and, in many instances, suppress dissenting opinions and offer only cursory reasons. More important, supranational bodies tend to lack the accountability fostered by public and contested appointments on the front end, as well as mechanisms such as statutory override, jurisdiction-stripping, budgetary controls, and even impeachment in response to particular rulings.[411] All of these mechanisms become far more difficult to utilize as means of political control when multiple nations—often *many* nations—must concur.[412] Ironically, a freestanding court that is not accountable to anyone may be *less* powerful, in the end, than a tribunal whose rulings are legitimized by the existence of democratic checks on its authority.

The last point is that we already have a bewildering variety of supranational legal institutions with widely varying characteristics, and it is inevitable that some will inspire a great deal more confidence in their institutional competence than others. It may be possible to reform some of the weaker bodies, and efforts to do so deserve careful consideration and support. But the possibility—even the *probability*—remains that, at the end of the day, responsible national

409. *See generally* Anderson, *supra* note 19, at 1301 (concluding that Dean Slaughter's vision of global governance through government networks—which includes strong reliance on supranational courts—"tends to erode the respect for democracy and democratic accountability with which it began"); Rubenfeld, *supra* note 157, at 2017–18 ("The existing international governance organizations are famous for their undemocratic opacity, remoteness from popular or representative politics, elitism, and unaccountability.").

410. *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.'").

411. On the many mechanisms available to the national political branches for responding to federal court decisions, see generally McNollgast, *supra* note 272.

412. *See, e.g.*, Turner, *supra* note 333, at 21 ("Given the limited opportunities available to an individual state or even a group of states to sanction an international institution acting outside its delegated powers, national communities have no meaningful 'voice' in the oversight of international institutions.").

policymakers will have insufficient confidence in some supranational institutions to cede to them any measure of authority over our domestic judicial institutions. Likewise, national courts may well confront situations in which deferring to a supranational tribunal seems either extremely unwise or, possibly, simply impermissible under domestic law. The problem is that in the climate of our present discourse about international law, *any* refusal to go along with almost *any* supranational proposal is held up as a sign of national disrespect for international law in general.[413]

That view, like many of the views I have criticized here, seems to me not to take international law *seriously enough*. It is easy to go along with poorly constructed or conceived international rules or institutions when one thinks that the subject matter does not matter or that the enforcement mechanisms will be ineffectual; as Dean Koh has observed, "[m]any countries adopt a strategy of ratification [of international agreements] without compliance."[414] Supranational judicial institutions are designed to put an end to that strategy; their purpose is to force states that are parties to international agreements to take international law seriously.[415] To the extent that they succeed, we will have graduated from the period in which it was more important to convince nations to adhere to the international rule of law than to worry overmuch about the *content* of that law. It should no longer be an independent argument against a particular legal result that it "did not strengthen the place of international law in the law of the United States."[416] The question ought to be the same Legal

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413. Dean Koh, for example, denounces as equally blameworthy American refusals to defer to international actors on

> [S]uch diverse issues as the International Criminal Court, the Kyoto Protocol on Climate Change, executing juvenile offenders or persons with mental disabilities, declining to implement orders of the International Court of Justice with regard to the death penalty, or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons . . . holding Taliban detainees on Guantanamo without Geneva Convention hearings, and asserting a right to use force in preemptive self-defense.

Koh, *Exceptionalism*, *supra* note 377, at 1486. These examples raise a wide variety of issues, many of them confined to the specific context of each action. I do not mean to defend any of these American actions here—although I think many are defensible—but I do insist that they must be evaluated on their individual merits and that little can be gained by lumping them together as signifying some general disrespect for international law and institutions.

414. *Id.* at 1484.

415. *See* Ahdieh, *supra* note 10, at 2088–89 (noting that NAFTA's arbitration arrangements are meant to exert "power" over the signatory nations).

416. Henkin, *Provisional Measures*, *supra* note 57, at 683 (criticizing the Supreme Court's decision in *Breard*).

Process question asked of any other legal result, that is, whether it reflects a sensible allocation of authority among the various legal institutions in the system.

### *E. Doctrinal Resources within International Law*

International law has not completely ignored the notion of institutional settlement, even if it does not generally speak in those terms. A variety of doctrines and practices reflect the imperative to defer to national institutions. The problem, rather, is that these doctrines and practices are both scattered and controversial. They are often seen as unfortunate but necessary compromises rather than essential features of the system.[417] I want to suggest that these settling doctrines and practices should be preserved and expanded, and that they should be explored more systematically as instantiations of a common principle.

One of the most important ways in which international law "settles" authority to interpret with national institutions arises simply from the generality—and thus indeterminacy—of its norms. Instruments like the ICCPR, for example, define rights in highly abstract terms. As Professor Carozza has observed,

> [D]espite all of the normative developments of international human rights law over the last half century, it is still characterized less by a fully articulated normative content than by the interpretive discretion that it leaves to states through the open-ended nature of its language, the legal doctrines supporting it, and the political context of the culturally pluralistic world to which it is intended to apply.[418]

The general lack of strong institutional enforcement at the international level plays a similar role.[419] I want to argue that these aspects of international law, although frequently decried as weaknesses or immaturities in the legal order, are in fact beneficial to the extent that they force respect for national institutions and autonomy. They are not "bugs," but rather "features," of the system.

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417. *See, e.g.*, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 (1999) (observing that international human rights decisions by supranational bodies "carr[y] the promise of setting universal standards for the protection and promotion of human rights," but that "[t]hese universal aspirations are, to a large extent, compromised by the doctrine of margin of appreciation").

418. Carozza, *supra* note 31, at 62.

419. *See id.*

This Section canvasses more specific doctrines of international law that facilitate the settlement of questions in national institutions. I focus on two examples: the margin of appreciation doctrine developed by the European Court of Human Rights and the principle of complementarity in the Rome Statute of the International Criminal Court. Rather than attempt a comprehensive account of these doctrines, I explore how they fit into the broader paradigm of institutional settlement that I have already discussed.

1. *The Margin of Appreciation*. The European Court of Human Rights originally developed its "margin of appreciation" doctrine in connection with Article 15 of the European Convention on Human Rights,[420] which provides for derogations from Convention obligations "in time of war or other public emergency."[421] Although the concept began as a means to assess permissible derogations, the ECHR has come to apply the doctrine more broadly, outside the context of Article 15.[422] The Commission has since explained that the margin of appreciation applies also to national interpretations of the more open-ended rights provisions in the Convention, as well as to the choice of "appropriate means to guarantee a [protected] right."[423] The discretion accorded national governments is not unlimited, however. The ECHR has explained that "[t]he domestic margin of appreciation thus goes hand in hand with a European supervision," and it remains for the Court to make the final judgment on whether the permissible margin has been exceeded in a particular case.[424]

The margin of appreciation doctrine fits well with the institutional settlement idea that I have been pushing here. Obviously, this is not the place for a comprehensive account of the doctrine. Rather, I want to make two points about it: First, the values associated with institutional settlement provide a defense against charges that the doctrine undermines the universality of human rights and also justify the doctrine's expansion beyond the relatively narrow contexts in which it presently operates. Second, the principle of

420. European Convention on Human Rights, Dec. 10, 1948, art. 15.

421. *See, e.g.*, Greece v. United Kingdom, 1958–59 Y.B. EUR. CONV. ON H.R. 174, 174 (Eur. Comm'n on H.R.) (applying for the first time the doctrine of margin of appreciation).

422. *See* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 429–32 (1984).

423. Belgian Linguistic Case, 6 Eur. Ct. H.R. (ser. A) 4, 28 (1967).

424. Handyside v. the United Kingdom, 24 Eur. Ct. H.R. (ser. A) 5, 23 (1976).

deference behind the doctrine ought to be extended not simply to the substantive definition of rights but also to various forms of interjurisdictional doctrine.

Although the margin of appreciation may strike American observers as a relatively modest form of deference,[425] the doctrine is nonetheless controversial. The ECHR has been criticized as being too generous to national authorities in defining the permissible margin, and the doctrine has been criticized more generally for undermining the universality of human rights.[426] Eyal Benvenisti, for example, has worried that the margin of appreciation could seriously undermine "the promise of international enforcement of human rights that overcomes national policies . . . [and] compromise the credibility" of supranational courts that adopt "double standards" and "lead national institutions to resist external review altogether."[427] The values associated with institutional settlement, however, counsel that the doctrine should be strengthened rather than narrowed. As the ECHR has noted, the margin of appreciation rests on an assessment of the comparative institutional competence of national and supranational authorities to assess the necessity for departure from international norms or to give concrete definition to those norms within a particular domestic cultural and legal context.[428] The

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425. Consider, for example, the following statement of the American "rational basis" test for government action that does not implicate fundamental rights or a suspect classification:

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, . . . and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it . . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature . . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) (internal quotation marks and citations omitted).

426. *See, e.g.*, VAN DIJK & VAN HOOF, *supra* note 422, at 445–46 (criticizing the ECHR's jurisprudence); Benvenisti, *supra* note 417, at 843–45 (criticizing the doctrine more generally). *But see* Carozza, *supra* note 31, at 73 (arguing that the doctrine "merely recognizes that the specification of general principles of human dignity in concrete political and social situations will very often require a complex and uncertain balance of values," and that this balance should be "taken at the closest level to the affected person as is effectively possible").

427. Benvenisti, *supra* note 417, at 844.

428. *See, e.g.*, Brannigan and McBride v. United Kingdom, 17 Eur. H.R. Rep. 539, 569 (1993) ("By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international

competence advantage of national authorities may result not only from their closeness to the situation but also from the thinness of consensus on certain international principles, such as some of the more open-ended principles of human rights law.[429]

It is harder to find examples of the margin of appreciation doctrine outside the case law of the ECHR.[430] One critic of the doctrine notes that "[o]ther international human rights organizations wisely have avoided this approach thus far," and urges that "[t]hey must continue to caution themselves against being drawn to this way of analyzing the issues they face."[431] This view—which seems to presume that in the absence of a margin, supranational courts will be able to impose an effective and universal vision of human rights—strikes me as short-sighted. The deference entailed by the margin of appreciation is precisely the kind of accommodation necessary to incorporate international law into domestic legal systems *as operative law*, rather than as a set of universal aspirations. As Douglas Donoho has noted, "the margin of appreciation doctrine may well provide international institutions with the flexibility necessary for their long-term development as credible and authoritative decisionmakers."[432]

I do want to argue, however, that the margin of appreciation focuses on the substance of rights while neglecting fruitful avenues of deference grounded in interjurisdictional doctrine. Professor Donoho, for example, compares it to "levels of scrutiny" analysis in American constitutional law.[433] The point of that analysis is to balance governmental interests in order, morality, and the like with individual liberty, and the analysis goes to the substantive question whether a right has been violated in a given situation. These substantive questions are certainly important, and I have already argued that international law has sometimes adopted substantive standards that

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judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."); *see also* Donoho, *supra* note 27, at 452.

429. *See* Donoho, *supra* note 27, at 458–59; *see also id.* at 466 (offering the margin of appreciation doctrine as a tool for bridging disputes between the value of universal human rights and the need to accommodate diverse cultural traditions).

430. *See id.* at 440 n.140 ("Thus far, international human rights institutions, with the exception of the E.C.H.R., have made no serious attempt to develop a jurisprudence to deal with the issues of diversity, multiculturalism and self-governance in the implementation of rights.").

431. Benvenisti, *supra* note 417, at 853.

432. Donoho, *supra* note 27, at 465.

433. *See id.* at 447–49.

are insufficiently deferential to national policymakers.[434] One of the principal insights of the Hart and Wechsler tradition in Federal Courts scholarship, however, is the importance of interjurisdictional rules in implementing constitutional values.[435] As Dan Meltzer has observed, "many of the most important questions of American constitutional law pertain to the jurisdictional, remedial, and procedural doctrines that together create a framework for the vindication of rights."[436] This tradition suggests that a "margin of appreciation" for national institutions charged with implementing international law may best be achieved through interjurisdictional doctrines settling the authority to interpret and apply international law in domestic courts.

2. *Complementarity*. The most promising interjurisdictional counterpart to the margin of appreciation is the principle of complementarity. Unlike the margin of appreciation, complementarity focuses not on the substantive standards applied by supranational institutions but rather on when those institutions will decide disputes themselves and when they will allow domestic institutions to decide. The most prominent example appears in the statute of the International Criminal Court, which provides that the ICC will step in only where the domestic legal system concerned is unwilling or unable to prosecute.[437] One might generalize this principle by stating that supranational institutions should not attempt to replicate tasks that the domestic legal system is willing and able to perform; as Dean Slaughter has noted, complementarity "recognizes national government institutions as a first choice to exercise power and responsibility even in the design of an international system of governance."[438] In this sense, complementarity is a principle of institutional settlement.

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434. *See supra* notes 284–89 and accompanying text.

435. *See supra* notes 72–74 and accompanying text.

436. Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT'L. J. CONST. L. (forthcoming 2005) (manuscript at 1, on file with the *Duke Law Journal*).

437. *See* Statute of the International Criminal Court, *supra* note 389, art. 17–18 (articulating the principle of "complementarity"). *See generally* Turner, *supra* note 333. Professor Burke-White notes that "[t]he principle of complementarity has a history dating back to the Treaty of Versailles" and to "the first proposals for an international criminal court in 1943." Burke-White, *supra* note 293, at 8–9.

438. SLAUGHTER, *supra* note 6, at 149.

As I have already suggested,[439] complementarity effectively creates "double standards" by deferring to some domestic judicial systems but not others, depending on the willingness and capacity of each local system to proceed on its own. Indeed, the obvious advantage of such a principle is that it is scalable to the particular capacities of whatever domestic system is involved in a given case. If the domestic system is capable of applying the relevant international principle (or its domestic analog), then there may be little role for the supranational court. On the other hand, in domestic systems that lack the needed capacity the supranational court may play a greater role. On this view, the supranational tribunal plays a "complementary" role to whatever judicial system exists at the national level. Complementarity thus seems a promising response to the disparate capacities of different domestic legal systems.

The complementarity principle might be strengthened, from the standpoint of settling authority in domestic courts, by adding two elements. First, litigants could be required to *exhaust* their domestic remedies before appealing to a supranational tribunal. Customary international law already imposes such a requirement, in at least some cases, under the "local remedies rule."[440] One can imagine a workable system without this requirement: in the American system, for instance, there is no presumption that most federal claims should be brought in federal rather than state court or (where diversity of citizenship exists) vice versa; rather, the parties retain a great deal of freedom to choose the forum.[441] But there are advantages to a presumption in favor of domestic jurisdiction. Encouraging domestic courts to hear cases under international law will encourage the domestic legal regime to internalize international legal principles.[442] As claims raising those principles become more commonplace, moreover, exclusive or preferred jurisdiction in supranational bodies will strain the decisional resources of those tribunals. And domestic courts are probably better situated to incorporate international law in ways that minimize disruption to surrounding domestic legal arrangements and maximize domestic legitimacy.

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439. *See supra* note 377 and accompanying text.

440. *See Loewen*, *supra* note 89, ¶¶ 143–57, at 41–45.

441. *See* HART & WECHSLER, *supra* note 15, at 427.

442. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2651 (1997) (book review).

Second, decisions by domestic courts on issues of international law could be given preclusive effect in future litigation in supranational tribunals. Institutional settlement holds that, in at least some cases, the decision of the body with primary jurisdiction to decide must be treated as settled, even though other bodies might have decided the question differently.[443] This is not to say that there can be no review of such decisions—only that there should be some measure of deference to the domestic outcome. There is little "settlement," after all, without some level of preclusive effect on future litigation. Neither the parties nor the domestic forum itself will have much incentive to take the international law issues in a case seriously if they know that those issues are likely to be fully relitigated at a later stage in an international forum.[444]

Although the complementarity idea has much to recommend it, the principle is not without difficulty in application. There is, for example, the latent ambiguity in the ICC statute's reference to domestic judicial processes that are "unwilling or unable" to apply international norms themselves. What if, after a thorough review, the domestic prosecutorial institution determines that there is insufficient evidence to prosecute? Or what if the defendant prevails on some "technical" or procedural ground? Are these situations in which the domestic system has abdicated or failed and the supranational body should step in pursuant to its complementary role? Or has the domestic process "worked" and resolved the case, obviating the need for supranational intervention? As Dean Slaughter acknowledges, "it will take years of litigation to establish precisely what 'unable or unwilling' actually means, thereby establishing the precise parameters of ICC jurisdiction in relation to national courts."[445]

Complementarity is designed to respect domestic institutions, but there seems to be little way around the need for the supranational

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443. *See supra* notes 65–68 and accompanying text.

444. Article III may pose a constitutional barrier to federal court decisions of international issues that lack preclusive effect in future litigation. The Court has suggested that some degree of preclusive effect is a necessary component of the finality requirement under Article III's vision of the "judicial Power." *See* Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 700–01 (1927). However, the reasoning of the leading cases is somewhat opaque, and it is clear that a judgment may be "final" for Article III purposes even if it lacks the full preclusive effect that it might have under traditional principles of *res judicata*. *See generally* Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Tutun v. U.S., 270 U.S. 568 (1926). My focus here is on the practical advantages of preclusive effect; on the constitutional issue, see generally HART & WECHSLER, *supra* note 15, at 105–07.

445. SLAUGHTER, *supra* note 6, at 149.

tribunal to review the adequacy of the domestic proceedings before determining whether to proceed.[446] The alternative system, in which the supranational body's ability to proceed would depend on something like a certification from the domestic institutions that they do not want the case, will strike many as too ineffectual to realize the substantive goals of the international rules being enforced.[447] On the other hand, review of the adequacy of domestic proceedings will inevitably create considerable frictions between the two systems. No judge likes to be told that the proceedings in her court were "inadequate" and will therefore be ignored at a subsequent phase, and this irritation is likely to be far worse when the reviewing body is a distant supranational tribunal made up primarily of jurists from other countries.

The system might evaluate the adequacy of domestic proceedings in at least two very different ways. The evaluation might occur "wholesale" in the sense of a *general* judgment about the adequacy of domestic legal institutions that is then reflected in the structure of the supranational process. The First Congress's decision *not* to grant general federal question jurisdiction to the newly established federal courts, for example, reflected a general judgment that the state courts were adequate fora for adjudicating most federal statutory and constitutional claims.[448] By analogous reasoning, we might reject a domestic exhaustion requirement if we thought national courts were *never* an appropriate place to adjudicate prosecutions for war crimes. Or the evaluation might occur "retail" in the form of supranational review of the adequacy of domestic proceedings in a particular case. Something like this seems implicit in the *Mondev* and *Loewen* opinions: while both opinions strike me as fairly intrusive in their review of the state court proceedings at issue, the *Mondev* panel seems to have had more confidence in the Massachusetts courts than the *Loewen* panel had in the courts of Mississippi.[449] Accordingly, the

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446. *See* Turner, *supra* note 333, at 6 & n.21 (noting that "[c]omplementarity will be administered in practice through ICC decisions on the admissibility of cases" and that, as a result, the court retains "the ultimate power to decide whether a country is 'unwilling' or 'unable' to prosecute a case"); Burke-White, *supra* note 293, at 9.

447. For example, China and the U.S. both urged that either national courts or the Security Council make complementarity determinations in ICC cases, but this proposal was rejected by the drafters of the Rome Statute. Turner, *supra* note 333 at 10–11.

448. *See supra* note 15.

449. I cannot help suspecting that this judgment rested, a least in part, on regional stereotypes.

*Mondev* panel seemed more willing than the *Loewen* panel to defer to the state courts' resolution of the issues.

In the American system, this sort of adequacy determination takes place most often in the context of habeas corpus review of state criminal convictions. That regime seeks to mitigate the irritant produced by the federal courts' final say over the adequacy of state proceedings by building in quite deferential standards of review.[450] Those standards are designed to respect both the substance of the state courts' determinations and the procedures by which those determinations were arrived at. By this means, the institutional settlement of primary decisional authority in the state courts is reconciled with a final right of review in the federal judiciary.[451]

Application of this principle would compel a quite different approach from that taken by the supranational courts in *Medellin*, *Mondev*, and *Loewen*. The procedural default doctrine is designed to give state courts a chance to rule on a litigant's federal defenses; extended to the international level, it would require individuals to present their treaty claims to the domestic courts before their governments could bring those claims before the ICJ.[452] The doctrine is simply an element of exhaustion, foreclosing supranational intervention unless the domestic courts—properly presented with the treaty claim—were unwilling or unable to respect it.[453] Reasonable persons may disagree about whether the current American "cause and prejudice" standard for overcoming a procedural default is too high, but that is a question of detail. The ICJ's seeming disregard for procedural default *in principle* in cases like *Avena* and *LeGrand* undermines the principle of complementarity that is necessary to build a workable relationship between the ICJ and domestic courts.

The NAFTA cases, on the other hand, highlight the element of preclusion. NAFTA includes a preclusion principle: if a party chooses

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450. *See* 28 U.S.C. § 2254(d)(1) (2000) (providing for a deferential standard of review on substantive issues); 28 U.S.C. § 2254(e)(2) (2000) (codifying the doctrine of procedural default in some circumstances).

451. *See* Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (observing that the procedural default doctrine has "the salutary effect of making the state trial on the merits the 'main event,' so to speak").

452. In the U.S. habeas scheme, the state court's resolution of the federal claim does *not* have preclusive effect in the federal collateral review proceeding. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 487 (1953).

453. *See* Dretke v. Haley, 541 U.S. 386, 392 (2004) (observing that the procedural default doctrine is "[a] corollary to the habeas statute's exhaustion requirement").

to present its claim to the domestic courts, then it is not permitted to seek a more favorable answer later on from a NAFTA tribunal.[454] But the denial-of-justice claim recognized in *Mondev* and *Loewen* makes a mockery of that principle. Rather than relitigate the initial claim rejected in the domestic courts—state law contract, business tort, and antitrust claims—the *Mondev* and *Loewen* plaintiffs argued that the domestic courts' ruling against them gave rise to a *new* NAFTA violation in its own right.[455] Concern for complementarity, however, suggests the denial-of-justice claims under NAFTA should be limited largely to situations in which foreigners are excluded entirely from domestic courts. In a case like *Mondev* or *Loewen*, for example, there is little reason to believe that the NAFTA tribunal has any comparative advantage over the domestic appellate system in detecting errors of domestic law. To paraphrase Justice Robert Jackson, the NAFTA tribunal is final in such a situation not because it is less fallible than the courts that have considered the issues earlier, but simply because it gets the last word.[456] The point is not that denial-of-justice claims should be eliminated entirely, but rather that the bar for finding such a denial should be set much higher.

However these issues of institutional detail are worked out, complementarity seems a promising rubric for protecting and promoting a strong role for domestic courts in the application, interpretation, and development of international law. The obvious irony is that the principle appears in the charter of the institution to which many proponents of national autonomy have expressed the greatest skepticism.[457] No matter how one feels about other aspects of

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454. *See* NAFTA, *supra* note 119, Art. 1121(1)(b) (authorizing the filing of a Chapter Eleven claim only if the claimants "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116").

455. The *Loewen* panel thus concluded that "Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act." *Loewen*, *supra* note89, ¶ 164.

456. *Brown*, 344 U.S. at 540 (1953) (Jackson, J., concurring in the result) ("[R]eversal by a higher court is not proof that justice is thereby better done. . . . We are not final because we are infallible, but we are infallible only because we are final.").

457. *See generally* Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003) (canvassing reasons for U.S. opposition to the ICC). I do not say that such skepticism is wrong-headed. As Professor Goldsmith notes, "[t]he perceived efficacy of complementarity and other ICC safeguards turns on the level of trust a nation has toward the ICC. The United States has little." *Id.* at 95. At a time of widespread hostility to the U.S. in the

the ICC as an institution, however, the complementarity principle deserves a close look.

### *F. The Politics of Judicial Globalization*

Some of my proposals in this Part may be controversial; they may require, after all, a fairly significant change in the way we think about the relationship between international and domestic law. I want to close by suggesting, however, that any such controversy should not be political or ideological in nature. Much of our current debate about the role of international law has a Left-Right cast to it. When we speak of international human rights, for example, we typically see political liberals urging domestic application of "progressive" international principles—such as greater tolerance for gay rights or less tolerance for capital punishment—and political conservatives resisting such calls.[458] I have chosen my primary examples with some care, however. When we turn to free trade law, by contrast, we typically see political conservatives preaching free trade and globalization while political liberals fear that these trends will undermine the domestic regulatory state.[459] For my own part, I worry about *both* scenarios. But the gentle reader can choose the nightmare that he or she finds most unsettling: the point is that neither political liberals nor political conservatives should be sleeping peacefully.[460]

It is also worth remembering the centrist tradition of the Legal Process School that I have invoked. That School had its origins in responding to critiques of prior ways of thinking about the law from Legal Realists on the Left, but it responded by accepting many

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international community, that attitude may well be sensible. But the concept of complementarity itself nonetheless seems worth exploring.

458. *Compare, e.g.*, Koh, *World Opinion*, *supra* note 255 (urging reliance on international law to limit capital punishment), *with Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (rejecting such calls and stating that "equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people").

459. *Compare, e.g.*, *CAFTA's Benefits*, WALL ST. J., July 27, 2005, at A12 (supporting the latest free trade agreement from a politically conservative perspective, and discounting "sovereignty" concerns arising from NAFTA-like dispute resolution procedures), *with* Mark Engler, *The Trouble with CAFTA*, THE NATION, Jan. 16, 2004, *available at* http://www.thenation.com/doc.mhtml?i=20040202&s=engler) (making the politically liberal case against CAFTA).

460. *See generally* Rubenfeld, *supra* note 157, at 2017 ("[T]he right is internationalist where international law pursues a property- and commerce-protecting agenda, while the left is internationalist where international law pursues an human rights or use-of-force or environmental protection agenda. In each case, support for international law is adventitious.").

elements of those critiques, and it was centrally concerned with preserving elements of the modern regulatory state that both political liberals and conservatives have come to accept.[461] More importantly, the incremental nature of the Legal Process approach and its central tenet of respect for decisions by other actors even in the face of disagreement on the merits are both conducive to accommodation of disparate perspectives.

I also want to stress that the approach I have outlined here has something to offer both nationalists and internationalists. Just as the web of interjurisdictional doctrine that is the subject of the Federal Courts field was designed to preserve traditional notions of federalism and separation of powers while facilitating workable governance at the national level, the extension of that field would protect a meaningful role for international law by seeking to mediate conflicts with domestic institutions. The point is to take international law seriously as law, by subjecting it to the same sorts of institutional give and take that have characterized our domestic legal arrangements throughout our history. Moreover, Dean Slaughter has demonstrated that developing relationships of mutual respect and direct communication between national and supranational courts has great potential to strengthen the position of the latter.[462]

Failure to develop thoughtful accommodations between supranational and domestic institutions will undermine international law, especially in a community like the U.S. that is already ambivalent about constraints on national sovereignty. Speaking of cases like *Loewen*, for example, Renée Lettow Lerner has observed that "[o]ur desire for international trade is starting to collide with our unusual (by international standards) system of civil justice, and that collision may generate tension that saps support for international trade agreements."[463] And the U.S.'s recent withdrawal from the Vienna Convention's dispute resolution protocol in the wake of *Avena* demonstrates this risk of backlash in the most concrete way.[464] Demonstrably workable accommodations, by contrast, should allay

461. *See, e.g.*, Amar, *supra* note 58, at 693–94; William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HART & SACKS, *supra* note 60, at xci.

462. *See* SLAUGHTER, *supra* note 6, at 146, 150.

463. Lerner, *supra* note 27, at 233; *see also* Ahdieh, *supra* note 10, at 2043 n.52 ("If Chapter 11 and other investment-review mechanisms do not develop in a careful and sensitive fashion, there is every reason to fear a backlash . . . .").

464. *See supra* notes 112–13 and accompanying text.

fears about the loss of sovereignty and to build public confidence in international institutions. To be sure, both nationalist opponents and internationalist proponents of international norms have something to lose in this sort of compromise. But the benefit of the bargain is a stronger, if more moderate, international law.

## CONCLUSION

International law increasingly features supranational institutions that interpret, apply, and develop international law. Some of these supranational judicial institutions are new and some are not; even the old ones, however, seem likely to play roles that increasingly intersect with domestic legal arrangements. Robert Ahdieh has thus observed that "[i]nternational tribunals have become more willing to engage in the review of national courts in recent years," and that they have "growing power to make such review stick."465 As supranational courts interact with domestic ones, they will give rise to a host of interjurisdictional problems involving standards of review, the allocation of jurisdiction, remedies, and similar issues. It is only a matter of time before Medellin—or some case like it—returns to the U.S. Supreme Court, and the trade cases cannot be far behind. Whatever one thinks of the particular approaches I have suggested for thinking about these problems, the first central point of this Article is that it is time to think about them systematically.

The second point is that the Legal Process jurisprudence that has served Americans well in dealing with parallel interjurisdictional problems in our federal system can also serve in an era of judicial globalization. In particular, the notion of institutional settlement—that authority to decide should be allocated to particular decisionmakers, and that decisions reached by those institutions should receive some level of deference from other actors in the system—seems even more important on an international plane featuring multiple sovereigns with diverse cultural and legal traditions. Accepting that notion, of course, still leaves a host of questions to be answered: In which institutions should authority to decide in the first instance be settled? How *much* deference should these decisions receive from other actors? To ask these questions is not to challenge the place or status of international law and

465. Ahdieh, *supra* note 10, at 2148.

institutions, but rather to take them seriously enough to integrate them into our other legal arrangements.