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DYNAMIC INCORPORATION OF FOREIGN LAW

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DYNAMIC INCORPORATION OF FOREIGN LAW***Abstract***

Lawmaking bodies in one polity sometimes incorporate the law of another polity “dynamically,” so that when the law of the foreign jurisdiction changes, the law of the incorporating jurisdiction changes automatically. Dynamic incorporation can save lawmaking costs, lead to better legal rules and standards, and solve collective action problems. Thus, the phenomenon is widespread. However, dynamic incorporation delegates lawmaking power. Further, as the formal and practical barriers to revocation of the act of dynamic incorporation become higher, that act comes closer to a cession of sovereignty, and for democratic polities, such sessions entail a democratic loss. Accordingly, dynamic incorporation of foreign law has proven controversial both within federal systems and at the international level. The problem is most acute when nation-states agree to delegate lawmaking power to a supra-national entity. In order to gain the reciprocal benefits of cooperation and coordination, the delegation must be functionally irrevocable or nearly so. Representation of the member nation-states within the decision-making structures of the supra-national entity can ameliorate but cannot fully compensate for the resulting democracy losses suffered by those nation-states. More broadly, the benefits of dynamic incorporation must always be balanced against its costs, including the cost to self-governance.

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Introduction

When lawmaking bodies incorporate by reference laws from other jurisdictions, typically they do not thereby delegate any lawmaking power. Incorporation by reference functions as a shorthand. It adopts the law as it stands at the moment of incorporation. Future changes in the law of the adopted jurisdiction do not take effect in the adopting jurisdiction, unless and until the lawmaking body in the adopting jurisdiction takes the further step of incorporating the changes. Thus, incorporation by reference is usually *static*. However, lawmaking bodies sometimes employ a strategy of *dynamic* incorporation of foreign law, so that if and when the law of the incorporated jurisdiction changes, the law of the incorporating jurisdiction changes with it. By contrast with static incorporation, dynamic incorporation does delegate lawmaking authority, and has therefore proven controversial.

At the national level, scholars disagree about whether the Constitution permits the United States to enter international agreements (whether by treaty or by other means) that cede to foreign or partly-foreign bodies the power to make rules of law that are self-executing within the United States and thus binding on U.S. government officials. For example, David Golove and Henry Monaghan (separately) argue that since the Founding, the federal government has had the power to enter agreements authorizing international and foreign bodies to take legislative, executive, and adjudicatory actions that not only bind the United States as a matter of international obligation, but operate internally.¹ By contrast, Curtis Bradley, John Yoo, and others offer a different picture of the historical record and contend that, in any event, modern understandings of the Constitution limit the ability of the federal government to place the making, execution, and interpretation of law in the hands of foreign bodies it does not control.²

¹ David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *Stan. L. Rev.* 1697 (2003); Henry P. Monaghan, *Article III and Supranational Judicial Review*, 107 *Colum. L. Rev.* 833 (2007).

² See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *Stan. L. Rev.* 1557, 1596 (2003) (endorsing non-self-execution approach in order to “reduce many of the constitutional concerns associated with international delegations without significantly affecting the United States’s ability to participate in international institutions”); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander-in-Chief Power Be Delegated to the United Nations?*, 82 *Geo. L.J.* 1573, 1598--99

The proper resolution of the federal constitutional question has important consequences both for international agreements into which the United States has already entered, such as the North American Free Trade Agreement (“NAFTA”),³ and for international agreements into which the United States may enter in the future, such as the Kyoto Protocol and successor environmental treaties. If and when the validity of such federal commitments reaches the United States Supreme Court, the Justices will no doubt be attentive to the constitutional text, structure, and original understanding, as well as historical practice, their own precedents, and the expected consequences of whatever rule they announce.⁴

Likewise, similar tensions will need to be resolved in accordance with the particular language, history, and interpretive conventions in the

(1994) (calling delegation of Congress’s war power to United Nations Security Council constitutionally “troublesome”); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *Minn. L. Rev.* 71, 76--77 (2000) (arguing that treaty-based international delegations are unconstitutional due to accountability and legitimacy deficiencies); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 *U. Pa. L. Rev.* 1673, 1708--20 (2000) [hereinafter Yoo, *Kosovo*] (contending that placing U.S. troops under foreign command “creates significant tension with American constitutional principles of government accountability and popular sovereignty, as promoted by the Appointments Clause, the unitary executive, and the non-delegation doctrine”); John C. Yoo, *New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 *Const. Comment.* 87, 88, 128 (1998) [hereinafter Yoo, *New Sovereignty*] (arguing that Chemical Weapons Convention is in tension with Appointments Clause insofar as it “permits individuals who are not officers of the national government to exercise authority under federal law that affects the rights of American citizens”).

³ U.S.-Can.-Mex. Dec. 17, 1992, 32 *I.L.M.* 289 (1993). Under Chapter 19 of NAFTA, each signatory nation retains the right to apply its domestic antidumping and countervailing duty law, subject to review by “binational panels.” *Id.* at 682--84. It is unclear whether the decisions of these binational panels, which are not subject to review by an Article III court, 19 U.S.C. § 1516a(g), can directly bind federal agencies. See Michael C. Dorf, *Fallback Law*, 107 *Colum. L. Rev.* 303, 313--14 (2007) (noting “doubts about the constitutionality” of binational panel system).

⁴ Although there is no official list, my factors closely resemble the “modalities” of constitutional interpretation identified by Philip Bobbitt. See Philip Bobbitt, *Constitutional Interpretation* 12--13 (1991) (listing history, text, structure, consequences, precedent, and national ethos).

European Union (“EU”) and its member states. The European Court of Justice insists that treaty signatories have undertaken a commitment to bring their domestic law—including constitutional provisions—into conformity with EU obligations,⁵ while member states insist that EU law must yield to contrary domestic constitutional requirements where they conflict.⁶

⁵ See, e.g., Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585, 593 (“the [European Economic Community] Treaty . . . could not . . . be overridden by domestic legal provisions”), Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (“[T]he validity of a Community measure . . . cannot be affected by allegations that it runs counter to . . . the constitution of that State . . .”). The European Community “is one of three ‘pillars’ constituting the overarching European Union.” Paul Craig & Grainne de Burca, *EU Law: Text, Cases & Materials* 3 (2003). For an argument that the well-established supremacy of European Community norms applies for all European Union norms, including those of the second and third pillars, see Koen Lenaerts & Tim Corthaut, *Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law*, 31 *Eur. L. Rev.* 287, 289-90 (2006).

⁶ See, e.g., *Poland’s Membership in the European Union (Accession Treaty)*, Judgment of 11 May, 2005, K 18/04 (Pol.) (asserting primacy of Polish constitutional law over EU law). A summary of the “principal reasons for the ruling” can be found at the official website of the Polish Constitutional Tribunal, and is available at http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf, last visited Jan. 23, 2008, but only the Polish language text is authoritative. See also Krystyna Kowalik-Bañczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 *German L.J.* 1355, 1361--65 (2005), available at http://www.germanlawjournal.com/pdf/Vol06No10/PDF_Vol_06_No_10_1355-1366_Developments_Kowalik%20final.pdf (analyzing Accession Treaty case).

National constitutional courts have relied on three lines of argument to reject the supremacy of European law: the primacy of fundamental rights; the notion that some European actions are *ultra vires*; and the supposed supremacy of national constitutions. See Mattias Kumm & Victor Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3 *Int’l J. Const. L.* 473, 474--76 (2005) (identifying these three grounds on which national constitutional courts have asserted authority to overrule EU law). The fundamental rights argument is expressed in the German Constitutional Court’s *Solange* (“so long as”) cases, which first rejected supremacy of European law on the grounds that it did not include fundamental rights protection, *Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 37 BVerfGE 271 (1974) (Solange I)*, then accepted supremacy conditionally, finding that adequate rights protection had been established, *Bundesverfassungsgerichts [BVerfGE]*

To be sure, the looming collision in the EU concerns static as well as dynamic incorporation: Under the Westphalian approach of some national constitutional courts, even an EU norm that was clear at the time of accession would have to yield to a contrary national constitutional norm.⁷ But the issue is more acute with respect to dynamic incorporation. For pre-existing EU norms, the act of ratification provides legitimacy for any subsequent sublimation of a national norm to a European one. By contrast, where the relevant EU norm is promulgated (by the European Commission, say) after some nation's accession, all that vindicates the EU norm is the original, perhaps decades-old, act of accession. Given the well-mooted "democratic deficit" in the EU,⁸ dynamic incorporation of EU law thus means replacing domestic norms with supra-national ones of questionable legitimacy.

The legitimacy of dynamic incorporation of foreign law also poses potential difficulties *within* federal systems such as the United States, both at the state and national levels. Although some state constitutions expressly prohibit static as well as dynamic incorporation by reference,⁹ even among states that do not generally prohibit incorporation by reference, courts have been reluctant to approve dynamic incorporation. Depending on how one counts, either twelve or fifteen state high courts forbid dynamic incorporation

[Federal Constitutional Court], 73 BVerfGE 339 (1986) (Solange II). See also Wojciech Sadurski, "Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union 2--26 (Eur. U. Inst. Law Working Paper No. 2006/40, Dec. 2006), available at <http://ssrn.com/abstract=963757> (describing use of Solange-type arguments by constitutional courts in post-communist Central and Eastern European EU member states).

⁷ See Kumm & Comella, *supra* note 6, at 474--76 (describing jurisprudence on supremacy of national constitutional law over EU law).

⁸ The term "democratic deficit" can be attributed to David Marquand, Parliament for Europe 64--66 (1979) (explaining democratic deficit resulting from lack of governmental accountability). For an overview of the democratic deficit debate, see Craig & Burca, *supra* note 5, at 167-75.

⁹ See, e.g., La. Const. art. III, § 15 ("No system or code of laws shall be adopted by general reference to it."); N.D. Const. art. IV, §13 ("No bill may be . . . incorporated in any other bill by reference to its title only . . ."); Okla. Const. art. V, §67 ("[N]o law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only . . .").

of federal law as an impermissible delegation of lawmaking power,¹⁰ and more might forbid it if they were to face the question directly.

¹⁰ Ably aided by my research assistants, I have found twelve states that clearly forbid dynamic incorporation. They are: Arizona, see *State v. Williams*, 583 P.2d 251, 254--55 (1978) (“[I]t is universally held that an incorporation by state statute of rules, regulations, and statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an unlawful delegation of legislative power.”); California, see *People v. Kruger*, 48 Cal. App. 3d Supp. 15, 19 (Cal. App. Dep’t Super. Ct. 1975) (finding dynamic incorporation unconstitutional) (citing *Brock v. Superior Court*, 71 P.2d 209, 212--13 (Cal. 1937)); Florida, see *Florida Indus. Comm’n v. State ex. rel. Orange State Oil Co.*, 21 So. 2d 599, 603 (Fla. 1945) (same); Hawaii, see *State v. Tengan*, 691 P.2d 365 (Haw. 1984) (same); Maine, see *State v. Webber*, 133 A. 738, 738 (Maine 1926) (same); Michigan, see *Lievense v. Michigan Unemployment Comp. Com.*, 55 N.W.2d 857, 859 (Mich. 1952) (same); Ohio, see *State v. Gill*, 584 N.E.2d 1200 (Ohio 1992) (same); Oregon, see *Seale et al v. McKennon*, 336 P.2d 340, 345--46 (Or. 1959) (same); South Carolina, see *Santee Mills v. Query*, 115 S.E. 202, 205--06 (S.C. 1922) (same); South Dakota, see *State v. Johnson*, 173 N.W. 2d 894 (S.D. 1970) (same); Washington, see *State v. Dougall*, 570 P.2d 135, 137--39 (Wash. 1977) (same); and West Virginia, see *State v. Grinstead*, 206 S.E.2d 912, 920 (W. Va. 1974) (same).

Arkansas, Kentucky, and Minnesota also forbid dynamic incorporation generally, though apparently with exceptions. For Arkansas see *Cheney v. St. Louis Sw. Ry. Co.*, 394 S.W.2d 731, 732 (Ark. 1965) (“[A]ppellee’s tax liability to Arkansas is based upon a formula subject to prospective federal legislation or administrative rules. It is [therefore] unconstitutional.”), but see *Curry v. State*, 649 S.W.2d 833 (Ark. 1983) (allowing dynamic incorporation of federal drug regulations where state agency retains power to veto incorporation); for Kentucky see *Dawson v. Hamilton*, 314 S.W.2d 532, 535 (Ky. 1958) (“[A]doption . . . of prospective Federal legislation . . . constitutes an unconstitutional delegation of legislative power.”) (quoting 133 A.L.R. 401), but see *Hamilton v. City of Louisville*, 332 S.W.2d 539, 543 (Ky. 1960) (noting that dynamic incorporation of federal income tax provisions would probably not be unconstitutional); and for Minnesota see *Wallace v. Comm’r of Taxation*, 184 N.W.2d 588, 591 (Minn. 1971) (interpreting incorporation of federal tax law statically because the Minnesota legislature “could not grant to Congress the right to make future . . . changes in Minnesota law”); but see *State v. King*, 257 N.W.2d 693 (Minn. 1977) (upholding state law that dynamically incorporated federal determination of what counts as a controlled substance).

Twelve state constitutions explicitly permit dynamic incorporation of federal tax law, see *infra* note 12. The following seven state high courts have permitted, either expressly or impliedly but clearly, dynamic incorporation of federal law without relying on an explicit Constitutional provision: Alaska, see *Alaska S.S. Co.*

Yet notwithstanding the skeptical states, domestic examples of dynamic incorporation of foreign¹¹ law abound. For example, some states define various terms in their income tax codes in a way that incorporates definitions found in the federal Internal Revenue Code, including definitions that Congress changes *after* the state decides to incorporate federal law.¹² In

v. Mullaney, 180 F.2d 805, 816 (9th Cir. 1950), followed by *Hickel v. Stevenson*, 416 P.2d 236, 238 (Alaska 1966) (upholding dynamic incorporation of federal tax law); Idaho, see *State v. Kellog*, 568 P.2d 514 (Idaho 1977) (upholding law criminalizing unauthorized sale of drugs that require a prescription under state or federal law). Maryland, see *Katzenberg v. Comptroller of the Treasury*, 282 A.2d 465 (Md. 1971), 470, 473 (upholding dynamic incorporation of federal tax law); Massachusetts, see *Parker Affiliated Cos. v. Dep't of Revenue*, 415 N.E.2d 825, 831 (1981) (same); Nebraska, see *Anderson v. Tiemann*, 155 N.W.2d 322, 327 (1967) (same); Pennsylvania, see *Commonwealth v. Warner Bros. Theatres, Inc.*, 27 A.2d 62, 63--64 (1942) (upholding dynamic incorporation of federal definition of net income); and Tennessee, see *McFaddin v. Jackson*, 738 S.W.2d 176, 180-182 (1987) (upholding dynamic incorporation of federal tax law). In addition, the New Jersey Supreme Court has commented favorably on dynamic incorporation of federal food packaging regulations, see *State v. Hotel Bar Foods, Inc.*, 112 A.2d 726, 732 (N.J. 1955) (discussing dynamic incorporation at length before finding it wasn't at issue in case).

Four other states have upheld dynamic incorporation where a state agency retains power to veto the incorporation: Alabama, see *Ex parte McCurley v. Alabama*, 390 So.2d 25, 27 (Ala. 1980) (upholding law that state board of health must control a substance once it becomes controlled under federal law, absent objection by the state agency); Arkansas, see *Curry v. State*, 649 S.W.2d 833 (Ark. 1983) (same); Minnesota, see *State v. King*, 257 N.W.2d 693 (Minn. 1977) (same); Missouri, see *State v. Thompson*, 627 S.W.2d 298, 302 (1982) (same).

¹¹ Throughout this Article I use the term "foreign" to refer to truly foreign sovereigns as well as to different sovereigns within the American federal system. In doing so, I do not mean to deny that the relation of U.S. states to one another and to the national government differs in key respects from the relation of a U.S. state or the national government to a truly foreign sovereign. See *Testa v. Katt*, 330 U.S. 386, 389--90 (1947) (explaining that, in light of the Supremacy Clause of Article VI, a state cannot treat federal law as "foreign" in the way that it treats the law of a truly foreign sovereign); but cf. *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (likening Michigan to Finland, with respect to the federal government).

¹² See, e.g., Del. Code. Ann. tit. 30 § 1105 (2007) ("The entire taxable income of a resident of this State shall be the federal adjusted gross income as defined in the laws of the United States as the same are or shall become effective for any taxable year with the modifications . . . provided in this subchapter."). Twelve state

addition, liability in tort in some states may depend on compliance with federal law, even where the relevant federal standards go into effect after the state rule (whether legislated or judicially created) incorporating them.¹³ And some states interpret their state constitutions in “lockstep” with the U.S. Supreme Court’s interpretation of parallel provisions of the federal Constitution, with the consequence that a change in U.S. Supreme Court constitutional jurisprudence can change the meaning of the state constitution.¹⁴

constitutions expressly allow dynamic incorporation of federal tax law: Colorado, see CO Const. art. 10, § 19; Hawaii, see Haw. Const. art 7, §2; Illinois, see Ill. Const. art. IX, § 3; Kansas, see Kan. Const. art. 11, § 11; Missouri, see Mo. Const. art. X §4(d); New Mexico, see N.M. Const. art IV, § 18; New York, see N.Y. Const. art. 3, § 22; North Dakota, see N.D. Const. art 10, § 3; Oklahoma, see Okla. Const. art 10, § 12, Oregon, see Or. Const. art 9, § 32; Utah, see Utah Const. art 13, § 4; Virginia, see Va. Const. art 4, § 11. Four state high courts have upheld dynamic incorporation of federal tax law even in the absence of explicit constitutional authorization: Alaska, see *Ala. S.S. Co. v. Mullaney*, 180 F.2d 805, 816 (9th Cir. 1950), followed by *Hickel v. Stevenson*, 416 P.2d 236, 238 (Alaska 1966); Maryland, see *Leatherwood v. State*, 435 A.2d 477, 478 (Md. Court of Special Appeals, 1981); Massachusetts, see *Parker Affiliated Companies v. Department of Revenue*, 415 N.E.2d 825, 831 (1981), and Tennessee, see *McFaddin v. Jackson*, 738 S.W.2d 176 (Tenn. 1987).

¹³ Although states differ in whether violation of a federal statute itself constitutes negligence, raises a presumption of negligence, or counts as evidence thereof, neither the federal nature of a duty, nor the fact that the federal statutory or regulatory duty arose after the state’s general tort rules, disqualifies the duty for incorporation under state law as negligence per se. See Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 Whittier L. Rev. 831, 877-83 (1992) (cataloguing approaches).

¹⁴ See, e.g., *Mitchell v. State*, 818 P.2d 1163, 1165 (Alaska 1991) (applying dynamic lockstep approach); *Mefford v. White*, 770 N.E.2d 1251, 1260 (Ill. App. Ct. 2002) (“Illinois courts typically apply the ‘lockstep’ doctrine, which dictates that provisions of the Illinois Constitution should be construed in the same manner as similar provisions of the United States Constitution.”). See also Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 Cornell L. Rev. 656, 692--93 (2000) (citing evidence of and reasons for lockstep approach). Interestingly, although the Florida Constitution requires that its search and seizure provision “be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court,” Fla. Const. art. I, § 12, the Florida Supreme Court has consistently held that legislative dynamic incorporation of federal statutory law constitutes an

Likewise, federal law sometimes dynamically incorporates state law. For example, under the Conformity Act, federal courts applied the procedural law of the states in which they respectively sat.¹⁵ Federal Rule of Evidence 501 (which was enacted by an ordinary Act of Congress) makes state privilege law applicable in federal court where state law provides the rule of decision.¹⁶ The Assimilative Crimes Act incorporates the criminal law of the state in which federal land is located.¹⁷ And the federal judiciary, in exercising its power to fashion federal common law in discrete areas of federal concern, presumptively defines the content of federal law as state law.¹⁸

The foregoing examples reveal that the federal government and many states have found dynamic incorporation useful, even as other states forbid the practice. But even without a blanket proscription on dynamic incorporation, some instances of the phenomenon will appear problematic or at least highly peculiar. For example, to my knowledge, no state has ever defined its law to dynamically incorporate the law of one of its sister states. Statutory efforts at harmonization, such as state-by-state adoption of restatements or uniform codes, typically function as a form of static incorporation, and to the extent that state courts thereafter look to one another for guidance, they treat out-of-state decisions only as persuasive

unconstitutional delegation. See, e.g., *Adoue v. State*, 408 So.2d 567, 570 (Fla. 1981) ("Any attempt to incorporate a law as part of this state's body of laws prior to its creation by the appropriate federal authority is an unconstitutional delegation of the legislative power."); *Hutchins v. Mayo*, 197 So. 495, 498 (Fla. 1940) ("We cannot accept the view that the state commission may make binding rules to be promulgated by the federal bureau in the future.").

¹⁵ See 17 Stat. 196, 197 (1872), cited in 1 James W. Moore et al., *Moore's Federal Practice* § 1.02 (3d ed. 1997) ("In 1872, Congress passed the so-called 'Conformity Act,' which required that federal district courts conform their procedure 'as near as may be' with that of the state in which the district was located.").

¹⁶ Fed. R. Evid. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.").

¹⁷ 18 U.S.C. § 13 (2000). The Act was upheld in *United States v. Sharpnack*, 355 U.S. 286 (1957).

¹⁸ See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739-40 (1979) (expressing preference for dynamic incorporation of state law rather than formulation of a federal rule, absent demonstrated need for national uniformity).

precedent.¹⁹ Moreover, each of the examples of federal dynamic incorporation of state law of which I am aware is a territorially limited accommodation to the complexities created by a system of federalism. Congress has not attempted to make the law of a single state applicable, on a dynamic basis, to the nation as a whole, and presumably an attempt to do so—for example, via a law specifying that federal law in admiralty cases shall be Florida law or that federal law governing contracts with the federal government shall be New York law—would prompt serious misgivings if not objections on non-delegation or other constitutional grounds.

Whether the misgivings indeed rise to the level of state or federal constitutional violations is not my main concern here. My goals are analytic and general. This Article asks how and when dynamic incorporation of foreign law does or does not violate democratic principles. Given the diversity of state and national constitutions, different states and nations will reach different conclusions about whether and to what extent dynamic incorporation of foreign law is permissible or desirable. Nor would it be surprising if some courts that were troubled by some instances of dynamic incorporation nonetheless permitted the practice on the grounds that the legislature was better situated to make these judgments.²⁰ To avoid paying undue attention to any particular constitutional text or set of doctrines, this Article treats dynamic incorporation of foreign law as a *general* question of institutional design.²¹ My analysis undoubtedly has implications for constitutional interpretation, at least if one thinks that democratic theory properly informs constitutional interpretation. But those implications are at most a bonus. My core concern is the normative question as such.

This Article distinguishes between instances of dynamic incorporation that raise questions of *sovereignty* and those that, at most, raise questions of *delegation*. The difference, which proves to be one of degree rather than kind, turns on revocability. When the several states ratified the United States Constitution in 1789 and thereafter, they made federal law—whatever its

¹⁹ See *infra* n. 77 and accompanying text.

²⁰ Such an argument was made, for example, by the Kansas Supreme Court in upholding dynamic incorporation. See *Missouri Pacific Railroad Company v. McDonald*, 486 P.2d 1347, 1352 (Kan. 1971).

²¹ Reflecting the limits of my own expertise, I disproportionately draw examples from the American context.

future content—irrevocably operative in their respective territories.²² They thereby ceded some of their sovereignty. By contrast, should the United States by treaty authorize a multinational body—the United Nations General Assembly, say—to promulgate rules of law that are directly enforceable in U.S. courts as “the supreme Law of the Land,”²³ no serious issue of sovereignty would be raised, because the United States would retain the power to abrogate the treaty either by its terms or, even failing that, by ordinary legislation pursuant to the rule that a later-in-time statute prevails over an earlier-in-time treaty.²⁴ Any objections would sound in principles of non-delegation rather than sovereignty.

However, the distinction between questions of sovereignty and delegation is not binary. They lie on a spectrum that includes intermediate cases, such as a partly entrenched delegation. Indeed, even a completely unentrenched delegation is, from a practical perspective, partly entrenched. For example, once a treaty comes into effect, the burden of overcoming legislative inertia to supersede it can be substantial because repealing a measure is always more difficult than not enacting it in the first place.²⁵ Furthermore, as a practical matter, an act originally intended only as a delegation, may become a cession of sovereignty over time, as arguably occurred in the United States between the ratification of the Constitution and the conclusion of the Civil War.²⁶

²² See *Texas v. White*, 74 U.S. 19, 48 (1869) (“The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”); Daniel Farber, *Lincoln’s Constitution* 77--81 (2003) (explaining Lincoln’s understanding of a perpetual, unbreakable Union).

²³ U.S. Const., art. VI.

²⁴ See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 193--95 (1888) (holding that when a treaty and statute conflict, “the one last in date will control the other”). To be sure, a later-in-time U.S. law that conflicts with a U.N. Resolution might violate international law, but that would not render the U.S. law inoperative internally.

²⁵ For an excellent discussion of the degree to which “ordinary” legislation can have entrenching effects, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *Yale L.J.* 1665, 1686--88 (2002).

²⁶ Justice Holmes put the point this way:

[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. It was enough

To the extent that this Article advances a single thesis, it is this: All acts of dynamic incorporation of foreign law pose a *prima facie* threat to democratic principles, but as we move along the spectrum from easily revocable delegations to irrevocable cessions of sovereignty, the burden of justification for dynamic incorporation increases—and representation of the power-delegating polity or its members in the decision-making procedures of the body to which dynamic incorporation delegates power can, to some extent, substitute for a fully satisfactory functional justification for delegation. Thus, administrative convenience may be sufficient to justify a state's dynamic incorporation of federal income tax law, where that incorporation can be undone by a simple legislative act. Something very substantially stronger than administrative convenience would be required for a polity to cede sovereignty.

The Article proceeds in four parts. Part I lays out the core of the argument, explaining how dynamic incorporation threatens to undermine democratic principles and how, *ceteris paribus*, the threat increases as the incorporating decision becomes progressively more irrevocable.

Part II distinguishes among three sorts of dynamic incorporation: *upward* incorporation, in which a political entity delegates lawmaking authority to a larger political entity, as when a state dynamically incorporates federal law; *downward* incorporation, in which a political entity delegates lawmaking authority to a sub-unit, as when the federal government dynamically incorporates state law; and *horizontal* incorporation, in which a political unit dynamically incorporates the law of a comparable political unit, as when (to pick a hypothetical but plausible example), some state dynamically incorporates Delaware corporate law.

Part III catalogues and evaluates the principal sorts of reasons why a polity might choose to dynamically incorporate the law of another jurisdiction.²⁷

for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

²⁷ I mostly bracket a fourth kind of delegation—to private actors—which raises sufficiently distinct issues to warrant its own full treatment. Among these issues is the question of how, in a world without natural baselines, to distinguish between delegations of government power to private actors and mere government failure to regulate private power. For a useful discussion of the implications of privatization

Part IV addresses the special case of irrevocable or nearly irrevocable upward incorporation. Upward incorporation will often prove most attractive in circumstances in which states need assurances of reciprocity, but to make those assurances as meaningful as possible, they will place limits on revocability. Thus, some of the most important instances of dynamic incorporation—states or nation-states agreeing to be bound by decisions of inter-state or supra-national bodies—prove the most problematic in terms of democratic principles, at least *prima facie*. Part IV concludes that political representation of the states or nation-states in the inter-state or supra-national bodies may be the best way to ameliorate the democracy-threatening character of upward dynamic incorporation. It then asks whether such political representation is a viable option when the foreign body whose lawmaking decisions are dynamically incorporated is a court.

The Article concludes by observing the kernel of truth in the argument of jurists and scholars who object to citation of foreign law by U.S. courts interpreting U.S. law.

I. How Dynamic Incorporation Threatens Democracy

This Part explains why and how, in a reasonably well-constituted democracy, dynamic incorporation of foreign law can threaten democratic government. It then explains that the threat is roughly proportional to the obstacles to undoing the decision to dynamically incorporate foreign law. A truly irrevocable decision amounts to a cession of sovereignty over the relevant subject matter, but even nominally unentrenched decisions to dynamically incorporate foreign law can be “sticky” in practice, and thus dynamic incorporation always poses some *prima facie* threat to democratic values.

for state action doctrine within the United States, see Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367 (2003). For an argument that beneficiaries of privatized government programs have greater ability to enforce accountability than beneficiaries of public programs, see Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 646--66 (2000).

A. *The Prima Facie Threat to Democracy*

Dynamic incorporation of foreign law poses a *prima facie* threat to the democracy of the incorporating polity because it takes decisions out of the hands of the people's representatives in that polity and delegates them to persons and bodies that are accountable, if at all, only to a different polity. Under various circumstances, such a delegation of power may be sensible as a matter of policy. It may even increase the democratic accountability of the political system as a whole. Nonetheless, where the polity that dynamically incorporates foreign law is a reasonably well-constituted democracy, the act authorizing dynamic incorporation undermines self-government within that polity.

In making this claim, I do not have in mind any special definitions of terms like “democracy” or “reasonably well-constituted.” I mean simply to distinguish between democratic and non-democratic regimes by whatever standards might be used to draw the distinction in clear cases. For example, as of this writing, Canada and its provinces, the United States and its individual states, and the member states of the EU all count as reasonably well-constituted democracies, while Cuba, Egypt, and North Korea do not.²⁸ I am not concerned with intermediate cases such as Russia.²⁹ I want to limit my discussion to reasonably well-constituted democracies because delegation of power from the decision-making organs of non-democracies, by definition, does not threaten democracy (although it may threaten other values, such as national self-determination, at least if one assumes that national self-determination does not depend on popular rule).

My contention that dynamic incorporation poses a *prima facie* threat to democracy may seem inconsistent with the familiar notion that within any political system as a whole—including, for these purposes, the international

²⁸ See, e.g., Freedom House, *Freedom in the World 2008*, available at <http://www.freedomhouse.org/uploads/fiw08launch/FIW08Tables.pdf> (ranking countries on “political rights” and “civil liberties”); Laza Kekic, Economist Intelligence Unit, *The Economist Intelligence Unit’s Index of Democracy*, Table 1 (2007), available at http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf. (ranking countries from most to least “democratic”).

²⁹ See Freedom House, *supra* note 28 (ranking Russia in the middle of the scale on political rights, and civil liberties) and Kekic, *supra* note 28 (ranking Russia in the middle of the scale on democracy).

legal system—different kinds of decisions are sensibly allocated to different levels of government. There had to have been an initial decision to design political institutions so that responsibility for various kinds of policy issues resides at the local, state, national, or supra-national level, after all, and unless we are prepared to say that all such initial allocations of jurisdiction are perfect, we might think that the decision of one polity to dynamically incorporate another's law is simply a decision to revisit the initial allocation of authority among different levels of government. Is the resulting, post-dynamic-incorporation allocation, necessarily inferior, from the standpoint of democracy, to the initial one?

No, not necessarily, but, *ceteris paribus*, yes. To begin, where neither the incorporating polity nor its members are represented in the polity whose law is dynamically incorporated, there is a clear democratic loss. To advert to categories I develop more fully in Part II, dynamic incorporation is not even potentially equivalent to the reallocation of authority among different levels of government when it amounts to *horizontal* or *downward* incorporation. Whatever else might be said for a decision by Newfoundland to be governed by Quebec law (horizontal incorporation), or for Germany as a whole to be governed by the law of Bavaria on some subject (downward incorporation), in neither case do we have a re-allocation of power from one democratic unit to another. So far as citizens of Newfoundland are concerned, the government of Quebec is not democratic, because it does not represent Newfoundlanders. Likewise, so far Germany as a whole is concerned, the government of Bavaria is not democratic because it provides no representation whatsoever to persons residing in other *Länder* (States).³⁰

By contrast, *upward* incorporation can, under some circumstances, function as the rough equivalent of the reallocation of jurisdiction between government units, because the citizens of the incorporating jurisdiction have representation in the government of the jurisdiction whose law is incorporated. Indeed, as Part IV argues, such representation can, under some circumstances, substitute for a fully effective functional justification for dynamic incorporation.

However, upward incorporation invariably exacts a democratic cost (albeit one that may sometimes be outweighed by countervailing benefits). One need not believe that people always have the mobility to find the polity

³⁰ Nonetheless, as I explain in Part II, downward and horizontal incorporation can be democracy-enhancing in the aggregate.

with policies best suited to their preferences³¹ to recognize that, absent a geographically homogeneous distribution of policy preferences, on average, people have a greater likelihood of approving the policy choices of their local governments than of their supra-local governments. And whatever the distribution of preferences, as a matter of simple arithmetic, an individual's vote is worth proportionally more in a smaller polity than in a larger one (assuming apportionment on principles that do not deviate wildly from one-person, one-vote).³²

³¹ For the classic model, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 418 (1956) (“The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods The greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position.”). Regional migration patterns within the United States tend to show that people do try to match their policy preferences to those of other citizens in choosing where to live. See Robert P. Preuhs, *State Policy Components of Interstate Migration in the United States*, 52 *Pol. Res. Q.*, 527, 527--49 (1999) (finding that “consumer-voter model explains a significant portion of the variation in aggregate migration behavior”).

³² Representation in the United States Senate does substantially deviate from one-person, one-vote principles. See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Fix It)* 49-62 (2006). Accordingly, a decision by a very small state like Vermont or Wyoming to dynamically incorporate federal law does not dilute the political influence that individual Vermonters or Wyomingites exercise over the laws that govern them nearly as much as a similar decision by a large state like California or Texas dilutes the political influence of Californians or Texans. Nonetheless, even voters in the smallest states lose a measure of democratic representation when they cede authority to the federal government. According to the U.S. Census Bureau, in 2006 the national population was just under 300 million. Thus, if the 100 Senate seats were apportioned on a strictly proportional basis, it would take six million people to elect two Senators. In fact, however, the smallest state, Wyoming, with a population of just over half a million, see U.S. Census Bureau, *State & County QuickFacts*, at <http://quickfacts.census.gov/qfd/states/56000.html>, last visited Jan. 23, 2008, elects two Senators. Thus, Wyoming has roughly twelve times the representation in the Senate as it would have if seats were apportioned proportionate to population. However, Wyomingites still only elect one fiftieth of the U.S. Senate, whereas they elect all of the Wyoming legislature. The twelve-fold increase in influence relative to the national population does not compensate for the fifty-fold decrease in influence that accompanies delegation to a much larger polity. Thus, even for population-challenged Wyoming, dynamic incorporation of federal law entails a democratic

These considerations do not mean that it never makes sense for a polity to delegate authority upward or that doing so is necessarily *undemocratic*. They do show, however, that the resulting allocation of authority will be somewhat *less* democratic than maintaining relatively local control over the relevant policy question. All sorts of reasons might justify upwards delegations of authority, including overcoming collective action problems, taking advantage of economies of scale, and coordinating regulation. Part III looks at these and other grounds for dynamic incorporation in greater detail. My point here is simply that the decision of a polity to be governed on some set of questions by the decisions of others—including others of whom they are a proper subset—is almost always a decision for that polity to forego some measure of self-government.

B. *The Revocability Spectrum*

Polity A's decision to delegate decision-making power over some class of questions to polity B via dynamic incorporation (or via other methods of delegation) does not divest A of sovereignty over this class of questions, unless the delegation is irrevocable. Revocability, however, is not merely an on/off relation. It can be a matter of degree. *Ceteris paribus*, the greater the formal and practical obstacles to revocation of a decision to dynamically incorporate the laws of a foreign jurisdiction, the greater the threat that such dynamic incorporation poses to democracy.

We can see the importance of revocability to democratic objections against dynamic incorporation by looking at the importance of revocability to democracy more generally. Consider a leading example. Article 79(3) of the German Constitution purports to categorically forbid certain sorts of amendments, but scholars have questioned whether this sort of permanent entrenchment is legitimate.³³ What gave the drafters of the original Article 79(3) the right to decide any questions for all time?

loss—one that is compounded when we take account of the much-closer-to-proportional influence that Wyoming exercises over the choice of House members and the President.

³³ See, e.g., Julian N. Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 12 Am. B. Found. Res. J. 379, 386--96, 403--05 (1987) (examining objections to entrenchment in British and American contexts); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 502--09 (1997) (describing majoritarian objections to legislative and

This is a hard question that also can be, and has been, asked about the less severe forms of entrenchment that one commonly sees in constitutions. What gives any super-majority at any time the right to entrench its work against change by a mere ordinary majority? A satisfactory account of constitutional entrenchment—and thus of constitutionalism itself—must provide an answer to this question.

We should distinguish two sorts of problems with entrenchment. The first is simply a matter of positive law. Akhil Amar has argued that the arduous amendment procedure set out in Article V of the U.S. Constitution is not the exclusive means of amending the Constitution, suggesting that a national referendum would also be effective.³⁴ Likewise, one might think that Germans could circumvent Article 79(3) simply by amending Article 79(3) itself. According to these sorts of arguments, the U.S. and German Constitutions are best read—by their own terms and in accordance with their histories—not to be as deeply entrenched as they appear to be. These arguments draw some strength from claims about the democratic (il)legitimacy of entrenchment, but they do so in the service of understanding the scope of entrenchment that actually exists under current law.

A second kind of problem with entrenchment concerns legitimacy directly. Critics attentive to this problem typically begin with the (reasonable) assumption that contemporary majorities have the best claim to legitimate lawmaking authority.³⁵ According to this argument, one generation never has the power to bind another, or if one generation does have some power to bind later generations, the power must be limited in

cross-temporal entrenchment); Frank I. Michelman, *Entrenchment and the Dignity of Legislation* (2006) (unpublished manuscript).

³⁴ Akhil Reed Amar, *Philadelphia Revisted: Amending the Constitution Outside Article V*, 55 *U. Chi. L. Rev.* 1043 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994) But see Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121 (1996) (arguing that Amar “ignores the crucial role reserved for the states in the newly established constitutional order, and . . . the fact that the Constitution nowhere contemplates any form of direct, unmediated lawmaking or constitution-making by ‘the People.’”).

³⁵ See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *Geo. Wash. L. Rev.* 1127, 1127 (1998) (“The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago.”).

some way.³⁶ This sort of argument is sometimes used to attack the practice of judicial review,³⁷ but it also applies to constitutionalism itself.

I am not now interested in whether persuasive answers can be given to critics of constitutional entrenchment. Instead, I merely wish to note a common and apparently justified assumption in this debate: As the degree of entrenchment of a constitutional provision (or its authoritative interpretation by a constitutional court) increases, so too does the difficulty of reconciling the provision (or its interpretation) with democratic principles. A constitutional rule that says, for example, “no criminal prohibition of abortion” is more “counter-majoritarian” in a constitutional system like that of the United States, in which it can only be reversed by constitutional amendment³⁸ (or through the judicial appointments process³⁹), than it is in a constitutional system like that of Canada,⁴⁰ where it can be superseded by the national Parliament acting pursuant to the “notwithstanding clause” of the Charter of Rights and Freedoms.⁴¹

To say that the burden of persuasion on those who would justify entrenchment increases as the entrenchment increases is not to say whether or when that burden can be met. It is not even to say that this is the only way of framing the problem. One could, alternatively, say that as the state seeks to regulate increasingly personal matters, the burden of justification for

³⁶ See *id.* (“[E]very age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it.”) (quoting Thomas Paine, *The Rights of Man*, in *The Life and Major Writings of Thomas Paine* 243, 251 (Philip S. Foner ed., 1961)).

³⁷ See, e.g., Klarman, *supra* note 33, at 494--95 (critiquing judicial review on the grounds that standard sources of decision-making, including “[t]ext, original intent, and tradition are problematic . . . because of the dead hand problem”).

³⁸ U.S. Const. art. V.

³⁹ See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1068 (2001) (suggesting that “[p]artisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”).

⁴⁰ The Canadian Supreme Court found criminal prohibition of abortion unconstitutional in *R. v. Morgentaler* [1988] 1 S.C.R. 30 (Can.).

⁴¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 28 (U.K.).

the state also increases. One could even say that protection of certain fundamental freedoms is so essential to constitutional democracy that the failure to protect them—i.e., the exposure of individuals to state regulation in the area of these freedoms—renders the state less “democratic,” even as it becomes more “majoritarian.”⁴² But this is a somewhat tendentious (which is not to say incorrect) use of the word “democratic.” When I say that *Roe v. Wade*⁴³ or, for that matter, the Equal Protection Clause of the Fourteenth Amendment, is *prima facie*, undemocratic, all I mean is that the decision and the clause limit what laws duly elected legislative majorities can enact. Someone who thinks that I should use the word “majoritarian” rather than “democratic” should feel free to substitute the former for the latter; his disagreement with me on this point is semantic, not substantive.

This digression into constitutional law illustrates a commonplace bordering on the tautological: From the standpoint of democratic (or, if you prefer, majoritarian) values, entrenchment of constitutional provisions (or interpretations thereof) against simple majoritarian change stands in need of justification, and the greater the entrenchment, the greater the need of justification.

We can readily generalize the point about entrenchment to other limits on decision-making by officials elected within the relevant polity: From the standpoint of democratic values, the greater the entrenchment of the delegation to a body not directly accountable to the polity in question, the greater the need of justification. Other things being equal, it takes a stronger argument to justify Polity A’s decision to dynamically incorporate Polity B’s law if the incorporating decision can only be undone by a super-majority vote of the legislature than it takes to justify an incorporating decision that can be undone by simple majority vote.

The fact that formal entrenchment makes dynamic incorporation (and other sorts of delegation) more problematic should not obscure the fact that even formally unentrenched incorporation raises *prima facie* democratic problems, because, as a practical matter, all legislation is entrenched in some

⁴² See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 17--18 (1996) (making this argument in support of a “constitutional,” as opposed to a “majoritarian,” conception of democracy); James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* 19-36 (2006) (rejecting methods of constitutional interpretation that seek only to perfect the processes of representative democracy).

⁴³ 410 U.S. 113 (1973).

sense.⁴⁴ Ordinary laws that can be repealed by simple majority vote are actually formally entrenched (even if only slightly), because obtaining a majority to repeal a law means obtaining more votes than are required to prevent the enactment of new legislation. Moreover, in legal systems like the United States and all but one of its states, the requirement of bicameral passage and signature by the President or governor for “ordinary” legislation is, on its face, a super-majority process.⁴⁵ And, of course, as a practical matter, the burden of overcoming legislative inertia even in a single house of the legislature makes the repeal of legislation substantially more difficult than its non-enactment in the first place.

The closest thing to a completely unentrenched law is a law with a sunset provision, but even sunset laws are entrenched during the period from their enactment until their sunset. Further, in some circumstances laws that formally sunset create expectations of renewal. Most notoriously, appropriations measures that distribute concentrated benefits create powerful constituencies that lobby for their continual re-enactment, as the U.S. experience with agricultural subsidies demonstrates.⁴⁶ Despite the fact that such subsidies must be re-enacted with each budget bill,⁴⁷ critics of subsidies accurately complain about the difficulty of “eliminating,” rather than “not re-enacting,” these technically sunset measures.⁴⁸

To be sure, dynamic incorporation by A of B’s law will not invariably create the sort of constituency for re-enactment that agricultural subsidies do, but in some circumstances the practical obstacles to eliminating dynamic incorporation (regardless of whether the act of incorporation formally sunsets), will be formidable. For instance, when multiple polities collectively undertake to incorporate the future enactments of a supra-national body—as

⁴⁴ See Posner & Vermeule, *supra* note 25, at 1686--88.

⁴⁵ See Levinson, *supra* note 32, at 29-49 (explaining how the bicameralism and presentment requirements of the Constitution’s Article I, § 7, protect the status quo against new legislation).

⁴⁶ Dan Morgan, et. al, Powerful Interests Ally to Restructure Agriculture Subsidies, *Washington Post*, A1 (Dec 22, 2006) (“Ever since subsidies began . . . Farm Belt politicians . . . have repeatedly thwarted efforts to scale [them] back.”).

⁴⁷ Elizabeth Garrett, Rethinking the Structures of Decisionmaking in the Federal Budget Process, 35 *Harv. J. on Legis.* 387, 397--401 (1998) (explaining budget process for renewal of discretionary spending).

⁴⁸ See, e.g., Morgan, *supra* note 46.

in the EU or NAFTA—and when the only way to opt out of one of those enactments is to opt out of the entire apparatus, with potentially disastrous economic and diplomatic consequences, we may treat the act of dynamic incorporation as effectively irrevocable. Indeed, de facto irrevocability is often the very point of such arrangements, precisely because supra-national entities like the EU and the NAFTA bodies aim to provide assurances of reciprocal treatment, thus solving collective action problems that could otherwise lead to sub-optimal outcomes such as trade wars.⁴⁹

* * *

In sum, all instances of dynamic incorporation of foreign law raise *prima facie* questions of democratic accountability. Entrenchment of the incorporation against ordinary democratic processes exacerbates the problem, but even when there is no formal entrenchment, the problem persists, in part because all law is entrenched in some sense.

II. Directions of Incorporation: Up, Down and Across

This Part introduces a three-part typology of dynamic incorporation: *upward* incorporation, in which a political entity delegates lawmaking authority to a larger political entity; *downward* incorporation, in which a political entity delegates lawmaking authority to a sub-unit; and *horizontal* incorporation, in which a political unit dynamically incorporates the law of a comparable political unit.

⁴⁹ See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int. Org.* 421, 429 (2000) (describing EU and NAFTA as “clubs’ of sincerely committed states” purposely accepting high costs of withdrawal in order to “identif[y] . . . as having a low propensity to defect.”).

A. *Up*

When a polity dynamically incorporates the law of a larger entity of which it is a component, it incorporates *upward*. Within the United States, state tax codes provide a familiar example. Some such codes define “gross income” as the federal definition of gross income, even if the federal definition changes (as it frequently does) after the enactment of the state incorporating law.⁵⁰

I shall also use the term upward incorporation to refer to decisions to dynamically incorporate some legal norms of supra-national bodies. When the Czech Republic joined the European Union, for example, it agreed to make EU legal norms—including EU norms that had not yet been adopted at the time of the Czech accession—applicable in the Czech Republic.⁵¹ This was upward incorporation even though, under the dominant Westphalian paradigm, the Czech Republic did not cede any of its sovereignty to the EU (because accession is revocable).⁵² To be sure, under the German *Solange* decisions and comparable rulings, European Constitutional Courts purport to retain the authority to invalidate EU norms that violate national constitutions.⁵³ But that only shows that an EU law that is dynamically

⁵⁰ See *supra* note 12.

⁵¹ See Saulius Lukas Kaleda, Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?, 10 Eur. L. J. 1, 102 (2004).

⁵² See Mattias Kumm, To be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty, 11 Colum. J. Eur. L. 481, 495 (2005) (arguing that, despite debate about legal process for EU withdrawal, “the right to withdrawal remain[s] a residual sovereign right, unencumbered by and antecedent to EU Law.”).

⁵³ See Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 37 BVerfGE 271 (1974) (*Solange I*) (Germany) (denying supremacy of European law on grounds that European law lacks fundamental rights protection); Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court], 73 BVerfGE 339 (1986) (*Solange II*) (Germany) (conditionally accepting European law’s supremacy because it had developed sufficient fundamental rights protection); Corte const. [Constitutional Court] *Spa Fragn v. Amministrazione delle Finanze*, Decision No. 232 of 21 Apr., 1989, 72 *Rivista di Diritto Internazionale* 103 (1989) (Italy) (holding that European law must conform to fundamental rights protections of Italian Constitution); Hojesteret [Constitutional Court], *Carlsen v. Prime Minister*, 6

incorporated by an EU member state may sometimes prove to be invalid, just as a domestic statute enacted by the parliament of an EU member state may be held invalid by that member state's constitutional court. EU accession counts as upward dynamic incorporation because in ordinary cases, it gives the force of law to future EU laws and regulations that otherwise would have no effect within the country in question.

B. Down

When a polity dynamically incorporates the law of one of its sub-units, it incorporates *downward*. Within the United States, examples of express decisions by Congress to dynamically incorporate the law of states include the Assimilative Crimes Act,⁵⁴ Federal Rule of Evidence 501,⁵⁵ and the Rules of Decision Act⁵⁶—although in this last example there is a colorable argument that Congress has no authority to make federal law, and so state law, in virtue of the Tenth Amendment, applies of its own force, rather than as a result of a Congressional decision to incorporate it dynamically.⁵⁷ Putting

April 1998, [1999] 3 CMLR 854 (Den.) (holding that European law that violates basic constitutional rights is unenforceable in Danish courts). See also *supra* note 6.

⁵⁴ 18 U.S.C. § 13 (2000). See *supra*, text accompanying note 17.

⁵⁵ Fed. R. Evid. 501. See *supra* note 16 and accompanying text.

⁵⁶ 28 U.S.C. §1652 (2000) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”)

⁵⁷ This is the argument, to which Justice Brandeis alludes in *Erie v. Tompkins*, 304 U.S. 64 (1938), that the Constitution requires the Rules of Decision Act to be construed so as to deny federal courts the power to formulate general federal common law. At its core, it asserts that where Congress has no Article I power to regulate, Congress may not assign to the courts the power to resolve disputes on the basis of judge-made rules. To be sure, given the expansive modern view of the Commerce Clause (even after *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)), there are few subjects over which Congress lacks Article I power. However, as George Rutherglen has argued persuasively, there is a further, horizontal, dimension to the constitutional view of *Erie*: Even where Congress has Article I power over some subject matter, it cannot delegate that power to the courts on a wholesale basis but only in cases that happen to fall within their jurisdiction under Article III and Title 28. See George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10

this last caveat aside, in each of these instances, Congress requires the application of state law, and the question of *which* state's law applies will be answered differently for different cases.

We can also imagine a form of downward dynamic incorporation that selects the law of a single sub-unit and makes it applicable as the law of the whole larger entity. In particular industries, standard form contracts sometimes come to include choice-of-law clauses that select the law of a jurisdiction with no clear connection to the underlying contract,⁵⁸ and we can thus imagine that, pursuant to a mimic-the-market approach, some federal statute might do the same, at least as a default rule. Consider, for example, a federal statute stating that federal contracts will be governed by the contract law of New York State. Because much contract law is judge-made,⁵⁹ here the federal act of dynamic incorporation would put into place future decisions of the New York courts in addition to the New York legislature, but that should not give us serious pause.

Indeed, true dynamic incorporation will typically incorporate not only the future text of the statutes of the incorporated jurisdiction but also the future authoritative interpretations thereof. To give an example in the upward incorporation context, states that require “lockstep” interpretation of their state constitutional rights require their state high courts to lock their steps with those of the United States Supreme Court in its future interpretations of federal constitutional rights.⁶⁰

Const. Comment 285, 288, 295--96 (1993). See also Thomas W. Merrill, *The Judicial Prerogative*, 12 *Pace L. Rev.* 327, 342--45 (1992) (challenging interpretations of *Erie* that “assum[e] federal courts can exercise common law powers in any area that has been visited by congressional legislation”).

⁵⁸ See Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. §1-301 and a Proposal for Broader Reform*, 36 *Seton Hall L. Rev.* 59, 94--99 (2005) (surveying states that uphold contractual choice of law “irrespective of whether the transaction has any relationship to the law chosen”).

⁵⁹ See Robert E. Scott & Jody S. Kraus, *Contract Law and Theory 2* (rev. 3d ed. 2003) (“Despite the statutory provisions that govern certain areas, much of modern contract law is still based on common law decisions.”)

⁶⁰ See *supra* note 14.

C. Across

When a polity dynamically incorporates the law of a polity with which it has no hierarchical relationship, it incorporates horizontally. Examples of *static* horizontal incorporation abound. States attaining independence frequently adopt “reception acts,” which continue in effect the law of their former colonial masters pending the adoption of new law.⁶¹ At the point at which the reception act becomes the law of the newly independent state, this amounts to horizontal incorporation, because the new state stands on (newly) equal footing with the former master state. However, reception acts usually operate statically. Post-independence changes in the law of the mother country do not, by virtue of the reception act, automatically become the law of the daughter state.

Examples of one especially unproblematic form of horizontal dynamic incorporation abound. States frequently authorize the application of the law of foreign states to transactions involving citizens or subjects of that foreign state interacting with the host state.

For example, California could be said to dynamically incorporate the law of foreign states insofar as California (like other American states) permits residents of other American states and foreign nations who possess valid driver’s licenses from their states of residence to drive in California.⁶²

⁶¹ See, e.g., Indon. Const., Transitional Provisions, art. 1, translated in 9 *Constitutions of the Countries of the World* (Gilbert H. Flanz, et. al. eds. 2007) (“All existing laws and regulations shall remain in effect as long as new laws and regulations have not yet taken effect under this Constitution”); Mass. Const. pt. 2, ch. 6, art. 6 (“All the laws which have heretofore been adopted . . . in . . . Massachusetts Bay . . . shall still remain and be in full force, until altered or repealed by the legislature . . .”). For an overview of reception acts in U.S. states, see generally Elizabeth Gaspar Brown, *British Statutes in American Law 1776-1836*, 46 (summarizing how each state re-enacted all or some British statutes). On other former colonies retaining the law of their colonizers, see Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 *Sing. J. Int’l & Comp. L.* 315, 334--35 & nn.73--74 (2003). See also M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* 360--409 (discussing “independent nation[s that have] of [their] own volition imported into [themselves] a legal system (or parts of such a system) which is the product of a totally dissimilar legal culture”).

⁶² See CAL. VEH. CODE § 12502--12505 (2000). See also, e.g., N.Y. VEH & TRAF. LAW § 250 (2005); FLA. STAT. ANN. § 322.04(c)-(d) (2005); VA. CODE ANN. § 46.2-307 (2005).

As the motor vehicle licensing laws of these other states change, California's treatment of out-of-state visitors changes along with them. Indeed, California even permits unlicensed drivers to drive for a limited period if their state or country of residence does not require licenses.⁶³ Accordingly, whether a visitor to California may drive without a license depends on whether her home state requires licenses; should the foreign law change, her legal ability to drive in California would change accordingly.

We can readily find other examples of this sort. Under familiar conflicts principles, courts routinely apply the laws of foreign states, either because the forum state's conflicts law directly makes foreign law applicable, or because the forum state's contract law makes enforceable a voluntarily adopted choice-of-law provision in a contract.⁶⁴ And unless the parties to a contract otherwise specify, the operative law that will be applied by the forum state will be the foreign law at the time the dispute arises, not at the time that the forum state (either legislatively or by judicial decision) set forth the relevant choice-of-law or contract rule.

State recognition of out-of-state marriages works in roughly the same manner. Subject to a somewhat controversial public policy exception, U.S. states recognize marriages that took place in their sister states and foreign countries, even when the couple would not have been eligible to marry in the host state.⁶⁵

⁶³ See CAL. VEH. CODE § 12503 (2000).

⁶⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."); *id.* at § 187 ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.")

⁶⁵ See, e.g., ARK. CODE ANN. § 9-11-107 (2002) ("(a) All marriages contracted outside this state that would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state. (b) This section shall not apply to a marriage between persons of the same sex."); IDAHO CODE § 32-209 (2006) ("All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.")

It is a nice semantic question whether to call laws of the foregoing sort actual examples of dynamic horizontal incorporation. As a formal matter, it is true that state laws governing driving, conflicts, marriage, and some other subjects do make the legality of an act in State A turn on the law of State B at some time that is at least potentially later than the State A law went into effect. But these sorts of laws do not raise the questions of democratic legitimacy that are the primary concern of this Article—or at least do not raise them to the same degree as other instances of dynamic incorporation do.

When California permits a visiting Oregonian to drive because of the Oregonian's compliance with Oregon law, California does (revocably) cede some of its regulatory authority to Oregon.⁶⁶ But it does so as a supplement to, rather than a replacement of, its own regulatory efforts. Likewise, the decision to adjudicate a dispute based on the law of a foreign jurisdiction typically rests upon either a voluntary commitment of the parties or the conclusion that the foreign jurisdiction has a greater regulatory interest in the subject matter. The forum state continues to apply its own law to persons and transactions more closely connected to the state.

Accordingly, we would do better to focus on horizontal circumstances in which polity A makes the law of polity B *its own law*, rather than applying it to special cases as a supplement to the law of A. Such cases are unusual, but they can be found.

Israel between 1948 and 1955 provides an object lesson. When Israel attained independence from Great Britain in 1948 it continued in effect a colonial-era law that incorporated—on a dynamic basis—to English common law decisions on questions as to which Israeli law was silent.⁶⁷ By 1955,

⁶⁶ Whether even this limited statement is true depends upon the extent to which California is free, under the federal Constitution, to prevent Oregon-licensed non-Californians from driving in California. The dormant commerce clause, the privileges and immunities clause of Article IV, and the Fourteenth Amendment, all limit that freedom. See *Saenz v. Roe*, 526 U.S. 489, 500--504 (1999) (identifying these constitutional provisions, as well as the constitutional structure itself, as sources of a constitutional right to travel); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529-530 (1959) (holding that the dormant commerce clause prohibits a state from enforcing laws that “place a great burden of delay and inconvenience on . . . interstate motor carriers entering or crossing its territory”).

⁶⁷ See Law and Administrations Ordinance, 1948, 1 L.S.I. 7 (1948) (adopting Article 46 of the Palestine Order in Council, 1922, Moses Doukhan, 2 Laws of Palestine 431 (1933). See also U. Yadin, Reception and Rejection of English Law in Israel, 11 INT'L & COMP. L.Q., 60-61. (1962) (Under the British Mandate, Israeli courts were to

however, the Supreme Court of Israel realized that this practice was anomalous. Thenceforth, the Court declared, it would treat English common law decisions as persuasive precedent only,⁶⁸ although the Knesset did not formally repeal the act incorporating English common law until 1980.⁶⁹

The view that dynamic horizontal incorporation is of dubious legitimacy appears to be widespread, and I have thus been able to find relatively few examples in which one polity applies the law of another unrelated polity as its own law. Nonetheless, I have found something very close that raises the same basic concerns. Consider East Timor, Ecuador, El Salvador, the Federated States of Micronesia, the Marshall Islands, Palau, and Panama. Each of these small countries in the developing world has decided not to devote any of its limited resources to managing its own monetary policy. Accordingly, none of these countries has its own currency, but instead has designated the United States dollar as its official currency.⁷⁰ Thus, U.S. laws and regulatory actions governing the currency have direct effect on the currency of each of these countries. Whenever the Federal Reserve Board, acting pursuant to authority delegated by Congress,⁷¹ tightens or loosens the money supply, its actions affect not only the United States currency but, in virtue of the dynamic incorporation, also the money supply in East Timor, even though East Timor is not in any way part of, or represented in, the United States.

In addition, some countries that maintain their own currency “peg” that currency to the U.S. dollar, meaning that the government commits to an

“rel[y] on English law [whenever the legal question] was a problem which fell into a gap, a lacuna, of the local law.”)

⁶⁸ See *Kohavi v. Becker*, 11 P.D. 225 (1955). See also Michael Zander, *Selected Judgements of the Supreme Court of Israel, 1948-1958*, 13 INT’L & COMP. L.Q., 1133 (1964).

⁶⁹ See *Foundations of Law*, 1980, 34 L.S.I., 181 (1980).

⁷⁰ See International Monetary Fund, *Monetary and Capital Markets Department Review of Exchange Arrangements, Restrictions, and Controls*, Table 7 (Nov. 27, 2007), available at <http://www.imf.org/external/np/pp/2007/eng/112707.pdf> (listing countries that have officially adopted or pegged to currency of another country). Panama officially calls U.S. dollars “balboas,” even though there are no actual balboa notes. See *id.* at 31 n.4.

⁷¹ See 12 U.S.C.A. § 411 (2001) (authorizing Board of Governors of the Federal Reserve system to issue federal reserve notes).

official *fixed* exchange rate with the dollar.⁷² Some such pegs act simply as unofficial commitments on the part of foreign governments to adopt fiscal and monetary policies that keep their currency at the pre-set exchange rate.⁷³ However, where the decision to peg is embodied in a law, that law might be said to dynamically incorporate U.S. law and regulatory actions governing the dollar, because any subsequent changes in U.S. law or monetary policy—and concomitant effects of those changes on the dollar's value against currencies that are not pegged to it—take effect automatically within the pegging countries.

Needless to say, countries seeking a currency without creating one of their own, or seeking stability through pegging, have choices besides dollars. Thus, for example, the official currency of Montenegro is the Euro, even though Montenegro is not part of the European Union.⁷⁴ Likewise, since its introduction, other countries outside of the EU have pegged their currency to the Euro.⁷⁵

Whether a polity's adoption of another sovereign's currency or a law formally pegging the polity's own currency to a foreign currency should be seen as dynamic incorporation of foreign *law* is not entirely clear. The answer to that question might depend on what other laws operated in the polity. For example, limits contained in laws governing the interest rates that Panama banks can charge on loans, or pay on deposits, could be triggered by a decision by the U.S. Federal Reserve Board to cut or raise interest rates, and if so, it would be fair to say that the latter's decision is dynamically incorporated through the Panama law. But whether we call this or other variations on foreign currency adoption and pegging pure or merely near examples of horizontal dynamic incorporation, this class of decisions will likely involve the same sorts of costs and benefits as more straightforward dynamic horizontal adoption of foreign regulatory norms of the sort that existed in Israel pre-1955.

⁷² See Paul R. Krugman & Maurice Obstfeld, *International Economics: Theory and Policy* 447--58 (7th ed. 2005) (providing overview of fixed exchange rates).

⁷³ See *id.* at 456--58.

⁷⁴ See International Monetary Fund, *supra* note 70, Table 7, at 32.

⁷⁵ These include Eastern European countries, such as Estonia, Lithuania, and Latvia, Table 7, at 32, as well as the fourteen African countries that use the CFA Franc, itself pegged to the Euro. See *id.*, Table 6, at 30.

As a practical matter, something reasonably close to dynamic horizontal incorporation of regulatory norms is quite common within the United States. On questions of state corporate law to which corporate codes do not spell out an answer in detail—matters such as the scope of the business judgment rule, for example—many states treat Delaware law as persuasive precedent.⁷⁶ Although I have found no example of a state dynamically incorporating Delaware statutory or decisional law as an official matter, we could readily imagine a state that hoped to replace Delaware as the corporate home for out-of-state corporations doing just this, and undercutting Delaware on registration fees.⁷⁷ Indeed, it is something of a mystery why no state has tried doing just that.⁷⁸

⁷⁶ See, e.g., *Vogel v. Missouri Valley Steel, Inc.*, 625 P.2d 1123, 1126 (Kan. 1981) (“The Kansas Corporation Code was patterned after the Delaware Corporation Code . . . and therefore, Delaware decisions interpreting its code are considered persuasive in our interpretation of the Kansas code.”); *Int’l Ins. Co. v. Johns*, 874 F.2d 1447, 1459 n. 22 (11th Cir. 1989) (“The Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines.”); *McMinn v. MBF Operating Acquisition Co.*, 164 P.3d 41, 53 (N.M. 2007) (looking to Delaware corporate law for guidance and citing cases from other states that do the same).

⁷⁷ Corporate law scholars frequently point to Nevada as an example of a jurisdiction that unsuccessfully attempted to supplant Delaware by copying its law. See Jill E. Fisch, *The Peculiar Role Of The Delaware Courts in the Competition For Corporate Charters*, 68 U. Cin. L. Rev. 1061, 1067 (2000) (“In addition to adopting the Delaware statute, the Nevada legislature adopted Delaware case law. Moreover, courts construing Nevada law appear to follow Delaware precedent.”); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469, 488 (1987) (“Nevada essentially has followed this course, adopting both the Delaware statutory and common law as it applies to corporations.”). See also William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 665 (1974) (describing Nevada’s attempt “to become the western Delaware”). Whatever these scholars may think Nevada did, Nevada did not, as a formal matter, dynamically incorporate Delaware law. The authorities cited by the works listed in this footnote at most show that Nevada statically copied provisions of the relevant Delaware statute and that Delaware cases are persuasive precedent in Nevada. For example, Fisch, *supra*, at 1067 n.45, characterizes *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1346--47 (D. Nev. 1997), as “explicitly finding that Nevada follows Delaware case law.” In fact, this case only states that Delaware law is persuasive authority where no Nevada statutory or case law is on point. With respect to actual incorporation (of laws, not companies!) the most one can find in the Nevada case law is the statement that the Nevada statute, because it was modeled on a model act that was in turn

III. Reasons for Dynamic Incorporation

This Part describes and evaluates three of the most likely reasons why a polity might find dynamic incorporation attractive.⁷⁹ The Part considers three sorts of benefits that can flow from dynamic incorporation: (A) avoiding unnecessary costs by free-riding on the lawmaking efforts of other polities; (B) customizing the law to local conditions; and (C) coordinating the efforts of actors in different jurisdictions. Each of these justifications comes with attendant costs as well as benefits, so that the availability of a particular argument for dynamic incorporation in some context does not necessarily entail that dynamic incorporation is the best policy. Where relevant, this Part distinguishes between circumstances justifying upward, downward, and horizontal dynamic incorporation.

A. Avoiding Lawmaking Costs

Lawmaking is often costly. Where the institutional apparatus of lawmaking already exists, many of the costs—such as salaries, benefits and expenses incurred by legislators and their staff, the cost of holding elections, and the building and maintenance of government office buildings—are essentially fixed. The marginal cost of adding or amending the legislative code is small along these dimensions.

However, legislation can have high marginal costs along other dimensions. Suppose the legislature in polity A wants to regulate pollutants in drinking water. Formulating a legal rule or standard that properly balances threats to human health against compliance costs requires a mix of normative judgments and technical expertise. At a minimum, either the legislature itself or an administrative agency to which it delegates the task will need to undertake potentially expensive scientific studies. Saving these

rooted in Delaware and New York case law, *statically* incorporates Delaware (and New York) case law. See *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 10, 62 P. 3d 720, 726 n. 10 (2003).

⁷⁸ Perhaps the best explanation is that the Delaware courts enjoy a reputational advantage that an upstart rival would have great difficulty overcoming.

⁷⁹ This Part does not argue that these are the only three reasons that might be offered in support of dynamic incorporation.

costs by writing law without adequate investigation risks imposing unwarranted back-end costs from selecting a badly sub-optimal rule.

Alternatively, the legislature in polity A could free-ride on work done in polity B by simply adopting B's rule or standard. This approach is especially attractive if the law requires continual updating in light of new knowledge—as it plausibly might in an area like pollution regulation—because dynamic incorporation permits A's legislature to make the one-time decision to depend on B's law, and then to be done with the matter.

To be sure, this strategy has drawbacks. The circumstances of A may differ substantially from those of B. Perhaps A has a wetter climate than B, or B's economy depends on water-intensive agricultural production to a greater extent than does A's. Or perhaps the people in A simply value economic growth more (or less) relative to human health than do the people of B. These sorts of differences will require a dynamically (or, for that matter, a statically) incorporating polity like A to be careful in selecting a jurisdiction B to ensure that B is sufficiently like A before borrowing its (current and future) law. Legislators in A will also want to consider whether the law of C might not be a better choice than the law of B.

Although these problems are real, they should not be overstated. Even if polity A cannot find another polity with the identical mix of circumstances and values, the circumstances of some polity B may be close enough to those of A that the savings that accrue to A from not having to create and continually amend its own substantive law more than compensate for the defects, if any, in B's law relative to the law that A would ideally generate if left wholly to its own devices. That will be especially true if A is a small polity and B a large one, as illustrated by the fact that the countries that choose to use either the U.S. dollar or the euro as their official currency tend to be quite small.⁸⁰

In principle, dynamic incorporation of foreign law as a cost-saving device could proceed upwards, downwards or horizontally. So long as polity A judges that the benefits of incorporating polity B's law outweigh the costs, it should not matter whether A is a sub-unit of B, B a sub-unit of A, or neither is a sub-unit of the other. However, we are unlikely to see downwards dynamic incorporation purely on cost-savings grounds unless the sub-unit whose law is incorporated by the larger political entity has a greater capacity

⁸⁰ See International Monetary Fund, *supra* note 70.

to generate optimal law than most other sub-units and the larger political entity itself.⁸¹

When might that be true? Conditions favorable to downward dynamic incorporation on cost-savings grounds could be found in a federal system with a weak and/or under-funded central government, and one or a small number of powerful state governments. However, such federal systems tend to be the product of historical bargains between geographically-based ethnic groups with sufficient inter-ethnic distrust that federal incorporation of the law of a dominant state would likely be politically infeasible.⁸² For example, Belgian incorporation, and thus nationalization, of Flemish law, or, during the brief period between Czechoslovakia's democratization and dissolution, Czechoslovakian incorporation of Czech law, would be unacceptable to the minority ethnic groups (principally Walloons and Slovaks, respectively).⁸³ Even static incorporation under such circumstances would usually be problematic, and thus dynamic incorporation, as a form of hegemony by one ethnic group over the other(s), would almost certainly be regarded with suspicion.

Accordingly, we are most likely see dynamic incorporation on labor-saving grounds going upward and horizontally rather than going downward. State tax codes that dynamically incorporate the federal definition of income (as well as other aspects of the Internal Revenue Code)⁸⁴ provide an example of double savings. First, by piggybacking on the federal definition, the state legislature saves itself and its taxing authority the work of adjusting the law to changing circumstances. Second, this version of dynamic incorporation creates cost savings for taxpayers. Rather than having to calculate their income (and possibly other terms preliminary to determining their tax liability) once for their federal forms and a second time for their state forms,

⁸¹ I consider downward dynamic incorporation as a means of accommodating diversity in Sub-Part B, *infra*. Such downward incorporation often will produce cost savings, but that is not its sole justification.

⁸² See Donald L. Horowitz, *The Many Uses of Federalism*, 55 *Drake L. Rev.* 953, 957-58 (2007) (arguing that federalism arises in states plagued by ethnic conflict only when potential or actual violence forces central governments to yield power to subunits).

⁸³ See generally John Fitzmaurice, *The Politics of Belgium: A Unique Federalism* (1996); Eric Stein, *Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (1997).

⁸⁴ See *supra* note 12.

they can simply copy the result(s) from the federal form to the state form. The time savings for state taxpayers are substantial, although less so now than they were a generation ago, given the widespread availability of inexpensive computer software that can use the same raw data to generate both federal and state returns.

As in our schematic water pollution example, so too here, the benefits for state lawmakers and state citizens are not free. Changes in federal tax law that become dynamically incorporated into state tax law may result in revenue losses unwanted by state lawmakers or increased tax liability unwanted by state taxpayers. Nonetheless, the widespread dynamic incorporation of federal tax law by state law⁸⁵ shows that many states regard these risks as cost-justified.

As noted in Part II, true examples of horizontal dynamic incorporation are hard to find, but the examples that come closest—such as the adoption by a small polity of a larger polity’s currency—will typically be justified on cost-savings grounds. Here too, there is a tradeoff. In accepting U.S. monetary policy as its own, Palau sacrifices the ability to expand or shrink the money supply in response to economic conditions specific to Palau,⁸⁶ but the cost savings for a nation with a population that would just barely fill Madison Square Garden outweigh this sacrifice.

Dynamic incorporation on cost-savings grounds will be especially attractive where the polity whose law will be incorporated has, or is perceived to have, special expertise in the relevant policy area. U.S. states do not, as an official matter, dynamically incorporate the corporate law of Delaware, but in treating Delaware corporate law decisions as especially persuasive precedent, they come close.⁸⁷ Likewise, in developing the federal common law of contracts that applies to government contracts,⁸⁸ the federal courts may pay special attention to the law of states (such as New York) that have the most extensively developed bodies of doctrine addressed to commercial matters. To be clear, neither of these examples constitutes actual dynamic incorporation, as the target jurisdiction’s law is only deemed persuasive, and

⁸⁵ See *supra* note 12 and accompanying text.

⁸⁶ See *supra* note 70 and accompanying text.

⁸⁷ See *supra* notes 76--77 and accompanying text.

⁸⁸ See *Clearfield Trust Co. v. United States*, 318 U.S. 744 (1943) (holding that federal common law governs federal contracts in suits by or against the federal government).

incorporation of polity B's judge-made law by the courts of polity A raises some questions not presented by legislative incorporation of foreign legislation. Nonetheless, they demonstrate that expertise can be a reason to give some special place to the law of a foreign jurisdiction. Dynamic incorporation based on expertise simply takes the point one (admittedly large) step further.

The arguments thus far considered for dynamic incorporation on cost-savings and expertise grounds are all specific to particular policy domains. However, the logic of cost savings may entail dissolution of the polity entirely, and the fear of that logical consequence in turn may lead polities to use upward dynamic incorporation less frequently than simple cost-benefit analysis would counsel.

Consider Scotland. From the early eighteenth century through 1999, Scots voted in local elections and for ministers in the Parliament of Great Britain, but had no Parliament of their own.⁸⁹ In the debate leading up to the 1997 referendum that resulted in a Scottish Parliament, the opposition emphasized cost (among other things). Running a government would be expensive, opponents argued, and the money spent on the mechanics of a new layer of legislative government could be better spent on the provision of services (or rebated through lower taxes).⁹⁰ That argument lost in the court of public opinion, as the referendum passed by a three-to-one margin.⁹¹

Now suppose that on some particular issue as to which formal competence has been devolved to the Scottish Parliament, a Scottish MP argues that formulating the appropriate legal standard would be too costly and that Great Britain as a whole is similarly situated to Scotland. Accordingly, this MP suggests that the Scottish Parliament should dynamically incorporate the British rule or standard. We can readily imagine other MPs rising to argue that the creation of the Scottish Parliament rules out this sort of "de-devolution." Such an argument would rely on the very existence of the polity's own lawmaking bodies (which, for these purposes include administrative agencies to which responsibility for

⁸⁹ See generally Thomas M. Devine, *The Scottish Nation: A History, 1700-2000* (1999).

⁹⁰ See Sarah Lyall, *With Gusto, Scots Say 'Yes' to Setting Up Parliament*, *New York Times*, Sept. 12, 1997, at A3 ("Opponents of a new parliament in Scotland, in the 'Think Twice' campaign led by the Conservative Party, have argued that it would saddle Scotland with new expenses [and] result in far higher taxes . . .").

⁹¹ See *id.*

promulgating regulations with the force of law might be delegated) as a reason why the substantive decisions must be made within the polity—even if decisions that are, by hypothesis, better, would be reached by dynamic incorporation of the larger polity’s law.

The argument I have placed in the mouth of the hypothetical opponents of the hypothetical dynamic incorporation of British law is available in any polity as an objection to upward incorporation. “We Oklahomans have our own legislature for a reason,” the argument goes, “and thus even if Oklahoma would be better served by dynamically incorporating federal law, that would be an abdication of our responsibility to legislate for the state.” As noted in the Introduction, in some U.S. states, this reasoning operates as a state constitutional bar to dynamic incorporation,⁹² but even in states in which the practice is not per se forbidden, the argument from the existence of state lawmaking power may be invoked to resist particular efforts at dynamic incorporation.

To be clear, I am not saying that those who invoke the existence of lawmaking institutions as an argument against upward (or for that matter, any) dynamic incorporation are *correct*. I am only noting that the very existence of government institutions at any level of government will often tug against a decision to engage in dynamic incorporation. The loss—or even the perception of loss—of direct accountability for the law within the polity proper will count as a cost of dynamic incorporation. For some, this cost will be seen as so high that no benefit will justify incurring it, while for others it will merely be thrown into the mix of overall costs and benefits. For anyone who feels the tug of what might be called the “argument from the existence of government,” the argument counters claims that cost savings justify dynamic incorporation as well as other sorts of justifications for dynamic incorporation. The balance of this Part examines two such other justifications for dynamic incorporation, without separately raising the argument from the existence of government as an objection to each, though each is vulnerable to that argument.

B. Accommodating Local Diversity Through Customization

Large political entities sometimes find it advantageous to devolve power to their sub-units. By permitting the law of the sub-unit to fill gaps in or entirely supply the law on particular issues, the larger unit customizes the

⁹² See *supra* note 10 and accompanying text.

law to diverse local conditions and preferences. Dynamic incorporation in this context permits the sub-units to play the primary regulatory role in many substantive areas. Thus, even as devolution through dynamic incorporation decreases the reach of the larger polity, it increases the democratic character of the system as a whole. In addition to matching policy to circumstances, devolution also tends to encourage experimentation, which can in turn yield new solutions that are then available for additional sub-units or the polity as a whole. This set of arguments for downward dynamic incorporation closely parallels a familiar set of arguments for decentralization as a more general matter.⁹³

As noted in the Introduction,⁹⁴ within the United States, there are numerous examples of federal law rendering state law applicable within the state or within some class of cases to which state law applies. These include the Conformity Act, which, prior to the adoption of the Federal Rules of Civil Procedure, required federal courts to apply the procedural law of the states in which they respectively sat,⁹⁵ Federal Rule of Evidence 501, which makes state privilege law applicable in federal court where state law provides the rule of decision,⁹⁶ and the Assimilative Crimes Act, which incorporates the criminal law of the state in which federal land is located.⁹⁷ More broadly, although he was in dissent when he said it, Justice Scalia was surely right in his observation that “there is nothing unusual about having the applicability of a federal statute depend on the content of state law.”⁹⁸

Here, a digression on American constitutional doctrine will illuminate the broader question. The constitutionality of downward dynamic incorporation by the federal government was not firmly established until 1957, when the Supreme Court upheld the Assimilative Crimes Act in *United*

⁹³ See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998).

⁹⁴ See *supra*, text accompanying notes 15--17.

⁹⁵ See *supra* note 15.

⁹⁶ Fed. R. Evid. 501 (“[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”)

⁹⁷ 18 U.S.C. § 13 (2000).

⁹⁸ *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 34 n. * (1988) (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457, 464-465 (1967) and *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199, (1988)) (internal quotation marks omitted).

States v. Sharpnack.⁹⁹ Even then, neither the Court nor the appellee's brief¹⁰⁰ cited the best authority for the proposition that federal law *cannot* dynamically incorporate state law.

In *Cooley v. Board of Wardens*,¹⁰¹ Justice Curtis, speaking for the Court, refused to rely on a 1789 federal statute purporting to authorize state and local harbor laws in upholding an 1803 Pennsylvania law that required the use of local pilots. Justice Curtis made clear that Congress could have statically incorporated state law, but asserted that—at least if a power were exclusively federal—the federal government could not, in the exercise of that power, dynamically incorporate state law.¹⁰² He concluded: “If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convey to the states that power.”¹⁰³

To be sure, this was dicta, because the Court held in *Cooley* that the Constitution *did not* “exclude[] the states from making any law regulating commerce.” The case was important for establishing the proposition that, with the exception of the ill-defined category of objects of regulation that “are in their nature national, or admit only of one uniform system, or plan of

⁹⁹ See *United States v. Sharpnack*, 355 U.S. 286 (1957).

¹⁰⁰ Brief for Appellee, *United States v. Sharpnack*, 355 U.S. 286 (1957) (No. 35), 1957 WL 87702.

¹⁰¹ 53 U.S. 299 (1851).

¹⁰² The Court stated:

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them.

But the law on which these actions are founded was not enacted till 1803. . . . If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate.

Id. at 317--18.

¹⁰³ *Id.* at 318.

regulation,”¹⁰⁴ states have concurrent power to regulate commerce, unless and until Congress pre-empts their regulations. And because *Cooley* upheld what amounted to a devolution of power from Congress to the states in effect not unlike the devolution accomplished by the Assimilative Crimes Act, it is not really surprising that, in the days before computer-based legal research, the appellee’s lawyer in *Sharpnack* (apparently a solo practitioner arguing his only Supreme Court case) did not think to look to *Cooley* for support.

But we have no such excuse and so we should face the question whether Justice Curtis and the *Cooley* Court were right in 1851 or the *Sharpnack* Court was right over a century later: Does the Constitution permit Congress to dynamically incorporate downward when it exercises an exclusive federal power (as Congress does pursuant to the Territories Clause of Article IV, § 3, when, as under the Assimilative Crimes Act, it makes law for federal territories)?

History and precedent would appear to be on the side of the *Sharpnack* Court. In addition to the passage by the first Congress of the federal act at issue in *Cooley*—which, on its face, incorporates state law dynamically rather than just statically¹⁰⁵—the Conformity Act of 1872 (admittedly adopted after the *Cooley* decision) expressly displaced a regime of static conformity to state procedure under the Process Act of 1792¹⁰⁶ with a regime of “dynamic conformity.”¹⁰⁷ Moreover, as the *Sharpnack* Court itself noted, numerous other federal statutes in force by 1957 dynamically incorporated state law.¹⁰⁸

¹⁰⁴ *Id.* at 319.

¹⁰⁵ The Act provided: “That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, *or with such laws as the states may respectively hereafter enact* for the purpose, until further legislative provision shall be made by Congress.” *Id.* at 317 (quoting Act of Congress of the 7th of August, 1789, sect. 4) (emphasis added).

¹⁰⁶ Act of May 8, 1792, 1 Stat. 275, 276. See Richard H. Fallon, Jr. et al., Hart and Wechsler’s *The Federal Courts and the Federal System* 605--07 (5th ed. 2003) (noting that Process Acts “adopted state law ‘as it existed in September, 1789 . . . not as it might afterwards be made’”) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 32 (1825)).

¹⁰⁷ *Id.* at 607 (“The Conformity Act eliminated the anachronism of federal adherence to no-longer-existent state practice.”).

¹⁰⁸ See *Sharpnack* at 294--97.

Did Justice Curtis nonetheless have logic on his side? Consider a Constitution like that of Germany, which divides federal subject matter competencies into two categories: those over which the federal government exercises exclusive authority;¹⁰⁹ and those over which the Länder and the Federal government exercise concurrent authority.¹¹⁰ Now suppose that, within an area of exclusive federal competence, the national legislature enacts a law purporting to dynamically incorporate Länder law. This certainly looks like an effort to reclassify an exclusive federal power as a concurrent power. Thus it would likely be unconstitutional were it not for another provision of the German Constitution, which expressly empowers the Federal government to delegate lawmaking authority to the Länder even with respect to subjects within exclusive Federal jurisdiction.¹¹¹ Were it not for that additional provision, however, it would be a fair inference that exclusive Federal powers are not delegable to the Länder.

Likewise, where the U.S. Constitution clearly delineates a power as exclusively federal, dynamic incorporation of state law would appear to be forbidden. Only one provision of the Constitution expressly confers an “exclusive” power. Article I, § 8 authorizes Congress to “exercise exclusive legislation in all cases whatsoever” with respect to the capital district. Nonetheless, Congress has granted (and taken away and re-granted) the District of Columbia varying degrees of “home rule” over the course of its existence.¹¹² In 1953, the Supreme Court rejected the argument that such home rule violates the constitutional requirement of exclusively federal legislation, observing “that the word ‘exclusive’ was employed to eliminate any possibility that the legislative power of Congress over the District was to

¹⁰⁹ Grundgesetz, art. 73, translated in 7 Constitutions of the Countries of the World (Supp. 2007) (Gisbert H. Flanz, et. al. eds., 2007 (enumerating areas in which federal government has “exclusive power to legislate”).

¹¹⁰ Grundgesetz, art. 74, translated in Constitutions of the Countries of the World, supra note 109 (extending “[c]oncurrent legislative powers” to enumerated subjects).

¹¹¹ Grundgesetz, art. 71 provides: “On matters within the exclusive legislative powers of the Federation, the Länder shall have the power to legislate only when and to the extent that they are expressly authorized to do so by a federal law.” Id., translated in 7 Constitutions of the Countries of the World, supra note 109.

¹¹² For a brief history, see Note: *Democracy or Distrust? Restoring Home Rule for the District of Columbia in the Post-Control Board Era*, 111 Harv. L. Rev. 2045, 2046--51 (1998).

be concurrent with that of the ceding states.”¹¹³ Thus, the Constitution’s grant of “exclusive” power is not delegable to the states in this context, but mostly because no state has a clear interest.

Bankruptcy and naturalization provide additional examples of potentially non-delegable powers. Article I, § 8 empowers Congress “[t]o establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.” A federal naturalization or bankruptcy law that made the law of each state operative in its own territory would seem to violate the requirement of uniformity. Note, however, that even *static* federal incorporation of the law of fifty different states would violate uniformity on this theory. Conversely, a federal law that dynamically incorporated the law of a *single state*, and made it applicable to the nation as a whole, would *not* be objectionable on disuniformity grounds. Accordingly, these uniformity requirements do not provide a very good test of the question whether exclusive federal power precludes dynamic territorially-based incorporation of state law.

In fact, it turns out that federal bankruptcy law does dynamically incorporate the law of the several states, thus seeming to violate the uniformity requirement. Although the Bankruptcy Code begins by defining terms,¹¹⁴ even a casual perusal of those terms makes obvious that these terms are, in turn, defined by reference to relationships that the federal Code does not itself define but that take their substance from state law. For example, although the Code defines a “domestic support obligation,” that definition relies on the underlying law of domestic relations.¹¹⁵ In principle, Congress, in enacting the Bankruptcy Code, could have intended for the federal courts to develop a freestanding federal law of domestic relations, applicable in bankruptcy cases—and the Supreme Court has sometimes asserted that there is a presumption in favor of federal definitions of federal statutory terms.¹¹⁶ But such statements cannot be taken at face value.

¹¹³ *District of Columbia v. John R. Thompson Co.*, 436 U.S. 100, 109 (1953) (citing *The Federalist*, No. 43; *Elliott's Debates*, pp. 432-433; 2 Story, *Commentaries* (4th ed. 1873), § 1218).

¹¹⁴ 11 U.S.C. § 101.

¹¹⁵ 11 U.S.C. § 101(14A).

¹¹⁶ See *Jerome v. United States*, 318 U.S. 101, 104 (1943) (“Congress when it enacts a statute is not making the application of the federal act dependent on state law.”). Accord *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

Although the development of federal standards in principle promotes the uniformity of federal law, where, as in the Bankruptcy Code and elsewhere, federal law assumes an existing set of legal relationships, federal uniformity comes at the unacceptably high cost of almost random unpredictability. Must federal bankruptcy courts develop federal standards governing alimony, divorce, guardianship, and separation (to name just four legal relations and obligations to which one of over fifty definitional sections of the Bankruptcy Code refers)? And to what end? Whatever the merits of the outcomes reached in the cases in which the Supreme Court has broadly (and blithely) asserted the presumption in favor of federal definitions, surely the Justices were closer to the mark when they said:

The Scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.¹¹⁷

To be clear, I am making a normative claim that federal law *should not* be interpreted so as to require the formulation of federal definitions for all of the legal relationships, rights, and duties to which it refers,¹¹⁸ but I am also making a descriptive claim: Federal law frequently builds on state law as it finds it at the moment of application. Or in other words, in many instances federal law dynamically incorporates state law. And that is true even of nominally uniform federal law—such as the federal law of bankruptcy.

Could it be otherwise? Once we recognize that in many instances federal law will incorporate state law rather than supply all of its own terms, can we say with confidence that it does so dynamically rather than statically? We can. Despite the enormous growth of the federal government since the Founding, Herbert Wechsler's 1954 observation remains largely true even in 2008: "federal law is still a largely interstitial product, rarely occupying any field completely, building normally upon legal relationships established by

¹¹⁷ *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

¹¹⁸ For an instructive discussion of the materials relevant to the normative question, see Fallon et al, Hart & Wechsler's *The Federal Courts and the Federal System* 723-24 (5th ed. 2003).

the states.”¹¹⁹ When Wechsler said, accurately, that federal law builds on these state-defined legal relationships—including such fundamental matters as contracts,¹²⁰ family relations,¹²¹ and property¹²²—what he meant was that federal law dynamically incorporates state law.

Incorporation of state law in such circumstances must be dynamic in order for the incorporation to achieve one of its central purposes: to layer federal law on top of the *operative* state law in any given case. Static incorporation would require keeping track of the operative dates of federal law and the law of each state, with incongruous results. It would require, among other things, a determination of which amendments to federal law reset the clock for purposes of incorporation.¹²³

Dynamic incorporation also makes more sense than static incorporation as a matter of congressional intent. Consider a tax example.

¹¹⁹ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.*, 543, 545 (1954). See also Fallon, *supra* note 118, at 495 (observing that “today one finds many more instances in which federal enactments supply both right and remedy in, or wholly occupy, a particular field,” but wondering whether Wechsler’s thesis, which was also espoused by Henry Hart, “does not remain accurate over an extremely broad range of applications.”)

¹²⁰ See, e.g., *First Options v. Kaplan*, 514 U.S. 938, 944 (“When deciding whether the parties agreed to arbitrate a certain matter [under the federal Arbitration Act]. . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”)

¹²¹ See, e.g., *Califano v. Jobst*, 434 U.S. 47, 52-53 n.8 (1977) (enumerating several provisions of Social Security Act that incorporate marital status as defined by state law); *Purganan v. Schweiker*, 665 F.2d 269, 270-71 (9th Cir. 1982) (holding that California law on marriage annulment affects insurance benefits under Social Security Act); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004) (conditioning entitlement to insurance benefits on state law determinations of whether children are legitimate).

¹²² See, e.g., *United States v. Craft*, 535 U.S. 274, 278 (2002) (“The federal tax lien statute itself ‘creates no property rights but merely attaches consequences, federally defined, to rights created under state law.’”) (quoting *United States v. Bess*, 357 U.S. 51, 55 (1958)).

¹²³ For an excellent discussion of this difficulty in the context of a purportedly non-substantive change to the Federal Rules of Civil Procedure, see Edward Hartnett, *Against (Mere) Restyling*, 82 *Notre Dame L. Rev.* 155 (2006).

Federal law treats punitive but not most compensatory damages for personal injuries as part of gross income.¹²⁴ Subject to federal constitutional limits, state law defines when punitive damages are allowed and where the line lies between punitive damages and compensatory damages. To some extent, the distinction is a matter of labeling, because juries may base their awards on a gestalt reaction to the facts of the case, rather than a careful parsing of the differences among economic damages, compensatory non-economic damages, and punitive damages.¹²⁵ Nonetheless, these labels matter for federal tax purposes. But is it reasonable to suppose that when Congress chose to accord significance to the state-drawn line between punitive and most compensatory damages, it meant to adopt the lines as they existed in each of the fifty states at the moment of enactment of the federal law—an administrative nightmare—or the line as it exists in particular verdicts based on the state law as it stands at the moment of that verdict, even if that state law became operative after the relevant provision of the federal tax law?

The pervasiveness of federal dynamic incorporation of state law shows that Justice Curtis was not merely wrong in his *Cooley* dictum denying the federal government this power, but very wrong. Or if he was right, he was right only as to the almost vanishingly small category of truly exclusive federal powers. A federal law that dynamically incorporated state law with respect to some aspect of foreign affairs—“incorporating” Massachusetts law regarding transactions with firms conducting business in Burma/Myanmar,¹²⁶ say—might violate the principle that in the exercise of its truly exclusive federal powers, Congress cannot dynamically incorporate state law. But such exotic examples aside, a federal system in which federal law is interstitial in the way that Wechsler described cannot operate effectively without dynamically incorporating state law willy-nilly.

¹²⁴ 26 U.S.C. § 104(a)(2). The evident object of the distinction is clear. Because the law does not tax imputed income from healthy bodies, damages for the loss of healthy bodies should not be treated as income. Note, however, that the law also does not tax imputed income from emotional wellbeing, but damages for emotional distress are only partially exempt from gross income. See 26 U.S.C. § 104(a)(5).

¹²⁵ Cf. Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damage Caps, 80 N.Y.U. L. Rev. 391 (2005) (finding that caps on non-economic damages lead to higher awards for economic damages).

¹²⁶ Cf. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

C. Coordination and Reciprocity

Dynamic incorporation of foreign law can be a powerful mechanism for solving coordination problems and ensuring reciprocal compliance with agreements among sovereigns or quasi-sovereigns. By contrast with static incorporation, dynamic incorporation ensures that initial efforts at coordination do not drift apart over time.

Consider first a common alternative mechanism for achieving coordination among various jurisdictions: the adoption by each of a “uniform” or “model” code. The Uniform Commercial Code (“UCC”) is a leading example. Originally promulgated in 1952 and revised periodically since then, some version of the UCC is in force in all fifty states.¹²⁷ States adopting the UCC may do so for one or both of two principal reasons: First, the legislature in a given state may conclude that the American Law Institute and the National Conference of Commissioners on Uniform State Laws—the bodies responsible for writing and updating the UCC (and other uniform laws) have greater expertise than do the legislators in drafting appropriate laws to govern commercial affairs; second, given the large number of commercial transactions that cross state lines, states may conclude that uniform rules are preferable to custom-tailored rules. Even if State X could, by its lights, enact a code that was superior to the UCC, the State X legislature might nonetheless conclude that the advantages of a set of uniform rules outweigh the disadvantages arising out of the (assumed) sub-optimality of the UCC rules. Accordingly, many states simply adopt the UCC or individual articles thereof.

However, not every state adopts every article of the UCC, and states sometimes adopt parts of the UCC with changes chosen by their individual legislatures.¹²⁸ Moreover, even if every state has adopted an article of the

¹²⁷ See Table of Jurisdictions Wherein Code Has Been Adopted, U.C.C., 1 U.L.A. 1-2 (2004).

¹²⁸ For example, U.C.C. § 2-302 sets forth a standard for an unconscionable contract or clause. Forty-eight states have adopted section 2-302 in order to regulate the perceived fairness of contracts. See Ronald L. Hersbergen, *Unconscionability: The Approach of the Louisiana Civil Code*, 43 La. L. Rev. 1315, 1315, 1317 (1983). California has not adopted the UCC’s unconscionability provision, but instead applies its own “judicially imposed” unconscionability doctrine. See, e.g., *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172-78 (Cal. 1981) (en banc). Louisiana, on the other hand, does not expressly impose any unconscionability limit. See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (“No

UCC,¹²⁹ individual states do so statically. How to interpret a provision of the UCC in Wisconsin is a question of Wisconsin law, while how to interpret the identical language in Minnesota is a question of Minnesota law. *Ceteris paribus*, in order to maintain uniformity, state courts may prefer interpretations adopted by the courts of their sister states, but this is at best an imperfect strategy for maintaining uniformity. Different fact patterns will arise in different orders in different states, and thus lines of doctrine interpreting uniform but somewhat ambiguous language may diverge over time. More fundamentally, since *Erie R.R. v. Tompkins*,¹³⁰ American lawyers and judges have understood state law (whether common law or statutory) as validating distinctive state authority rather than some general law. Despite its name, the Uniform Commercial Code can never be fully uniform.

If respectful consideration of the persuasive precedents of foreign jurisdictions is an imperfect method of achieving harmonization, dynamic incorporation marks an improvement. Suppose that instead of adopting the Uniform Commercial Code, Minnesota were to dynamically incorporate Wisconsin's version of the Uniform Commercial Code, along with its authoritative interpretation by the Wisconsin courts. Now there would be a self-correcting limit to drift. On questions of first impression, the Minnesota courts would either interpret the UCC according to their own best judgment or, following the practice of federal courts when called upon to make rulings of state law, attempt to predict how the Wisconsin Supreme Court would rule on the question.¹³¹ But once the Wisconsin Supreme Court had actually ruled on some question arising under the UCC, that ruling would be binding in

section of the Louisiana Civil Code directly addresses, in so many words, the doctrine of unconscionability or the related concept of adhesion contracts.”); *La. Power & Light Co. v. Mecom*, 357 So. 2d 596, 598 (La. App. 1 Cir. 1978) (“Louisiana courts have not to date adopted the theory of adhesion contracts.”).

¹²⁹ According to the website of the Uniform Law Commissioners, every state (and the District of Columbia and the U.S. Virgin Islands) has adopted Article 9 of the UCC, governing secured transactions. http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucca9.asp (last visited Oct. 31, 2007).

¹³⁰ 304 U.S. 64 (1938).

¹³¹ See *Salve Regina College v. Russell*, 499 U.S. 225, 241 (1991) (Rehnquist, C.J., dissenting, but not on this point) (“ . . . [W]here the state law is unsettled . . . the courts’ task is to try to *predict* how the highest court of that State would decide the question.” (emphasis in original)).

Minnesota. The commercial law would remain uniform between Wisconsin and Minnesota.

In practice, it is difficult to imagine one state delegating so much authority to another state in this manner, and harder still to imagine forty-nine states delegating such authority to just one—although the persuasive weight given to Delaware corporate law comes fairly close in practice. As noted above, setting aside special cases involving the application of external law to travelers and conflicts of law, true instances of horizontal dynamic incorporation are difficult to find.

More commonly, polities looking for a mechanism to keep their law synchronized will dynamically incorporate upward the law of some larger political entity. Multilateral treaties can serve this purpose. Each member state signs onto the treaty and makes the law of the larger entity part of its own law—or, what amounts to much the same thing, makes the law of the larger entity superior to its own law and enforceable in its own courts.

We might regard the U.S. Constitution itself as a leading example of this sort of upward dynamic incorporation for the purpose of solving coordination problems and ensuring reciprocal compliance with mutually beneficial agreements among sovereigns or quasi-sovereigns. The states granted to the national government the power, among other things, to regulate interstate commerce, and, through the Supremacy Clause, actions of the federal government in this and other domains of its policy competence were made both superior to contrary state law and enforceable within state courts.¹³² Thus, the Constitution gave the states a mechanism to achieve uniformity in interstate commercial regulation and to avoid costly trade wars.

The example of the U.S. Constitution also highlights an important feature of dynamic incorporation. Where there is a real possibility that issues of interpretation will arise over time, in order for the original act of incorporation to count as truly dynamic, there must be some mechanism for coordinating subsequent interpretations. Typically, that mechanism will be submission of contested questions to a single tribunal whose rulings will be binding on the courts of the incorporating polities. In the early Nineteenth Century, the highest court of Virginia took the position that its interpretation

¹³² See U.S. Const. art. VI (“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.”).

of the federal Constitution was no less authoritative than the interpretation provided by the Supreme Court of the United States. Unsurprisingly, the latter Court concluded that its own interpretation was binding, principally relying on an argument rooted in the need for uniform interpretation of federal law.¹³³ Many years later, Justice Holmes famously remarked that this ruling was essential to the preservation of the Union.¹³⁴

Thus, we might conclude that in general parties entering a multilateral agreement aimed at overcoming coordination problems should also establish some body to issue authoritative decisions resolving questions arising out of ambiguities in the agreement. This aim might be accomplished by the creation of a legislature, an administrative body, a court, or some combination. But whatever the nature of the body or bodies, they will only confer on the parties the benefits of true dynamic incorporation if their pronouncements are effectively binding within the legal systems of the agreeing parties. At the same time, however, bestowing the power to make binding rules of law on a body that is in substantial part beyond the control of the polity granting the power at issue, renders dynamic incorporation potentially problematic on delegation or sovereignty grounds.

* * *

The foregoing catalogue of the sorts of reasons why a polity might dynamically incorporate the law of another jurisdiction (whether up, down or horizontally) is not meant to be exhaustive. Other grounds can be adduced in particular circumstances. For example, states that require their high courts to interpret their state constitutions in “lockstep” with the U.S. Supreme Court’s interpretation of parallel provisions of the federal Constitution may do so for substantive ideological reasons: Because states are already bound (under the incorporation doctrine) to apply the Supreme Court’s interpretation of most of the provisions of the Bill of Rights, a lockstep requirement can be a means of preventing a liberal state high court from

¹³³ See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347--48 (1816) (invoking “necessity of *uniformity* of decisions throughout the whole United States”) (emphasis in original).

¹³⁴ See Oliver Wendell Holmes, *Collected Legal Papers* 295-96 (1920) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.”).

interpreting the state constitution to provide for additional rights.¹³⁵ Or the ideological valence could be reversed. In circumstances in which state judicial “over-protection” of rights leads to conservative results—for example, by interpreting a state equal protection requirement to ban affirmative action programs, regulatory Takings, or gun control laws that the federal Constitution would permit—a lockstep requirement will prevent a conservative state high court from invalidating liberal state policies that the federal courts would uphold.

A lockstep requirement may not typically be understood as a form of dynamic incorporation because the operative constitutional norm already operates of its own force. However, this way of viewing the matter is misleading. The rights-protective element of a Supreme Court interpretation of the Fourteenth Amendment and the Bill of Rights operates against the states of its own force, but the rights-denying element does not. A state court that would, if left to its own devices, interpret state constitutional limits on searches and seizures to require probable cause and a warrant before the police may search a person’s garbage, but instead, on the authority of U.S. Supreme Court precedent interpreting the Fourth Amendment,¹³⁶ holds that such police activity does not constitute a “search,” has—in virtue of the lockstep requirement—limited the freedom of the state’s citizens via dynamic incorporation.

This last example shows how dynamic incorporation can be used to limit “negative” freedom, or “freedom from” government action. Dynamic incorporation can, of course, also enhance such negative freedom. For example, a polity that chooses to dynamically incorporate the human rights law of a body that, over time, tends to afford more and more protection for more and more liberties, increases its citizens’ liberties (assuming that, absent dynamic incorporation, the polity would not have taken such steps

¹³⁵ For example, the Florida Legislature introduced the “lockstep” approach to search-and-seizure cases after concern that the Florida Supreme Court was overly liberal and defense oriented. See Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida’s “Forced Linkage” Amendment*, 39 U. Fla. L. Rev. 653, 666--73 (1987) (describing the political background to the adoption of Fla. Const. art. 1, § 12).

¹³⁶ *California v. Greenwood*, 486 U.S. 35 (1988) (holding police inspection of garbage bags left on curb did not constitute a Fourth Amendment “search” requiring a warrant and probable cause, while conceding that “[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct”).

directly). Thus, there is no necessary connection between dynamic incorporation and negative liberty.

By contrast, with one important exception, dynamic incorporation systematically reduces the “positive liberty” of a polity’s citizens by taking key decisions away from the organs of that polity.¹³⁷ That is simply a restatement of the point noted above in Part I: even when cost-justified, dynamic incorporation undermines democratic self-government within the polity doing the incorporating. The one exception is that where dynamic incorporation places limits on counter-majoritarian institutions within a polity—as in the example of lockstep requirements for state constitutional provisions that might otherwise be used to invalidate internal legislation—those limits may have the effect of empowering democratic institutions within the dynamically incorporating polity. As the next Part explains, there are also other potentially important differences between dynamic incorporation of decisions by politically accountable executive and legislative actors, on the one hand, and dynamic incorporation of decisions by politically unaccountable judicial actors, on the other.

IV. The Political Safeguards of Dynamic Incorporation

Thus far, this Article has argued that: dynamic incorporation of foreign law raises a *prima facie* threat to democratic values; *ceteris paribus*, the threat is roughly proportional to the difficulty of revoking the decision to dynamically incorporate foreign law; and that the attendant costs and benefits of dynamically incorporating upward, downward, or horizontally will vary greatly based on context, including the justification for dynamic incorporation. This Part addresses a tension raised by the foregoing analysis. To attain some of the benefits of dynamic incorporation—especially the benefits of coordination and reciprocity from multilateral upward incorporation—polities will often need to make firm commitments, that is, to make a decision to engage in dynamic incorporation practically irrevocable. In other words, the benefits of some kinds of dynamic incorporation will flow

¹³⁷ On the difference between negative and positive liberty, see Isaiah Berlin, Two Concepts of Liberty, *in* *The Proper Study of Mankind* 191, 203-06 (1997). For a related typology, see Benjamin Constant, The Liberty of the Ancients Compared with That of the Moderns, Address Before the Athenee Royal in Paris (1819), *in* *Political Writings* 307 (Biancamaria Fontana ed. & trans., 1988).

precisely when such incorporation poses the greatest threat to democratic values.

This Part first argues that political representation of the dynamically incorporating polity (or representation of its citizens) within the polity whose laws are incorporated, can compensate for the loss of local democratic control that irrevocable or nearly irrevocable dynamic incorporation entails. For example, the EU provides for representation of its member states in the Presidency and the Commission, as well as elections to its Parliament. Thus, when a member state agrees to make EU law enforceable as its own law in domestic courts, it dynamically incorporates law that is, in an important sense, not fully foreign. Political safeguards at the EU level substitute for the exercise of sovereignty at the member state level.

This Part next asks whether this strategy—which I call the political safeguards of dynamic incorporation¹³⁸—can be successfully employed when the body formulating law to be incorporated is a court. Does dynamic

¹³⁸ The term “political safeguards” is meant to evoke a well-known article by Herbert Wechsler, in which he suggested that the U.S. Constitution’s principal protections against the erosion of state sovereignty could be found in the representation of the states as political units in the federal government itself. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 559 (1954). The Supreme Court has relied on the notion of political safeguards to avoid searching judicial scrutiny of laws challenged as intruding into the sovereign prerogatives of states. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (“the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”) (citing Wechsler, *supra*, and Jesse H. Choper, *Judicial Review and the National Political Process* (1980)), although decisions since the 1990s indicate a greater willingness on the Court’s part to find judicially enforceable safeguards for federalism as well. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617 (2000) (striking down provision of the Violence Against Women Act that allowed victims of gender-motivated violence to sue their attackers in federal court because Congress may not “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”); *Printz v. United States*, 521 U.S. 898 (1997) (holding Brady Act, which required state law enforcement officials to conduct background checks of gun buyers, offended state sovereignty); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (invalidating federal Gun-Free School Zones Act as beyond Congress’s authority under Commerce Clause). For a reformulation of Wechsler’s thesis emphasizing the role of state and national political parties, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215 (2000).

incorporation of judge-made law pose a threat to democratic values, and if so, can the threat be mitigated by representation within a court? How one answers these questions may depend on how one understands the nature of adjudication.

A. Representation as Remedy

Suppose that some number of sovereign polities wish to enter into a mutually beneficial agreement to create a supra-sovereign body that will have the power to make laws binding on and in their respective polities. Perhaps the contracting sovereign parties wish to create a common economic market so as to discourage trade wars and to harmonize regulations. Or perhaps they wish to avoid the race-to-the-bottom dynamic that can undermine the incentive of any single polity to enact strong protections for workers' rights or the natural environment. Whatever the driving force behind the quest for coordination, each polity faces a dilemma: To secure the advantages of the agreement, it must be irrevocable or nearly so, but as we saw in Part I, the greater the obstacles to repeal of an Act or Treaty dynamically incorporating foreign law, the greater the threat to democracy.

Formalism poses a tempting potential solution to this problem. An incorporating polity can decline, as a matter of internal law, to give direct effect to the supra-sovereign body's decrees. This is not necessarily a toothless gesture. In the United States, for example, treaties—whether they empower future lawmaking by a supra-national body or merely express nominally static norms—are effectively presumed to be non-self-executing; that is, only the implementing legislation has internal effect (absent evidence to the contrary in the treaty text or perhaps the *travaux preparatoire*).¹³⁹ And in the Military Commissions Act of 2006, Congress even took the step of forbidding any person from relying directly on the Geneva Conventions for a claim of right,¹⁴⁰ adding further that in construing the implementing

¹³⁹ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (“Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action.”) (citing *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884)).

¹⁴⁰ Military Commissions Act of 2006 (MCA) § 5(a), Pub. L. No. 109-366, 120 Stat. 2600 (2006).

legislation, U.S. courts could not even take guidance from foreign or international decisions.¹⁴¹

However, formally denying direct effect in Polity A to supra-national legislation and decisions can readily backfire. Because (by hypothesis) the main point of the inter-sovereign agreement is to bind the parties, the other potential signatories will not accept A's accession to the agreement, if that accession does not actually commit A to incorporate the legislation or decisions of the supra-sovereign body it creates.

To be sure, there will be circumstances in which, as a formal matter, polity A neither makes the supra-sovereign body's legislation or judgments directly enforceable domestically nor renders its accession to the inter-sovereign agreement formally irrevocable, but other factors provide the remaining sovereign parties with adequate assurances of A's ongoing compliance. The status of the decision of panels of the World Trade Organization ("WTO") in U.S. law provides an interesting example. A decision by a WTO panel or appellate body that some U.S. law or policy violates the treaty is not automatically effective domestically. Instead, Section 129 of the Uruguay Round Agreements Act confers discretion on the U.S. Trade Representative, in consultation with the relevant federal agencies—which are, of course, accountable, through the President, to the American people, rather than to the WTO—to decide whether to implement a WTO panel or appellate body decision.¹⁴²

However, a decision by the United States to defy the WTO has serious external repercussions. Most dramatically, it will lead to permission for other WTO members to impose punitive duties on U.S. goods. The 2003 showdown between the U.S. and the WTO¹⁴³ was a rare example of the

¹⁴¹ *Id.* § 6(a)(2).

¹⁴² See Uruguay Round Agreements Act § 129(b)(4), 19 U.S.C. § 3538(b)(4) (2006) ("The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination" by the agency that would be consistent with the WTO mandate.)

¹⁴³ In March of 2002 the United States imposed thirty percent tariffs on certain imported steel products and fifteen percent tariffs on rebar and stainless steel. See Presidential Proclamation No. 7529, 67 Fed. Reg. 10,553 (Mar. 7, 2002). Several countries promptly filed a complaint before the WTO and successfully argued that the steel tariffs violated non-discriminatory WTO provisions. See WTO Appellate Body, *United States -- Definitive Safeguard Measures on Imports of Certain Steel*

failure of such repercussions to deter U.S. defiance of its WTO obligations, and in the end, after the European Community threatened sanctions heavily affecting swing states prior to a Presidential election, the U.S. backed down.¹⁴⁴ In nearly all other circumstances, the formal power of the U.S. not to incorporate WTO rulings into its domestic law counts for little. What matters are the practical obstacles to defiance of the WTO, not the formal obstacles.

This is not to say that formal automatic incorporation and formal irrevocability count for nothing. Under particular constitutional provisions and doctrines in any given polity, it may make a critical difference whether an Act or Treaty acceding to the supra-sovereign body's authority is formally irrevocable and whether laws made by the supra-sovereign body have direct effect within that polity. The U.S., for example, cannot, as a formal matter, irrevocably join supra-sovereign agreements for the simple reason that a later-enacted statute approved by a simple majority vote in each house of Congress (and signed by the President) can revoke an earlier-enacted treaty.¹⁴⁵

For present purposes, however, we can gloss over these distinctions and focus on irrevocability and effectiveness in practice. Regardless of the form of the deal, what matters is whether the cost of revoking an agreement to be bound by future enactments and judgments of a supra-sovereign body is sufficiently high that, as a practical matter, it is very unlikely that a polity, having entered the agreement, will back out.

Products, WT/DS248/AB/R (Dec. 10, 2003), available at www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm.

¹⁴⁴ The European Community, aware that the steel tariffs benefited President Bush in battleground states such as West Virginia, Pennsylvania, and Ohio, threatened economic sanctions affecting other crucial states like Florida, South Carolina, Washington, and North Carolina. Just prior to the retaliation deadline set by the EC, President Bush ordered an end to the steel tariffs. See Jide Nzelibe, *The Role and Limits of Legal Regulation of Conflicts of Interest (Part 1): The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 *Theoretical Inq. L.* 215, 224–25 (2005). See also *Bush Ends Steel Safeguard Tariffs in Face of Threat by EU to Retaliate*, 20 *Int'l Trade Rep. (BNA)* 2021 (Dec. 11, 2003).

¹⁴⁵ *Ex parte Webb*, 225 U.S. 663, 683 (U.S. 1912) (“Of course an act of Congress may repeal a prior treaty as well as it may repeal a prior act.”)

And there's the rub. A *de facto* irrevocable decision by Polity A to enter into a supra-sovereign agreement to be bound by the future enactments and judgments of some supra-sovereign body poses roughly the same threat to democratic values in Polity A as a formally irrevocable decision to do the same. In either case, important policy decisions will be taken by actors that are not accountable to the citizens of A, and if the citizens of A are unhappy about those decisions, as a practical matter there is little they can do about them. Thus, formalism provides a false solution because formal revocability without actual revocability does not mitigate the anti-democratic impact of dynamic incorporation of foreign law.

Representation is a better, and more common, solution. Consider the situation of the States of the United States in 1787 or, more recently, the original member States of the European Economic Community in 1957 or the EU Member states when the Maastricht Treaty came into effect in 1993. A State entering into one of these unions gave up some of its regulatory power in agreeing to accept the larger body's law in exchange for the reciprocal benefits of Union. But in partial compensation for the resulting loss of local democratic control, the member States received political representation in the larger political entity.

Representation in the larger entity does not perfectly substitute for the lost regulatory autonomy, of course. The votes of citizens of Polity A are diluted by the larger denominator associated with a larger political entity. If this effect is sufficiently large, citizens of a small polity may demand special protections to prevent their interests from being completely overrun by those of their more populous neighbors. Representation of each State by two Senators in the U.S. Senate, and the assignment to each EU member State of one seat in the European Commission, compromise the principle of one-person-one-vote at the higher political level in order to preserve some measure of self-governance at the lower political level. Whether such arrangements provide sufficient representation at the supra-state level to offset the loss of democratic accountability at the state level cannot be answered in the abstract. But, where the benefits of the inter-State agreement are substantial, representation could be enough to tip the balance. Certainly that was the judgment of the States that joined the United States and of those that joined the EEC and later the EU.

Representation in the supra-state body need not be the only safeguard for States that give up some self-rule for the benefits of mutual coordination, but it will often be essential for the enforcement of the other safeguards. Here the U.S. experience is especially instructive. Perhaps the single most

important protection for self-rule at the state level is the allocation of powers among the federal and state governments. Certainly that was the belief of the original Constitution's most prominent defenders.¹⁴⁶ Yet from very early in the Republic, it became apparent that there would be few, if any, judicially enforceable limits on the subject-matter competence of Congress.¹⁴⁷ Notwithstanding periodic judicial efforts to rein in the scope of congressional power,¹⁴⁸ with the growth of the national economy, the judicially enforceable limits have come to play at best a marginal role.¹⁴⁹ Today, only one Justice of the Supreme Court argues for any serious restriction.¹⁵⁰

Nonetheless, Congress is not in fact omnipotent, because the “political safeguards of federalism”—that is, the role of the States and their citizens

¹⁴⁶ As James Madison explained, “the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.” *The Federalist* No. 46, p. 295 (Clinton Rossiter ed., 1961). See also *The Federalist* No. 45, at 292-93 (Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”)

¹⁴⁷ See *McCulloch v. Maryland*, 17 U.S. 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.”); *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) ([The power to regulate commerce] “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”)

¹⁴⁸ See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding federal Gun-Free School Zones Act unconstitutional because it extended beyond Congress's Commerce Clause power); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (invalidating federal prohibition of interstate shipment of goods produced by child labor) (overruled by *United States v. Darby*, 312 U.S. 100, 115-17 (1941)).

¹⁴⁹ See *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal statute banning possession, obtaining or manufacture of marijuana as applied to person growing marijuana under state license strictly within California for medical purposes).

¹⁵⁰ See *Lopez*, 514 U.S. at 584--602 (Thomas, J., concurring) (arguing that current Commerce Clause jurisprudence is “far removed from both the Constitution and from our early case law” and advocating for more restrictive interpretation); *Raich*, 545 U.S. at 58 (Thomas, J., dissenting) (arguing for restrictive view whereby Commerce Clause only “empowers Congress to regulate the buying and selling of goods and services trafficked across state lines”).

voting on a State-by-State basis in the selection of federal office holders—give Congress a reason not to push its power to the full extent that the courts would permit. Viewing the United States as a supra-State body whose law (in virtue of the Supremacy Clause) is irrevocably¹⁵¹ and dynamically incorporated into the laws of the several States, we can regard the various mechanisms by which the States are represented in the federal government¹⁵² as mechanisms for keeping the latter within its appropriate bounds, and thus as counterweights to the democratic loss suffered by the States as a consequence of the dynamic incorporation. More broadly, representation can play this function whenever a state dynamically incorporates the law of a supra-state body.

B. Representative Courts?

In principle, a polity can dynamically incorporate future legal rules and standards regardless of whether those rules and standards are enacted by a legislature, promulgated by an executive agency, or expressed in the judgment of a court. This sub-Part focuses on the special concerns raised by using “political safeguards” to limit democracy losses when the incorporated rules or standards come from courts.

Dynamic incorporation of judicial decisions will sometimes be deemed a necessary element of a regime of multilateral upward incorporation. The State parties to a multilateral agreement will often deem it useful to submit disputes concerning the meaning of provisions of the mutually incorporated law to an adjudicatory body created by that very agreement. Whether such an adjudicatory body acts as a court of first instance or an appeals court, and whether it acts directly on private parties or requires State parties to espouse the claims of its citizens, the reason for a separate, supranational body will usually be the same: The contracting State parties do not trust the domestic courts of the respective signatories to provide impartial justice.

Nonetheless, the mere existence of a supranational adjudicatory body does not, as a formal logical matter, require dynamic incorporation of supranational (for our purposes, “foreign”) *law*. If the adjudicatory body

¹⁵¹ See *Texas v. White*, 74 U.S. 700, 725 (1868) (describing Union as “perpetual” and “indissoluble.”).

¹⁵² See Wechsler, *supra* note 119, at 543--44 (invoking role of states in selecting composing and selecting federal government among the chief political safeguards of federalism).

resolves cases but does not set precedents, then its judgments are not, in a formal sense “law” to be incorporated. Although Anglo-American lawyers and scholars tend to regard the precedent-setting feature of adjudication as an essential guarantee of procedural regularity,¹⁵³ civil law jurisdictions have long functioned without a formal notion of precedent. Accordingly, a regime of upward-incorporated statutory and administrative law could be devised in which the supranational adjudicatory body did not make law that would then have to be incorporated within the member States.

Yet many close observers have long taken the view that, as a functional rather than a formal matter, civil law jurisdictions *do* have a doctrine of precedent.¹⁵⁴ The proliferation in recent years of trans-European and other international courts that publish their judgments accompanied by lengthy opinions in the “American” style—and that adjudicate cases for both common law and civil law countries—only further erodes the notion that high-profile adjudication can proceed without a functional notion of precedent.

Moreover, even if it is possible to establish a system of adjudication without precedent, it will often make policy sense to require that judgments of a supra-State court be given precedential effect. Suppose one thinks that, *ceteris paribus*, the best way to settle disputes arising under a supranational legal regime is for a supranational adjudicatory body to resolve the question retrospectively for past cases, but for an inter-State legislative or administrative body to adopt new rules and standards specifically addressing and resolving the disputed question prospectively. Even then, the adjudicatory body will be “making law” for past cases, and the same sorts of dysfunctions that create “gridlock” and “ossification” in domestic legislative

¹⁵³ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 30 (1995) (“If the Constitution predominates because it is law, its interpretation must be constrained by the values of the rule of law, which means that courts must construe it through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied.” (footnote omitted)).

¹⁵⁴ Mirjan R. Damaska, *The Faces of Justice and State Authority* 36-38 (1986); Peter Goodrich, *Reading the Law* 39 (1986).

and regulatory processes may operate at the supranational level.¹⁵⁵ Thus, the adjudicatory body's decision may end up establishing law prospectively as well for some considerable period of time.

Accordingly, we have reason to take seriously the possibility of a regime of irrevocable or nearly-irrevocable upward dynamic incorporation of supranational judicial lawmaking. Is such a regime a threat to democratic values? That depends on how one understands the judicial process.

If one is strongly committed to (a strong conception of) formalism, then judicial lawmaking is pure usurpation; courts never legitimately make law; all they do is apply pre-existing legal norms; because there will sometimes be disagreements about how to apply those pre-existing norms and uniform interpretation has value, there may be sound reasons to prefer a system of supranational adjudication in which final interpretive authority resides in a single supranational court, but there is no reason in principle why the supranational court will do a better or worse job of reaching correct interpretations than would individual national courts. So long as the judges of the supranational court are highly qualified legal technicians acting in good faith, there will be no judicial lawmaking and thus no threat to democratic values within the States that comprise the supranational regime. For a hyper-formalist of this description, the notion that individual judges "represent" the States from which they hail would be a deeply problematic solution to the problem of dynamic incorporation, but happily for the hyper-formalist, there is no problem in the first place because no law to be made.

For different reasons, neither is there a serious problem for the hypothetical hyper-formalist's equally hypothetical antithesis, the hyper-realist. If one accepts the extreme legal realist view that courts decide cases no differently from political actors, there is no reason in principle to deny that representation can serve the same function with respect to dynamic incorporation of judicial lawmaking as it can serve with respect to dynamic incorporation of legislative and administrative lawmaking—namely, it can mitigate the anti-democratic impact.

But what if one is neither a thoroughgoing formalist nor a thoroughgoing realist? What if, in other words, one thinks that law, while

¹⁵⁵ See Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* 4-11 (2003) (finding bicameral differences, partisan polarization, and disappearing political center to be significant gridlock causes); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *Duke L.J.* 1385 (1992) (discussing causes of and potential solutions to problem of regulatory "ossification").

not completely independent of politics, is not simply reducible to politics either? In that case, one is likely to think that courts do legitimately make law in resolving hard cases but also that there is something problematic about the idea that judges “represent” constituencies in deciding among potential rules and standards.

To see whether we can fashion an acceptable role for representation in supranational judicial lawmaking, it will be helpful to consider how representation functions in related adjudicatory contexts. Arbitration provides a stark example. In both private and public arbitration, it is common for the interested parties each to name one or more arbitrators, with one or more “neutral” arbitrators to be selected by a different means—commonly by the consent of the party-chosen arbitrators.¹⁵⁶ Although arbitrators, once chosen, are supposed to decide cases fairly,¹⁵⁷ the very selection mechanism underscores the widespread understanding that party-chosen arbitrators represent, or at least are likely to be sympathetic to, the parties that have chosen them. This understanding is reinforced by, and in turn reinforces, two key procedural dimensions to most arbitration: The law as such is less binding on decisions of arbitrators than it is on courts, and decisions of arbitrators do not have the same precedential force as decisions of courts.¹⁵⁸

Suppose, however, that for the sorts of reasons just described, the State parties to a multi-State agreement do wish to submit disputes arising under the agreement or laws made pursuant thereto to adjudication that is more “law-like,” that is, to adjudication in which the judges regard themselves as impartial and in which decisions in concrete cases establish

¹⁵⁶ See *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962) (describing a typical tripartite arbitration agreement “where each party to a dispute is given the right to select an arbitrator and the third member is selected by them or by a disinterested party”).

¹⁵⁷ AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon I.E. (1977) (“Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest.”).

¹⁵⁸ See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (noting that arbitrators have no obligation to follow precedent); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash & Lee L. Rev. 395, 402--03 (1999) (describing nonbinding, generally confidential, private nature of arbitration decisions).

rules and standards of decision for other cases. Might there still be a role for “representation” as a means of pulling the anti-democratic sting from dynamic incorporation of judge-made law?

Before considering that question, we might wonder whether there really is any such sting when it comes to judicial lawmaking. After all, even within a single domestic legal system, courts do not decide questions of law “democratically.” This is especially true when courts exercise the counter-majoritarian power to invalidate legislative decisions on constitutional grounds, but even when exercising the ordinary power of statutory interpretation, courts do not typically act in an especially democratic fashion. If, for example, the test for determining what some Act of Congress means is one that looks to the plain meaning of the words, the context of enactment, and the legislative history, we ordinarily think that unelected judges can do as good a job of applying this test as elected judges can. Indeed, concerns about the possibility of corruption (due to the expense of judicial elections and the concomitant imperative of raising funds from potential parties) incline us to think that *unelected* and thus *disinterested* judges will do a more faithful job of applying that test than judges who represent any constituency.

The difficulty with this line of argument, however, is that it rests on the highly formalist premises that, by hypothesis, anyone who thinks there is a real problem here will have already rejected. To recognize what we might call “the partial autonomy of law”¹⁵⁹ from politics is not to concede the formalist claim that the background, training, and values of judges make no difference at all in the resolution of concrete cases or judicial lawmaking. The politicians and interest groups who treat each Supreme Court nomination as a high-stakes political event rightly understand that such matters contribute to a “judicial philosophy,” and that judicial philosophy matters.¹⁶⁰

To be sure, someone who knows and agrees with a judge’s judicial philosophy is not exactly “represented” by that judge, but then, perhaps

¹⁵⁹ Michael C. Dorf, *No Litmus Test: Law Versus Politics in the Twenty-First Century* xix (2006).

¹⁶⁰ For an excellent account of what constitutes a judicial philosophy and how it figures in Supreme Court decision making, see Christopher Eisgruber, *The Next Justice* 98--123 (2007). Eisgruber describes a judicial philosophy as the sum of a judge’s “ideological convictions” and “procedural convictions, including . . . convictions about the proper role of courts within the American political system.” *Id.* at 99.

nothing quite so strong as representation is needed to serve the function with respect to supranational judicial lawmaking that representation serves with respect to supranational legislative and administrative lawmaking. That function might be better described as something like “values alignment.”

Domestically, when Presidents, Senators, and the interested public seek judges and Justices who share their values, they do not (if acting in good faith) seek judges and Justices who will literally take orders. Indeed, even an elected representative—pace Edmund Burke—does not simply take instruction from his constituents.¹⁶¹ But the distance is greater for a judge than for a legislator. We think it laudable when a legislator listens to the concerns of her constituents or, in running for office, explains what policies she proposes to pursue. Supreme Court nominees, by contrast, pointedly refuse to answer questions that even hint at how they will vote, if confirmed. Much of this, of course, is a self-serving pose—what Senator Joseph Biden aptly called a “Kabuki dance”¹⁶²—because a prospective Justice could say a great deal more than recent nominees have said, while still promising to keep an open mind to new arguments if confirmed. That Justices do not take this approach has more to do with nomination and confirmation politics than to do with judicial ethics.¹⁶³

Nonetheless, it is hard to imagine anyone seriously maintaining that judicial nominees should make campaign promises in the same way that candidates for legislative or executive office do. If judges “represent” particular viewpoints within a domestic legal system (or at least within the

¹⁶¹ Burke believed that a representative should exercise his best judgment about the public interest, even if that means disappointing his constituents. See Edmund Burke, *Speech to the Electors of Bristol on Being Elected* (Nov. 1774), in *The Political Philosophy of Edmund Burke* 110 (Iain Hampsher-Monk ed., 1987). He successfully ran for Parliament and put these principles into practice, whereupon he was voted out of office. Robert Luce, *Legislative Principles: The History and Theory of Lawmaking By Representative Government* 464 (1930).

¹⁶² Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary, 109th Cong. 328 (2006) (statement of Sen. Joseph R. Biden, Jr., Member, S. Comm. on the Judiciary).

¹⁶³ Christopher Eisgruber argues that confirmation hearings are most likely to be acrimonious, and thus that nominees are most likely to try to hide their views, when Presidents nominate ideological extremists rather than moderates. See Eisgruber, *supra* note 160, at 124--43.

one domestic legal system with which I am most familiar) only in the limited sense that citizens have a right to demand that their Senators only confirm judges who broadly share their values and hold a judicial philosophy they deem acceptable, then the appropriate question for supranational lawmaking courts is whether they can be made representative in roughly the same way.

The answer to that question is probably yes. Today, Presidents rarely pay much attention to the State or region from which a prospective Supreme Court nominee hails, except perhaps as a means of placating a particular Senator or as a proxy for particular values (to the extent that “red state/blue state” divisions translate into judicial philosophy). By contrast, ideology and (sometimes) membership in a particular racial or ethnic group play substantial roles in Presidential nomination and Senate confirmation. In previous eras, however, when political cleavages closely tracked geographic lines, political actors paid close attention to issues of State and regional balance on the Court.¹⁶⁴ Although no one thought that a Southern Justice was legally or even morally bound to represent Southern interests on questions involving slavery in quite the way that Southern state delegations to Congress did, it was understood that geographical origin shaped outlook.

Likewise, if we look at prominent international judicial bodies today, we find that membership criteria pay exquisite attention to the country and/or region from which judges are selected. For example, the International Court of Justice (“ICJ”) at the Hague, the principal judicial organ of the United Nations, “may not include more than one national of the same State. Moreover, the Court as a whole must represent the main forms of civilization and the principal legal systems of the world.”¹⁶⁵ The formula is even more rigid for the European Court of Human Rights (“ECHR”) in Strasbourg. Although “[j]udges sit on the Court in their individual capacity and do not represent any State,”¹⁶⁶ the total number of judges equals the number of

¹⁶⁴ Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* 3 (new & rev. ed. 1999) (including “geographic” representation in list of various representative factors considered in judicial appointments).

¹⁶⁵ International Court of Justice, *Members of the Court*, <http://www.icj-cij.org/court/index.php?p1=1&p2=2> (last visited February 4, 2008).

¹⁶⁶ European Court of Human Rights, *Survey of Activities: 2007 5* (2008), available at http://www.coe.int/t/dc/files/themes/cedh/1-2248184-Survey_of_activities.pdf.

members of the Council of Europe,¹⁶⁷ with each Council member having the right to put forward names for one seat on the court.¹⁶⁸

The greater diversity of viewpoints likely to be found in a global organization relative to a national one (or, in a federal system, the greater viewpoint diversity to be found at the national level than at the state level), makes it more difficult for an international (or national) court to achieve rough viewpoint representativeness than for a national (or state) court to achieve such representativeness. Simply as a practical matter, for a court to function collegially requires some relatively small limit to the number of judges—nine, eleven, or perhaps fifteen, but not substantially larger—or what amounts to the same thing: a practice of hearing cases in panels rather than in plenum.

This practical limit in turn means that many member States of a large supranational judicial system will have to settle for virtual representation: For example, Nicaragua and Colombia count on judges from Venezuela and Mexico to represent, if not necessarily their interests, at least their way of understanding their legal obligations. Indeed, given that the ICJ's jurisdiction includes the resolution of territorial disputes, which are most likely to arise between nations in the same region, it should be clear that regional representation is keyed not to representation of interests but to understanding of perspective.¹⁶⁹

But if member States of a multi-State court must settle for virtual representation, it is not clear that constituencies do much better under the selection systems in place for national courts. The United States has perhaps the world's most highly politicized process for choosing the judges of its constitutional court, and one would therefore think that the system would therefore routinely produce moderate Justices broadly in tune with national values. In fact, however, depending on the happenstance of Senate control and a President's commitment to change through the courts, a small difference in elections can result in substantial philosophical differences among the Justices that are confirmed under different Administrations. In a supranational system in which judicial seats are apportioned roughly one to a

¹⁶⁷ See *id.* at (“The Court is composed of a number of judges equal to that of the Contracting States (currently forty-five).”). There are actually 47 members but the seats of judges from Ireland and Montenegro are currently vacant. See *id.* at 5.

¹⁶⁸ For a list of members as of December 31, 2007, see *id.* at 8.

¹⁶⁹ See, e.g., (*Nicaragua v. Colombia*), 2007 I.C.J. 124 (Dec. 13) (accepting jurisdiction over territorial dispute).

country or region, one can at least count on one judge with a broadly sympathetic perspective, and norms of neutrality and collegiality may then give that judge substantial influence. Thus, the virtual representation for which many nations must settle in the selection of judges for supranational courts may do a better job of reflecting the interests and outlooks of the member nations than a more political, and thus more directly representative, system would do.

To be clear, the principal example of “representation” on supranational judicial bodies I have used here—the ICJ—does not issue judgments that are automatically or irrevocably incorporated into the domestic law of U.N. member States. Thus, for example, the U.S. Supreme Court held in *Sanchez-Llamas v. Oregon*,¹⁷⁰ that ICJ rulings interpreting the Vienna Convention on Consular Relations were entitled to “respectful consideration,” but were not binding on the Supreme Court, which went on to disagree (respectfully) with the ICJ’s conclusions.¹⁷¹ Meanwhile, even before the Court’s decision in *Sanchez-Llamas*, the State Department had given notice that it would prospectively withdraw from the Vienna Convention’s Optional Protocol, which had invoked the ICJ’s compulsory jurisdiction in the first place.¹⁷²

If representation of member States among the judges of a supranational judicial body is thought to be a necessary expedient when the supranational judicial body’s judgments lack the automatic force of law within the member States, such representation would seem to be especially necessary where the supranational court’s judgments have greater force. Whether such representation is a *sufficient* condition to compensate for the loss of domestic judicial authority is a different question, but the answer is probably yes. Representation on courts accomplishes less than representation in legislative and administrative bodies. At the same time, however, delegating judicial decisions to a supranational court poses less of a threat to domestic democracy because judicial decision making itself is not best understood as a democratic process. Thus, to compensate for irrevocable or nearly irrevocable dynamic incorporation of judge-made law, representation can succeed despite accomplishing less than representation accomplishes with respect to legislation and administration.

¹⁷⁰ 126 S. Ct. 2669 (2006).

¹⁷¹ *Id.* at 2685--87.

¹⁷² See *id.* at 2675.

Before concluding this Part, it is worth noting an argument that is *not* available to justify nearly irrevocable dynamic incorporation of judge-made law. In a recent article, Henry Monaghan argues that supranational judicial review does not violate U.S. constitutional norms.¹⁷³ Monaghan's best arguments are historical. The United States, he contends, has submitted to supranational adjudication since the early days of the Republic.¹⁷⁴ Monaghan also advances a functional argument, however. Supranational adjudication, he argues, is small potatoes compared to supranational legislation. As to the latter, he concedes that "[i]ssues of national sovereignty and democratic accountability are surely raised by this increasingly widespread practice. But that bell having been rung, it cannot be unringed."¹⁷⁵ In other words, because the United States has acquiesced in the sovereignty-threatening practice of supranational legislation, it is too late to worry about the lesser threat posed to national sovereignty by supranational adjudication.

This line of argument is unavailable here, however, because, as Monaghan's examples themselves reveal, he conceptualizes supranational adjudication as a form of arbitration or other dispute-resolution mechanism that does not create law. Indeed, he is careful to distinguish these mechanisms not from legislation as such, but from the broader category of "lawmaking."¹⁷⁶ Presumably supranational judicial lawmaking poses the same serious threat to national sovereignty that other forms of supranational lawmaking do.¹⁷⁷

To be sure, Monaghan also thinks that even these more serious threats have been accepted as the price of participation in the global order. I am less certain on this point, perhaps because I am less persuaded than he that one

¹⁷³ See generally Monaghan, *supra* note 1.

¹⁷⁴ See *id.* at 851--66.

¹⁷⁵ *Id.* at 882.

¹⁷⁶ See *id.* at 881--82.

¹⁷⁷ Like almost everything else, the question whether a supranational tribunal makes law will not always be amenable to a yes or no answer. The decisions of tribunals that, in theory, only resolve disputes between parties, may have varying degrees of precedential effect in practice. Cf. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. Rev. 2029, 2034 (2004) (describing the NAFTA Chapter 11 review process and offering "dialectical review" as an intermediate case between non-binding "dialogue" between national and supranational tribunals and strictly binding judicial review).

of the safeguards that he regards as crucial still obtains—“the ultimate prerogative of the political branches to withdraw from any supranational institution.”¹⁷⁸ As a formal matter, the Supremacy Clause of the U.S. Constitution does ensure that, absent constitutional amendment, the political branches do retain that ultimate prerogative. Yet, as I argued in the previous sub-Part, those who are concerned about sovereignty should be concerned principally about whether the delegation of lawmaking power is functionally revocable, and not merely about whether it is formally revocable.

Thus, supranational judicial lawmaking and other forms of supranational lawmaking pursuant to functionally irrevocable grants of power do pose threats to sovereignty. Whether those threats rise to the level of constitutional violations in the United States or any other country is not my main concern here. Rather, as I have endeavored to show throughout this Part, the functional irrevocability of a delegation to a supranational lawmaking body—whether that body is nominally legislative, administrative or judicial—calls for safeguards to mitigate the effect on democratic values. Where the delegation is otherwise sensible, representation in the supranational lawmaking bodies themselves is the most natural such safeguard, and though one needs to stretch the notion of “representation” somewhat to accommodate *judicial* lawmaking, given the other differences between judicial and non-judicial lawmaking, the solution works reasonably well for judicial lawmaking as well.

Conclusion

In recent years, much judicial, legislative and academic attention has been paid to the question of whether it is appropriate for U.S. courts to cite foreign law as guidance in interpreting U.S. law.¹⁷⁹ Much of the criticism of

¹⁷⁸ Monaghan, *supra* note 1, at 882.

¹⁷⁹ Compare *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . .”), and *id.* at 604 (O’Connor, J., dissenting) (acknowledging some role for international law in Eighth Amendment jurisprudence because “this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries”), with *id.* at 622--28 (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument---that American law should conform to the laws of the rest of the world---ought to be rejected out of hand.”); see also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the

this practice misses the mark, for those who favor it never contend that foreign judgments should be treated as binding precedents.¹⁸⁰ But if misapplied as a criticism of citation practices, the points made in opposition to the invocation of foreign law have greater force in circumstances in which the law of one jurisdiction dynamically incorporates the law of another jurisdiction. Regardless of whether that other jurisdiction contains, is contained within, or is wholly outside of, the incorporating jurisdiction, the act of incorporation cedes some measure of political accountability to actors answerable to a different polity. This practice can sometimes be justified by the benefits it confers, and the concerns it raises can be mitigated by a variety of procedural mechanisms, but the concerns cannot simply be dismissed.

S. Comm. On the Judiciary, 109th Cong. 25 (2006) (statement of Sen. Mike DeWine, Member, S. Comm. on the Judiciary) (“Many are troubled when they see the Court cite international law in its decisions”); MCA § 6(a)(2) (“[N]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [18 U.S.C. § 2441(d), the War Crimes Act]”). For an argument for “the emergence of a transnational law . . . that merges the national and the international,” see Harold Hongju Koh, *International Law as Part of Our Law*, 98 *Am. J. Int’l L.* 43, 53 (2004). For an argument that “[f]oreign and international law cannot be legitimately used in an outcome-determinative way to decide questions of constitutional interpretation,” see Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 *Harv. J.L. & Pub. Pol’y* 291, 295 (2005).

¹⁸⁰ Justice Kennedy stated for the Court in *Roper v. Simmons* that foreign experience merely confirmed the conclusions he and his colleagues would have otherwise reached independently. 543 U.S. at 578 (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions.”).