

## TOWARD A FRAMEWORK STATUTE FOR SUPRANATIONAL ADJUDICATION

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The early decades of the twenty-first century may turn out to be the time when supranational adjudication comes of age. Jenny Martinez recently observed that “there are now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years.”<sup>1</sup> Curtis Bradley notes that “[i]ncreasingly, in terms of the subject matters that they address and the ways in which they are structured, international adjudicatory institutions are resembling traditional domestic courts rather than simply interstate arbitral mechanisms.”<sup>2</sup> And private litigants are asking domestic courts to enforce the judgments of international bodies with increasing frequency.<sup>3</sup>

The upshot is that while courses in International Law used to be a lot like Constitutional Law, they will increasingly turn into Federal Courts. Constitutional Law, after all, has most often been concerned with questions of substantive right—Does the Due Process Clause protect abortion? Does the Dormant Commerce Clause prohibit certain forms of state regulation of business?—and International Law has frequently focused on similar questions under both human rights and trade agreements. But with the advent of supranational institutions that legislate, prosecute, and adjudicate, and the concomitant need to manage the relationship between those institutions and

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<sup>1</sup> Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430 (2003); see also Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 38 GEO. WASH. INT’L L. REV. (forthcoming 2008) (“This is a golden age for international dispute resolution. There are more courts covering more topics with more cases than ever before.”). For a useful schematic, see CESARE P.R. ROMANO, THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, THE INTERNATIONAL JUDICIARY IN CONTEXT: A SYNOPTIC CHART (2004), [http://www.pict-pecti.org/publications/synoptic\\_chart/Synop\\_C4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/Synop_C4.pdf).

<sup>2</sup> Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 97 [hereinafter Bradley, *Judicial Power*]; accord Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT’L L. 65, 66 (2007).

<sup>3</sup> See generally Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006) (discussing a rising tide of attempts to domestically enforce international tribunals’ judgments).

parallel institutions at the national level, International Law seems likely to become increasingly preoccupied with managing jurisdictional conflicts and developing rules for remedies and choice of law—the bread and butter of the domestic course in Federal Courts.<sup>4</sup>

International institutions with authority to legislate, prosecute, and adjudicate of their own volition necessarily raise questions about due process, judicial independence, and the delegation of authority ordinarily exercised by domestic governments. How those questions are answered will, in turn, affect more basic constitutional values of federalism, separation of powers, democratic accountability, and procedural fairness. One way to approach these questions is to measure the new supranational arrangements against domestic constitutional norms that guarantee fair procedure, separation of powers, and democratic accountability. In the United States, those norms include a general, if not-very-lively, principle of non delegation as well as several more specific principles, such as the textual strictures of the Due Process and Appointments Clauses and doctrinal limits on the allocation of federal judicial authority to non-Article III courts. Much good work has been done along these lines.<sup>5</sup> But these domestic constitutional provisions and principles were originally framed to address quite different problems, and they have evolved over time in ways that reflect largely domestic concerns. The awkwardness of bringing them to bear on contemporary supranational judicial institutions is reflected in Henry Monaghan's recent way of framing the question: "Does the 'ancient Constitution' of 1789, particularly its Third Article, and of 1791, particularly its Due Process Clause, impose any real limits upon the new, wholly unanticipated, supranational adjudicatory developments?"<sup>6</sup> It is unsurprising that, having framed the question in this way, Professor Monaghan concludes

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<sup>4</sup> See generally RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) [hereinafter HART & WECHSLER]. For a much more extended application of the "Federal Courts" paradigm to international adjudication, see Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005) [hereinafter Young, *Institutional Settlement*].

<sup>5</sup> See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

<sup>6</sup> Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 842 (2007).

that “any difficulties created by the Constitution for the emerging adjudicatory order will prove to be rather small beer.”<sup>7</sup>

I want to try a different approach in this Essay. While remaining agnostic about whether any given supranational regime violates the specific constitutional principles discussed in the existing literature, I agree that those principles map rather awkwardly onto the real concerns we have (or ought to have) about supranational institutions. In this sense, I think David Golove is right when he suggests that “[t]he considerations that are relevant to structuring the forms of domestic democratic government can provide at best only a starting point in thinking about how to structure . . . relationships . . . with other sovereign nations for the purpose of carrying out cooperative projects serving mutual interests and addressing common concerns.”<sup>8</sup> What I propose here is a set of statutory principles to regulate the delegation of authority to supranational adjudicatory institutions. Because they are formulated as a legislative proposal, these principles need not be teased out of constitutional provisions and doctrines formulated long ago for entirely different purposes. Our entrenched Constitution has long left considerable room for institutional innovation with respect to both foreign relations and, on the domestic side, managing the relations between two parallel systems of courts. We ought to use that flexibility to talk directly about how the interface between domestic and supranational courts *ought* to be structured.

I hasten to add, of course, that my particular proposals are tendered in the most tentative possible way. Hopefully, they will at least serve as a starting point for fruitful discussion of how we might integrate supranational adjudication into our existing judicial system.

#### I. THE CASE FOR A FRAMEWORK STATUTE

Scholars of constitutional law are often criticized for focusing too much on courts, to the exclusion of other institutional actors—legislators, executive actors, even “the People Themselves.”<sup>9</sup> One consequence of this judicial focus

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<sup>7</sup> *Id.*

<sup>8</sup> David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1701 (2003). As will be clear, however, I do think that domestic constitutional experience will often be relevant in determining how to structure supranational adjudicatory institutions.

<sup>9</sup> See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004) (emphasizing the role of the People); KEITH E. WHITTINGTON, *CONSTITUTIONAL*

is to take the non-constitutional law—the object of constitutional review—essentially as given; constitutional analysis tends to enter at the stage of the judiciary’s “sober second thought,” when legislative or executive policy has already been formulated.<sup>10</sup> Notwithstanding the oft-heard critique that our Constitution is too difficult to amend so as to take account of new developments,<sup>11</sup> constitutional scholarship is forever inventing new doctrines or adapting old ones to deal with the problems of the day. We take the law on which those constitutional doctrines will operate—for present purposes, our existing supranational organizations and the implementing legislation that governs how those organizations operate on the domestic legal system—as relatively fixed.

This judicial review orientation likely has a number of causes. Most constitutional scholars are lawyers by training, and we tend to see constitutional issues as courts see them. We are also likely to perceive the courts as “forums of principle”<sup>12</sup> that may be influenced simply by making a good argument, whereas legislative or executive action often depends on the mobilization of political forces to which scholars rarely have access. It may not *actually* be easier to convince a court to strike down the North American Free Trade Agreement (NAFTA) on delegation grounds than it would be get Congress to amend the treaty’s implementing legislation, but the processes by which one would go about pursuing the former course are certainly more familiar to most constitutional scholars than those involved in pursuing the latter.

The more basic cause, however, may have to do with a sense of the division of labor between constitutional and non-constitutional law. In the conventional view, constitutional law sets the boundary on a range of permissible legislative choices, but it has virtually nothing to say about how choices within this bounded area ought to be made.<sup>13</sup> For example, the delegation doctrine—if it

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CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) (discussing the construction of constitutional meaning in the political branches).

<sup>10</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25–26 (1962); cf. William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437, 458–61 (1998 Supp.) (arguing, conversely, that constitutionalizing legal questions tends to judicialize them as well).

<sup>11</sup> See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 159–66 (2006).

<sup>12</sup> See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

<sup>13</sup> See GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* 15 (2002) (observing that modern

even exists anymore, and if it applies to supranational delegations—requires that U.S. treaty-makers provide an intelligible principle for supranational delegates to follow;<sup>14</sup> Article III and the Appointments Clause may also place certain aspects of federal judicial and executive power off limits to delegation.<sup>15</sup> But as the metaphor of a boundary or frame suggests, these constraints nibble round the edges of the more basic problems: Precisely how much authority should supranational institutions exercise? And how should they be structured? Given the capacious nature of the limits imposed by the delegation doctrine and the textual limits just mentioned, constitutional lawyers may have to shrug their shoulders when we come to these more basic questions.

I suggest that we broaden our conception of “constitutional” law.<sup>16</sup> The primary function of a constitution is to “constitute” the government—to establish institutions, confer powers upon them, set the boundaries of their jurisdiction, and define rights that individuals may possess against government action.<sup>17</sup> In some legal systems, such as the British, whatever laws perform these functions are considered part of “the Constitution.”<sup>18</sup> And although the American system limits that appellation to a particular document that is

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constitutional lawyers tend “to see politics as *working within* a constitutional order rather than *working out* that constitutional order”).

<sup>14</sup> See, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). As the Court noted in *American Trucking*, “[i]n the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes,” *id.* at 474, and “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,’” *id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). As Curtis Bradley has recently noted, there are good reasons to think that the delegation doctrine might have more purchase when applied to delegations of *judicial* authority and when those delegations are to actors outside the domestic governmental process. See Bradley, *Judicial Power*, *supra* note 2, at 87–89. But even a more rigorous delegation principle would most likely leave a considerable range of institutional arrangements open to U.S. treaty-makers, and it is worth focusing on the constitutive questions existing *within* that range of constitutionally-permissible options.

<sup>15</sup> See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding that the 1978 Bankruptcy Act violated Article III by delegating judicial duties to non-Article III bankruptcy judges); *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 8 (D.C. Cir. 2006) (construing treaty to avoid constitutional questions that would arise if the treaty-makers had delegated binding rulemaking authority to a supranational body).

<sup>16</sup> See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408 (2007) [hereinafter Young, *Outside the Constitution*].

<sup>17</sup> See ADAM TOMKINS, *PUBLIC LAW* 3–6 (2003); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 152, 153–54 (Larry Alexander ed., 1998) (identifying seven features that define constitutions).

<sup>18</sup> See TOMKINS, *supra* note 17, at 7–14; see also Matthew S.R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 *AM. J. COMP. L.* 587 (2006) (discussing the constitution of New Zealand).

uniquely entrenched against change, it remains the case that most of the legal rules that constitute our government—that is, the legal rules that establish and limit our governmental institutions—exist outside the canonical text.<sup>19</sup> The organic statutes establishing the various federal administrative agencies, the Judiciary Acts that establish and delimit our judicial system, and the House and Senate rules for vetting and voting upon legislation—all of these are examples of our “constitution outside the Constitution.”<sup>20</sup>

This phenomenon is nowhere more salient than in the law governing the foreign relations of the United States. The canonical Constitution has relatively little to say about the conduct of foreign affairs.<sup>21</sup> The dominant separation of powers principle in the area, articulated by Justice Jackson in the *Steel Seizure Case*,<sup>22</sup> makes executive power largely a function of congressional action. According to Justice Jackson’s scheme, the President’s power is at its maximum when he acts with authorization from Congress, and at its minimum when he contravenes a legislative command.<sup>23</sup> For this reason, as Harold Koh has observed, foreign affairs powers are allocated through “framework statutes” such as “the Judiciary Act of 1789, the National Security Act of 1947, the War Powers Resolution of 1973, the Congressional Budget and Impoundment Control Act of 1974, the National Emergencies Act of 1976, and the International Emergency Economic Powers Act of 1977.”<sup>24</sup> Dean Koh defines such statutes as “laws that Congress enacts and the president signs within their zone of concurrent authority, not simply to ‘formulate policies and procedures for the resolution of specific problems, but rather . . . to implement

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<sup>19</sup> See generally Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

<sup>20</sup> See generally Young, *Outside the Constitution*, *supra* note 16.

<sup>21</sup> See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67 (1990) (“One cannot read the Constitution without being struck by its astonishing brevity regarding the allocation of foreign affairs authority among the branches.”).

<sup>22</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (adopting Justice Jackson’s analysis). The other crucial separation-of-powers case in foreign affairs law, *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), focused more on abstract political theory than on statutory frameworks governing the conduct of foreign relations. Justice Sutherland’s elaborately theoretical opinion seemed to ground national power in foreign affairs not so much in the Constitution itself but in pre-constitutional notions of powers inherent in sovereignty—a “constitution outside the Constitution” indeed. See generally Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999). More importantly, however, the actual result in *Curtiss-Wright* was to affirm Congress’s power to reallocate foreign affairs powers to the President through statutory delegation. See *Curtiss-Wright*, 299 U.S. at 318–23. That result is entirely consistent with *Youngstown*’s notion that the boundary between legislative and executive power is defined through legislation.

<sup>23</sup> *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

<sup>24</sup> KOH, *supra* note 21, at 69.

constitutional policies” such as the separation of governmental powers in foreign affairs.<sup>25</sup> Framework statutes “constitute” institutions and procedures of government in much the same way that the Constitution itself does.<sup>26</sup>

The Supreme Court dramatically underlined the importance of such statutes in *Hamdan v. Rumsfeld*<sup>27</sup>—one of the most vitally important foreign affairs cases in a generation. The critical issues in *Hamdan* involved interpreting not the Constitution itself, but the Uniform Code of Military Justice,<sup>28</sup> the post-September 11, 2001 Authorization to Use Military Force,<sup>29</sup> and the Geneva Convention on Treatment of Prisoners of War.<sup>30</sup> *Hamdan* vividly illustrates the extent to which critical constitutional boundaries, such as the line between executive and legislative authority over suspected war criminals, are defined by statute and treaty rather than by the text of the canonical Constitution.<sup>31</sup>

Thinking of the Constitution in this more capacious sense ought to lead constitutional scholars past an exclusive focus on judicially enforceable constraints on political action that are grounded in the canonical document. An international agreement like the NAFTA or the World Trade Organization (WTO) Agreement, as well as the domestic legislation implementing such agreements, performs a constitutional function: It creates institutions with the authority to make law and resolve disputes, much like Articles I and III of the Constitution do. These institutional arrangements, in turn, implicate constitutional values of separation of powers, federalism, democratic accountability, and individual rights. It makes sense, in other words, to think

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<sup>25</sup> *Id.* (quoting Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187 (1985)).

<sup>26</sup> See Casper, *supra* note 25, at 187–93 (discussing the role of framework legislation). The key difference, of course, is that such legislation is not *entrenched* against change to the same extent as constitutional provisions. See Young, *Outside the Constitution*, *supra* note 16, at 426–28, 448–61 (discussing the entrenchment issue). Elizabeth Garrett’s important recent work on framework legislation uses the term in a somewhat narrower sense, limited to statutes affecting the processes of deliberation and voting within Congress itself. See, e.g., Elizabeth Garrett, *Conditions for Framework Legislation*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 294 (Richard W. Bauman & Tsvi Kahana eds. 2006).

<sup>27</sup> 126 S. Ct. 2749 (2006).

<sup>28</sup> 10 U.S.C. §§ 801–946 (2006).

<sup>29</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>30</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>31</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050–52 (2005) (emphasizing the importance of legislative enactments in construing the scope of presidential authority); Young, *Outside the Constitution*, *supra* note 16, at 436–42 (discussing *Hamdan*).

of the design, interpretation, and administration of such agreements as raising constitutional issues, whether or not we think that canonical provisions and principles, like the Appointments Clause or the delegation doctrine, require or forbid international agreements to be structured in particular ways.

Constitutional lawyers have generally eschewed questions of institutional design, except on the rare and heady occasions when one is flown in to consult on a new constitution for some exotic island republic in the South Pacific. As I've already suggested, that omission stems from our tendency to see constitutional law as a set of hard-wired, largely immutable *constraints* on institutions rather than as extending to the structure and content of ordinary legislation within those constraints. But if ordinary legislation—like the NAFTA—frequently plays constitutive roles and implicates constitutional values, then the design of such institutional arrangements is itself a question on which constitutional lawyers may have something useful to say.<sup>32</sup> We need not focus simply on the constitutional constraints on the structure and operation of supranational institutions because the design of such institutions is itself, at bottom, a question of constitutional law.

## II. WHAT THE STATUTE SHOULD SAY

In proposing a framework statute to govern the relationship between domestic and supranational courts, it will help to have a specific example in mind. I focus here on investor arbitrations under Chapter 11 of the NAFTA, which requires signatory countries to abide by important substantive limitations in their treatment of foreign investors.<sup>33</sup> Unusually, Chapter 11 provides a private right of action for investors against signatory states for violations of their treaty.<sup>34</sup> Such cases are tried to an arbitral panel chosen by

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<sup>32</sup> See generally Young, *Outside the Constitution*, *supra* note 16 (suggesting that constitutional scholars should more broadly engage issues of institutional design).

<sup>33</sup> See NAFTA, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 107 Stat. 2057 (1993). Chapter 11 requires signatory countries to afford "national treatment" to investors from other signatory countries, art. 1102; to abide by a nonrelative "minimum standard of treatment," requiring that investors be treated "in accordance with international law, including fair and equitable treatment and full protection and security," art. 1105; and to avoid nationalization or "expropriation" of investments, art. 1110.

<sup>34</sup> See *id.* art. 1116. Although Chapter 11's private right of action remains somewhat unusual, direct private access to international dispute resolution seems to be waxing in importance across the domain of international law. See, e.g., Borgen, *supra* note 1, at 4 ("The dominant form of international dispute resolution has shifted from State versus State tribunals to mechanisms that allow non-State actors . . . to claim rights under international law and access fora to resolve conflicts concerning those rights."). The structural problems

the parties.<sup>35</sup> The decisions of these panels are binding on the parties, but the U.S. implementing legislation specifically provides that panel decisions have no direct domestic legal effect absent implementing measures by the U.S. political branches.<sup>36</sup> Christopher Borgen reports that, “[s]ince 1995, there have been about thirty-five NAFTA claims, roughly evenly split with Mexico, the United States, and Canada as defendants.”<sup>37</sup>

I want to propose, for purposes of discussion, amendments to both the underlying agreement and the American implementation legislation. Amendments to the agreement would replace the current system of arbitration panels with a permanent supranational court, having the following characteristics:

1. Nine members, three appointed by each of the signatory nations.
2. Judges would be required to have served previously on a national court of generalist jurisdiction (i.e., not a specialty court like the Federal Circuit or the Court of International Trade).
3. Judges would serve twelve year terms, subject to good behavior.
4. The authority of the court would be limited to answering questions certified to them by the national courts of the signatory nations.
5. Hearings in the supranational court would be open to the public.
6. Majority, concurring, and dissenting opinions would be published.
7. Opinions of the supranational court would have precedential effect for future deliberations by that court.

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presented by private rights like Chapter 11 are thus likely to be increasingly salient even outside the NAFTA context.

<sup>35</sup> See NAFTA, *supra* note 33, art. 1120 *et seq.*

<sup>36</sup> See, e.g., 19 U.S.C. § 3312(b)(2) (2006) (“No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the [NAFTA] agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.”). For a sampling of the debate over Chapter 11, see, for example, Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365 (2003); Renée Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229; Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, at A20; and PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY i–xi (2001), <http://www.citizen.org/documents/ACF186.PDF>.

<sup>37</sup> Borgen, *supra* note 1, at 15. Professor Borgen also notes that “[a]s of September 2007, the United States has not lost any cases under NAFTA Chapter 11.” *Id.* at 16 n.72. But there have been some very close calls. See, e.g., *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); *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003); Young, *Institutional Settlement*, *supra* note 4, at 1170–77 (describing the *Mondev* and *Loewen* cases).

The proposal would also amend the U.S. implementing legislation giving domestic effect to the NAFTA. The amendments would provide as follows:

1. Except as superseded by valid federal legislation, provisions of the NAFTA would have direct effect in domestic courts. Private rights of action under Chapter 11 would be subject to the exclusive jurisdiction of the federal courts.
2. In any case in which the NAFTA is invoked, and the correct application of the NAFTA is not clearly established under existing precedent, the domestic court would be required to certify the relevant questions to the supranational NAFTA court.
3. Upon receipt of an answer to the certified questions, the domestic court would be required to defer to the NAFTA court's interpretation, so long as the domestic court finds the NAFTA court's interpretation to be reasonable.
4. In any case in which the NAFTA is invoked by a party, the domestic court would be required to furnish notice to the Office of the U.S. Trade Representative (USTR), and to afford the USTR an opportunity to intervene in the proceedings or participate as *amicus curiae* if it should so desire.
5. If the interpretation of the NAFTA offered by the USTR should conflict with the opinion of the NAFTA court, then the domestic court should decide for itself which is the more reasonable interpretation of the agreement.

These proposals are meant to operationalize three positions that I developed in a more abstract form in earlier work. First, the proposals shift from a status quo in which the supranational court has exclusive jurisdiction to consider questions under an international agreement to a concurrent jurisdiction model in which domestic courts play a primary role.<sup>38</sup> Second, they make clear that the international agreement is "shared law"<sup>39</sup> among the various national and supranational courts with jurisdiction to construe it; no single court enjoys interpretive supremacy over the others.<sup>40</sup> Third, they endeavor to address some of the institutional weaknesses that currently plague supranational tribunals under the NAFTA.<sup>41</sup> The remainder of this Essay briefly summarizes my reasons for resolving these issues as I have in the proposal.

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<sup>38</sup> See Young, *Institutional Settlement*, *supra* note 4, at 1221–29.

<sup>39</sup> *Id.* at 1229.

<sup>40</sup> See *id.* at 1229–36.

<sup>41</sup> See *id.* at 1243–48.

### A. *Concurrent Jurisdiction*

The current implementing legislation for the NAFTA (and for the WTO) takes great pains to “wall off” the domestic legal system from decisions by supranational tribunals.<sup>42</sup> Those decisions have no direct effect on domestic law absent further action by the U.S. political branches.<sup>43</sup> This arrangement is intended to protect U.S. sovereignty from international actors. Hence, “[c]onstitutionalist’ or ‘revisionist’ scholars” of foreign affairs law, for whom domestic sovereignty remains a central value, “generally advocate political branch rather than judicial control over the domestic implementation of international legal obligations.”<sup>44</sup> The fear is that if domestic courts are allowed to construe international obligations without specific authorization by the political branches, those courts will become, in Richard Falk’s terms, “agents of the international order.”<sup>45</sup>

Many scholars view Professor Falk’s vision as a desirable one, and they have accordingly proposed engaging national courts in the enforcement of international law in ways that the NAFTA implementing legislation forecloses.<sup>46</sup> One might also object to such provisions from a more nationalist perspective, however. Even though they are designed to insulate the domestic legal system from supranational decisions, “walling off” measures seem unlikely to do so effectively. Once a supranational tribunal has found a U.S. policy to violate the NAFTA, the national political branches will face heavy pressure to take action to accommodate U.S. law to the requirements of the international agreement, as interpreted by the supranational court.<sup>47</sup>

If we believe that supranational decisions will, as a practical matter, exert an important influence over the domestic legal system, then the NAFTA implementing statute has a crucial drawback. By prohibiting domestic courts from construing and applying the agreement, it effectively forecloses those

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<sup>42</sup> *Id.* at 1229.

<sup>43</sup> *See supra* note 36.

<sup>44</sup> Bradley, *Judicial Power*, *supra* note 2, at 59–60.

<sup>45</sup> RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 72 (1964).

<sup>46</sup> *See, e.g.*, ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 66–69 (2004).

<sup>47</sup> *See, e.g.*, Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 *TEX. INT’L L.J.* 527, 534–36 (2003); *see also* George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 *AM. J. COMP. L.* 463, 478 (Supp. 1998) (observing that, notwithstanding similar legislation foreclosing direct effect for WTO rulings, “the executive branch has shown its readiness to comply with adverse WTO rulings”).

courts from influencing the developing interpretation of the agreement.<sup>48</sup> That leaves the treaty to be construed exclusively by supranational or foreign actors who may or may not have perspectives sympathetic to our own.<sup>49</sup> Moreover, the current legislation forces interpretation to occur in institutions cut off from local conditions, rather than in domestic courts sensitive to the day-to-day pragmatics of the domestic legal environment.<sup>50</sup>

Denying the domestic courts the power to construe and apply international law is a departure from the main thrust of past practice. As Professor Monaghan has noted, “American courts have had a long history of enforcing international legal norms, but in so doing they have generally determined the content of that law for themselves, as well as its domestic consequences.”<sup>51</sup> The Supreme Court recently insisted on the right of domestic courts to “say what the [international] law is” in *Sanchez-Llamas v. Oregon*,<sup>52</sup> which addressed whether domestic courts were bound by the International Court of Justice’s (ICJ) interpretation of a treaty:

If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law “is emphatically the province and duty of the judicial department,” headed by the “one supreme Court” established by the Constitution . . . . Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.<sup>53</sup>

Under the NAFTA implementing legislation, of course, Congress quite deliberately denied domestic courts this power to give the NAFTA “effect as federal law” and, in the process, to determine the NAFTA’s meaning.

There are reasons to believe that the American judiciary may offer a valuable perspective on the sort of property rights and free trade protections

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<sup>48</sup> Cf. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (considering the authority of state courts to apply federal law as an important aspect of state sovereignty).

<sup>49</sup> See, e.g., *Movsesian*, *supra* note 2, at 93 (noting that “international courts lack the ties of civic identity, history, and legal culture that often make the decisions of domestic courts acceptable to national communities”).

<sup>50</sup> See *id.* at 94–95.

<sup>51</sup> Monaghan, *supra* note 6, at 843; see also RESTATEMENT (THIRD) OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 cmt. b (1987) (“The [national] courts . . . have the final say as to the meaning of an international agreement insofar as it is law of the United States applicable to cases and controversies before the courts.”).

<sup>52</sup> 126 S. Ct. 2669 (2006).

<sup>53</sup> *Id.* at 2684; see also *Movsesian*, *supra* note 2, at 108–09 (refuting claims in the *Sanchez-Llamas* dissent that past decisions had deferred to the ICJ).

embodied in the NAFTA. In particular, our courts' institutional experience with open-ended principles of freedom of contract<sup>54</sup> and burden analysis under the dormant Commerce Clause<sup>55</sup> could inject an important note of caution in the development of judicial review under free trade regimes. The more basic point, however, is a nationalist one: International law seems more likely to develop in ways that are not to our liking if our courts do not participate in the enterprise.

To be sure, provisions denying domestic courts the authority to construe international law directly do guard against Falkian co-option of the national judiciary by guaranteeing a "democratic filter" for international norms.<sup>56</sup> The alternate risks of nonparticipation and co-option must be weighed against one another, but there is no reason to think that the balance will tip in the same direction in each discrete area of international cooperation. One virtue of the statutory approach advocated here—as opposed to formulating a general principle that domestic courts always or never get to apply international norms—is that it can be fine-tuned to maximize domestic judicial participation in those areas where the political branches think domestic courts can influence the development of international norms in ways that reflect U.S. interests. In those areas where direct application of international norms is likely to empower domestic courts to avoid the constraints of national law and politics, by contrast, domestic jurisdiction can be constrained more narrowly.

The proposal confers exclusive federal court jurisdiction to hear private rights of action under Chapter 11, reflecting the conventional assumption that guaranteeing a federal forum better promotes uniform and respectful treatment of foreign litigants.<sup>57</sup> I have made no effort to exclude the possibility of state

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<sup>54</sup> Compare, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law regulating the hours of bakers as an unreasonable legislative interference with freedom of contract), with *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court used the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

<sup>55</sup> Compare, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (striking down an Iowa statute limiting the length of trucks on state highways on the ground that it imposed an excessive burden on interstate commerce), with *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) ("I do not know what qualifies us to make . . . the ultimate (and most ineffable) judgment as to whether, given importance-level *x*, and effectiveness-level *y*, the worth of the statute is 'outweighed' by impact-on-commerce *z*.").

<sup>56</sup> See Bradley, *Judicial Power*, *supra* note 2, at 103.

<sup>57</sup> HART & WECHSLER, *supra* note 4, at 426 (citing uniformity and concerns about a lack of parity between state and federal courts as the most frequent reasons to create exclusive federal jurisdiction). This assumption is reflected in the provision for alienage jurisdiction in Article III, for example. Whether the

court jurisdiction entirely, however. Such an effort would require special removal provisions, for example, whenever a foreign investor raised NAFTA obligations as a defense to the enforcement of a state regulation. As I have demonstrated elsewhere, the Framers of Article III were at pains to make a federal forum available in most cases involving foreign nationals, but they did not make federal jurisdiction exclusive, and they plainly contemplated that the state courts would hear important classes of cases implicating foreign affairs interests.<sup>58</sup>

Indeed, it would be plausible to scrap the proposal's provision for exclusive jurisdiction over NAFTA-created claims in favor of concurrent state and federal jurisdiction over *all* NAFTA matters.<sup>59</sup> As Judith Resnik has pointed out, state (and local) institutions are increasingly playing a role in the formulation and dissemination of international law.<sup>60</sup> Simply as a practical matter, there are international agreements that will become dead letters in the absence of state judicial enforcement. Full protection of the right of foreign nationals accused of crimes to consult their consulate,<sup>61</sup> for example, will surely require enforcement by state courts hearing prosecutions in the first instance. As the volume of investor disputes under trade agreements grows, availability of a state forum might likewise prove a boon to treaty enforcement. Moreover, as I have argued elsewhere, a state court role in interpreting federal law serves important diffusion-of-power values.<sup>62</sup> A significant degree of uniformity would remain attainable through the U.S. Supreme Court's appellate jurisdiction.<sup>63</sup>

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assumption is actually warranted under current conditions is, of course, a complex empirical question that I cannot hope to address here.

<sup>58</sup> See Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 426–31 (2002).

<sup>59</sup> See HART & WECHSLER, *supra* note 4, at 427 (noting that concurrent state and federal jurisdiction, subject to a right of removal to federal court, is the most common jurisdictional configuration for federal claims).

<sup>60</sup> See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 1 (2007).

<sup>61</sup> See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, art. 36; see also Young, *Institutional Settlement*, *supra* note 4, at 1164–70 (describing problems arising with respect to the enforcement of this treaty).

<sup>62</sup> See Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775 (2007).

<sup>63</sup> 28 U.S.C. § 1257 (2006).

### B. *Dualism and Shared Law*

The proposed NAFTA regime would allow multiple courts, both national and supranational, to interpret the agreement without according interpretive supremacy to any single tribunal.<sup>64</sup> It would encourage the supranational court to play a coordinating role by requiring that domestic courts certify doubtful questions and defer to the supranational court's answers. To an extent, the proposed NAFTA court's role is analogous to that of the European Court of Justice (ECJ), which hears "preliminary references" of European law questions arising in cases in the national courts.<sup>65</sup> The proposal departs from the ECJ model, however, by denying the NAFTA court power to bind national courts.<sup>66</sup>

By leaving domestic courts the option to disagree with the NAFTA court, the proposal follows the "dualist" approach of Chief Justice Roberts's majority opinion in *Sanchez-Llamas*.<sup>67</sup> On the other hand, the proposal would not treat the NAFTA court's interpretation of the treaty as having only *persuasive* authority. Rather, the supranational decision would have independent weight—albeit not *conclusive* weight—in addition to the persuasive force of its reasoning.<sup>68</sup> In this sense, the proposal resembles Justice Breyer's comity-based dissent in *Sanchez-Llamas*, which seemed to place independent value on respecting the ICJ's judgment above and beyond the persuasive force of ICJ's arguments.<sup>69</sup> Under the proposal, supranational interpretations are

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<sup>64</sup> To the extent that state courts interpret the NAFTA as described in the preceding section, they would be bound by interpretive decisions of the U.S. Supreme Court. For domestic purposes, after all, NAFTA is federal law.

<sup>65</sup> See Treaty Establishing the European Community art. 234 (ex art. 177), Nov. 10, 1997, O.J. (C 340) 173 (1997); 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, 425–26 (1996).

<sup>66</sup> See Cohen, *supra* note 65, at 421 (noting that "a preliminary ruling by the European Court is a supreme rule of decision for the courts of Member States"); GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN UNION LAW* 354 (2d ed. 2002).

<sup>67</sup> See 126 S. Ct. at 2684 (denying that ICJ rulings are "conclusive on our courts"); Movsesian, *supra* note 2, at 88–90 (characterizing the majority opinion in *Sanchez-Llamas* as "dualist" in its approach).

<sup>68</sup> See generally Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 156 (2005) (arguing that a legal practice is "authoritative," in the jurisprudential sense, if it "carries weight that is independent of the underlying reasons for that practice").

<sup>69</sup> See *Sanchez-Llamas*, 126 S. Ct. at 2705 (Breyer, J., dissenting) ("In sum, I find strong reasons for interpreting the Convention as sometimes prohibiting a state court from applying its ordinarily procedural default rule to a Convention violation claim. The fact that the ICJ reached a similar conclusion in *LaGrand* and *Avena* adds strength to those reasons."); see also Movsesian, *supra* note 2, at 101–03 (discussing Justice Breyer's dissent as an example of a "comity" model attributing authoritative weight to supranational interpretations).

authoritative but defeasible, and the national courts retain the final say as to whether the presumption has been overcome.

The deference prescribed here is analogous to the deference that domestic courts pay to administrative agencies under the *Chevron* doctrine.<sup>70</sup> Indeed, I would argue that in applying the statutory “reasonableness” test, domestic courts should be *less* deferential than they are to domestic administrative agencies under *Chevron*.<sup>71</sup> This would reflect the fact that the scheme does not delegate authority to the supranational court to act “with the force of law,”<sup>72</sup> as well as the lack of mechanisms of legislative oversight and executive control that provide accountability for domestic agencies. In any event, it is also important that domestic courts would retain control over the often vital application of the agreement to the facts of individual cases.

The proposed framework would lack a single court with authority to resolve conflicts in the interpretation of the international agreement. It thus follows a “shared law” model, rather than one of interpretive supremacy.<sup>73</sup> Any shared-law arrangement will raise concerns about maintaining the uniformity of the underlying regime. But an interpretive hierarchy subjecting the U.S. federal courts to appellate control by a supranational tribunal would raise thorny doctrinal problems under Article III;<sup>74</sup> more fundamentally, it would put a great deal more pressure on the competence and legitimacy of the supranational tribunal.

Probably the best-known example of shared law for American lawyers is the general commercial law, or law merchant, which both federal and state

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<sup>70</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring courts to defer to an agency’s constructions of a statute it administers if the statutory provision is ambiguous and the agency’s construction is reasonable).

<sup>71</sup> See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”); see also Monaghan, *supra* note 6, at 850 (suggesting that the “respectful consideration” accorded by the *Sanchez-Llamas* court to the ICJ’s ruling was equivalent to *Skidmore* deference). The problem with *Skidmore* deference as an alternative, of course, is that it “can mean all things to all people.” Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. (forthcoming 2008).

<sup>72</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (limiting *Chevron* deference to those circumstances in which Congress has delegated to the agency authority to act with “the force of law”); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (same).

<sup>73</sup> See Young, *Institutional Settlement*, *supra* note 4, at 1229.

<sup>74</sup> See *Hayburn’s Case*, 2 U.S. (3 Dall.) 8 (1792) (suggesting that Article III forbids subjecting the judgments of federal courts to revision by actors outside the federal judicial branch).

courts applied under the regime of *Swift v. Tyson*.<sup>75</sup> Experience under that regime suggests that multiple courts can maintain acceptable levels of uniformity even in the absence of a single appellate arbiter with authority to resolve conflicts, so long as the subject matter is limited in scope and one court is able to play a coordinating role.<sup>76</sup> The proposal is designed to meet those criteria in the context of the NAFTA: the subject matter is limited to interpreting the NAFTA itself, and even a watered-down version of *Chevron* deference should be sufficient to enable the supranational tribunal to guide and coordinate interpretations by domestic courts. The uniformity problem obviously becomes more difficult if we seek to generalize to contexts involving more national players and substantively broader agreements.<sup>77</sup>

More fundamentally, any dualist approach leaving national courts with authority to reject supranational interpretations is likely to draw charges of parochialism.<sup>78</sup> This is likely true notwithstanding the proposal's incorporation of presumptive deference to the NAFTA court. Such concerns may recede if I am right that national courts can maintain a generally high level of uniformity under a shared-law regime. But at the end of the day, "parochialism" is just a pejorative label for the view that national courts have legitimacy advantages over supranational ones as well as superior expertise in adapting international law to the domestic legal regime. I would need to see a much more impressive track record for supranational courts than we have to date before becoming willing to give those domestic advantages up. And to the extent that such perceptions are widely shared in the domestic community, dualism and shared law may be necessary to render the international project acceptable. As Mark Movsesian points out, the dualist insistence on national control may "minimize[] the occasion for nationalist backlashes that can only lessen the beneficial influence of international courts."<sup>79</sup>

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<sup>75</sup> 41 U.S. (15 Pet.) 166 (1842). For an exploration of the operation of the general law regime, see William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

<sup>76</sup> See Fletcher, *supra* note 75, at 1515; see also Young, *Institutional Settlement*, *supra* note 4, at 1233–36 (applying Judge Fletcher's analysis to the problem of supranational courts).

<sup>77</sup> See *infra* Part III.

<sup>78</sup> See, e.g., Louis Henkin, *Implementation and Compliance: Is Dualism Metastasizing?*, 91 AM. SOC'Y INT'L L. PROC. 504, 517 (1997) (claiming that dualism rests upon "anachronistic . . . isolationism and unilateralism").

<sup>79</sup> Movsesian, *supra* note 2, at 70.

### C. Restructuring the Supranational Court

My proposed replacement for the current system of arbitral panels is designed to meet three frequent criticisms. The first is that trade panels, typically composed of experts on the subject of international economic law, are biased toward the promotion of free-trade values over other competing values, such as environmental protection.<sup>80</sup> That criticism resonates with the U.S. federal judiciary's traditional reluctance to create specialist courts.<sup>81</sup> The proposal seeks to address this problem by requiring that judges appointed to the supranational tribunal have at least some judicial experience on a generalist court.<sup>82</sup>

The second criticism is that NAFTA panel decisions are a ticket for this day and train only. Because they sit to decide only a single case, they are undisciplined by the prospect of having to live with the precedential force of their rulings in future cases.<sup>83</sup> Institutional continuity seems particularly important in a period when supranational and domestic courts must work out rules and doctrines governing their relations with one another; in such circumstances, repeat players are more likely to take a balanced view of the competing institutional imperatives and to invest time and other resources in the development of workable interjurisdictional rules.<sup>84</sup> Hence, the proposal would constitute a permanent supranational court whose members serve extended terms.

Finally, supranational institutions are often criticized for being insufficiently transparent, both with respect to the selection of their

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<sup>80</sup> See, e.g., David W. Leebron, *The Boundaries of the WTO: Linkages*, 96 AM. J. INT'L L. 5, 22 (2002) (suggesting that WTO personnel will have a "natural inclination" to favor liberal trading rules over competing values).

<sup>81</sup> See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 147–60 (1985) (opposing proposals for specialized federal courts).

<sup>82</sup> Some NAFTA panels under the current regime have, in fact, included generalist judges. The panel in *Loewen*, for example, included not only Abner Mikva, a respected former judge of the D.C. Circuit, but also Sir Anthony Mason, former Chief Justice of the Australian High Court, and Lord Michael Mustill, a former British law lord. See *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003). *Loewen* shows that the proposed requirement is unlikely to be a panacea, as the panelists' generalist backgrounds did not prevent them from showing an extraordinary lack of deference to the state courts' rulings in the case. See *id.*

<sup>83</sup> See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2099 (2004) (criticizing the lack of "'institutional' continuity" under NAFTA Chapter 11).

<sup>84</sup> *Id.*; Young, *Institutional Settlement*, *supra* note 4, at 1245–46.

membership and the processes by which they do business.<sup>85</sup> As Curtis Bradley notes, appointments to supranational courts typically do not have “nearly as much transparency or public deliberation as with domestic judicial appointments.”<sup>86</sup> Moreover, serious concerns exist about national bias by supranational judges.<sup>87</sup> My proposed statute here would shift front-line adjudicative authority to domestic judges who are publicly vetted and subject to all sorts of domestic institutional constraints. The bias issue is more tricky, of course: Using domestic courts avoids the problem of foreign judges potentially biased against U.S. interests, but obviously creates a risk that foreigners will distrust the decisions of national tribunals. It should at least help on this score, however, that the domestic courts in this country have considerable guarantees of judicial independence and a long record of willingness to buck the interests of domestic political actors.<sup>88</sup>

On the process side, proceedings before NAFTA tribunals are not generally public, and opinions can be hard to find. The proposal advanced here would open hearings to the public and require publicly available written opinions. It also discourages the phenomenon, common in some international and foreign courts, of suppressing concurring and dissenting views. All of this is meant to promote the discipline of written reason-giving and public criticism.<sup>89</sup>

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<sup>85</sup> See, e.g., Lerner, *supra* note 36, at 284–86 (criticizing the current rules limiting access to NAFTA proceedings).

<sup>86</sup> Bradley, *Judicial Power*, *supra* note 2, at 100 (citing Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 277–78 (2003)); see also Movsesian, *supra* note 2, at 92–93 (“Typically, international organizations far removed from national communities appoint international judges. These organizations use selection procedures that are opaque or even secretive . . .”) (internal quotation marks omitted).

<sup>87</sup> See, e.g., Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).

<sup>88</sup> See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (striking down the Bush Administration’s policy of trying suspected terrorists before military commissions).

<sup>89</sup> See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1271, 1374–75 (1995) (emphasizing the discipline imposed on courts by the need to produce reasoned written opinions). The more discursive nature of domestic opinions, in comparison to those of many supranational tribunals, is not simply a function of transparency. Much of it may be attributable to differences between the common law tradition of Anglo-American courts and the civil law roots of many supranational institutions. Such gaps are unlikely to be easily bridged. To the extent that domestic rules of deference accord only *persuasive* weight to supranational rulings, however, supranational tribunals might be encouraged to spend more time explaining the rationale underlying their rulings.

## III. BEYOND THE NAFTA

By focusing on NAFTA adjudication here, I have so far avoided the difficult question of whether the law governing the relationship between domestic and supranational courts should be agreement-specific, with different arrangements for different treaty regimes, or general, with one framework statute governing all interactions between domestic and supranational tribunals. That is a difficult question, in part because some arrangements will work best for agreements like the NAFTA, with a relatively small number of parties that enjoy close relations, while others will be more appealing for agreements among hundreds of less familiar parties. In the former case, treaty partners may be more familiar with and willing to trust the U.S. domestic courts to play a prominent role in dispute resolution, and the U.S. may be willing to grant reciprocal concessions to the domestic courts of its partners. Both dimensions of trust become considerably more doubtful as we proliferate the number of parties to the supranational regime.

A general statute governing the role of domestic adjudication under multiple treaty regimes would likewise have to confront the radical differences that exist among supranational adjudicatory institutions.<sup>90</sup> The level of deference accorded to the supranational court's interpretations of the underlying treaty, for example, might need to vary considerably depending upon the institutional characteristics of the particular supranational court at issue.<sup>91</sup> It makes little sense to accord the U.N. Human Rights Commission, for example, the same degree of deference that we might give to the ICJ. One might finesse the problem by instructing domestic courts to employ a flexible, *Skidmore*-type rule that takes into account the institutional characteristics of the particular international tribunal. To do that, however, is to largely sacrifice any advantage of uniformity and predictability one might have hoped to gain by drafting a general supranational adjudication statute.

A second, even more vexing question concerns whether the interjurisdictional rules under a particular agreement must be the same for all parties to the regime, or whether those rules may vary according to the different capacities of the various domestic legal systems with which the supranational adjudicator must interact. The Legal Process Tradition has long

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<sup>90</sup> These differences reflect an even more fundamental divergence in levels of legalization among international norms in different areas. See Borgen, *supra* note 1, at 9.

<sup>91</sup> See Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 792 (2002).

suggested that the allocation of decisionmaking authority should be, in large part, a function of the institutional capacities of the relevant actors.<sup>92</sup> From this perspective, radical variations in the institutional capacities of different domestic legal systems at least arguably should be reflected in different interjurisdictional rules for each system.<sup>93</sup> For much of the international law community, on the other hand, this sort of variable deference regime smacks of pernicious “double standards.”<sup>94</sup> A more practical objection would be that, given the immense diversity of domestic legal regimes, a set of injurisdictional rules that purported to take account of variations in institutional capacity would be incoherent.

It is hard to imagine that the work of constructing a viable set of interjurisdictional rules can proceed without some effort to unify the field. In domestic law, we generally do not have multiple abstention doctrines or habeas corpus regimes that apply to different state judicial systems.<sup>95</sup> And while American administrative law does accord different degrees of deference to different agencies in some circumstances,<sup>96</sup> and the procedures required for agency action under the Administrative Procedure Act may vary according to the organic statute governing each agency,<sup>97</sup> there remains a sense that the field functions best when it can be regarded as a coherent regime operating across multiple subject matters. Indeed, one significant impediment to rational discussion of the interjurisdictional problem in foreign affairs law today is that the different regimes are so numerous and so various that few observers—much less the people who have to negotiate, draft, and administer the agreements—can claim the breadth and depth of knowledge to think systematically about the field.<sup>98</sup> Under the circumstances, drafting an interjurisdictional statute to solve a narrower set of problems may be the best

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<sup>92</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 158 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>93</sup> See generally Young, *Institutional Settlement*, *supra* note 4, at 1236–43.

<sup>94</sup> See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1485–86 (2003) (characterizing the view that some domestic legal systems deserve more deference than others as a form of American “exceptionalism”).

<sup>95</sup> *But see* *Gibson v. Berryhill*, 411 U.S. 564 (1973) (refusing to require *Younger* abstention where the state judicial system offered an inadequate remedy); 28 U.S.C. § 2261 (2006) (providing expedited procedures for habeas proceedings in capital cases, applicable only in states meeting certain federal criteria for provision of effective defense counsel).

<sup>96</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (deferring under *Chevron* only to those agencies to whom Congress has delegated authority to act “with the force of law”).

<sup>97</sup> See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 199 (3d ed. 2004).

<sup>98</sup> The present author certainly makes no such claim.

we can do, but that approach itself contributes to the proliferation of diverse interjurisdictional regimes.

#### CONCLUSION

The proposal here, of course, is simply meant as a starting point for discussion of what the relationship between supranational and domestic judicial institutions ought to look like. The broader point is that such a proposal may offer a readier step toward this ultimate question than a focus on particular constitutional *constraints* on supranational delegation. I do not mean to disparage the importance of such constraints or to suggest that such constraints should not continue to bind us in our contemporary environment of legal globalization. What I do suggest is that the broad question of institutional design is also a constitutional question.

The usual focus on a fairly narrow set of constitutional objections to supranational adjudication—e.g., the nondelegation doctrine and the Appointments Clause—may be obscuring the extent to which basic constitutional values are *pervasively* at stake in the design of supranational institutions. These values include federalism, separation of powers, democratic accountability, and procedural fairness. Any number of institutional configurations might be constitutionally “permissible” in the sense that no domestic court would strike them down, but that hardly means that every possible configuration would serve these constitutional values equally well. International law is “constituting” a new set of institutions on top of our existing structures, much like the advent of the national administrative state grafted a new set of institutions on top of the old Constitution in the last century. It is time for constitutional scholars to stop nibbling round the edges of the supranational project and give their full attention to the constitutional design issues at its core.