

# The Trouble with Global Constitutionalism

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## I. INTRODUCTION

It is becoming more and more obvious that those of us who study the American structural constitution need to broaden our horizons. There are a lot of reasons for this. One is the longstanding—if also long-neglected—value of comparative insights from the constitutional experience of other countries. Another is the fact that you tend to get invited on better trips if you do comparative or international law. What I want to talk about today, however, is a more fundamental set of reasons lurking within the title of this symposium. By “globalization,” we might mean the blurring of the line between “domestic” and “international” concerns in areas from economic policy to the environment to human rights.<sup>1</sup> “Judicialization,” on the other hand, signifies a broad change in the way that international law is created and enforced—by the establishment of supranational legislative and interpretive bodies, on the one hand, and sometimes by the direct effect of international norms in domestic fora on the other.<sup>2</sup> These tendencies make it increasingly incomplete to think about the institutional balances of federalism and separation of powers in their American context, without also paying heed to the international context in which our institutions operate.

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1. See, e.g., Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 650–51 (2002).

2. See, e.g., Robert Hudec, *The Judicialization of GATT Dispute Settlement, in WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE* 9 (M. Hart & D. Steger eds., 1990); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295.

My topic today is “global constitutionalism,” which is an awfully vague and possibly sinister term. I do not mean to conjure up images of black helicopters disgorging hordes of blue-helmeted UN troops on the Texas capitol lawn here in Austin.<sup>3</sup> What I mean by “global constitutionalism” is that international norms are increasingly called upon to play the role that *constitutional* principles play in the domestic legal order. This has been true for some time in the area of international human rights law, which has long striven to protect individuals against governments in much the same way that our own Bill of Rights protects Americans. But international law is more recently coming to overlap with the real heart of constitutional law—the part that *constitutes* a government by setting up structures for the legislation, interpretation, and enforcement of legal rules. The World Trade Organization agreement, for example, does not simply prescribe rules governing international trade; it also sets up quasi-legislative procedures and adjudicatory institutions for interpreting and enforcing those rules.<sup>4</sup>

Global constitutionalism has the potential to profoundly alter domestic constitutional balances governing the making and enforcement of American law. When I was little we learned how law was made in America from a three-minute cartoon short called “I’m Just a Bill.”<sup>5</sup> (All the kids saw this because they broadcast it in between Saturday morning cartoons in a futile attempt to keep our brains from rotting.) The cartoon began with a piece of legislation named Bill, who was “sittin’ here on Capitol Hill” in hopes of becoming a law someday. We followed him through committees and floor votes in both houses of Congress until the glorious moment when he was signed by the President and became a law. But we also knew that most of Bill’s colleagues—other bills, on other subjects—didn’t make it. Thus did everyone learn the rigorous lawmaking gauntlet that Article One of the Constitution prescribes for federal legislation.

“I’m Just a Bill” was incomplete even before the Lexus met the olive tree.<sup>6</sup> Many of us did not realize until we read Justice White’s dissent in *INS v. Chadha*<sup>7</sup>—many, many years later—that most federal law is not made by Congress but by federal administrative agencies.<sup>8</sup> And none of the Schoolhouse Rock cartoons on American government said a word about federalism and state governments—something I’ve always chalked up to a sinister conspiracy by East Coast liberals to discredit the remnants of “states’ rights.” But despite the oversimplifications, the two basic truths that Bill taught us remained valid: law in this country is made through an intricate, carefully balanced process that is deliberately designed to be difficult to navigate. And the actors in that process are all ultimately accountable both to each other and to the American people.<sup>9</sup>

Globalization has the capacity to change those two basic truths about American law. Our system has relied on institutional checks and balances and popular accountability to protect liberty without, by and large, imposing many substantive limits on what government

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3. Cf. *Free Fire at the United Nations*, WASH. POST, July 10, 2001, at A20 (discussing “the usual paranoid fantasies about international shock troops in black helicopters”). For an example of such concerns, see *Little Black Helicopter Page*, at <http://www.sss.org/lbh> (last visited Mar. 3, 2003) (asserting that “the Little Black Helicopters are aircraft used by the United Nations to prepare for a total [t]akeover of the United States”). I *think* this site is tongue-in-cheek, but it’s sometimes hard to tell.

4. See, e.g., JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 58–73 (2d ed. 1997).

5. You can still get it on video. See *SCHOOLHOUSE ROCK!—AMERICA ROCK* (Walt Disney Home Video 1973).

6. Cf. THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* (2000).

7. 462 U.S. 919 (1983).

8. See *id.* at 985–86 (White, J., dissenting) (“For some time, the sheer amount of law . . . made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”).

9. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339–42 (2001).

may do. My basic argument is that because supranational lawmaking operates outside those systems of checks and balances and accountability, it risks undermining our Constitution's institutional strategy. Global lawmaking may circumvent the constitutional lawmaking structure entirely, as when customary international law is argued to have direct effect in American courts. Or it may change the dynamics of the domestic lawmaking process, as where the WTO agreement requires national implementation of rules formulated on the international plane. Finally, globalization also proposes to change the dynamics of the domestic law *enforcement* structure—for example, by allowing circumvention of norms of prosecutorial accountability and domestic procedural rights of criminal defendants by international courts.

I want to emphasize at the outset that this discussion is not intended as a diatribe against globalization and international lawmaking institutions. My own education in this area is frankly not far enough advanced to support strong normative conclusions. For the present, my aim is largely descriptive: I want to identify some ways in which globalized lawmaking is changing not simply the structure of our Constitution but our Constitution's basic strategy for maintaining itself. Without condemning these changes outright, I will suggest that a substantial burden of proof rests on those who would replace our institutional structure with something different. And finally I will suggest some different routes along which efforts to maintain balance and accountability in a globalized world might proceed.

## II. SUBSTANCE, PROCESS, AND THE AMERICAN CONSTITUTIONAL STRUCTURE

I want to start out with a basic distinction between substantive and procedural limits on government. This dichotomy oversimplifies in all kinds of ways—and the distinction between “substance” and “procedure” has notorious gray areas—but I think it will do for present purposes. The line that I want to draw is between constitutional restrictions on what laws can be made and restrictions on the *way* those laws are made. A constitutional rule that no law may be made restricting abortion is a substantive restriction; a rule that no law may be made without passing both Houses of Congress and being signed by the President is procedural.

One complication that I cannot assume away for present purposes is that whether a constitutional restriction is substantive or procedural often depends on our frame of reference. Take, for instance, a rule that Congress may not invade the reserved powers of the states by making rules about family law.<sup>10</sup> From the federal government's perspective, this is a *substantive* restriction—the limit on federal power turns on the subject matter of the law being made, not on the *way* in which it is made. But from the perspective of individuals, the restriction is procedural—it means simply that rules about family law must be made by state governments, not the national one. Since I will be discussing federalism rules mainly from the perspective of guarantees of state autonomy, rules like my hypothetical restriction on federal family law measures will generally be substantive for purposes of my analysis.

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10. *Cf.* *United States v. Lopez*, 514 U.S. 549, 564 (1995) (suggesting that family law remains an area of exclusive state power); *id.* at 615 (Breyer, J., dissenting) (seeming to accept this postulate). I do not mean to suggest that this idea of “separate spheres” of state and national authority is a particularly helpful way to think about constitutional federalism. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 166–67 (2001) [hereinafter Young, *Dual Federalism*].

A second point that I need to make clear at the outset is that procedural rules may apply both to the making and to the *enforcement* of laws. A rule that a person may not be punished for burning the American flag<sup>11</sup> is substantive; a rule that no one may be punished for *any* crime without evidence establishing their guilt beyond a reasonable doubt<sup>12</sup> is procedural.

My basic thesis is that, as “I’m Just a Bill” suggests, the main restrictions on governmental power under the American Constitution are procedural rather than substantive in nature. In this I follow John Hart Ely, who claimed that “the original Constitution was principally, indeed . . . overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.”<sup>13</sup> This is most obviously true of separation of powers, in which the Court has recently struck down a number of congressional attempts to restructure the lawmaking process.<sup>14</sup> In the *Aircraft Noise* case,<sup>15</sup> for example, the Court struck down an innovative scheme to administer Washington National Airport. Justice Stevens’s opinion conceded that “Congress had the power to achieve that result through legislation, but the statute was nevertheless invalid because Congress cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I.”<sup>16</sup>

Process is preeminent in the area of federalism as well. In the *Garcia* case,<sup>17</sup> Justice Blackmun argued that “the fundamental limitation that the constitutional scheme imposes on the Commerce Clause”—the most important federal power—“is one of process rather than one of result.”<sup>18</sup> Drawing on an idea traceable to James Madison<sup>19</sup> and popularized by Herbert Wechsler,<sup>20</sup> the *Garcia* majority argued that the States must rely for protection on their representation in the federal lawmaking process rather than on substantive constitutional limits to federal power.<sup>21</sup> And although the Court has proven willing to recognize a few substantive limits on Congress’s authority in recent years,<sup>22</sup> it has been far more active on procedural fronts—for example, by limiting the mechanisms by which Congress may enforce its policies<sup>23</sup> or by requiring Congress to legislate with particular clarity when impinging on state sovereignty.<sup>24</sup> “Process federalism” has turned out to mean

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11. See *Texas v. Johnson*, 491 U.S. 397 (1989).

12. See *In re Winship*, 397 U.S. 358 (1970).

13. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 92 (1980).

14. See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998) (striking down the line-item veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down the Gramm-Rudman budget procedure); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto).

15. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

16. *Id.* at 275.

17. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

18. *Id.* at 554.

19. See THE FEDERALIST NO. 46 (James Madison).

20. See 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 (1954); see generally JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

21. *Garcia*, 469 U.S. at 550–53.

22. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding that provisions of the federal Violence Against Women Act exceeded Congress’s power under the Commerce Clause or Section Five of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the federal Gun Free School Zones Act was not a regulation of “commerce” within the Commerce Power).

23. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not require state officers to enforce federal law); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not subject the states to monetary liability under federal statutes).

24. See, e.g., *Solid Waste Agency of Northern Cook Cty, Inc. v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2000) (requiring a clear statement of congressional intent to delegate authority to federal administrative

rather more than the *Garcia* majority may have had in mind,<sup>25</sup> at the same time that the imposition of more substantive limits on Congress's authority has proven more difficult than some of *Garcia*'s critics may have anticipated.<sup>26</sup>

It may be more controversial to say that the primacy of process is true of individual rights, but I think it *is* true even here. Most of the provisions of the Bill of Rights are concerned with procedural limitations on the enforcement of federal law—jury trials, assistance of counsel, and the like.<sup>27</sup> When one considers how many free speech cases are really either vagueness or overbreadth cases—both at least arguably procedural rather than substantive constraints on government<sup>28</sup>—the overall point is even clearer.<sup>29</sup> While rights like privacy, free speech, and anti-establishment do impose certain substantive limitations on government, the general thrust of our Constitution is to limit *how* government acts rather than what ends it may pursue.

Perhaps the largest potential exception is the general guarantee of equality under the Fifth and Fourteenth Amendments.<sup>30</sup> But equality is a substantive limit of a peculiar kind. It does not so much limit the substance of regulation as require that such regulation be conducted evenhandedly. As Justice Scalia has observed, the Equal Protection Clause protects us from tyrannical laws indirectly, by “requir[ing] the democratic majority to accept for themselves and their loved ones what they impose on you and me.”<sup>31</sup> Similar arguments can be made about the structure of contemporary doctrine under the First Amendment's Free Exercise Clause.<sup>32</sup> If these provisions are not strictly procedural in their effect, they nonetheless contribute to the Constitution's general concern with how government acts rather than the substantive policies that it pursues.

agency to promulgate regulations at the outer limit of Congress's commerce power); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (requiring Congress to speak clearly if it wishes to regulate core state governmental functions).

25. See generally Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) [hereinafter Young, *Two Cheers*]; Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

26. See, e.g., Young, *Dual Federalism*, *supra* note 10, at 150–52, 157–63.

27. See U.S. CONST. amend. IV (search and seizure), amend. V (grand jury, double jeopardy, self-incrimination, due process), amend. VI (fair trial, jury trial in criminal cases, confrontation of witnesses, assistance of counsel), amend. VII (jury trial in civil cases), amend. VIII (excessive bail and fines).

28. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (overbreadth); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (vagueness). For a discussion highlighting the procedural aspects of these doctrines, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1288 (14th ed. 2001) (“When invalidated for overbreadth, a law . . . becomes wholly unenforceable until a legislature rewrites it or a properly authorized court construes it more narrowly.”). See also *id.* at 1299 (observing that the vagueness doctrine “draws on the procedural due process requirement of adequate notice” but also protects “equality and the separation of executive from legislative power through the prevention of selective enforcement”).

29. Indeed, the most persuasive justification for protecting free speech generally may be that it is necessary to an open lawmaking *process*—not that it is intrinsically good. Compare ELY, *supra* note 13, at 105–16 (advancing such an instrumental view of free speech protection) with THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4–7 (1966) (focusing on the right of the individual to self-fulfillment through speech). See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978) (observing that the facilitation of self-government is the primary value of free speech).

30. For foreign readers who may foolishly rely on what the Constitution actually *says*, it is necessary to point out that the Fourteenth Amendment's guarantee of “equal protection” by *state* governments has been applied to the national government through the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). This implication is hard to justify textually or historically, but it would be a crazy world where it wasn't true.

31. *Cruzan v. Director, Missouri Dep't. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

32. See *Employment Division, Dep't. of Human Res. v. Smith*, 494 U.S. 782 (1990) (holding that government may generally impose burdens on religious free exercise so long as it does so through generally-applicable laws, without singling out religious observers for unfavorable treatment).

American constitutional discourse has been preoccupied for a long time with a debate between those who think that these procedural safeguards are all there is and those who think that the judiciary should also enforce substantive limits on what government can do. We see this debate most prominently at the present in the area of federalism.<sup>33</sup> But few of the proponents of *some* substantive restrictions would deny that procedural limits are critical or even primary.<sup>34</sup> And it is precisely these procedural limits that globalization threatens to undermine.

### III. HOW GLOBALIZATION PUTS PRESSURE ON THE STRUCTURE

Debates about the impact of globalization on the domestic constitutional balance have tended to focus on questions of substance. We have, for instance, the much-discussed question of *Missouri v. Holland*.<sup>35</sup> Can Congress legislate in areas that would otherwise be off limits to federal power, so long as it is implementing a treaty with another nation?<sup>36</sup> This question has contemporary relevance, for example, to debates about ratification of the International Convention on the Rights of the Child.<sup>37</sup>

Similar questions concern whether particular substantive limits on government—such as the Free Speech Clause of the First Amendment—are in conflict with or overridden by aspects of international law.<sup>38</sup> More commonly, scholars and advocates argue that practices held *not* to violate domestic constitutional norms—such as the death penalty—are nonetheless invalid because they violate *international* rules that confer rights on individuals.<sup>39</sup>

Sometimes, of course, debates about the domestic constitutional constraints on government action in globalized contexts have centered around procedural limitations. Much of the debate about whether the Federal Government's supposedly "inherent" foreign affairs powers are subject to constitutional constraint has concerned procedural limitations on lawmaking and enforcement.<sup>40</sup> But discussions of these issues do not tend to distinguish between procedural and substantive limitations on government power.

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33. Compare, e.g., Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (rejecting judicial enforcement of substantive limits on national power), with Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (arguing for some substantive judicial enforcement) and Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (same).

34. See, e.g., *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (observing that "it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance"); Prakash & Yoo, *supra* note 33, at 1461; see also Young, *Two Cheers*, *supra* note 25, at 1364–66.

35. 252 U.S. 416 (1920).

36. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (surveying debates about the scope and reasoning of *Holland*).

37. See, e.g., Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 575–76 (1997).

38. See, e.g., Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?* 53 ME. L. REV. 487 (2001) (discussing conflicts between First Amendment protection for hate speech and the International Covenant on Civil and Political Rights).

39. See, e.g., Brilmayer, *supra* note 2, at 295–96.

40. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (holding that the United States may not agree with foreign countries to try military dependents for crimes committed abroad by procedures that do not satisfy the Bill of Rights); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (holding that the non-delegation doctrine does not apply in the context of Executive power in foreign affairs); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (rejecting alien's claim of right to judicial review of immigration officers' decision to exclude her on the ground that Congress possessed plenary power over immigration matters); see generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

I think there is something to be learned from making such a distinction. I focus here, therefore, on ways in which globalization and, in particular, supranational lawmaking risks undermining the procedural balances that dominate our domestic constitutional scheme.

#### A. *Circumventing the Constitutional Lawmaking Structure*

I want to start with an example of supranational lawmaking circumventing the domestic constitutional lawmaking structure altogether. That example is the direct effect of customary international law. Customary international law may be our oldest form of supranational lawmaking.<sup>41</sup> Long before the WTO or the NAFTA, principles of international law were being derived from the customary practice of civilized nations. And as customary norms extend further and further beyond their traditional sphere of regulating the relations of nation states to one another—and particularly as customary law develops a comprehensive code of universal human rights—they become available as an alternate or parallel “constitution” for any nation willing to apply them. In recent debates over the death penalty in this country, for example, customary norms have been deployed in precisely the same way that the Eighth Amendment is often invoked as a constraint on state power.<sup>42</sup>

The direct effect of customary international law is an article of faith among the international law academy in this country but has never been directly endorsed by American courts.<sup>43</sup> Seizing upon the Supreme Court’s statement in the *Paquete Habana* that “international law is part of our law,”<sup>44</sup> the academic lawyers have insisted that American courts must apply customary law even in the absence of congressional authorization, and that such law is fully “federal” for purposes of its supremacy over state law.<sup>45</sup> Some critics of this “modern position” on customary law have argued that the Constitution simply does not permit treating customary norms in this way. But whether or not one accepts that argument, there is no serious question that giving direct effect to

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41. See generally Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

42. See, e.g., Mike Tolson, *Killer Executed Despite Protests, Age Controversy*, HOUSTON CHRON., Oct. 23, 2001, at A19 (reporting that foreign leaders asked Texas Governor Rick Perry to commute the sentence of Gerald Lee Mitchell, who committed his murders at the age of 17, on the ground that his execution would violate customary international law); William A. 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.”).

43. 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 (1997) (arguing that customary international law is not federal common 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 (1998) (insisting that customary international law is federal common law) and Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (same). For my own contribution, see Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365 (2002) [hereinafter Young, *Customary International Law*].

44. 175 U.S. 677, 700 (1900).

45. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 Reporters’ Note 3 (“[T]he modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”). Some academics go even further, insisting that customary international law overrides prior-enacted federal statutes, see, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1563–67 (1984), and, sometimes, that customary law trumps even the Constitution itself, see Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985).

customary norms works a profound departure from the ordinary procedure by which law is made in this country.

This departure may unbalance the system in all sorts of ways. Because national executive branches tend to be in charge of the international practice from which customary norms are derived, direct effect shifts lawmaking authority from the legislature to the executive.<sup>46</sup> Absent “direct effect,” the primary authority for implementing customary law in the domestic context would rest with Congress pursuant to its Article I power to “define and punish offences against the Law of Nations.”<sup>47</sup> It shifts even more authority to courts, which exercise a great deal of discretion in interpreting the vague materials on which customary norms rest.<sup>48</sup> And because direct effect allows a form of “federal” law to be produced without going through the difficult lawmaking gauntlet of Article I, it shifts authority away from the states that would otherwise fill the regulatory vacuum produced by inertia at the federal level.<sup>49</sup> But mostly direct effect shifts power from national politicians to the international community—a community that is not politically accountable to the American electorate in any meaningful way.<sup>50</sup>

### B. *Changing the Dynamics of the Lawmaking Structure*

Other forms of supranational lawmaking leave a role for the domestic lawmaking institutions but profoundly change the political dynamics governing those institutions’ operations. The best examples here come from the law of international trade—a subject on which I am still climbing the learning curve and will have to beg indulgence for some inevitable errors. The WTO and NAFTA agreements have, in recent years, shifted lawmaking and enforcement powers to supranational organizations in a number of ways.<sup>51</sup> The processes by which such agreements are negotiated and enforced likewise tends to shift power *within* the domestic system.

The WTO agreement, for instance, delegates broad interpretive authority to the WTO Member States, acting by a three-quarters majority, and to adjudicative panels.<sup>52</sup> Given the general nature of many WTO provisions and the resulting interpretive discretion remaining

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46. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 81 (2000) (observing that “[i]n reality, . . . Congress and the courts rarely affect the customary international lawmaking sphere” because “most of these sources for evidence for ‘state practice’ fall under the constitutional powers of the President in his conduct of foreign relations and military affairs”). As Professor Ku acknowledges, the exclusion of courts was especially true under the “old” international law that “focused almost exclusively on the intercourse between nation-states.” *Id.* Many observers have noted that the role of courts has increased dramatically as customary law has come to govern the relations of states to their citizens. See, e.g., Bradley & Goldsmith, *supra* note 43, at 846–47.

47. U.S. CONST. art. I, § 8.

48. See Bradley & Goldsmith, *supra* note 43, at 852–55.

49. See Clark, *supra* note 25, at 1339–42; Young, *Customary International Law*, *supra* note 43, at 400–04.

50. See Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 721 (1986).

51. See, e.g., Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L.J. 1, 3 (2000) (arguing that “the rise of international economic organizations has yielded a source of regulation so significant that it is a fundamental alteration of the constitution of federal government”); Ku, *supra* note 46, at 93–113 (surveying various delegations of federal powers to international organizations).

52. See generally Agreement Establishing the World Trade Organization, Art. IX, § 2, 33 I.L.M. 9 (1994) [hereinafter WTO Agreement] (providing for interpretation by the membership); WTO Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 6–22 [hereinafter Dispute Settlement Understanding] (providing for settlement of disputes by panels). For a brief overview of the WTO dispute settlement process, see JACKSON, *supra* note 4, at 124–27.



to these actors, it is hard to deny that they make law.<sup>53</sup> WTO decisions are not binding on private actors in the United States, however, until implemented by domestic legislation.<sup>54</sup> Some contend that this need for domestic implementation eliminates any concern about interference with domestic constitutional structures.<sup>55</sup>

The fact that the United States is bound by WTO decisions on the international plane, however, cannot help but alter the dynamics of domestic constitutional processes. Absent the WTO, for example, Congress's decision whether to preempt a state environmental statute that also burdens trade would be purely a matter of policy. The issue is simply, "Do you think the environmental benefits of the law outweigh its economic costs?" Because the states are represented in Congress, our dominant "political safeguards of federalism" paradigm predicts that the state politicians who approved the environmental law in the first place will be able to influence Congress's decision and protect the state's interests—at least some of the time.<sup>56</sup>

Once the WTO rules that the state statute violates foreign trade agreements, however, the decision becomes not simply one of policy but of whether to adhere to the treaty. It's not just "Is money more important than trees?", but rather "Do you want the United States to be an international lawbreaker and pariah?" If international law means anything, then the element of international legal obligation *must* change the character of Congress's decision, and the domestic pressures produced by state representation in Congress will inevitably have less force. It is almost surreal to hear international lawyers claim that the WTO does not disrupt the domestic constitutional balance because international obligations do not really mean anything until the domestic government decides to follow them. It *ought* to mean something that our country is violating its agreements. And that means that when we evaluate the impact of an agreement on the domestic structure, we ought to assume that the agreement *will* be implemented by our national political actors.<sup>57</sup>

In any event, the new supranational agreements have teeth, and it is probably unrealistic to think that national politicians won't implement them most of the time. The WTO authorizes trade penalties for non-compliance,<sup>58</sup> just recently, the WTO ruled that the European Union may impose up to \$4 billion in sanctions for U.S. tax policies that violate

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53. See Ku, *supra* note 46, at 96 (concluding that due to the open-ended nature of the trade agreements under the WTO, "an interpretation adopted by three-fourths of the WTO membership could effectively create a new obligation on a member state against the will of that member state").

54. The Uruguay Round Agreements Act provides that "[n]o 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." 19 U.S.C. § 3512(a)(1). The Act further prohibits challenges to government conduct on the ground that the conduct violates WTO obligations. 19 U.S.C. § 3512(c)(1)(B).

55. See, e.g., 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 (1998).

56. See *supra* notes 10–26 and accompanying text.

57. Cf. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (observing that "international rules are rarely enforced, but usually obeyed").

58. See Dispute Settlement Understanding, *supra* note 52, art. 22 (providing for compensation and suspension of trade concessions where member states do not adequately implement decisions of the Dispute Settlement Body); DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION §§ 8.04–8.06, at 166–71 (explaining the compensation and suspension of concessions provisions).

the free trade agreement.<sup>59</sup> Such rulings create considerable pressure to comply with global trade rules, even in the face of determined domestic opposition.<sup>60</sup>

Some regimes, like NAFTA Chapter Eleven, go even further and replace state-centered sanctions—which are themselves subject to strong political checks—with private rights of action against the national government for damages.<sup>61</sup> As Professor Hansen noted, that shift has allowed enforcement to go further than *any* of the signatory states seem to have wanted.<sup>62</sup> In any event, the stronger the pressures for domestic implementation of supranational rulings, the more likely that those pressures will override elements of the domestic political balance that ordinarily protect state governments.

These agreements are likewise likely to undermine political accountability to domestic voters. In *New York v. United States*,<sup>63</sup> Justice O'Connor's majority opinion explained that when Congress "commandeers" state legislative bodies by requiring them to enact laws pursuant to federal directives, the ordinary lines of political accountability become blurred. Voters may not be able to tell whether to blame state or federal officials for unpopular policies.<sup>64</sup> A similar dynamic seems likely to occur when federal legislators are induced to implement decisions taken at the supranational level. For example, when U.S. Congressmen start to take the political heat back home for repealing popular laws in response to a WTO panel ruling, they are going to say "the WTO made me do it." It may be difficult for voters to evaluate, in these circumstances, the extent to which their representatives should be held accountable for the unpopular policy.

The strong political and policy imperative to achieve trade agreements like the WTO and NAFTA has also resulted in fundamental changes to the domestic structure. These two agreements are the most prominent recent examples of the congressional-executive agreement as a substitute for the treaty power—a substitution that shifts power from the Senate to the Executive and from the states to the federal government.<sup>65</sup> Two things seem absolutely clear about the congressional-executive agreements: one is that the procedure by which really important agreements are being ratified has *deep* constitutional problems. As Bruce Ackerman and David Golove have ably demonstrated, the original understanding of the Founders and the broad consensus of informed observers prior to the 1940s rejected the idea that statutes—which is what congressional-executive agreements are—are equivalent to treaties.<sup>66</sup> Ackerman and Golove actually conclude that congressional-executive agreements like the WTO and NAFTA are perfectly constitutional *today*, but only by virtue of an *implicit* constitutional amendment in 1943.<sup>67</sup> Unless one buys the Ackermanian

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59. Edmund L. Andrews, *Trade Panel Says Europe Can Impose Penalties on U.S.*, N.Y. TIMES, Aug. 31, 2002, available at <http://www.nytimes.com/2002/08/31/business/worldbusiness/31TRAD.html> (last visited Mar. 3, 2003).

60. See Paul Blustein, *EU Told It Can Slap Duties on U.S. Goods; WTO Permits Penalty Of Up to \$4 Billion*, WASH. POST, Aug. 31, 2002, at E1 (observing that "[t]he WTO ruling will strengthen the hand" of members of Congress who favor repealing the offending tax breaks).

61. See North American Free Trade Agreement Art. 1115–16 (providing for institution of proceedings against a party by private investors); Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 N.Y.U. J. INT'L L. & POL. 1 (2001).

62. Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 TEX. INT'L L. J. 489 (2003).

63. 505 U.S. 144 (1992).

64. See *id.* at 154–55; see also *Printz v. United States*, 521 U.S. 898, 930 (1997) (discussing similar accountability problems that arise when the federal government commandeers state officers).

65. See generally Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

66. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

67. See *id.* at 810–11.

heresy of constitutional amendment outside Article V,<sup>68</sup> the net impact of Ackerman and Golove's history is to demonstrate the *unconstitutionality* of these agreements.

The second clear fact about congressional-executive agreements, however, is that very few people are remotely interested in this constitutional problem. Debates about NAFTA and the WTO agreement have focused on whether those agreements will help or hurt the economy and—to a far more limited extent—whether they cede too much power to supranational actors. No one seems to care about the process by which these agreements were ratified. It's enough to make constitutional scholars wonder why they bother.<sup>69</sup>

The “fast track” authority under which trade agreements are negotiated likewise affects the domestic structure in important ways. It minimizes the ability of Congress—and through it, state governments—to block or modify trade agreements after they are negotiated.<sup>70</sup> Although fast track procedures do give Congress a consultative role and may even enhance that role beyond the ordinary treaty process, “consultation” is not “legislation.” We kid ourselves if we think that delegation of authority to make far-reaching trade agreements with widespread and unpredictable effects does not decrease the overall importance of Congress in the system. Although we have had congressional-executive agreements and fast track authority for some time, I think that it's fair to say that the potential of recent agreements to interfere with domestic policies and structures is materially greater than in the past. New agreements like the WTO and the NAFTA, after all, constitute *institutions* rather than simply establish binding commitments. It is thus far too early to be too sanguine about the effects of circumventing the constitutional treaty structure.

If Congress becomes less important, then we cannot rely upon it as much to protect constitutional values. In this context, I am concerned about values of both federalism and democracy. As I have mentioned,<sup>71</sup> the primary means by which current constitutional doctrine protects the autonomy of state governments in this country is through their representation in Congress. That protection, frankly, has always been a bit tenuous. There is no reason for confidence that federal representatives faithfully protect the institutional interests of state governments; sometimes, in fact, federal representatives seem likely to *compete* with their state counterparts.<sup>72</sup> But as a practical matter the “political safeguards of federalism” are not nothing, and they may be the best the states can do in most circumstances. To take away that protection—by changing the political dynamics of

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68. For an explanation of why it is heresy, see Tribe, *supra* note 65, at 1248.

As a matter of constitutional topology, the Yale school propounds interpretive transformations that leave us with a configuration fundamentally different from the one that the Constitution's text and structure create. Nonexclusive views of Article V and of Article II's Treaty Clause enfeeble two of the Constitution's state-sensitive supermajority requirements for what should be especially solemn modes of lawmaking, and thereby damage the Constitution's basic structure.

*Id.*

69. As Sandy Levinson and I have demonstrated elsewhere, the reasons why people care about some plausible constitutional claims but not other equally plausible ones can be quite mysterious. See Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925 (2001).

70. See generally Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992); see also Thomas, *supra* note 51, at 27 (concluding that the fast track procedure “has rendered congressional approval of subsequent agreements largely pro forma”).

71. See *supra* Part II.

72. See, e.g., Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1357 (1997); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510–11 (1994); see generally Prakash & Yoo, *supra* note 33; Baker, *supra* note 33.

Congress in ways that make it less responsive to the states—may have far-reaching structural implications.

This problem becomes even more troubling when paired with the broader issue of democracy. NAFTA and the WTO set up a scheme in which the statutes enacted by democratically-elected state and national legislatures can be declared invalid by supranational tribunals that make life-tenured federal judges look like models of democratic accountability. One of the real coups of the present Symposium is that it offers some insight into the thinking and experience of a real, live (former) WTO judge.<sup>73</sup> But to most of us, those personages are destined to remain faceless and nameless. Contrast that with this morning's paper, in which you can read about the outcome of a public debate about the qualifications and suitability of one nominee to a federal appellate court.<sup>74</sup> There's a name (Priscilla Owen) and a picture (although it's not a very good one). You can even find out how your own state's senators voted on the matter. Although many of us have our frustrations about the process and outcomes of federal judicial confirmations, at least that process operates in public and the people have a meaningful say in it.

One might respond, of course, by pointing out that WTO decisions still have to be implemented by national political processes. But again, I would say that at that point it is too late for a meaningful political debate. If we take international law seriously, then the outcome of any debate over implementation should be foreordained. And in any event the probability of sanctions will produce heavy incentives to override any domestic opposition. In a system that relies on political incentives rather than formal boundaries, a substantial change in the incentives facing Congress is a *constitutional* change.

### C. *Changing the Dynamics of Federal Law Enforcement*

Our system also protects constitutional values of federalism, separation of powers, and individual liberty through procedures for the *enforcement* of the law. Here, too, these domestic balances are under pressure from institutions at the supranational level. The International Criminal Court, for example, creates an enforcement regime in which American citizens would potentially not be able to avail themselves of the procedural protections of the Bill of Rights.<sup>75</sup>

Perhaps even more important, the ICC creates a prosecutorial office outside the domestic executive branch and therefore not subject to the chain of political accountability that constrains domestic prosecutors.<sup>76</sup> Justice Scalia warned us in the independent counsel case that a prosecutor who is not accountable to anyone is a dangerous thing,<sup>77</sup> and I think

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73. Claus Dieter-Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT'L L.J. 469 (2003).

74. See David Stout, *Senate Democrats Reject Another of Bush's Judicial Nominees*, N.Y. TIMES, Sept. 5, 2002, available at <http://www.nytimes.com/2002/09/05/politics/05CND-JUDG.html> (last visited Mar. 3, 2003).

75. See, e.g., Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, Cato Policy Analysis No. 311, July 16, 1998, available at <http://cato.org/pubs/pas/pa-311.html> (last visited Mar. 3, 2003); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE FEASIBILITY OF AND THE RELATIONSHIP TO THE FEDERAL JUDICIARY OF AN INTERNATIONAL CRIMINAL COURT 13–14 (1991).

76. See John Bolton, *Courting Danger: What's Wrong with the International Criminal Court*, 54 NAT'L INTEREST 60 (Winter 1988/89). For discussion of other potential problems with the ICC, see David M. Baronoff, Comment, *Unbalance of Powers: The International Criminal Court's Potential to Upset the Founders' Checks and Balances*, 4 U. PA. J. CONST. L. 800 (2002).

77. See *Morrison v. Olson*, 487 U.S. 654, 728–31 (1988) (Scalia, J., dissenting) (attacking the independent counsel statute on the ground that it created a prosecutorial office cut off from political accountability through the unitary executive).

opponents of the ICC are right to worry that its prosecutor could become another Ken Starr.<sup>78</sup>

Professor Ratner assured us that, whatever the ICC might technically be *entitled* to do in the way of prosecuting U.S. nationals, our fears are unrealistic because the court is more likely to be our friend.<sup>79</sup> But I think Americans in the current world political climate can be forgiven for wondering who our friends really are. The outpouring of sympathy that followed September 11th is virtually gone.<sup>80</sup> Our closest allies go out of their way to call us a “simplistic” “hyperpower,”<sup>81</sup> accuse us of planning military “adventures,”<sup>82</sup> and compare our President to Adolf Hitler.<sup>83</sup> Some are willing to suggest that our policies are likely to violate international law.<sup>84</sup> Why should we have so much faith that no one will ever want to prosecute us?<sup>85</sup>

I hasten to add that the arguments surrounding the validity and wisdom of the ICC are complex and that I am no expert. But one need not conclude that the ICC would actually be unconstitutional to recognize that it would shift domestic political and procedural

78. Cf. Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1067–68 (1999) (discussing the tradeoff of independence versus accountability in the context of the American independent counsel statute). Not that I had any problem with Ken Starr, particularly. But it seems likely that the sets of Judge Starr’s critics and the ICC’s fans in this country are not entirely without overlap.

79. Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT’L L.J. 445 (2003).

80. See, e.g., Michael Ignatieff, *The Divided West*, FIN. TIMES, Aug. 30, 2002, at 8; Ellen Hale, *Global Warmth for U.S. after 9/11 Turns to Frost*, USA TODAY, Aug. 14, 2002, available at [www.usatoday.com/news/nation/2002-08-14-1acover\\_x.htm](http://www.usatoday.com/news/nation/2002-08-14-1acover_x.htm) (last visited Mar. 3, 2003).

81. Each *bon mot* is from former French Foreign Minister Hubert Védrine. See Suzanne Daley, *French Minister Calls U.S. Policy ‘Simplistic’*, N.Y. TIMES, Feb. 7, 2002, at A14 (quoting M. Védrine: “[t]oday we are threatened by a new simplistic approach that reduces all the problems in the world to the struggle against terrorism”); John-Thor Dahlburg, *U.S. Global Clout Particularly Galling to French*, N.Y. TIMES, Feb. 19, 1999, at A8 (“French Foreign Minister Hubert Vedrine refers to the United States not as a superpower, but as an even more unchecked ‘hyperpower’ that needs hemming in by the United Nations and other international organizations.”).

82. See *U.S. Rebukes German*, N.Y. TIMES, Aug. 18, 2002, sec. 4, at 2 (reporting that German chancellor Gerhard Schröder described “an American-led war on Iraq . . . as ‘an adventure’”).

83. See Peter Finn, *German Official Compares Bush on Iraq to Hitler*, WASH. POST, Sept. 20, 2002, at A19 (reporting that German Justice Minister Herta and Paul Daubler-Gmelin “said yesterday that President Bush’s ‘method’ of pressuring Iraq was similar to tactics employed by Adolf Hitler because both sought to divert attention from domestic problems”). Ms. Daubler-Gmelin—who was later sacked—apparently went on to say “that the United States ‘has a lousy legal system’ and that ‘Bush would be sitting in prison today’ if current U.S. laws against insider trading had been on the books when he worked in the oil industry in Texas.” *Id.*

84. See, e.g., Karen DeYoung & Walter Pincus, *U.N. Pressed for Tough Stance on Iraq; U.S. Seeks Backing for Military Action if Hussein Defies Inspections Agreement*, WASH. POST, Oct. 14, 2002, at A25 (reporting that “[m]ost U.S. allies in Europe and the Middle East . . . felt an unprovoked, preemptive U.S. action [in Iraq] would violate international law”).

85. Obviously, the situation has gotten far worse since this talk was given in the Fall of 2002. “Allies” such as France have not only opposed American policy in Iraq at every turn but condemned it as “illegal.” See, e.g., Judy Dempsey & Krishna Guha, *Chirac Plans to Resist the Control of Postwar Iraq by US Allies*, FIN. TIMES, March 22, 2003, at 6 (“Jacques Chirac, French president, yesterday ended the fragile truce at the European Union summit in Brussels with a strong attack on the “illegal” US-British attack on Iraq.”); see also Gaby Hinsliff, *Iraq Crisis*, OBSERVER (London), Mar. 16, 2003, at 5 (“The UN Secretary General, Kofi Annan, has said he believes war without a second resolution would break international law.”). Much of the academic international law community—not altogether surprisingly—in the U.S. seems to share this view. See, e.g., Peter Slevin, *Legality Of War Is A Matter Of Debate; Many Scholars Doubt Assertion by Bush*, WASH. POST, March 18, 2003, at A16 (“University of Pittsburgh law professor Jules Lobel called the administration’s argument ‘ludicrous.’ He said a war would be ‘clearly illegal,’ not least because he believes it is ‘absolutely clear’ that a large portion of the Security Council does not favor military action.”). And Iraq has already filed a complaint with the U.N. alleging that the U.S. is guilty of war crimes in its conduct of the Iraqi war. See *Iraq Files Complaint with United Nations*, CNN, Mar. 31, 2003, available at <http://edition.cnn.com/2003/WORLD/meast/03/30/sprj.irq.un.letter/> (last visited May 8, 2003).

balances designed to constrain government and protect individual liberty, with consequences hard to predict in advance. And one need not be a paranoid nationalist to recognize that institutions, once formed, take on a life of their own.<sup>86</sup> The evolution of both the European Court of Justice and John Marshall's Supreme Court ought to convince us of that.

Another example of a potential shift in enforcement powers comes from the International Court of Justice's provisional order in the *Breard* case.<sup>87</sup> Angel Breard's challenge to his state court conviction and death sentence for failure to have observed the Convention on Consular Relations failed under the doctrine of procedural default, which forbids a federal *habeas* court from overturning a state conviction on grounds that were not argued to the state court in the first instance.<sup>88</sup> These sorts of restrictions on the ability of federal courts to reopen state convictions and sentences are one of the primary means by which state and federal interests are balanced in our system of judicial federalism.<sup>89</sup> Mr. Breard's advocates, however, seem to have expected these sorts of restrictions to drop away when a conviction is challenged under *international* law.<sup>90</sup> This expectation entails a kind of *super* direct effect, under which the international norm is not only effective but also not subject to procedural limitations that constrain domestic claims. (If Breard's challenge to his conviction had been based on a fundamental domestic constitutional violation—such as a coerced confession—it would have been barred just as surely as his consular consultation claim.<sup>91</sup>) Such a development would likely skew the domestic balance between state and federal courts, as well as the finality of criminal convictions, in ways that are hard to predict.

Paraguay's parallel challenge to the Breard execution was barred by the Eleventh Amendment, which forbids suits against state governments under certain circumstances.<sup>92</sup> I

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86. The neo-functional theory that has driven much of European integration, for example, posits that supranational institutions formed for fairly narrow purposes will attract political support over time and will thereby be able to expand their functions. See, e.g., BEN ROSAMOND, *THEORIES OF EUROPEAN INTEGRATION* 51–52 (2000).

87. *Breard v. Greene*, 523 U.S. 371 (1998).

88. See *id.* at 375 (“It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts.”). See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977).

89. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (observing that the procedural default rules arise out of “the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus”); see generally Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986).

90. See *Breard*, 523 U.S. at 375 (noting that “in their petitions for certiorari, both Breard and Paraguay contend that Breard’s Vienna Convention claim may be heard in federal court because the Convention is the ‘supreme law of the land’ and thus trumps the procedural default doctrine”). For international law scholars agreeing with this claim, see Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, 680 (1998) (arguing that “as a treaty of the United States under the U.S. Constitution, the Statute of the International Court of Justice, and the Order of the Court pursuant to the Statute, are the law of the land, and law for all who exercise authority in, or on behalf of, the United States”—including both the President and the Governor of Virginia); Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT’L L. 691, 692 (1998) (“As supreme federal law under the Constitution, the admittedly self-executing treaty should have trumped inconsistent judicially created federal procedural doctrines.”).

91. In fact, one would think that if Breard were exempted from the procedural default rules, the hypothetical prisoner in the next cell whose domestic constitutional challenge to his own conviction fell victim to those rules would have a formidable equal protection claim.

92. The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. One could be forgiven for thinking that this provision would not bar Paraguay—which is a foreign state itself rather than a *citizen or subject* of such a state—from bringing suit against Virginia to stop Mr. Breard’s execution. But that would amount to a foolhardy reliance on what the Amendment actually *says*. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934) (holding that suits by foreign sovereigns are barred by the principle of state sovereign

and many others have argued that the current Supreme Court's broad construction of that Amendment—and of its underlying principle of state sovereign immunity—is incorrect.<sup>93</sup> Right or wrong, however, the state sovereign immunity rules are another procedural limitation on federal power that, like procedural default, is both fundamental to current federalism doctrine and equally applicable to domestic claims.<sup>94</sup> To suggest that supranational rules should trump state sovereign immunity when a federal treaty is being enforced is to rather profoundly alter the constitutional constraints on enforcement of federal law.<sup>95</sup>

The international scholars have an answer to our courts' refusal to break the habeas corpus and state sovereign immunity rules for people like Angel Breard. They say it is a fundamental norm of treaty law that nation-states cannot get out of their treaty obligations by pleading internal law.<sup>96</sup> But that, I think, just cements my point. International law does not care about our internal law. It has not thought, by and large, about whether this or that international rule will disrupt domestic legal compromises designed to balance competing constitutional values. But those compromises and values are important, and as a constitutional lawyer it's my job to worry about them. Indeed, the whole sub-discipline of Federal Courts scholarship is directed to this problem.<sup>97</sup> If international law is truly to be taken seriously, it will have to develop a similar set of rules for mediating interjurisdictional conflicts in a balanced way. Its current "international law always wins" paradigm simply ensures that international law will be ignored in the cases that matter.

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immunity embodied in the Eleventh Amendment); *see generally* *Alden v. Maine*, 527 U.S. 706, 729 (1999) ("[T]he scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design.").

93. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 100–85 (1996) (Souter, J., dissenting) (arguing that the Eleventh Amendment bars federal jurisdiction only in suits against states where jurisdiction rests on diversity of citizenship); William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (same); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1665–75 (2000) (criticizing the Rehnquist Court's contrary interpretation). The specific interpretation of present doctrine in *Breard* may also have been incorrect, as the traditional exception to state sovereign immunity for suits against state officers for prospective relief may have been applicable to that case. *See generally* Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998). But that is neither here nor there to the usual internationalist argument, which is that domestic constitutional restrictions like state sovereign immunity should be *irrelevant* when compliance with international law is at stake.

94. *See, e.g.*, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 633 (1999) (holding claims against state government under federal patent law barred by the Eleventh Amendment). On the centrality of the state sovereign immunity cases to the Rehnquist Court's federalism jurisprudence, *see* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 1–2.

95. It is worth noting that a different solution—that the United States government should have itself brought suit against Virginia to enforce the ICJ's provisional order—would *not* violate the ordinary state sovereign immunity rules. It is clear under present law that suits by the United States itself are not barred by state sovereign immunity. *See, e.g.*, *Alden*, 527 U.S. at 755–56; *United States v. Texas*, 143 U.S. 621, 646 (1892). That the United States chose not to initiate such a suit on Mr. Breard's behalf is no doubt an instance of the "political safeguards" of federalism at work.

96. Article 27 of the Vienna Convention on the Law of Treaties, for example, provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *See also* Rett R. Ludwikowski, *Supreme Law or Basic Law: The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253, 267–68 (2001).

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

#### IV. WHERE DO WE GO FROM HERE?

The primary thrust of this essay has been to trace the linkages between the domestic constitutional balance and the emerging phenomenon of global constitutionalism. It bears emphasis that the latter phenomenon, while not entirely new, remains sufficiently in its infancy to discourage confident predictions about where it will lead. Nor should we imagine that radical changes will happen overnight; it seems more likely, as Brian Havel has suggested, that “a supranational order of things will arrive incrementally, with specialized tribunals responsive to micropressures applied by domestic and transnational constituencies and interest groups.”<sup>98</sup> But incremental changes matter; it would be better to focus on them now rather than to permit a “tyranny of small decisions”<sup>99</sup> that alters our institutions without conscious deliberation and choice. In that connection, it would be a sufficient *raison d'être* for this essay simply to highlight that we cannot think intelligently about supranational lawmaking and law enforcement without considering their impact on constitutional settlements at home.

Nonetheless, I offer three brief sets of observations in this final part. The first has to do with continuing debates over the importance and role of “sovereignty” in international affairs. I then summarize three different approaches to managing the tension between global constitutionalism and domestic structures. Finally, I offer some concluding thoughts—worries, really—about the reinvention of our domestic constitutions that supranationalism will necessarily entail.

##### A. *The Abiding Importance of Sovereignty*

“Sovereignty” seems a bit under siege today as a term of legal and political analysis. Joel Trachtman calls sovereignty an “epithet” that “should be greeted with suspicion, if not derision.”<sup>100</sup> Louis Henkin once urged “away with the S word!”, complaining that “sovereignty has . . . grown a mythology of state grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worthy in it.”<sup>101</sup> But hopefully my earlier observations about the nature of America’s domestic constitution will allow us to put debates about national “sovereignty” in a little better perspective—perhaps, even, to find “what is authentic and worthy” in the concept.

I want to suggest that “sovereignty” in American law is intimately bound up with the basically procedural nature of our constitutional commitments: The American people expect that certain decisions affecting them will be made through specified constitutional processes by people who are accountable to them. These constitutional processes, as I have discussed, are designed to preserve liberty not only through direct mechanisms of accountability but through separating and dividing power. When law binding on American actors is made or enforced outside these processes, the problem is not simply one of affront to the “grandeur” or “dignity” of the State. Rather, the concern is that the circumvention of

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98. Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 265 (2000).

99. Cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 381 (2d ed. 1988) (“[N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions . . .”).

100. Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L.J. 399, 399 (1994).

101. Louis Henkin, *The Mythology of Sovereignty*, NEWSLETTER OF THE AM. SOC’Y OF INT’L L., Mar.–May 1993, at 1, 6–7.



ordinary domestic processes renders those processes ineffective in their role of safeguarding liberty.

One fear entailed by sovereignty concerns is that delegation of lawmaking and law enforcement authority to supranational structures may interfere with domestic arrangements that, in our country at least, seem to be functioning relatively well. The habeas corpus rules at issue in the *Breard* case, for example, are the product of over two hundred years of legislative and judicial tinkering designed to balance a variety of structural and individual rights concerns; one does not lightly throw such a structure out the window in favor of a largely untested international procedure with unpredictable effects.

### B. *Three Ways Forward*

At the same time, we must recognize that the pressures that have led to supranational lawmaking and law enforcement are unlikely to go away and will inevitably require changes in the domestic structure. At least three different approaches seem available.

First, we might try to re-orient our domestic constitutional scheme so that it relies less on the sorts of procedural balances likely to be disrupted by supranational lawmaking. If supranational delegations cause us to lose faith in the “political safeguards of federalism,” for example, we might simply carve out substantive areas of state autonomy which will be off limits to national or supranational intrusion. We might say, for instance, that state safety legislation is simply sacrosanct and not subject to preemption by federal or supranational actors.

At the other extreme, we might attempt to replicate domestic political and procedural safeguards at the supranational level. The agreement creating the ICC, for example, establishes its own procedural safeguards for criminal defendants,<sup>102</sup> and we might work to ensure that these safeguards are comparable to the protections enshrined in the Bill of Rights. Similarly, we might make an effort to render ICC prosecutors accountable to some popularly responsible entity. On the federalism side, we might promote direct representation of subnational governments at the supranational level, as in the European Union’s Committee of the Regions.<sup>103</sup>

Between these extremes, we might seek to redesign domestic procedures authorizing supranational delegations to protect structural values. We might, for example, enhance the role of state governments in national litigation of WTO disputes, much as the German Länder have demanded and received an enhanced role in their national government’s dealings with the European Union.<sup>104</sup> Or we might simply impose some substantive limit on the subjects upon which the federal government may enter into international agreements.

Some of these approaches will be more plausible in some contexts than others, and many sensible solutions will no doubt rely on a combination of these approaches. They all have their problems. The first—abandoning the procedural thrust of our constitutional structure and attempting to allocate power in a more substantive way—has been tried before and did not work out so great. For a long time, for instance, the Supreme Court tried to limit national power by placing certain substantive areas—like manufacturing or

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102. See Baronoff, *supra* note 76, at 805.

103. See JOHN MCCORMICK, *THE EUROPEAN UNION: POLITICS AND POLICIES* 183 (2d ed. 1999).

104. See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213, 242–43 (Kalypso Nicolaidis & Robert Howse eds., 2001).

agriculture—off limits. That all fell apart by 1937, and we have generally been happier with a more process-based approach.<sup>105</sup>

The second—and most ambitious—approach amounts to accepting a very long term shift to supranationalism as the locus of constitutionalism and trying to develop new structures there to guarantee liberty and accountability. Perhaps that is a viable strategy in some areas, such as the provision of procedural protections for persons accused of war crimes. But as a general strategy it is simply too much a leap into the unknown for me, for reasons I will return to in a moment.

The third, more moderate approach amounts to a form of constitutional damage control. It neither embraces the shift toward supranationalism nor tries to wall our constitution off from it. Rather, it would seek simply to limit the scope of delegations to supranational entities and, where possible, render them accountable to various domestic actors. This approach does raise the concern whether our traditional structural balances in the domestic constitution can ever be successfully merged with effective globalism. It may be, for instance, that giving the states a meaningful voice is simply incompatible with effective action on the international plane.<sup>106</sup> This, however, is the approach I for my own part would prefer to try.

### C. *The Fragility of Constitutions*

I think that it's fair to say that the shifts I have described, if they continue, will amount to what Bruce Ackerman calls a "constitutional moment."<sup>107</sup> They have occurred, however, without anything approaching "constitutional politics" in this country—that is, the kind of fundamental public debate that would allow us to accept these changes with our eyes open. Our debates about NAFTA and the WTO have been debates about the economic merits of free trade; no one has made clear to the public the sort of powers to invalidate important social policies that has been delegated to supranational institutions. One thing that makes me uncomfortable about my talk today is that I have ended up agreeing with a bunch of brick-throwin', body-piercin', Nirvana-listenin' Seattle protesters. I have to tell you that at the time I couldn't muster up much sympathy for those people; they struck me as a bunch of spoiled children who couldn't bear having missed the Sixties. But they had a point; the problem was that they were singularly inarticulate in explaining to the rest of us why we ought to share their worries. No constitutional change, however, can be legitimate without an informed public discussion on its consequences.

I want to close where I began, which is with the implication of globalization for legal academia. To be perfectly frank, I would prefer not to have to study international law. It's fascinating and the people are nice, but the learning curve is awfully steep. For me, as a domestic constitutional lawyer, the Commerce Clause and the Eleventh Amendment are like old friends, and I would just as soon spend the rest of my days writing progressively more learned—and more obscure—treatises on the ins and outs of those provisions.

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105. See Young, *Dual Federalism*, *supra* note 10, at 142–52 (documenting the rise and fall of dual federalism leading to models based on concurrent jurisdiction).

106. See Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1472, 1482 (1994) (predicting that "globalization's impact will be to displace state regulatory autonomy to the national government," but also suggesting that "a revitalization of federal principles may be perfectly consistent with globalization").

107. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (offering a theory of constitutional amendment outside the Article V process). Chantal Thomas, for example, has invoked Professor Ackerman by arguing that "globalization has generated a 'constitutional moment.'" Thomas, *supra* note 51, at 21.

The problem is that I fear domestic constitutional law may soon cease to exist as an autonomous discipline. Who makes the law? Well, sometimes Congress and the President—but sometimes the WTO, sometimes the International Criminal Court, sometimes the community of nations implicitly through customary practice. What rights do I have? Well, a few under the domestic constitution—but also others under international human rights treaties and the like. It is just increasingly unrealistic to study constitutional structure without including supranational institutions and constitutional rights without including the corpus of international law.

Is this a good thing? I don't know. Certainly it's a lot more work. But the larger problem is whether we are undermining a domestic constitution that has served us fairly well for two centuries in favor of untested supranational institutions. I'll leave you with a thought from Edmund Burke, who understood that constitutions are delicate machines and not to be tampered with lightly. A constitution, he said, "is the result of the thoughts of many minds, in many ages . . . . An ignorant man, who is not fool enough to meddle with his clock, is however sufficiently confident to think he can safely take to pieces, and put together at his pleasure, a moral machine of another guise, importance and complexity, composed of far other wheels, and springs, and balances, and counteracting and co-operating powers."<sup>108</sup>

Is that what we're doing? I wonder.

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108. Edmund Burke, *An Appeal from the New to the Old Whigs*, in *FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE* 73, 196 (Daniel E. Ritchie ed., 1992)

