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The Constitution in an Era of Supranational Adjudication

Brian F. Havel

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THE CONSTITUTION IN AN ERA OF SUPRANATIONAL ADJUDICATION

BRIAN F. HAVEL*

Since the establishment of the World Trade Organization, Americans have become increasingly aware of supranational forms of governance. But there has been little scholarly effort to understand the implications of increasing economic and legal interdependence for America's constitutional order. In this Article, Professor Brian Havel analyzes whether the United States Supreme Court would sanction supranational courts, endowed with obligatory jurisdiction, outside the conventional order that has evolved under Article III of the Constitution. To address this question, Professor Havel applies the insights of Chomskyan structural linguistics, a field that legal scholars largely have neglected despite renewed interest in textualist interpretation. Using Noam Chomsky's core concepts, Professor Havel explains that the text of Article III (its surface structure) reflects the Framers' deep structure understanding that judicial power would not be exercised under the Constitution exclusively by judges appointed under Article III. Thus, the Article traces how supranational tribunals can be considered, along with state courts and legislative courts, to "share" in the exercise of the Constitution's judicial power in a way that is consistent with the fundamental deep structure idea of the separation of powers.

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* Associate Professor of Law, DePaul University College of Law. I wish to thank Susan A. Bandes, M. Cherif Bassiouni, Graeme B. Dinwoodie, Richard S. Kay, Michael P. Van Alstine, and Mark C. Weber for their comments and suggestions. I am also grateful to Stephen B. Rudolph, Patrick M. Jones, David S. Becker, Micah E. Marcus, Amy Schaefer, Andy Eastmond, and Chad Beaver for their fine research assistance and to the DePaul University College of Law for a grant to support this project.

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[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

—Justice Oliver Wendell Holmes (1920)¹

INTRODUCTION

This Article probes the Constitution of the United States to see whether the founding document will accept a jurisprudential idea—the transfer of judicial power to supranational tribunals—that the Framers did not explicitly anticipate, but that they tacitly may have

1. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.). Not surprisingly, Justice Holmes's dynamic view has been used as the basis for a historical, evolutionary metric of constitutional analysis. This evolutionary view consciously transcends the time-bound conceptual and textual choices that the Framers made in drafting the Constitution. See, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068 (1981) (concluding that constitutional law should be viewed "not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government"). While respecting Justice Holmes's endorsement of constitutional evolution, this Article always places the conceptual and textual choices made by the Framers at its center. Thus, while the Framers may not have foreseen supranational adjudication completely, I argue that the creation of supranational tribunals is a type of governmental action that is contemplated in the structural design of their Constitution. In this sense, this Article explores the abiding tension between governmental innovation and constitutional limitations.

foreseen in the structural imperatives of their revolutionary creation.² The notion that the Constitution embraces both a surface and a deep structure³ is an insight of classical Chomskyan linguistic theory that may have some analogical application to constitutional interpretation. The deep structure of the Constitution naturally confirms the well-understood idea of the separation of governmental powers, which this Article treats as the fundamental principle of constitutional integrity in the Constitution. The Constitution's deep structure, however, also supports the more startling conclusion that the judicial power, as organized in Article III, has a fragmented composition that allows it to be shared with tribunals established without the presence of Article III judges. Accordingly, the deep structure of the Constitution not only supports courts created pursuant to Congress's authority under Article I,⁴ but also may support global tribunals exercising jurisdiction over the United States, its business corporations, and its citizenry.⁵

Despite focusing on supranational governance, this Article does not promise readers yet another excursion aboard one of international law's celebrated (but, sadly, mythical) arks.⁶ Its purpose

2. To foresee an event or circumstance, in this sense, does not necessarily mean to "fore-know" that it will happen. It can simply mean to "exercise foresight," where "foresight" refers to "care or provision for the future," "provident care," or "prudence." THE RANDOM HOUSE UNABRIDGED DICTIONARY 750 (2d ed. 1987). In the reasoning adopted here, while the Framers did not explicitly anticipate a supranational system of adjudication, they nonetheless created the structural conditions for its future emergence. The idea of supranationalism dates to the early twentieth century, but the first use of the word "supranational" in a treaty did not occur until 1951. See HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW § 41, at 27-28 (2d rev. ed. 1980) (discussing the Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140). This Article argues that the Framers' constitutional structure, notably the importance they attached to the foreign commerce and treaty powers, reveals a providential concern for the emergence of imaginative ideas for international governance. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 262 (2d ed. 1996).

3. See *infra* text accompanying notes 62-65 (defining these terms).

4. On congressional authority to create specialized courts under the enumerated legislative powers of Article I, see generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION 207-11 (2d ed. 1994).

5. Dispute settlement, after all, "has become a central preoccupation of the public international law field." David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 70.

6. The ark in this sense refers to the propensity of Professor Hans Kelsen and his acolytes, in the evolution of Kelsen's seminal theories of public international law, to seek the grandiloquent, all-embracing, institutional solution. See Kennedy, *supra* note 5, at 102-03. In Kennedy's cosmos, Professor Kelsen serves as the slightly musty ark-builder, the utopian who imagines a world made peaceful and prosperous by the benign hand of multilateral and international institutions. Kelsen's "metropolitanism" contrasts with the presumably more canny figure of the "cosmopolitan" international lawyer, the technocrat

is resolutely a matter of hard constitutional law. This Article steps back from recent work concerning the functional cartography of supranational adjudication⁷ and examines the debate on an emerging constitution for the global trade system from the perspective of the United States Constitution.⁸ To borrow a coinage popularized by

who urges government and business into a vigorous transnational process of open and deregulated market bargaining, tries to deflect the parochial disruptions of politics, and shows a certain disdain for the formalistic metropolitan sensibility. *Id.* (summarizing this argument and suggesting Georgetown's John Jackson as representative of this kind of lawyer). As might be surmised, the metropolitan/cosmopolitan dyad smacks of caricature, and Kennedy himself seems to concede that each of his chosen exemplars might exhibit some characteristics of the other style. *See id.* at 52–54, 70–71. John Jackson, ironically, has been acknowledged most for his work in interpreting the General Agreement on Trade and Tariffs, now retooled into one of the most seaworthy arks (the World Trade Organization (WTO) regime) that the Kelsenians could ever have conceived. *See generally* JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997) (placing the WTO at the fulcrum of the emerging global trade framework).

7. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 287 (1997) (presenting a checklist of criteria for effective supranational adjudication without explicitly accommodating American constitutional concerns). By focusing on adjudicative power, this Article leaves for another time an evaluation of the juristic implications of an entire supranational order. Nevertheless, some of the broader questions already can be anticipated. Would the United States Constitution permit a wholesale transfer of any of the enumerated legislative powers in Article I to a supranational authority? Could the United States agree to a currency union with Canada and the states of South America that would assign coinage of money and regulation of “the value thereof” to a new Central Bank of the Americas? *See generally* Caren Bohan, *In Dollars We Trust: Argentina May Test Currency-Bloc Idea*, *SEATTLE TIMES*, Feb. 7, 1999, at A19 (discussing a proposed single currency area for North America); *No More Peso?: Argentina Says It Is Thinking About Replacing Its Currency with the American Dollar. The Step Would Be Logical but Not Necessarily Correct*, *ECONOMIST*, Jan. 23, 1999, at 69, 69 (explaining the difficulties of merging the United States and Argentine currencies). While these questions are vital and perplexing, the task here is doubly specific: to define a generally applicable constitutional rule of recognition for supranational adjudication of a particular class of private disputes and to do so in the domain of international commerce. The analysis attempted in these pages will have trans-substantive application in discussing legislative and executive transfers of power and in evaluating other species of supranational judicial power, such as the new International Criminal Court. *See generally* INTERNATIONAL ASS'N OF PENAL LAW ET AL., *THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997–98 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS* (1997) (compiling a documentary record of preparatory work to create the new International Criminal Court).

8. *See* JACKSON, *supra* note 6, at 81–89; *see also* *GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science, and Transp.*, 103d Cong. 285, 292 (1994) (Sup. Docs. No. Y4.C73/7iS.Hrg.103-823) [hereinafter *Uruguay Round Senate Hearings*] (statement of Professor Laurence H. Tribe) (emphasizing that the WTO agreement, if adopted, would “significantly affect” the law-making sovereignty of the United States and the 50 sovereign states of the Union). International trade has had a profound impact on the evolution of public international law. The traditional Grotian apparatus of world law, regulating the laws of war and peace, has evolved into elaborate

Yale's Bruce Ackerman, this inquiry may reveal whether America's embrace of the new international economy and of global dispute settlement could trigger a "jurisgenerative" event in the country's constitutional history.⁹ If the United States wants to extend the peace of the marketplace to all comers, it must confront the implications for its own constitutional order that are presented by growing economic and legal interdependence.¹⁰

Nevertheless, the theories presented in this Article face a high burden of persuasion. We should not assume that the United States Supreme Court, even if beguiled by the promise of global integration, would sanction establishment of rival courts, endowed with obligatory jurisdiction, outside the conventional constitutional order.¹¹ Justice

commercial treaties that establish institutional frameworks that eventually may break free of the discretionary control of their masters, the contracting parties to the treaty. As the European Union has demonstrated, multilateral economic relations supply a motive for this kind of international constitutionalization of treaties that traditional bilateral trade or alliance compacts could never supply. For example, Arie Reich applied a theory of "ramification" to the growth of the European Union, stressing the expansion of integrated regimes outward from pure trade toward policy issues encompassing investments, transportation, taxation, social policy, and monetary policy. Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 831-32 (1996-1997). See generally Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 36 (1996) (describing traditional public international law as the "default structure" on which to build constitution-like treaties that contain the basis for further legislation and adjudication).

9. See BRUCE ACKERMAN, WE THE PEOPLE (FOUNDATIONS) 40 (1991) (adapting the word "jurisgenesis" used in Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983)). The portmanteau adjective "jurisgenerative," in the sense of an event or normative consensus that eventually creates legal meaning, has been gaining some academic currency. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 35 (1997) (discussing the idea that the Rule of Law may include a jurisgenerative effect, reflecting societal morality); Judith Resnik, *Rereading "the Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1054 (1994) (noting the jurisgenerative power of communities).

Harold Koh has captured the same thought in more pointed language, noting that commentators have queried whether, "over time, America's constitutionalism has grown increasingly incompatible with its globalism." HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 209 (1990).

10. See Boris Kozolchyk, *NAFTA in the Grand and Small Scheme of Things*, 13 ARIZ. J. INT'L & COMP. L. 135, 137 (1996). As previously observed, see *supra* note 7, a different question is presented by the evolving constitutionalization of the global project itself, including the creation of new forms of supranational organization and the elaboration of transnational legal codes. See SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 22 (1996).

11. An unreflective faith in the Supreme Court's likely support for supranational adjudication would transfer to the realm of international policy the kind of hopeful finger-crossing that Robert Nagel has identified in the operation of domestic constitutional law: "[M]uch can be tolerated if left unspoken that might destroy if spoken." ROBERT F.

Sandra Day O'Connor stated as much in a recent symposium address, even though she prefaced her remarks with the judiciary's traditional deference toward the political branches in foreign policy.¹² Justice O'Connor asserted that the vesting of supranational adjudicatory authority in international tribunals would present "a very significant constitutional question in the United States."¹³ Specifically, citing Article III, she contended that Congress generally should not delegate "the essential attributes of judicial power" to tribunals outside the Constitution.¹⁴ Although delivered off the bench, Justice O'Connor's caveats alert us to the likelihood that the Supreme Court eventually will be called upon to evaluate the domestic authority of the judgments of various international tribunals and may or may not concede the jurisdictional reach of its rivals.¹⁵

NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 18 (1989). See generally JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE FEASIBILITY OF AND THE RELATIONSHIP TO THE FEDERAL JUDICIARY OF AN INTERNATIONAL CRIMINAL COURT 1 (1991) [hereinafter JUDICIAL CONFERENCE REPORT] (reminding scholars and political leaders that their "conclusory pronouncements" on the viability of an international criminal court have neglected the constitutional limitations "unique to the United States").

12. See Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 36-40 (1995-1996). Justice O'Connor accepted that legislation consenting to the creation of international tribunals would represent a judgment by the political branches that tribunals of this kind "further America's foreign interests." *Id.* at 40. This Article also stresses the history of judicial tolerance of congressional innovation. See, e.g., *infra* text accompanying note 116.

13. O'Connor, *supra* note 12, at 42.

14. *Id.* (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). This Article addresses the constitutional questions implicated by Justice O'Connor's statements. Preliminarily, it should be noted that this Article proposes that supranational tribunals exercise judicial power under the Constitution and are not (as some have argued) a unique species sustained outside the usual constitutional order. For arguments rejecting the notion of a "quarantined" form of international judicial power, see *infra* note 337.

15. See O'Connor, *supra* note 12, at 43; *infra* note 337 (discussing the political question doctrine). To date, no case of the kind imagined by Justice O'Connor has come before the Court. The President and Senate, exercising their Article II treaty powers, might agree to a treaty creating supranational tribunals. Such a treaty might face a future constitutional challenge, for example by an aggrieved party forced to abandon a significant commercial opportunity—perhaps a corporate merger—because of an unfavorable tribunal opinion. Until such a challenge occurs, however, the American constitutional system makes it impossible to predict the jurisprudential destiny of an unratified treaty or unadopted statute: the Supreme Court cannot give the kind of pre-enactment advisory opinions found in state practice and in several European constitutions. See Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1394 n.69 (1994). Ireland, France, and Spain, for example, permit another branch of government to request an authoritative judicial opinion on the constitutionality of proposed legislation. See Allan Randolph Brewer-Carias, General Report on the Domestic Constitutional Implications of Participation in a Regional Integration Process 75 (July 30, 1998) (unpublished manuscript, on file with the author) (Proceedings of the XVth International Congress of

To weigh the constitutionality of supranational adjudication, this Article uses three analytical devices, which are introduced in Parts I through III. Part I outlines a proposed model for specialized supranational tribunals to serve the global airline industry. Part II explains certain principles of Chomskyan linguistic theory, including Chomsky's ideas of the deep and surface structures of language, that I will use as analogical guides to understanding the Framers' Constitution. Part III sets forth the principle of constitutional integrity, a restatement of the theory of separation of powers, which will serve as the fundamental structural principle that ultimately controls all other exercises of interpretation that occur in this Article.

Thereafter, Part IV uses the principles of Chomskyan linguistics as a powerful analogical tool to integrate state courts, legislative courts, and supranational tribunals into the broad grant of judicial power contemplated by the Framers in Article III of the Constitution. Finally, in Part V, I conclude that the proposed tribunals, even though they remove access to final review by an Article III judge, do not impermissibly distort the alignment of the judicial and political powers in the American government and therefore do not, within their limited jurisdiction, offend the principle of constitutional integrity.

I. A PROPOSAL FOR A SYSTEM OF SPECIALIZED SUPRANATIONAL TRADE COURTS

Professor Louis Henkin, who has led perhaps the most extensive modern reconnaissance of the foreign relations landscape of the Constitution, displays impatience with abstract, quixotic speculation

Comparative Law, Bristol, England). The epithet "advisory" understates the power of the opinion because a finding of constitutional incompatibility probably will prevent the proposed statute from becoming law. On the failure to incorporate advisory opinions into the American Constitution, see generally Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 769-72 (1984); Robert P. Deyling, *Free Trade Agreements and the Federal Courts: Emerging Issues*, 27 ST. MARY'S L.J. 353, 376 (1996). The propriety of assigning an advisory role to federal judges resurfaced in the international trade context when then-Senator Robert Dole proposed the appointment of Article III judges to a commission that would evaluate retroactively cases in which the United States was a losing party before the dispute panels of the World Trade Organization. See Kendall W. Stiles, *The New WTO Regime: The Victory of Pragmatism*, 4 DET. C.L. J. INT'L L. & PRAC. 3, 38-39 (1995); see also Fred L. Morrison & Robert E. Hudec, *Judicial Protection of Individual Rights Under the Foreign Trade Laws of the United States*, in 8 STUDIES IN TRANSNATIONAL ECONOMIC LAW 91, 110-11 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (noting that the standing doctrine has prevented the emergence of an *actio popularis* in American jurisprudence, thereby disabling public interest plaintiffs from challenging legislation or treaties solely on the ground of unconstitutionality).

about the constitutional threat posed by supranational adjudication.¹⁶ Henkin, a dauntless pragmatist in his international law writings,¹⁷ prefers to work with “a particular proposal and context.”¹⁸ He believes that only from such a process of reification can we properly assess whether innovative arrangements can spark constitutional controversy.¹⁹ To anchor my argument and to honor Professor Henkin’s prescripts, this Article rests on precisely the kind of specific proposal that he might accept for scrutiny.

My argument assumes that a supranational order of things will arrive incrementally, with specialized tribunals responsive to micropressures applied by domestic and transnational constituencies and interest groups.²⁰ In 1998, for example, the international community established a new international criminal court.²¹ In the services sector, it makes sense to imagine the appearance of sectoralized tribunals to facilitate specific wealth-generating segments of the global service economy.²² The following is a synoptic account

16. See HENKIN, *supra* note 2, at 273.

17. It is tempting to speculate how Henkin might be assimilated into the archetypal style labels that David Kennedy has assigned to the great modern international law scholars. See *supra* note 6. Henkin, in any event, laid independent claim to a sort of cosmopolitan pragmatism with his epigrammatic remark that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis omitted).

18. HENKIN, *supra* note 2, at 273.

19. Proposals infringe upon the Constitution, in Henkin’s view, “if they distort[] domestic institutions or impinge[] substantially and directly on individuals in the United States, [and] particularly if they deprive[] persons of civil rights and liberties.” *Id.* at 272.

20. Professor John Jackson, while praising the General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1167, as the highwater mark of trade liberalization in services, speculates that the sheer number of service sectors (perhaps 150) presages at least 50 years of sector-by-sector negotiating. See JACKSON, *supra* note 6, at 307. The complexity of the service sector mirrors, to some extent, the fragmentation of the discipline of public international law itself into a rich mix of new legal specialties that includes international contracts for the sale of goods, international tort and criminal law, international resource law, international human rights law, aviation law, law of the sea, communications law, space law, unfair business practices, international antitrust and tax law, and many others. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 5 (1995). In Franck’s opinion, international law has entered its “post-ontological era,” when its existence is no longer under challenge, and its content has become the sole object of assessment. *Id.* at 6.

21. For prescient insights into the emergence of this new court, see M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT’L L. 151 (1992).

22. See JACKSON, *supra* note 6, at 307. For example, public comments on the United States Department of Transportation’s recent draft predatory pricing guidelines for the domestic airline industry included an argument by the Washington Airports Task Force that the worldwide dimension of airline alliances, with the risk of anti-competitive levels of concentration, have begun to create “a supranational situation” with respect to

of how constitutional issues associated with supranational adjudication might surface in “the world’s most visible service industry,”²³ the international air transport industry.²⁴

Chicago, December 2000: The delegates to a new global air transport conference have crafted a proposed multilateral “open skies” agreement that would supersede the mercantilist Chicago Convention, originally signed in 1944. The new dispensation would transform commercial access to the world’s airspace, eliminating the government domination of routes, prices, and market access that has limited the expansion of the world’s airlines for more than fifty years.²⁵ As part of the effort, the delegates have proposed establishing two supranational²⁶ institutions to monitor international airline competition, an Open Skies Commission and an International Court of Air Transportation.²⁷ The Commission and Court, applying a new code of international

competition policies for the first time. In the view of the Task Force, issues created by these far-flung alliances will be increasingly difficult to resolve through the prevailing network of *bilateral* aviation agreements. See Washington Airports Task Force, Response to the U.S. Department of Transportation’s Request for Comment on Proposed Predatory Pricing Enforcement Policy, DOT Docket No. OST-98-3713-717 (July 22, 1998).

23. BRIAN F. HAVEL, *IN SEARCH OF OPEN SKIES: LAW AND POLICY FOR A NEW ERA IN INTERNATIONAL AVIATION*, jacket cover (1997).

24. For an overview of the global air transport passenger industry, see *id.* at 17–23.

25. The model used in the main text is based on an earlier proposal that I developed. See *id.* at 427–33. The regulatory order that governs the international airline industry has been an object of scholarly interest since the signing of the Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. See HAVEL, *supra* note 23, at 31–34. During the following 50 years, the rapid technological advances in air transport have been subordinated to diplomatic maneuvering among nations, a kind of grand zero-sum game to negotiate where airlines fly, how often, with how many passengers, and at what price. No other modern transnational industry is so buffeted by the conflicting demands of diplomacy and business enterprise, although in many countries the two interests coincide to suppress competition. See *id.* at xix.

26. For the definition of “supranational” used in this Article, see *infra* text accompanying note 35.

27. These institutional innovations are consciously modeled on the template of the European Commission and the European Court of Justice as they operate to administer the European Union’s competition policy. See HAVEL, *supra* note 23, at 430. The European Commission provides centralized executive review of interstate antitrust disputes with established procedures to ensure fairness. The Court of Justice has a broad appellate mandate to ensure that “in the interpretation and application of [the founding treaties] the law is observed.” TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 164, 298 U.N.T.S. 11, 73 [hereinafter EC TREATY]; TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITY, AND CERTAIN RELATED ACTS, Oct. 2 1997, art. 220, 1997 O.J. (C 340) 1, 269, 37 I.L.M. 56, 124 [hereinafter EC TREATY CONSOLIDATED VERSION] (renumbering the EC TREATY, *supra*). See generally HAVEL, *supra* note 23, at 249–51 (examining the jurisdictional ambit of the European Court of Justice).

competition law,²⁸ would exercise exclusive supervision over the legal relations between private citizens, between private citizens and sovereign states, and between sovereign states, in connection with the operation of international air transport routes. Accordingly, for example, a United States airline seeking to merge with a European Union airline could find the proposed deal blocked by the Open Skies Commission as anti-competitive, but would have a right of appeal to the International Court of Air Transportation. Decisions of the Commission and Court would have the status of domestic law within each contracting party's jurisdiction, and no further domestic appeals or challenges would be allowed. To facilitate this regime, private citizens would be granted standing²⁹ before the Commission and the Court.³⁰ The United States delegation has demurred; in its view, the United States Constitution precludes the assignment of obligatory and

28. For a discussion of historical efforts to multilateralize competition rules, including more recent WTO initiatives, see Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules, Report of the Group of Experts, COM(95)359 final at 10. See generally Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL'Y J. 1 (1995) (proposing a common international antitrust code). Substantively, for example, the observed linkages between the Sherman/Clayton paradigms of United States antitrust law and Articles 85 and 86 of the EC TREATY, *supra* note 27, 298 U.N.T.S. at 47-49; EC TREATY CONSOLIDATED VERSION, arts. 81, 82, *supra* note 27, 1997 O.J. (C 340) at 208-09, 37 I.L.M. at 93-94, point unmistakably to a unified transatlantic code on inter-carrier agreements and abuse of market dominance. "It is striking that, on paper, the similarities in the competition laws of major trading nations are much greater than the differences. It is only sensible therefore to build upon this developing consensus . . . in the interests of more open markets and the reduction of trade friction." Sir Leon Brittan, Competition Law: Its Importance to the European Community and to International Trade, Address Before the University of Chicago Law School (Apr. 24, 1992) (transcript available in the Library of the European Union Delegation, Washington, D.C.).

29. For an explanation of the use of the familiar American juridical term "standing" in an internationalized setting, see *infra* note 39.

30. Thus, unlike the dispute panel structure created under the WTO agreements in 1994, the direct access procedures of the model proposed here would no longer compel nongovernmental complainants to lobby their national governments to raise unfair competition issues—and, failing agreement, to enter into formal dispute—with foreign governments. On the presentation of claims against foreign governments, see generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, cmt. 1 (1986) [hereinafter RESTATEMENT (THIRD)] (discussing the responsibility of the President and the executive branch for claims against foreign governments, including those on behalf of private persons). For a critical evaluation of democratic weaknesses in the new WTO dispute system, see generally Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699 (1994) (discussing how current international trade agreements undercut principles of democratic governance even in democratic states). Conversely, of course, ouster of domestic jurisdiction would enable governments to implead private parties directly—and obligatorily—before the proposed new tribunals. For a reflection on how the proposed tribunals could transform the role of private parties in international trade disputes, see *infra* text accompanying note 412.

*exclusive adjudicative powers over private party relationships—and possibly even over the sovereign actions of the United States itself—to supranational tribunals and judges.*³¹

The above scenario assumes permanent institutions of adjudication and compliance, operating prospectively to accept a contingent and unknowable docket.³² The new tribunals would not be

31. This constitutional dimension of supranational institutions is not solely an object of American constitutional concern. The European Court of Justice, for example, recently reiterated that it has the power—and responsibility—to scrutinize European Union participation as a party in international arrangements that involve judicial control machinery that may impinge on the Court's own jurisdictional competence under the Treaty of Rome. See Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-783 to I-1786, [1996] 2 C.M.L.R. 265, 287-89 (1996). *But see* Opinion 1/91, Draft Treaty on the European Economic Area, 1991 E.C.R. I-6079, I-6084, [1992] 1 C.M.L.R. 245, 270-72 (1992) (recognizing that in certain circumstances the Union has power to submit to decisions of an international court if the autonomy of the Union "legal order," including the paramount position of the Court of Justice, would not be compromised).

32. To this extent, much of the historical evidence from specially constituted "international" claims tribunals is simply irrelevant. These entities, among them the claims commissions established between the United States and Mexico in 1868 and 1923, see RESTATEMENT (THIRD), *supra* note 30, § 902, reporters' note 8, and the Iran-U.S. Claims Tribunal set up under the Algiers Declaration of 1981, Jan. 19, DEP'T ST. BULL., Feb. 1981, 1, 1-4, reprinted in 20 I.L.M. 230-33, were truly ad hoc in nature, forming a closed and predictable set of litigants, timeframes, and causes, so that the limits of jurisdiction *ratione personae*, *ratione temporae*, and *ratione materiae* were always fixed and ascertainable. Their existence relied more on judicial deference to the foreign policy prerogatives of the political branches and to the need for diplomatic comity, and the few reported cases did not dwell upon potential ramifications for the judicial power. See generally RESTATEMENT (THIRD), *supra* note 30, § 902, reporters' note 8 (discussing cases approving the international claims practice of the United States); 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 504, at 24-26 (1922) (arguing that the United States may constitutionally agree to refer to an international tribunal future controversies that may not prove susceptible to amicable adjustment by direct negotiation); Thomas Raeburn White, *Constitutionality of the Proposed International Prize Court—Considered from the Standpoint of the United States*, 2 AM. J. INT'L L. 490, 491 (1908) ("[T]he power of the United States to provide by treaty for the establishment of international courts and the adjustment of international differences therein is free from doubt."). The scope of this general treaty power, it would appear, reaches settlement of international claims where the claimants, as private parties, have already commenced suit against a foreign government in United States federal court proceedings. See *Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981) (authorizing the President to order claims settlement by executive agreement, thereby terminating legal proceedings and nullifying all orders of attachment pending in United States courts against Iranian governmental interests and transferring them to binding arbitration before an international claims tribunal). The desirability of this kind of settlement is enhanced by the existence of legal doctrines that permit foreign nations to disclaim legal responsibility in United States courts (notably the act-of-state doctrine, see generally RESTATEMENT (THIRD), *supra* note 30, § 443 (discussing the principle that American courts will not pass judgment on internal acts of other states), and, frankly, by "a tradition of presidential involvement in settling foreign claims," William N. Eskridge, Jr. & John Ferejohn, *Positive Political Theory and Public*

integrated components of the domestic appeals systems, perched atop or alongside national supreme courts.³³ At the beginning of the twentieth century, in fact, hopes were high that the project for an International Prize Court, designed originally as a lineal superior to the national court systems, would usher in a gilded age of global adjudication.³⁴ Under true supranational governance, however, all domestic jurisdiction is ousted. As usually understood, supranationalism³⁵ requires that a quantum of judicial power is, in effect, transferred out of the nation-state to the supranational agency. The judicial power later re-enters the state in the form of absolute decrees to which the nation-state, including the judiciary, must give plenary and unconditional effect.³⁶ In the metaphorical construct of a

Law: The Article I, Section 7 Game, 80 GEO. L.J. 523, 559 (1992)). Eskridge and Ferejohn maintain that the President must have "at least some inherent powers to settle claims under Article II of the Constitution." *Id.* at 562. With respect to the special contexts of international military and criminal tribunals, see Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 106-07, 127-32 (1995).

33. Though the project seems unfeasible today, it is an interesting question whether the United States Constitution, if it were to permit a specialized supranational system of the kind proposed in this Article, would also permit an additional (supranational) appellate structure that allowed discrete appeals of decisions of the United States Supreme Court. As Henry Brown pointed out in a 1908 article, the Constitution raises no textual impediment that would prohibit *the Supreme Court itself* from accepting the jurisdiction of a higher court. See Henry B. Brown, *The Proposed International Prize Court*, 2 AM. J. INT'L L. 476, 478-79 (1908).

34. See *id.* Prize law concerns the rights of belligerents to seize the ships and cargo both of other belligerents and of neutrals during wartime. It is a true juristic anomaly: although prize law is a branch of international law, it has always been administered by special national courts known as prize courts. See generally D.H.N. Johnson, *Prize Law*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1122-28 (Rudolf Bernhardt ed., 1997) (tracing the historical evolution of wartime prize law). For obvious reasons, domestic judicial administration frequently was open to bias and unfairness toward the nationals of the seized vessel. The proposed International Prize Court would have had full power to review decisions of a national court of justice as to both facts and law, to affirm or reverse, and to certify its judgment to the national court for proceedings in accordance therewith. See 2 HYDE, *supra* note 32, § 504, at 25-26. The United States objected on the ground that the Supreme Court was the constitutional court of final appeal in prize cases, see *id.* at 26, but not, it will be noted, on the ground that the Court must be the final court of appeal for *all* federal cases, which it demonstrably has never been, see *infra* text accompanying notes 154-55. White emphasized that, in the unusual context of prize law, the United States federal government recognized international commissions that did not technically "reverse" the Supreme Court, but did reach contrary conclusions to prior Court holdings. United States recognition was premised on the principle of international law that the judicial power of the belligerent captor did not comprehend a final decision of international questions arising in prize cases. See White, *supra* note 32, at 499.

35. *But cf.* Helfer & Slaughter, *supra* note 7, at 287 (suggesting that supranational, strictly speaking, has no "canonical" definition); *supra* note 2 (commenting on the provenance of the term "supranational").

36. See generally G. Richard Shell, *Trade Legalism and International Relations*

recent article by Professors Helfer and Slaughter, supranational tribunals have the ability "to penetrate the surface of the state."³⁷ The acts of supranational institutions—whether they wield legislative, executive, or judicial powers, or a blend of all three—receive direct and immediate application, without formal re-incorporation, in the domestic constitutional order.³⁸ The aviation model adopts this supranational construct in the judicial sphere.

More significantly, in its emphasis on the standing of private citizens, the supranational aviation model contains an unexplored constitutional novelty.³⁹ In all previous incarnations of transnational adjudication that have been accepted by the United States government, United States citizens either could appear before the relevant tribunals only by the sovereign consent of the United States or were represented by the United States in its sovereign capacity.⁴⁰ The aviation model anticipates that various party configurations would emerge, in addition to the classical international law sovereign-to-sovereign contest, that would reject the traditional view of the

Theory: An Analysis of the World Trade Organization, 44 DUKE L.J. 829, 885 (1995) (describing how awards of international tribunals might convert into domestic law with only "minimal substantive scrutiny").

37. Helfer & Slaughter, *supra* note 7, at 289. These authors used the term "supranational" to nominalize a particular type of international organization that is "empowered to exercise directly some of the functions otherwise reserved to states." *Id.* at 287. In this perspective, the European Union is today the maximal example of a transfer of state sovereign power to an international organization. *See id.*

38. *See id.* at 287.

39. The unexplored novelty considered here is a *procedural* one, for which the U.S. jurisprudential term "standing" is used metonymically. *See generally* RESTATEMENT (THIRD), *supra* note 30, § 906 (discussing the general principle that private persons, natural or juridical, are generally prohibited from bringing claims in international fora). The Framers, contrarily, would hardly be surprised by an engagement of individual responsibility at the international level. It was precisely their governmental purpose to attach the individual's participation to the enterprise of federal administration. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 153 (1996) (suggesting that the involvement of the individual countered the solecistic notion of a sovereignty over sovereigns). Alexander Hamilton, in a similar vein, took "the people" to be "the only proper objects of government." THE FEDERALIST NO. 15, at 149 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

40. *See Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981) (involving an executive agreement transferring all claims of United States nationals against the Iranian government to international arbitration); *United States v. Pink*, 315 U.S. 203, 211-13 (1942) (involving an executive agreement settling claims of American nationals against Russia and its nationals arising out of the United States's recognition of the Soviet government); *United States v. Belmont*, 301 U.S. 324, 326-27 (1937) (involving an American government action in order to complete the settlement of claims of United States nationals made by previous executive agreement with the Soviet government); *see also* HENKIN, *supra* note 2, at 56 (discussing the *Pink* and *Belmont* cases).

individual as lacking an autonomous right of access to international tribunals.⁴¹

Thus, while the model contemplates that the United States might press a claim against France because of an allegedly illegal public subsidy paid to Air France, that jurisdiction alone might not seem a remarkable advance on present World Trade Organization (WTO) dispute settlement procedure.⁴² The authentic innovation comes in granting private parties a direct right of appearance, or standing,⁴³ before the international tribunals in two prototypical party configurations. First, a private party could bring suit directly against a foreign government because participation in the founding treaty would require an unequivocal waiver of sovereign immunity.⁴⁴

41. Thus, Helfer and Slaughter suggest, potential new conflicts include cases directly involving private parties—"whether between a private party and a foreign government, a private party and her own government, private parties themselves, or, in the criminal context, a private party and a prosecutor's office." Helfer & Slaughter, *supra* note 7, at 289. On international law's traditional reluctance to accord standing to individuals at the international level, see Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 558 (1956) (describing the "[r]epugnance" felt by international law jurists at making an individual a subject of international law (internal quotation marks and citation omitted)); see also Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1084 (1992) (interpreting the customary position of the individual in international law as "lack[ing] the power to set in motion the machinery of international law for enforcing treaty obligations"). For a broad summons to expand standing in international trade tribunals, see Shell, *supra* note 36, at 838 (calling for "places at the table," including standing to litigate cases, for all trade policy stakeholders).

42. See Shell, *supra* note 36, at 898 n.325 (describing the WTO, in this specific sense, as a "contract organization" that adopts the classic public international law contractual model of bilateral relationships between states); cf. Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2277-78 (1997) (proposing the extension of standing before WTO tribunals to nongovernmental parties in the context of a challenge before WTO tribunal to U.S. legislation punishing foreign companies that trade with Cuba).

In contrast, European Union treaty law allows natural and juridical persons to contest trade norms promulgated by European Union institutions before the supranational European Court of Justice. See EC TREATY, arts. 173, 175, *supra* note 27, 298 U.N.T.S. at 75-76; EC TREATY CONSOLIDATED VERSION, arts. 230, 232, *supra* note 27, 1997 O.J. (C 340) at 272, 273, 37 I.L.M. at 125, 126; see also Helfer & Slaughter, *supra* note 7, at 276-77 (adding the tribunals established by the European Convention for the Protection of Human Rights and Fundamental Freedoms to a select category of supranational adjudication involving private parties litigating directly against state governments or against each other). On the so-called direct effect of European Union treaty and legislative rights, see Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 600-02, 606-09 (1998).

43. See *supra* text accompanying note 41.

44. States are generally not immune from liability for commercial activities, but might argue that regulation of their airspace and international air transport routes, despite commercial ramifications, falls properly within the sphere of governmental activity (*de*

Accordingly, the treaty would allow a United States airline, for example, to sue a foreign government to remove capacity restrictions unilaterally imposed by that government on air traffic routes served by the United States complainant.⁴⁵ Second, any individual airline could sue, and be sued by, its commercial peers.⁴⁶

The model of supranational aviation tribunals presented in this Part not only satisfies Professor Henkin's requirement of specificity,⁴⁷ but also can serve as a template for interpreting the constitutional status of supranational tribunals as a class. Next, in Part II, I turn to the features of Chomskyan linguistics that comprise the intellectual wellspring of this new project of interpretation.

II. THE ANALOGICAL POWER OF STRUCTURAL LINGUISTIC THEORY

A. *Chomskyan Linguistics and Constitutional Interpretation*

Surprisingly, Noam Chomsky's insights into language, although

jure imperii) and, thus, attracts the plenary protection of classical sovereign immunity. See RESTATEMENT (THIRD), *supra* note 30, § 451 cmt. a; see also Jurisdictional Immunities of Foreign States Act, 28 U.S.C. §§ 1602-1611 (1994) (granting and governing the scope of jurisdiction to be exercised by federal district courts in civil cases involving claims against foreign states).

45. Under the proposed model, for example, Northwest Airlines could have brought suit directly against the Japanese government in 1993 to remove unilateral capacity restrictions imposed by Japan on Northwest's Tokyo-Sydney services. See HAVEL, *supra* note 23, at 188 (describing Northwest's complaint against Japan, pursued under the U.S. Department of Transportation's statutory administrative investigation procedures for international air transportation). Northwest would also be able to bring suit against the American government if, for example, the United States were to issue rules setting fare ranges that violated the new principle of open price competition on international routes. In this context, the proposed supranational aviation tribunals would supersede any potential jurisdiction of the U.S. Claims Court. See 28 U.S.C. § 1491 (1994). This result would not only be consistent with the scenario outlined in the text, but would also be mandated by an existing statutory provision that denies the court jurisdiction over claims against the United States that "grow[] out of or [are] dependent upon" an international agreement—here, the open skies treaty. 28 U.S.C. § 1502 (1994). *But cf. Dames & Moore*, 453 U.S. at 689-90 (preserving claims before the U.S. Claims Court that are founded upon the Constitution).

46. For example, a U.S. airline might challenge two European competitors or an alliance of United States and European competitors for alleged price-fixing on a major United States/European route. It is likely, in fact, that most disputes in a deregulated international airline industry would be private in nature, especially as governments continue to withdraw from public ownership of their flag carriers. See generally HAVEL, *supra* note 23, at 85-89 (discussing the trend, especially in the European Union, of government withdrawal from public ownership of flag carriers).

47. See *supra* text accompanying note 18 (discussing Professor Henkin's insistence that the constitutionality of supranational adjudication be tested in the context of specific proposals).

difficult to penetrate and seemingly in a constant state of abandonment and reform,⁴⁸ have left virtually no mark on the practice of constitutional interpretation.⁴⁹ While the reason for this neglect might itself be an enterprise for another day,⁵⁰ the task here is

48. The worst offender in this respect may be Noam Chomsky himself. This Article is grounded in what I call "classical" Chomskyan linguistics, the theories of transformational-generative grammar that Chomsky introduced nearly four decades ago. Lately, however, Chomsky, has abandoned what he apparently views as the rococo trappings of his earlier work in favor of a simplified, but still inchoate, linguistic inquiry, dubbed the "Minimalist Program." See Margalit Fox, *A Changed Noam Chomsky Simplifies*, N.Y. TIMES, Dec. 5, 1998, at B7. Lacking the principles of deep and surface structure and the dynamic transformational device discussed in this Article, the new "Program" carries no analogical weight for our present analysis. Its effort at extreme concision also has alienated many linguists, some of whom claim to find it incomprehensible. See *id.* at B9. For a useful sketch of Chomsky's new inquiry, see V.J. COOK & MARK NEWSON, CHOMSKY'S UNIVERSAL GRAMMAR: AN INTRODUCTION 311-44 (2d ed. 1996).

49. The neglect of Chomskyan linguistics seems especially puzzling given recent attempts to revive textualism as a method of statutory and constitutional interpretation. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23-25 (Amy Gutmann ed., 1997) (sketching a theory of textualism as an explicitly formalistic analysis). But cf. *infra* note 88 (discussing Laurence Tribe's hermeneutic view). This is not to say that Chomsky is ignored in the legal literature. To the contrary, his notions of language are always interesting to scholars who envisage a realm of neoteric endeavor that joins the insights of law to those of the science of linguistics. See, e.g., Jim C. Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1283-90 (1995) (comparing law students to second-language learners, noting the strong reliance of legal thinkers on non-textual terms, and arguing that the apparent division between legal rhetoric and legal reasoning suggests that the law's underlying syntax observes the Chomskyan distinction between surface structure and deep structure); Judith N. Levi, "What is Meaning in a Legal Text?" *A First Dialogue for Law and Linguistics*, 73 WASH. U. L.Q. 771, 775-83 (1995) (discussing the formation of a lawyer/linguist collaboration to study the unconscious values of language); M.B.W. Sinclair, *Plugs, Holes, Filters, and Goals: An Analysis of Legislative Attitudes*, 41 N.Y.L. SCH. L. REV. 237, 240 (1996) (using Chomsky's syntactic theory to defend the idea that in metaphors speakers generally modify "underlying declaratives" in ways that make "complex sentences to suit our social purposes"); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 257 (basing an argument in small part on Chomsky's distinction between knowledge and use of language to explain why Justice Scalia's use of textualism fails because of an inherent "inability to recognize the range of sensible interpretations that come to light only after we have looked at context as an initial matter").

50. Some legal scholars, after all, have shown intense dislike for linguistics and the ideas of Chomsky in particular. See, e.g., Francis J. Mootz III, *Desperately Seeking Science*, 73 WASH. U. L.Q. 1009, 1009-18 (1995) (warning against the junction of law and linguistics being degraded into an "intellectual colonization" whereby each discipline merely attempts to gain value or importance through integration with the other, without utilizing the other in any valid effort to increase its own self-conceptualization). See generally Marc R. Poirier, *On Whose Authority? Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025, 1035-37 (1995) (arguing that interpretive expertise involves an explicit claim to a social position which is unwarranted for linguists attempting

to identify some elemental principles of Chomsky's classical universal grammar that can be used in the present analysis to give a more textured reading of Article III of the United States Constitution.⁵¹ A cross-pollination of law and classical Chomskyan linguistic theory is not in the least strange. Both disciplines use the same fundamental assumption, that the activity they explain is governed by identifiable rules.⁵²

Nevertheless, I will not stretch the analogy too far.⁵³ I do not purport to set out a universal theory of the juristic properties of world constitutions, although such an enterprise would have some value in a world that manufactures new states with some regularity.⁵⁴ Nor do I

statutory interpretation because the use of language in law is far different from its relation to "ordinary speakers"). George Fletcher has challenged semantic theory as a medium to explain "law." In Fletcher's reasoning, both law and language are quintessentially social facts, because both enable human beings to live and work in close consort. Fletcher sunders the analogy at that point: "The theory of meaning cannot help us understand the nature of the truth in law, for meaning and truth have little to do with each other." George P. Fletcher, *Law, Truth, and Interpretation: A Symposium on Dennis Patterson's Law and Truth: What Law Is Like*, 50 SMU L. REV. 1599, 1607 (1997); see also Peter W. Schroth, *Language and Law*, 46 AM. J. COMP. L. 17, 27-28 (1998) (discussing Chomskyan linguistic theory and concluding that "scientific linguistics has very little assistance to offer to statutory construction").

51. On Chomskyan linguistics, see NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* (1965) (presenting a comprehensive theory of syntactic relations in language); see also ADRIAN AKMAJIAN ET AL., *LINGUISTICS: AN INTRODUCTION TO LANGUAGE AND COMMUNICATION* 135 (4th ed. 1995) (applying Chomskyan theories of syntax); COOK & NEWSON, *supra* note 48 (providing a comprehensive introduction to Chomskyan linguistic theory); OSWALD DUCROT & TZVETAN TODOROV, *ENCYCLOPEDIA OF THE SCIENCES OF LANGUAGE* 235 (Catherine Porter trans., 1983) (analyzing Chomskyan ideas of deep and surface structure in language relations); VICTORIA FROMKIN & ROBERT RODMAN, *AN INTRODUCTION TO LANGUAGE* 105-48 (6th ed. 1998) (examining Chomskyan ideas to understand sentence patterns in language); RANDY ALLEN HARRIS, *THE LINGUISTICS WARS* 35-73 (1993) (recounting the Chomskyan "revolution" in linguistic analysis); GEORGE A. MILLER, *THE SCIENCE OF WORDS* 213-22 (1996) (explaining the concept of syntactic rewriting as fundamental to structural linguistics).

52. See AKMAJIAN ET AL., *supra* note 51, at 6.

53. Perhaps the analogy *cannot* be stretched too far; linguistic rules, in the sense preferred by modern linguistic science, are promoted as rules of description rather than prescription. They express "generalizations" and "regularities" about the structure and function of language, rather than establish norms for proper linguistic behavior. See *id.* at 7. Whether this distinction holds true seems open to question; linguistics routinely tests the conventional grammaticality of utterances, an operation that is inescapably prescriptive, even if no pretense of judgment is intended.

54. Comparative constitutional law may have been given new impetus by a few members of the present Supreme Court. Justice O'Connor recently exhorted United States judges to look "beyond American borders in our search for persuasive legal reasoning." Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 4 INT'L JUD. OBSERVER 2, 2 (1997); see also *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (inviting the majority to consider the relevant experience of the federal systems of Switzerland,

wish to present an unduly formalist reading of the United States Constitution,⁵⁵ for that would weaken the premise of structural resilience that is the interpretive lodestar of this Article.⁵⁶ Rather, from my first acquaintance with his work, I have considered Chomsky's theory of knowledge to be a likely source for an elegant theoretical solution to some aspects of the incompleteness of exposition within the United States Constitution. Chomsky conceded that his classical theory was, as others have described it, an "implicational universal" because it derived virtually entirely from the study of English.⁵⁷ Similarly, I make no claim that the analysis presented here is more than a rebuttable, but robust, projection of the scope of the judicial power contemplated in Article III of the Constitution.⁵⁸

B. *A Summary of Chomsky's Transformational Grammar*

To appreciate better the analogical richness of Chomskyan linguistic theory, the reader may find a quick overview of Chomsky's terminology helpful. According to Chomsky, speakers of a language have internalized its grammatical rules. Chomsky labeled this internalized knowledge the speaker's "competence,"⁵⁹ in contrast to the speaker's potentially infinite actual utterances, which he called "performance."⁶⁰ Because most speakers have learned their native languages intuitively and are not trained in grammar, Chomsky

Germany, and the European Union). *But see Printz*, 521 U.S. at 921 n.11 (Scalia, J.) (disagreeing with Justice Breyer's suggestion on the premise that comparative analysis is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one").

55. This Article has a neo-originalist focus, arranging the words and ideas of the Framers' Constitution so that innovations in government can be accommodated, but with due regard to underlying postulates of constitutional integrity. This Article, however, seeks to avoid outcome-blind scholarship that pivots the entire meaning of a text on, for example, the presence or absence of a comma in the Exceptions Clause in Article III, or the caesura in the litany of "alls" in the Cases and Controversies Clause of the same provision.

56. *See infra* note 186 (providing an overview of the structuralist values underlying this Article's interpretive method).

57. COOK & NEWSON, *supra* note 48, at 29.

58. *Cf.* Fletcher, *supra* note 50, at 1604 (recognizing that Chomsky's universal grammar provides "many seductive metaphors and analogies for other fields"). Fletcher's tone is faintly disapproving, which I deduce from his footnoted citation to a LEXIS search on the number of occurrences of the phrase "deep structure" in legal scholarship. *See id.* at 1604 n.22 (reporting that a search in March 1997 revealed 247 usages of the phrase "deep structure"). A search of this kind, however, actually reveals the paucity of Chomsky's influence in constitutional scholarship.

59. CHOMSKY, *supra* note 51, at 4.

60. *Id.*

conceptualized a universal theory of competence that sought to explain a speaker's creative facility to produce new but *comprehensible* language performance.⁶¹

The terms "deep structure" and "surface structure," coined by Chomsky,⁶² are the intellectual mainstays of this theory. The deep structure is a fixed domain of archetypal phrase forms,⁶³ such as the simple declarative sentence "John likes Peter."⁶⁴ The "surface structure" is the actual uttered speech—the performance—that the speaker presumably has derived from implicit knowledge of the grammar (including deep structure). Chomskyan linguistics holds that the speaker "maps" the deep structure to the surface structure by means of dynamic operations that Chomsky called "transformations."⁶⁵ For the passive transformation, for example, Chomsky devised a series of instructions (resembling lines of computer code) that convert deep structure sentences like "John likes Peter" into the surface structure passive form "Peter is liked by John."⁶⁶ In Chomskyan theory, the transformations generate (i.e., produce) surface structures through their specific recursive operations on the deep structure phrasal forms.⁶⁷ The words to be inserted into these various structures are drawn from what Chomsky

61. Chomsky, who focused his theoretical lens on competence rather than performance, *see infra* text accompanying note 75, assumed an "ideal speaker-listener, in a completely homogeneous speech-community, who knows its language perfectly and is unaffected by such grammatically irrelevant conditions as memory limitations, distractions, shifts of attention and interest, and errors . . . in applying his knowledge of the language in actual performance." CHOMSKY, *supra* note 51, at 3.

62. CHOMSKY, *supra* note 51, at 16–17 (explaining the syntactic roles of deep and surface structures).

63. *See id.* at 17 (describing these phrasal forms as "the elementary units" of the deep structure).

64. The determination of which phrasal structures belong to the deep structure is a complexity that need not be addressed here. It is clear, for example, that active sentences are *more likely* to be deep structure phrases than passive sentences, because the number of verbs that do not permit a passive form is, at least in English, a tiny subset of the number of verbs that do. *See* JEAN AITCHISON, LINGUISTICS 115 (2d ed. 1978). Chomsky's grammar prizes economy, and a grammar that puts passive sentences into the deep structure could hardly expect to respect that ideal. *See id.* at 110, 115. In any event, the elements of the deep structure are generally identified through empirical observation of the language. *See* AKMAJIAN ET AL., *supra* note 51, at 162–63 (discussing how "constituent structures" are used to determine basic phrase types).

65. CHOMSKY, *supra* note 51, at 17.

66. *See id.* at 103–04, 128–31; AKMAJIAN ET AL., *supra* note 51, at 177. Note that, in classical theory, the transformations should not change meaning. A separate deep structure would therefore underlie the interrogative form "Does Peter like John?" *See* HARRIS, *supra* note 51, at 83 (discussing the efforts of Chomsky and others to control semantic changes potentially caused by transformations).

67. *See* CHOMSKY, *supra* note 51, at 135.

called the “lexicon,” or the list of the words in a language.⁶⁸ The lexicon includes specific information as to the part of speech each word occupies (for example, whether it is a proper or common noun, an animate or inanimate noun, and so forth).⁶⁹

C. *Theoretical Foundations of Chomskyan Grammar*

The core insight of classical Chomskyan structural linguistics⁷⁰ is that the spoken utterances of language, however random they appear to be, conform to predetermined rules. The recursiveness of these underlying rules allows a speaker to invent and utter *comprehensible* sentences that neither the speaker, nor anyone else, has ever before heard or spoken.⁷¹ In this way, Chomsky identified a specific principle of structure dependency in human language. According to this principle, “knowledge of language relies on the structural relationship in the sentence, rather than on the sequence of words.”⁷²

68. See *id.* at 84. Chomsky described the words in more orotund language as “lexical formatives.” *Id.*

69. Chomsky developed passive transformations that would “rewrite” the deep structure phrase form through a series of instructions involving substitutions, deletions, and embeddings. See *id.* at 128–33. Thus, one of Chomsky’s favorite sentence examples, “Sincerity frightens the boy,” has a deep structure that combines lexical items (“the boy” and “sincerity”) and grammatical category symbols (S for sentence, NP for noun phrase (“the boy”), and V for verb (“frightens”). Chomsky’s passive transformation writes instructions in the generalized form $S \rightarrow$ (“rewrite S as”) that substitute the first NP (“sincerity”) with the second NP (“the boy”), and add an adverbial particle (“by”) that “passivizes” the active verb form “frightens” into the verb auxiliary form “is frightened.” At the surface structure, therefore, the generated sentence reads, “The boy is frightened by sincerity.” See *id.* at 65, 103–04.

70. Chomsky’s 1965 work, *Aspects of the Theory of Syntax*, *supra* note 51, is generally regarded as the classical exposition of his theory of transformational generative linguistics. See HARRIS, *supra* note 51, at 89. *Aspects* was a synthesis and reconceptualization of theoretical developments since his groundbreaking earlier work, *Syntactic Structures* (1957), which is regarded as the inspirational source for all of modern generative grammar. See HARRIS, *supra* note 51, at 81. Chomsky’s structural insights were an absorbing departure for linguistic science, which formerly aped Einsteinian physics by obsessively slicing language into tinier and tinier particles of speech and meaning. See generally *id.* at 95 (viewing deep structure as a formalistic explanation of the “intuitively appealing notion that sentences have an underlying logical form that differs from the surface arrangement of words” (quoting Eric Wanner, *Psychology and Linguistics in the Sixties*, in *THE MAKING OF COGNITIVE SCIENCE: ESSAYS IN HONOR OF GEORGE A. MILLER* 143, 147 (William Hirst ed., 1988))).

71. See COOK & NEWSON, *supra* note 48, at 24. The alternative, of course, would be to attempt the incomprehensibly prodigious feat of memorizing all of the possible sentences that one might need to describe any new event or thought, or to re-describe any prior event or thought. See AKMAJIAN ET AL., *supra* note 51, at 135–36 (suggesting that it would be impossible to understand an unmemorized sentence).

72. COOK & NEWSON, *supra* note 48, at 4.

Particularly in English, which has a highly structured syntax,⁷³ simply moving words around in a phrase or sentence will not produce correct speech. For example, the rules for English passives and questions, or for the subject-predicate form of English sentences, "are structure-dependent, not based on the linear order of elements."⁷⁴ Competence, a speaker's internalized knowledge of these relational rules of structure, is possibly a genetic facility that Chomsky thought vastly more susceptible to formal description than the utterances of individual speakers, their language performance.⁷⁵

Importantly, Chomsky's idea of grammar was not intended to model how a speaker actually thinks about the creation of a linguistic utterance. Indeed, speakers clearly do not assemble their linguistic utterances with this level of cognition.⁷⁶ In Chomsky's construct, the grammar "can be regarded only as a characterization of the *intrinsic tacit knowledge* or competence that underlies actual performance."⁷⁷ In other words, inherent structural knowledge must be the initiator of as-yet unformed and unuttered language performance.⁷⁸ Analogically, if there is implicit structural knowledge within the Framers' Constitution, this structure may help to reveal the unformed and unuttered idea of supranational adjudication to a generation two hundred years removed from the original drafters.

Chomsky's theory of syntax assumes that at the base level, or deep structure, the elements of structure remain fixed and finite.⁷⁹ The study of transformations from this fixed base became the signature of Chomsky's theory, giving it the characteristic of a

73. See MILLER, *supra* note 51, at 213.

74. COOK & NEWSON, *supra* note 48, at 9. As Chomsky himself recognized, it is not at all clear whether the semantic component of language needs to be embedded in syntactic analysis. See CHOMSKY, *supra* note 51, at 75-76 (attempting to incorporate some rules of semantics into the syntactic component so that nonsensical sentences, such as "the boy elapsed," can be rejected by the grammar); see also HARRIS, *supra* note 51, at 49 (explaining how syntax is itself an important contributor to semantic meaning, because words by themselves are thin signifiers without a structural context).

75. See CHOMSKY, *supra* note 51, at 4. See generally AKMAJIAN ET AL., *supra* note 51, at 137 (analyzing competence as an "intuitive judgment" of "grammaticality").

76. See CHOMSKY, *supra* note 51, at 139 (describing as an absurdity the idea that a system of generative rules could serve as a "point-by-point model for the actual construction of a sentence by a speaker"). Thinking of a generative grammar in this way, Chomsky argued, would be to take it as a model of performance, rather than of competence, "thus totally misconceiving its nature." *Id.* at 140.

77. *Id.* at 140 (emphasis added).

78. See AKMAJIAN ET AL., *supra* note 51, at 6. Hence, a wonderful structural irony exists in language—although it is governed by strict principles, "speakers nonetheless control a system that is *unbounded in scope*, which is to say that there is no limit to the kinds of things that can be talked about." *Id.* at 7 (emphasis added).

79. See CHOMSKY, *supra* note 51, at 17; COOK & NEWSON, *supra* note 48, at 27.

dynamic “generative grammar.”⁸⁰ The efficiency of this grammar is that it can use common syntactic principles to characterize phrases and sentences that might seem related but obviously carry distinct, and sometimes ambiguous, semantic loads—*He likes people, People like him, Does he like people?*⁸¹ The transformational rules themselves, which “map” the deep structure phrases to the surface structure of language to allow actual multiple utterances (performance),⁸² are the product of the “interaction between the [deep structure] principles and the lexicon.”⁸³ These rules, in effect, specify how the deep structure phrases are to be “rewritten” to generate a potentially infinite surface structure of grammatically conditioned performance.⁸⁴ When Chomsky described a “generative” grammar, however, he did not mean literally a grammar that could limitlessly *generate* words and phrases; he meant precisely that the grammar is explicit and formal, so that the deductive process from deep to surface structure is capable of reliable and replicable description.⁸⁵

D. Using Chomskyan Theory to Read Article III

From the sketch presented of Chomsky’s deep/surface dichotomy, I have derived three principles to apply in my exposition of Article III. First, the principle of deep structure (or “competence,” in Chomskyan terms) contends that the Constitution rests on underlying structural principles, such as “constitutional integrity,”

80. CHOMSKY, *supra* note 51, at 4. As noted above, Chomsky postulated that the deep structure comprised a set of underlying model phrase structures. *See id.* at 17; *supra* note 63 and accompanying text.

81. Because I am adopting an analogical approach to some key concepts of transformational grammar, I do not consider further the prevailing debate about the ultimate generative power of Chomsky’s original grammar.

82. *See* CHOMSKY, *supra* note 51, at 135, 141. Grammatical functions and relations, as we commonly understand them, are defined in the base phrases of the deep structure. *See id.* at 136. Thus, as Chomsky summarized, “one major function of the transformation rules is to convert an abstract deep structure that expresses the content of a sentence into a fairly concrete surface structure that indicates its form.” *Id.*

83. COOK & NEWSON, *supra* note 48, at 35. In *Aspects of the Theory of Syntax*, Chomsky remodeled his generative theory to include specification of lexical information (such as proper and animate nouns) in the deep structure. *See* CHOMSKY, *supra* note 51, at 86–88, 164–66.

84. *See* CHOMSKY, *supra* note 51, at 66. Chomsky, in his 1965 exposition, seemed to treat the transformational operations themselves as part of the deep structure phrase forms, rather than as an independent connection to the surface structure. *See id.* at 138–39. Here, in the elaboration of the transformations, Chomskyan grammar is at its most formal, and the analogical refraction of our present enterprise of constitutional analysis at its most faint.

85. *See* COOK & NEWSON, *supra* note 48, at 36.

that can be explicitly described and that are capable of recursive application to changing circumstances.⁸⁶ Second, the principle of surface structure (Chomsky's theory of "performance") is reflected in the textual matter of the Constitution, itself a performance by the original Framers that was controlled by the principles embedded in the deep structure of their document. The constitutional text is but one performance in a series of extended or enhanced performances that are sanctioned by the deep structure and revealed through iterated acts of interpretation.⁸⁷ The third and final principle adopts the popular (and, frankly, intuitive) meaning of the word "generative" in place of Chomsky's non-intuitive usage, proposing that the surface structure of the Constitution, in all of its performances, has been *generated*, or produced, by a series of transformational operations upon the deep structure.⁸⁸ These transformations initially derive from the "lexicon" of the Constitution itself, comprising primarily its surface structure and its legacy of judicial exegesis.⁸⁹

III. THE DEEP STRUCTURE PRINCIPLE OF CONSTITUTIONAL INTEGRITY

A. *Respecting the National Constitutional Order*

Before beginning a close reading of Article III, it is important to note the profound limiting directive that constrains the entire

86. The deep/surface dichotomy has reverberated in other fields of linguistics. In some forms of generative semantics, for example, it has been thought that the multiplicity of meanings of words can actually be reduced to a core conceptual set of primitive meanings, from which all other more nuanced or complex meanings ultimately would be generated. As Miller explained this process, for example, the word "move" would function as a core concept for verbs of motion, "see" would serve as central to verbs of visual perception, and so on. See MILLER, *supra* note 51, at 226-27. This kind of componential analysis, however, has serious analytical limitations as a descriptive theory of language. See *id.* at 227.

87. Unlike the universe of potential linguistic utterances, however, the Constitution's performances have perceptible limits because the Constitution's universe of textual matter is demonstrably finite.

88. There is a discernible deep structure resonance in Laurence Tribe's contribution to Justice Scalia's recent *Festschrift* of commentaries on textualism. See Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 49, at 65. According to Tribe, the challenge of deciding which provisions of the Constitution to regard as "generative of constitutional principles broader or deeper than their specific terms might at first suggest, and then of deciding just what principles such provisions, read alone or in combination with others, should be taken to enact, *lies at the core of the [constitutional] interpretive enterprise.*" *Id.* at 71 (emphasis added).

89. See *infra* page 301.

interpretive task of my analysis. At its most abstract, this deep structure principle requires that a supranational transfer of power must respect the national constitutional order. This principle of constitutional integrity is proposed here as the primordial principle, or proto-principle, of deep structure in the United States Constitution.⁹⁰ Application of this principle is intended to ensure that supranational adjudication, or any species of supranational transmission of powers, cannot corrupt the vision of the constitutional order adopted and perpetuated by “We the People.” Thus, if the national polity rejects a supranational transfer of judicial power, that power surely cannot be exercised in defiance of the domestic Constitution merely by resorting to one of international law’s most reflexive, yet suspect, canons: that international obligations remain binding even if internal constitutional limitations or supervening national law prevent them from being given effect domestically.⁹¹

Ironically and inescapably, therefore, the legitimacy of a supranational transfer of power ultimately depends on reception of the specific exercises of that power into the domestic order.⁹² Some academic opinion in the United States, for example, seems alarmed

90. Assigning primacy to one principle of deep structure might not seem, at first glance, analogically consistent with the work of Chomsky. Chomsky, however, did not doubt that some universality connected languages in their deep structure, countering the great diversity apparent in their surface structures. See CHOMSKY, *supra* note 51, at 117–18. In the search for universality among languages, therefore, it might be plausible to propose some “deepest” component of the deep structure. The concept of the deepest component of the deep structure gives coherence to the very idea of a language qua language or to the ontological integrity of a language.

91. See RESTATEMENT (THIRD), *supra* note 30, § 115 cmt. b (setting forth the doctrine of continuity of international legal obligation). Indeed, to concede that the United States can be bound outside its borders but not within them is to sanctify international law as a kind of mystic *Überrecht* in the sense condemned by Justice Holmes in *The Western Maid*, 257 U.S. 419, 432 (1922) (stating that maritime law “derives its whole and only power in this country from its having been accepted and adopted by the United States” because the sovereign power has “take[n] up a rule suggested from without and ma[de] it part of its own rules”). Rejection of the continuity doctrine, however, does not imply rejection of supranational transfers of sovereign authority, provided that such transfers operate consistently with domestic constitutional law.

92. The constitution of the Federal Republic of Germany, see *infra* text accompanying note 103, includes what appears to be a prototypical rule of constitutional integrity: “Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law. All Germans shall have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.” GRUNDGESETZ [Constitution] [GG] art. 20 (F.R.G.) (paragraph numbers omitted). The principle, thus stated, seems broad enough to legitimate the restrictive view of supranational transfer of powers that the German Federal Constitutional Court gladly embraced in its opinion on the European Union’s proposed treaty of union in 1992. See *infra* text accompanying note 103 (showing that the court preferred to rely on other, less apocalyptic constitutional provisions as a basis for its opinion).

by an expected confrontation between the United States Constitution and a globalizing economic system.⁹³ As one commentator has asked, “has the movement toward the [Rule of Law in international trade] proceeded at the expense of U.S. constitutional integrity?”⁹⁴ The germane constitutional inquiry, however, is not whether supranational institutions can bind states and enforce obligations—the old preoccupation with the “bindingness” of international law⁹⁵—but whether it is constitutionally permissible in the first place for the state to bind itself and to accept the consequences of self-limitation.⁹⁶ If a national constitution so permits, explicitly or because supranationalism does not disturb or destroy the structural integrity of that constitution, the binding force of supranational law is arguably no more mysterious than the binding force of a domestic statute; what changes is that there is a new, constitutional source of legal authority that, within its proper sphere, is not capable of being trumped by the edicts of existing constitutional organs.⁹⁷

93. See, e.g., Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 169–71 (1994) (warning that the “constitutional implications” of transnational trade law have not been properly considered).

94. Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 970 (1996); see also Metropoulos, *supra* note 93, at 142 (noting that the “hard choices” presented by the conflict between domestic constitutions and the world trade system); Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance*, 11 ST. JOHN'S J. LEGAL COMMENT. 307, 322 (1996) (speculating “that international trade rules can serve constitutional functions,” provided that private parties have access to the global dispute settlement system).

95. See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184–86 (1996) (offering a legal realist appreciation of the “normativity” that creates positive international law).

96. See Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the U.S. and Germany*, 21 YALE J. INT'L L. 395, 399 (1996).

97. *But cf. infra* text accompanying note 98 (stating the European view that formal constitutional amendment is a prerequisite to any supranational exercise of power). Bruce Ackerman, in a recent article, tries to upset a certain academic conventional wisdom that has looked only to the European Union for insights on supranationalism. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 775–76 (1997) (using a narrative of the early American constitutional republic to describe “a group of states [that] delegate[d] a set of functions to an embryonic center by means of a treaty. But this ‘treaty’ turn[ed] out to be different from most, . . . [because it became] increasingly difficult to evade the commands of the emergent center,” especially as courts accepted the primacy of the treaty over later inconsistent laws enacted by individual states). While Ackerman’s interpretation of United States history between the Revolution and the Civil War is instructive, the European Union remains the more remarkable exemplar because it has achieved authentic interstate supranationalism without the benefit of an express supremacy clause in its founding treaties. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION COMMUNITY LAW* 192 (1993).

B. *A Comparative Example: The Principle of Democracy in Germany's Constitution*

How do constitutions permit supranational law to trump the laws of a domestic legislature? European jurists have argued that courts cannot merely reinterpret existing constitutions to legitimize the transmission of governmental powers to supranational agencies.⁹⁸ As a political matter, therefore, European governments felt the need to sponsor constitutional amendments to explicitly authorize the transfer of power to the European Union institutions.⁹⁹ But, even the adoption of an explicit constitutional amendment does not necessarily mean that the principle of constitutional integrity has been respected. In this Section, I will consider how the German Federal Constitutional Court narrowed Germany's constitutional license to accept supranational adjudication in order to preserve Germany's parliamentary system from being completely corrupted by the supranational European Union. I will explain that the German experience is valuable to the present discussion because it focuses attention on the need to shape a specific principle of constitutional integrity for each national constitutional circumstance. In the American experience, considered in Section C, the ruling intellectual seduction of the Constitution has been its susceptibility to competing, and even complementary, schools of interpretation.¹⁰⁰ Accordingly, the absence of any explicit constitutional sanction for supranational authority in the United States Constitution requires an especially careful appraisal of the scope and content of the principle of constitutional integrity.

In a 1993 opinion, the German Federal Constitutional Court

98. See generally Brewer-Carias, *supra* note 15, at 2 (concluding, after a survey of the constitutions of the European Union member states, that the current status of the European Union could not have been achieved if the member states' constitutions had not included explicit provisions limiting the powers of state bodies in favor of the European Union supranational institutions, as well as clauses granting supremacy to European Union law).

99. See *id.* at 15.

100. For a more detailed examination of this proposition, see Brian F. Havel, *Forensic Constitutional Interpretation*, 41 WM. & MARY L. REV. (forthcoming Mar. 2000) (constructing an eclectic model of constitutional analysis). Louis Henkin, rejecting as "uncongenial" the use of the United States Constitution's complex amendment process to resolve issues of supranationalism, urged legal creativity to bring innovative governmental arrangements within a "dynamic, flexible, hospitable Constitution." HENKIN, *supra* note 2, at 273. This Article responds to Henkin's challenge, but articulates also a theory of *limitation*, the principle of constitutional integrity, to set bounds to the hermeneutic exercise. There is a point beyond which the interpreter's art will corrupt the basic character of the national government and the amendment process (if not a new constitutional writing) *must* be triggered.

offered a rare and compelling insight into how a national supreme court manages the boundaries of legitimate supranational incursion.¹⁰¹ The court delivered a densely plotted opinion on the legality under German federal constitutional law of the supranational transfer of some German governmental powers under the Treaty on European Union, popularly known as the Maastricht Treaty.¹⁰² The complainants included academics, members of the German Federal Parliament, and members of the European Parliament representing the German "Green" party. They alleged inter alia that Germany's accession to the Maastricht Treaty, by transferring additional decisional authority from the domestic constitutional order to undemocratic European Union institutions, would undermine their constitutional rights to democratically legitimate representation in the Federal Parliament and to participate in the exercise of Germany's state power.

The opinion performed a kind of recombinant genetic operation, resembling the deep structure exploration in this Article, to splice and rebuild three provisions of the German federal constitution (the Basic Law) into a holistic "principle of democracy" that limits dilution in the value of each individual citizen's right to vote. The provisions that the court manipulated were the right of suffrage in parliamentary elections, the declaration that the Federal Republic of Germany is a democratic state in which all state authority emanates from the people through their right to vote, and the inviolability of these basic principles even by constitutional amendment. From these provisions, the court constructed the judicial coda that transformed the simple right to vote, in its "fundamental democratic content,"¹⁰³ into the right of any German citizen "to participate in the election of the German Federal Parliament, and thereby to cooperate in the legitimation of

101. See Decision Concerning the Maastricht Treaty, Brunner v. European Union Treaty, 89 Entscheidungen des Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court], 155 (1993), translated in 33 I.L.M. 388, 395 (1994); see also *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (pointing to the German federal experience as a possible source of comparative juristic enlightenment for the United States Supreme Court); Ackerman, *supra* note 97, at 772-73 (criticizing the "emphatic provincialism" of American judges, who typically "would not think of learning from an opinion by the German or French constitutional court"); *supra* note 54 (discussing Justice Breyer's dissent in *Printz* and Justice Scalia's response).

102. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992). See generally J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 429 (1996) (concerning the constitutional ontology of the European Union).

103. *Decision Concerning the Maastricht Treaty*, 33 I.L.M. at 409.

State power by the people at a federal level, and to influence the implementation thereof."¹⁰⁴

In this juristic setting, the "principle of democracy"¹⁰⁵ required that a transfer of any powers of the Federal Parliament to one of the governmental institutions of the European Union must respect the "minimum inalienable requirements of democratic legitimation."¹⁰⁶ The court insisted on this interpretation even though the German constitution, unlike its United States counterpart, explicitly provides that "[t]he Federation may, *by legislation*, transfer sovereign powers to international institutions."¹⁰⁷ Thus, when the European Union exercises sovereign powers that properly have been assigned by the German parliament through "a sufficiently precise specification of the assigned rights to be exercised by the [European Union] and of the proposed program of integration," the value of the citizen's vote has not been diluted because "the legitimation and influence which derives from the people will be preserved."¹⁰⁸ On the other hand, if too many functions and powers were placed in the hands of the European Union institutions, the present embryonic stage of their democratic development would present a serious constitutional obstacle. Democracy within the individual member states would be so enervated that the national parliaments would be constitutionally unable to transfer any "legitimation" of the sovereign power purportedly exercised by the European Union institutions.¹⁰⁹

The German court's opinion was a remarkable judicial rebuke to proponents of the idea that the European Union already had evolved into a self-powered engine for expanding supranational integration. The court expected that further integration within the Union would

104. *Id.* (emphasis added).

105. *Id.* at 417. The phrase "principle of democracy" does not appear anywhere in the German constitution. In that sense, the German court manifested itself as a true exponent of the deep structure theory presented in this Article.

106. *Id.* at 410.

107. GRUNDGESETZ [Constitution] [GG] art. 24 (F.R.G.) (emphasis added). The court, however, omitted any discussion of the implications of this provision. See Brewer-Carias, *supra* note 15, at 75-76.

108. *Decision Concerning the Maastricht Treaty*, 33 I.L.M. at 419, 422.

109. *Id.* at 421. The principle of democracy also would require that local parliaments retain their own areas of significant responsibility to give legal recognition to matters concerning the spiritual, social, and political life of the local citizenry on a relatively homogenous basis. See *id.* This principle of "subsidiarity," which expects that certain responsibilities will be (and, in the German court's view, *must* be) discharged at the local level by locally franchised parliaments, is one of the fundamental principles of the modern European Union. See generally MARGOT HORSPOOL, EUROPEAN UNION LAW 93-95 (Nicola Padfield ed., 1998) (explaining the origin and evolution of the principle of subsidiarity in European Union jurisprudence).

have to comply with the principle of democracy as a superintending rule of constitutional integrity. This principle would require that any enhancement of supranational powers occur in an organic sequence stemming from the simple exercise of the franchise by each German citizen in a parliamentary election.¹¹⁰

C. *The Principle of Constitutional Integrity in the American Constitutional Order*

The democracy principle, at least as the German Federal Constitutional Court sought to articulate it, is unlikely to transfer cleanly to the American experience. One telling example will suffice to demonstrate the difference. In the American conception of government, the very fact that federal judges are *not* subject to periodic election and are therefore truly the "remote choice" of the people¹¹¹ has been an acknowledged mark of their legitimacy.¹¹² The jurisprudential curiosity of the American system, in fact, is that it relies on a theory of fragmented governmental powers, rather than on an undiluted (and overly metaphysical) progression from the polling booth to the presidential signature, to assure United States citizens that theirs is a government of laws. Given the so-called democratic deficit in the European Union,¹¹³ it is hardly surprising that a local

110. See *Decision Concerning the Maastricht Treaty*, 33 I.L.M. at 421–22.

111. THE FEDERALIST NO. 39, at 255 (James Madison) (Isaac Kramnick ed., 1987).

112. See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 317 (1997) (reflecting on the paradox that it is "precisely the nondemocratic nature of [U.S. federal] courts that is assumed to provide their legitimacy"). There are deep skeptics, however. See, e.g., ACKERMAN, *supra* note 9, at 52–54 (opposing the appointive system as an antidemocratic process of constitutional amendment); see also Gordon S. Wood, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 49, at 53 (describing as propaganda the idea of convincing people that judges appointed for life are an integral and independent part of America's democratic government, equal in status and authority to popularly elected executives and legislatures).

113. The German federal court's unflinching emphasis on democracy must be understood more narrowly as a function of the particular evolutionary state of the European Union institutions. The court probably feared that an executive-dominated European Union could not reliably claim legitimacy through the actions of the national parliaments, partly because of the European Union Parliament's lack of any power of legislative initiative. See BUTTERWORTH'S EXPERT GUIDE TO THE EUROPEAN UNION 92–93 (Jörg Monar et al. eds., 1996). On the presence of a so-called democratic deficit, focused primarily on the European Union's byzantine and non-transparent legislative process, see Dennis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 575 (1996). The persistence of the deficit explains the court's understandable resort to the (by now probably quixotic) proposition that Germany's membership of the Union could be terminated simply "by means of an appropriate act being passed." *Decision Concerning the Maastricht Treaty*, 33 I.L.M. at 425; see also Tangney, *supra* note 96, at 423 (arguing that an "executive-dominated"

constitutional court would educe the idea of a democracy principle in hopes of deterring new transfers of broadly drawn substantive power. In contrast, the United States Constitution is sophisticated enough to offer democratic protection in a “top-down” rather than “bottom-up” configuration. In the American constitutional order, the constant democratic value of each citizen’s vote derives not primarily from the act of voting itself, but from the constitutional guarantee that the elected political bodies must compete with one another for power and influence in a system of divided government.¹¹⁴ Confronting the democratic shortcomings of a weak European Union Parliament and an unelected executive Commission,¹¹⁵ the German court sought to make the abstraction of a democracy principle serve as a conceptual simulacrum for the more subtle and flexible operations of the American separation of powers.

Moreover, the United States judiciary, when called upon to scrutinize the work of its political compeers, has been careful to weigh the importance of innovation and even anomaly¹¹⁶ and to read clauses of the Constitution, and even entire articles, within their proper context.¹¹⁷ This utilitarian approach might be described as

European Union could not meet the German court’s requirement for democratic legitimacy). *But cf.* Weiler & Haltern, *supra* note 102, at 422 (asking, in light of the overwhelming practice of the European Union for 40 years, “if the Community order is treated as constitutional who cares what it ‘really’ is?”).

114. These ideas were especially vivid in Justice Kennedy’s concurrence in *Clinton v. City of New York*, 524 U.S. 417 (1998), in which the Supreme Court upheld a constitutional challenge to the so-called Line Item Veto Act, 2 U.S.C. §§ 691–692 (Supp. III 1997). In Justice Kennedy’s analysis, the Framers used the principles of separation of powers and federalism precisely as a means to secure fundamental political liberty and not merely with the mundane purpose of protecting the citizenry from intrusive governmental acts. *See Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). “The idea and the promise” were that the popular delegation of some measure of power to a distant centralized authority meant that one branch of government must not hold the power to influence citizens’ destiny without a countervailing check by the competing branches. *Id.* at 450 (Kennedy, J., concurring). Separation of powers, in other words, “operates on a vertical axis as well, between each branch [of the federal government] and the citizens in whose interest powers must be exercised.” *Id.* at 452 (Kennedy, J., concurring).

115. *See supra* note 113 and accompanying text (discussing the European Union’s so-called democratic deficit).

116. *See Mistretta v. United States*, 488 U.S. 361, 384–85 (1989) (accepting that even “peculiar institutions within the framework of our Government,” such as a judicial sentencing commission including federal judges that is not a court and does not exercise judicial power, need not necessarily violate the principle of separation of powers). After all, the present field of study is the Constitution, in which interpretive inquiry by the courts is “always open.” *Glidden Co. v. Zdanok*, 370 U.S. 530, 592 (Douglas, J., dissenting); *see also Clinton*, 524 U.S. at 472 (Breyer, J., dissenting) (calling “attention to the genius of the Framers’ pragmatic vision, which this Court has long recognized in cases that find constitutional room for necessary institutional innovation”).

117. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson,

Hamiltonian in deference to Alexander Hamilton's careful distinction between the diffuse objects of governmental authority (the very fear expressed by the German federal court) and the structural mechanisms by which the government exercises that authority. In *The Federalist Papers*, Hamilton reasoned that a government ought to contain in itself "every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people."¹¹⁸ But if the government enjoys such ecumenical flexibility in the range of the legislative and executive powers it needs to achieve its objects, then what guards against what Hamilton called "the danger of usurpation"?¹¹⁹

In reply to this question, Hamilton would argue that all observations founded upon the danger of usurpation "ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."¹²⁰ Indeed, Hamilton's emphasis on the structure of government is the centripetal motor of integrity in the United States Constitution.

The preservation of constitutional integrity in this American understanding, and in the context of this Article, has two mutually reinforcing dimensions. First, the system requires that the special character of the United States government, a working mechanism of divided and interacting powers,¹²¹ must not be compromised or

J., concurring in the judgment and opinion). See generally WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56-57 (paperback ed. 1961) (warning against treating the Framers' work as though it were a kind of Newtonian machine—a miracle of legal science that could turn politics into mechanics in just a few paragraphs of numinous prose).

118. THE FEDERALIST NO. 31, at 217-18 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Administrative law theory would say that Hamilton was expounding a "wide" view of the government's powers, in that the existence of a legislative goal or object implies the existence of a power necessary to accomplish it. See generally CASES AND MATERIALS ON EUROPEAN UNION COMMUNITY LAW, *supra* note 97, at 31 (discussing a wide view of implied powers in European Union administrative law). In this sense, the word "power" carries a double signification—evident in Hamilton's essays—that references both the object of governmental action and the authority used (for example, a law or treaty) to accomplish the object.

119. THE FEDERALIST NO. 31, *supra* note 118, at 219.

120. *Id.* at 219; see also THE FEDERALIST NO. 44, at 290 (James Madison) (Isaac Kramnick ed., 1987) (indicating Madison's support for a theory of wide powers, see *supra* note 118, by his assertion that "wherever the end is required, the means are authorized," and that "wherever a general power to do a thing is given, every particular power necessary for doing it is included").

121. See *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); see also Barbara Bucholtz, *Sawing off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing*

defeated by congressional acquiescence in new forms of supranational administration.¹²² Second, the Constitution must raise an articulable, specific objection to the proposed exercise of the power.¹²³ In the vivid metaphor of Justice Holmes, the actions of government are not to be inhibited “by some invisible radiation from the general terms” of any constitutional provision.¹²⁴ Neither the power to create supranational tribunals nor the objective of using these tribunals to advance foreign commerce is *in terms* denied by the Constitution.¹²⁵ As I move to an argument that supranational tribunals would not infringe upon, but rather would share in the exercise of, the judicial power of the United States Constitution, this tempered understanding of the principle of constitutional integrity will be manifest.

Duty Assessments Under Free Trade Agreements, 19 MD. J. INT’L L. & TRADE 175, 200 (1995) (concluding from a review of cases that agreements between the United States and other nations must respect the United States’s constitutional order). For a new essay on the American constitutional tradition, see Richard S. Kay, *American Constitutionalism, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16, 21 (Larry Alexander ed., 1998) (noting that the structural division of powers in the United States Constitution both enhances and circumscribes public discussion and action, complementing the more direct limitations of power contained in “bills and declarations of rights”).

122. I will investigate the content of this limiting principle *infra* in Part V. See *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) (insisting that, despite arguments that the political branches have a “somewhat free hand” to reallocate their authority, the Constitution’s structure nonetheless “requires a stability which transcends the convenience of the moment”).

123. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920). Though aspects of Justice Holmes’s reasoning in *Holland* have been questioned implicitly, see, e.g., *Reid v. Covert*, 354 U.S. 1, 18, 26 (1957), his opinion offered two benchmark tests that are helpful in framing the substantive reach of any governmental power: first, the pragmatic test of experience (i.e., does the proposed legislation respond to some public need that has arisen and that requires the action of government?); and second, the test of textual fidelity (i.e., does the legislation contravene any prohibitory words to be found in the Constitution?). See *Holland*, 252 U.S. at 432–33. Constitutional scholars see these questions as reflecting the venerable interpretive doctrine of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”). As we have seen, both Alexander Hamilton and James Madison subscribed to this theory of a wide assignment of powers to meet the Constitution’s stated objects. See *supra* notes 118–20 and accompanying text.

124. *Holland*, 252 U.S. at 434.

125. Were Chief Justice Marshall applying himself to the challenge of supranational adjudication, he might very well content himself with his minimalist premise, expressed in *McCulloch*, 17 U.S. (4 Wheat.) at 408, that the words of the Constitution do not imperiously proscribe it.

IV. ARTICLE III AS THE TEST-SITE FOR AN IDEA OF SUPRANATIONAL ADJUDICATION

A. Overview: *The Performances of Article III*

Here, at the analytical center of this endeavor, we turn to the site of the judicial power in the United States Constitution, Article III.¹²⁶ If the concept of supranational tribunals can be incorporated into the Framers' statement of the judicial power in Article III, an argument for application of supranationalism to transfers of legislative and executive power may have an improved chance of suasion.¹²⁷ This is because, in the past, Article III has not been typically considered as one of the "foreign" provisions of the United States Constitution. Thus, it is not so obviously subject to ideological capture by global law enthusiasts as, for example, the Foreign Commerce Clause or the treaty power.¹²⁸

A central premise of the present discussion is that the structure of the United States Constitution exhibits at least an analogical

126. Article III states, in relevant part:

Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States . . .

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, §§ 1–2.

127. See *supra* note 7 (discussing the question of transfer of legislative and executive powers to supranational institutions).

128. Moreover, the enumeration of judicial business in Article III—specifically, the cases that “arise under” the Constitution, laws, and treaties of the United States—defines a scope of power that is arguably coterminous with the vast potential reach of the legislative power in Article I, including its multiplier feature, the Necessary and Proper Clause. U.S. CONST. art. I, § 7, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper” for carrying into effect the enumerated powers in Article I); see also *infra* note 174 (discussing judicial support for coextensiveness of judicial and legislative powers under the U.S. Constitution). A successful transmission of judicial power to a supranational court, therefore, could be a template for the assignment of the coterminous legislative powers to supranational agencies.

similarity to the structure-dependency of human language presented in Chomskyan grammar theory.¹²⁹ As we have seen, Chomsky expected multiple performances to be derived from the deep structure of language.¹³⁰ Using that model as a foundation for my analogy, I intend to treat the surface features of the Constitution as a performance that may, through repeated acts of interpretation, potentially generate enhancements of a kind that the Framers might have anticipated. That insight, further explored here, offers a persuasive explanation of why supranational transfers of judicial power—although not explicitly “seen” by the Framers—can be said to have been “foreseen” by them in the deep structure principles by which they organized the grant of the judicial power under Article III.

B. The Surface Structure of Article III: Status, Organization, and Open-Textured Process

Chomsky arranged his theory to give primacy to deep structure, but the act of deriving a deep structure begins with the surface structure, linguistic performance, and examples of uttered speech. Likewise, no description of the deep structure of the United States Constitution can begin without explicit attention to its surface features, in this instance the complex textual matter of Article III.¹³¹ In this Section, I examine the implications of how Article III organizes the judicial branch. I begin with a discussion of the protected professional status of judges appointed under Article III, reflecting in the surface structure the deep structure principle of judicial independence. Next, I contrast this professional security with the broad power that Article III apparently gives Congress to shape the federal court system and even to limit the appellate jurisdiction of the Supreme Court. Finally, I discuss how Article III, unlike the provisions that establish the legislative and executive powers, fails to specify the procedural nature of judicial “process” under the Constitution. This open texture, combined with Congress’s power to distribute federal jurisdiction, provides an opportunity to enlarge the potential sources of judicial authority under the Constitution. A limiting condition, it would appear, must be to ensure that these novel sources do not compromise the deep structure principle of judicial independence.

129. See *supra* Part II. The analogy is made with Chomsky’s theory, not with the structure of human language itself.

130. See *supra* text accompanying note 59–60 (discussing Chomsky’s competence/performance dichotomy).

131. For the relevant text of Article III, see *supra* note 126.

1. The Incidents of Judicial Independence

Article III, Section 1, organizes the judicial department.¹³² Drawing from the Preamble's object to "establish Justice,"¹³³ it appears to vest the *puissance de juger*,¹³⁴ the judicial power "of the United States," in a thinly taxonomized system comprised of "one supreme Court" and "such inferior courts as the Congress may from time to time ordain and establish."¹³⁵ Although Article III does not *directly* vest the judges of these courts with the federal judicial power, the Constitution carries an explicit guarantee that judges appointed to serve in Article III courts will have lifetime tenure and undiminished compensation.¹³⁶ Thus, Article III focuses on both the professional security of individual judges and the establishment of a system of federal courts having original or appellate jurisdiction. The surface feature of secure professional status can be mapped from a deep structure constitutional principle—the independence of the judiciary¹³⁷—that appears to be distinct from the details of how the judicial system is organized.¹³⁸ The federal judiciary has described

132. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313 (1810).

133. U.S. CONST. preamble; see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) (noting that the preambular formula points in a "particular manner" to "the Judicial authority").

134. The phrase is from Montesquieu, who was "the Framers' idol." Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1197 (1992); see MONTESQUIEU, DE L'ESPRIT DES LOIS, Livre XI, ch. VI (1748), reprinted in 4 OEUVRES COMPLÈTES DE MONTESQUIEU 7 (Édouard Laboulaye, ed., Kraus Reprint 1972) (1877).

135. U.S. CONST. art. III, § 1. See generally *Durousseau*, 10 U.S. (6 Cranch) at 313 (suggesting that the judicial power of the United States vests in the Supreme Court *and* in the discretionary inferior courts).

136. Article III, Section 1 provides that "The Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

137. See *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933) (holding that the tenure and salary privileges are awarded "not as a private grant, but as a limitation imposed in the public interest"). The constitutional guarantee of tenure and salary is critical to the Framers' notion of an independent judiciary. In fact, it would take a constitutional amendment to supply judges appointed *other than* in accordance with Article III with the tenure and salary privileges that Article III grants. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 593-94 (1962) (Douglas, J., dissenting). Without the Constitution, Congress is free to revoke mere legislative grants of privileges. The guarantee of undiminished salary allows Congress to keep judicial salaries punitively low—or to freeze them in perpetuity—even at the risk of violating a deep structure principle. The Constitution does not (and probably could not) hold in check all imaginable malversations of the political branches. By the same token, presidential refusal to make judicial appointments or Senate recalcitrance to ratify them could in equal measure emasculate the federal bench.

138. As John Harrison has noted, the principle of judicial independence is more

itself as the recognized medium for putting the “parchment stipulations” of the Constitution into effect,¹³⁹ with the tenure/salary covenant as the mark of its independence.¹⁴⁰ In Chomskyan terms, the Framers’ constitutional value is not the surface feature that gives judges appointed under Article III life tenure and unreduced salaries, but rather the deep structure directive that they must be independent.¹⁴¹

2. Congressional Control of the Judicial System

The structure of Article III rests on two potentially contradictory ideas: the insulated professional security of judges occurs within a judicial *system* that is largely shaped by the will of Congress.¹⁴² The

abstract than the protected tenure that actually appears in the Constitution. See John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 253 (1997). Judicial independence also would be consistent with requiring a simple majority vote in the Senate for impeachment or a three-quarters majority, rather than two-thirds. See *id.* To say that there should be judicial independence, in other words, is not to establish a *quantum* of independence. See *id.* Harrison’s theory of design assumes a Chomskyan conceptual recession toward higher levels of abstraction, so that the principle of judicial independence would be traced ultimately to a “fundamental meta-principle (a principle about the implementation of principles)” holding in the starkest terms that “power is dangerous.” *Id.* at 255. An intermediate principle, one could suggest, would be the preambular object to “establish Justice.” U.S. CONST. preamble. The meta-principle that power is dangerous also yields other constitutional ideas, such as the fixed terms of the President and members of Congress. See Harrison, *supra*, at 255.

139. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 389 (1821).

140. In a system where many state judges are dependent on the will of the legislature for office and salary, the Constitution’s attachment to the principle of an independent judiciary is all the more conspicuous. See *id.* at 387.

141. See generally Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 566 (1996) (attempting to define the content of the principle of judicial independence and to explain its existence). As we will later explore, see *infra* text accompanying note 343, the principle of independence may be viewed as part of the doctrine of separation of powers and, therefore, as a component of the principle of constitutional integrity.

142. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1868) (discussing the plenary power of Congress); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (discussing the plenary power of Congress and how courts created by statute only have the jurisdiction that the statute confers). See generally Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (presenting a simulated Socratic dialogue on the broad scope of congressional power to curb federal appellate jurisdiction, especially with respect to the Supreme Court). While no record exists concerning the level of support for the general principle of congressional control over the judiciary in two months of Constitutional Convention debates, see Clinton, *supra* note 15, at 769, the textual “performance” of the Framers’ thoughts on the judiciary does award Congress at least two crucial channels of discretionary control—to establish inferior federal courts and to shape the Supreme Court’s appellate jurisdiction.

surface, or text, of Article III expresses an effort to shield the judiciary from the crassest of political influences (threats to income and job security), but to permit congressional domination of the organization and jurisdiction of the system of courts.¹⁴³ Martin Redish has observed that this structural dissonance is consistent with the pragmatic balances of the Constitution but yields significant doctrinal and theoretical uncertainty.¹⁴⁴

Article III's direct vesting of judicial power is remarkably parsimonious, naming only a unitary Supreme Court. Indirectly, the judicial power vests also in an undifferentiated subset of lesser courts that Congress may, but manifestly need not, create.¹⁴⁵ This incomplete vesting of authority betrays the mark of political compromise, rather than a thoughtful theory of how to organize and distribute judicial power.¹⁴⁶ Exiguous detail is also evident from the

143. The federal judiciary has recognized the contingency of its present structure. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, COMM. ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 10 (1994) [hereinafter JUDICIAL PLAN] (sustaining core values such as judicial independence, but acknowledging that "specific elements of jurisdiction, structure, governance, and function are not sacrosanct," and that adaptation to new conditions reflects a healthy institutional character).

144. See Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 697 (1995).

145. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 550 (1962); see also *Printz v. United States*, 521 U.S. 898, 907 (1997) (noting that the Framers made creation of lower federal courts optional for Congress, "even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States").

146. See *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); see also *Glidden*, 370 U.S. at 551 (noting the compromise nature of Article III, Section 1). The wording smacks of compromise, although practical concerns were also at play. See *infra* note 188 and accompanying text. The compromise suggests a faction yielding on a supreme federal court only if the federal system as a whole remained contingent on what the legislature might wish to do. Indeed, compromise was very much in the air when the Framers discussed the judicial power. The antifederalist New Jersey Plan, for example, contemplated a supreme court and no inferior federal courts, leaving the state courts as the default system of inferior courts. See Clinton, *supra* note 15, at 760, 766; see also 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 517 (Jonathan Elliot ed., 2d ed. 1896) [hereinafter STATE CONVENTION DEBATES] (noting an expectation at the Virginia Convention debate that Congress would appoint the state courts to have inferior federal jurisdiction for reasons of general satisfaction and economy). James Madison's historic compromise proposal, adopted into the Constitution, foreclosed the certainty that the state courts would be the main engine for enforcement of federal law (perhaps even with an independent right to determine the right of appeal to the supreme national court). See Clinton, *supra* note 15, at 763. In presenting his proposal, Madison explicitly noted the distinction between establishing the inferior federal courts absolutely and giving Congress the discretion to create or not to create them. See *id.* In sum, Madison hoped to ensure that, at least as a last resort, federal law would be ultimately supreme, even if (without a national system of inferior federal courts) it could not be guaranteed to be uniform. See

first clause of Article III, Section 2, the Extending Clause, which synopsisizes nine categories of cases and controversies¹⁴⁷ to which “the judicial Power shall extend.”¹⁴⁸ Ranked first among those categories

id. at 753–54. But, compare *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), in which Justice Story concluded that Congress had to establish inferior courts because otherwise what he regarded as Article III’s mandatory enumeration of cases and controversies could not completely vest in a federal court. See *id.* at 330–33. The Supreme Court, in Justice Story’s reading, could enjoy only a narrow original jurisdiction, and state courts might lack jurisdiction over one or more of the enumerated cases and controversies. In those circumstances, the appellate jurisdiction of the Supreme Court could not reach those cases, and the injunction of the Constitution (as Justice Story interpreted it) that the judicial power “shall be vested” would be disobeyed unless lower federal courts existed to hear the cases. *Id.* at 330 (quoting U.S. CONST. art. III, § 1). Justice Story’s view that the whole judicial power of the United States should, at all times, be vested either in an original or appellate form in some courts created under Article III did not survive as Supreme Court doctrine. See *infra* note 195 (discussing later cases). But cf. *Eisentrager v. Forrestal*, 174 F.2d 961, 967–68 (D.C. Cir. 1949) (holding a complete preclusion of jurisdiction in habeas corpus proceedings to be unconstitutional where the Supreme Court had no original jurisdiction, Congress had not awarded jurisdiction to any inferior federal court with respect to prisoners held by U.S. military authorities overseas, and the Supreme Court earlier had ruled that state courts cannot grant habeas to federal prisoners).

147. U.S. CONST. art. III, § 2. Julian Velasco has advocated what Akhil Amar, his former teacher, would regard as the apostatical view that there is measurable daylight between the words “cases” and “controversies.” See Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 690–709 (1997). John Harrison, focusing on historic meaning and the fact that the word “all” precedes cases but not controversies, argues that controversies includes only civil proceedings, while cases could embrace both civil and criminal matters. See Harrison, *supra* note 138, at 210. See generally Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 230–31 (1990) (endeavoring to formulate a coherent definition of Article III’s case requirement). I am happy to assume that the difference may be a stylistic quirk, well known to the lawyerly craft of redundant repetition and to leave it at that. As the *Glidden* Court observed, “[t]o derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall’s admonition that ‘it is a constitution we are expounding.’” *Glidden*, 370 U.S. at 562 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

148. U.S. CONST. art. III, § 2. These categories are defined either by the nature of their subject matter or the special position of the parties. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821). For the relevant text of Article III, see *supra* note 126. Thus, the judicial power comprehends, inter alia, “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2, cl. 1. On “arising under” jurisdiction, see *infra* note 149. The judicial power also comprises (with a sudden caesura in the use of the encompassing “all”) cases “to which the United States shall be a Party,” and various other controversies involving the states. U.S. CONST. art. III, § 2, cl. 1. Beyond these categories of cases and controversies must lie a vast residual category of cases that will be the sole province of the state courts. See *Calabresi & Rhodes*, *supra* note 134, at 1167. As to whether the variable use of the word “all” has measurable textual power, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 218 (1985) (splitting the nine enumerated categories into a mandatory three—the cases, prefaced by “all”—and a discretionary rump of six—the controversies, which do not comprise the plenary federal jurisdiction and can be entirely committed to the state courts).

is general federal subject matter jurisdiction, which embraces all cases "arising under" the Constitution, treaties, and laws of the United States.¹⁴⁹

The second clause of Section 2 establishes the original and appellate responsibilities of the Supreme Court.¹⁵⁰ The Court holds original jurisdiction only in cases affecting consular diplomacy and when a state is a party,¹⁵¹ while appellate jurisdiction is conferred with respect to "all the other cases before mentioned," a phrase that refers back to the enumerated cases specified in the Extending Clause.¹⁵² There is no mention of whether these several heads of jurisdiction are *inherent* in the judicial power vested in the Supreme Court and the inferior courts or whether their exercise is contingent on some jurisdiction-granting act of Congress.¹⁵³ Congress clearly is authorized to act in the second clause, which "distributes" the heads of jurisdiction previously described¹⁵⁴ by giving Congress permission to narrow the scope of the Supreme Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."¹⁵⁵

149. U.S. CONST., art. III, § 2. See generally CHEMERINSKY, *supra* note 4, at 255 (discussing the "crucial issue" of defining "arising under" jurisdiction). This is potentially an enormous category of cases. Justice Frankfurter, dissenting in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 649 (1949) (Frankfurter, J., dissenting), identified the 18 divisions of legislative power in Article I, Section 8 of the Constitution as the "sources of federal rights and sanctions" to which the Article III judicial power would extend. Thus, laws affecting revenue, war, foreign and domestic commerce, offenses against the Law of Nations, as well as "the vast range of laws authorized by the 'Necessary-and-Proper' Clause," would be the generating sources of "all Cases, in Law and Equity, arising under . . . the Laws of the United States." *Id.* at 649 (Frankfurter, J., dissenting) (quoting U.S. CONST. art. III, § 2, cl. 1).

150. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512 (1868).

151. See U.S. CONST. art. III, § 2, cl. 2. For relevant text of Article III, see *supra* note 126.

152. U.S. CONST. art. III, § 2, cl. 2; see *supra* note 147 (considering relevance of the distinction between "Cases" and "Controversies").

153. As Lessig and Sunstein argued in relation to the executive power, however, if the judicial power is actually conferred by the vesting clause (in "Websterian" terms) "in the lump," the heads of jurisdiction might be viewed as being illustrative or even as mere surplusage. Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 48 (1994). All of the vesting clauses, these authors have suggested, should be accorded no substantive meaning beyond identifying who holds the respective powers, with Congress empowered through the Necessary and Proper Clause to fill in the details left unresolved in the Constitution. See *id.* at 52.

154. *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810).

155. U.S. CONST. art. III, § 2, cl. 2. In the opening section of Article III, the Framers described "inferior" courts that Congress "may from time to time" establish. *Id.*, art. III, § 1 (emphasis added). Article III, Section 2 refers to exceptions and regulations that the Congress "shall make." *Id.*, art. III, § 2, cl. 2 (emphasis added). The may/shall inconsistency is not atypical in the Constitution. See Clinton, *supra* note 15, at 782-86

The Framers' contingent grant of appellate jurisdiction to the Supreme Court¹⁵⁶ yields at least two readings that reflect substantially different interpretations of the scope of the judicial power. In the first reading, Congress passes legislation to create specific exceptions to what otherwise is acknowledged as the Court's inherent appellate jurisdiction under the Constitution.¹⁵⁷ In an alternative reading, Congress enacts legislation that affirmatively prescribes the appellate jurisdiction of the Court and thereby implicitly forbids the exercise of any appellate power not specifically described in the legislation. By its affirmative description, therefore, Congress is by implication exercising its power to make exceptions.¹⁵⁸

n.147 (discussing examples). On the exegetical art of comparing like words and phrases in the Constitution, see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 748 (1999).

156. Clinton emphasizes that the Exceptions Clause appeared after agreement on the Madisonian Compromise, which made the existence of inferior federal courts dependent on the will of Congress. See Clinton, *supra* note 15, at 777. He therefore intuits an Amar-like interpretation of the Exceptions Clause, understanding it as simply a mechanism to allow Congress to transfer appellate jurisdiction from the Supreme Court to any inferior tribunals that it might create. See *id.* at 778; see also Amar, *supra* note 148, at 255 (arguing that Congress's power to make exceptions to the Supreme Court's appellate jurisdiction, where it exists, requires creation of other "Article III" tribunals with power to hear all excepted cases). But why would Congress not have this power even without an Exceptions Clause? If "[t]he judicial Power" is vested in inferior federal courts and extends to all the enumerated cases in Article III, Section 2, why could those courts not be invested with appellate jurisdiction in addition to the Supreme Court? The Supreme Court's appellate jurisdiction was not granted exclusively or finally; indeed, that would have been counterintuitive, because the inferior courts' jurisdiction might have been declared final in some of the enumerated categories. Moreover, Clinton is unable to overcome the suppleness of the text, since he asserts, *pace* Chief Justice Marshall, that Congress could constitutionally authorize the Supreme Court to exercise its appellate jurisdiction in original form. See Clinton, *supra* note 15, at 778. *But cf.* Amar, *supra* note 148, at 214 (disputing congressional power to expand the boundaries of the Supreme Court's original jurisdiction).

157. Justice Story, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816), read Article III's enumeration of cases and controversies as "mandatory upon the legislature." Congress's duty to vest the judicial power of the United States, Justice Story submitted, was a duty to vest *the whole judicial power*. See *id.* at 330. Otherwise, Congress could refuse to vest jurisdiction in any one class of cases, "and thereby defeat jurisdiction as to all; for the constitution has not singled out any class on which Congress [is] bound to act in preference to others." *Id.* at 330.

158. See *Durousseau*:

They [the first Congress] have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

10 U.S. at 314. In *Durousseau*, the Court considered a jurisdictional threshold of \$2000, for example, to be an affirmative description manifesting Congress's intent that all cases decided in the circuits for a lesser value would not lie within the Court's appellate

The latter reading, which requires a very broad conception of congressional power under Article III, Sections 1 and 2,¹⁵⁹ has been endorsed by the Supreme Court since its early rulings such as *Durousseau v. United States*¹⁶⁰ and *Ex parte McCardle*.¹⁶¹ The Court, in other words, has made no claim to an *inherent, residual* appellate jurisdiction, beyond whatever mixture of jurisdiction it has received from Congress under the combined force of the Extending Clause and the Exceptions Clause.¹⁶² Justice Chase felt the Court's reticence to be a consequence of the sheer political truth that the disposal of the judicial power belongs ultimately to Congress.¹⁶³ The appellate

jurisdiction. *Id.*

159. Article III, as scholars have noted, "contains no clear statement either way on the scope of congressional power." Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 84 (1995). After all, Congress is given *explicit* organizing and distributive power only with respect to the creation of inferior courts and the making of exceptions and regulations to the Supreme Court's appellate jurisdiction. Even under the enumerated powers of Article I, only the creation of "Tribunals inferior to the supreme Court" is mentioned. U.S. CONST. art. I, § 8, cl. 9. The Court in *Durousseau*, therefore, appeared to transcend the text when it asserted that Congress had the power "of creating a supreme court as ordained by the constitution." *Durousseau*, 10 U.S. (6 Cranch) at 313. Maybe this was true as a matter of *practice*; the Supreme Court could hardly have been expected to spring, Minerva-like, from the mere words of vesting in the Constitution. But congressional intervention is assuredly not a textual requirement in the Constitution and indeed may not reflect the intent of the Framers. See Clinton, *supra* note 15, at 843-52. Justice Story, in *Hunter's Lessee*, argued that the mandatory grant of original jurisdiction to the Supreme Court in Article III, Section 2 also should govern the succeeding words that grant the Court appellate jurisdiction "[i]n all the other Cases before mentioned," subject to Congress's power to make exceptions to the Court's appellate jurisdiction. 14 U.S. (1 Wheat.) at 332-33. There would be no necessity to give Congress the power to make exceptions, in Justice Story's view, if the preceding words did not appear in an imperative sense. See *id.* *But cf.* *Turner v. President of Bank of N.-Am.*, 4 U.S. (4 Dall.) 8, 10 (1799) (noting the constitutional proposition that a cause of action is "without" the jurisdiction of the circuit courts "until the contrary appears," the opposite of what courts of general jurisdiction enjoy). Attorney Rawle, for the defendant in error in *Turner*, argued that the judicial power is the grant of the Constitution and that Congress "can no more limit, than enlarge, the constitutional grant." *Id.* at 10.

160. 10 U.S. (6 Cranch) 307 (1810).

161. 74 U.S. (7 Wall.) 506 (1868).

162. See *id.* at 514.

163. See *Turner*, 4 U.S. (4 Dall.) at 10. As Justice Chase explained,

If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. . . . [C]ongress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.

Id. at 10 n.1; see Amar, *supra* note 148, at 270 (noting the "virtual orthodoxy" rejecting Justice Story's thesis that Article III required the entire quantum of judicial power to be vested in the federal courts); see also THE FEDERALIST NO. 80, at 450 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (stating that "the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be

jurisdiction of the Supreme Court, in sum, is inherently a limited and limitable subset of the federal judicial power.¹⁶⁴

3. The Open-Textured Expression of the Judicial Power in Article III

Article III, in creating the judicial power of the United States and in arranging categories of cases to which the judicial power extends, provides no procedural signals to identify when this power is being exercised. In this sense, as Paul Bator commented, it is hard to posit an ontological essence that truly defines the exercise of the judicial power.¹⁶⁵ This silence contrasts appreciably with how the Constitution treats the other great constitutional powers—the *political* powers—of the government. The legislative power, for example, is guided by procedures that the Supreme Court has extolled as “a single, finely wrought and exhaustively considered” protection against improvident laws.¹⁶⁶ We know, therefore, that a bill must pass through the two chambers of Congress¹⁶⁷ and must be presented to the President for signature¹⁶⁸ to become a law.¹⁶⁹ There

calculated to obviate or remove [any] inconveniences”); Calabresi & Rhodes, *supra* note 134, at 1163 (arguing that any theory of mandatory vesting of federal jurisdiction “must explain how Congress’s twin jurisdiction-stripping powers [the Ordain and Establish Clause and the Exceptions Clause] can retain some force if these powers cannot be added together to trump the Article III Vesting Clause”). Scholars have noted how Congress’s authority to control federal jurisdiction may add democratic legitimacy to the judicial power of constitutional review, which has been described as antimajoritarian, *see, e.g.*, Velasco, *supra* note 147, at 757–58 (citing Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 847 (1975)), and as the product of questionable implications and history, *see, e.g.*, Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 390–91 (1983).

164. As we will see, *infra* text accompanying note 346, the Supreme Court’s appellate jurisdiction may even be vulnerable (textually) to wholesale congressional repeal. Moreover, as discussed *infra* in note 339, Congress’s control over the Supreme Court’s appellate jurisdiction a fortiori confers power to circumscribe—or remove—the subject matter jurisdiction of inferior federal courts.

165. See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990) (“[There can be no] rigid logical scheme which purports in some mechanical way to define what ‘is’ the exercise of the federal judicial power . . . The judicial power is neither a Platonic essence nor a pre-existing empirical classification.”). For Bator, in fact, the judicial power was a “purposive institutional concept, the product of history and custom, distilled in light of experience and expediency.” *Id.*

166. *INS v. Chadha*, 462 U.S. 919, 951 (1982).

167. See U.S. CONST. art. I, § 1.

168. See U.S. CONST. art. I, § 7, cls. 2, 3.

169. See generally *Clinton v. City of New York*, 524 U.S. 417 (1998) (sustaining a constitutional challenge to the Line Item Veto Act, 2 U.S.C. §§ 691–692 (Supp. III 1997), by adhering to *Chadha*’s principle of procedural exclusivity).

are no other procedural routes provided in the constitutional text for the creation of a law,¹⁷⁰ and no other institution or combination of institutions competes with the two Houses of Congress in this process. Even the executive power, which lacks the precise lineaments of bicameralism and presentment, at least offers a collateral procedural restriction—the condition of Senate advice and consent—with which the President must comply to make treaties or to appoint ambassadors or judges.¹⁷¹ Article III, however, wholly lacks evaluative benchmarks of this kind—for example, a requirement that a legal challenge to an exercise of the treaty power must obtain a two-thirds vote of a federal appellate bench. In the absence of a single, finely wrought procedure for exercise of the judicial power, no clean lines of textual demarcation assign federal judicial power to the federal courts and deny it, for instance, to the state tribunals.¹⁷²

In sum, Article III fails to yield a dynamic, process-based conception of judicial power. In its surface manifestation, the text only reveals, for example, that the Supreme Court is probably exercising judicial power when it hears a case concerning an ambassador because the Court is named in Article III and is adjudicating a case that is explicitly among the nine enumerated heads of jurisdiction. The constitutional text yields no more refined

170. There are, however, four provisions in the Constitution (concerning House initiation of impeachment, Senate conduct of impeachment trials, presidential appointments, and the ratification of treaties) that contemplate one House acting alone with the unreviewable force of law. These provisions are not subject to the President's veto. See *Chadha*, 462 U.S. at 955.

171. See U.S. CONST. art. II, § 2, cl. 2. Admittedly, nothing in Article II insists that a particular procedural route must be the sole mechanism for the exercise of presidential power. The President, under various constitutional provisions, acts alone, acts in tandem with the Congress, or acts with the Senate upon its advice and consent. Edward Corwin, for whom Articles I and III were the models of constancy of method, wrote of an "indefinite residuum" and the "plasticity as to *method*" that attach to the operations of the Presidency. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 3 (Randall W. Bland et al. eds., 5th rev. ed. 1984). To Corwin, the notion of the executive was a term of uncertain content, located in a chapter of the Constitution that he considered the founding document's "most loosely drawn" component. *Id.* The question remains, however, as to whether there is any greater transparency in the "method" put into Article III to engage and reveal the judicial function. In fact, the Framers prescribed no "method" of judicial power and did not mandate that there be a federal structure at all beyond the Supreme Court in its narrowest original jurisdiction.

172. To conclude that state courts might exercise federal judicial power is not to deny that the Constitution established a system of dual sovereignty that defines federalism. See *Printz v. United States*, 521 U.S. 898, 918 (1997) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). But, in the legislative context, for example, the Constitution enumerates the powers of Congress and identifies a single procedure for exercising these powers to enact laws. All residual legislative authority implicitly remains with the states, a conclusion that is rendered express by the Tenth Amendment. See *id.*

conceptualization of the judicial power than the identification of tribunals and enumeration of cases. In the present investigation, however, the open texture of Article III presents an opportunity, not an obstacle. The absence of unique or required process, or of any explicit procedural link to the work of the political branches, may unlock a portal to interpretations that enlarge the sources of judicial authority under the Constitution. For that exploration, however, I need to extend my discussion into the deep structure of Article III.

C. The Deep Structure of Article III: Implications of Open Texture

This Section presents my core thesis that the surface structure of Article III derives from a deep structure that permits sources of federal judicial authority, including supranational tribunals, in addition to the courts and judges mentioned in Article III itself. The argument develops in two stages. First, I use the open-textured surface structure of Article III to show that the Framers did not require the judicial power, whether original or appellate in form, to vest only in the federal courts explicitly mentioned in Article III or to be exercised only by federal judges appointed under Article III. This deep structure principle of shared judicial power, I argue, explains why Article III refers not only to “[t]he judicial Power of the United States” but also to “[t]he judicial Power” generally. Second, I apply Chomsky’s concept of transformations to connect, or “map,” the deep structure principle of shared power to the surface structure of Article III. I have selected three transformations, which I derive primarily from surface features of the Constitution and doctrinal innovations of the Supreme Court (just as Chomsky derived his transformations from the surface features of the lexicon). The “transformational sequences,” as I call them, dynamically apply the deep structure principle of shared judicial power. The sequences will show, in their turn, how state courts, legislative courts, and specialized supranational tribunals can each share the federal judicial power using this deep structure principle.

1. An Implicit “Sharing” of the Judicial Power

In my theoretical and interpretive system, the surface structure of Article III stems from a kernel set of underlying deep structure principles, including the principle of judicial independence. In fact, the organizational features of the surface structure of Article III, considered in the preceding section, can be mapped from a second principle in the deep structure, that of shared judicial power. As I have shown, Article III requires a Supreme Court, comprised of life-

tenured judges and possessing only the express appellate jurisdiction conceded by Congress and very narrow original jurisdiction.¹⁷³ Moreover, the judicial power extends only to the enumerated heads of jurisdiction, and there is no textual command to commit any, some, or all of these nine categories to the jurisdiction of inferior federal courts.¹⁷⁴ Finally, the judicial power in Article III has an open texture, unfastened to specific procedural or institutional action.

These features define a major structural consequence and a principle of the Constitution's deep structure. Article III does not require that the judicial power vest in federal courts of original jurisdiction, in federal appellate tribunals only, in both,¹⁷⁵ or in neither.¹⁷⁶ Nor, for that matter, does Article III contain any requirement that the enumerated cases be decided by judges who enjoy life tenure and undiminished salary.¹⁷⁷ Accordingly, for cases not falling under the Supreme Court's narrow original jurisdiction,¹⁷⁸ the constitutional text allows a tribunal without Article III judges to hear, at least through original jurisdiction, any cases that arise under

173. The Supreme Court has affirmed that Congress cannot enlarge the original jurisdiction of the Court. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803).

174. See U.S. CONST. art. III, § 2, cl. 1; *Palmore v. United States*, 411 U.S. 389, 401 (1973). Nonetheless, the enumeration is helpful to measure the range of judicial power, if not necessarily to predict its distribution. In *Cohens v. Virginia*, Chief Justice Marshall declared the “axiom” that “the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.” 19 U.S. (6 Wheat.) 264, 384 (1821). The Chief Justice was not quite ready to declare his “axiom” to be immutable truth, but he offered it as an argument of constitutional construction that should not be overlooked. *Id.* at 384–85. Nonetheless, Chief Justice Marshall did not complete the logic of this reasoning: if there *is* a principle of co-extensiveness, then surely the Extending Clause acts as a granting clause that requires no intermediate step to connect the courts to their jurisdiction in the same way as the enumeration of powers in Article I. Just as the legislative power “vests” immediately in Congress, the judicial power “vests,” without more, in the courts. Thus, arguably there might be a double vesting of the judicial power, in both the Supreme Court and in the inferior courts, by force of the repeated word “in” in Article III, Section 1. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). The second “in,” however, seems pleonastic.

Chief Justice Marshall's opinion eschewed Justice Story's reading a few years earlier in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), see *supra* note 147, which saw deliberate purpose in the enumeration of cases and controversies and would have required Congress to distribute all of these categories to the federal courts, whether at original or appellate level. *But cf.* Lessig & Sunstein, *supra* note 153, at 47–52 (rejecting the idea of mandatory vesting clauses).

175. See *Hunter's Lessee*, 14 U.S. (1 Wheat) at 333.

176. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (noting the “continuous possibility” that all inferior federal court jurisdiction can be withdrawn).

177. See Velasco, *supra* note 147, at 682–83.

178. See U.S. CONST. art. III, § 2, cl. 2.

federal law or treaty law or that involve the United States as a party.¹⁷⁹ As Justice Brandeis noted in *Crowell v. Benson*,¹⁸⁰ the judicial power of Article III is the power of the federal government, not of any inferior tribunal: "There is in that Article nothing which requires any controversy to be determined *as of first instance* in the federal district courts."¹⁸¹ From these propositions, I derive a deep structure principle, mapped to the surface text of Article III, that *none* of the categories of cases in Article III, Section 2, other than those few cases for which the Supreme Court has original jurisdiction, must *begin* in a court with Article III judges.¹⁸²

Further, the deep structure principle of "shared" judicial authority explains the conceptual distinction between the phrase "[t]he judicial Power" in Article III, Section 2, and the more elaborate invocation of "[t]he judicial Power of the United States," which opens the first section of Article III.¹⁸³ "The judicial Power" is

179. Cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 916-17, 949-50 (1988) (arguing that "article III litigation" is untenable and that non-Article III courts should be able to hear matters "that might have been assigned to an article III court other than the Supreme Court" as long as there is adequate opportunity for appellate review by an Article III court of the non-Article III court's decision). In other words, a tribunal without Article III judges could entertain the jurisdictional matters that Fallon, for example, has described as core federal concerns. See *id.*; see also *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court."). Indeed, the constitutional premise that federal issues could be litigated in the state courts prompted the special leapfrog appellate process from state supreme courts directly to the Supreme Court of the United States. See 28 U.S.C. § 1257 (1994) (providing, inter alia, that final judgments rendered by the highest state courts are reviewable by the Supreme Court when the validity of a federal treaty or statute is in question or if the validity of a state statute is in question on ground of repugnancy to the Constitution, laws, or treaties of the United States); *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 351 (upholding this procedure as consistent with the structure of the Constitution and, especially, Article III). In *Hunter's Lessee*, Justice Story characterized the Article III judicial power as extending to *cases*, not courts, so that the United States's appellate jurisdiction could reach state courts that heard cases within the scope of the Article III judicial power. 14 U.S. (1 Wheat.) at 338. In Justice Story's view, the Supremacy Clause revealed the Framers' expectation that cases implicating the federal judicial power would also arise in state courts. See *id.* at 340.

180. 285 U.S. 22, 86 (1932) (Brandeis, J., dissenting).

181. *Id.* (Brandeis, J., dissenting) (emphasis added).

182. The state courts are, after all, also bound by the Constitution as the supreme law of the land. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause); *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 340; see also Rossum, *supra* note 163, at 398 (noting that the Supremacy Clause facilitates a determination of "how far judicial jurisdiction should be left to the state courts"). See generally HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 363 (Richard H. Fallon et al. eds., 4th ed. 1996) (implying that the Madisonian Compromise, see *supra* note 146, precluded the argument that litigation of federal claims in state courts would burden litigants in defiance of the Constitution).

183. U.S. CONST. art. III, §§ 1, 2. It is conventional constitutional practice that every

a compact expression that references, in three words, the Framers' anticipation that judicial authority might be exercised by courts or by tribunals other than those constituted in accordance with Section 1.¹⁸⁴

word is to be given meaning. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Similarly, I would argue, each *absent* word—including aposiopetic foreshortening of like phrases used in an earlier, related context—should be considered.

184. Paul Bator, for example, condemned the incoherent and unruly proposition . . . that when a federal [legislative] court adjudicates a case or controversy arising under federal law, it is not exercising the judicial power of the United States, but when the Supreme Court decides that very same case on appeal, it is exercising the judicial power of the United States. Bator, *supra* note 165, at 242 (emphasis added). If a congressionally constituted tribunal enforces rules that “obtain their force of law from the national government,” Bator asked, “whose judicial power is in play *if not the judicial power of the United States?*” *Id.* at 241 (emphasis added). But Bator neglected another potential reading of Article III, Sections 1 and 2: as noted in the main text, the term “[t]he judicial Power of the United States” has a discrete, specific application only to those courts established with judges appointed under Article III, Section 1. The state courts—and, in a modern reading, legislative courts and even supranational tribunals—arguably partake of “[t]he judicial Power” *simpliciter* that the Framers declared in Article III, Section 2. For that precise reason, the present study avoids the common epithetical descriptions “Article I courts” and “Article III courts” in favor of the more simple distinction that some federally created tribunals have judges appointed under Article III, Section 1 (the United States federal district courts, for example), while other federally created tribunals and the state courts exercise judicial power under Article III, Section 2, but do not have judges appointed under Article III, Section 1. It is at best a misnomer, and at worst a constitutional solecism, to speak of an “Article I court” as though legislative courts could exercise judicial power derived from some ineffable constitutional source that is not Article III.

The phrase “[t]he judicial Power” in Article III, Section 2, incidentally, was inserted by the Committee on Detail in place of the more restrictive expression “The jurisdiction of the Supreme Court.” See Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 163–64 (1960). And, while it is true that the intended meaning of the change was to incorporate the inferior courts into the specified jurisdiction, it is also true that the use of a much broader phrase in Section 2 (although the change was made without debate, see Clinton, *supra* note 15, at 792–93) weakens the argument for a structural distinction between the “arising under” jurisdiction of the state courts and that of the Supreme Court or the contingent inferior federal courts. The potential distinction between the two phrases, “[t]he judicial Power” and “[t]he judicial Power of the United States,” has not, however, kindled debate among the constitutional law clerisy. See, e.g., *id.* (treating the phrases as identical). Much more attention has been paid to the question of whether the Vesting Clause in Section 1 should be read as mandatory or non-mandatory, on the assumption that the answer to that question might determine to what extent tribunals without Article III judges legitimately could exercise any portion of the judicial power of the United States. Thus, for instance, the word “shall” in the Vesting Clause of Article III and in the opening of the Enumeration Clause suggests a command to Congress to vest the federal courts with at least some jurisdiction and correspondingly limits discretion to transfer jurisdiction to tribunals without Article III judges. See Calabresi & Rhodes, *supra* note 134, at 1162. The distinction made here in the main text, however, eliminates the need for dispute. Whether or not the Article III Vesting Clause is mandatory, the judicial power is manifestly exercisable by tribunals that lack judges appointed under Article III. Moreover, the determination of whether it is mandatory by itself will not answer whether the Constitution requires final federal appellate review in all the enumerated cases and

As Steven Calabresi has noted, the phrase “[t]he judicial Power shall extend to” in Article III, Section 2, describes a power, but “ ‘fails to make clear who may exercise that power, thus leaving open the possibility that the judicial power in question could be exercised [for example] by the states.’ ”¹⁸⁵ In this reading, the phrase “[t]he judicial Power” in Section 2 has no textual antecedent, which it would have had, for instance, if Section 2 had mentioned “the foregoing judicial Power” or “the judicial Power heretofore vested in accordance with Section 1.”¹⁸⁶

Thus, the separate references to “[t]he judicial Power of the United States” and “[t]he judicial Power” simply confirm a deep structure idea of a shared judicial authority under Article III. In

controversies in Article III, Section 2. *See infra* text accompanying note 339. After all, if the judicial power is exercisable by state courts, then the Exceptions Clause might be used to vest final appellate jurisdiction in the state courts, *whether or not* the Vesting Clause might be mandatory. *See* Calabresi & Rhodes, *supra* note 134, at 1161.

185. Calabresi, *supra* note 15, at 1383 (quoting A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1355 (1994)). Calabresi infers a quite different conclusion from this textual lacuna. In his view, the absence of any reference to the institutions being empowered to act must imply that Article III, Section 2, while itself not a “power grant,” must refer to a power *already granted*, namely “ ‘the judicial Power of the United States.’ ” *Id.* at 1383 (quoting U.S. CONST. art. III, § 1).

186. Calabresi, for example, has not explained how his “power grant” reading, *see supra* note 185, which disregards the absence of an expressed antecedent to the words in Article III, Section 2, might displace a neutral reading that opens the possibility of judicial power exercised by the states. As noted in the main text, Calabresi himself raises the state court reading. *See* Calabresi, *supra* note 15, at 1383. Calabresi’s true riposte, of course, would not be textual at all, but polemical. Eliminate the first section of Article III, he argues, and “all you have is a vague guarantee that something called ‘the judicial Power,’ exercised by who knows whom, could reach a whole lot of cases . . . [and] could presumably be given wholesale by Congress not only to the state courts, . . . but also to Article I courts, to the White House Counsel’s office, or even to the Senate House and Judiciary Committees.” *Id.* at 1383. In other words, Calabresi, like Justice Brennan in *Northern Pipeline Construction Co.*, 458 U.S. 50, 73 (1982) (plurality opinion), would insist upon some kind of limiting principle to prevent a wholesale supplantation of courts with Article III judges.

While my intent certainly is not to read Article III out of the Constitution, neither do I intend to suppress attention to the manifest structural principles of Article III. Scholars may criticize the Framers for not giving the judicial power the mono-institutional trappings of its competitor governmental powers, but that is how the Constitution is written. If a wholesale grant to state courts is allowed by the text and is supported by deep structure design, then the judicial power can be exercised credibly in that manner. Article III permits wide congressional discretion in arranging the federal court system, and that, too, in combination with the enumerated powers of Article I, opens up the exercise of judicial power by tribunals other than those mentioned in Article III itself. We cannot promote textual fidelity and then pick and choose which parts of the text we will honor and which we simply will ignore. The important work of Article III jurisprudence, therefore, is to construct theories that acknowledge the existence of other sources of judicial authority, while defining the proper constitutional place of the very few tribunals that the Constitution itself explicitly anticipates.

contrast, Article I and Article II do not reference the legislative or executive power of *the United States*. Neither of those Articles contemplates rival sources, such as state legislatures or executives, which have a constitutionally assigned role in the creation of federal law. It is not yet manifest, however, precisely *which* sets of complementary (or even rival) tribunals might enjoy the privilege of exercising federal judicial authority. To resolve this question, I next apply a series of three transformational sequences to the deep structure principle of shared judicial power. The sequences will demonstrate that classes of tribunals that are not identified in Article III, Section 1—state courts, legislative courts, and supranational tribunals—can nonetheless lay claim to a share in the federal judicial power.

2. Three Transformational Sequences, Three Tribunals Sharing Article III Power

Transformations are the dynamic elements of classical Chomskyan linguistic theory. They connect the deep structure to the potentially multiple performances of the surface structure. The Constitution's deep structure comprises a fixed base of principles, including the idea that the judicial power in Article III is not exclusively exercised by judges appointed under Article III. The transformational rules comprise an array of textual and jurisprudential ideas, shaped primarily by Articles I and III of the Constitution and by doctrinal innovations of the Supreme Court, which "map" the deep structure idea of shared judicial power to a set of surface structure performances. These performances amplify the actual performance—a limited number of courts staffed exclusively by Article III judges—that we know from the familiar surface structure of Article III.

Three transformational sequences are discussed here. The first sequence maps state courts to the surface structure of Article III by synthesizing four elements: the discretionary nature of Article III's court system, the Framers' awareness of a "redundant" system of state courts, their explicit recognition of state courts in the Supremacy Clause, and the logical proposition that the Supreme Court's appellate jurisdiction could apply only to cases from the state courts if Congress had declined to use its power to create inferior federal courts. The source of the second sequence, which maps legislative courts to Article III, is the Supreme Court's jurisprudence of public rights. Under this jurisprudence, the Court gradually has accepted that Congress can use its Article I legislative powers to create federal

tribunals to administer specialized statutory schemes of regulation. Legislative tribunals also share the federal judicial power because their dockets “arise under” federal law, an enumerated category of judicial power in Article III, Section 2. Finally, the third sequence maps supranational tribunals to Article III through a specific foreign relations vision of the Constitution. This final sequence synthesizes modern interactive conceptions of sovereignty, the Framers’ expansive view of the scope of the treaty power and of the centrality of foreign commerce, and the public rights jurisprudence of the Supreme Court. The result is a powerful transformation that would allow supranational tribunals—if the principle of constitutional integrity can be accommodated—to share exercise of the federal judicial power.

a. First Transformational Sequence: The State Courts

The surface structure of Article III provides categorically for only a single federal tribunal, the Supreme Court.¹⁸⁷ This organizational sparseness reveals at least two aspects of the Framers’ expectations for the new judicial order. First, and rather prosaically, the broadness of congressional discretion in the organization of the court system does not appear to have troubled the architects of the Constitution. The great diversity in state systems pointed to no single superior model, and the Convention did not relish the task of creating prolix organizational charts for the new tribunals.¹⁸⁸ Secondly, and more pertinently, the Framers were acutely conscious of the parallel and a priori existence of the state systems of justice. Surely they did not expect that the entire work of the federal judicial branch would burden a single national tribunal, yet that is the only court for which they explicitly provided. From these premises, I add an additional level of interpretive detail to the deep structure principle of shared judicial power: if Congress had chosen not to establish inferior federal courts, then by default the state courts would have become the tribunals of first resort and *would thereby exercise judicial power*, although not necessarily the judicial power of the United States, in all federal matters.¹⁸⁹

187. U.S. CONST. art. III, § 1; see also *supra* text accompanying note 135 (discussing court structure under Article III).

188. See Wells & Larson, *supra* note 159, at 84; see also Amar, *supra* note 148, at 259 (indicating the complexity of building a plenary court structure into the Constitution). The genius of the Framers was to create a constitutional document without the numbing prolixity of a legal code. Public understanding, after all, was critical to the success of the revolutionists’ enterprise. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

189. See *infra* note 339 (suggesting that the power to strip Supreme Court appellate

State courts do not exercise their judicial authority upon grant from the Constitution of the United States, but by favor of their own state constitutions.¹⁹⁰ The federal Constitution, however, recognizes the *exercise* of judicial power by the state courts.¹⁹¹ Moreover, the idea of the state courts as the “redundant” system in the Framers’ judicial machine cannot be confuted as a matter of simple logic: if there had been no inferior federal courts, from which courts could the Supreme Court have enjoyed appellate jurisdiction if not the state courts?¹⁹² The structural complementarity between the federal and state systems, in fact, is even more complete than first appears. Both systems can declare finality in matters of federal law. The state system does so whenever a decision of a state supreme court, implicating a matter of federal law, is not appealed or is denied certiorari.¹⁹³

Accordingly, Article III in its deep structure requires that the state court system shares judicial power with federal courts created under Article III, Section 1. Article III’s deep structure also recognizes that this shared exercise is a legitimate center of judicial authority under the Constitution.

b. Second Transformational Sequence: The Legislative Courts

The first transformational sequence, while acknowledging the historical fact of the Madisonian Compromise, is primarily a text-driven derivation of a deep structure idea. But the recognition of a

jurisdiction a fortiori confirms Congress’s power to deny compensatory or collateral jurisdiction to the inferior federal courts).

190. See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 515–16 (1858) (stating that judicial authority must be conferred “by a Government or sovereignty”); see also Calabresi & Rhodes, *supra* note 134, at 1161 (noting that state courts take jurisdiction over Article III categories of federal jurisdiction by virtue of their own state constitutional grants of judicial power).

191. If the Constitution did not recognize this alternative source of judicial authority over federal laws, the Supremacy Clause would likely be nugatory.

192. This view reflects the scholarly insight of Herbert Wechsler. See, e.g., Amar, *supra* note 148, at 211–13. Wechsler’s reading of the plan of the Constitution for the courts was that “Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the [Supremacy Clause].” Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965).

193. Neither the Constitution nor Congress has provided for a “reverse certiorari” process, whereby the Supreme Court could itself subject selected cases from the state system to mandatory high court review. The system of Supreme Court review of state application of federal law is not a constitutional requirement; rather, it was created by Congress to avoid the possibility that the states simply would ignore governing federal law. See CHEMERINSKY, *supra* note 4, at 570–72.

shared, open-ended judicial power in the Constitution's deep structure suggests that this power also might be accessed by bodies other than the pre-constitutional state courts. The Framers certainly could "see" the state court system and, perhaps, they also might have "foreseen" that other kinds of tribunals might evolve in appropriate circumstances.¹⁹⁴ The question, therefore, is whether further transformational sequences discernible in the surface structure of the Constitution and in the Supreme Court's interpretive canon will generate these tribunals.

(1) *New Tribunals for the Administrative State*

The paradigmatic example of a non-state court authority generated from the deep structure of Article III is the sequence of transformative Supreme Court cases that recognized the power of Congress to locate some of the federal judicial power in tribunals created by Congress's Article I powers and staffed with non-Article III judges.¹⁹⁵ Since its 1932 ruling in *Crowell v. Benson*,¹⁹⁶ the Court's

194. See *supra* note 2 (explaining how the Framers' "foresight" might be reflected in the structural design of their Constitution). The expansion of shared judicial power can be linked, in a historical sense, to the broad expansion of governmental responsibilities. The legislative courts were an outgrowth of the vast expansion of the administrative-bureaucratic state that began before World War II. Similarly, in the wake of the Cold War and in an era of globalized trade opportunities and challenges, the judicial power may be extended to new fields of supranational endeavor. See Reich, *supra* note 8, at 839 (emphasizing the importance of juridical stability to a trade system that is fundamentally anarchic).

195. In *Martin v. Hunter's Lessee*, Justice Story argued that Congress must vest all of the judicial power "either in an original or appellate form" in a federal court. 14 U.S. (1 Wheat.) 304, 331 (1816); see also Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the U.S.-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1467 (1992) (noting the rejection of Justice Story's thesis by the first Judiciary Act); *supra* note 146 (discussing Justice Story's opinion). The beginnings of a crack in the monolithic view of Article III appeared as early as 1828, in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), in which Chief Justice Marshall analyzed the vesting of admiralty jurisdiction in courts created by the Florida territorial legislature (as Florida had yet to be admitted to the Union). The fact that the Florida superior court judges held their offices for four years, in Chief Justice Marshall's opinion, meant that their courts were not "constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited." *Id.* at 546. But, if not constitutional courts, what were they? The Chief Justice appeared to have detected an entirely new strain of Article III jurisprudence when he denominated the Florida courts as "legislative Courts, created in virtue of the general right of sovereignty which exists in the government." *Id.* The wider premise (and the new categorization) was unnecessary; Chief Justice Marshall was equally able to rest the jurisdiction of the Florida administration on Article IV, Section 3, clause 2 of the Constitution, which gives Congress the power "to make all needful rules and regulations, respecting the territory belonging to the United States." *Id.*

As commentators have noted, without proper constitutional principles the notion

attitude toward these tribunals without Article III judges has slowly become more pragmatic. This judicial attitude has developed in tandem with the metastasizing of the post-New Deal administrative state and its need for bureaucratic entities to administer statutory schemes of federal regulation. Indeed, the administrative state scarcely could operate without a degree of pragmatism on the part of the Supreme Court, which early on established that not every immigration hearing, workers' compensation hearing, or veterans' benefits hearing merited *ex ovo* the panoply of Article III federal judicial intervention.¹⁹⁷ This pragmatic approach¹⁹⁸ emerged in frank deference to Congress's wide legislative jurisdiction under Article I and to the multiplier effect of the Necessary and Proper Clause.¹⁹⁹ As I will show, the Supreme Court sanctions the so-called "Article I" or legislative courts,²⁰⁰ most of which do permit some eventual appellate

of legislative courts could overwhelm the Article III judiciary. *See* Fallon, *supra* note 179, at 923; *infra* text accompanying notes 213–14 (discussing need for a limiting principle in establishing legislative courts); *see also* Glidden Co. v. Zdanok, 370 U.S. 530, 546 (1962) (concluding that the "historical background" of the Florida courts made Chief Justice Marshall's decision "hardly surprising").

196. 285 U.S. 22 (1932). In *Crowell*, the Court made its first explicit attempt to define a sphere of specialized governmental functions that would allow Congress (in tandem with the executive) to establish regulatory schemes outside the domain of Article III. *See id.* at 50. These schemes would regulate the relationship between the federal government "and persons subject to its authority." *Id.* In *Crowell*, the Supreme Court was asked to consider the administrative authority of the U.S. Employees' Compensation Commission, a New Deal entity that offered maritime workers under Congress's constitutional jurisdiction the same workers' compensation remedies that were provided by virtually all states. The Commission processed 138,788 cases in the four years the legislation was in operation. *See id.* at 45 n.10.

197. *See* Bator, *supra* note 165, at 235–39. Bator viewed the validation of the administrative state as an inexorable historical phenomenon that the courts can no longer impugn. *See id.* at 239 ("And I do think that the fact of this consistent judgment is impressive and ought to have weight."). Nonetheless, the Supreme Court's acquiescence in the creation of legislative courts has drawn the ire of formalist scholarship. The formalist view has read Article III wholly to "preclude[] legislative courts from exercising federal judicial power." Calabresi & Rhodes, *supra* note 134, at 1189. Similarly, Martin Redish has argued that "[a]lthough most of the Constitution's provisions leave substantial room for modernizing interpretation, Article III does not." MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 75 (2d ed. 1990).

198. *See* Bator, *supra* note 165, at 254 (identifying as "instrumental" Congress's reliance on the expedient of legislative courts constituted outside the formalities and limitations of Article III, Section 1).

199. *See* Calabresi & Rhodes, *supra* note 134, at 1172; *see also* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 649 (1949) (Frankfurter, J., dissenting) (accepting the generative effect of congressional authority under the Necessary and Proper Clause to expand areas of federal jurisdiction).

200. *See* Fallon, *supra* note 179, at 921; *see also* Eskridge & Ferejohn, *supra* note 32, at 533 (discussing the changes to the Framers' vision of the Republic wrought by the growth

recourse to an Article III judge, when Congress establishes these courts to occupy “ ‘specialized areas having particularized needs and warranting distinctive treatment.’ ”²⁰¹

(2) *Rationalizing Legislative Courts: The Field of Business Approach*

In discovering the deep structure origin of Article I tribunals, it is interesting to consider how the Supreme Court came to extrapolate a second occurrence of shared “arising under” jurisdiction from Article III.²⁰² For a long time after *Crowell*, the Court clung tenaciously to what it perceived as the traditional or historical prerogatives of the federal judiciary, an approach that looked back to the kinds of actions that were the quotidian work of the ordinary English and American courts at the time the Constitution was adopted.²⁰³

This field of business approach was reflected thirty years after *Crowell* in *Glidden Co. v. Zdanok*.²⁰⁴ In *Glidden*, the Supreme Court held that two new federal tribunals, the Court of Claims and the

of the modern administrative state). The tribunals established under Congress’s Article I powers have provided troublesome problems of nomenclature. The variety of tribunals that Congress has established precludes a single all-encompassing term. Nomenclature, in any event, is not important to the structural analysis that this Article undertakes. Here, I am investigating the extent to which matters arising under federal law can be “committed for final determination to courts non-Article III tribunals, be they denominated legislative courts or administrative agencies.” *Glidden*, 370 U.S. at 549. The terminological choice I have made, in any event, is to refer always to “legislative courts.”

201. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 72 (1982) (plurality opinion) (quoting *Palmore v. United States*, 411 U.S. 389, 408 (1973)); see also *Bator*, *supra* note 165, at 235–36 (arguing that Article I tribunals developed because of special institutional needs, not as an attempt to subvert the ideal of Article III by creating a cadre of subservient judges). The pragmatic approach, in fact, suffused the opinion in *Crowell*, 285 U.S. *passim*. The Court could find no constitutional objection to Congress availing itself of a method that experience had shown to be essential to tame a burgeoning caseload, relieving the burden of the courts, but preserving their complete authority to ensure the proper application of the law. *See id.* at 54. Three times in its opinion, the Court mentioned pragmatic volume of business considerations, describing the large intake of cases before the commission and the likelihood that challenges to the application of the statute would be few. The Court explained that review by the courts had been sought in only a small number of the many thousands of cases and that very few of those cases had implicated the constitutional jurisdictional issues of whether the injury occurred within the maritime jurisdiction or whether the relation of employment existed. *See id.* at 65.

202. The “arising under” jurisdiction under Article III, Section 2, which is by far the largest category of federal cases, is likely to be the most fruitful source of business for state and legislative courts. Supranational tribunals also likely would exercise jurisdiction in cases in which the United States is a party, another category mentioned in Section 2. *See infra* text accompanying note 337 (discussing categories of Article III jurisdiction involving the United States as a party).

203. *See Glidden*, 370 U.S. at 563 (quoting *United Steelworkers v. United States*, 361 U.S. 39, 60 (1959) (Frankfurter, J., concurring)).

204. 370 U.S. 530 (1962).

Court of Customs and Patent Appeals, had been created under Article III, Section 1 of the Constitution, thereby allowing their judges to serve by designation on United States District Courts and Courts of Appeals.²⁰⁵ The Court accepted that tribunals that predominantly deal with “cases and controversies” under Article III, even if their docket includes some nonjudicial or administrative business that does not technically come under that rubric, could nevertheless qualify as courts established under Article III.²⁰⁶ The *Glidden* decision included a laborious exposition of how the boundaries of the judicial power were framed in the phrase “cases and controversies,” which thereby defined the work of courts with Article III judges.²⁰⁷ Given that the work of both legislative courts and courts with Article III judges could be said to “arise under” the common source of the federal law of the United States,²⁰⁸ the *Glidden* Court’s attempt to distinguish judicial and nonjudicial business by a quantitative rather than a qualitative test foundered rapidly on the reef of a startling *reductio ad absurdum*.²⁰⁹ Thus, the Court appealed to “the ‘expert feel of lawyers,’ ” rather than to any innate ontological distinction between judicial and nonjudicial activity, to rationalize why Article III cases and controversies must nonetheless remain the exclusive province of courts with Article III judges.²¹⁰ Although

205. *See id.* at 584.

206. *Id.* at 583 (internal quote marks omitted).

207. *Id.* at 572–73 (internal quote marks omitted). In *Glidden*, the Court ruled that tribunals constituted without regard to the tenure and salary limitations of Article III can nonetheless entertain judicial business that is encompassed in Article III, but that such business will necessarily be “beyond the range of conventional cases and controversies.” *Id.* at 545. To that extent, the *Glidden* Court specifically rejected the implications of Chief Justice Marshall’s remark in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), that courts created under Congress’s Article I powers were “‘incapable of receiving’ ” federal question jurisdiction. *Glidden*, 270 U.S. at 545 n.13 (quoting *Canter*, 26 U.S. (1 Pet.) at 546).

208. As the Court later explained in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985), “[n]either this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . to be tried in an Article III court before a judge enjoying life tenure and protection against salary reduction.” (quoting *Palmore v. United States*, 411 U.S. 389, 407 (1973)).

209. As used here, this phrase (meaning, literally, “reduction to absurdity”) indicates a proposition that disproves itself by the absurd outcome that it implies.

210. *Glidden*, 370 U.S. at 574 (quoting *United Steelworkers v. United States*, 361 U.S. 39, 60 (1959) (Frankfurter and Harlan, JJ., concurring)). In seeking to legitimate the Court of Claims and the Court of Customs and Patent Appeals as Article III courts, the *Glidden* Court explained why certain highly discrete aspects of these courts’ jurisdiction, although not technically “cases and controversies” as traditionally understood, nonetheless did not disqualify them as tribunals established under the second section of Article III. The distinction for the Supreme Court was not so much qualitative and analytical as simply numerical. In the case of the Court of Customs and Patent Appeals,

dialectically consistent with the majority's opinion, Justice Douglas's dissent in *Glidden* nonetheless reached the spirited conclusion that legislative courts, like courts with Article III judges, "exercise judicial power."²¹¹ Justice Douglas's conclusion reflects the deep structure principle of shared authority.

(3) *The Emergence of a Public Rights Doctrine*

In addition to the *Glidden* Court's functional approach, the Supreme Court later employed a formalist "public rights" approach to explain how tribunals constituted without Article III judges could share in the exercise of judicial power. While the functional approach in *Glidden* simply collapsed from its own incongruity, the categorical formalism of public rights was introduced twenty years after *Glidden* in the plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²¹² and has survived to the present day. Recast in pragmatic terms, the notion of public rights has remained part of the Court's later theoretical cartography and is the source of the transformation that maps legislative courts to Article III. The

for example, tariff appeals jurisdiction represents only an insubstantial portion of the total judicial docket. *See id.* at 583. The Court held, therefore, that the status of a district court or court of appeals would not be changed by a "congressional attempt to invest it with insignificant nonjudicial business." *Id.* In the Court's view, "it would be equally perverse to make the status of [the Court of Claims and the Court of Customs and Patent Appeals] turn upon so minuscule a portion of their purported functions." *Id.*

211. *Id.* at 605 n.11 (Douglas, J., dissenting). Justice Douglas concluded that "the only relevant question here is whether a court that need not follow Article III procedures is nonetheless an Article III court." *Id.* (Douglas, J., dissenting). Notably, his opinion did not resolve the ontological implications of his question, whether courts that exercise judicial power in federal cases and controversies are part of the structural understanding of Article III. Instead, Justice Douglas castigated the majority for making its decision turn on the "false standard" of whether the courts in question performed judicial functions because courts established under both Article I and Article III performed functions of that character. *Id.* at 597 (Douglas, J., dissenting). Justice Douglas proposed an alternative standard, namely, "the manner in which that judicial power is to be exercised." *Id.* at 598 (Douglas, J., dissenting). Unfortunately, this standard turned out to be the functions standard by a different name because Justice Douglas devoted the bulk of his opinion to trying to isolate specific activities (i.e., distribution of federal largesse, zoning, territorial administration, and giving of advisory opinions) that only courts created under Article I performed. He also interposed the distinctly odd stipulation that only courts with Article III judges were bound by the plenary standards of due process in the Bill of Rights. *See id.* at 598-601 (Douglas, J., dissenting). This latter proposition appeared grounded on the traditional view of the jury as a popular check on life-tenured judges. *See id.* at 602 (Douglas, J., dissenting); *see also* *Granfinanciera v. Nordberg*, 492 U.S. 33, 82-83 (1989) (White, J., dissenting) (noting that the role of the jury as a restraint on life-tenured judges is "inapt" in the context of non-traditional specialized tribunals such as the bankruptcy courts); *infra* note 249 (considering legislative courts in relation to the Seventh Amendment).

212. 458 U.S. 50 (1982) (plurality opinion).

Court's new jurisprudence of public rights also features prominently in the transformation that maps supranational adjudication to Article III.

Northern Pipeline Construction Co. essentially was a search for a "limiting"²¹³ or "unifying"²¹⁴ principle to explain how legislative courts could co-exist with the Article III judiciary without potentially displacing Article III courts. In his plurality opinion, Justice Brennan's formalistic analysis generally proscribed courts created without Article III judges,²¹⁵ but recognized a trio of purportedly narrow, historically validated exceptions: territorial courts, military courts, and courts specializing in public rights.²¹⁶ Justice Brennan's formalism, however, was conceptually weak. Given the breadth of legislative action contemplated in Article I, the plurality's approach did not explain how the purported limiting principle of three exceptions could sanction courts under certain Article I powers without licensing Congress to use the plenary range of Article I powers to create *any* courts of its choosing. What made the creation of military courts or courts for the District of Columbia²¹⁷ so

213. *Id.* at 73 (plurality opinion).

214. *Id.* at 105 (White, J., dissenting).

215. *See id.* at 73 (plurality opinion).

216. *See id.* at 64–70 (plurality opinion). The initial two exceptions were so easily drawn that they lacked almost any explanatory power. These categories were, first, the special territorial courts sustained by Chief Justice Marshall in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), *see supra* note 195, and second, the military courts established under Congress's Article I power to regulate the defense forces. *See Northern Pipeline Constr. Co.*, 458 U.S. at 64–66 (plurality opinion).

In *Glidden*, Justice Harlan had taken the view that the absence of a federal structure in the territories produced problems not anticipated by the Framers of Article III, so that the realities of territorial government made it less urgent that judges there enjoy the independence from Congress and the President envisioned by Article III. *Glidden*, 370 U.S. at 546. The territories, in other words, were not ruled directly from Washington, and "Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto." *Id.* The "protections deemed inherent in a separation of governmental powers" could therefore be dispensed with. *Id.* To make the Constitution work, as Justice Harlan put it, Chief Justice Marshall in *Canter* avoided dogma and doctrinairism and allowed practical considerations to supervene. *See id.* at 547. Other courts of limited tenure mentioned by Justice Harlan had similar provenances. For example, the Court of Private Land Claims had the power to settle claims under treaties to land in the territories, while the Choctaw and Chickasaw Citizenship Court had the authority to resolve questions of tribal membership relevant to property claims within Indian territory under the exclusive control of the national government. *See id.* (citing *Wallace v. Adams*, 204 U.S. 415 (1907); *Ex parte Joins*, 191 U.S. 93 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899)). The touchstone of the *Canter* decision, in Justice Harlan's summary, was "the need to exercise the jurisdiction then and there and for a transitory period." *Id.*

217. In *O'Donoghue v. United States*, 289 U.S. 516 (1933), Justice Sutherland explained the very wide jurisdiction of the federal courts for the District of Columbia (picking up a

exceptional that they merited distinct ontological treatment from the power of Congress to regulate foreign commerce? The answer, in Justice Brennan's reasoning, seems to have been mere historical practice.²¹⁸ But this basis for predicting the constitutional validity of legislative courts was precisely what the Court itself found wanting after *Glidden*.

It is the third Brennan exception, founded on agencies that adjudicate cases involving public rights, that seems most relevant for our present investigation. Through public rights, Justice Brennan placed at the core of his opinion a formalistic idea that had a potentially wide functional application. Originally, the doctrine implicated matters arising between the government and others, rather than the liability of one individual to another (the sphere of private rights).²¹⁹ As Justice Brennan noted in his opinion, the federal government's exposure to lawsuits occurs because it chooses to waive its right to sovereign immunity.²²⁰ The Constitution grants no natural

goodly share of typically state jurisdiction) through an exposition of Congress's "dual constitutional right" to combine its explicit power in Article III to create federal district courts with its power in Article I, Section 8 to legislate for the District of Columbia. *Id.* at 547. This power to legislate included the implied power to create a court system in the District in the manner of a sovereign state. *See id.* The conceptualization of a "dual power," combining an express and implied grant, was limited to the particular and unusual circumstances of governing the District of Columbia. *Id.* Nonetheless, the Supreme Court failed to clarify why a similar constitutional duality could not flow from the combination of any of the enumerated powers in Article I with the express grant of power in Article III. *See infra* text accompanying note 229 (discussing Justice White's similar observation).

218. *See Northern Pipeline Constr. Co.*, 458 U.S. at 64-66, 70 (plurality opinion) (considering how the Constitution, interpreted in light of "historical consensus," explained the provenance of each of Justice Brennan's three exceptions).

219. Drawing on earlier authority in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), the Court in 1931 attempted to distinguish cases of private rights from those arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. *See Crowell v. Benson*, 285 U.S. 22, 50 (1931). Where public rights were implicated, the Court said, Congress may establish "legislative courts" to aid in the performance of governmental functions. *Id.* (quoting *Canter*, 26 U.S. (1 Pet.) at 546). The jurisdiction of these specialized courts would include governance of U.S. territories and the District of Columbia or serving as special tribunals to "determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." *Id.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). The mode of determining this class of matters would be completely within congressional control. *See id.* The Court listed these administrative agencies in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, public lands, public health, post office facilities, pensions, and payments to veterans. *See id.* at 51.

220. *See Northern Pipeline Constr. Co.*, 458 U.S. at 67 (plurality opinion). Thus, courts have held that they do not have jurisdiction to hear a case against the U.S. government unless the government has by law granted jurisdiction to the court or otherwise waived its sovereign immunity. *See, e.g., Dalehite v. United States*, 346 U.S. 15, 30 (1953) ("[N]o

right to sue the federal government, nor did the Framers intend it to do so.²²¹ Although there are no definitive boundaries between public rights and private rights,²²² public rights tend to involve specialized rights related to the performance of the constitutional functions of the executive or legislative departments,²²³ which the government could commit completely to nonjudicial executive determination.²²⁴ Private rights, in contrast, have historical roots in traditional state-created common law or equitable causes of action such as breach of contract.²²⁵ Accordingly, Justice Brennan reasoned, choosing the less drastic expedient of committing public rights to the determination of a legislative court or administrative agency does not fall afoul of the separation of powers because the judicial monopoly over private

action lies against the United States unless the legislature has authorized it.”); *see also Compulsory Jurisdiction, International Court of Justice: Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong. 1, 137 (1946) (Sup. Docs. No. Y4.F76/2:In8/11) [hereinafter *ICJ Hearings*] (statement of Charles Fahy, Legal Adviser to the State Department) (discussing the principle of sovereign consent in international public law).

221. *See* THE FEDERALIST NO. 81, at 455 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.”); *see also Glidden*, 370 U.S. at 563–64 (stating that “there was no surrender of sovereign immunity in the plan of the convention” and concluding accordingly that “Article III’s extension of judicial competence over controversies to which the United States is a party” did not confer jurisdiction over suits to which the United States is a defendant).

222. *See Northern Pipeline Constr. Co.*, 458 U.S. at 69 (plurality opinion).

223. *See id.* at 68 (plurality opinion). In *Crowell*, however, the Court concluded that the compensation commission at issue fell within the category of private rights because it addressed the liability of a private employer to its employee under the law. The Court accepted that the commission, despite its administrative origin, could nevertheless exhibit attributes of the federal judicial power. *See Crowell*, 285 U.S. at 51. The Court justified this splitting away of some aspects of judicial power by noting how juries typically assisted on “the common law side of the Federal courts” (a constitutional requirement) and how masters and assessors assisted the courts of equity and admiralty without the consent of the parties to state an account or to find damages. *See id.* The Court, avowing that substance should prevail over form in determining constitutional limits, noted that the application of the statute was limited to the relation of master and servant and that the method of determining the questions of fact was necessary to the statute’s effective enforcement. *See id.* at 55.

224. *See Northern Pipeline Constr. Co.*, 458 U.S. at 68 (plurality opinion). As Justice Brennan recognized in his concurrence in *Thomas v. Union Carbide Agricultural Products Co.*, however, the legislature’s freedom to dispose of entitlement claims in any manner it deemed fit is itself subject to constitutional restraints of due process. *See* 473 U.S. 568, 596 n.1 (1985) (Brennan, J., concurring); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 553–54 (1985) (Brennan, J., concurring in part and dissenting in part) (noting that administrative procedures could run afoul of the Constitution if unreasonably delayed); *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (Brennan, J.) (noting that due process applies to the withdrawal of various “public assistance benefits”).

225. *See Northern Pipeline Constr. Co.*, 458 U.S. at 69–71 (plurality opinion).

rights is not invaded.²²⁶

As noted earlier, however, the difficulty with this superficially neat dichotomy is that its implicit reversion to the idea of a discrete field of business for Article III judges is hardly different from the *Glidden* approach. The bankruptcy scheme challenged in *Northern Pipeline Construction Co.* was almost entirely a creature of federal regulation, enacted pursuant to Congress's Article I powers to create uniform laws on bankruptcies.²²⁷ As such, however, the scheme necessarily implicated private, or state, contract and tort rights because potential plaintiffs must sue the bankrupt debtor for common law causes of action within the framework of the statutory bankruptcy.²²⁸ As Justice White emphasized in dissent, rather than telling us that bankruptcy courts were not sufficiently like territorial courts, military courts, or courts that adjudicated public rights, the plurality needed to explain why bankruptcy courts could not qualify as legislative courts in their own right.²²⁹ Applying the Brennan doctrine in all of its literalness, as the plurality did, allowed the mere presence of some private rights to infect—and to doom—the congressional scheme.²³⁰ And yet, despite the sweeping consequence of its opinion, the plurality acknowledged that legislative courts can and do exercise the judicial power as that term has been understood in Article III.²³¹ The distinction drawn in *Northern Pipeline Construction Co.*, therefore, seems to have been between exercises of the judicial power that bear on so-called public rights and those that bear on what the plurality perceived to be the protected core of

226. See *id.* at 68 (plurality opinion). In *Northern Pipeline Construction Co.*, Justice Brennan noted what he saw as “a critical difference between rights created by federal statute and rights recognized by the Constitution.” *Id.* at 83 (plurality opinion). When Congress creates a statutory right, it has substantial discretion to prescribe the manner in which that right will be adjudicated—including the creation of presumptions, assignment of burdens of proof, and prescription of remedies—and to require parties to seek vindication of that right before “particularized tribunals created to perform the specialized adjudicative tasks related to that right.” *Id.* at 80, 83 (plurality opinion). While such provisions “affect the exercise of [the] judicial power, . . . they are also incidental to Congress’ [sic] power to define the right that it has created.” *Id.* at 83 (plurality opinion). Justice Brennan’s cautious embrace of novel fora for the judicial power piqued Justice White into remarking that “the plurality itself breaks the mold” through its acceptance of Congress’s “substantial discretion” in framing remedies for new federal substantive rights. *Id.* at 104 (White, J., dissenting) (internal quotes omitted).

227. See *id.* at 72 (plurality opinion); see also U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to establish national bankruptcy laws).

228. See *Northern Pipeline Constr. Co.*, 458 U.S. at 96–97 (White, J., dissenting).

229. See *id.* at 105 (White, J., dissenting).

230. See *id.* at 100 (White, J., dissenting).

231. See *id.* at 63 n.14 (plurality opinion).

Article III judicial power,²³² the historical corpus of actions that were customarily dealt with in the courts according to "the law of England and the States at the time the Constitution was adopted."²³³ The Court, in other words, had regressed full circle to the exhausted tenets of *Glidden's* functionality test.

(4) *A New Pragmatism—and a New Public Rights Jurisprudence*

Three years later, in *Thomas v. Union Carbide Agricultural Products Co.*,²³⁴ the Court replaced the theoretical discourse from the plurality opinion in *Northern Pipeline Construction Co.* with a new canon of pragmatism based on Justice White's bold dissent in *Northern Pipeline*.²³⁵ In *Thomas*, the Supreme Court upheld as constitutional an arbitration procedure to fix compensation for manufacturers of pesticides who registered their products under a federal pesticide statute and whose data were used by "follow-on registrants."²³⁶ The issue in *Thomas* was whether Congress could assign this ostensibly private dispute to a court comprised of non-Article III judges. The majority opinion, written by Justice O'Connor, held that Congress, when "acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."²³⁷ To hold otherwise, Justice O'Connor reasoned, would be to erect a needlessly formalistic restraint on Congress's ability to innovate.²³⁸

It is difficult to say why the premise of Justice White's dissent in *Northern Pipeline Construction Co.* ultimately held sway in *Thomas*, other than to speculate that the Court's political nous told it that formal categories would have to be endlessly and unsystematically expanded to allow congressional innovation under Article I.²³⁹ Justice

232. *See id.* at 70-71 n.25 (plurality opinion).

233. *Id.* at 68 (plurality opinion).

234. 473 U.S. 568 (1985).

235. *See id.* at 583, 589 (O'Connor, J.) (holding that an absolute construction of Article III is not possible, and that substance rather than form must prevail in interpreting Article III).

236. *Id.* at 575. The manufacturers were required to register their pesticides with the Environmental Protection Agency.

237. *Id.* at 593-94.

238. *See id.* at 594.

239. In its Article III jurisprudence, the Court has been anxious not to thwart congressional innovation. *See* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986); *Thomas*, 473 U.S. at 594; *supra* notes 1-2 (introducing a theme of governmental innovation in this Article). In his dissent in *Northern Pipeline Construction*

White had been unable to find conceptual daylight between the ordinary work of the legislative courts and what he called “the general ‘arising under’ jurisdiction” of courts with Article III judges.²⁴⁰ In accordance with this reasoning, the post-*Thomas* approach focuses on the intent of Congress and the reasons Congress offers for not using a court with Article III judges.²⁴¹

This non-categorical approach has been criticized for indeterminacy²⁴² and for exposing the separation of powers theory to the whims of judicial intuition.²⁴³ While these arguments cannot be overlooked, the development of the public rights doctrine nevertheless has normative force in showing how the judiciary assimilated, rationalized, and demystified the administrative state. As a transformational concept, the doctrine is no longer merely a rigid

Co., Justice White faulted the plurality’s opinion for trying to limit the scope of courts created under Article I because the plurality failed “to add together the sum of [its opinion’s] parts.” 458 U.S. 50, 105 (1982) (White, J., dissenting). In Justice White’s view, legislative courts already operated throughout the country, adjudicating both private and public rights and matters arising from congressional actions in those areas in which congressional control could be described as “extraordinary.” *Id.* (White, J., dissenting).

240. *Northern Pipeline Constr. Co.*, 458 U.S. at 105 (White, J., dissenting) (quoting U.S. CONST. art. III, § 2, cl. 1).

241. *See id.* at 108 (White, J., dissenting). Oddly, however, Justice White attached his thesis to Justice Harlan’s analysis in *Glidden*, 370 U.S. 530 (1962). As Justice White himself noticed, Justice Harlan came “dangerously close” to adopting the tautological proposition that “Article III courts” were those with Article III judges, and Article I courts were those without such judges. *See Northern Pipeline Constr. Co.*, 458 U.S. at 113 (White, J., dissenting); *supra* note 184 (discussing the avoidance of these epithetical descriptions throughout this Article).

242. One of the strongest cases against the new method was made by Robert F. Nagel in a compilation of his thoughtful essays. *See generally* NAGEL, *supra* note 11, at 62–63 (attacking Court for an even “balder” form of balancing than it has adopted in rights cases). But the post-*Thomas* doctrine has at least escaped the dogmas of functionalism that appear to have provoked Nagel’s other attack on the “intellectual crabbedness” of structural jurisprudence. *Id.* at 64; *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987) (expressing regret over the lack of a true objective scale of values external to judges’ personal preferences). Aleinikoff seems to regard much of constitutional theory as an inferior discourse composed largely of dilettantish social policy. *See* Aleinikoff, *supra*, at 992. As previously discussed, however, the balances struck in Article III separation of powers jurisprudence should *not* look outward to Aleinikoff’s supposed calculus of social consensus. Instead, deep structure analysis should occur within the Constitution, driven by the structural understanding that Article III, Section 1 does not exhaust the organizational creativity that is within the power of the United States federal government. *Cf. Printz v. United States*, 521 U.S. 898, 932 (1997) (holding that no comparative assessment of the various interests can overcome a fundamental offense to the principle of separate state sovereignty).

243. *See Granfinanciera v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring in part and concurring in the judgment) (assailing the use of “intuitive judgments” and “multifactor ‘balancing test[s]’” as ultimately harmful to preservation of a system of separation of powers, a central feature of the Constitution).

slide-rule to mark off areas of government and private controversy, a purpose it manifestly failed to serve.²⁴⁴ Rather, public rights offer a way to nominalize those actions of Congress, pursuant to its enumerated powers, that create adjudicatory mechanisms in specialized areas where the claims that may be asserted simply would not exist *but for* the intervention of the legislature.²⁴⁵ As Paul Bator explained, Congress's greater power not to create the claim or right at all includes the lesser power to assign its jurisdiction to a legislative court.²⁴⁶

This post-formalist conception of a public right, in other words, stands on its own terms and not as part of some Saussurean artifice²⁴⁷ that defines a public right only by declaring that it is not a private right.²⁴⁸ Because knowledge of the work of the ordinary courts comes

244. Thus, Paul Bator felt that the public rights doctrine was an imposture to cover up the *Northern Pipeline Construction Co.* plurality's reluctance to cast doubt on the validity of administrative adjudication. See Bator, *supra* note 165, at 248.

245. Thus, for example, the right to compensation at issue in *Thomas v. Union Carbide Agricultural Products Co.* was created by the federal pesticide statute and did not depend on or supersede any right to compensation under state law. 473 U.S. 568, 584 (1985). Indeed, the flexibility of the doctrine allows Congress to create ostensibly private rights—as a right of compensation may seem to be—that are “so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Id.* at 594. The *Thomas* doctrine thereby casts doubt on the outcome of *Northern Pipeline Construction Co.* As Justice White explained in his dissent in that case, the “extreme specialization” of the non-Article III bankruptcy courts should not be compromised by the fact that these courts also initially adjudicated a raft of state law issues. *Northern Pipeline Constr. Co.*, 458 U.S. at 96–97 (White, J., dissenting).

246. See Bator, *supra* note 165, at 250.

247. Ferdinand de Saussure's linguistic theory recognized the so-called “principle of opposition,” declaring that “the most precise characteristic [of linguistic signs] is in being what the others are not.” FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 118 (1959); see also DUCROT & TODOROV, *supra* note 51, at 18–19 (citing Saussure as discussing how the linguistic “unit” is defined only by its differences, and as such, is based upon nothing other than “its noncoincidence with the rest”).

248. See Bator, *supra* note 165, at 250 (arguing that it is unintelligible and futile to maintain rigid distinctions between questions of private and public rights, and mentioning, *inter alia*, Title VII discrimination suits). The existence of a public right does not require that the federal government be a party of record in the dispute. See *Thomas*, 473 U.S. at 586, 599. *But see Granfinanciera*, 492 U.S. at 38 (Scalia, J., concurring in part and concurring in the judgment). In Justice Scalia's view, the public rights doctrine could not, as a matter of definition, involve any claims that did not involve the federal government either as plaintiff or defendant. Justice Scalia placed the origin of the doctrine in a waiver of sovereign immunity, which is historically accurate, but attacked *Thomas*'s extension to non-government claims as a pronouncement “by sheer force of our office.” *Id.* at 69 (Scalia, J., concurring in part and concurring in the judgment). But Justice Scalia's position is unduly formalistic: in the case of my proposed model of supranational aviation tribunals, for example, the contest between two private airlines before a supranational tribunal would be a private matter, but the assertion of the claim only could be made because of federal government action (adoption of the global aviation treaty). In other

largely from long centuries of practice, there is space for history in this more focused definition, but only in the sense that we can more certainly identify a public right by novelty and innovation.²⁴⁹ Administrative agencies or legislative courts that adjudicate new public rights exercise judicial power under the Constitution because of congressional innovation under Article I, but primarily by force of the second section of Article III. Thus, the Supreme Court's public rights jurisprudence has created a transformational sequence that can incorporate innovative legislative courts into the judicial power of Article III.

The final transformation, discussed below, maps supranational aviation tribunals to Article III. In the context of a proposed scheme of supranational aviation tribunals, the gradual legalization and juridicization of trade law enforcement in the United States speaks graphically to the idea of new public rights when the common law provided nothing comparable, or at least offered only very narrowly circumscribed rights.²⁵⁰

words, the "public" dimension of public rights must refer to the statutory origin of the right, not to any aprioristic requirement of a claim by or against the federal government. *Cf. Thomas*, 473 U.S. at 599 ("A bankruptcy adjudication, though technically a dispute among private parties, may well be properly characterized as a matter of public rights.").

249. The idea of using novelty and innovation to identify a public right is not intended to revive the *Glidden* Court's idea of "the expert feel of lawyers." *See supra* text accompanying note 210. It merely directs us to look closely at innovative congressional activity, especially in the field of international trade where the common law has had limited influence. *See infra* note 331 (discussing the history of certain kinds of trade rule enforcement in the United States).

A recurrent question has been the public rights doctrine's relationship to the Seventh Amendment right to trial by jury. While the Seventh Amendment applies generally to suits at common law, the full power of the public rights doctrine would allow precisely these kinds of suits to be adjudicated within a congressionally created regulatory framework. A thorough treatment of this question lies outside the scope of this Article, but it is important to recognize that the prevailing, if arguably dubious, judicial perspective appears to turn Seventh Amendment jurisprudence, in this context, into a subset of Article III analysis; in other words, a tribunal that fits an acceptable public rights profile and therefore passes muster under Article III will ipso facto clear Seventh Amendment objections. *See generally Granfinanciera*, 492 U.S. at 37 (holding that, if Congress may assign the adjudication of a statutory cause of action to a tribunal created outside Article III, Section 1, then the Seventh Amendment would pose no independent bar to the adjudication of that action by a non-jury fact-finder).

250. *See infra* note 331 (noting congressional action to make justiciable antidumping and antisubsidy determinations). *See generally* John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984) (discussing the costs and benefits of American municipal legal procedures in light of the policy objectives sought in implementing international trade laws).

Within the present discussion, I do not consider whether tribunals created outside Article III, Section 1 also might exercise the judicial power of the *United States* in the very

c. Third Transformational Sequence: Specialized
Supranational Tribunals

In its jurisprudence of legislative courts and public rights, the Supreme Court uncovered a deep structure foundation to Article III that has helped to endow the domestic administrative state with normative coherence. The tacit knowledge of deep structure revealed in the Court's jurisprudence—that Article III is capable of supporting other court systems that share in the exercise of the judicial power—enables us to consider whether the Constitution offers conceptual support for a system of supranational aviation tribunals that meets the nation's needs in *foreign* commerce. In fact, a transformational sequence for such a supranational system may be more accessible than the sequence for legislative courts, particularly in light of how the Supreme Court has traditionally interpreted the Constitution's fluid arrangement of foreign relations with great deference and has avoided plotting fixed lines of scope and responsibility.²⁵¹

I have attempted to show that state courts and legislative tribunals can be generated as authentic repositories of Article III judicial power by engaging the deep structure principle of shared or fragmented judicial authority. Just as a pragmatic federal judiciary has adapted itself to the rise of the administrative state, there is significant evidence that Article III judges would not be temperamentally or philosophically discomfited by supranational adjudication.²⁵² The federal courts have shown great deference to the

specific sense that courts created under Article III have a well-recognized plenary power to review political branch actions that may violate the constitutional order. *See supra* text accompanying note 186; *see also Thomas*, 473 U.S. at 601 n.4 (Brennan, J., concurring) (explaining that the exercise of the Supreme Court's power of judicial review may be what restrains the exercise of legislative power). Paul Bator wrote of "multiform" agencies, such as the National Labor Relations Board and the Occupational Health and Safety Administration, which engage in policymaking, rule-formulation, and enforcement, as well as adjudication. *See Bator, supra* note 165, at 238.

251. *See, e.g.,* Jonathan I. Charney, *The United States Constitution in Its Third Century: Foreign Affairs, Distribution of Constitutional Authority: Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 805-06 (1989) (discussing traditional judicial deference toward interbranch allocations of authority in cases implicating foreign policy). *But see infra* note 337 (noting skepticism concerning a so-called political question doctrine). Indeed, from its inception, one of the most problematic features of the Constitution was the Framers' failure to specify "who had sail and who had rudder, and, most important, where is command" regarding international relations. HENKIN, *supra* note 2, at 314. The balance struck, to the extent the courts have agreed to strike it, has tended to favor the discretion of the political branches. *See generally* RESTATEMENT (THIRD), *supra* note 30, § 1, reporters' notes 3-4 (speaking largely to the political question doctrine, discussed *infra* note 337).

252. *But see supra* text accompanying notes 12-15 (discussing Justice O'Connor's wariness about the constitutional implications of supranational adjudication).

métier of arbitrator in the field of international consensual arbitration and have even tolerated arbitral dissection of that most laconic business statute, the Sherman Act.²⁵³ Justice Blackmun's borrowed observation in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*²⁵⁴ is typical of this apparent judicial open-mindedness: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."²⁵⁵

The Supreme Court's receptiveness to the application of complex United States laws by foreign arbitral panels is certainly impressive. It might even form part of an emergent federal *Realpolitik* that concedes that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."²⁵⁶ If the Court will sanction consideration of the law of the United States in this manner, segregated entirely from Article III, it clearly does not expect the federal judiciary to claim a presumptive monopoly on dispute resolution under the United States Constitution. But while federal judges may adopt a pose of internationalism when asked to honor the decisions of global arbitrators, judicial sufferance might not embrace the constitutionality of an obligatory supranational court system, including a Court of International Air Transportation, permanently seated outside Article III. Unlike virtually all legislative courts, after all, this new tribunal system would contemplate no ultimate review by a court with Article III judges.²⁵⁷

253. See *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (declaring that skepticism over the ability of foreign arbitrators to apply American maritime law "must give way to contemporary principles of international comity and commercial practice"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); see also *Shell*, *supra* note 36, at 888 (suggesting that arbitral jurisdiction effectively "privatizes" these public regulatory schemes by taking them out of the hands of domestic judges and placing them in the hands of ad hoc international adjudicators). See generally SASSEN, *supra* note 10, at 15 (concluding that international commercial arbitration has become the "leading contractual method for the resolution of transnational commercial disputes").

254. 473 U.S. 614 (1985).

255. *Id.* at 629 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (holding for the first time that mandatory forum selection clauses for foreign jurisdictions should be enforced by American courts)).

256. *The Bremen*, 407 U.S. at 9; see also Thomas W. Bark, *The Binational Panel Mechanism for Reviewing U.S.-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?*, 29 VA. J. INT'L L. 681, 706-07 (1989) (noting the popularity of international commercial arbitration as an alternative to United States courts).

257. It is important to emphasize again that Supreme Court deference to the political

The prospect of supranational adjudication, therefore, presents two distinct constitutional issues for deep structure scrutiny. First, I will consider whether specific aviation tribunals like the Open Skies Commission and the Court of International Air Transportation, contained in my proposed working model,²⁵⁸ could be assimilable at all to the United States constitutional order. And second, if such tribunals would indeed rank with state and legislative courts in wielding judicial power under the Constitution, I must examine the harder question of whether these novel institutional forms could displace the appellate hierarchy of Article III. The latter issue, as I have suggested, falls ultimately within the province of the deep structure principle of constitutional integrity and will, therefore, be considered in Part V of this Article. The question of assimilation, however, will be immediately explored using a third iteration of the deep structure principle of shared judicial authority. In this context, the transformational operation derives its "lexical" content from a foreign relations vision of the Constitution, just as the Supreme Court tethered the constitutional survival of the legislative courts to the spiraling domestic agenda of the federal government.

(1) *Sovereignty According to the Framers (and a New Paradigm)*

Traditionally, the United States has responded with deep recalcitrance to the basic question of conveying governmental power to external institutions.²⁵⁹ Congressional debates on the new World

branches across a wide spectrum of innovative legislative activity has been common in the United States constitutional system. See *supra* notes 1–2 (introducing this theme). A provision that wins the approval of both Houses of Congress and the President requires invalidation only for the most compelling constitutional reasons, especially if the statute "confronts a deeply vexing national problem." *Bowsher v. Synar*, 478 U.S. 714, 736 (1986).

258. See *supra* text accompanying note 27.

259. Paul Stephan has written about a "deeply isolationist streak in United States culture." Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 734 (1996–1997). In a recent article on international criminal tribunals, one author criticized a psychology of "reflexive resistance" to international jurisdiction among the American judiciary. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 432 (1998). For an example of legislative disfavor that long preceded the 1994 WTO debates, see generally *Membership and Participation by the United States in the International Trade Organization: Hearings on H.R. Res. 236 Before the House Comm. on Foreign Affairs*, 81st Cong. (1950) (Sup. Docs. No. Y4.F76/1:In8/20) (rejecting United States participation in the proposed global trade body). The most prominent recent example of recalcitrance was the President's decision in 1985 to terminate American recognition of the compulsory jurisdiction of the International Court of Justice (ICJ). See U.S. Dep't of State, Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, *reprinted in* 24

Trade Organization, to take a still-warm example, protested the imagined foreign knavery of the proposed organization by invoking the Constitution as a cipher for national sovereignty.²⁶⁰ Sovereignty, in this traditional understanding, means the state's "right to do as it wishes, particularly within its own territory, free of external constraint or interference."²⁶¹

Despite Americans' emphasis on protecting their sovereignty, however, neither the American Declaration of Independence²⁶² nor the United States Constitution²⁶³ appeals explicitly to the traditional

I.L.M. 1742, 1743 (1985). For an analysis of American practice with respect to both the ICJ and its predecessor, see generally Douglas J. Ende, Comment, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New U.S. Declaration*, 61 WASH. L. REV. 1145 (1986).

260. See, e.g., 140 CONG. REC. 10,583 (1994) (statement of Sen. Jesse Helms) (describing the WTO as "a United Nations for world trade, combined with a world court" and as "a potential assault on the sovereignty of the United States of America"). It has also been emphasized that the Constitution, while making no direct reference to sovereignty, includes no plan or provision for merging "the Union" with other nations. See James H. Ramsey, Note, *Relinquishing Domestic Sovereignty Through Polypolitical Treaty in the Federal Republic of Germany and the United States*, 3 WILLAMETTE BULL. INT'L L. & POL'Y 143, 160 (1995). But cf. U.S. CONST. art. IV, § 3, cl. 1 (providing that Congress may admit new states to the Union).

261. Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CAN.-U.S. L.J. 9, 10 (1994). In this sense, the word "sovereignty" serves as a surrogate for "statehood," "independence," "equality," "autonomy," and "self-determination." *Id.* at 12; see also Ruth Lapidoth, *Redefining Authority: The Past, Present, and Future of Sovereignty*, HARV. INT'L REV., Summer 1995, at 8, 9 (discussing the emergence of an absolute conception of sovereignty).

262. The opening paragraph of the Declaration of Independence announced a revolutionary people assuming among the powers of the earth "the separate and equal station to which the Laws of Nature and of Nature's God entitle them." THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776). The Declaration's embrace of a sovereignty defined by reference to other powers suggests that the notion of state, rather than popular, sovereignty, was intended. See *infra* note 263.

263. As an initial matter, we need to distinguish state sovereignty from its junior sibling, popular sovereignty. As Anne-Marie Slaughter has argued, in the constitutional democracy established by the Framers, "sovereignty lies with the people," who confer law-making authority on the federal government. See *Uruguay Round Senate Hearings*, *supra* note 8, at 287 (reprinting a letter from Anne-Marie Slaughter to Sen. Ernest Hollings (Oct. 18, 1994)); see also Steven Lee, *A Puzzle of Sovereignty*, 27 CAL. W. INT'L L.J. 241, 249 (1997) (mentioning the "familiar idea" that ultimate political power rests with the electorate). Slaughter derives her assertion of popular sovereignty from the Constitution's opening invocation, "We the People of the United States." See *Uruguay Round Senate Hearings*, *supra* note 8, at 287 (reprinting a letter from Anne-Marie Slaughter to Sen. Ernest Hollings (Oct. 18, 1994)); see also Calabresi, *supra* note 15, at 1377 (celebrating the "majesty of the Preamble's ringing declaration of popular sovereignty"). Other constitutions have conflated the ideas of state and popular sovereignty, on the probable premise that *the state's* sovereignty is actually the external expression of the internal sovereign authority already conferred by "popular" action. See, e.g., IR. CONST. art. I ("The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to

dogmas of state or national sovereignty. In keeping with its practical bent, the Constitution features a terse preamble, heralding the perfect Union, that yields quickly to the structural apparatus of the people's government. Thereafter, the *de jure* incidents of an externally conditioned sovereignty do appear—the sweep of legislative powers to tax and spend, to raise armies and defend the territory, to make treaties, and to regulate foreign commerce.²⁶⁴ The “powerful idea” of sovereignty,²⁶⁵ however, makes no mark *expressis verbis* on the text, not even as a polemical flourish.²⁶⁶

Thus, the Framers, keen acolytes of the Law of Nations, must have felt secure that their new Union would enjoy a natural external sovereignty.²⁶⁷ Since the time of the Framers, sovereignty has held its place at the intellectual core of public international law.²⁶⁸ A subtle mutation of meaning has occurred, however, particularly in the post-Communist decade since 1989.²⁶⁹ Formerly freighted with the notion

develop its life, political, economic and cultural, in accordance with its own genius and traditions.”).

264. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (cataloguing the external powers of government, which would have vested even without explicit enumeration in the Constitution “as necessary concomitants of nationality”); see also Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 412 (1996) (analyzing the distinctions drawn in *Curtiss-Wright* between domestic and foreign affairs).

265. Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the U.S. Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559, 623 (1996).

266. See *id.* at 625 (noting German political theorist George Jellinek's description of sovereignty as a polemical idea). The Framers, moreover, were hardly unaware of the word's polemical freight. The states had asserted precisely this kind of internecine autonomy under the Articles of Confederation: Article 2 of those Articles provided that “[e]ach State retains its sovereignty, freedom, and independence.” ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. 2, reprinted in MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 263 (1976); see Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 636 (1997) (discussing the states' insistence on sovereignty in framing the Articles of Confederation).

267. See generally *Curtiss-Wright Export Corp.*, 299 U.S. at 318 (attributing power to exercise the incidents of external sovereignty, the “supreme will,” ultimately not to the Constitution but to the law of nations). In the time of the Framers, the law of nations was thought to be (at least in part) the product of “natural law.” See R.J. SMITH, *THE FACTUAL GUIDE TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 222–23 (1995) (discussing the works of classical international law scholars and publicists).

268. See, e.g., Jean Bethke Elshtain, *Sovereign God, Sovereign State, Sovereign Self*, 66 NOTRE DAME L. REV. 1355, 1355 (1991) (commenting that sovereignty remains essential for full membership in international society). But see Schaefer, *supra* note 94, at 329 (noting some international scholars' readiness to discard use of the term “sovereignty” because of semantic confusion).

269. The coming of a new world order had been heralded much sooner, however. Senator Wayne Morse, speaking on the compulsory jurisdiction of the International Court of Justice, counseled his Senate colleagues in 1946 that “the narrow interpretations of

of excluding all others,²⁷⁰ the newest version of the doctrine of sovereignty rests on a paradigm of interaction.²⁷¹ The globalization of markets is only one among several keystones of the paradigm. The reported demise of the nation-state, for example, has not occurred. On the contrary, the global club of sovereigns has almost doubled since the founding of the United Nations.²⁷² The international system, therefore, has a new morphology of rising trade activity among a larger number of states.²⁷³ Transnational process,²⁷⁴ to modify Harold Koh's useful term, has remodeled the sovereignty doctrine to emphasize its neglected counter-side: sovereignty is not only a claim of freedom from external interference, it is also the liberty to *permit* some kinds of external interference.²⁷⁵ That insight revives a timeworn pronouncement of the United States Supreme Court, which stated in 1938 that international treaties and conventions necessarily restrict to some extent the freedom of action that defines

sovereignty that have heretofore existed in international law are going to have to be broadened." *ICJ Hearings*, *supra* note 220, at 32 (statement of Sen. Wayne Morse).

270. See Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 1, 43 (Apr. 9) (separate opinion of Judge Alvarez) (describing sovereignty as encompassing "the whole body of rights and attributes which a state possesses in its territory, *to the exclusion of all other states*" (emphasis added)).

271. As Richard Bilder has suggested, "this entire classical model of international governance—for which the term 'sovereignty' appears in one sense to have become a code-word or symbol—is under challenge." Bilder, *supra* note 261, at 12–13; see also Lapidot, *supra* note 261, at 10–11 (analyzing the decline of absolutist conception of sovereignty provoked by worldwide interconnectedness, but also *within* traditional monolithic state structures through diffusion of state power to substate ethnic, social, and religious groups).

272. See Bilder, *supra* note 261, at 13.

273. *But cf.* FRANCK, *supra* note 20, at 477 (providing contrarian reference to an "anarchic rabble" of states). Another recasting of traditional sovereignty has emphasized its dispersal to transnational private regimes, new supranational organizations (such as the WTO and the European Union), and the various international human rights codes. Sassen has described a "decentering" of sovereignty, whereby all of these neoteric institutions constrain the autonomy of national states through a "web of obligations." See SASSEN, *supra* note 10, at 29, 31. In an extreme rendering of this paradigm, economic citizenship is held not by citizens but by the new global capital markets, which exercise the accountability functions associated with citizenship. See *id.* at 38–39. A decentered reading of sovereignty, however, would be less an erosion of the traditional form than its transformation to new locations and contexts. See *id.* at 31.

274. See Koh, *supra* note 95, at 183–84 (describing transnational legal process as a non-traditional cumulative theory of how public and private actors—states, international organizations, transnational corporations, nongovernmental organizations, and private citizens—"interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law").

275. See SASSEN, *supra* note 10, at 27–28 (describing how the nation-state interacts deeply with the global economy, especially in internalizing legal forms that implement global processes).

sovereignty.²⁷⁶ In other words, if sovereignty now expresses a reanimated sense of autonomy, it does so in the guise of a perfectly rational paradox: its existence also is defined by its capacity to be given away.²⁷⁷

The new insight is more accurately a shift in focal point rather than a fundamental reconstruction of the image of sovereignty.²⁷⁸ Mutual consent by sovereign states was the catalyst for the entire international political system.²⁷⁹ For the purposes at work in the present Article, the modern view places the accent on the trade value of sovereignty rather than on its old association with consensual statecraft.²⁸⁰ It is a dynamic, purposive view, rather than the kind of

276. See *United States v. Bekins*, 304 U.S. 27, 52 (1938); see also WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW* 82 (1991) (arguing that the "conclusion of treaties is the exercise of an attribute of sovereignty, not a limitation"); Jonathan T. Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN.-U.S. L.J. 39, 40 (1994) (commenting on the impossibility of complete and absolute sovereignty when states enter treaties with other states); Farah Hussain, Note, *A Functional Response to International Crime: An International Justice Commission*, 70 ST. JOHN'S L. REV. 755, 772 (1996) (stating that the concept of an absolute sovereignty is obsolete and concluding that every time a nation enters into a treaty it cedes some of its rights, but gains something in return that better serves its people).

277. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995) ("Sovereignty, in the end, is status—the vindication of the state's existence as a member of the international system.").

278. See Martti Koskenniemi, *The Wonderful Artificiality of States*, in *THE AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 88TH ANNUAL MEETING: THE TRANSFORMATION OF SOVEREIGNTY* 22, 23 (1994) (noting the sociological view that sovereignty in the traditional sense has become illusory as states enter economic, military, and ecological interdependence, and the ethical view that regards statehood as morally indefensible egotism and an inessential, historical accident that should have no moral significance in measuring our duties to people in general).

279. See Lee, *supra* note 263, at 256 (citing LOUIS HENKIN, *INTERNATIONAL LAW* 16 (3d ed. 1993)).

280. See C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 123 (1958) (observing that the primary goal of "progressive thought in the field of international law since 1919 has been to subdue . . . sovereignty in the interest of the rule of law"). The international trade policy of the United States since the WTO negotiations has been focused by *congressional mandate* toward substitution of a rules-based system, with disputes resolved through common *external* institutions, for the power-centered, *internal* unilateralism reflected in the sanctions apparatus of the trade statutes. See JACKSON, *supra* note 6, at 109–11.

Inevitably, there is an evolutionary aspect to the success of global rulemaking. If a culture of compliance emerges, the organization will thrive, and the organization's applications and declarations of law will bind the member states. "The resurgence of rules and procedures in the service of an organized international order is the legacy of all wars, hot or cold." Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993). It was the sovereign will of the United States, in fact, which *appeared* to promote this paradigm transformation in preparation for a future in which American economic hegemony would no longer define

zero-sum game of Metternichian diplomacy.²⁸¹ In this modern view, sovereignty is not history's defiant *noli me tangere*;²⁸² in utilitarian terms, it is meant *for something*.²⁸³ Systems of open trade and non-

most of the vectors of international economic relations.

281. See Schaefer, *supra* note 94, at 332. Accordingly, except as bounded by the Constitution, United States delegations are free to volunteer the nation's consent for whatever diplomatic purpose they might have. The United States could, for example, properly award privately owned airlines the right of standing before the institutions proposed in the aviation model. See generally Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996) (proposing that nongovernmental organizations, including business groups, should have standing before WTO dispute settlement tribunals); St. Korowicz, *supra* note 41, at 533 (making a case for limited recognition of the legal personality of individuals before tribunals applying international law).

282. Literally, "touch me not." According to the evangelist John, these were Christ's words when he was approached by Mary Magdalene after the Resurrection. See *John* 20:17. On the growth of the nation-state, see generally HARRY G. GELBER, *SOVEREIGNTY THROUGH INTERDEPENDENCE* 5, 7 (1997) (suggesting that states emerged above all as organizations for the management of—primarily military—power and that power politics, in turn, is "the politics of not being overpowered").

283. The idea of the new sovereignty as a master key to economic betterment is scarcely threatening. Perhaps, however, it may have a Panglossian feel, the kind of thing for which international lawyers are routinely chided by their realist colleagues. See Stephan, *supra* note 259, at 733–34 (chastising international lawyers for their smug confidence that "human progress marches in step with gains in the extent and significance of settled international rules"). After all, states that solemnly intone *pacta sunt servanda* in their relationships with other states have shown little hesitation in invoking a countervailing sovereign right to sever those ties if their bargains threaten to sour. While arguably the "prisoner's dilemma" equilibrium, see Shell, *supra* note 36, at 861, helps to deter violation or renunciation of treaties, in practice states *do* exercise rights of withdrawal in response to sudden domestic micropressures. The American air talks delegation mentioned in my aviation treaty model, for example, see *supra* text accompanying note 31, would be well aware of France's denunciation of its bilateral air transport agreement with the United States in 1995, a tactic adopted to protect Air France against rising market penetration by much larger American transatlantic carriers. See HAVEL, *supra* note 23, at 181–82.

What response does the new sovereignty have to the old pattern of scofflaw states? One response is the subject of this Article: in the interactive paradigm of sovereignty, state consent can escalate to a level at which elements of the state's autonomy are transferred to the supranational level, thereby checking the right—and the power—to withdraw from the treaty system. See Weiler & Haltern, *supra* note 102, at 419 (arguing that the constitutive act "may explicitly or implicitly extinguish the separate existence of the constituent units"). The United States Constitution was itself a centralizing counterthrust to the foreign relations pusillanimity of the Articles of Confederation. See *Michelin Tire Corp. v. Wages*, Tax Comm'r, 423 U.S. 276, 283 (1975) (noting that a "compelling reason" for the Constitutional Convention of 1787 was that the Articles left the individual states free to burden commerce with foreign countries "very much as they pleased"); Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1285 (1996) (concluding that eliminating the states' ability to act on the world stage was a "principal motivation" for replacing the Articles of Confederation); *supra* note 97 (discussing Bruce Ackerman's theory of post-Confederation Union).

national adjudication are not established in defiance of sovereignty, as some popular commentators like to assert;²⁸⁴ instead, they are emanations of that sovereignty.²⁸⁵ And the interactive paradigm of sovereignty, as we have seen, meets no impediment in the surface structure of the Framers' Constitution.

(2) *International Trade in the Constitution: Treaty and Foreign Commerce Powers*

The theme of constitutional flexibility in external trade relations, introduced by the new paradigm of sovereignty, must now be pursued more deeply. The Framers, for example, made treaties with foreign nations co-equal to congressional laws without restricting treaties' potential field of application.²⁸⁶ They mentioned foreign commerce only iconically²⁸⁷ and did not seek to orient the specific commercial policies of successive American governments toward either protectionism or mercantilism. In building a transformation for supranational tribunals, therefore, I will next consider the treaty and the government's role in foreign commerce as the primary foreign trade features of the Constitution's surface structure. In positing a transformation that will map supranational tribunals to Article III, I will look, in a phrase, to the transformational power of the "International Trade Constitution."

(a) The Special Discourse of Treaties

The conceptual landscapes inhabited by legislative courts and

284. See, e.g., PATRICK J. BUCHANAN, *THE GREAT BETRAYAL: HOW AMERICAN SOVEREIGNTY AND SOCIAL JUSTICE ARE BEING SACRIFICED TO THE GODS OF THE GLOBAL ECONOMY* (1998) (arguing that liberal free trade affronts U.S. economic and political sovereignty).

285. See Luzius Wildhaber, *Sovereignty and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 425, 442 (R. St. J. MacDonald & Douglas Johnston eds., 1983); see also David R. Purnell, *1993 International Trade Update: The GATT and NAFTA*, 73 *NEB. L. REV.* 211, 226 (1994) (arguing that the abstraction of sovereignty is the supreme tautology and noting that sovereignty would be a "meaningless shibboleth" if all it meant were that states could indefinitely resist supranational settlement); Rogoff, *supra* note 265, at 623 (asserting that "auto-limitations" define the existence of sovereignty).

286. See U.S. CONST. art. VI, cl. 1 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."); *infra* notes 290-94 and accompanying text (contrasting the procedural requirements for approving treaties with those for enacting laws and noting that the substantive scope of treaties is not defined by the enumerated powers of Article I).

287. See U.S. CONST. art. I, § 8, cl. 3 (stating Congress's power "[t]o regulate Commerce with foreign Nations").

supranational tribunals are not as distant from one another as might first be imagined. Although we tend to think of two constitutional fields of operation, a domestic and a foreign, the Framers did not compartmentalize their thinking in this way. The foreign commerce power, as they conceived it, contributed as much to domestic welfare as the general powers of the Congress to tax and appropriate.²⁸⁸

Nevertheless, the constitutional design incorporates one paradigm of process, the international treaty, that represents a conscious departure from the domestic route to legislation.²⁸⁹ Under

288. See THE FEDERALIST NO. 22, at 177 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (advocating a general power “to regulate commerce” and describing the commerce power *inter alia* in terms of a capacity to form “beneficial treaties with foreign powers”). The Constitution, in its pragmatic way, grants Congress the right to regulate “foreign commerce” as one of a dozen or so taxonomically undifferentiated external and domestic powers of government. See U.S. CONST. art. I, § 8, cls. 1–17.

289. See *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) (mem.) (noting that a treaty is *sui generis*, not just another law). Similarly, Alexander Hamilton conceived of the treaty as an entirely unique species of power—neither legislative nor executive in nature, but partaking of both through the management of foreign negotiations (executive power) and the importance of the operation of treaties as laws (legislative power). See THE FEDERALIST NO. 75, at 425 (Alexander Hamilton) (Isaac Kramnick ed., 1987); see also RESTATEMENT (THIRD), *supra* note 30, § 302, cmt. c (stating that international law knows no limitation on the purpose or subject matter of international agreements, other than that they may not conflict with a peremptory norm of international law). See generally Malvina Halberstam, *A Treaty Is a Treaty Is a Treaty*, 33 VA. J. INT’L L. 51 (1992) (discussing and rejecting the so-called “dual treaty” rule that distinguishes between the domestic and international effects of treaty obligations of the United States); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310 (1992) (exploring policy considerations relating to the effect of a treaty in United States domestic law and arguing against the direct application of treaties in the present state of public international law).

Under United States constitutional law, the treaty proper is a product of executive/legislative collaboration (i.e., the President acts with the advice and consent of the Senate) under Article II of the Constitution. But the American system has evolved other forms of what McDougal and Lans called, generically and tendentiously, “the agreement,” including the sole executive agreement and the congressional/executive agreement. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 186 (1945). A treaty may also emerge as the joint product of both Houses of Congress and the President, a mixed form that has attracted scholarly support. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 802–03 (1995) (arguing that a change in constitutional practice occurred in the aftermath of the Roosevelt New Deal that conventionalized the idea of a two-House treaty); see also Stephan, *supra* note 259, at 723 (concluding that there are no satisfactory candidates for a constitutional definition of a treaty in determining to which international agreements and norms the Senate-only rule applies). See generally Jack S. Weiss, Comment, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. REV. 1533, 1535–36 (1991) (describing President George Bush’s “four options to bring the chemical weapons agreement into force”). Notably, despite its ancient provenance, the treaty gained its widest usage and importance in the late twentieth century. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion*

the United States Constitution, treaties are different from legislation in at least three respects: they are approved by only one House of Congress (the Senate), they cannot be adopted by Congress without the President's consent,²⁹⁰ and they assume the participation of foreign countries in the United States law-making process.²⁹¹ These features give the treaty almost the status of a distinct department of government—a collaboration of the executive and legislative branches²⁹² that also requires the consent of a foreign nation.²⁹³ To

and Operation of Treaties, 67 CHI.-KENT L. REV. 571, 641 (1991).

290. U.S. CONST. art. II, § 2, cl. 2. Compare this absolute requirement of consent, which does not allow for a congressional override of presidential authority, with ordinary legislation, in which Congress has the power to override a presidential veto. *See id.* art. I, § 7, cl. 2 (stating Congress's power to override a presidential veto of legislation by a two-thirds majority of both Houses).

291. John Jay observed that "a treaty is only another name for a bargain, and . . . it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it." THE FEDERALIST NO. 64, at 378-79 (John Jay) (Isaac Kramnick ed., 1987).

292. This is one of the paradoxes of the Constitution. If Congress is the recipient of "all legislative powers herein granted," how do we conceptualize the treaty instrument, which is "made" by the President, by and with the advice and consent of the Senate, and which is (notwithstanding the last-in-time doctrine) functionally co-eminent with laws made under the Constitution? Is the "President-and-Senate," for purposes of treaty-making, a co-ordinate legislative branch? *Cf. Goldwater*, 617 F.2d at 720 (MacKinnon, J., dissenting in part and concurring in part) (observing that the treaty power seems to draw in equal measure on the presidential strength in negotiations and the legislative strength in granting the resulting product the status of a law). Steven Calabresi has suggested that exercises of government power can be characterized among the three departments by their procedural requirements. *See Calabresi, supra* note 15, at 1391. In this analysis, bicameralism and presentment indicate the legislative power, case or controversy litigation manifests the judicial power, and any government action taken when these procedures are absent is an exercise of the executive power. *See id. But cf. supra* text accompanying note 165 (arguing that the *judicial* power is the power least identified by process in the Constitution). The treaty, with its hybrid executive/legislative form, fits uneasily—if at all—into Calabresi's scheme. Moreover, this kind of neat partitioning takes little account of the (constitutional) effects of inter-branch governmental innovation.

293. *See Goldwater*, 617 F.2d at 721 (MacKinnon, J., dissenting in part and concurring in part) (quoting JEFFERSON'S MANUAL, RULES AND PRACTICES, House of Representatives, 96th Cong., § 599 (1979)). This is a striking feature of the treaty that was recognized by the Framers: the requirement, by its very nature, that it involves a non-constituent of the American constitutional order, namely, a foreign nation. Foreign commerce, for example, "by its nature implies the involvement of another sovereign." William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE L. REV. 1315, 1324 (1992); *see also* THE FEDERALIST NO. 75, *supra* note 289, at 425 (asserting that these are agreements "between sovereign and sovereign"). Accordingly, if Congress wants to use its Article I legislative powers to regulate the conduct of foreign commerce by other nations, it will be limited to unilateral declarations of "policy," or unilateral exactions of tariffs and tariff equivalents. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (codified as amended at 49 U.S.C. §§ 1301-1302, 1371-1386, 1482, 1502-1508 (1994)), was

that precise extent, the Framers did not define the substantive scope of constitutional treaty-making either by the enumerated powers that bind Congress under Article I of the Constitution, or by the cloudy reaches of the executive power under Article II.²⁹⁴ Consequently, much constitutional ink has been spilled in consideration of the so-called Bricker question—the capacity of treaties to be used for purposes that might lie beyond the federal government’s remit of attributed powers.²⁹⁵ The Bricker debate is both an expression of the

an example of unilateral, non-prescriptive congressional policymaking in foreign commerce. Designed to encourage deregulation in the global air transport industry, it granted permissive authority to the President for a more flexible regime of pricing and route allocation, but could not follow the domestic deregulation statutes by decreeing a phased elimination of regulatory control in the international skies. Consequently, programmatic goal-setting took precedence over hard law. See generally HAVEL, *supra* note 23, at 159–60 (noting that Congress was confined to a kind of “unilateral declaration of deregulation” in the international sphere).

294. The early ratification debates on the treaty power, though nominally guided by the law of nations, nonetheless disclosed unease that the power’s scope as a royal prerogative had been virtually without limit. See 3 STATE CONVENTION DEBATES, *supra* note 146, at 502. Patrick Henry, who argued that treaties would have more force in the United States “than in any part of Christendom,” saw no restraint on using a treaty to subvert the Constitution itself. *Id.* at 500, 504. Inevitably, repeated invocation of the more abstract idea of the “Law of Nations” created the sense that international law, the general “law of nations,” was superior to the individual law of any one nation, and this tension pervaded the ratification debates. See *id.* at 502. Perhaps it was to deflect imperial pretensions that the Framers eventually divided the treaty power dexterously between the executive and the legislature in Article II. See generally Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 *PERSP. AM. HIST.* 233 (new ser. 1984) (discussing the complex and unclear origins of the Framers’ decision to split the treaty power between the Senate and the President). The supermajoritarian Senate vote “did not affect the *scope* of the treaty power, but only made ratification of treaties more difficult.” *Edwards v. Carter*, 580 F.2d 1055, 1060 (D.C. Cir. 1978) (emphasis added). See generally RESTATEMENT (THIRD), *supra* note 30, § 303, cmt. b (stating that the scope of U.S. treaty power is limited only by constitutional considerations). Congressional ambivalence about the scope of the treaty power persists, however, as shown by the practice of attaching reservations to treaties to indicate that the Constitution takes precedence. For example, the Senate attached a reservation to the Genocide Convention of 1948 which states that “[n]othing in the Convention requires or authorizes legislation or other action by the United States prohibited by the Constitution of the United States as interpreted by the United States.” COVEY T. OLIVER ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 761 (4th ed. 1995). The Supreme Court, too, has had moments of existential hesitation. See, e.g., *United States v. Minnesota*, 270 U.S. 181, 208 (1926) (mentioning its practice of regarding treaties as “usually subject to the general limitations in the Constitution” (emphasis added)).

295. In its initial, undiluted incarnation (submitted in 1951), the Bricker Amendment, sponsored by Senator John W. Bricker, would have amended the Supremacy Clause, U.S. CONST. art. VI, cl. 2, to provide that no treaty or executive agreement could be made “respecting the rights and freedoms of citizens of the United States recognized in [the] Constitution [or] the character and form of government prescribed by the Constitution and laws of the United States.” S.J. Res. 102, 82d Cong. (1951), *reprinted in* DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER’S*

enormous potential scope of the treaty power and an admonishment that legislation by treaty can provoke a possible violation of the deep structure principle of constitutional integrity.²⁹⁶

Because the treaty is the joint product of sovereign nations, it requires a form of legal discourse that acknowledges a much wider field of potential application than governments may enjoy, or be constitutionally entitled to enjoy, in their domestic law-making.²⁹⁷

POLITICAL LEADERSHIP app. A at 221 (1988). Later amendments progressed through more or less restrictive attempts to cabin the reach of the treaty power as a viable substitute for the domestic constitutional processes of legislation and adjudication. In 1952, for example, a revised version of the proposal would have prohibited the vesting "in any international organization or in any foreign power" of the legislative, executive, or judicial powers of the United States. S.J. Res. 130, 82d Cong. (1952), reprinted in TANANBAUM, *supra*, app. C at 222. The basic thrusts of the evolving formulas were to deny the supremacy of treaties or executive agreements over state or federal law (including the Constitution itself) and to provide that a treaty normally would have no force in domestic law without implementing legislation. See Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1465 (1994); see also Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 703-04 (1998) (detailing reasons for isolationists' support of this type of legislation in the 1950s).

296. Supporters of the Bricker Amendment tried to demagogue the domestic legal effects of hortatory global instruments like the Universal Declaration of Human Rights. As Duane Tananbaum has recounted, American Bar Association President Frank Holman warned the Utah Bar Association in 1948 that the Declaration's provisions proclaiming freedom of residence and freedom of movement "might easily be interpreted as authorizing some agency of the United Nations like the World Court to nullify our immigration laws and enable large numbers from the over-populated areas of China, India, and of Indonesia to move into the United States." TANANBAUM, *supra* note 295, at 10. Though the issue is far from finally settled, the Supreme Court pronounced obiter dictum in *Reid v. Covert* that "the United States is entirely a creature of the Constitution," so that "no agreement with a foreign nation can confer power on the Congress [there, to provide for non-jury military trial of dependents accompanying United States armed forces in Britain and Japan] or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. 1, 5-6, 16 (1956). The Court found nothing in the text of the Supremacy Clause nor any suggestion in the founding debates that intimated that treaties—and the laws enacted under them—would not have to comply with the provisions of the Constitution. See *id.* at 26; S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 862 (1992); see also 2 HYDE, *supra* note 32, § 494, at 9 ("An unconstitutional treaty must be regarded as void."). Thus, a treaty which purported to unseat a state governor or to alter substantially the machinery of state government would seem manifestly at variance with the requirements of the Constitution. See 2 HYDE, *supra* note 32, § 497, at 12 n.1. For a recent treatment of these issues, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, *passim* (1998).

297. See Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1475 (1985). Chayes has tried to show that lawyers have been myopic about international law by focusing too narrowly on court adjudication for every dispute, including inter-branch constitutional rivalries, that pervades the domestic legal system. In Chayes's analysis, law as a system of allocating public powers, the stuff of inter-branch disputes, was by no means a creature of only courts and judges. See Abram Chayes, A

This expansive view²⁹⁸ looks beyond the enumerated categories of substantive legislative power, for example, that bind the United States Congress under Article I of the Constitution. In fact, when the Framers engineered the treaty power into the superstructure of their new constitution, but defined it formally rather than substantively as a competing source of positive law,²⁹⁹ they encouraged a sanguineness about the scope of law-making under the treaty power.³⁰⁰ The Framers' implicit understanding of a new legal discourse for foreign relations, and with respect to the broad scope of treaty-making, is likewise revealed in their citation to the "Law of Nations" among the enumeration of powers in Article I.³⁰¹

Common Lawyer Looks at International Law, 78 HARV. L. REV. 1396, 1413 (1965). Chayes's intent in his 1965 article, to justify the lack of congestion in the World Court's docket, appears dated today as the concept of supranational adjudication plants its roots in the more fertile soil of the post-Communist world trade order.

298. In the precise context of supranational adjudication, the internationalist cast of the Constitution inspired Thomas Raeburn White, in 1908, to speak expansively of a "very reasonable assumption that our fathers [sic] intended the grant of judicial power to be exercised within the limits of the United States to be subject to the great and unlimited power of making treaties which was to regulate our relations with all the peoples of the earth." White, *supra* note 32, at 506.

299. There is no doubt that the Framers intended this result; they *wanted* treaties to have "the force of law." THE FEDERALIST NO. 75, *supra* note 289, at 425; see Rakove, *supra* note 294, at 264, 280. Indeed, Rakove explains that this underlying recognition that treaties were legally binding would alone have prohibited the Convention from nakedly empowering the President to make them on his own authority. See Rakove, *supra* note 294, at 266-67, 285-86.

300. The fact that the Constitution embraced the treaty even though the Framers were aware of its inherent frailty compared with the force of domestic statutory law is a peculiarity in their plan of government. In a Machiavellian mood, Hamilton, for example, wrote of how compacts between nations, however precise and comprehensive, were "subject to the usual vicissitudes of peace and war, of observance and nonobservance, as the interests or passions of the contracting powers dictate." THE FEDERALIST NO. 15, *supra* note 39, at 148; see *supra* note 283 (discussing the subject of scofflaw states). It was an "afflicting lesson" for governments, Hamilton reasoned, "how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith." THE FEDERALIST NO. 15, *supra* note 39, at 148. Speaking later of the importance of the supremacy of the Union's laws, Hamilton argued that supremacy was required because otherwise the new constitution would be "a mere treaty, dependent on the good faith of the parties." THE FEDERALIST NO. 33, at 225 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

301. U.S. CONST. art. I, § 8, cl. 10 (empowering Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"). For an interesting account of the law of nations in late eighteenth century jurisprudence, see generally Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 823 (1989) (commenting that "[i]mplicit in this widespread usage was acceptance of the validity of the law of nations as knowable doctrine"). The existence of a knowable law of nations, divined in large measure through the work of scholars such as Vattel and Grotius, was displayed vividly in contemporary judicial opinions. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224, 226-30 (1796)

Even more radical, given their discernible skepticism about the reliability of treaty partners, is the Framers' instruction in Article VI of the Constitution, dubbed the Supremacy Clause, that treaties are to be accorded in domestic law a status at least equivalent to statutes.³⁰² While both too much and too little can be made of the mention of treaties in the Supremacy Clause—as Jim Chen points out, a treaty has no greater constitutional “positivistic value” than a valid statute³⁰³—nevertheless, it has *at least* that equivalency, that coequal status,³⁰⁴ which allows a latitudinarian view of the treaty

(Chase, J.) (addressing the laws of war, including confiscation and restitution of property between belligerents); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (accepting that the United States, by its place among the nations of the earth, had “become amenable to the laws of nations”). Despite its archaic flavor, the phrase continues to be used in modern judicial opinions. See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (confirming that the language of the law of nations is always to be consulted in the interpretation of treaties).

302. U.S. CONST. art VI, § 2; see also *United States v. Minnesota*, 270 U.S. 181, 208 (1926) (“The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress . . .”). There are, however, two doctrines of judicial interpretation that have upset the legal parity that the Framers must have contemplated. First, following the opinion of Chief Justice John Marshall in *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), treaties of the United States either require no further congressional action (they are self-executing and can be invoked directly as binding federal law in the domestic courts) or they require implementing legislation (they are non-self-executing and create no enforceable rights or obligations under federal law). See *Spieß v. C. Itoh & Co.*, 643 F.2d 353, 355–56 (5th Cir. 1981); George Slyz, Note, *International Law in National Courts*, 28 N.Y.U. J. INT’L L. & POL. 65, 78 (1995–1996) (distinguishing between self-executing and non-self-executing treaties). The option to make treaties non-self-executing has proven a boon to Congress in restraining the domestic force of international commitments such as the WTO and human rights charters. See, e.g., 138 CONG. REC. S8068–72 (daily ed. April 2, 1992) (declaring the International Covenant on Civil and Political Rights to be non-self-executing); see also Schneider, *supra* note 42, at 597 (commenting that the idea that international law might differ from or exceed the reach of U.S. domestic law “remains anathema to many members of Congress and other citizens”).

A second judicial doctrine, known as the last-in-time principle, also sits uneasily with the “monist” pretensions of Article VI of the Constitution. Simply put, the principle states that the latest expression of sovereign authority prevails, so that an international obligation can be superseded by a later inconsistent federal statute. See *The Head Money Cases*, 112 U.S. 580, 599 (1884) (denying treaties any superiority over an act of Congress, “which may be repealed or modified” by acts of a later date). *But cf. Vazquez*, *supra* note 41, at 1114 (indicating the existence of strong evidence that the Framers intended that treaties be “lexically superior” to statutes).

303. Chen, *supra* note 195, at 1462.

304. So, paradoxically, the last-in-time doctrine, see *supra* note 302, is a sign of equivalency with domestic legislation. See *Riesenfeld & Abbott*, *supra* note 289, at 591; see also Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT’L & COMP. L. 15, 20–21 (1996) (discussing the implications of the last-in-time doctrine with respect to obligations of United Nations membership). It should not be forgotten that a treaty is, by itself, what John Jay called “[a] constitutional act[] of power,” with as much legal validity and obligation as if it proceeded from the legislature. See THE

power that otherwise (in a truly dualistic system, for example³⁰⁵) would be more questionable.³⁰⁶

(b) The Constitutional Centrality of Foreign Commerce

The indeterminate contours of the treaty power mirror the unsettled and unilaterally uncontrollable agendas of foreign relations and foreign commerce.³⁰⁷ But a potentially boundless substantive scope for the treaty power, while practically efficient, cannot ipso facto sanction species of inter-sovereign association, such as a set of supranational aviation tribunals, which are unfamiliar to the American law-maker.³⁰⁸ Mistrusting a transfer of sovereign judicial authority to an external tribunal that would directly affect United States airline corporations and passengers, the law-maker (Congress) would demand that the transfer be couched as an exercise of ordinary legislative powers rather than as an emanation of the global reach of the treaty power. In this political context, the project for

FEDERALIST NO. 64, *supra* note 291, at 378; *see also* Hoke, *supra* note 296, at 839 (referring to treaties as a favored class of law and as supreme law under Article VI of the Constitution).

305. *See generally* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 83–84 (2d ed. 1993) (dividing municipal legal systems into “monist,” viewing international and domestic legal orders as a unity, and “dualist,” treating national and international legal systems as separate, “each with its own power to settle the effect any rule of law might have within it”). The American constitutional system exhibits elements of both monism and dualism. *See supra* note 302.

306. *See* Riesenfeld & Abbott, *supra* note 289, at 591–94; *supra* text accompanying notes 39–41 (discussing standing of individuals to appear before proposed supranational aviation tribunals); *see also* Vazquez, *supra* note 41, at 1084–85 (arguing that, through the Supremacy Clause, the Framers gave treaties the status of law to ensure that they would operate directly on individuals, supplanting the traditional view that treaties, as international instruments, are operative only on “states as bodies politic”).

307. *See supra* note 293 (discussing the predominantly unilateral effects of American international air transport competition legislation).

308. Supranational adjudication must also contend with another field of resistance that lies beyond the purely legal and constitutional issues treated here. As I noted in introducing the discussion of sovereignty, *see supra* text accompanying note 259, there has long been a strong public distrust of adjudication by tribunals made up of non-American judges, even though the United States has historically accepted this kind of adjudication (albeit without the absolute prospective bindingness proposed for the supranational aviation model) in numerous forms. *See Strengthening the International Court of Justice: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong. 24–25 (1973) (Sup. Docs. No. Y4.F76/2:In8/42) (discussing the history of United States acceptance of foreign adjudication beginning with the Jay Treaty of 1794 between the United States and Great Britain); *supra* text accompanying note 40 (distinguishing the proposed aviation tribunals from situations in which the United States “mediates” the presence of individuals before an international tribunal). *See generally* RESTATEMENT (THIRD), *supra* note 30, § 902 (discussing interstate claims for violation of international obligations owed to the claimant state or resulting in injury to the claimant state’s nationals).

supranational aviation tribunals³⁰⁹ profits from the clear allocation to the federal government in the surface structure of the Constitution of both the general treaty power in Article II and the specific congressional power in Article I “[t]o regulate Commerce with foreign Nations.”³¹⁰ As the Supreme Court has indicated, foreign commerce is “preeminently a matter of national concern,”³¹¹ recalling the Framers’ overriding purpose that “the Federal Government must speak with one voice when regulating commercial relations with foreign governments.”³¹²

The desire for a single voice, however, while accurate, hardly captures the centrality of foreign commerce to the mission of the new nation as a “commercial republic.”³¹³ One of the recurrent themes of *The Federalist Papers* was that foreign commerce would not be facilitated merely by the plan of federation, but ought to be a

309. The global governance of the airline industry is a project of international economic law, itself a term that the Framers would understand from the revolutionary ferment caused by adversarial impositions of imposts, customs, and duties. The Framers hoped to establish a uniform foreign trade policy and to encourage wealthy foreigners to do business with and emigrate to the United States. See Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1415 (1996).

310. U.S. CONST. art. I, § 8, cl. 3. The foreign commerce power, in this context, would be aided by the Export-Import Clause, *id.* art. I, § 10, cl. 2, which prohibits the states from burdening the federal government’s exclusive regulation of foreign commerce by imposing “imposts and duties on imports and exports” without permission from Congress, *Michelin Tire Corp. v. Wages*, Tax Comm’r, 423 U.S. 276, 285 (1976); see also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953) (holding that the power to regulate foreign commerce is not among the powers incident to the Presidency, but is expressly vested by the Constitution in the Congress).

311. *Japan Line Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979). The indispensability of powers over foreign trade and diplomacy to the enterprise of nation-building was a recurrent theme of *The Federalist Papers*. See, e.g., THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987) (declaring that “[i]f we are to be one nation in any respect it clearly ought to be in respect of other nations”).

312. *Japan Line Ltd.*, 441 U.S. at 449. The Court commented that in international relations and with respect to foreign intercourse and trade the people of the United States “act through a single government with unified and adequate national power.” *Id.* at 447 (citing *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)); see also *Michelin Tire Corp.*, 423 U.S. at 285 (holding that state tariff power that might affect foreign relations would conflict with exclusive federal power to regulate commercial relations with foreign governments).

313. THE FEDERALIST NO. 6, at 106 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Indeed, as Madison also made clear, the Framers saw regulation of domestic commerce as a power necessary in aid of the greater objective of regulating foreign commerce because “without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual.” THE FEDERALIST NO. 42, *supra* note 311, at 276.

galvanizing purpose of unity.³¹⁴ Thus, foreign commerce was implicated in (at least) three of the four purposes of the Union expressed in *The Federalist Papers*: common defense, preservation of the public peace, regulation of commerce “with other nations and between the States,” and “the superintendence of our intercourse, political and commercial, with foreign countries.”³¹⁵ The axial position of foreign commerce in the Framers’ plan for government, ranking with war and peace in the litany of government tasks, suggests that the improvement of foreign trade through supranational adjudication would not have been viewed by the Framers as an inherently improper legislative objective of the federal government. Indeed, a metaphor of the supranational could easily have explained their own experiment in consolidation, which envisaged the assent of a number of distinct and independent political societies (the states) to participation in a larger political society (the federal Union).³¹⁶

If Hamilton is again our guide, the Framers had an eye to the circumstances of “remote futurity”³¹⁷ and should not lightly be branded with the inflexible originalism that became a conceit of later

314. Madison’s recitation of the objects of the Union government ranked regulation of intercourse with foreign nations, including foreign commerce, second only to security against foreign danger. See THE FEDERALIST NO. 41, at 267 (James Madison) (Isaac Kramnick ed., 1987); THE FEDERALIST NO. 42, *supra* note 311, at 273; see also *Michelin Tire Corp.*, 423 U.S. at 285 (noting that the idea that “the Federal Government must speak with one voice when regulating commercial relations with foreign governments” was one of three primary concerns that the Framers attempted to address “by committing the sole power to lay imposts and duties on imports in the Federal Government”).

315. THE FEDERALIST NO. 23, at 184 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis added). Alexander Hamilton maintained that no rule existed to measure the momentum of civil power required to govern any given number of individuals. See THE FEDERALIST NO. 13, at 139 (Alexander Hamilton) (Isaac Kramnick ed., 1987). The Framers’ task, accordingly, was to design an appropriate architecture for the civil power, but more deeply to ensure that America’s status as a commercial republic would be enhanced by the new structure. See THE FEDERALIST NO. 6, *supra* note 313, at 106. Since modern war was most often inspired by commercial cupidity, Hamilton argued that a central government would be best placed to fend off America’s rivals as her commercial success advanced. See *id.* at 106–07. Military superiority was only part of Hamilton’s calculus, however. He saw also that unity of government “would enable us to bargain with great advantage for commercial privileges” from other nations. THE FEDERALIST NO. 11, at 130 (Alexander Hamilton) (Isaac Kramnick ed., 1987). John Jay, too, advocated a centralized government that would defend and advance the Union’s foreign trading interests. See THE FEDERALIST NO. 4, at 98–99 (John Jay) (Isaac Kramnick ed., 1987).

316. See, e.g., THE FEDERALIST NO. 39, *supra* note 111, at 256–57 (discussing the bold innovation of a “consolidation” of the constituent states). Completing the image, the Framers further arranged for the supremacy of the laws of the Union over its state constituents. See THE FEDERALIST NO. 33, *supra* note 300, at 225.

317. THE FEDERALIST NO. 34, at 227 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

scholarship.³¹⁸ Hamilton's words bear quoting at length:

We must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs There ought to be a capacity to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.³¹⁹

This solicitude for futurity occurred precisely in the context of defending commerce. Hamilton wrote of the flexibility needed by government as part of the plan Americans must have "if we mean to be a commercial people."³²⁰ Surely, it breaks faith with the Framers not to read their Constitution in these resilient terms,³²¹ particularly

318. Hamilton explicitly allowed, for example, that what Madison called the "cloudy medium" of language, THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987), however well-expressed, must lead to equivocation in meaning as the phrases of the Constitution were parsed by succeeding generations and its words divined. See THE FEDERALIST NO. 34, *supra* note 317, at 227. Strict originalism suffers from retrospection; if a document has been designed for futurity, as the Constitution evidently was, see *infra* text accompanying note 319, unyielding adherence to fixed historical meanings must frustrate that design (apart from the inherent dangers of relativism and solipsism). See RAKOVE, *supra* note 39, at xv (noting the real problems of reconstructing coherent intentions and understandings from evidence of history).

319. THE FEDERALIST NO. 34, *supra* note 317, at 227. In this signature passage, Hamilton embraced the idea of novelty in government. Hamilton's emphasis was entirely proper, given that the object of his polemics was nothing less than the replacement of the existing form of government. Madison's words, too, still carry resonance for those who advocate new forms of supranational administration:

Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience.

THE FEDERALIST NO. 14, at 144 (James Madison) (Isaac Kramnick ed., 1987). The absence of an exact model of government, in other words, commended itself to Madison as a very good reason to invent one. See *id.* Madison also contemplated "all the possible changes which futurity may produce" in describing the reach of the Necessary and Proper Clause. THE FEDERALIST NO. 44, *supra* note 120, at 289. Anchored in these beliefs of Hamilton and Madison, respect for the innovations of "futurity" lies at the core of the structuralist approach of this Article.

320. THE FEDERALIST NO. 34, *supra* note 317, at 228. The Constitution reflects these early preoccupations. The very first enumerated power of Congress is to "lay and collect Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8, cl. 1. The Constitution also prohibits export duties by the states, see *id.* art. I, § 9, cl. 5, reflecting the fears of southern states that their northern compatriots would tax their profitable exports to Europe. See Morrison & Hudec, *supra* note 15, at 102.

321. See *supra* note 2 (noting the importance of innovation to the Framers')

when it is the arena of foreign commerce that today hosts most of the United States government's sovereign engagements with other nations.³²² As international trade scholar William Davey has remarked, "[i]t would be an odd constitution that gave exclusive power over foreign affairs and commerce to a federal government, but then so limited its powers in that field that it could not deal as an equal with other nations."³²³

D. Supranational Tribunals as Wielders of Constitutional Judicial Power

The surface structure of foreign trade in the Constitution contemplates a broad domain of substantive operation for treaties, but also a specific congressional license to regulate foreign commerce. The surface structure further reveals, as we have seen, that the Framers did not impress an insularist and mercantilist idea of sovereignty upon their Constitution. In this hardly adventitious setting, I conclude here that these constitutional precepts, fused with the Supreme Court's new jurisprudence of public rights, provide the transformational sequence that maps supranational adjudication from the deep structure principle of shared judicial power to the surface structure of Article III.

In Part V, I will consider whether this result comports with the

constitutional project).

322. As Madison himself warned, "[i]f a federal constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertions for its own safety." THE FEDERALIST NO. 41, *supra* note 314, at 267; *see supra* note 293 (explaining conceptual limitations of U.S. domestic laws encouraging competition in global air transport).

323. Davey, *supra* note 293, at 1324. Charles Cheney Hyde, in his 1922 treatise on international law, similarly acknowledged "a general reluctance to impute to the framers of the Constitution a design to fetter the United States in such a way as to deprive it of the power to regulate by convention matters so dealt with by other States as a normal and necessary incident of international intercourse." 2 HYDE, *supra* note 32, § 496, at 11. Hyde drew some support for his assertion from the Constitution's open-textured treaty provisions, at least as far as the federal government is concerned. Article II fails to specify any prohibited classes of treaty, and he noted that the Constitution otherwise speaks only to the states when it prohibits them from entering into "any Treaty, Alliance, or Confederation," U.S. CONST. art I, § 10, cl. 1, and from entering into "any Agreement or Compact with another State, or with a foreign Power," *id.* cl. 3. *See* 2 HYDE, *supra* note 32, § 496, at 11. Nevertheless, a treaty which purports to alter the character of the government, however we may evaluate the content of that proposition, is simply undoable under any provision of the Constitution as a matter of substantive law. *See id.* § 496, at 11-12; *see also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (stating that the treaty power "is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states").

deep structure principle of constitutional integrity. At the present level of description, however, the proposed specialized supranational adjudicative system would in no way forebode the fears expressed by the Supreme Court that Congress might create "a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts . . . without evidence of valid and specific legislative necessities."³²⁴ In this proposed specialized assignment of judicial power, therefore, I locate the elusive limiting principle required by Justices Brennan and White.³²⁵

As the Supreme Court indicated in *Palmore v. United States*,³²⁶ the requirements of Article III, which apply where laws of national applicability and affairs of national concern are at stake, "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."³²⁷ Like

324. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986) (plurality opinion). *But see supra* note 184 (explaining that the terms "Article I courts" and "Article III courts" fail to account doctrinally for the sharing of judicial power by legislative courts—and supranational tribunals—under Article III, Section 2).

325. *See supra* text accompanying notes 213–14 (introducing the search for a limiting principle as the core of the Court's public rights jurisprudence).

326. 411 U.S. 389 (1973).

327. *Id.* at 408. In *Palmore*, the Court approved a congressional reorganization of the District of Columbia court system that established one set of courts with Article III characteristics devoted to matters of national concern and a wholly separate court system designed primarily to apply local law and to serve as a local court system for a large metropolitan area. *See id.* at 409. The reorganization was crisis-driven because caseloads had become unmanageable. The remedy was to relieve the regularly appointed Article III judges from "the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city." *Id.* at 408–09. The proper work of courts with Article III judges, in the Supreme Court's reasoning, was to "try cases arising under the Constitution and the nationally applicable laws of Congress." *Id.* at 409. To that end, the courts created under Article III, Section 1 were divested of "distinctively local controversies that arise under local law." *Id.*; *see supra* note 137. *But cf. O'Donoghue v. United States*, 289 U.S. 516, 522 (1933) (holding that some courts in the District of Columbia were both "Article I" and "Article III" courts); Bator, *supra* note 165, at 240 (describing the D.C. courts discussed in *O'Donoghue* as "hermaphroditic"). Analogically, it would appear that the *Palmore* Court's model of analysis—accepting a system of "divested" courts more narrowly circumscribed for local affairs—could apply also to a system of *supranational* tribunals delimited not by the needs of regional administration but by a substantive relationship to another enumerated power in Article I, the regulation of foreign commerce. Justice Brennan in *Northern Pipeline Construction Co.* preferred to give *Palmore* a restrictive reading, narrowing its holding to the proposition that Congress's power to govern the District of Columbia, *see* U.S. CONST. art. I, § 8, cl. 17, was "obviously different in kind from the other broad powers conferred on Congress." 458 U.S. 50, 76 (1982) (plurality opinion). *But*, as previously noted, Article I sets no differences in kind or degree among the enumerated powers, and Justice Brennan's own words—his reference to the "other broad powers" of Congress—vitiated his premise. *Id.* at 76 (plurality opinion); *see supra* text accompanying note 227. Although

the legislative courts contemplated in *Palmore*, the supranational tribunals envisaged in my model would embody the concept of shared judicial power.³²⁸ The sharing, in fact, would have a double significance with respect to supranational tribunals. Primarily, through the deep structure principle of a fragmented judicial power, the Article III judicial power would be shared with courts to which Article III judges are appointed.³²⁹ In addition, however, judicial power would be shared also with foreign nations. Such sharing is possible because foreign nations occupy a specialized role in the United States governmental process that the Framers acknowledged when they preserved the treaty as a coequal form of law-making in

Justice Brennan claimed that “our reference in *Palmore* to ‘specialized areas having particularized needs’ referred only to geographic areas,” this semantic limitation was not discussed in *Palmore* and is not present in Article I of the Constitution. *Northern Pipeline Constr. Co.*, 458 U.S. at 76 (plurality opinion) (quoting *Palmore*, 411 U.S. at 408). *But see id.* at 114 (White, J., dissenting) (explaining that *Palmore* “rested on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities”); Bator, *supra* note 165, at 245 (asking why Congress’s “exceptional” power over the territories, but not its “exceptional” power over bankruptcies, should be deemed to carry with it “a power to trump the separation of powers?”).

328. Metropoulos envisaged a draft constitutional amendment vesting the judicial power of the United States in international tribunals ordained by Congress. *See* Metropoulos, *supra* note 93, at 172. But the issue would not be solely one of transferring U.S. judicial power to a foreign multilateral agency. In contrast to the proposed aviation tribunals, which would not apply U.S. law to begin with, *see supra* text accompanying note 28, Metropoulos’s amendment seems to have focused only on the anomalous condition of the *ersatz* U.S. law applied by the arbitral panels established under NAFTA. *See* Metropoulos, *supra* note 93, at 172; *see infra* note 399 (commenting on application of U.S. law by the NAFTA binational arbitral panels).

329. It has long been thought that the power of the federal government to provide by treaty for the judicial decision of questions of an international nature is not limited by the grant of judicial power to the federal judiciary. *See* White, *supra* note 32, at 499 (noting that this proposition recognizes “that there is a judicial power which is international and may be exercised by one nation only in cooperation with others”). This power, White argued, would embrace “questions of an international character,” and would be exercised through the agency of international commissions and courts appointed under the treaty power. *Id.*; *supra* note 32 (discussing U.S. sovereign power to assign claims to international tribunals). While White would evidently be in sympathy with the applied consequences of the arguments made in this Article, his reasoning (in 1908) did not appreciate that the sharing of judicial power with other nations actually observed a deep structural principle of the United States Constitution—an internal logic, as it were—that would later sanction a similar sharing between courts created directly under Article III and evolving forms of administrative tribunal rooted in Congress’s legislative jurisdiction under Article I. Surely, the analogy is imperfect; sharing of power with other nations cannot contemplate that the United States would intrude its own final tribunal of review. But it may ultimately be the existence of a broader vision of judicial authority that is most significant, rather than the specific arrangements that the Constitution makes for internal review of that authority.

the Constitution.³³⁰

Moreover, like Article I courts, the global aviation tribunals proposed here would adjudicate disputes governed by the public rights doctrine. They would fit into a public regulatory scheme occupying its assigned field³³¹ and applying federally created rules of decision (a body of international competition law for the aviation industry).³³² These rules would support a new corpus of "standing" rights that not only never existed in the common law, but also probably never would have developed in the common law.³³³ Such a

330. This is a recognition, moreover, that the United States manifestly lacks power unilaterally to establish courts of general or limited jurisdiction in any other sovereign territory, and equally to do so in the unclaimable juridical space inhabited by supranational tribunals. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("[T]he public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders."). Thus, the Supreme Court in *Sabbatino* refused to rule that the act of a foreign state to expropriate property within its borders, if retaliatory, discriminatory, and unaccompanied by adequate compensation, could dislodge the traditional act-of-state doctrine and thereby suffer challenge in the United States court system as a violation of international law. *Id.* at 423-25; *supra* note 32 (discussing the act-of-state doctrine). The *Sabbatino* Court thus rejected the argument that the U.S. courts could make a significant contribution to the growth of international law in this area in light of the paucity of decisional law by international bodies. 376 U.S. at 434.

331. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 600 (1985) (Brennan, J., concurring). The power of Congress to devise and juridicize a field of public law has been illustrated amply by the sequence of congressional action to create review procedures for United States antidumping and countervailing duty determinations (compensatory tariffs imposed by the United States on foreign goods sold in the United States, either below cost or at a price subsidized by a foreign government, in order to compete unfairly with domestically produced U.S. goods). See generally JACKSON, *supra* note 6, at 251, 279. For a detailed history of how Congress gradually expanded standing to seek review of antidumping and antisubsidy determinations by U.S. agencies, see COMMITTEE ON INT'L TRADE, ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE UNITED STATES/CANADA FREE TRADE AGREEMENT: BINATIONAL REVIEW PROCEDURES FOR ANTIDUMPING AND COUNTERVAILING DUTY CASES 4-18 (1988).

332. Compare *Thomas*, 473 U.S. at 601-02 (Brennan, J., concurring) (looking at a regulatory scheme as a significant congressional case-by-case delegation of its law-making function to an arbitrator), with Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 753-58 (1998) (arguing that through the U.N. Convention on Contracts for the International Sale of Goods—a treaty—Congress had delegated the power to make international common law to federal courts in order to "construct substantive solutions for gaps that emerge in [the Convention's] regulatory scheme").

333. If individual airlines were to assert claims against each other before the Open Skies Commission described in my model for aviation tribunals, see *supra* text accompanying notes 24-31, rather than asserting claims on behalf of or against a government, these disputes would obviously reflect a condition of "privateness." But, as Justice Brennan indicated in *Thomas*, the Supreme Court now views private disputes of this kind as involving at their core the exercise of authority by the federal government. See *Thomas*, 473 U.S. at 600 (Brennan, J., concurring). Such disputes, though they may ultimately involve determinations of the duty owed one private party by another, nevertheless must arise within a comprehensive federal regulatory scheme, applying

system appears consistent with *Northern Pipeline Construction Co.*, in which the potentiality of the public rights doctrine led the plurality to conclude that the doctrine could indeed support legislative courts in the arena of foreign commerce.³³⁴

The system of tribunals proposed here would honor the Framers' design, perpetuated in the Constitution's deep structure, that Congress, rather than the judiciary, should shape how the United States judicial power is distributed.³³⁵ As the Supreme Court acknowledged in *Glidden*, relying on a vintage opinion of Chief Justice John Marshall, there is "a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system."³³⁶ Problems of such magnitude and rarity, including the challenge of supranationalism, are likely to be presented by the exigencies of foreign trade. As such, adroit management of global trade has become a legitimate national policy objective and may in

federal rules of decision. See *id.* at 600–01 (Brennan, J., concurring); see also *supra* note 248 (explaining the public law foundation—in treaties—for the proposed assertion of private rights through the aviation tribunals).

334. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.22 (plurality opinion) (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). The public rights doctrine is used extensively by commentators who support the jurisdictional mechanism of the NAFTA dispute panels. The usage obviously has conceptual appeal in a field (international trade) that bespeaks rights of public origin. Arguably, Congress could return trade law to its primordial condition of executive administration. See *supra* note 331 (mentioning the juridicization of antidumping and subsidy regimes). "[A]ntidumping and countervailing duty" actions were not "the stuff of traditional actions at common law tried by the courts at Westminster in 1789." Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT'L TAX & BUS. LAW. 101, 133 (1996) (internal quotes and citation omitted).

335. See *supra* text accompanying note 145 (discussing the distribution of judicial power in the United States Constitution). Thus, in Paul Bator's view, Article III contemplated that the extent of federal jurisdiction would mirror Congress's ongoing political judgments. See Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030–31 (1981–1982). Of course, a treaty establishing supranational tribunals normally would be ratified only by advice and consent of the Senate, rather than by the full Congress. See *supra* text accompanying note 290.

336. 370 U.S. 530, 547 (1962) (citing *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). Recognition of governmental innovation and judicial concurrence in new ideas for government are core themes of this Article. See *supra* text accompanying notes 116–18 (discussing this "Hamiltonian" approach to government).

The Court also reflected an empathetic judicial philosophy in *Chevron U.S.A., Inc. v. National Resources Defense Council*, noting that the federal courts have "no constituency," but have a duty to respect legitimate policy choices made by those who do. 467 U.S. 837, 866 (1984). In the *Chevron* Court's reasoning, "while agencies are not directly accountable to the people, the chief executive is, and it is entirely appropriate for this political branch of the government to make such policy choices." *Id.* at 865. In this way, the executive may "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865–66.

turn inspire an entirely novel constitutional *mythos*: recognition of an “allodial” judicial power (in the sense of a power that is not subject to the feudal overlordship of Article III judges). The Framers did not contemplate or prophesy such a power in the text of the Constitution, but it is implicit in their neglect of traditional sovereignty concerns, in their insistence on recognizing the treaty as a source of federal law, in their preference for federal control of all aspects of foreign commerce, and most dramatically in their stationing of dynamic deep structure principles, including a principle of shared judicial power, beneath the placid surface of their Constitution.³³⁷

337. At least three arguments have been advanced to “constitutionalize” supranational tribunals using the paradoxical expedient of simply denying them a constitutional dimension at all—in effect, quarantining them outside the Constitution. These arguments insist that supranational tribunals are not United States courts, that they exercise a species of international judicial power, or that their existence is in any event a political decision of the federal government with which the courts should not interfere. Each of these arguments betrays a conceptual oversimplification. The argument that supranational tribunals are not “United States courts,” applied literally, would move whole swathes of domestic jurisdiction into the international arena using only the elemental premise of ontological novelty. See, e.g., Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT’L L. REV. 27, 43 (1996) (suggesting “the obvious fact that [the new International Criminal Court] would not be an Article III court”). The second quarantining argument holds that supranational courts would exercise only an amorphous international judicial power that would be the common donation of all participating states in the global treaty creating the tribunals. The argument is controverted, however, by the very text of Article III itself. At least three of the so-called “arising under” subject-matter heads of jurisdiction in Article III, Section 2 would be in question, for example, in a dispute between the United States and a foreign private party: all cases involving United States treaties, the laws of the United States, and the United States and foreign citizens as parties. For a clarification of “arising under” jurisdiction, see *supra* note 149. The judicial power in Article III explicitly extends to these three categories of jurisdiction, and all of them are granted to the federal courts (in original and appellate guise) by acts of Congress. See CHEMERINSKY, *supra* note 4, at 248. Finally, the third argument would explain the constitutionality of supranational tribunals in the earnest words of the district court for the Southern District of New York in *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988), which held that “the question whether the United States should submit to the jurisdiction of an international tribunal is a question of policy not for the courts but for the political branches to decide.” *Id.* at 1463. The flaw in this reasoning is that the courts do not abstain when the principle of constitutional integrity is implicated, see *supra* text accompanying note 90 (explaining derivation of this principle), and advocates of supranational adjudication cannot simply assume that a purported transfer of judicial power under Article III would not violate this principle. Although the courts have sometimes applied “the loose shorthand phrase, ‘political question,’” to their apparent self-effacement in matters of foreign affairs, Baker v. Carr, 369 U.S. 186, 278 (1962) (Frankfurter, J., dissenting), the notion of a true political question doctrine may be a myth that needs to be dispelled. See generally KOH, *supra* note 9, at 183–84, 220 (describing the political question doctrine as “a catchall method [to] avoid[] deciding even straightforward constitutional cases,” but noting that courts nevertheless *do* issue “rulings that span the foreign policy spectrum and involve interpretation of virtually all bodies of law”). In no foreign affairs case, in fact, has the Supreme Court required judicial abstention from the task of constitutional review. See

E. Conclusion

A deep structure, in Chomskyan linguistics, is a fixed structure. Using deep structure analogically, I explored in Part IV a series of dynamic formulations—transformations, in Chomsky's terminology—that map the fixed idea of shared judicial authority from the Constitution's deep structure to the surface structure of Article III. To provide a dynamic transformational sequence for supranational tribunals, Part IV presented a coherent vision of an International Trade Constitution. This vision, blending the new interactive paradigm of sovereignty, the legislative exceptionalism of the treaty power, the centrality of foreign commerce, and the modern jurisprudence of public rights, appears to allow supranational tribunals to take their place in Article III, alongside the state courts and legislative courts, as a viable exponent of the Constitution's deep structure idea of shared judicial power. But one further test of viability still remains, and that is to assess supranational tribunals in light of the deep structure principle of constitutional integrity. It is to that final task that I now turn in Part V.

V. ARTICLE III AND THE PRINCIPLE OF CONSTITUTIONAL INTEGRITY: THE ISSUE OF APPELLATE ACCESS TO ARTICLE III JUDGES

A. Background: The Independent Article III Judiciary

It is a very large interpretive step to conceptualize supranational courts as part of the Constitution of the United States. Part IV of this Article attempted most of that interpretive and assimilative process, applying powerful structural principles that arguably would permit supranational courts to wield judicial power, though not necessarily the judicial power "of the United States,"³³⁸ under the aegis of Article III of the United States Constitution. Nonetheless, the assertion of a potentially shared judicial authority has had a significant caveat from the outset of my discussion. The difficult pragmatic balance of independent federal judges and a congressionally controlled organization of the judiciary is helpful if it means that original jurisdiction, when denied to courts with Article III judges, could be assigned to a supranational tribunal. But to conclude that federal

HENKIN, *supra* note 2, at 145.

338. U.S. CONST. art. III, § 1; *see also supra* note 250 (noting that "[t]he judicial Power of the United States" authorizes judicial review of the constitutionality of acts of the political branches).

cases “arising under” federal statutory or treaty law need not begin in courts with Article III judges invites the profound question of whether the Constitution—in its deep structure—requires cases with a federal provenance always to *terminate* in an appellate court with Article III judges.³³⁹

To provide at least a tentative, if not decisive, resolution of this question, I now offer a postlude to my explication of a deep structure principle of constitutional integrity. Recalling that discussion,³⁴⁰ I inquire in this Part of the Article whether the special character of United States constitutional government, its “hydraulic pressure” of divided and interacting powers,³⁴¹ raises an articulable, specific objection to a putative sharing of the judicial power with supranational aviation tribunals enjoying both original and appellate jurisdiction. The Supreme Court pragmatically has staved off a similar conflict involving legislative courts, possibly convinced that any issue of real constitutional merit will find its way to ultimate review by the Article III judiciary.³⁴² But in imagining a novel system

339. As Paul Bator asked, “[h]ow could the Framers have . . . designed a system . . . to insulate the independent judiciary . . . and also give[] the Legislature carte blanche to displace that independent judiciary with judges who are . . . its creatures?” Bator, *supra* note 165, at 258. This is presumably also the burden of arguments by Clinton and Amar, canvassed earlier, which insisted that the Exceptions Clause, if used to deny appellate jurisdiction to the Supreme Court over any of the enumerated cases and controversies, would require Congress to transfer that jurisdiction to one of the inferior federal courts created under Article III, Section 1. See Amar, *supra* note 148, at 230 (arguing that a shift of appellate jurisdiction from the Supreme Court would merely move final resolution “to any other Article III court that Congress may create” and specifically to a court with a judge appointed under Article III, Section 1); Clinton, *supra* note 15, at 781 (same); *infra* text accompanying note 364. I see no justification for these arguments, either in the deep or surface structures of the Constitution. If the appellate power of the paramount Supreme Court can be removed, *pro tanto* the appellate power of all courts contingently established under Article III must also be capable of removal. See *infra* note 364 (discussing the implications of stripping appellate jurisdiction from the inferior federal courts). For that reason, I have focused in Part V on the expansive reach of the Exceptions Clause, rather than on (to my view) misconceived arguments concerning whether other courts created under Article III might have final appellate jurisdiction if the Supreme Court were constitutionally denied that jurisdiction.

340. See *supra* text accompanying note 90.

341. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

342. Congress, in legislation implementing NAFTA, included a fast-track appellate procedure to allow constitutional challenge to NAFTA’s novel (and constitutionally strange) breed of binational dispute panels. See *infra* note 399. Thus, in exercise of its distributive authority over the judicial power, see *supra* text accompanying note 142, Congress granted the U.S. Court of Appeals for the District of Columbia Circuit exclusive original jurisdiction to review all constitutional challenges to the panel structure. See 19 U.S.C.A. § 1516a(g)(4)(A) (1999); see also *National Council for Indus. Defense, Inc. v. United States*, 827 F. Supp. 794, 797–800 (D.D.C. 1993) (confirming the exclusivity of the D.C. Circuit’s jurisdiction for NAFTA constitutional challenges).

of sectoralized supranational tribunals and their certain displacement of Article III judges in a global setting, we squarely confront a ranking of constitutional principles. These principles potentially might require Article III judges, as a condition of the separation of powers, to remain ultimately responsible for final appellate control of all of the judicial power that is generated from the deep structure of the Article under which they are appointed.

B. A Contest of Deep Structure Principles

What precisely are the principles that must be balanced? As I already have shown, the tenure-salary covenant in the surface structure of Article III is mapped from a deep structure principle of judicial independence.³⁴³ The independence of the Article III judges is a conceptually distinct deep structure idea from the principle that ultimately determines the surface details of how and by whom the judicial system is organized.³⁴⁴ The latter is solely a surface refraction of the deep structure principle of shared judicial power, from which we have mapped the constitutional exercise of Article III judicial power by state courts, legislative courts, and supranational tribunals.

If the principle of judicial independence were to be supreme in this contest of principles, final appellate review by judges who constitutionally possessed the marks of Article III independence would be required. This outcome would severely constrain the extent to which judicial power could be transferred to supranational tribunals. It also would vitiate the jurisdictional supremacy of the final appellate court of international aviation proposed in Part I. On the other hand, the question of supremacy may not arise, or may be mooted, if the fixed imperatives of the principle of independence can be properly accommodated by the new supranational system.

C. Appellate Review in the Surface Structure: The Exceptions Clause

I begin this final investigation by revisiting another feature of Article III's complex surface structure, the Exceptions Clause.³⁴⁵ This Clause awards Congress explicit power to strip appellate functions

343. This may, indeed, ultimately derive from the proto-principle of constitutional integrity. The federal judiciary itself has identified independence as one of its core values. See JUDICIAL PLAN, *supra* note 143, at 5 (noting that “[f]ederal judges must be able to decide the cases before them in an atmosphere free from fear that an unpopular decision will threaten their livelihood or existence”).

344. See *supra* text accompanying notes 150–55 (discussing the distribution of appellate jurisdiction under Article III).

345. U.S. CONST. art. III, § 2, cl. 2.

from the Supreme Court.³⁴⁶ Logically, therefore, the Clause suggests that the deep structure principle of independence does not impose a requirement of mandatory Article III review by the Supreme Court.³⁴⁷ It is true that the Supreme Court early on sought to deny the state courts any escape from federal review, achieved either through removal before judgment or appeal after judgment.³⁴⁸ Otherwise, according to Chief Justice Marshall in *Cohens v. Virginia*,³⁴⁹ the construction of the Constitution, laws, and treaties of the United States would be confided equally to the state courts, "however they may be constituted."³⁵⁰ The Court recoiled from the idea of thirteen independent state courts of final jurisdiction over the same cause, a veritable "hydra in government."³⁵¹ At a minimum, therefore, the Supreme Court, as the national tribunal of final resort, expected to rank as the trustee of uniformity atop this potentially ochlocratic mass of sovereign systems.³⁵² Its claim of superiority,

346. See *supra* text accompanying note 155 (discussing the stripping of appellate jurisdiction from the Supreme Court). The Exceptions Clause provides that the Supreme Court will have appellate jurisdiction (outside its narrow prescribed fields of original jurisdiction) "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

347. See *supra* note 339 (disputing the argument that congressional removal of Supreme Court appellate jurisdiction, even if constitutionally legitimate, would require the award of compensatory appellate power to inferior courts created under Article III, Section 1).

348. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821).

349. 19 U.S. (6 Wheat.) 264 (1821).

350. *Id.* at 415 (emphasis added). The value expressed in *Cohens*, however, was that of uniformity, rather than supremacy. Supremacy of federal law is constitutionally imposed on the state judiciaries by the express words of the Supremacy Clause. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The Constitution, however, does not appear to treat uniformity as having the same structural importance as supremacy. Unlike supremacy, uniformity is not a requirement of the Constitution; in fact, uniformity would have required a much more complex federal court system. See William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an 'Essential Role,'* 100 YALE L.J. 1013, 1016-17 (1991). Supremacy without some mechanism for uniformity, however, would disarticulate the precedential development of federal law.

351. *Cohens*, 19 U.S. (6 Wheat.) at 415-16; see also *Ableman v. Booth*, 62 U.S. (21 How.) 506, 518 (1858) (applying the same reasoning to the criminal laws of the United States).

352. See *Cohens*, 19 U.S. (6 Wheat.) at 416; *Ableman*, 62 U.S. (21 How.) at 517. As Amar has surmised, the limited size of the Supreme Court has created a de facto exception to the Supreme Court's jurisdiction, "as if Congress had explicitly told the Court that it could only hear one out of every ten mandatory cases." Amar, *supra* note 148, at 268 n.213. The likelihood of sheer natural limits to the Supreme Court's capacity to superintend all state systems did not feature in early opinions, such as Chief Justice

however, was made with the confidence that Congress had already instituted a certiorari procedure from the highest state courts to the Supreme Court.³⁵³

Moreover, insofar as it purported to state a rule of general application, Chief Justice Marshall's claim of superiority in *Cohens* was fundamentally in conflict with the constitutional language.³⁵⁴ If the Court holds true to its opinions assigning organizational supremacy to the Congress,³⁵⁵ it scarcely can protest congressional power under the Exceptions Clause to strip the Supreme Court of even this fundamental review of state decisions. Indeed, forty years after *Cohens*, Chief Justice Taney's confidence in *Ableman v. Booth*³⁵⁶ that the Supreme Court had authority over state courts was not based on Article III at all, but on the Supremacy Clause.³⁵⁷ There is no indication, however, that the supremacy doctrine requires appellate review from state supreme courts to the United States Supreme Court, and strong reason, discussed below, to conclude that Article III does not.

Chief Justice Taney's argument in *Ableman*, in fact, was paralogical. If Article III truly meant, as he wrote, that the federal judicial power extends to "all cases which might arise under the Constitution,"³⁵⁸ then all state court jurisdiction would necessarily be ousted and the Supreme Court alone would have original jurisdiction over all federal cases. Article III, of course, cannot mean that,

Taney's in *Ableman*, which spoke contradictorily of a single final and conclusive tribunal to hear "all cases which might arise under the Constitution and laws and treaties of the United States, *whether in a State court or a court of the United States*," and a federal government that must be "supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities." 62 U.S. (21 How.) at 517, 518 (emphasis added). The opinion failed to explain, however, why the Constitution in Article III adopted a manifestly contingent structure that virtually invited at least one level of state interruption (in other words, the preservation of original jurisdiction in the state courts over federal law). Chief Justice Taney's judgment rested, centrally, on the premise of legal supremacy in Article VI. See *id.*

353. See *supra* note 179 (discussing the certiorari procedure in 28 U.S.C. § 1257 (1994)).

354. The claim, moreover, is defeated by the simple truism of our constitutional system that unappealed judgments of state courts have the status of procedural finality (*res judicata*), even when a federal question is necessarily involved. See *supra* text accompanying note 193 (noting this default finality of state judgments).

355. See *supra* text accompanying notes 159–61 (considering the Supreme Court's acceptance of the broad distributive powers of Congress under Article III, Sections 1 and 2).

356. 62 U.S. (21 How.) 506 (1858).

357. See U.S. CONST. art. VI, cl. 2 (providing *inter alia* that the "Judges in every State" shall be bound by the Constitution, laws, and treaties of the United States, which are "the supreme Law of the Land"); *Ableman*, 62 U.S. (21 How.) at 517.

358. *Ableman*, 62 U.S. (21 How.) at 518.

because inferior federal courts are contingent and discretionary and the Supreme Court is primarily an appellate tribunal under Article III. If Article III necessarily comprehends original jurisdiction of federal cases in the state courts, how could Chief Justice Taney logically have reasoned that it also necessarily includes appeal to the Supreme Court? If Article III does not exclude the state courts from original jurisdiction, it cannot be assumed necessarily to *include* them for the select purpose of appellate recourse to the Supreme Court. The Chief Justice's only unequivocal textual support for direct appeal to the Supreme Court was, as it had been for Chief Justice Marshall in *Cohens*, the fact that Congress had ordained it in section 25 of the first Judiciary Act in 1789.³⁵⁹

As Leonard Ratner has pointed out, "the extent of the congressional power over the appellate jurisdiction of the Supreme Court has never been judicially determined because the jurisdiction statutes have always allowed the Court to carry on its essential constitutional functions with reasonable effectiveness."³⁶⁰ To the extent that those essential functions may be said to include assuring the supremacy of federal law when state law is in conflict or is challenged by state authority, the first Judiciary Act short-circuited what might have been a much more searching analysis by Chief Justice Taney.³⁶¹

This Article need not explore in detail the outer bounds of the congressional power, conferred in Article III's surface structure, to reduce or eliminate the Supreme Court's appellate jurisdiction.³⁶²

359. *See id.* at 522.

360. Ratner, *supra* note 184, at 184.

361. For Richard Fallon, however, recourse to Article III appellate review is no mere accident of congressional edict, but a core value of the Constitution. *See* Fallon, *supra* note 179, at 945. In Fallon's analysis, all of the cases that *might* have been committed to courts created under Article III, Section 1 must in fact end in those courts, in the form of an appellate review that is a sufficiently searching review of a legislative court's or administrative agency's decisions. *See id.* Fallon's view echoes Hamilton's exposition of the importance of the federal judiciary power to the interpretation and operation of the treaties of the United States. It was Hamilton's belief that, in the last resort, treaties must be submitted to "one SUPREME TRIBUNAL," instituted under the same authority that formed the treaties themselves, the national government. THE FEDERALIST NO. 22, *supra* note 288, at 182. State courts of final jurisdiction, in other words, would disrupt the uniformity of interpretation that treaties required because of the participation of foreign nations. *See id.* at 182-83. Hamilton wrote of "one court paramount to the rest," as other nations have established, "possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice." *Id.* at 182. The juridical value of uniformity, however, provides a far more cogent assessment of the relationship of federal and state courts than of the nature of the relationship, if any, between federal courts and supranational tribunals.

362. The Supreme Court, after all, was designed as a department of government in a

Professor Henry Hart placed a question-begging limitation on this power, namely, that it should not “destroy the essential role of the Supreme Court in the constitutional plan.”³⁶³ The pliancy of the text has justified a great deal of free-form scholarly hermeneutics, from Professor Amar’s benign redistribution of appellate power from the Supreme Court to the inferior federal courts³⁶⁴ to calls for the

trinitarian Constitution. As Calabresi and Rhodes have maintained, there might have to be “some residuum of jurisdiction” that would allow the Court to function in that capacity. Calabresi & Rhodes, *supra* note 134, at 1162 (quoting Hart, *supra* note 142, at 1364) (emphasis added). In their view, it would be absurd to insist upon the independence of the federal judiciary and then to give them no judicial business in which to apply that independence. *See id.* But President Franklin Roosevelt’s court-packing plan illustrated some of the political limits of the Court’s jurisdiction, however deftly it may be partitioned and apportioned in quieter times. *See* Presidential Message, 81 CONG. REC. 877–79 (1937) (promoting the packing plan as a means to relieve congestion and asserting that life tenure had created a “static” judiciary). Roosevelt’s words were startling in their ironic disregard for democratic punctilio: “We must find a way to take an appeal from the Supreme Court to the Constitution itself.” *Id.* app. at 470; *see* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 126 (1988); *see also* Cox, *supra* note 141, at 578 (noting the failure of the court-packing plan because of the nation’s “near religious attachment to constitutionalism and the Supreme Court”).

363. Hart, *supra* note 142, at 1365. Hart’s view has received wide homage in the literature. *See, e.g.*, Calabresi & Rhodes, *supra* note 134, at 1162; Dodge, *supra* note 350, at 1015–16. Hart noted that the vulnerability of the Supreme Court’s appellate jurisdiction to control by Congress had led to “serious proposals of amendment” (for example, to substitute “the Supreme Court” for “the Congress” in the phrase “with such Exceptions . . . as the Congress shall make,” U.S. CONST. art. III, § 2, cl. 2). *See* Hart, *supra* note 142, at 1401 n.107. This Article, however, proposes only a *limited* reduction of federal appellate jurisdiction that *is* consistent with the character of the Constitution. *Cf.* Amar, *supra* note 148, at 221 n.60 (explaining that a national tax court from which no appeal would lie would not affect the supremacy of the high court as the only court whose jurisdiction derives from the Constitution itself and the only court from which no appeal can constitutionally lie); Ratner, *supra* note 184, at 168–71 (discussing the possible semantic limits imposed on exceptions and regulations by contemporary usage and noting that, in its historical dictionary meaning, an exception could not nullify the rule or description that it limited, but must necessarily have a narrower application); Dodge, *supra* note 350, at 1014 (arguing that *some* amount of appellate jurisdiction is needed to maintain the Supreme Court as “the most important court” in the nation, but concluding that particular exceptions, such as creation of an abortion court, would not likely defeat this essential role).

364. *See* Amar, *supra* note 148, at 230. Certainly, the Supreme Court could be stripped of its “arising under” appellate jurisdiction, “thereby allowing the federal courts of appeals and the highest state courts to become, in their respective jurisdictions, the final interpreters of federal law.” Ratner, *supra* note 184, at 158; *see also* Calabresi & Rhodes, *supra* note 134, at 1163–64 (discussing Amar’s distributive model). That these distributive alterations are feasible, however, does not refute my contention, *see supra* note 339, that if the Supreme Court’s appellate jurisdiction is excisable by Congress in any respect, as it appears to be, then Congress certainly has the constitutional capacity to remove the same appellate recourse from inferior federal courts as well. *See* Rossum, *supra* note 163, at 424 (arguing that the greater power not to create lower federal courts must include the lesser power to create them with limits on their jurisdiction). The only remaining issue, therefore, would be whether the principle of “judicial independence”—as a deep structure

annihilation of all federal appellate jurisdiction.³⁶⁵ Importantly for the present discussion, Congress's jurisdiction-stripping power confirms the reach of the deep structure principle of shared judicial authority; removal of Supreme Court appellate jurisdiction, after all, seems logically consistent with a deep structure principle that allows Congress to confer federal judicial power, both original and appellate, on tribunals that lack Article III judges.

From what has been said already, it would appear constitutional for Congress to use its Article III exceptions power, backed by the deep structure principle of shared judicial power, to reshuffle the heads of appellate jurisdiction and to prescribe in implementing legislation that an International Court of Air Transportation, for instance, would be the proper tribunal of final resort under a new multilateral aviation treaty.³⁶⁶ Without speculating as to the extreme limits of Congress's jurisdiction-sapping power, it is at least plausible to assert that Congress could, as a matter of rational textual exposition—and actual legislative practice—configure the boundaries of the Supreme Court's (and, a fortiori, the federal court system's)³⁶⁷ original jurisdiction and final appellate review.

principle of Article III—would ultimately *preclude* Congress from any specific jurisdiction-stripping exercise. See *infra* text accompanying note 377 (discussing due process implications of judicial independence).

365. If the Supreme Court's entire appellate jurisdiction were abolished by Congress and the lower federal courts dissolved, the state court systems would decide virtually all cases and controversies implicating federal law, outside the Supreme Court's narrow original jurisdiction, and the highest state courts would serve as a hydra-headed surrogate for a national Supreme Court. See Hart, *supra* note 142, at 1401 (contending that state courts "[i]n the scheme of the Constitution are primary guarantors of constitutional rights"). As noted, there are several contrary arguments denying that the federal court system could be minimized in this way, but these arguments often rely on textual sources outside Article III. Ratner, for example, reasoned that the Supremacy Clause would be a mere exhortation without an implementing national tribunal that is empowered to interpret and apply the supreme law in every case, whether state or federal. See Ratner, *supra* note 184, at 201. *But cf.* Amar, *supra* note 148, at 208–10 (using Article III itself as the basis for a non-minimalist reading).

366. See Amar, *supra* note 148, at 258 (describing Congress's power to structure the federal judiciary as "not trivial" because it includes the power to create unreviewable Article III tax or abortion courts). The Open Skies Commission, proposed in my model for supranational aviation tribunals, see *supra* text accompanying notes 24–31, would enjoy a secure constitutional status under the deep structure principle of shared judicial power. See *supra* text accompanying notes 324–28 (bringing supranational tribunals within the principle of shared judicial power).

367. See *supra* note 339 (discussing permissible alterations to the reach of federal appellate jurisdiction).

D. *Appellate Review in the Deep Structure: Problems of Essentializing Judicial Power*

The principle of constitutional integrity warns that congressional power over the federal judicial system is not solely a matter of Congress's distributive and organizational powers in Articles I and III.³⁶⁸ Organizational flexibility surely permits us to uncover a deep structure principle of shared judicial power, but this principle is manifestly not the only deep structure value that underlies Article III.³⁶⁹ In this vein, when Chief Justice Marshall ruled in *Cohens* on Virginia's claim that the states were exempted from "arising under" jurisdiction, he appealed to "the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed."³⁷⁰

As we have seen, the principle of constitutional integrity is a more rarefied restatement of a doctrine that Justice Scalia has described, with some élan, as "the separation and equilibration of powers."³⁷¹ This fundamental deep structure idea, which nowhere appears in the text of the Constitution,³⁷² generates the surface lexicon of vesting in Articles I, II, and III.³⁷³ Despite its tie to the

368. As Hart has maintained, the primary check on Congress and on the exercise of its powers to make the judiciary function is "the political check—the votes of the people." Hart, *supra* note 142, at 1399.

369. See *INS v. Chadha*, 462 U.S. 919, 944 (1982) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . ."). Thus, convenient and efficient procedures cannot be absolved, even if they facilitate governmental functions, if they nevertheless violate the constitutional order. See *id.*

370. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) (finding in the nature of the Constitution no exception that would exempt a state as a party from federal jurisdiction when the case involved the general grant of judicial power to decide all cases "arising under" the Constitution or laws of the United States). Chief Justice Marshall emphasized a (deep) structural principle of "subordination" in the relationship of the state governments to the government of the Union and the Constitution. See *id.* at 382.

371. *Printz v. United States*, 521 U.S. 898, 922 (1997); *Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J. dissenting). For a recent invocation of the doctrine, see *Clinton v. City of New York*, 524 U.S. 417, 449–53 (1998) (Kennedy, J., concurring).

372. See E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989) (referring, appropriately, to the "immanence" of separation of powers principles in the Framers' Constitution).

373. Thus, the principle of separation of powers is implicit in the first section of each of the first three Articles of the Constitution. Article I, Section 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States," Article II, Section 1 provides that "[t]he executive Power shall be vested in a President of the United States of America," and Article III, Section 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1; see *Morrison*, 487 U.S. at 697–99 (Scalia, J., dissenting).

vesting clauses, however, the intent of the separation of powers doctrine is not to set up a *cordon sanitaire* that divides the powers one from the other.³⁷⁴ Articulating a deep structure theory, Chief Justice Hughes opined that the separation of powers theory arose, “not from Art[icle] III nor any other single provision of the Constitution, but because ‘behind the words of the constitutional provisions are postulates which limit and control.’ ”³⁷⁵

The judicial branch, then, is a component of a tripartite constellation of governmental powers. The separation of the branches of government—the principle of constitutional integrity—is indisputably a deep structure principle that *limits and controls*. Moreover, a major part of the understanding that Article III judges have of their role in the separation of powers is that *their* exercise of the federal judicial power offers an independent, neutral, unbiased domain of dispute resolution to parties in federal causes who challenge the actions of the political branches—and to the political branches themselves when they challenge one another.³⁷⁶ That understanding is underwritten by the explicit assurances of professional independence given in Article III.

If the virtues of independence, neutrality, and absence of bias accurately capture the federal judiciary’s essential self-image, the Supreme Court’s jurisprudential rationale for this essentialist perception remains elusive. The Court’s rationale, in fact, has shifted uncertainly between treating the federal judiciary’s independence as a

374. See *Mistretta v. United States*, 488 U.S. 361, 386 (1989) (recognizing “the constitutionality of a ‘twilight area’ in which the activities of the separate branches merge” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment and opinion)); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (rejecting as archaic a complete division of authority among the three branches); *United States v. Nixon*, 418 U.S. 683, 703–05 (1974) (adopting Madison’s flexible approach to separation of powers).

375. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590–91 (1949) (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (Hughes, C.J.)). Ironically, the formal plan of Article III itself might have been dispositive on the question of eliminating Article III appellate review. As earlier noted, *see supra* text accompanying note 193, the system of state courts displaces federal judicial review by an Article III judge whenever a judgment of a state supreme court, implicating a matter of federal law, remains unappealed. Moreover, the finality of state decisions is confirmed by the powerful effect of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1.

376. These, after all, were the root principles that apparently animated Justice Brennan’s opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 86 n.39 (1982) (plurality opinion). Judicial independence, in Justice Brennan’s reasoning, maintained the checks and balances of the constitutional structure and guaranteed the impartiality of the adjudication process by ensuring judges who were “‘free from potential domination by other branches of government.’ ” *Id.* at 58 (plurality opinion) (quoting *United States v. Will*, 449 U.S. 200, 217–18 (1980)).

part of the separation of powers—in other words, as embedded in the deep structure of the Constitution—and treating it as a personal and waivable right of every federal litigant.³⁷⁷ Such ambivalence is hardly decisive.³⁷⁸

An unbending structural requirement of ultimate appellate review by the Article III judiciary, or specifically by the Supreme Court, would seem inconsistent with the Court's Article III jurisprudence after *Thomas* and the conceptualization of specialized tribunals adjudicating public rights.³⁷⁹ When Justice White, in his dissent in *Northern Pipeline Construction Co.*, described Article III appellate review as “go[ing] a long way” to ensuring a proper separation of powers,³⁸⁰ he came close to suggesting that review by the privileged judiciary appointed under Article III might indeed be an integral component of the deep structure principle of constitutional integrity.³⁸¹ But Justice White, the parent of the

377. To Robert Nagel, the apparent antinomy of this statement cannot stand. See NAGEL, *supra* note 11, at 64–65. Nagel maintains that the Framers expected the structure of the separation of powers to become *itself* “the great protection of the individual,” rather than the “parchment barriers” that were later added as the Bill of Rights. *Id.* Calabresi would agree; he has projected a vision of “the Constitution of the Federalist Papers with its reliance on checks and balances, separation of powers, and federalism to preserve freedom.” Calabresi, *supra* note 15, at 1401.

378. As further evidence of judicial ambivalence, see *infra* note 386 (discussing Justice Brennan's comments on the more “mundane,” rights-focused function of judicial independence).

379. 473 U.S. 568, 583 (1985). In *Schor*, Justice Brennan seemed puzzled that the Court appeared to have pitted legislative convenience and efficiency against judicial independence. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting). Justice Brennan's unease was predictable. In *Northern Pipeline*, speaking for the plurality, he had cited approvingly to the much earlier decision in *Crowell v. Benson* for the proposition that the requirement of de novo review was “not ‘simply the question of due process in relation to notice and hearing,’ but was ‘rather a question of the appropriate maintenance of the Federal judicial process.’” *Northern Pipeline Constr. Co.*, 458 U.S. at 82 n.33 (plurality opinion) (quoting *Crowell v. Benson*, 285 U.S. 22, 56 (1932)). Yet immediately thereafter, Justice Brennan repeated words of the *Crowell* dissent asserting that “‘under certain circumstances, the constitutional requirement of due process is a requirement of [Article III] judicial process.’” *Id.* (quoting *Crowell*, 285 U.S. at 87 (Brandeis, J., dissenting)). It is difficult to discern where Brennan himself might have drawn a distinction between an immutable structural principle of judicial independence and a personal right of due process, to be invoked only “under certain circumstances.” See *infra* text accompanying note 387 (considering further the issue of a due process right of access to the judiciary appointed under Article III).

380. 458 U.S. at 115 (White, J., dissenting).

381. Justice White regarded appellate review of the decisions of legislative courts, like appellate review of state court decisions, as providing “a firm check on the ability of political institutions of government to ignore or transgress constitutional limits on their own authority.” *Id.* (White, J., dissenting). Therefore, a scheme of courts created under Article I that provided for appellate review by the Article III judiciary “should be substantially less controversial than a legislative attempt entirely to avoid judicial review

pragmatic, values-based tests that inspired later Article III jurisprudence, was careful never to elevate final review by Article III judges into a *sine qua non* of the structural principle of constitutional integrity. Otherwise, the availability of appellate review simply could not have become subject to a test of congressional intent as it was in *Thomas*,³⁸² nor presumably could it have been the object of simple party waiver, as it was in *Commodity Futures Trading Commission v. Schor*.³⁸³ In that sense, the right to Article III appellate review is, at most, an individual liberty interest preserved by the Due Process Clause³⁸⁴ rather than a specific, articulable restriction on the constitutional ability of Congress to map new courts to the surface structure of Article III using the deep structure principle of the fragmented judicial power.³⁸⁵ Indeed, as Justice White concluded in

in a constitutional court." *Id.* (White, J., dissenting). That something may be controversial, however, does not mean that is constitutionally impermissible. Taking Justice White at his word, he may have meant only that the values expressed in Article III should not be undermined by whatever legislative alternative to appellate review Congress might establish.

382. *Thomas's* holding rested, as the Supreme Court itself declared, on the proposition that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I," might allow for the adjudication of so-called private rights within a broad public regulatory scheme, "with limited involvement by the Article III judiciary." 473 U.S. at 593-94. The Court did not define "limited involvement." In accordance with Justice White's analysis in *Northern Pipeline Construction Co.*, however, the meaning of the phrase could be stretched to the full semantic range of the word "limited," including checked, constrained, and perhaps even minimal. Justice White's argument, after all, was that Article III, while not to be read out of the Constitution, should be read as "expressing one value that must be balanced against competing constitutional values and legislative responsibilities." *Northern Pipeline Constr. Co.*, 458 U.S. at 113 (White, J., dissenting). When Justice White concluded that "[t]his Court retains the final word on how that balance is to be struck," *id.*, he was stating a truism of the American constitutional order that is also a controlling premise of this Article—ultimately, supranational tribunals must pass muster under the principle of constitutional integrity, and only the Supreme Court can make that final determination. See *supra* note 342 (describing a possible mechanism for special constitutional review of an international treaty system).

383. 478 U.S. at 848-50. Richard Fallon, a stern critic both of *Northern Pipeline Construction Co.* and *Thomas*, has adopted the straightforward position that "appellate review by article III courts offered sufficient protection for article III values." Fallon, *supra* note 179, at 991. A danger in Fallon's approach, however, is that it may confound a deeper investigation of what those values are and of why they might still be protectable by other forms of judicial (or even non-judicial) authority.

384. For consideration of relevant implications of the due process protections of the Bill of Rights, see *infra* text accompanying notes 387-97.

385. If the requirement of Article III review were a discrete constitutional restriction on the power of Congress to distribute judicial power, it would not be possible for individual litigants to correct Congress's misfeasance merely through their right of waiver of review. Individual actions cannot alter the principle of constitutional integrity. See *Schor*, 478 U.S. at 850-51 (accepting that parties cannot by their mere consent cure constitutional difficulties, because "the limitations serve institutional interests that the parties cannot be expected to protect"). See generally *Insurance Corp. of Ir. v. Compagnie*

Northern Pipeline, “[h]ad Congress decided to assign all bankruptcy matters to the state courts, a power it clearly possesses, no greater review in an Article III court would exist.”³⁸⁶

E. Due Process, but Not Article III Appellate Review, as a Personal Right

Accordingly, I argue that due process—in the specific guise of a right to final appellate review by Article III judges—is not an imperative of the deep structure of Article III. In *Schor*, for example, the majority held that the guarantee in Article III, Section 1 of an independent and impartial adjudication by judges appointed under Article III protected “primarily personal, rather than structural, interests.”³⁸⁷ In *Thomas*, the guarantee of independence and impartiality ultimately was assured through appellate review by an Article III judge of the arbitrators’ findings for fraud, misconduct, or misrepresentation,³⁸⁸ and the Court held that review of constitutional error was also preserved incident to due process.³⁸⁹ The majority in *Crowell v. Benson*³⁹⁰ believed that minimum review would include whether the agency had acted in conformance with its organic statute

des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982) (emphasizing that personal jurisdiction objections can be waived by federal defendants because due process, rather than constitutional federalism, is the source of the personal jurisdiction requirement).

386. 458 U.S. at 116 (White, J., dissenting). Justice Brennan, in his penultimate footnote in *Northern Pipeline Construction Co.*, seemed troubled by the abstractness of his emphasis on the watchdog role of the judicial branch. See *id.* at 86–87 n.39 (plurality opinion). Thus, he preferred to interpret the guarantee of judicial independence as extending to “the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law.” *Id.* (plurality opinion). Justice Brennan, in other words, read judicial independence with a strong bias toward assertion of personal rights rather than solely as a structural principle that puts the judiciary in the role of constitutional oracle. While he recognized that constitutional interpretation should be a vital task of the federal judiciary, he was more concerned that its vaunted independence be used to promote “the quality of judicial decision-making.” *Id.* (plurality opinion).

387. 478 U.S. at 848. The Court reasoned that the parties would gain protection “‘from the risk of legislative or executive pressure on judicial decision.’” *Id.* (quoting David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 460 n.108 (1983)). Significantly, however, *Schor* rejected the assertion of an absolute right to the plenary consideration of every claim by an Article III judge. See *id.* Fallon, too, is skeptical of assigning primacy to the value of due process, which would come (in his view) too close “to reading Article III out of the Constitution.” Fallon, *supra* note 179, at 978 n.371. In Fallon’s perspective, the due process inquiry, if it were to become the only determinant of a general requirement of judicial review (whether of law or fact), would not be as reflective of separation of powers concerns. See *id.*

388. 473 U.S. 568, 592–93 (1985).

389. *Id.*

390. 285 U.S. 22 (1932).

and the assertion of constitutional rights.³⁹¹ Justice Brennan, concurring in *Thomas*, required that "at a minimum" Congress may not assign to an Article I decision-maker "the ultimate disposition of challenges to the constitutionality of Government action."³⁹² In his dissent in *Webster v. Doe*,³⁹³ Justice Scalia injected a strong note of doubt as to Justice Brennan's claim of an unbreachable minimal position of constitutional review. Expressing the opinion that Congress retained discretion to identify claims of constitutional violation that would *not* require a judicial remedy (including, presumably, appellate review by an Article III judge), Justice Scalia opened up the possibility that claims of that nature might indeed exist. Justice Scalia seemed to place himself, therefore, squarely within Justice White's pragmatic tradition.³⁹⁴

391. *Id.* at 60. *Crowell's* assumption of broad judicial supervision of agency powers has not survived. The *Crowell* Court addressed as a question of principle whether the compensation commission's determination of the facts of its own jurisdiction (such as the locus of the injury in United States navigable waters, and the existence of the employer-employee relationship) could be disturbed, holding that jurisdictional (or "fundamental") facts of this kind were "condition[s] precedent to the operation of the statutory scheme" and implicated constitutional rights because the power of Congress to enact the legislation depended on them, as well as the exercise of the judicial power of the United States to police constitutional limitations. *Id.* at 54. Congress, in other words, could not reach beyond the constitutional limits that were inherent in the admiralty and maritime jurisdiction. *See id.* at 54-55. In these circumstances, the federal judicial power had to be maintained in order to require the observance of a constitutional restriction. *See id.* at 56-57. And, to that extent, Congress could not "sap the judicial power" under the federal Constitution "to establish a government of a bureaucratic character alien to our system." *Id.* at 57. *But cf.* *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984) (holding that a regulatory agency's interpretations of its governing statutes, when the statute is silent or ambiguous, is entitled to deference as a legitimate policy choice to fill any gap left by Congress and should be overturned only if it is arbitrary, capricious, or manifestly contrary to the statute).

392. 473 U.S. at 599 (Brennan, J., concurring). Separately, Justice Brennan left open the possibility that "some eventual review" might be required "in the exercise of its responsibilities to check an impermissible accumulation of power in the other branches of [g]overnment." *Id.* (Brennan, J., concurring). While this assertion is true as a matter of general principle, this Article offers constitutional legitimization for supranational tribunals that would overcome objections founded on aggrandizement by the political branches.

393. 486 U.S. 592, 606-21 (1988) (Scalia, J., dissenting).

394. *See id.* at 614 (Scalia, J., dissenting). *Webster* concerned the interpretation of the Administrative Procedure Act, which provides that Congress may preclude judicial review of administrative action in two categories of cases: when a statute expressly precludes review and when a decision is committed to agency discretion by law. *See* Administrative Procedure Act, 5 U.S.C. § 701(a)(1), (a)(2); *Webster*, 486 U.S. at 599-601. The Court ruled that the termination decisions of the Director of the Central Intelligence Agency (CIA) under the National Security Act of 1947, 50 U.S.C. § 403(c), were judicially unreviewable. *See Webster*, 486 U.S. at 601. The statutory standard for termination, allowing dismissal where "necessary or advisable in the interests of the United States," 50 U.S.C. § 403(c), in the Court's view "fairly exude[d] deference to the Director" and thus

Nevertheless, to reclaim the reasoning of Professor Hart, if this series of propositions is true to any extent, it is not because of anything in Article III (in either its surface or deep structures). The source of these propositions must be some other constitutional provision or even some generative principle of deep structure *other than* the principle of constitutional integrity. Hart himself proposed the Due Process Clause as a possible source of litigants' rights.³⁹⁵ Without addressing here the deep structure provenance of the due process principle, I believe that Hart was correct. Article III itself, however, offers no specific textual guarantee of access to judges appointed under its authority. It may even be read to eliminate all forms of appellate recourse to any forum created directly under Article III.³⁹⁶ To that extent, it must affect the content of litigants'

provided no "meaningful judicial standard of review." *Webster*, 486 U.S. at 600. The Court refused to read the statute, however, to exclude *constitutional* claims such as the respondent's assertion (though not considered by the Court) that there might be a general CIA policy against employing gays and lesbians. *See id.* at 604 n.8. Interestingly, both Justices O'Connor and Scalia saw the case as strongly implicating separation of powers concerns. *See id.* at 605-06 (O'Connor, J., concurring in part and dissenting in part); *id.* at 612-15 (Scalia, J., dissenting). In Justice O'Connor's view, the authority of the CIA Director "to control access to sensitive national security information by discharging employees deemed to be untrustworthy flow[ed] primarily from [the] constitutional power of the President" in international relations, as panegyricized in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). *Webster*, 486 U.S. at 605-06 (O'Connor, J., concurring in part and dissenting in part). In that context, Justice O'Connor seemed to imply, Congress might surely provide that the inferior federal courts could not be used to infringe on the President's constitutional authority. Justice Scalia's astringent dissent rejected the majority's dictum that a " 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 611 (Scalia, J., dissenting) (quoting majority opinion, *id.* at 603). Unable to find any "general principle that *all* constitutional violations must be remediable in the courts," *id.* at 612 (Scalia, J., dissenting), Justice Scalia concluded that the issues of foreign policy and national defense implicated in the case revealed a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 614 (Scalia, J., dissenting).

395. *See* Hart, *supra* note 142, at 1373. In this sense, Hart contended, "the power to regulate jurisdiction" was actually a power to regulate rights, including the right to access the judicial process. *Id.* at 1372-73. In making this argument, Hart agreed with Justice Brandeis, who maintained:

If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell, 285 U.S. at 87 (Brandeis, J., dissenting).

396. *See supra* notes 346-67 and accompanying text. Because of the uncertainty surrounding appellate review, Vazquez expressed reluctance, in an article otherwise punctuated by lapidary pronouncements on the reach of the Supremacy Clause, to assign definitively the constitutional origin of such a right of appeal either to Article III or to the

due process guarantees. Thus, if separation of powers concerns are not otherwise implicated, a federal litigant's due process right to impartial adjudication does not always mean access to a judge holding the privileges of appointment under Article III. Separation of powers principles do not trump the actions of Congress in establishing tribunals without Article III judges under its treaty and foreign commerce powers.³⁹⁷

F. *A Political Accommodation of Due Process Values*

The quest for the outer bounds of due process rights lies beyond the scope of this Article, and I therefore conclude with a much more tightly drawn proposition. My proposed Court of International Air Transportation represents the terminal appellate recourse for litigants before the Open Skies Commission. As this Article has shown, from the American constitutional perspective these tribunals would exercise the judicial power granted to the federal government under the deep structure principle of shared judicial power apparent in the United States Constitution.

The character of the United States government would almost certainly be altered if Congress were to attempt a wholesale excision of domestic judicial authority by a transfer to supranational tribunals at large.³⁹⁸ In this Article, I advocate only a sectionalized transfer of federal judicial power to such tribunals.³⁹⁹ Even this narrower

Due Process Clause. See Vazquez, *supra* note 41, at 1151. Vazquez went so far as to suggest that the state courts might be an appropriate venue for final vindication of any putative right to administrative review. See *id.*

397. Vazquez would appear to agree, at least in a footnoted comment. When rights flow from a treaty instrument, he maintained, "the power of Congress to limit the procedures available for the vindication of the treaty right might be thought to be broader, on the theory that, if Congress has the power to repeal the right entirely, it must have the lesser power of limiting the manner in which it may be enforced." Vazquez, *supra* note 41, at 1151 n.288. Such an attribution of congressional discretion is entirely in keeping with a broad theory of public rights in the international trade context.

398. In the precise context of transferring U.S. constitutional power to supranational institutions, George Bermann has recently emphasized that "treaty regimes [are] subject to the procedural and substantive requirements of the United States Constitution." George A. Bermann, *Constitutional Implications of United States Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 479 (Supp. 1998). *But cf.* Helfer & Slaughter, *supra* note 7, at 287 (suggesting that supranational, strictly speaking, has no "canonical" definition).

399. NAFTA, for instance, has been a Procrustean menace for constitutional interpretation: under the doughty diplomatic compromise that allowed the agreement, the various United States, Canadian, and Mexican laws on antidumping and countervailing duties, see *supra* note 331, were pressed into service as a kind of *ersatz* "common" law of the treaty, a fiction that failed to satisfy either internationalists or sovereigntists. See Richard Bilder et al., *The Canada-U.S. Free Trade Agreement: New Directions in Dispute*

proposal, however, contemplates a transfer of *constitutional* judicial power, and as such the transfer must respect other principles in the Constitution's deep and surface structures that determine the proper exercise of that power. The political branches, accordingly, would have to ensure compliance by supranational tribunals with the principles of due process and fairness that the Constitution also mandates.⁴⁰⁰ Achieving these ends is complicated because the United States must work with other countries to establish the proposed supranational tribunals.⁴⁰¹ Consequently, accommodation of the

Settlement, 83 AM. SOC'Y INT'L L. PROC. 251, 266 (1989). NAFTA's assignment of authority to what Chen "most charitably" has labeled an "executive tribunal," Chen, *supra* note 195, at 1478-79, inevitably led to the suspicion that Congress may have " 'inten[ded] . . . to transfer jurisdiction from constitutional to [non-Article III courts] for the purpose of emasculating' the federal judiciary." *Id.* at 1479 (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). The NAFTA construct may have been so poorly conceived that it justified Metropoulos's lament that it set "too dangerous a precedent, in too sensitive an area of law, for too wrong a reason." Metropoulos, *supra* note 93, at 168. Chen, notwithstanding his chiliastic comparison of NAFTA to "the battle of Gettysburg in the struggle to define separation of powers," Chen, *supra* note 195, at 1457-58, did not foresee that NAFTA would unleash a doomsday scenario of "a phalanx of non-Article III tribunals" brutally suppressing the business of Article III judges. *Id.* at 1479.

Commentators have identified other constitutional infirmities in the NAFTA agreement. It is arguable, for example, that the appointment of Canadian members of the binational panels reviewing United States law violates the Appointments Clause, which requires that inferior officers of the United States must be appointed by the President upon the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. But an Appointments Clause objection would hardly prevail against the proposed supranational aviation tribunals, which would not exercise authority pursuant to the laws of the United States, but rather according to the special requirements of a U.S. treaty and in conformity with a code of international competition law. *See supra* text accompanying notes 24-31 (discussing the proposed structure of aviation tribunals); *see also* Kim, *supra* note 94, at 985-86 (presenting arguments against the application of the Appointments Clause to the NAFTA panel system). *See generally* Davey, *supra* note 293, at 1327 (noting that the Appointments Clause has rarely been implicated in foreign affairs, especially when the political branches, which are the objects of the Clause's protection, take united action); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 344 (1998) (concluding that "[t]he Appointments Clause simply does not speak to the issue of whether Congress may assign significant authority pursuant to federal law, without more, to nonfederal actors").

400. Similar concerns have been raised by the federal judiciary with respect to due process protections to be offered by an international criminal court. *See* JUDICIAL CONFERENCE REPORT, *supra* note 11, at 13-14.

401. The constitutional provenance of these tribunals, created by the treaty instrument and directly exercising the judicial power of Article III, should overcome any potential objection that they would represent an unlawful delegation of constitutional power to nongovernmental parties or to private citizens. *See generally* *Melcher v. Federal Open Mkt. Comm.*, 644 F. Supp. 510, 523 (D.D.C. 1986) (holding that Congress may use its Article I, Section 8 powers to vest private persons with the responsibility of open market trading, a tool used by the Federal Reserve Board's Open Market Committee in setting

interests of due process could never be achieved by the mere *ipse dixit* of Article III judges.⁴⁰² In negotiating the treaty to establish supranational tribunals, the political branches would have to seek the protection of private American constitutional interests.⁴⁰³ The executive would have to ensure that the Open Skies Commission and the Court of International Air Transportation each were comprised of independently selected judges applying standards of forensic fairness that would accord with developed United States constitutional practice.⁴⁰⁴ If these rights could not be assured, the United States ultimately might choose to withdraw from the establishing treaty.

But the forensic inadequacies of the global aviation tribunals, in contrast to their compliance with the principle of constitutional integrity, would not be for the United States federal courts to supervise.⁴⁰⁵ The United States Constitution, through its Bill of

monetary policy), *aff'd in part, vacated in part*, 836 F.2d 561 (D.C. Cir. 1987). The recent constitutional challenge to NAFTA by the American Coalition for Competitive Trade—a challenge that failed solely on standing grounds—was premised in part on the argument that the NAFTA binational panels, in purporting to exercise Article III judicial power, unlawfully “aggrandized” foreign citizens. Brief of Petitioner at 27, American Coalition for Competitive Trade v. Clinton, 128 F.3d 761 (D.C. Cir. 1997) (No. 97-1036). *But cf.* Dames & Moore v. Regan, 453 U.S. 654, 686–87 (1981) (upholding the general authority of the President to delegate the power to settle claims of U.S. citizens to an international arbitral body).

402. It is a major premise of this Article, however, that a constitutional challenge to the supranational tribunals would be framed only as a *systemic* challenge to the compatibility of these tribunals with the Framers’ conception of judicial power. I believe this is consistent with the form of accelerated challenge inserted by the Congress in the NAFTA implementing legislation. Specific challenges to the fairness of the tribunals’ forensic procedures would be resolved before the tribunals themselves and, ultimately, by the Court of International Air Transportation. Here, however, Congress would presumably retain a political veto over continued participation in the treaty.

403. *See generally* FRANCK, *supra* note 20, at 327, 468 (noting, *inter alia*, due process concerns raised by the International Court of Justice). As to the due process protections intended for the new International Criminal Court, see Marquardt, *supra* note 32, at 110–11.

404. This is the precise dialectical moment that might encourage proponents of the International Criminal Court to retool their analytical thinking. They have argued, in my view incorrectly, that U.S. constitutional judicial power would not be implicated by their new tribunal because the International Criminal Court would exercise only the judicial power of the international community. I have attempted to show, to the contrary, that the judicial power that is specified in Article III, Section 2 of the United States Constitution *would* be implicated and would be exercised by any supranational tribunal acting within specialized and particularized spheres under statutory or treaty grant from the political branches of the United States government.

405. Supranational law, in this sense, carries what one scholar of European Union integration has recently called an “unavoidable legal-constitutional consequence,” consisting of “limiting the power of the Constitutional Courts to examine conformity of [European Union law] with the Constitutions of the Member States.” Brewer-Carias,

Rights and the jurisprudence of its Supreme Court, would stipulate a necessary juristic baseline for participation in global adjudication: that the proposed aviation tribunals, wielding judicial power that ultimately derives from the deep structure imperatives of the Constitution, would satisfy the United States constitutional standards of due process.⁴⁰⁶

VI. SYNTHESIS

The premise of this Article is that supranational tribunals can exercise federal judicial power, not by delegation from our existing federal courts, but by a limited transfer of the federal judicial power contained in Article III of the United States Constitution.⁴⁰⁷ As I indicated at the outset, I use three interpretive devices to argue this evidently startling premise. First, I hypothesize a system of supranational tribunals governing a specific trade sector, the global air transport industry. These hypothetical tribunals, enjoying both original and appellate jurisdiction, depart from the usual state-to-state paradigm of international dispute settlement because they could hear disputes among private parties and disputes among states and private parties. The Article explores whether sectoralized tribunals with this kind of obligatory jurisdiction are compatible with Article III of the Constitution.

I examine the text of Article III using a second interpretive device, a set of analogical principles derived from the insights of

supra note 15, at 99. The body of law contemplated in the main text as explicitly unreviewable by the domestic United States courts would be an international legal code. This legal code would be largely comprised of common principles of competition law appended to the proposed global aviation treaty.

406. Moreover, to whatever extent independent appellate review in the domestic setting comprises an element of due process, it is satisfied implicitly in supranational adjudication because the tribunals operate separately from the political branches of the federal government. *See supra* note 399 (discussing implications of the Appointments Clause).

407. In constitutional doctrine, a delegation differs from a transfer in that a delegation may be withdrawn by the delegating body. *Cf.* Daniela Obradovic, *Community Law and the Doctrine of Divisible Sovereignty*, LEGAL ISSUES EUR. INTEGRATION, No. 1 1993, at 1, 6–9 (1993) (discussing the transfer of sovereignty in the European Community structure). The transfer of judicial power that I propose, however, could not be withdrawn—and certainly not by the Article III judiciary—unless the United States were to withdraw from the establishing treaty. *Cf.* Case 26/62, *N.V. Algemene Transp. en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12 [1963] 2 C.M.L.R. 105, 129 (1963) (explaining the European Court of Justice's view that the European Union "constitutes a new legal order of international law for the benefit of which the [member] states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.").

Noam Chomsky's structural linguistics. Deep structure principles, in Chomskyan terms, are the fixed base of the Constitution, the fundamental postulates that limit and control the text, which is the surface structure. The text, as Chomsky would put it, is a performance arranged initially by the Framers, but capable of extended or enhanced performances whenever dynamic operators, called "transformations," are applied to the deep structure. I argue that the surface structure of the federal judicial power, with its parsimonious taxonomy of a single named court and a contingent system of inferior tribunals, reveals a controlling deep structure principle that allows Congress to distribute that power to tribunals other than those constituted directly under Article III. The judges appointed under Article III have immense professional security (in the surface structure), and therefore an assured independence (in the deep structure), but they do not monopolize the judicial power itself.

The distribution, or sharing, of the power is most apparent with state court systems, which are plainly implicated by Article III's frugal scheme for federal courts. In addition, legislative or Article I courts exercise the federal judicial power through transformations based on Congress's legislative power under Article I and the Supreme Court's public rights jurisprudence. The modern public rights doctrine postulates areas of governmental activity, such as foreign trade, that the government can make justiciable by waiving its ordinary sovereign immunity. So long as Congress uses the public rights doctrine to create only sectoralized legislative courts, these courts may share exercise of the Article III federal judicial power. To provide a transformation that allows supranational courts also to exercise this power, I blend the public rights doctrine with the Constitution's expansive foreign commerce and treaty powers and the emergence of a purposive, transactional view of national sovereignty.

In a third analytical device, I seek to lend ballast to the entire argument by proposing a deep structure principle of constitutional integrity. The rationale for this principle is that all interpretive techniques bear the risk of corrupting the basic character of the Constitution, and some ultimate limiting principle must eventually be applied. The limiting principle of constitutional integrity is a restatement of the doctrine of separation of powers. This resolving "proto-principle" is needed because two deep structure principles of Article III—Congress's authority to create tribunals that share the Article III judicial power, and the independence of the Article III judiciary—may be in conflict if Congress can use the sharing principle to eviscerate the courts recognized explicitly in Article III using

tribunals that lack appellate review by judges appointed under Article III. This will be especially true of an at-large transfer of power to a supranational tribunal system, which necessarily would have an appellate structure wholly outside the Article III framework. Thus, if the creation of new federal or supranational tribunals offends the principle of constitutional integrity, by threatening the survival of an independent Article III judiciary co-equal to the political branches, then the transfer of power under the sharing principle will be blocked.

To foreclose this contest of principles, I draw on the congressional power to limit or remove the Supreme Court's appellate jurisdiction, and again on the transformation of the jurisprudence of public rights. I conclude that final review by an Article III judge is not mandated by the deep structure principle of constitutional integrity when Congress creates highly specialized tribunals, such as global aviation tribunals, in areas that Congress has not previously made justiciable. I also emphasize that accommodation of due process rights, which in a domestic setting might sometimes require appeal to a judge appointed under Article III, is not a deep or surface structure imperative that limits the creation of tribunals that share judicial power under Article III. Nevertheless, because a *constitutional* judicial power is being transferred to supranational tribunals, the political branches must arrange the transfer to comport with other relevant principles of deep and surface structure within the Constitution, including the values of fairness and due process.

CONCLUSION

Some readers may be uncomfortable that a supranational exercise of judicial power would take precedence, in the constitutional mythopoesis at work in this Article, over the individual's expectation of traditional judicial review by Article III judges. To ease that discomfort, I invoke once more the conceptual specificity insisted upon by Louis Henkin.⁴⁰⁸ The supranational aviation tribunals proposed here would adjudicate novel rights conceded by the pooled sovereign wills of the global community. These would be truly public rights.⁴⁰⁹ Within the domain of international trade, of which aviation is a highly visible but rather

408. See *supra* text accompanying notes 16–18.

409. The assumption that trade disputes should be part of a public rights discourse has been well-illustrated by the history of congressional juridicization of these disputes. See *supra* note 331; see also Morrison & Hudec, *supra* note 15, at 124–28 (discussing nature of judicial review under major United States trade statutes).

modest component, the individual's right to judicial review has always been acknowledged to be contingent.⁴¹⁰ Thus, the United States courts have been unwilling to impose due process of law or, for that matter, a guarantee of a right to trade as justiciable constitutional restraints on the foreign commerce power.⁴¹¹

410. Professor Andreas Lowenfeld was much less circumspect, testifying in congressional hearings that "I don't think there is a constitutional requirement for judicial review." *U.S.-Canada Free Trade Agreement: Hearing Before the Senate Comm. on the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, 100th Cong. 96, 120 (Sup. Docs. No. Y4:C7377:S.Hrg.103-823) (statement of Professor Andreas Lowenfeld, New York University School of Law). Trade lawyers have been aware that there is some American customs authority holding that "there is no generally available, protectable interest to engage in foreign trade." *Sacilor v. United States*, 613 F. Supp. 364, 370 (Ct. Int'l Trade 1985), *vacated and remanded* by 85 F.2d 1488 (Fed. Cir. 1987); *see also* *Norwegian Nitrogen Prods. v. United States*, 288 U.S. 294, 318 (1933) ("No one has a legal right to the maintenance of an existing rate or duty.").

411. *See* Ernst-Ulrich Petersmann, *Limited Government and Unlimited Trade Policy Powers? Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights*, in 8 *STUDIES IN TRANSNATIONAL ECONOMIC LAW*, *supra* note 15, at 537, 544. An assertive school of international relations theory, championed by Petersmann, has sought perfection of the logic of free trade at the level of the individual citizen by advocating recognition of a *right to trade* within the scheme of ordered liberty, protecting both process and property, that comprises the Bill of Rights of the United States Constitution. Thus, Petersmann has argued that "[t]he 'collective liberty' of the government to tax, restrict or prohibit transnational economic transactions is considered more important than individual liberty and 'private sovereignty' of US [sic] citizens." *Id.* at 545. This critique, which Petersmann has also applied to the external trade policies of the European Union, *see id.* at 547-48, has been animated by the neoliberalist sensibility of the post-war global trade regimes. *See* Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, in 8 *STUDIES IN TRANSNATIONAL ECONOMIC LAW*, *supra* note 15, at 8 [hereinafter Petersmann, *National Constitutions*]. The claim of a right to trade may appear overly dogmatic, however, when set against the backdrop of congressional and judicial precedent since the establishment of the Republic. In a ruling that is typical of this tradition, the Court of Appeals for the Federal Circuit held that economic injury to an importer when Congress bans importation of a product was "nonredressable" because the injury was to "a nonexistent right to continued importation of a Congressionally [sic] excluded product." *Arjay Assocs. Inc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989). In the court's opinion, "[w]hen the people granted Congress the power 'To regulate Commerce with foreign Nations' . . . they thereupon relinquished at least whatever right they, as individuals, may have had to insist upon the importation of any product Congress has excluded." *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3). If Congress were to act from considerations of public policy to exclude certain products from importation, it would not thereby violate the Due Process Clause of the Constitution. *See id.* at 896 (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904)); *see also* *American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) (holding that a "prerequisite for due process protection is some interest worthy of protecting" and that "[n]o one has a protectable interest to engage in international trade"). For a recent, very broadly articulated opinion on the perilous linkage between international trade and foreign policy involving the compression of constitutional rights under the Fifth Amendment Takings Clause, *see* *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997) (Clevenger, J., joining the opinion of the court).

Transposing trade matters to the care of supranational judges, accompanied by the required incidents of due process fairness, would have the salutary—and ironic—effect for the individual litigant of promising a greater degree of accountability over government action than has heretofore been possible in the making of international trade policy.⁴¹² To a large extent, it would diminish the “black box” phenomenon of policymaking that has placed so much unchecked discretion in the executive as to whether a specific complaint against foreign governments will ever be pursued.⁴¹³ It would open trade issues to a new transparency, exposing the manner in which certain

What accounts for this sustained judicial deference to use of the foreign commerce power? A major part of the reason is contextual: foreign commerce inevitably intermeshes with considerations of foreign policy, what one court has described as “the political side of foreign affairs.” *American Ass’n of Exporters*, 751 F.2d at 1248; see also *South P.R. Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 630 (Ct. Cl. 1964) (noting that, “[i]n the intercourse of nations, changes in economic relationships have many an important political corollary”). Nevertheless, whatever these reasons may be, Petersmann’s thesis surely deserves renewed attention in the context of an evolving international integration within which rule of law procedures displace state adversarial diplomacy (and even war). This proposal would focus on treating the private citizen as part of the global legal order, the beneficiary of rights and the object of obligations that are created, without state intermediation, by the rulings of a supranational tribunal. Ironically, the historical insistence on a *privilege*, in contrast to a *right* to trade, see Petersmann, *National Constitutions, supra*, at 17, vindicates the argument developed in this Article that the right to trade—as a public right—is susceptible to supranational adjudication, and therefore to invocation against discriminatory or disproportionate governmental foreign trade restrictions. It is partly the very contingency of the right to trade domestically, in fact, that facilitates its transfer out of traditional Article III courtrooms and its assertion, newly invigorated, in a supranational setting.

412. In this sense, access of private parties to international dispute settlement is, in itself, a guarantee of due process. See American Bar Ass’n, Section of Int’l Law and Practice, *Dispute Settlement Under a North American Free Trade Agreement*, 26 INT’L LAW. 855, 858 (1992) (noting that private party access would allow disputes to be dealt with on a more technical level, avoid forcing citizens to rely upon the attention and backing of their home states, and remove disputes from the state-to-state context, “where considerations extraneous to the particular dispute may be injected into the process”); see also Schneider, *supra* note 42, at 603 (noting that the role of private actors, in the absence of treaty standing, is necessarily limited to lobbying their governments to protect their interests and industries).

413. As Andreas Lowenfeld has remarked in the context of the GATT panels, for example, “there usually is some kind of a private dispute behind these . . . cases.” Andreas F. Lowenfeld, *Transcript of Discussion Following Presentation by Kenneth W. Abbott*, 1992 COLUM. BUS. L. REV. 151, 161. And the complex trade sanctions enforcement apparatus of the American government (the so-called “Section 301” power, see JACKSON, *supra* note 6, at 129) can only be invoked by executive discretion, with private party involvement limited to submission of petitions that may (or may not) lead to investigations. See generally Trade Act of 1974, 19 U.S.C. §§ 2411–2412 (1994) (setting forth procedures for and determining the scope of the mandatory and discretionary authority of the U.S. Trade Representative when the rights of the United States under trade agreements have been infringed).

interest groups use the secretive processes of trade policy to impose their protectionist agendas.⁴¹⁴

At another time in our history, caring about how the Constitution would treat supranational adjudication might be dismissed as mere law professors' folderol.⁴¹⁵ Now, on the threshold of a century of globalization, this Article has attempted to show, using the insights of Chomskyan linguistics and the Framers' own structural vision of their Constitution, that new forms of global adjudication could become an integral element of our evolving constitutional order. These new tribunals may prove to be the most stimulating innovation in the future of the federal judicial power.

414. See Robert E. Hudec, *The Role of Judicial Review in Preserving Liberal Foreign Trade Policies*, in 8 *STUDIES IN TRANSNATIONAL ECONOMIC LAW*, *supra* note 15, at 503 (discussing Jan Tumlir's critique of the constitutional structure under which democratic governments make foreign trade policy); see also Patti Goldman, *The Democratization of the Development of U.S. Trade Policy*, 27 *CORNELL INT'L L.J.* 631, 648 (1994) (criticizing the absence in U.S. trade policymaking of the core principles of "openness, public participation, neutrality, and accountability of both the decision-makers and the decision-making process").

415. Laurence Tribe resuscitated this venerable medieval English nonce word (which does, literally, mean "nonsense") during testimony to a Senate committee considering the implementing legislation for the WTO. See *Uruguay Round Senate Hearings*, *supra* note 8, at 334 (statement of Laurence H. Tribe). Tribe, dueling with Yale's Bruce Ackerman on the propriety of using a congressional-executive agreement in lieu of the treaty procedure in Article II of the Constitution to adopt the massive WTO trade reform package, feared that the grinding of professorial axes might simply encourage Senators to shrug off their responsibility (in Tribe's view) to comply with Article II's treaty-making protocol. See *id.*