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ARTICLES

ARTICLE III AND SUPRANATIONAL JUDICIAL REVIEW

Henry Paul Monaghan*

With the rise of supranational legislative bodies, the use of supranational adjudicatory bodies has also increased. These adjudicatory bodies have even been allowed to review the domestic law decisions of federal administrative agencies, and their decisions are insulated from any review by Article III courts. These developments have been met by intense opposition. This Article addresses the question whether, as claimed by several writers, the emerging supranational adjudicatory order impermissibly contravenes the "essential attributes of the judicial power established by Article III." Examining two case studies, the North American Free Trade Agreement (NAFTA) and the Supreme Court's recent decisions regarding Article 36 of the Vienna Convention, Professor Monaghan concludes that (generally at least) supranational judicial review does not run afoul of Article III. He draws upon the historical practice of allowing binational panels (BNPs) to adjudicate claims by Americans against foreign sovereigns that stretches back to the earliest days of the Founding, beginning with the Jay Treaty. Indeed, in the period following the Civil War, BNPs even "reviewed" decisions of the United States Supreme Court. With respect to the constitutionality of supranational tribunals expounding treaty obligations, Professor Monaghan argues that these tribunals are fully competent to determine these obligations, and, at least in the trade area, fit well within the "public rights" doctrine, which has played an important role in the rise of the administrative state. Professor Monaghan concludes that based on historical practice and current doctrine, Article III, standing alone, poses no substantial barrier to supranational judicial review.

I. SUPRANATIONAL ADJUDICATORY TRIBUNALS AND THEIR CRITICS

Surprised? Yes, indeed: "To say I was surprised to hear [at a dinner party] that a judgment of this court [the Supreme Judicial Court of Massachusetts] was being subjected to further review would be an understatement." So stated Chief Justice Margaret Marshall in her telephone interview with New York Times reporter Adam Liptak for his newspaper report.

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article, Review of U.S. Rulings by NAFTA Tribunals Stirs Worries.\(^1\) The Chief Justice was referring to Mondev International Ltd. v. United States,\(^2\) which ultimately rejected a North American Free Trade Agreement (NAFTA)-based challenge to the Supreme Judicial Court’s decision in Lafayette Place Associates v. Boston Redevelopment Authority.\(^3\)

NAFTA, an accord among the United States and its leading trade partners, Canada and Mexico,\(^4\) is designed to open the domestic markets of the signatory nations. Toward that end, Chapter 11 of NAFTA provides various substantive safeguards to foreign investors, such as equality of treatment and protection against uncompensated expropriation.\(^5\)


2. 6 ICSID (W. Bank) 181 (NAFTA Ch. 11 Arb. Trib. 2002).


5. Id. art. 1102 (providing equality with local investors); id. art. 1110 (prohibiting direct or indirect expropriation of an investment except in accordance with certain conditions and "on payment of compensation"). In Metalclad Corp. v. United Mexican States, a Chapter 11 panel gave an expanded conception of the protection against uncompensated expropriation. 5 ICSID (W. Bank) 209, 230–31 (NAFTA Ch. 11 Arb. Trib. 2000). This ruling, which involved actions taken by Mexico to keep Metalclad (a U.S. corporation) from operating a hazardous waste landfill it had constructed, has upset environmentalists. See Danielle Knight, Mexico Ordered to Pay U.S. Company 17 Million Dollars, Inter Press Serv., Aug. 31, 2000, available at http://www.globalpolicy.org/soccon/envronmt/nafta.htm (on file with the Columbia Law Review) (quoting Dan Seligman, director of Sierra Club’s sustainable trade campaign, describing Metalclad decision as "a nightmare"); see also Chris Tollefson, Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA’s Chapter Eleven Investor-State Claim Process, 11 Minn. J. Global Trade 183, 184 (2002) (describing media reaction to Metalclad as "a foreboding illustration of the implications of free trade and globalization for local governance and environmental regulation").

But the panel’s decision was not the end of the matter. Mexico sought review of the award in annulment proceedings at the seat of arbitration—in this case, British Columbia, Canada. The Supreme Court of British Columbia reviewed the arbitral award by applying the standard of review set forth in British Columbia’s International Commercial Arbitration Act and implied in the process that the answer to whether the reviewing court could review the conclusions of law made by the NAFTA Tribunal was determined solely by reference to applicable domestic law. See United Mexican States v. Metalclad Corp., [2001] 89 B.C.L.R.3d 359, 371–73 (B.C. Sup. Ct., Can.) (considering which of two British Columbia statutes should determine standard of review and applying R.S.B.C. ch. 235 (B.C., Can. 1996)). In the end, the court upheld the tribunal’s decision with respect to the Article 1110 claim, though it did overturn other aspects of the decision. Id. at 395–96 (overturning two of three questions of law submitted to NAFTA Tribunal and setting aside Metalclad award’s calculation of interest); see also Anthony DePalma, Judge Issues Split Decision in NAFTA Rules Case, N.Y. Times, May 4, 2001, at W1 (describing decision of B.C. Judge Tysoe as rejecting transparency requirements imposed by NAFTA Tribunal). For a more detailed discussion of the use of annulment proceedings to review Chapter 11 arbitration awards, see generally Charles H. Brower II, Investor-State Disputes Under NAFTA: The Empire Strikes Back, 40 Colum. J. Transnat’l L. 43 (2001). For a criticism of the use of annulment proceedings, see David A. Gantz, Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA, [2001] 31 Envil. L. Rep.
More importantly here, foreign investors are also generally protected against denials of justice such as denial of equal treatment and denial of due process.6

As implemented by the North American Free Trade Implementation Act,7 Chapter 11 provides for a binational investor-state dispute arbitration mechanism (binational panel, or BNP) to adjudicate alleged Chapter 11 violations.8 In *Mondev International Ltd. v. United States*, for example, the Supreme Judicial Court had rejected state law contract- and tort-based claims by a Canadian investor arising out of an urban renewal project in Boston.9 Instituting Chapter 11 proceedings against the United States, the investor argued that the state court decision *itself* had so far departed from that court’s prior decisions that it amounted to a “denial of justice” under Article 1105(1).10 Accepting the liability theory asserted, the NAFTA panel rejected the challenge on the merits.11

*Loewen Group, Inc. v. United States*, by contrast, sustained such a challenge.12 There, a Canadian company challenged the largest jury award in Mississippi’s legal history: a four hundred million dollar punitive damage award against the company in a simple breach of contract dispute worth no more than ten million dollars on the merits.13

10,646, 10,667 (Envtl. Law Inst.) (describing this method of challenging NAFTA decisions as “short-sighted in the medium and long term”).

6. NAFTA, supra note 4, arts. 1115–1116. The classic work on denial of justice claims is Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (1938). The basic idea of denial of justice is that if a country denies a foreigner adequate judicial process in its own courts, his sovereign could assert a denial of justice claim at international law. Id. at 1. Under traditional principles of international law, the claim might be vindicated by war, diplomacy, or arbitration. The international legal concept of denial of justice has never been clearly articulated, although it resonates with due process on the domestic level. For an excellent discussion of denial of justice claims located within a larger historical framework, see generally Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int’l L. 809 (2005). Professor Bjorklund discusses Jan Paulsson, *Denial of Justice in International Law* (2005), throughout her article.


8. State-foreign investor arbitration has long been available under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 36, Aug. 17, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, but no such proceeding has been brought against the United States.


10. NAFTA, supra note 4, art. 1105(1); *Mondev*, 6 ICSID (W. Bank) at 217–18.

11. *Mondev*, 6 ICSID (W. Bank) at 226–34; see also Young, supra note 9, at 1172–73 (summarizing *Mondev* decision).


13. Id. at 442. When the state courts refused to waive an appeal bond requirement of one and one quarter the amount of the judgment, *Loewen Group* settled the lawsuit for
NAFTA panel\textsuperscript{14} characterized the trial proceeding as a "miscarriage of justice"\textsuperscript{15} and "the antithesis of due process."\textsuperscript{16} The trial judge, the panel said, had "failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice."\textsuperscript{17} The result was a clear denial of justice, the panel concluded.\textsuperscript{18} On procedural grounds, however, the panel held that no NAFTA violation had been established.\textsuperscript{19}

Although Chapter 11 scrutiny of United States judicial proceedings has thus far produced no concrete adverse results,\textsuperscript{20} Chief Justice Marshall's intuitive misgivings are widely shared.\textsuperscript{21} "There are grave implications here," said the chief justice of the California Supreme Court, "[i]t's rather shocking that the highest courts of the state and federal governments could have their judgments circumvented by these tribunals."\textsuperscript{22} Judge Mikva, a former congressman and a member of the three-judge panel, agreed: "If Congress had known that there was anything like this in NAFTA . . . they would never have voted for it."\textsuperscript{23} A great deal is at stake, Professor Peter Spiro informs us: "[I]t points to a fundamental reorientation of our constitutional system. You have an international tribunal essentially reviewing American court judgments."\textsuperscript{24}


\textsuperscript{14} The panel consisted of former District of Columbia circuit judge Abner Mikva, Sir Anthony Mason, a former chief justice of the High Court of Australia, and Lord Mustill, a former British law lord. \textit{Loewen}, 7 ICSID (W. Bank) at 421.

\textsuperscript{15} Id. at 451.

\textsuperscript{16} Id. at 464.

\textsuperscript{17} Id. at 450.

\textsuperscript{18} Id. at 467-68.

\textsuperscript{19} Loewen Group had failed to exhaust its domestic remedies prior to invoking the Chapter 11 procedure. Id. at 484.

\textsuperscript{20} "The United States has yet to lose any investor-state case." Bjorklund, supra note 6, at 889 n.328.

\textsuperscript{21} Interestingly, in other contexts Chief Justice Marshall had been strongly supportive of paying heed to foreign tribunals. Ahdieh, supra note 13, at 2033 n.8 (citing Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence, 79 N.Y.U. L. Rev. 1633 (2004)).

\textsuperscript{22} Liptak, supra note 1 (internal quotation marks omitted) (quoting Chief Justice Ronald M. George of the Supreme Court of California). Loewen Group's American lawyer also expressed unease. "I agree with the principle that people should not short-circuit or second-guess the American legal system . . . . But this case was so extreme that hopefully it will never happen again." Id. (internal quotation marks omitted) (quoting John H. Lewis Jr.).

\textsuperscript{23} Id. (internal quotation marks omitted). When asked about Chapter 11, Senator John Kerry's response shows that Congress was unaware of the full implications of the chapter: "When we debated NAFTA . . . not a single word was uttered in discussing Chapter 11. Why? Because we didn't know how this provision would play out. No one really knew just how high the stakes would get." Id.

\textsuperscript{24} Id. (internal quotation marks omitted).
Chapter 19 of NAFTA provides, at first blush, an even more striking example of the substitution of supranational for domestic dispute resolution. Chapter 19 BNPs (a) directly apply domestic American legal standards, and (b) issue orders directly binding federal administrative officials without a right of appeal to federal courts.\textsuperscript{25} American import law has long regulated "dumping" (sales below a "fair" price) and "unfair" foreign governmental subsidies.\textsuperscript{26} Both are subject to administrative penalties when, after a hearing, they are determined to threaten material injury in the United States.\textsuperscript{27} These proceedings may be triggered by a very wide range of “interested parties” (e.g., domestic competitors).\textsuperscript{28} Judicial review of these antidumping/countervailing duty (AD/CVD) determinations is available in the United States Court of International Trade and thence in the Federal Circuit, both Article III tribunals.\textsuperscript{29} Review is under the standard provided by section 706 of the Administrative Procedure Act.\textsuperscript{30} While Chapter 19 preserves application of American antidumping and countervailing duty laws,\textsuperscript{31} it effectively substitutes BNP review for that of Article III courts.\textsuperscript{32}

\begin{footnotesize}
  \begin{enumerate}
    \item 25. NAFTA, supra note 4, art. 1904. For a comprehensive description of Chapter 19 in the American courts, see Judge Pogue’s opinion in Ontario Forest Industries Ass’n v. United States, 444 F. Supp. 2d 1309, 1311–16 (Ct. Int’l Trade 2006).
    \item 26. See 19 U.S.C. § 1671 (2000) (mandating duty imposition to offset subsidies on products imported into United States); id. § 1673 (same, with respect to dumping).
    \item 27. The Department of Commerce determines the issue of fair price or impermissible subsidy, and the United States International Trade Commission determine the issue of material injury. Id. §§ 1671, 1673, 1677(1).
    \item 28. Id. § 1677(9).
    \item 30. See, e.g., Consol. Bearings Co. v. United States, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (“In reviewing decisions by the Court of International Trade . . . we apply the standard of review set forth in the APA and will 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” (second omission in original) (quoting 5 U.S.C. § 706(2) (2000))).
    \item 31. Each signatory “reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party.” NAFTA, supra note 4, art. 1902(1).
    \item 32. Id. art. 1904(2) (“An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.”); see also 19 U.S.C. § 1516a(a)(5)(B) (2000) (requiring party seeking BNP review to file notice of review with NAFTA Secretariat within thirty days of decision). The implementing statute also expressly exempts Chapter 19 subject matter from the otherwise typically exclusive jurisdictional grants to the U.S. Court of International Trade. See 28 U.S.C. § 1581(i). For a description of the relationship between domestic review and the BNP, see Ontario Forest Industries Ass’n v. United States, 444 F. Supp. 2d 1309, 1311–16 (Ct. Int’l Trade 2006).
  \end{enumerate}
\end{footnotesize}
Chapter 19 proceedings are state-state, not investor-state proceedings. Unlike Chapter 11 proceedings, which can be brought by private parties, in Chapter 19 proceedings private parties must follow the ancient practice and persuade their states to "espouse" their claims. Once a state decides (as a matter of discretion) to take up the private law claims of its nationals, the state itself becomes the claimant, and no other state may question its decision to espouse. Arbitration awards from espoused claims do not create vested rights in the American claimants so long as the funds or property remain in the possession of the government. Unlike Chapter 11 panels, Chapter 19 panels are directed to apply domestic U.S. (not NAFTA) legal standards to determine whether the federal administrative decision should be sustained. Moreover, United States administrative officials must comply with the BNP decision: "The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."
ARTICLE III & SUPRANATIONAL REVIEW

BNP decisions are not subject to further review in Article III courts.\(^\text{40}\) Federal judicial review is unconstitutionally "outsourced," claimed the petitioner in the \textit{Fair Lumber Imports} litigation, which challenged Chapter 19 panels on a broad range of constitutional grounds, including delegation, due process, and the Appointments Clause.\(^\text{41}\) Underpinning most of its claims, the petitioner insisted that:

[T]he provisions challenged here are unprecedented. Never before has Congress replaced American courts with an international body granted the unreviewable power authoritatively to construe U.S. law, and to bind high-ranking Executive officials as a matter of domestic law, in connection with claims brought by U.S. companies against their own government.\(^\text{42}\)

NAFTA is but one example of the growing importance of international and regional dispute resolution. In American law, that development has been particularly intensified in the trade area by the rapid emergence of the World Trade Organization (WTO), with its resolution of state-state trade disputes through arbitration panels and an internal appeals process,\(^\text{43}\) and by various U.S.-negotiated regional trade agreements, such as the United States-Dominican Republic-Central America Free Trade Agreement.\(^\text{44}\)

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40. See NAFTA, supra note 4, art. 1904(1) ("[E]ach Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review."); see also id. art. 1904(11) ("A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination . . . "). These provisions are implemented by 19 U.S.C. § 1516a(g)(2)(A)–(B).


42. Reply Brief of Petitioner Coalition for Fair Lumber Imports Executive Committee at 1, \textit{Fair Lumber Imports}, 471 F.3d 1329 (No. 05-1366) [hereinafter Reply Brief, \textit{Fair Lumber Imports}] (emphasis added). But see infra Part III (describing this historical practice).


44. Chapter 20 of the US-DR-CAFTA provides for resolution of treaty disputes in a manner similar to that set forth in the WTO. See Dominican Republic-Central America-
Quickening patterns of supranational adjudication, of course, far outrun the trade area. “In the last few years, international dispute resolution has assumed unprecedented prominence in international politics.”

And unsurprisingly, the new adjudicatory order has come under sustained attack at home. Judge Bork, for example, views it as a platform for “the agenda of the liberal left or New Class,” an agenda that “contains a toxic measure of anti-Americanism.” Indeed, even in the area of international trade, Patti Goldman decries the displacement of domestic institutions “by trade bureaucrats . . . adjudicating disputes thousands of miles away.” Professor Jed Rubenfeld characterizes NAFTA and WTO panels as a “threat to [American] self government.” These objections are, of course, significantly fueled by the intense opposition to a parallel and, I believe, far more significant development: the rise of supranational “legislative” bodies.


45. Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 Cal. L. Rev. 1, 3 (2005); see also Ahdieh, supra note 13, at 2031 (“In recent years, a wave of international judicialization has washed over the globe.”).


49. The new legislative institutions are a far cry from the international order familiar to the Founding generation—a world of alliances and trade agreements, but of only rudimentary or nonexistent international or multinational institutions that independently formulated binding international norms.


51. Professor Rabkin denies that there can or should be much development of international nonfree-trade norms outside the framework of nation-state sovereignty. Rabkin, supra note 50, at 236–58. His criticism of the “surrender” of national sovereignty to international bodies is echoed by others. See, e.g., Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 Yale L.J. 1490, 1497–511.
That fundamental and far-reaching change is occurring in the American legal order with the rise of a supranational legal order may be conceded. And the desirability of these developments may be debated. But do these changes, at least so far as they concern supranational adjudication, portend fundamental changes in the American constitutional order? Favorably commenting upon the recognition of judgments of the International Court of Justice (ICJ), Justice O'Connor cautioned that:

[T]he vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal "the essential attributes of judicial power."
And, of course, the very highest of these "essential attributes" is the Marbury-based judicial duty "to say what the law is."

Like others, Justice O'Connor expresses the feelings of unease that are invariably created by rapid change. But what happens when that mood is examined? Commentators who welcome the emerging legal developments are dismissive of, or at least impatient with, inquiries that question the legitimacy of these developments. The question nonetheless persists: 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?

This Article submits that NAFTA-like trade tribunals raise no serious problems under Article III and are sanctioned by an ancient lineage. They are only a recent instantiation of an age-old practice: the use of arbitration to resolve disputes by American nationals against foreign states and their nationals. More generally, I believe that any difficulties created by the Constitution for the emerging adjudicatory order will prove to be rather small beer. While in the beginning of our constitutional history it was quite possible to claim that Our Federalism invested our national government with less legal authority in the international sphere than that possessed by other nation-states, any such conception has no purchase now. Indeed, the Court insists that the national government possesses an apparently freestanding "foreign affairs" power.

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56. Even commentators as perceptive as Professor Bjorklund do not address these issues. See Bjorklund, supra note 6.

57. Elsewhere in the Constitution there may be external (i.e., non-Article III) constitutional provisions that limit supranational review of U.S. decisions, but these issues are beyond the scope of this Article.

58. Professor Cleveland writes:

The U.S. Supreme Court early recognized . . . that the specific sovereign powers actually held by any particular state were determined by that state's domestic law, which might modify, or deny altogether, the powers otherwise bestowed by international law. Thus, answering the question of what international law allowed did not resolve what the Constitution allowed or required. The Constitution could deny the international power to the national government by reserving it to the states, or even withhold the power from both levels of government by reserving it to the people.


59. See, e.g., Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring))); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304,
That being the case, and assuming here the general validity of supranational lawmaking, it seems unlikely that the Court will understand the Constitution to seriously impede the manner by which supranational disputes are resolved. As Duncan Hollis observes, "[s]tates have a long history of using treaties not only to set out legal norms, but also to authorize extranational actors to interpret and apply treaties in specific cases involving specific parties."

Part II shows that 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. And the powerful grip on the judicial mind of Marbury's judicial duty "to say what the law is" was most recently in evidence in Sanchez-Llamas v. Oregon, a case interpreting domestic duties under the Vienna Convention. Part III shows, however, that historical practice—in which claims of American nationals against foreign states have been subject to resolution by international arbitration—dates back to the Jay Treaty. Indeed, following the Civil War, Supreme Court decisions were "reeexamined" by such tribunals. Part IV locates this longstanding arbitration history within the larger framework of the American doctrine of public rights, which has played an important role in American domestic law, allowing the adjudication of claims in whole or part outside the framework of Article III courts. Part V looks again at NAFTA BNPs and Sanchez-Llamas; regarding the latter, it speculates as to the possible relevance of the public rights doctrine. Finally, the conclusion suggests that much of the legal uncertainty in this area results from the fact that while American lawyers and judges believe that Article III courts are vitally important to the legitimacy of our constitutional order, no fully rounded account exists as to what that importance is or the degree to which it is beyond congressional control.

318 (1936) ("[T]he investment of the federal government with the powers of external sovereignty did not depend on the affirmative grants of the Constitution."). Professor Cleveland describes the emergence of judicial conceptions of an extratextual "independent" national authority. See Cleveland, Origins, supra note 58. Of course, the present Court might reach essentially the same foreign affairs power through McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415–17 (1819), by "summing up" the constitutionally enumerated powers concerning foreign affairs, so that when added together they constitute such a power.

60. See supra notes 50–51 and accompanying text for a reference to this debate.


63. The key mechanism for invoking the public rights doctrine in these cases is the international and domestic doctrine of espousal, which transforms private domestic claims, when they are transported to the international (or interstate) plane. This does not mean that the Chapter 11 cases, which do not rely on espousal, fall outside of the public rights doctrine. See infra text accompanying notes 215–216.
II. Marbury and the Domestic Interpretation of International Legal Obligations

The presence of "international" ingredients in domestic American adjudication was, we know, quite familiar to the Founding generation. The treaty power and Article I's legislative grants over foreign affairs matters attest to the Framers' concern with America's place in the (then European-dominated) world order. So too does Article III, which extends the judicial power of the United States to a large category of disputes with an international flavor. From the very beginning, American courts enforced treaties and customary international law. Indeed,


65. One of the driving forces in the adoption of the Constitution was the weakness of the Articles of Confederation in this regard. For that reason treaties were included in the Supremacy Clause. U.S. Const. art VI, cl. 2; see Jerald A. Combs, The Jay Treaty 27–28 (1970) ("The states' defiance of America's treaty obligations...convincing the most ardent advocates of states' rights at the Convention that treaties should be the supreme law of the land"); Walter Stahr, John Jay 145–222, 271–338 (2005) (detailing history of American peace treaty with Britain and difficulties of ratification in Continental Congress); The Federalist No. 64 (John Jay), supra note 64 (defending treaty power); cf. 2 The Records of the Federal Convention of 1787, at 29, 389 (Max Farrand ed., rev. ed. 1966) (describing offered supremacy clauses); 3 id. at 273, 286 (debating Supremacy Clause).


67. E.g., Fairfax's Devissee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813); see Henry Paul Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 Colum. L. Rev. 1919, 1971–76 (2003) [hereinafter Monaghan, State Court Decisions] (discussing early decisions on impact of treaties on state law); see also Lee, Original Jurisdiction, supra note 35 (describing originally intended role of the Supreme Court in correcting treaty violations by American states).

much of the early Supreme Court's docket was taken up with such matters as international law, admiralty, prize litigation, and the like. Moreover, as Sarah Cleveland has shown in an exhaustive examination, American understanding of foreign law has played a surprisingly large and underappreciated role in understanding the American Constitution itself.

The foregoing examples, of course, posed no threat to the Marbury-based judicial duty "to say what the law is": All involve Supreme Court determination of the content and the domestic significance of transnational norms. The Court was not "bound" by the holding of any foreign tribunal, however eminent its authority. Thus, the Founding generation did not confront any supranational threat to maintaining "the essential attributes of the judicial power." And the Court's recent encounters congressional authority under the Offences Clause, see J. Andrew Kent, Congress's Under-Ap preciated Power to Define and Punish Offenses Against the Law of Nations, 85 Tex. L. Rev. 843 (2007).

69. For a recent empirical survey of the Jay and Marshall Courts' "foreign affairs" docket, see Note, Rethinking Early Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket, 114 Yale L.J. 855, 889 (2005) ("The docket of the Supreme Court supports . . . assertions that the early Court was heavily involved in foreign affairs."). The lex mercatoria itself seems to have been viewed as a body of transcendent international legal principles. "[T]he affairs of commerce are regulated by a law of their own, called the law merchant or lex mercatoria, which all nations agree in and take notice of." 1 William Blackstone, Commentaries *273. Thus in Swift v. Tyson, an ordinary commercial dispute, Justice Story could comfortably invoke the immense authority of Lord Mansfield in Luke v. Lyde, (1759) 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (K.B.), in turn quoting Cicero's classic declamation on natural law: "Non eit alia lex Rome, alia Athenis; alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una et eademque lex obtenebit." 41 U.S. (16 Pet.) 1, 19 (1842). See generally Jeremy Waldron, The Supreme Court, 2005 Term—Comment: Foreign Law and the Modern Ius Gentium, 119 Harv. L. Rev. 129 (2005) (arguing that citation of foreign law can rest on the law of nations).

70. See Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int'l L. 1 (2006); see also Steven G. Calabresi & Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm. & Mary L. Rev. 743 (2005) (discussing history of Court's use of foreign law in constitutional cases).

with Article 36 of the Vienna Convention, and two International Court of Justice judgments construing that article, confirm the powerful hold of Marbury-based conceptions of judicial duty in the new supranational adjudicatory order. The Court categorically rejected giving preclusive domestic effect to the ICJ judgments, even though the United States was a party to both proceedings.

The United States is a party to the "self-executing" Vienna Convention on Consular Relations, and (was) to an Optional Protocol providing that "[d]isputes arising out of the interpretation or application of the Convention" fell within the compulsory jurisdiction of the International Court of Justice. Article 36 obliges states detaining foreign nationals to notify the foreign national's consular officials "upon request" and to inform detainees "without delay" that they have the right to make such a request. The article goes on to provide that:

The rights referred to in paragraph 1 of the Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

On three occasions, the Court has considered the domestic consequences of violations of the consular notification requirements. In Breard v. Greene, the foreign-national defendant had failed to raise the Article 36 violation claim in the state court criminal proceeding. In a hurriedly reached decision, the Court held that a state court procedural default (forfeiture) rule could be given effect to bar Article 36 challenges arising

76. VCCR, supra note 74, art. 36(2). Sanchez-Llamas contains the full text of Article 36. 126 S. Ct. at 2675 n.1.
78. See Sanchez-Llamas, 126 S. Ct. at 2704 (Breyer, J., dissenting) ("Breard is a per curiam decision that the Court had to reach within the few hours available between the time a petition for certiorari was filed and a scheduled execution . . . .").
in a federal habeas proceeding. In *Medellin v. Dretke*, the Court considered the domestic effect of an ICJ judgment obtained in a suit brought by Mexico against the United States (in which the *Medellin* claim had been espoused). The ICJ had held that Article 36 created enforceable private rights and that American courts must not impose normal procedural forfeiture rules to foreclose all consideration of such claims. While a majority of the Court was able to wash its hands of the issues for the moment, elaborate separate opinions focused upon the significance of the ICJ ruling.

*Sanchez-Llamas v. Oregon*, now with Chief Justice Roberts writing and Justice Alito participating, finally confronted what *Medellin* had postponed: the domestic legal significance of the ICJ rulings. Assuming

79. *Breard*, 523 U.S. at 375–76. The Court, as an alternative ground, rested upon federal legislation governing habeas review of state criminal convictions that postdated the Convention. Id. at 376–77.


81. Reviewing a habeas ruling by the Fifth Circuit, the Court agreed to decide two questions: whether American courts are "bound" by the ICJ ruling, or in any event, "whether a federal court should give effect [to the ICJ judgment] as a matter of judicial comity and uniform treaty interpretation." *Medellin*, 544 U.S. at 661–62.

82. A per curiam opinion noted that at least five difficult antecedent issues relating to the availability of federal habeas corpus to address these issues were presented. These preliminary issues could be avoided, because, the Court noted, after *Medellin* had been docketed, a petition for habeas, based on the ICJ's ruling, had been filed in the Texas courts, and the President had announced that the United States would discharge its treaty obligations by having the state courts give the requisite notice. Id. at 663–64. And the Supreme Court could review the judgment of the Texas Court of Criminal Appeals on direct review. Id. at 666. Four justices would have granted a stay of the Court's proceeding until the Texas courts had ruled. Id. at 672–95 (O'Connor, J., dissenting). The Texas court upheld its prior ruling, in the process criticizing the presidential directive. Ex parte *Medellin*, No. AP-75207, 2006 WL 3302699, at *16–*21 (Tex. Crim. App. Nov. 15, 2006), petition for cert. filed Jan. 16, 2007.

83. These opinions seemed to treat the ICJ as having established the specific rights of Medellin himself; the fact that private parties cannot institute proceedings before the ICJ does not prevent Mexico from espousing such claims. See Lee, Original Jurisdiction, supra note 35, at 1783, 1855–60, 1862–66 (articulating rule of espousal and examining interaction of espousal and state sovereignty). In Part III of her four-person opinion, Justice O'Connor concluded, with little detailed analysis, that the Court must give binding effect to the ICJ judgment, and in any event should do so as a matter of comity. *Medellin*, 544 U.S. at 682–90 (O'Connor, J., dissenting). The preclusion point was treated briefly, id. at 683–84, while her comity analysis seems to be an independent determination that the ICJ correctly interpreted the treaty, id. at 684–90. (Surprisingly, Justice O'Connor voiced little concern with maintaining the "essential attributes of the judicial power." See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); supra text accompanying note 54.) Justice Ginsburg, writing for herself and Justice Scalia, expressed discomfort with the "must" analysis, but she seemed quite prepared to honor the ICJ judgment as a matter of comity. *Medellin*, 544 U.S. at 667–72.

84. See 126 S. Ct. 2669, 2674 (2006).
arguendo that the Convention did create enforceable private rights,\footnote{85} as the ICJ had said, the Court held (quite convincingly, I should add) that suppression of detainee statements (an issue not addressed by the ICJ) was not required as a remedy either under the Convention or American domestic law.\footnote{86} More importantly for us, the Court reaffirmed \textit{Breard}, denying that the ICJ rulings precluded state courts from applying their normal procedural default rules to Article 36 claims.\footnote{87}

That the ICJ judgment conclusively fixed the meaning of Article 36 so far as the international obligations of the United States are concerned seems to have been assumed, at least arguendo.\footnote{88} But the established principle is that "[t]he [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."\footnote{89} Amici international law experts argued, nonetheless, that "the United States is \textit{obligated} to comply with the Convention, as interpreted by the ICJ."ootnote{90} This preclusion argument surely has plausibility. The United States was a party to a properly commenced ICJ proceeding. Domestic recognition and enforcement of those rulings need not rest upon any conception of comity;\footnote{91} it could rest directly on the Convention or on the U.N. Char-

\footnote{85. See id. at 2677–78. Justice Breyer, in dissent, sought to show that the Court's assumption was well founded. Id. at 2693–98 (Breyer, J., dissenting).}
\footnote{86. Id. at 2678–82 (majority opinion). "Suppression would be a vastly disproportionate remedy for an Article 36 violation," particularly since the right to consular notification "is at best remotely connected to the gathering of evidence." Id. at 2681.}
\footnote{87. See id. at 2682–88. The Court was divided on the scope of the ICJ judgment on this point. Compare id. at 2682 (stating that ICJ rulings do not preclude state court application of normal procedural default rules), with id. at 2691 (Breyer, J., dissenting) (replying that state rules "sometimes" must yield).}
\footnote{89. Restatement (Third) of the Foreign Relations Law of the United States § 326 cmt. b (1987). This description, I should add, seems to be predicated on a legal order that predates the emerging supranational adjudicatory tribunals. Of course, this observation does not show that the Restatement is incorrect. See Bedjaoui, supra note 88, at 51–52 (discussing effect of ICJ decisions on municipal courts' legal interpretations).}
\footnote{91. See generally Hilton v. Guyot, 159 U.S. 115 (1895) (discussing use of comity in recognition of foreign judgments).}
The power to make treaties, it would be said, surely subsumes the power to create tribunals for their binding interpretation and application even for domestic purposes. Sanchez-Llamas clearly recoiled from this line of argument. The Court’s analysis drew sustenance from Marbury-grounded conceptions of the “essential nature of the judicial power”:

[Petitioner’s] second reason is less easily dismissed. He argues that since Breard, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims . . . . Several amici contend that “the United States is obligated to comply with the Convention, as interpreted by the ICJ.” We disagree . . . .

Under our Constitution, “[t]he judicial Power of the United States” is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” That “judicial Power . . . extend[s] to . . . Treaties.” And, as Chief Justice Marshall famously explained, that judicial power includes the duty “to say what the law is.” 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. It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.

Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.

92. Hilton itself recognized that an analysis different from comity was required when the foreign judgment was pursuant to a “compact.” Id. at 166 (reiterating views of authorities at that time).
94. Sanchez-Llamas, 126 S. Ct. at 2683–84 (citations omitted) (emphasis in original) (quoting Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 11, Sanchez-Llamas, 126 S. Ct. 2669 (Nos. 04-10566 & 05-51); U.S. Const. art. III, § 1; id. § 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court continued:

The ICJ’s decisions have “no binding force except between the parties and in respect of that particular case.” Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent even as to the ICJ itself; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ’s principal purpose is to arbitrate particular disputes between national governments. While each member of the United Nations has agreed to comply with decisions of the ICJ “in any case to which it is a party,” the Charter’s procedure for noncompliance—referral to
Even Justice Breyer’s pro-ICJ dissent, authored by a member of the Court well known for his sympathetic views toward the relevance of foreign law, was reluctant to attribute preclusive effect to the ICJ judgment.\textsuperscript{95}

The Court’s reasoning is intriguing. After invoking a freestanding “essential attributes” argument drawn from \textit{Marbury}, the Court nicely converted it into a background interpretive principle, which it concluded neither the Vienna Convention nor the U.N. Charter purported to contravene. This meant, for the Court, that the ICJ opinion was entitled to no more than “respectful consideration,”\textsuperscript{96} which, at best, meant that the ICJ rulings had in reality a status no greater than \textit{Skidmore} deference, to borrow a phrase from administrative law.\textsuperscript{97} And here the ICJ was plainly wrong in assessing the domestic implications of Article 36 violations.\textsuperscript{98}

Among other things, the ICJ had, the Court believed, completely failed to appreciate the difference between inquisitorial and adversarial systems of criminal justice with respect to the importance of procedural rules and party initiative.\textsuperscript{99} The Court refused to endorse an “extraordinary . . . exception to [American] procedural rules that is accorded to almost no other right, including many of our most fundamental constitutional protections.”\textsuperscript{100}

Formally, \textit{Sanchez-Llamas} did no more than interpret the legal documents that control the domestic effect of ICJ judgments, and it concluded that they were not intended to vary the standard rule that the Supreme Court has the final say on the domestic significance of a foreign treaty. Quite clearly, however, \textit{Marbury}’s description of the “essential
function" of the Court "to say what the law is" drove the opinion. The Court was quite unwilling to surrender the keys of Saint Peter to say what the federal law is in the American domestic context. "Why?" is the question. Presumably American legal rights and obligations can be conclusively determined for international purposes by "foreign" tribunals, and on such a basis American officials can properly surrender American property, real and personal. Is the matter different when foreign tribunals' determinations are presented to American tribunals and sought to be given domestic effect? If so, is that because Article III requires that American (federal) courts have the final say on those obligations domestically? Or that it requires such a result only when certain rights are involved, i.e., the "private rights" of American nationals? To address these questions we must broaden our inquiry to include the historical practice that extends back to the beginnings of the Constitution—mixed commission international arbitration—as well as legal doctrine developed in an attempt to rationalize the legitimacy of the modern American administrative state, particularly the "public rights doctrine." The next two sections examine these topics.

III. Historical Practice and Supranational Adjudication

Marbury's judicial law-declaring duty notwithstanding, state-state dispute arbitration has a pedigree at least as old as Marbury itself. Since the Jay Treaty of 1794, it has been clear that claims of American nationals espoused by the United States against foreign sovereigns could be adjudicated by state-state mixed arbitration commissions. So far as practice

101. Professor Margaret McGuinness believes, however, that the decision is best understood as part "of the persistent objection of the United States to any international restrictions on the death penalty and the efforts of [various organizations] to nudge the United States [in a different direction]." Margaret E. McGuinness, Medellin, Norm Portals, and the Horizontal Integration of International Human Rights, 82 Notre Dame L. Rev. 755, 757 (2006).

102. It is, to say the least, strained to read the current AD/CVD statutes as having altered the established practice and as having established a "right" in the American competitor to whatever AD/CVD determinations were made by the federal administrative remedies.

103. See infra Part III.

104. See infra Part IV.

105. In a wide-ranging article, Professor Lee argues that the Founders had hoped that the sorts of claims the Jay Treaty arbitral commission was designed to handle might be settled in newly established national courts. Lee, Original Jurisdiction, supra note 35, at 1868–70. Specifically, he claims that the Supreme Court was intended to be a forum for the domestic litigation of claims by foreign states against states for violation of treaties, most notably the 1783 Treaty of Peace. Id. at 1884; see also id. at 1869 (discussing Jay Treaty as reinforcing Supreme Court's role as state-foreign state arbitrator). But the frequency and breadth of such violations, he notes, quickly rendered the possibility that Great Britain would consent to litigation in the Supreme Court remote: "Epidemic defection meant that the Supreme Court, as a national court, could no longer command the mantle of a neutral tribunal vis-à-vis the foreign state since the treaty breach itself seemed national in scope." Id. at 1868. Professor Lee argues that resolution of treaty-
can settle meaning,\textsuperscript{106} it establishes that the United States can enter international agreements creating state-state arbitration panels to resolve the private law claims of its nationals against foreign governments.\textsuperscript{107} This practice has even included the reexamination of decisions of the Supreme Court itself.\textsuperscript{108}

A. The Jay Treaty

The Jay Treaty is an important constitutive document of the Founding era.\textsuperscript{109} The treaty fit nicely within the then-developing historical pattern, and its Articles VI and VII significantly prefigured NAFTA Chapters 11 and 19. As Professor Bjorklund writes:

International investment protections, including the doctrine of denial of justice, developed within the ambit of the law of state responsibility for injuries to aliens. The law of state responsibility has a long pedigree. It reached its apogee in the late nineteenth and early twentieth centuries, although its underpinnings date back to Vattel and Grotius.\textsuperscript{110}

The Jay Treaty itself was designed to discharge the unfulfilled promises of the 1783 Treaty of Peace, which, inter alia, had sought to protect the land and credit interests of British nationals in America. Article IV of the Peace Treaty had provided that “creditors on either side, shall meet with no lawful impediment to the recovery of the full value in based controversies by an extranational body was accordingly not the preferred solution


\textsuperscript{107} The petitioner’s attempt in \textit{Fair Lumber Imports} to characterize the American importers’ claims in Chapter 19, a state-state arbitration, as “really” one against the Canadian exporters rather than the Canadian government has economic plausibility, of course. But it is a long road from that proposition to establishing the existence of a property right in the federal administrative determination. See infra note 201 and accompanying text.

\textsuperscript{108} See infra Part III.C.


\textsuperscript{110} Bjorklund, supra note 6, at 818. Espousal was an alternative to war. See supra note 36. Debtor states now vigorously challenge the belief that armed intervention is a legitimate means of enforcing debt collection. See the extended discussion by Judge Cabranes in \textit{EM Ltd. v. Argentina}, 473 F.3d 463, 466 n.2 (2d Cir. 2007).
sterling money, of all bona fide debts heretofore contracted." Thus, states should not impede the domestic law claims of A (a British creditor or landowner) against B (a state debtor or land claimant). In many states, particularly Virginia, this demand on the state went unhonored, much to the dismay of John Jay when he was Secretary for Foreign Affairs under the Articles of Confederation. State violations of Article IV were among the factors causing considerable strain between the two nations.

Accordingly, Article VI of the Jay Treaty created a mixed commission to arbitrate claims by British subjects concerning debts, to a considerable amount, which were bona fide contracted before the peace . . . and that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that by the ordinary course of judicial proceedings, the British creditors cannot now obtain . . . full and adequate compensation.

Article VI went on to require that the United States "make full and complete compensation" for the losses "occasioned by the lawful impediments." The Commission was directed "to determine the [losses] re-


113. Jay—a principal negotiator of the Treaty of Paris, Secretary to the Continental Congress, Chief Justice of the United States, and negotiator of the Jay Treaty—untiringly sought to secure state compliance. Stahr, supra note 65, at 145–222, 271–338. Jay authored only a few of The Federalist essays, Nos. 2, 3, 4, 5, and 64. No. 64 is a defense of the constitutional provisions concerning the making of treaties. The Federalist No. 64 (John Jay), supra note 64.


115. Jay Treaty, supra note 109, art. VI.

116. Id. The article stated:

It is agreed that . . . the United States will make full and complete compensation for the same to the said Creditors: But it is distinctly understood, that this provision is to extend to such losses only as have been occasioned by the lawful
spectively according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require."

Article VI has gone largely unnoticed. Observe, however, that: (a) It contemplates the resolution of private foreign claims against American nationals arising out of state (or colonial) law in state-state arbitration panels; and (b) the specific rights of American nationals are not adversely affected. Even so, Professor David Currie notes:

During the House debate Representative Page attacked this provision as vesting judicial power outside the federal courts in violation of Article III. Representative Bourne’s response that the matter fell outside that Article because “the Judicial authority is incompetent to take cognizance of controversies between independent nations” was clever but incomplete. For although the United States was substituted for the original debtor as defendant, individual British subjects were still to prosecute their own claims; the modern view is that private suits against the Government, when authorized, are “Controversies to which the United States shall be a party” within the meaning of Article III, § 2. On the other hand, Congress is still recognized as having the option to create alternative tribunals for such claims on the ground that it did not have to consent to be sued at all. A better answer to the Article III objection might be that an international tribunal, like a state court, does not exercise the judicial power of the United States.118

We postpone Professor Currie’s own analysis. Suffice it to say that, if acceptable, Article VI does show at a very early stage in American history that governmental “outsourcing” of determinations of American law (the underlying claims of the British creditors originate in American domestic law and are then protected from state interference by the treaty) was not thought to go to the heart of the matter.119 BNPs adjudicated foreign

impediments aforesaid, and is not to extend to losses occasioned by . . . other causes . . . .

Id. Pinckney’s Treaty, concluded in 1795, provided for a similar mixed commission to resolve war-related claims against United States citizens. Pinckney’s Treaty, supra note 111, art. XXI; see also Spanish Arbitration Treaty, supra note 111, at 200. Section VI of the Jay Treaty was repealed in 1802 by a subsequent treaty between the United States and Great Britain, providing for the payment of six hundred thousand pounds sterling to the Crown “for the use of the persons described in the said sixth article.” Convention, U.S.-Gr. Brit., art. 1, Jan. 8, 1802, 8 Stat. 196.

117. Jay Treaty, supra note 109, art VI.

118. David P. Currie, The Constitution in Congress 212 n.46 (1997) (citations omitted). “In the first half of the nineteenth century, however, the United States Senate repeatedly rejected proposals to join with ‘foreign powers (England, specifically)’ to [suppress the slave trade],” in part because of a fear that the rights of American citizens would be determined by mixed commissions. Resnik, supra note 51, at 1586.

119. To be sure, the relevant domestic law is state, not federal, and perhaps a distinction could be fashioned along these lines. We should note here that private commercial arbitration agreements often provide for determinations of federal law by
claims based upon American substantive law; but the BNP's award had limited domestic effect, since the individual rights of American nationals were not adversely affected. Nonetheless, the decision had some domestic effect. No one, for example, doubted that it was lawful for the United States government to transfer funds to satisfy the BNP awards.

Article VII of the Jay Treaty takes us an important step farther. It concerns largely (but not wholly) the rights of American nationals: "divers merchants and others, citizens of the United States" who complained of "irregular or illegal captures or condemnations of their vessels and other property, under colour of authority or commissions from his Majesty."120 Like the BNP established under Article VI, the Article VII mixed commission was authorized to "decide the claims in question according to the merits of the several cases, and to justice, equity, and [unsurprisingly, given the overriding relevance of prize law] the laws of nations."121 Here again administration of preexisting legal principles is transferred from domestic courts to a supranational tribunal. Domestic law was a significant ingredient of each claim.122 Awards in over 500 cases were

nonnational arbitrators. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985). If outsourcing is the problem, it is not clear why "consent" of the arbitrating parties solves the problem. The argument might be that the award has no stare decisis effect. The award would have real life consequences, however. See infra note 284.

120. Jay Treaty, supra note 109, art VII.
121. Id.
122. In Fair Lumber Imports, the petitioner sought to distinguish these proceedings on the ground that Article VII "changed" the otherwise controlling law. Reply Brief, Fair Lumber Imports, supra note 42, at 3–4. Why that should matter was not made clear, and in any event the claim seems factually inaccurate. Jay Treaty claimants had to prove the validity of their claims under domestic law. See 2 American State Papers, Foreign Relations 384–85 (Walter Lowrie & Matthew St. Clair Clarke, eds., Washington, Gales & Seaton 1832) (1789–1815) (describing requirement that it be proven that bona fide debt had been contracted before peace and prior to any lawful impediment imposed by states). The major distinction between having the claims adjudicated in U.S. federal court and in the binational tribunal seems to have been in the form of evidence that would be accepted to prove indebtedness. See Bemis, supra note 109, at 383–84, 436–37 (discussing admissibility of more evidence in tribunal proceedings as compared to American courts).

The Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims was designed in large measure to resolve American claims against the Mexican government arising out of the political turmoil in Mexico in the middle decades of the nineteenth century. Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, U.S.-Mex., pmbl., July 4, 1868, 15 Stat. 679 [hereinafter Convention with Mexico]. The Convention provided for espousal-based claims resolution by two commissioners who, in turn, chose an umpire to resolve claims when they could not agree. Id. art I. The umpire chosen was the eminent Dr. Francis Lieber, who "in at least some cases ... did not profess to be guided by any definite rules" and (in Dr. Lieber's words) instead stood ready to invoke the "power and duty which is possessed by the judges of peace in several countries of the European continent ... . It is the office of peacemaking by mutual cessions." 2 John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 1301 n.2 (Washington, G.P.O. 1898) [hereinafter Moore, History and Digest]. In at least one case the commissioners rejected a decision so grounded. Id. at 1302 n.2.
made in favor of American litigants.\textsuperscript{123}

Glass v. Sloop Betsey gave indirect support to Article VII's framework in a contemporaneous foray into another sensitive issue in Anglo-American relations.\textsuperscript{124} The federal district courts had been dealing with suits involving French warships and privateers preying on British and allied shipping in the Atlantic Ocean.\textsuperscript{125} Given the hazards of sailing prizes to the French West Indies or France, the seized vessels (and their valuable cargoes) were often brought into proximate American ports like Baltimore, Philadelphia, and Charleston, there to be condemned as prize by French consular courts and their cargo sold to eager American merchants.\textsuperscript{126} Some of the aggrieved owners of the seized cargo, including (importantly) American nationals, sued in U.S. federal district courts seeking "restitution" for the value of their cargoes.\textsuperscript{127} Difficult issues arose. Did the district courts have any statutory jurisdiction over prize, as opposed to civil admiralty and maritime, matters?\textsuperscript{128} More importantly, could they order restitution in face of the settled law-of-nations rule, which the Court confirmed a year later in Talbot v. Janson,\textsuperscript{129} that the legality of the capture of the vessel as prize was not a question for adjudication by the courts of a neutral country?\textsuperscript{130}

The Supreme Court held that the district courts had jurisdiction to order restitution.\textsuperscript{131} More importantly here, though counsel had declined the Court's invitation to argue the issue,\textsuperscript{132} a unanimous Court in a single paragraph in a one-page opinion by Chief Justice Jay, "decreed and adjudged" that the French consular courts could not exercise jurisdiction because "no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States."\textsuperscript{133} The Court articulated an important exception: "but such only as may be warranted by, and be in pursuance of treaties."\textsuperscript{134} And the Court stated that the French consular courts were not "so warranted."\textsuperscript{135} Article VII of the Jay Treaty seems to be the sort of warrant that would

\textsuperscript{123} The commission appointed pursuant to Article VII of the Jay Treaty issued a total of 565 awards, 553 of which were to American claimants. See 1 Moore, History and Digest, supra note 122, at 342-43.
\textsuperscript{124} 3 U.S. (3 Dall.) 6 (1794).
\textsuperscript{126} Id.
\textsuperscript{127} See Glass, 3 U.S. (3 Dall.) at 16; see also Casto, supra note 125, at 82 (describing suits filed by British owners).
\textsuperscript{128} See Glass, 3 U.S. (3 Dall.) at 16.
\textsuperscript{129} 3 U.S. (3 Dall.) 133, 155, 157 (1795) (Paterson, J.); id. at 159 (Iredell, J.); id. at 168 (Cushing, J.).
\textsuperscript{130} Glass, 3 U.S. (3 Dall.) at 16.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 15-16.
\textsuperscript{133} Id. at 16.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
have easily met the Court's approval. But it is extraordinary that the Court suggested that if authorized by treaty, an extraterritorial foreign court on U.S. soil—an animal entirely different from a bilateral mixed commission—might be constitutionally competent to displace U.S. courts in the adjudication of presumptively state-law restitution claims brought by an American national against a foreigner.\footnote{136}{Id.; cf. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) ("[A]dmiralty jurisdiction can be exercised in the states . . . only [in courts] which are established in pursuance of the 3d Article of the Constitution.").}

B. Subsequent Practice

Article VII alone arguably did not quite cover "private law claims of American nationals" because the applicable substantive law (prize law) was part of public international law, which seems to have been understood in the Founding period as a distinctively "independent" body of law. But the pattern of compromising American claims in arbitration proceedings against foreign sovereigns took strong hold, whatever the underlying sources of the applicable substantive law.\footnote{137}{See Brief for Respondents, \textit{Fair Lumber Imports}, supra note 106, at 20–22 (discussing examples of American resort to supranational arbitration from 1839 to modern era); see also 1 Richard B. Lillich & Burns H. Weston, International Claims: Their Settlement by Lump Sum Agreements 26–27 (1974) (finding, from 1794 to end of World War II, at least 249 uses of arbitration to settle disputes, with United States participating in some arbitrations); John Bassett Moore, Treaties and Executive Agreements, 20 Pol. Sci. Q. 385, 398–417 (1905) (discussing examples of compromising American claims in supranational arbitration). Professor Bjorklund states: The modern era of mixed claims commissions is usually traced to the Jay Treaty of 1794, which established panels to resolve disputes between the United States and Great Britain. By that treaty, the two countries agreed to settle claims stemming from the Revolutionary War. From 1794 until the onset of the Second World War, adjudicatory settlement, usually by means of mixed claims commission arbitration, was used in at least 249 cases. Most of the claims settled were personal injury and property claims arising from "civil rebellion, international conflict, and miscellaneous maritime seizures." Bjorklund, supra note 6, at 826–27 (footnotes omitted) (quoting Lillich & Weston, supra, at 27).}

\footnote{138}{Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).}

\footnote{139}{Louis Henkin, Foreign Affairs and the Constitution 262 (1972).}
with them, usually without exclusive regard for their interests, as distin-
guished from those of the nation as a whole.”140

Dames & Moore v. Regan states the current American law.141 There,
the Court sustained executive orders designed to implement an executive
agreement between Iran and the United States securing the release of
American hostages held in Iran.142 That agreement called for termina-
tion of “all litigation as between the Government of each party and the
nationals of the other” and for settlement of pending claims through
binding arbitration before a tribunal established under the agreement.143
An implementing executive order “suspended” all claims pending in
American courts that fell within the jurisdiction of the claims tribunal.144
The principal issue was the validity of that order. There was, however, no
suggestion that the order violated Article III or the Due Process Clause by
substituting a different adjudicatory tribunal. The Court assumed that
any such issues were foreclosed by settled practice, citing both the Re-
statement and Professor Henkin.145

A troublesome wrinkle in the Court’s opinion remains to be consid-
ered. In determining whether Congress had restricted presidential au-
thority to establish an arbitration commission by enacting the Foreign
Sovereign Immunities Act (FSIA),146 the Court rejected an argument that
the presidential claims suspension had “circumscribed the jurisdiction of
the United States courts in violation of Art. III.”147 The Court first weakly
responded that the only effect of the executive order was to “suspend”
the claims, not to divest the federal courts of jurisdiction—a surely un-
convincing response since the Court acknowledged that the only claims
that would not be conclusively resolved were those that were outside of
the jurisdiction of the arbitration commission.148 The Court then went
on to say:

140. Id. at 262–63.
142. Id. at 688.
143. Id. at 665 (internal quotation marks omitted) (quoting Declaration of the
in 1 Iran-U.S. Claims Tribunal Reports 3 (1983)). In Fair Lumber Imports the government
correctly observes that the mixed commission’s jurisdiction over debts and contracts
necessarily assumed resort to municipal law, not a wholly new body of law. Brief for
144. Dames & Moore, 453 U.S. at 665–66. The implementing executive orders also
nullified all prejudgment attachments against Iran’s assets in actions against Iran in
American courts and ordered transfer to Iran of all of its assets in U.S. banks, except for
one billion dollars to cover awards against Iran by the claims tribunal. Id. at 664–65.
145. Id. at 678–80. Subsequently, the Court reiterated the same point regarding
147. Dames & Moore, 453 U.S. at 684.
148. Id. at 684–85.
This case, in short, illustrates the difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law. See United States v. Schooner Peggy, 1 Cranch 103 (1801). The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner’s argument. No one would suggest that a determination of sovereign immunity divests the federal courts of “jurisdiction.” Yet, petitioner’s argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President’s determination of a foreign state’s sovereign immunity.\footnote{149}

The general reference to Schooner Peggy is unilluminating; that decision does no more than make the general distinction between the alteration of substantive rules and the alteration of jurisdictional ones.\footnote{150} When the Court said that the President “has simply effected a change in the substantive law governing the lawsuit,” the import of this sentence must be understood to say only that, in so doing, the President had not attempted to affect the jurisdiction of the Article III courts.\footnote{151} All that occurred was the elimination of a defense (sovereign immunity), which at least benefited the American private law claimants,\footnote{152} although it eliminated their forum of choice.\footnote{153} And whatever the limits on the Presi-

\footnote{149. Id. at 685 (emphasis added).}
\footnote{150. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109–10 (1801) (discussing Court’s obligation to enforce alteration of substantive rules but not jurisdictional rules).}
\footnote{152. The Court did not independently pursue the question whether FSIA had itself eliminated the defense.}
\footnote{153. The practice of executive foreign policy determinations closing the doors of the federal courts seems to be gaining traction. See, for example, Judge Kavanaugh’s dissenting opinion in Doe v. Exxon Mobil Corp., 473 F.3d 345, 357 (D.C. Cir. 2007) (Kavanaugh, J., dissenting). A sequel to Dames & Moore rejected an argument that the claims settlement process constituted a taking of property requiring just compensation. Abrahim-Youri v. United States, 139 F.3d 1462, 1468 (Fed. Cir. 1997). Moreover, foreign arbitration panels are widely assumed to be capable of fairly applying the relevant American substantive law. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985). Although this may be more fiction than reality, the point is that prior arbitrations have been at least formally charged with respecting the law creating the underlying obligations, and, frequently, this has included references to federal statutory law.}
dent's authority to fashion judicial door-closing or substantive rules on his own, one cannot extrapolate from that the broader idea that the President (or for that matter Congress), in transferring cases to arbitration, has an unlimited power to alter the otherwise applicable substantive law.

C. Reexamination of Supreme Court Decisions

None of the foregoing discussion involved direct review of a state court decision by a tribunal other than the Supreme Court. The Founding generation, I believe, simply would not have contemplated that Congress could authorize any such review by foreign tribunals. This would apply a fortiori to international review of decisions of the Supreme Court itself.

Seen in that light, the work of the mixed commission established by the Treaty of Washington has not received the attention from American constitutional lawyers that it deserves. The leading legal historian of the period, Charles Fairman, scarcely gives it any notice in his two volumes. But the commission's proceedings have considerable current relevance. Article XII of the treaty gave the commission jurisdiction over a wide (but by no means all-encompassing) range of claims involving American and British nationals against the two governments arising out of the Civil War. The overwhelming bulk of the claims, however, were

154. While Martin v. Hunter's Lessee sustained congressional authority to authorize the latter review, even this landmark decision did not still future challenges to the Court's appellate jurisdiction. 14 U.S. (1 Wheat.) 304, 351 (1816). "Between 1789 and 1860 the courts of Virginia, Ohio, Georgia, Kentucky, South Carolina, California, and Wisconsin denied that the Supreme Court had the power to review state court judgments on writs of error." Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 479 (5th ed. 2003) [hereinafter Hart & Wechsler]. State legislative efforts mirrored the controversy over the Court's jurisdiction. Id. The Court recognized that Congress could, in fact, authorize (at least initially) such review in the inferior federal courts. Martin, 14 U.S. (1 Wheat.) at 338; see also 28 U.S.C. § 2241 (2000) (discussing habeas corpus); Doe v. Mann, 415 F.3d 1038, 1043 (9th Cir. 2005) (discussing congressional grants of authority to review state-court judgments); Hart & Wechsler, supra, at 481. Hamilton made the same point in The Federalist No. 82. The Federalist No. 82 (Alexander Hamilton), supra note 64, at 494–95.

155. This formulation, of course, logically could mean that they had no specific thoughts pro or con. But the history behind the Constitution's effort to draw the states into a union closer than that under the Articles of Confederation is not consonant with review of state courts by "distant" foreign tribunals.


157. 6 Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864–88 (1971); 7 id. (1987). Fairman briefly describes the treaty in a section discussing Morrison Waite, a future Chief Justice of the United States Supreme Court, and his participation in the claims against Great Britain—generally known as the "Alabama Claims," which were not within Article XII. See id. at 78–79 (discussing Treaty of Washington, supra note 156); see also id. at 752 n.25 (discussing Alabama Claims treatment in Treaty of Washington, supra note 156).
brought against the United States on behalf of British claimants.\textsuperscript{158} Only nineteen American claims against Great Britain were submitted, and all were dismissed.\textsuperscript{159} By contrast, about 480 British claims came before the commission.\textsuperscript{160} The commission proceeded in customary form. Both countries appointed representatives, and they agreed upon a neutral commissioner.\textsuperscript{161} The claims presented were by way of espousal; agents of the respective governments made the presentations.\textsuperscript{162}

What is striking is that the commission clearly purported to "review" prize decisions of the United States Supreme Court (and the House of Lords).\textsuperscript{163} Indeed, the extent of the jurisdiction claimed is quite astonishing. In the \textit{Sir William Peel}, the lead discussion of one of several cases "argued and submitted together,"\textsuperscript{164} Mr. Robert Hale, the American representative, is reported to have stated that:

\begin{quote}
He admitted fully the jurisdiction of the commission, and their power and duty under the treaty to review the final judgments of the prize courts of ultimate resort of the respective nations as not conclusive upon the respective governments which might intervene on behalf of their subjects against the judgments of those courts, such jurisdiction having been long since fully established by the direct decision of the commission . . . .
\end{quote}

\begin{quote}
That while, therefore, the right of the commission to sit in judgment upon the validity and correctness of the judgments of the prize courts of the United States upon these cases is not now questioned, such validity and correctness are to be determined only in accordance with the settled principles of prize law, as recognized by the two countries.
\end{quote}

That in reviewing the judgments of the highest appellate courts of either of the two countries, high contracting parties to the treaty, the high reputation of those courts respectively, the weight uniformly given to the decisions of each by the other and the rules of international comity and mutual respect dictate that such judgments are not to be rashly or hastily overruled or reversed; but only on a clear showing of a violation of the rules of international law \textit{in re minime dubia}.\textsuperscript{165}

Mr. Hale apparently framed the general issue in denial of justice terms:

\begin{quote}
\textsuperscript{158} 1 Moore, History and Digest, supra note 122, at 692–93.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 692.
\textsuperscript{161} Id. at 689–90.
\textsuperscript{162} Id. at 683–93 (describing formation and operation of commission).
\textsuperscript{163} See id. (discussing treaty's treatment of prize disputes); see also 4 id. at 3838–43 (discussing Commission's review of The Peterhoff, 72 U.S. (5 Wall.) 28 (1867)); id. at 3902–11 (The Prize Cases, 67 U.S. (2 Black) 635 (1862)); id. at 3911–23 (The Circassian, 69 U.S. (2 Wall.) 135 (1865)); id. at 3928–35 (The Springbok, 72 U.S. (5 Wall.) 1 (1867)); id. at 3935–48 (The Sir William Peel, 72 U.S. (5 Wall.) 517 (1867)); id. at 3950 (The Volant, 72 U.S. (5 Wall.) 179 (1867)); id. at 3950–57 (The Science, 72 U.S. (5 Wall.) 178 (1867)); id. at 3957–58 (The Georgia, 74 U.S. (7 Wall.) 32 (1869)).
\textsuperscript{164} 4 id. at 3935.
\textsuperscript{165} Id. at 3942–43 (emphasis added) (internal quotation marks omitted).
That the question to be decided in these cases is whether injustice has been done to the subjects of Her Britannic Majesty by the judicial tribunals of the United States; and that the commission certainly can not find that such injustice has been done, unless they find that the well-settled principles of international law have been violated by those tribunals. 166

The United States commissioner did not challenge this description; indeed, he thought it was not an issue. 167 And the determinations of the commission were to be considered “as a full, perfect, and final settlement of all such claims as are mentioned in Article XII. of this treaty upon either government.” 168

In the Sir William Peel, the report sets out the American proceedings fully. The prize court decision ordered restitution of the vessel, but because of its doubt, decreed that costs be paid by claimants and no damages awarded. 169 The Supreme Court’s opinion was carefully described, including its reversal of the order on costs. 170 The commission, over the dissent of the American representative, awarded the claimants $272,920, apparently premised on its disagreement with the Supreme Court’s interpretation of the applicable substantive law. 171

The Sir William Peel reflected the general practice of close examination of the Supreme Court’s decisions. In the Dashing Wave, for example, the recital reported the Supreme Court decision “to which report reference is made for the . . . peculiar facts of the case. No proofs were made before the commission substantially changing the facts as there stated.” 172 The commission reviewed the decision, and viewing its decision as controlled by the principles it had announced in the Sir William Peel, unanimously disallowed all the claims. 173

D. The Appointments Clause

Consideration of an apparently sidebar issue, namely, the Appointments Clause, 174 proves to be quite illuminating. Appointment to these temporary, ad hoc mixed commissions has not generally been thought to implicate that clause. Nonetheless, in Fair Lumber Imports, the petitioner urged that BNPs violated the clause because both American and non-

166. Id. at 3943 (internal quotation marks omitted). The standard of review applied by the commission seems to have been more akin to independent judgment than a more deferential standard of review. It is difficult to say without a comprehensive discussion of the proceedings.
167. Id. at 3952–53.
168. 1 id. at 690 (discussing Treaty of Washington, supra note 156, arts. XI & XII).
169. 4 id. at 3947.
170. Id. at 3935–36.
171. Id. at 3948.
172. Id. at 3949.
173. Id.
American members were not appointed consistently with the clause.\footnote{175} The government responded as expected, namely, that judicial precedent confirmed historical practice: BNP members are not "officers" of the United States within the meaning of the Appointments Clause.\footnote{176} Alexander Hamilton, it noted, had defended the Jay Treaty against precisely such a charge.\footnote{177} The government said: "We are aware of no legal precedent or history of practice that requires members of case-specific international arbitral panels established under an international agreement entered into by the United States to be appointed under the Appointments Clause, and the Coalition has pointed to none."\footnote{178} The government then went on to cite prior opinions of the Attorney General and Supreme Court decisions.\footnote{179}

In \textit{Fair Lumber Imports} petitioners had insisted that the BNP's domestic law efficacy required compliance with all constitutional requirements, presumably including the Appointments Clause.\footnote{180} This argument resonated with the Office of Legal Counsel's (OLC) testimony at the United States-Canadian Free Trade Agreement hearings.\footnote{181} Ever zealous of presidential prerogative, OLC argued that without presidential sanction the BNP decisions could have no domestic effect.\footnote{182} "[P]anels and committees are international bodies," OLC said.\footnote{183} "While the United States would be absolutely bound to adhere to panel decisions as a matter of international law, neither the President nor government agencies may constitutionally be required to implement panel and committee decisions as a matter of domestic United States law."\footnote{184} The testimony was advanced in support of a statutory provision that would have authorized

\footnote{175. Brief of Petitioner Coalition for Fair Lumber Imports Executive Committee at 48-52, Coal. for Fair Lumber Imports, Exec. Comm. v. United States, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).}

\footnote{176. Brief for Respondents, \textit{Fair Lumber Imports}, supra note 106, at 45-53.}

\footnote{177. Id. at 46-47 (citing Alexander Hamilton, The Defence No. 37 (Jan. 6, 1796), reprinted in 20 \textit{The Papers of Alexander Hamilton} 13, 14, 20 (Harold C. Syrett ed., 1974)).}

\footnote{178. Id. at 46.}

\footnote{179. Id. at 48-52. \textit{United States v. Hartwell} explained that the term "officer" connoted "tenure, duration, emolument, and duties," attributes that were "continuing and permanent, not occasional or temporary." 73 U.S. (6 Wall.) 385, 393 (1868).}

\footnote{180. Reply Brief, \textit{Fair Lumber Imports}, supra note 42, at 27-28.}


\footnote{183. McGinnis Testimony, supra note 181, at 82.}

\footnote{184. Id. at 81 (emphasis omitted).}
(but not mandated) the President to order federal compliance with BNP decisions.

The OLC testimony drew no distinction between NAFTA- and treaty-based BNPs. While no reasoning and supporting authority were cited to buttress the OLC testimony, entailing complexities well beyond the scope of this Article, the lineage of the specific argument is familiar enough. The U.S. Code is full of "assimilative" provisions, as Professor Swaine reminds us. "Assimilative statues do not, in and of themselves, assign legislative authority to any international actor. Instead, they direct the President or other executive branch officials to abide by, or otherwise take into account, lawmaking by international institutions." The NAFTA Implementation Act would seem to constitute sufficient assimilative legislation.

OLC’s argument prefigured the now-fashionable claim that international law and obligations have no independent domestic force without political ratification. If the Appointments Clause is thought to provide a constitutional base for this result, the effect will be sweeping. Generally stated, the argument seems to assert that any new legal international obligation is domestically ineffective unless all of the promulgators have satisfied the Appointments Clause (i.e., never), or the President is given discretion to adopt the decision.

Suffice it to note here that the implications of the OLC arguments are far from clear, at least so far as Article III is concerned. BNPs' decisions usually require no domestic judicial involvement, but they clearly have had some effect domestically. The governments involved discharge their obligations by the payment of money or the recognition of title or property. The basis for any such conduct by American officials is puz-

185. Swaine, supra note 52, at 1519–22.
186. Id. at 1519.
189. Presidential discretion could come from an authorizing statute or through the legislation subject to presentment claims.
zling under the OLC's argument. Indeed, OLC itself seems aware of that fact. In a letter to the House Judiciary Committee transmitting its Senate testimony on NAFTA, OLC said:

We are aware that your Committee, after consulting with the Department of Justice, has considered a formulation different than the one we recommend, which would provide that the President may “advise” government agencies of the international obligations of the United States, flowing from the decisions rendered by binational panels and committees. . . . Government agencies that had merely been “advised” of panel and committee decisions would be under no legal obligation to implement those decisions. Indeed, they probably would lack the legal authority to do so.191

And while BNP awards do not create vested rights in the American claimants so long as the funds or property are in the possession of the government, the assumption seems to have been that the awards themselves would have domestic claim-preclusive effect.193 In Ford v. United States, arising out of the Treaty of Washington, the mixed commission had awarded a British claimant a sum of money that American heirs believed

190. So too is OLC’s conclusion that the conduct of American officials can bind the United States on the international level, even though the Appointments Clause has not been satisfied. Moreover, the Assimilative Crimes Act, 18 U.S.C. § 13 (2000) (incorporating state-law crimes occurring in federal enclaves into federal law), seems to be invalid if OLC’s argument is correct. Federal law could not incorporate future state-law crimes because the state legislators enacting those offences had not been appointed consistent with the Appointments Clause. However, this is not the case. The constitutionality of the forward-looking aspects of the Assimilative Crimes Act was sustained in United States v. Sharpnack, 355 U.S. 286, 297 (1958).


192. La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460–62 (1899).

193. The compacts creating the arbitration commissions contain sweeping finality provisions. For example, Article VI of the Jay Treaty provided that commission awards “shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant.” Jay Treaty, supra note 109, art. VI. In the Treaty of Washington, the parties agreed “to consider the decision of the commissioners as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objection, evasion, or delay whatsoever”; “to consider the result of the proceedings of this commission as a full, perfect, and final settlement of all such claims as are mentioned in Article XII of this treaty upon either government”; and further to treat “as finally settled, barred, and thenceforth inadmissible” “every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission.” Treaty of Washington, supra note 156, arts. XIII, XVII. While Frelinghuysen v. Key makes plain that this finality language has particular reference to the sovereign parties to the compact and that it marks their commitment to abide by the results of the arbitration process, 110 U.S. 63, 71–72 (1884), domestic preclusion seems assumed in the discussion of the finality language of the Convention Between the United States and Mexico, see Convention with Mexico, supra note 122, art. V.
was too low. They persuaded Congress to enact legislation invoking the then-existing reference jurisdiction of the Court of Claims.195 That court was authorized to receive as evidence the testimony presented to the mixed commission and any additional testimony.196 The clear assumption was that without the act of Congress the commission's award would have been preclusive.197 Put differently, claims of American debtors against foreign public debtors (and at least in part private debtors also) come with a congenital “espousal infirmity.” Congress has wide latitude to provide for the resolution of these claims by arbitration panels, without providing an alternative forum.198

IV. THE PUBLIC RIGHTS DOCTRINE

In *Fair Lumber Imports*, the government's principal defense of the Chapter 19 procedure rested upon the historical practice running back to the Jay Treaty.199 The government did, however, advance a second line of defense, one that drew more visibly upon precedents derived from the rise of the modern administrative state in American domestic law:200 Domestic law, the government maintained, had never recognized any “property right” in tariff or custom levels.201 It then went on to argue

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195. Id. at 214–15.
196. Id. at 213–14.
197. The Supreme Court entertained the suit but it held that the suit was barred by the statute of limitations, which the act of Congress was held not to have waived. Id. at 218.
198. Cf. Dames & Moore v. Regan, 453 U.S. 654, 687 (1981) (upholding President's power through executive agreement to provide for claims resolution); Joo v. Japan, 413 F.3d 45, 51 (D.C. Cir. 2005) (noting government's ability to make treaties providing for settlement of private claims by international tribunals). A Takings Clause claim might be available if the arbitration panels were clearly inadequate. Settlement alone, however, does not constitute a taking. See Abraham-Youri v. United States, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (“[T]he fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.”).
200. While the Constitution contained several provisions that could have been read to constrain the administrative state, that did not occur. The nondelegation doctrine is no restraint, and the administrative state's need for information has overcome any potential barriers that might have been drawn from the Fourth and Fifth Amendments. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 735 (1988) [hereinafter Monaghan, *Stare Decisis*]. My article, *Marbury and the Administrative State*, is concerned with the collapse of the potential Article III barriers to administrative adjudication. Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1 (1983) [hereinafter Monaghan, *Administrative State*].
201. Brief for Respondents, *Fair Lumber Imports*, supra note 106, at 30–38 (“No one has a legal right to the maintenance of an existing rate or duty.” (quoting Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 318 (1933))); accord United States v. George S. Bush & Co., 310 U.S. 371, 379 (1940). More generally, the petitioner was a coalition of competitors of Canadian exporters. That sufficed for standing, but it did not create property rights. The government pointed out that a litigant's interest in making a profit standing alone was not a property right, citing College Savings Bank v. Florida
that Article III was not violated because, at most, petitioner asserted only "public" rights, as to which no right to judicial review existed, or if it did, review did not require an Article III court.\(^{202}\) The government did not recognize that the mixed commission arbitration cases were themselves simply a subtle subset of the public rights doctrine.

Professor Currie, it will be recalled, believed that BNP panels raise no Article III difficulty because they do not exercise “the judicial power of the United States.”\(^{203}\) This laconic statement could mean that (a) Article III is implicated only when Article III courts are in fact employed by Congress, or (b) that although Article III presupposes that some adjudication at the federal level can occur only in Article III courts, customs disputes do not fall within that category.\(^{204}\) Professor Henkin, whom Professor Currie cites with approval, collapses both strands:

Some argued that this arrangement violates Article III establishing the Judicial power of the United States in the federal courts . . . . The relevant provisions are properly seen as an agreement by the United States to have some of its laws and executive actions reviewed by an international tribunal. As such, the agreement violates no provision of the Constitution or any constitutional principle. Such arrangements do not entail any delegation to an international body of legislative or judicial power of the United States. . . . The Constitution does not require that determinations of import duties be subject to review at all, and review by an international body (rather than a U.S. court, or no review at all), therefore, raises no constitutional issues. The arrangement seems fair and reasonable and does not deprive affected persons of due process of law.\(^{205}\)

This response is rather too brisk. The first sentences seem wholly conclusionary, the last two directed at a due process argument, not an argument that Article III’s very existence constrains congressional choice of adjudicatory mechanisms.\(^{206}\)

\(^{200}\) Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 675 (1999), cited in Brief for Respondents, Fair Lumber Imports, supra note 106, at 33.

\(^{202}\) Brief for Respondents, Fair Lumber Imports, supra note 106, at 38–45.

\(^{203}\) Currie, supra note 118, at 212 n.46; see supra text accompanying note 118.

\(^{204}\) Currie suggested the latter conception in the preceding sentence, which begins with “On the other hand.” Currie, supra note 118, at 212 n.46. That customs disputes fall outside of the required Article III jurisdiction is supported by case law. See, e.g., Ex parte Bakelite Corp., 279 U.S. 438, 458 (1929) (holding that customs disputes do not “inherently or necessarily require[ ] judicial determination”); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion) (discussing public rights exception’ (citing Ex parte Bakelite, 279 U.S. at 452)).


\(^{206}\) The tight connection between due-process- and Article III-based arguments was severed by Crowell v. Benson. 285 U.S. 22 (1932); see Monaghan, Administrative State, supra note 200, at 17–18 ("Crowell, in sum, sanctioned a wide area for the operation of
Article III might (at least as an original matter) have been understood to require that if any adjudication by federal tribunals occurs, it must occur in Article III courts. The expanding national government and the rapidly expanding national domain quickly rendered any such conception untenable. From the very beginning, the Court recognized "exceptions," i.e., that significant federal adjudication could occur in non-Article III tribunals. But not all. The very existence of Article III has always been understood to have some restraining content on Congress. That remains true to this present day. "There is wide agreement," state Hart and Wechsler, "to the highly general principle that Article III imposes at least some limits on Congress' power to vest judicial power in non-Article III federal tribunals, but much less consensus or certainty concerning precisely what those limits are." Speaking specifically of the federal judicial power, Hamilton long ago wrote, "[t]his time only . . . can liquidate the meaning of all the parts." NAFTA is a salient illustration of that insight.

Judicial efforts to rationalize the current reality cluster along two lines. The first is the well established (Justice Brennan said "narrow") "exceptions" to Article III, involving territorial courts, military tribunals, and the adjudication of public right disputes, that can, if Congress so decides, be adjudicated in non-Article III courts. The "public rights" exception is a wide and significant one. (The extent to which these determinations can be entirely insulated from Article III review is a different matter.) Second, a different set of authorities establishes that adjudica-

207. This is not to be confused with an original understanding argument that state courts could not entertain some categories of federal jurisdiction. See, e.g., Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 46–135, criticized in Hart & Wechsler, supra note 154, at 437–39. Time has wholly foreclosed that argument. For a recent illustration, see Tafflin v. Levitt, 493 U.S. 455, 458–60 (1990) (holding that state courts can enforce federal rights of action absent express or implied exclusion). Rather, my argument assumes that state courts could entertain federal claims because (like Article III courts) they are sufficiently insulated from the political branches of the national government.


210. The Federalist No. 82 (Alexander Hamilton), supra note 64, at 491. Madison, in The Federalist No. 37, expresses the same sentiments in another context. See id. No. 37 (James Madison), at 229.

tion involving many "private" rights can occur, at least initially, outside of the Article III framework, in administrative agencies. These proceedings are not viewed as "exceptions" to Article III, but rather as involving (with the very greatest strain in the case of agencies) the use of "adjuncts" to the Article III courts, much like (we are told) the traditional masters in equity.\footnote{The adjunct theory stems from Crowell v. Benson, 285 U.S. 22 (1932). United States v. Raddatz, involving magistrate judges, provides a more recent and plausible illustration. 447 U.S. 667 (1980).}

The government's reliance on Jay Treaty precedent in \textit{Fair Lumber Imports} is, at bottom, reliance upon a subset of the "public rights" exception: Espousal-based claims against foreign sovereigns have never been thought to be within the mandatory ambit of the Article III courts, much as money claims against the United States have always been understood to be within the "public rights" exception to Article III.\footnote{Claims against the United States for "money, lands or other things" have historically been understood to involve public rights. Ex parte Bakelite Corp., 279 U.S. 438, 452 (1929). Hart & Wechsler state: It has traditionally been understood that certain claims under federal law—notably including those involving the sovereign immunity of the United States—permit but do not require judicial determination. Pursuant to its Article I powers, Congress may provide or withhold original federal jurisdiction to decide such claims. If it so chooses, it may also provide for at least the initial determination of such claims in federal tribunals established under Article I and staffed by judges without the tenure and salary protections afforded to the Article III judiciary. Hart & Wechsler, supra note 154, at 319-20. For a comprehensive survey of the nineteenth century precedents, see Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 561-86 (2007).} Indeed, in \textit{La Abra Silver Mining Co. v. United States}, not mentioned by the government in \textit{Fair Lumber Imports}, the Court, in sustaining the jurisdiction of the Court of Claims to set aside an international arbitration award against Mexico because of fraud, explicitly relied upon the public rights doctrine.\footnote{175 U.S. 423, 456 (1899); see also \textit{Ex parte Bakelite}, 279 U.S. at 451 & n.8 (listing cases where Congress has power to use Article I or Article III courts); Ethan Boyer, Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA, 13 Int'l Tax & Bus. Law. 101, 131-34 (1996) (justifying BNP's on basis of public rights doctrine). Professor Chen, in an earlier article, reached a different conclusion. Jim C. Chen, Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement, 49 Wash. & Lee L. Rev. 1455, 1470-72, 1497-99 (1992) (relying greatly on absence of government as party). Neither article mentions \textit{La Abra}.}

Chapter 11, to be sure, changes the historic pattern because it permits a private litigant to invoke directly the BNP process (although not its appeal process).\footnote{See supra note 34 and accompanying text.} That is an important development for private litigants, but it does not seem to me to place Chapter 11 doctrinally outside its historic roots in the espousal cases: Absent Chapter 11, any suit by an
American citizen against a foreign state would be barred by sovereign immunity.\(^\text{216}\)

The administrative law precedents may well prove to have considerable relevance in the emerging supranational adjudicatory order. Administrative adjudication is, of course, an indispensable ingredient of the modern administrative state, much as international arbitration proceedings are in the emerging international commercial legal order.\(^\text{217}\) Despite potentially formidable barriers created by Article III and the Fifth and Sixth Amendments, the Court has long since withdrawn from any serious effort to require Article III rather than administrative adjudication of disputes arising in the modern regulatory state.\(^\text{218}\) The Court has, instead, largely settled for a regime of controlled judicial supervision.\(^\text{219}\) The agency supplies the relevant factfinding and initial law application, and indeed, under delegation principles (including *Chevron*),\(^\text{220}\) a significant amount of the applicable substantive law.\(^\text{221}\)

The foregoing is true whether or not we are talking about public or private rights. Domestically, that distinction may now have more theoretical than practical significance. Administrative Procedure Act (APA)-style judicial review dominates the domestic legal landscape, irrespective of

\(^{216}\) Foreign sovereign immunity has a long history in U.S. law. See *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) (establishing general immunity for foreign nations against suits brought by U.S. nationals). Traditionally, foreign sovereign immunity was absolute in scope, recognizing no distinction between public and private acts of sovereigns. See *Berizzi Bros. v. Steamship Pesaro*, 271 U.S. 562, 573–76 (1926) (extending immunity to commercial property of foreign sovereign). However, the modern approach conforms to the so-called restrictive theory, according to which immunity is extended only to public acts of sovereignty. See *Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2000)). Under either approach, the waiver of foreign sovereign immunity is a public right.

\(^{217}\) See generally Monaghan, *Administrative State*, supra note 200 (discussing constitutional limitations on administrative state).

\(^{218}\) As I have written elsewhere:

 Perhaps even more importantly, though little appreciated, is the demise of the apparent premise of several constitutional provisions—Article III, the Due Process clause, and the jury trial provisions of the sixth and seventh amendments—that most adjudication implementing national regulatory policy would occur before judicial tribunals. This premise failed to prevent extensive administrative determination of the rights and duties created by the modern state.

Monaghan, *Stare Decisis*, supra note 200, at 735 (footnotes omitted).

\(^{219}\) "[T]he Supreme Court is not anxious to reclaim for the courts the business they have lost to administrative agencies over the years." Bruff, supra note 209, at 201.


\(^{221}\) "The court’s task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria. . . . [T]he judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean." Monaghan, *Administrative State*, supra note 200, at 27.
the nature of the "right" involved. But the "public-private rights" dist-
tinction has a potential importance in foreign judicial review cases. That
distinction provides considerable support for the emerging supranational
adjudicatory order.

_Murray's Lessee v. Hoboken Land & Improvement Co._ relied upon in
_La Abra_, still remains the fountainhead for the modern public rights doc-
trine. There, an executive official had imposed a summary attachment on
the assets of the customs collector for the port of New York after audit-
ing his accounts. The account had been found deficient by the rather
startling sum of one million three hundred thousand dollars, and a dis-
tress warrant issued creating a lien on the collector's real property. The
validity of a subsequent property transfer pursuant to a lien foreclo-
sure proceeding depended upon the validity of the summary attachment
proceedings. After disposing of a due process challenge, the Court
turned to Article III. Justice Curtis acknowledged that the auditing "may
be, in an enlarged sense, a judicial act." He continued: "So are all
those administrative duties the performance of which involves an inquiry
into the existence of facts and the application to them of rules of law." But
such an acknowledgement did not necessarily implicate Article III's
"judicial power." Justice Curtis began with an important reservation: "To
avoid misconstruction upon so grave a subject, we think it proper to state
that we do not consider congress can either withdraw from judicial cogni-
zance any matter which, from its nature, is the subject of a suit at the
common law, or in equity, or admiralty . . . ."

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223. 59 U.S. (18 How.) 272 (1855); see Nelson, supra note 213, at 586–90 (discussing
_Murray's Lessee_ and public rights exception for taxation).
224. _La Abra_ invoked that decision in its public rights discussion. See _La Abra Silver
Mining Co. v. United States_, 175 U.S. 423, 456 (1899).
225. _Murray's Lessee_, 59 U.S. (18 How.) at 274.
226. Id. at 275.
227. Id.
228. Reviewing historical practice, the Court concluded, "We apprehend there has
been no period, since the establishment of the English monarchy, when there has not
been, by the law of the land, a summary method for the recovery of debts due to the crown,
and especially those due from receivers of the revenues." Id. at 277. "It is certain that this
diversity in 'the law of the land' between public defaulters and ordinary debtors was
understood in this country, . . . before the formation of the constitution of the United
States." Id. at 278.
229. Id. at 280.
230. Id.
231. Id. at 284. "But these claims are false, aren't they? Territorial courts frequently
entertain common law and equity actions, and the suit in _Canter_ was one in admiralty." _Hart & Wechsler_, supra note 154, at 380 (discussing _American Insurance Co. v. Canter_, 26
U.S. (1 Pet.) 511 (1828)). This is an overstatement. _Canter_, for example, quite clearly
assumed that admiralty proceedings in the states could occur only in Article III courts. 26
U.S. (1 Pet.) at 546 ("[A]dmiralty jurisdiction can be exercised in the states . . . only [in
courts] which are established in pursuance of the 3d article of the Constitution.").
[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.\textsuperscript{232}

This set in motion a doctrine that civil disputes between private parties and the government—many cases of which seemingly call for strongly independent adjudicators\textsuperscript{233}—can be withdrawn entirely from the Article III courts and assigned for determination either to Article I courts, or to executive and administrative agencies.\textsuperscript{234} If the Article III courts do participate, as is commonly the case, no general Article III problem exists in limiting the judicial role to something less than de novo examination of the matter. (In short, the judicial role can be confined to the review now provided in Section 706 of the Administrative Procedure Act\textsuperscript{235} and perhaps even more narrowly.)

What is striking about Murray's Lessee is less its holding than its vintage: 1855. This was an era of a small, relatively invisible, national government.\textsuperscript{236} Jacksonian democracy (with its distrust of legislatures) and negative government were taking firm hold, both politically and judicially, and litigation involving private parties and the government was pretty much an outlier in the judicial mind. No member of the Murray's Lessee Court could have imagined the modern administrative state with its vast regulatory and spending operations. But the decision provided an important foundation for judicial efforts to come to grips with the emerging industrial order. The Court's emphasis on the importance of "private rights" made good contemporary sense. The Lochner line of case law,\textsuperscript{237} condemning redistributive legislation, involved private rights: governmental efforts at establishing or altering the "private" rights of A against B. As judicial hostility to this kind of legislation waned,\textsuperscript{238} however, the

\begin{itemize}
\item \textsuperscript{232} Murray's Lessee, 59 U.S. (18 How.) at 284.
\item \textsuperscript{233} This is particularly true of coercive actions for "civil" penalties by the government against individuals. Hart & Wechsler, supra note 154, at 370. Some form of APA-type review is, however, the norm. E.g., Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 455-56 (1977) (allowing Congress to assign adjudication of public rights to agency, although noting agency determination is subject to judicial review); see also Nelson, supra note 213, at 602-05 (discussing Atlas Roofing and expansion of public rights doctrine).
\item \textsuperscript{234} See the lucid summary by Justice Van Devanter in Ex parte Bakelite Corp., 279 U.S. 438, 449-51 (1929).
\item \textsuperscript{235} 5 U.S.C. § 706 (2000).
\item \textsuperscript{236} This decision comes long before the emergence of the modern, bureaucratic, national government.
\item \textsuperscript{237} See Lochner v. New York, 198 U.S. 45, 64-65 (1905) (holding unconstitutional under Fourteenth Amendment New York laws limiting hours for bakers).
\item \textsuperscript{238} Sec, e.g., Nebbia v. New York, 291 U.S. 502, 520, 539 (1934) (rejecting equal protection and due process challenges to state regulation of milk prices).
\end{itemize}
Court became more appreciative of the need for a system of shared adjudication between agencies and Article III courts.\textsuperscript{239} In light of current perceptions of what makes sense, the public-private rights doctrine has produced some results that are not readily defensible.

- In suits between private parties, Article III courts, not administrative agencies, probably must (if the parties insist) be used for the resolution of common law claims of $A$ against $B$.\textsuperscript{240} Congress could, of course, eliminate this jurisdiction,\textsuperscript{241} and some believe that it should.\textsuperscript{242}

- *Crowell v. Benson* established that most private right claims between $A$ and $B$ created by Congress in the administrative state can be subject to initial administrative adjudication, with some APA-style Article III review thereafter.\textsuperscript{243} Moreover, the public rights exception has been significantly enlarged so as to absorb much of what hitherto had fallen into the private rights domain. Two decisions, both written by Justice O'Connor, seemed to have effectively discarded the distinction altogether in favor of an open-ended, wholly unstructured balancing approach.\textsuperscript{244} Then, Justice Brennan revived the general doctrine with a reformulated content:

> In our most recent discussion of the “public rights” doctrine . . . we rejected the view that “a matter of public right must at a minimum arise ‘between the government and others.’” . . . The crucial question, in cases not involving the Federal Government, is whether “Congress . . . [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme

\textsuperscript{239} Once the new regulatory order was sustained, considerations such as the volume and variety of adjudications, administrative expertise, etc. took hold in legitimating the new adjudicatory order. Hart & Wechsler, supra note 154, at 371.

\textsuperscript{240} This statement is necessarily of a qualified nature. Compare N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (“Our precedents clearly establish that only controversies in the [public rights] category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.”), with Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 854 (1986) (“[W]here private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching.”).

\textsuperscript{241} See Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (“Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.”).

\textsuperscript{242} The current debate over the utility of diversity jurisdiction is discussed in Hart & Weschler, supra note 154, at 1498–503. This jurisdiction remains an important staple of district court jurisdiction in the “real” world, particularly in the great commercial centers such as New York. For me, perhaps the last of the old order, the heart of a course in federal courts is what Henry Hart taught me: the law applied by district courts in civil litigation.

\textsuperscript{243} 285 U.S. 22, 50–52 (1932).

\textsuperscript{244} See *Schor*, 478 U.S. at 851 (stating that for encroachment on Article III jurisdiction “the Court has declined to adopt formalistic and unbending rules”); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589–91 (1985) (engaging in open-ended review to determine that challenged arbitration scheme does not violate Article III).
as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.\textsuperscript{245}

Justice Scalia may be the last of the Old Believers in insisting that the public rights doctrine is inapplicable unless the government itself is a party to the litigation.\textsuperscript{246} Effectively, therefore, every right created by the administrative state can be \textit{initially} adjudicated outside the framework of an Article III court—at least if it does not too closely resemble a common law right.

Finally, the public rights doctrine, however capacious, does not extend to most criminal prosecution.\textsuperscript{247} Thus, coercive governmental actions against defendants arising out of the same transaction can be subject to initial administrative adjudication, if a civil penalty is sought, but not if a criminal penalty is.\textsuperscript{248}

As many writers have observed, the existing doctrine produces some anomalies. In cases in which an independent, life-tenured Article III judge would seem to be quite vital, namely, cases of extrajudicial coercion by the government against private individuals, administrative agencies can serve as, at least, the initial adjudicators, except in criminal prosecutions. By contrast, where the need for Article III independence now seems far less central, namely, cases involving private right claims by $A$ against $B$ under a valid regulatory scheme, participation of an Article III court seems mandatory if the adjudication occurs at the federal level.

\textit{Ex parte Bakelite Corp.} long ago applied public rights doctrine to hold that customs disputes could be conclusively assigned to executive officials or legislative courts for final resolution.\textsuperscript{249} While existing case law thus bodes well for the emerging supranational adjudicatory order in trade disputes, NAFTA could provide an occasion to reexamine the entire jurisprudence of the public-private rights distinction. Bowing first to the imperatives of the administrative state and then to the emerging transnational adjudicatory order, one might concede that civil adjudication can occur at least initially, and sometimes entirely, outside the framework of Article III courts with only narrow, historically explained exceptions. Whether one should discard the public-private rights doctrine as the ex-


\textsuperscript{246} See id. at 70 (Scalia, J., concurring) (“I would return to the longstanding principle that the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication.”).

\textsuperscript{247} \textit{N. Pipeline}, 458 U.S. at 70 n.24 (“Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party.”); cf. Palmore v. United States, 411 U.S. 389 (1973) (sustaining prosecution for “local” District of Columbia crime before non-Article III court).

\textsuperscript{248} Compare \textit{N. Pipeline}, 458 U.S. at 69–71 (noting public rights doctrine does not extend to criminal matters), with Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n, 430 U.S. 442, 450 (1977) (allowing administrative agency adjudication of civil money penalty). This is, of course, not to deny that violation of an administrative order can be made a criminal offense.

\textsuperscript{249} 279 U.S. 438, 451 (1929).
planatory framework is another matter, however. The distinction is a fa-
miliar one, and if it can be made to fit the dominant reality in the vast
majority of cases it probably should be retained, even if it has some
ragged edges. No obvious replacement exists. Justice O’Connor’s “bal-
ancing” approach to the constraints imposed by Article III has no ca-
pacity to specify the relevant variables with any precision or to determine
how they should be weighed. In any event, the distinction between pub-
ic and private rights wholly disposes of the challenge in Fair Lumber Im-
ports. The petitioner was not asserting any “property right” in the tariff
rates, at least as the term has been historically understood. And if, as
competitors, the petitioner did have any right, it was surely a “public” one
which did not require an Article III court.

The “public rights” exception has another important feature in inter-
national adjudication. The rhetoric is that these can be withdrawn entirely
from any Article III scrutiny. But domestically rhetoric has not
matched reality. Hart and Wechsler suggest that no complete withdrawal
cases exist domestically. NAFTA provides an example of complete
withdrawal—and that may have the endorsement of Hart and Wechsler’s
learned authors. They suggest that any constitutional question in the in-
ternational context should not “be analyzed in the same way . . . [as] in a
purely domestic context.” Of course, those opposed to the emerging
order would agree, but they would invalidate much of the new adjudica-
tory order.

V. Revisiting Constitutional Issues

Historical practice and the rise of the public rights doctrine will, I
believe, play an important role in assessing the legitimacy of the emerg-
ing supranational adjudicatory order. But they do not exhaust the cate-
gory of relevant variables, and a second look at some of what has been
discussed is appropriate.

250. See supra note 244 and accompanying text.
251. See Ex parte Bakelite, 279 U.S. at 457–58 (stating that disposition of public rights
matters is within congressional control and applying this to customs and duties).
252. As the casebook suggests:
[T]he legal background has always included a range of common law and
equitable remedies against government officers, who are often suable in their
own names, even when the public rights and sovereign immunity doctrines bar
unconsented suit against the government itself. Historically, this tradition of
“officer suits” has diminished, but by no means eradicated, the tension between
the public rights category on the one hand and, on the other, the ideal of the
rule of the law and the dictum of Marbury v. Madison promising a legal remedy for
every deprivation of a legal right.
Hart & Wechsler, supra note 154, at 370–71 (citations omitted).
253. Id. at 403. An argument based on a constitutional federalism premise that state
procedural default rules cannot be displaced by the Convention is an argument directed at
the scope of the Treaty power, not the adjudicatory mechanism it sets up.
254. See supra text accompanying notes 45–51.
A. NAFTA BNPs

While Chapter 11 and 19 proceedings are in the mold first established by the Jay Treaty, they push beyond the traditional format. Chapter 11 dispenses with the necessity of espousal; it provides for an investor-state, not state-state, proceeding. Professor Bjorklund describes the change, discussing both its benefits and drawbacks:

Ad hoc investment arbitration offers manifold advantages to investors. Earlier claims commissions were technically government-to-government dispute settlement. An aggrieved alien was represented by his country of origin, rather than representing himself. In contrast, in entering investment treaties, the United States and other countries have permitted foreign investors to bring claims directly against the government in whose territory they are investing. This change accords with the purpose of the treaties: to increase the certainty and predictability of dispute resolution should there be a problem with the investment that is the fault of the government and a violation of international law. It means, however, that an important filtering mechanism is no longer in place: aliens do not need to convince their own countries to espouse their claims but may themselves commence arbitration.

A Chapter 19 state-state proceeding charges the BNP with directly reviewing the application of the domestic American law of judicial review, albeit nominally in a manner akin to APA-type review. Chapter 11, of course, does not formally provide for such direct review over the national courts, and Chapter 11 BNPs routinely disclaim any such “appellate” jurisdiction. As Loewen Group explained:

The Tribunal is concerned with domestic law only to the extent that it throws light on the [NAFTA] issues in dispute and pro-

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255. See supra text accompanying notes 33–35.
256. Bjorklund, supra note 6, at 831 (footnote omitted).
257. Moreover, it requires federal officials to take direct action to comply with the specific BNP determinations. See NAFTA, supra note 4, art. 1904. The WTO also requires only that the United States bring its law in compliance with the arbitration ruling, but if the United States does not, only sanctions are imposed. See Marrakesh Understanding, supra note 43, art. 22.
258. See Mondev Int’l Ltd. v. United States, 6 ICSID (W. Bank) 182, 216 (NAFTA Ch. 11 Arb. Trib. 2002) (“On the approach adopted by Mondev, NAFTA tribunals would turn into courts of appeal, which is not their role.”); Azinian v. United Mexican States, 5 ICSID (W. Bank) 269, 290 (NAFTA Ch. 11 Arb. Trib. 1998) (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA.”); see also Ahdieh, supra note 13, at 2047–49 (reviewing powers of Chapter 11 tribunals and concluding “[g]iven the seeming inconsistency of Chapter 11 with appellate review, it should come as little surprise that Chapter 11 panels have repeatedly rejected any conception of themselves as courts of appeal.”). In both Loewen Group and Mondev, the ultimate claim (at least in theory) was not that the state court got the state law “wrong,” but rather that its conduct denied rights secured by the treaty to foreign investors.
vides domestic avenues of redress for matters of which Claim-
ants complain. The Tribunal cannot under the guise of a 
NAFTA claim entertain what is in substance an appeal from a 
domestic judgment. 259

The formal differences between Chapter 11 and 19 are easily over-
stated. In both Mondev and Loewen Group, the Chapter 11 BNP, like the 
Chapter 19 BNP, formally asserted limited review over the American deci-
sionmakers. 260 In fact, in both schemes American proceedings came 
under very close review. 261 Indeed, such intense review is necessarily 
built into the scheme. BNPs are, after all, one-shot arbitrators with a sin-
gle-minded focus: the state court decision. 262

And so, where does this leave us? The United States has entered a 
trade agreement with its neighbors that guarantees that foreign investors 
will not fall victim to uncompensated expropriation and other wrongs, 
including a denial of justice by domestic courts, as well as unfair competi-
tion by way of tariffs and subsidies. No "right" of a successful American 
litigant is implicated. Nor is any "right" of the United States itself at issue; 
it, after all, has entered the trade agreement for eminently comprehensi-
ble purposes, which include binational rather than domestic dispute reso-
lution. And it is far too late in the day to argue that the arbitration pro-
cess is "forbidden by some invisible radiation from the general terms of 
the Tenth Amendment." 263

In the end, therefore, what is at stake in both Chapter 11 and 19 is 
not the "loss" of state Article III authority under NAFTA (and the WTO), 
but the loss of national (both federal and state) judicial authority. But 
why is the substitution of supranational for national adjudication of con-
cern to the American constitutional order so long as the legal rights of 
American nationals are not at stake? The historical practice from the Jay 
Treaty on down shows that such a dispute resolution framework does not

259. Loewen Group Inc. v. United States, 7 ICSID (W. Bank) 421, 450 (NAFTA Ch. 11 
260. Id.; Mondev, 6 ICSID (W. Bank) at 215.
261. Loewen Group, 7 ICSID (W. Bank) at 450; Mondev, 6 ICSID (W. Bank) at 227.
Ernest Young is quite right to say that, in Mondev, the panel's disclaimer notwithstanding, 
the Supreme Judicial Court's decision was subject to close inspection as to whether it had 
seriously misapplied its precedents. Young, supra note 9, at 1173 (describing panel review 
as "pretty searching"). Professor Bjorklund endorses such an approach:

This Article suggests that such tribunals engage in a sequential review. Under 
sequential review, the tribunal should first determine whether the challenged 
judicial practice in a particular case departed from national law so markedly that 
it denied justice to the alien. If it did not, the tribunal would secondly measure 
the challenged judicial practice or the national law itself against international law. 
Bjorklund, supra note 6, at 815; see also id. at 873–78 (expanding on how tribunals should 
review compliance with domestic law under sequential review).

262. The focus could be elsewhere—on state executive and administrative officials—but 
it would still be single-minded.
contravene the essential attributes of the judicial power as they have been historically understood. But if one varies the practice described, Article III (and federalism) concerns become far more visible. Suppose, for example, that (pursuant to statute) the United States sought reimbursement from any state whose courts had caused a NAFTA violative expropriation, or indeed, from the prevailing litigant in the state court (on the ground that the litigant [at least temporarily] had been unjustly enriched). Or, suppose that in suits between private litigants, as in Mondev, Congress authorized direct review in a supranational tribunal from a decision of the Supreme Court or the highest state court on NAFTA-based claims. One can surely expect that courts like the “supreme Court” would bristle at any such thought! Could the “supreme Court” itself be the object of treaty-based process? More realistically, perhaps, suppose Congress simply mandated a stay of judicial proceedings while a litigant sought a ruling from an appropriate supranational tribunal, a ruling which would then (ordinarily) be given preclusive effect.

Chapter 19 proceedings increase Article III concerns. Here, the federal agency must act in compliance with the NAFTA decisions. But is

264. One might say at the outset that any supposed variations that overtly threaten national judicial authority will “never” occur because of internal political constraints. For the near future that may very well hold true. But the variations themselves raise issues more difficult than the pattern that surprised Chief Justice Marshall. See supra text accompanying notes 1-3.

265. Distinctions, close ones perhaps, must be made here. The United States, like any private litigant, can waive the benefit of defenses, including claim preclusion. Hart & Wechsler, supra note 154, at 104-05.

266. In certain limited circumstances, a state party may request review of a panel decision by an extraordinary challenge committee. NAFTA, supra note 4, art. 1904(13). The three committee members are selected by a process similar to that of the binational panel. However, an incorrect application of domestic countervailing duty law is not necessarily a basis for overturning a panel decision if the circumstances do not meet specific enumerated criteria: The Party must establish (i) that a panel member was guilty of material misconduct, (ii) that the panel seriously departed from a fundamental rule of procedure, or (iii) that the panel manifestly exceeded its powers, such as by failing to apply the appropriate standard of review. See id. art. 1904(13)(a). In addition, the Party must show that the violation “has materially affected the panel’s decision and threatens the integrity of the binational panel review process.” Id. art. 1904(13)(b). The few extraordinary committees that have convened have all affirmed panel decisions. See, e.g., In re Fresh, Chilled or Frozen Pork from Can., 1991 WL 153112, at *9 (U.S.-Can. F.T.A. Ch. 19 Extraordinary Challenge Comm’n, June 14, 1991) (rejecting extraordinary challenge because state failed to meet standards set under U.S.-Can. F.T.A., supra note 181, art. 1904(13), which were substantially the same as NAFTA standards under art. 1904(13)).

267. Congress, it should be noted, was fully aware that this enactment might pose constitutional problems, and it sought to provide a “fallback” mechanism to deal with the issue if Chapter 19 ran afoul of the Constitution. The fallback provision would permit the President to accept the panel’s decision as his own. See 19 U.S.C. § 1516a (g)(7)(B) (2000). In Section 3 of Executive Order 12,662, 3 C.F.R. 624 (1988), reprinted as amended in 19 U.S.C. § 2112 note at 426 (2000), President Ronald Reagan stated that if the fallback mechanism takes effect pursuant to 19 U.S.C. § 1516a(g)(7)(B), “I accept, as a whole, all decisions of binational panels and extraordinary challenge committees.”
the latter feature of constitutional moment? At oral argument in *Fair Lumber Imports* the Court picked up on petitioners' suggestion that none of the precedents involved foreign judicial review of a suit "won" by an American citizen against the American government. The government responded, quite correctly in my view, that this misdescribed the proceeding—that the litigation was a suit by Canada against the United States in which the American citizens happened to agree with the views of the American government. Moreover, the government pointed out that it was not the BNP that extracted obedience by federal officials to its decision, it was the NAFTA Implementation Act that did.

To me, there seems to be little significant difference between a remedial scheme, such as Chapter 19, in which Congress requires immediate obedience from specific officials and ones like Chapter 11 and the WTO where the preclusive effect of the arbitration award means that penalties can be assessed if the United States fails to undertake corrective steps to bring its (impermissible) substantive law into compliance. This seems especially true because the Chapter 19 BNP has no power itself to compel obedience to its determinations.

B. Sanchez-Llamas

In *Sanchez-Llamas*, the Supreme Court filtered the significance of the ICJ judgment through the background mindset of *Marbury*.

The result was no more than "respectful consideration." Would the interpretive issues have seemed different had the Court thought that the relevant background principle was the public rights doctrine? More importantly, is *Sanchez-Llamas* beyond congressional correction because of *Marbury*-based concerns? While the topic is too large to consider fully here, *Medellín* presents the strongest case in which to consider the issue.

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268. Transcript, *Fair Lumber Imports*, supra note 182 at 25; see supra text accompanying notes 41–42.


270. Id. at 28; see supra text accompanying notes 184–187. At this point in the oral argument the court wondered whether there were limits on the extent to which Congress could order the President to comply with the mandates of foreign tribunals. Transcript, *Fair Labor Imports*, supra note 182, at 28–29. In an inconclusive exchange, the government submitted that there might be such limits, but they were not involved in this situation—that this was simply a time-honored commercial arbitration. Id. at 29–30. Practice and the effect of ordering compliance were no different from giving the judgment preclusive effect.


272. Id. at 2685.

like the Sanchez-Llamas petitioners, Medellin's claim had been espoused by Mexico in Avena.\textsuperscript{274} Why wasn't the judgment entitled to real deference (indeed, preclusive effect) on the meaning of the Convention?\textsuperscript{275} The power to enter treaties subsumes the power to establish tribunals for their interpretation. The idea of judicial deference is certainly not alien to the Court in the foreign law context. There are numerous (albeit by no means an unbroken line of) decisions in which deference has been given to the President's construction of treaty obligations.\textsuperscript{276} In judicial decisions enforcing foreign judgments in private rights cases, as Justice Ginsburg points out,\textsuperscript{277} the merits of the foreign judgment are not reexamined de novo. This fact is also reflected in the enforcement of foreign arbitration awards under the "New York Convention."\textsuperscript{278}

To be sure, completely bypassing Article III courts in favor of international tribunals, as in the NAFTA regime, is one thing; according their adjudications preclusive effect in a domestic proceeding in an Article III court is quite another.\textsuperscript{279} But the individual rights established by the Vienna Convention—even if assumed to exist (as the Court did in Sanchez-Llamas)—are, at best, only “public rights,” and I submit that fact


\textsuperscript{275} The fact that the United States was a party should alone be sufficient to establish the effect of the ruling for entities and citizens within the United States.

\textsuperscript{276} See Medellin, 544 U.S. at 685–86 (O'Connor, J., dissenting) (“When called upon to interpret a treaty in a given case or controversy, we give considerable weight to the Executive Branch’s understanding of our treaty obligations.” (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Charlton v. Kelly, 229 U.S. 447, 468 (1913))).

\textsuperscript{277} See id. at 670–71 (Ginsburg, J., concurring) (discussing recognition and enforcement of foreign judgments); sources cited supra note 71. This general doctrine is of ancient vintage. See Burchell v. Marsh, 58 U.S. (17 How.) 344, 350 (1854) (explaining that “mere error of judgment” was not basis for refusing to recognize arbitration award). The classic examination of the issue is, of course, Justice Horace Gray's opinion in Hilton v. Guyot, 159 U.S. 113, 162–203 (1895).


\textsuperscript{279} The canonical exploration of this dichotomy is, of course, Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, which, among other things, posited a distinction between bypassing those courts and limiting their jurisdiction when acting as an enforcement court or a court in the position of an enforcement court. 66 Harv. L. Rev. 1362, 1372–74 (1953). I have suggested that the crucial distinction is between bypassing those courts and utilizing them, whether or not acting as enforcement courts. See Monaghan, Administrative State, supra note 200, at 22–24.
is not altered because their principal relevance is in a criminal proceeding (a classic illustration of the private rights model). Given the long history of international dispute resolution, and the time-sanctioned doctrine of public rights, it is difficult to believe that deference to the ICJ judgment would have compromised the essential attributes of the judicial power.

**CONCLUSION**

Existing case law establishes that the emerging international commercial arbitration world does not compromise contemporary understandings of "the essential attributes of the judicial power." On the other hand, we have at present no satisfactory account of the nature of those "essential attributes," or the extent to which these attributes are constitutionally protected against congressional alteration. This is not surprising. The difficulty begins with the 1789 text itself, which can be read to give Congress unlimited power over the jurisdiction of federal courts, that is, Congress can use those tribunals or ignore them. But that reading of the text has never reflected our actual understanding. Article III's very existence has always exerted a strong gravitational pull, both politically as well as legally. The existence of these courts has always been perceived to be indispensable to the legitimacy of our constitutional authority. Nonetheless, the history of our jurisprudence governing the rise of the modern administrative state demonstrates that the factfinding and law-application

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280. Statements that Article III guarantees the structural integrity of the federal courts in the American scheme of government by not enforcing "unexamined" decisions of other tribunals cannot be understood in a sweeping fashion. Contra Fallon, supra note 211, at 950–70 (discussing public rights doctrine and noting that while it poses a challenge to argument for appellate review by Article III courts, it is not an "insuperable impediment" to that position).

281. Sanchez is not an enforcement proceeding within the traditional understanding. The ICJ judgment is not a predicate for federal judicial enforcement of duties against Sanchez; rather, he seeks a benefit based upon the ICJ interpretation of the Convention. Where an American litigant in a domestic proceeding is seeking the benefit of a favorable treaty or international judgment, it is unlikely that the Supreme Court will feel any imperative that the federal courts must independently determine that such a benefit exists. Burdens present more difficult issues. Historically, American law has been concerned about judicial review of governmental imposition of burdens on American residents. For example, it was understood quite early that litigants had standing to complain about deprivations of either liberty or property, at least as that term was understood in the common law. See Louis L. Jaffe, Judicial Control of Administrative Action 334–49 (1965). However these questions are resolved, they are not involved in the Vienna Convention cases. The concept of what constitutes a "burden" has shifted over time. In his great dialogue, Henry Hart very perceptively suggested, in 1953, that government entitlement programs might be viewed as triggering a burden analysis when deprivations had occurred. Hart, supra note 279, at 1386. In that respect, he anticipated Charles Reich's very well known essay on the "new property." Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964).

282. "Behind the words of the constitutional provisions are postulates which limit and control." Monaco v. Mississippi, 292 U.S. 313, 322 (1934).
functions of the district courts (except in criminal and common law trials) can be curtailed. But one important systemic role for the Article III courts remains: the power to confine other organs of government within the bounds of their authority. If NAFTA-like arbitration processes compromise that function, they do so only at the margin. Far more important issues for our constitutional order are raised by the delegation of lawmaking authority to international bodies. Issues of national sovereignty and democratic accountability are surely raised by this increasingly widespread practice. But that bell having been rung, it cannot be unrung.

Nor in the area of international trade should it be. That trade has a long-standing interest to the United States, and continued participation in international trade is now being significantly affected by the new supranational institutions. Necessarily, such a development challenges our own constitutional understandings, such as delegation of legislative powers. But given the decision of the representatives of the American people to participate in the new economic order, the large role that the United States plays in shaping the new institutions, our own vast economic power, and the ultimate prerogative of the political branches to withdraw from any supranational institution, I find it difficult to endorse, in limine, any categorical prohibition barring our full participation in these new institutions.

283. Monaghan, Administrative State, supra note 200, at 31–34.
284. At oral argument in Fair Lumber Imports, the petitioner conceded that the BNP decision, while authoritative for the litigants, had no precedential effect. Transcript, Fair Lumber Imports, supra note 182, at 21 ("I don’t believe they’re precedent, but . . . they are clearly authoritative . . . [i]n the case at hand.").